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Developing Cross-Border Practice Rules: Challenges and Opportunities for Legal Education

Louis F. Del Duca*

Vanessa P. Sciarra†

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Louis F. Del Duca and Vanessa P. Sciarra

Abstract

This Essay first discusses differences in the process used by the European Community ("EC") and North American Free Trade Agreement ("NAFTA") in developing cross-border practice rules. This is followed by discussions of the developing NAFTA rules and resulting challenges and opportunities for legal education.

ESSAYS

DEVELOPING CROSS-BORDER PRACTICE RULES: CHALLENGES AND OPPORTUNITIES FOR LEGAL EDUCATION

*Louis F. Del Duca & Vanessa P. Sciarra**

INTRODUCTION

Continuing increase in the volume of cross-border practice is a consequence of twentieth century globalization. Modern technology has fueled a massive increase in the potential for exchange of goods, services, and communication, and a growing need for legal norms to facilitate expansion of cross-border practice. As technology advances, the world is becoming more economically intertwined and economic borders are becoming less confining. Confluence of world markets, political structures, and societies is thus facilitated. Legal education, in turn, is challenged to produce lawyers with skills to serve the emerging global community.

Regional economic arrangements continue to proliferate in this setting. The belief grows that they contribute to improved productivity by maximizing efficient use of labor, capital, land, goods, and natural resources. Cross-border practice is one of the issues necessarily addressed by these regional organizations.

In this Essay we first discuss differences in the process used by the European Community ("EC") and North American Free Trade Agreement¹ ("NAFTA") in developing cross-border prac-

* Louis F. Del Duca, Associate Dean, Professor of law, Pennsylvania State University Dickinson School of Law, Carlisle, Pennsylvania. Vanessa P. Sciarra currently practices with the law firm of Holland & Knight LLP in Miami, Florida. She was formerly an Assistant General Counsel for the Office of the United States Trade Representative in Washington, D.C. The views expressed in this paper represent her personal views and are not necessarily those of the United States government. This Essay was originally presented as part of the program, *The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility and International Business Law*, at the 1997 AALS Annual Meeting.

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

tice rules. This is followed by discussions of the developing NAFTA rules and resulting challenges and opportunities for legal education.

I. *DIFFERENCES BETWEEN EC AND NAFTA PROCESSES*

Member States have surrendered a significant amount of sovereignty to the EC. Primarily because of this surrender of sovereignty, the EC has achieved a degree of harmonization over a broad area of subject matter unequaled by any other international organization. This is illustrated in the area of cross-border practice by:

- (1) The 1977 Provision of Services Directive² which permits EC lawyers, under specified conditions, to render services on an occasional basis throughout the EC;
- (2) The 1989 Mutual Recognition of Diplomas Directive³ which permits lawyers to obtain the lawyers' local title in any host Member State and provides compensation for objective differences between training in the state of origin and the host state by
 - (a) going through an "adaptation" of up to three years in the host country; or
 - (b) passing an aptitude test in the host country's law and language;⁴ and
- (3) The pending Proposed Right of Establishment Directive,⁵ which, if adopted, will allow EC lawyers to establish themselves in other EC countries under their home title. It would thereby abolish the need for lawyers to become certified to practice under the host country's title.

Dominant features of the EC set it apart from other regional organizations. We note first the unique grant of legislative power by Member States to the EC. Operating under the Treaty on European Union,⁶ the major branches of the EC, de-

2. Council Directive No. 77/249, O.J. L 78/1 (1977).

3. Council Directive No. 89/48 O.J. L 19/1 (1989).

4. *Id.* art. 4, O.J. L 19/1, at 19 (1989).

5. COM (94) 572 Final (proposed Dec. 21, 1994). Shortly after this Essay was finalized, the Proposed Right of Establishment Directive was adopted. See Council Directive No. 98/5, O.J. L 77/36 (1998).

6. Treaty on European Union, Feb. 7, 1992 O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU] (amending Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741

nominated by the Treaty as "Institutions," are the Commission,⁷ Parliament,⁸ Council of Ministers,⁹ European Court of Justice,¹⁰ and the Court of Auditors.¹¹ Legislative power of the EC is uniquely divided among the Commission, Council, and Parliament as to make it possible for the EC to enact desired legislation while minimizing the impact of the surrender of sovereignty by Member States to the EC. This is accomplished by a process in which the twenty member Commission proposes and supervises laws and policies which are enacted by the fifteen member Council of Ministers after study, comment, and sometimes, amendments by the 626 member Parliament.

Under the constitutional framework provided by the TEU, the twenty member Commission initiates all legislative proposals.¹² Each Member State is entitled to one commissioner, with the five larger Member States each entitled to two.¹³ Commissioners are elected every five years after nomination by their Member States and with the approval of the Parliament.¹⁴ Commissioners are not elected as representatives of their Member States but rather as independent officials serving the best interests of the EC. Commissioners are responsible to the EC as a whole, instead of to the Member States from which they originate.¹⁵

The Council enacts legislation proposed by the Commission with each member of the Council entitled to one vote or a weighted vote requiring a so-called "qualified majority" when specified topics are under consideration.¹⁶ Unlike the members of the Commission, members of the Council represent the interests of the Member State which appoints them.¹⁷

Members of Parliament are selected on the basis of election

[hereinafter SEA], in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987)).

7. *Id.* arts. 155-63, O.J. C 224/1, at 59-60 (1992).

8. *Id.* arts. 137-44, O.J. C 224/1, at 55-57 (1992).

9. *Id.* arts. 145-54, O.J. C 224/1, at 57-58 (1992).

10. *Id.* arts. 164-88, O.J. C 224/1, at 60-64 (1992).

11. *Id.* art. 188a-88c, O.J. C 224/1, at 64-65 (1992).

12. *Id.* arts. 155, 157(a), O.J. C 224/1, at 59 (1992).

13. *Id.* art. 157(1), O.J. C 224/1, at 59 (1992).

14. *Id.* art. 158(1) and (2), O.J. C 224/1, at 59 (1992).

15. *Id.* art. 157(2), O.J. C 224/1, at 59 (1992).

16. *Id.* art. 148, O.J. C 224/1, at 58 (1992).

17. *Id.* art. 146, O.J. C 224/1, at 57-58 (1992). *Contrast* art. 157(2), O.J. C 224/1, at 59 (1992).

in their individual home states.¹⁸ However, members of the Parliament sit on the basis of political party affiliation rather than on the basis of representation from individual Member States. More importantly, it is the fifteen member Council rather than the 626 member Parliament which actually enacts legislation. In the early days of the EC, the duties of the Parliament were limited to the provision of advice to the Council.¹⁹ Subsequently, the TEU expanded the power of the Parliament to permit it to make amendments to proposals initiated by the Commission for the Council's consideration.²⁰ More recently, the TEU further expanded the power of Parliament to give it veto power.²¹

Although the EC legislative process is more complicated than most legislative processes and involves more intricate deliberation, negotiation, and compromise to reach the consensus necessary for adoption, the final product is nevertheless the supreme law which governs all of the EC Member States.²²

The character of EC law, unique in its coverage, is the second feature setting the EC apart from other regional organizations. The broad scope of EC law, subject to the subsidiarity doctrine,²³ permits it to deal with administrative, environmental,

18. *Id.* art. 137-44, O.J. C 224/1, at 55-57 (1992).

19. PAOLO MENGOZZI, *EUROPEAN COMMUNITY LAW* 15-25 (Patrick Del Duca trans., 1992); F. JACOBS, *THE EUROPEAN PARLIAMENT* (1990); R. Bieber et al., *Implications of the Single European Act for the European Parliament*, 23 *COMMON MKT. L. REV.* 767 (1986); R. Corbett, *Testing New Procedures: The European Parliament's First Experiences With Its New "Single Act" Powers*, 27 *J. COMMON MKT. STUD.* 359 (1989).

20. TEU, *supra* note 5, art. 189(c), O.J. C 224/1, at 55-57 (1992). Since the Single European Act, the consultation procedure has been supplemented, even largely replaced by, the "cooperation procedure." However, the consultation procedure still continues to apply to agriculture, competition, freedom to provide services, and the harmonization of internal taxation. See J. Fitzmaurice, *An Analysis of the European Community's Co-operation Procedure*, 26 *J. COMMON MKT. STUD.* 389 (1988); J. Lodge, *The Single European Act and the New Legislative Cooperation Procedure: A Critical Analysis*, 11 *J. EUR. INTEGRATION* 5 (1987).

21. TEU, *supra* note 5, art. 189(b), O.C. J 224/1, at 66 (1992).

22. *Costa Ente Nazionale Per L'Energia Elettrica (ENEL)*, Case 6/64, [1964] E.C.R. 585, [1964] C.M.L.R. 425.

23. Art. 3(b) of the TEU provides:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed

taxation, labor, consumer protection, and any other economically relevant area.

Comparatively, most of the world's regional economic alliances, such as NAFTA, focus only on free trade issues and rely primarily on rules contained within the text of treaties, or rules found in parallel or supplemental agreements. These alliances have a limited institutional structure and agenda. They do not aspire to create a single market union, single currency, or political union. Accordingly, these alliances do not provide for creation of institutions like the Commission, Council, Parliament, and Court of Justice of the EC to generate and interpret new legislation from within. Instead, each alliance merely incorporates governing rules into the basic document by which the regional alliance is created and then supplements these rules with parallel or supplemental agreements.

Accordingly, the governing commission created by NAFTA functions only with a unanimous voting procedure and provides for an arbitration-type dispute resolution procedure with limited enforcement powers and jurisdiction. This design is consistent with the function and purpose of a free trade area whose member states are intent on preserving their individual sovereignty.

Canada, the United States, and Mexico, in their negotiation of NAFTA, appended lateral agreements on labor and the environment to the basic agreement before it was submitted for final approval. These countries were attempting to anticipate problems needing resolution which could not be addressed in the future within the confines of an agreement essentially limited to reduction of tariffs. It is only through these lateral agreements that new NAFTA norms can be produced.

As previously indicated, in the EC, the Commission proposes and supervises laws and policies and the Council of Ministers enacts the laws after receiving comments from the Parliament. EC legislation is enforceable on Member States through the use of regulations²⁴ or directives.²⁵ Under the Treaty, once

action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty. TEU, *supra* note 5, art. 3(b), O.J. C 224/1, at 9 (1992).

24. TEU, *supra* note 5, art. 189, O.J. C 224/1, at 65 (1992) (providing that "[a] regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.")

25. *Id.* art. 189, O.J. C 224/1, at 65 (1992) (stating that "[a] directive shall be

regulations are promulgated by the Council, the regulations are applied directly and uniformly to all Member States. It is, therefore, better to use regulations rather than directives when precise uniformity is essential and achievable without unduly disturbing the sensitivity of Member States.

Directives are a less rigid form of legislation than regulations. Directives dilute the immediacy and manner of EC intervention into domestic, legal, and economic systems of Member States. Directives are promulgated by the Council following preparation by the Commission and appropriate consideration by the Parliament. Directives merely state goals or standards to be adopted and implemented by Member States within a time frame stated by the Council. It is the duty of Member States to implement the legislative goals set forth by the Council in the directives within the time period specified. Directives are clearly gentler intrusions on the sovereignty of the Member States. With the use of directives, local governments, closer to the citizenry and culture of their jurisdictions, have more freedom to take into account the idiosyncrasies and special circumstances of their systems by tailoring the manner in which they achieve the legislative policies of the directives. The end result is achievement of legislative goals with minimal coercion and friction.

The clear lines of distinction between regulations and directives have been blurred by decisions of the European Court of Justice that interpret Article 189, which provides for the use of regulations and directives. Decisions by the Court, in *Ratti*²⁶ and *Francovich*,²⁷ for example, suggest that in cases where a Member State fails, within the time period stated by the Council, to implement a directive which has clear and unconditional requirements, the directive has the effect of becoming an EC regulation. The only difference between a regulation and a directive under this approach is that the waiting period provided for the directive to be implemented must expire before it automatically takes effect.

Rules governing occasional transnational practice, mutual

binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and method.")

26. *Pubblico Ministero v. Ratti*, Case 148/78, [1979] E.C.R. 629, [1980] 1 C.M.L.R. 96.

27. *Francovich v. Italy*, - Joined Cases C-6/90 & C-9/90, [1991] E.C.R. I-5357, [1993] 2 C.M.L.R. 66.

recognition of diplomas, and establishment can be promulgated from within the EC through use of the institutions under its constitutional framework. Conversely, under NAFTA, such rules can be developed only on the basis of unanimous agreement following negotiations amongst Member States or groups representing the Member States.

II. *NAFTA AND THE TRANSNATIONAL PRACTICE OF LEGAL SERVICES*

The inclusion of services as a subject for international trade negotiations is a relatively new development in the international trade field. While most governments agree that negotiations aimed at lowering trade barriers should focus on barriers to both providers of goods and services,²⁸ the dismantling of these barriers in the services arena has proven difficult both conceptually and in practice. The attempt to lower barriers to the provision of legal services among the NAFTA partners provides an excellent case study of the difficulties associated with such negotiations.

In order to discuss the NAFTA experience with respect to legal services, we will first outline the NAFTA provisions which govern the practice of transnational legal services in the NAFTA region and provide some explanation of the negotiating dynamic that led to the results. We will then comment on the current status of progress made by the NAFTA parties in their attempts to increase trilateral liberalization of legal services.

A. *NAFTA Provisions Affecting Legal Services*

1. The Historical Context

In order to understand the outcome of the NAFTA negotiations with regard to legal services, it is important to understand the conceptual framework with which the negotiators approached the area of services in general. The predecessor agreement to NAFTA, known as the United States-Canada Free Trade Agreement²⁹ ("CFTA"), contained relatively limited provisions

28. For example, one of the cornerstone agreements of the newly-created World Trade Organization is the General Agreement on Trade in Services, which is applicable at least in theory, to all types of services.

29. United States - Canada Free Trade Agreement, Dec. 22, 1987, 27 I.L.M. 281 (1988), Annex 1408 [hereinafter CFTA].

governing trade in services. Chapter 14 of CFTA employed a "positive list" approach which provided for liberalization of trade in services for only a limited number of listed services.

During the NAFTA negotiations, it was decided that the coverage of services and investment should be broadened from the coverage provided by CFTA with the adoption of a "negative list" approach. Under this approach, all services sectors were presumptively within the scope of the agreement and each government was forced to bargain for those services which would be removed from the scope of the agreement or guaranteed only on a limited basis. The negotiators agreed to a set of principles covering services and investment which would accomplish free trade objectives. These principles form Chapters 11 and 12 of NAFTA. Each country then proposed and negotiated a set of reservations to the principles set out in Chapters 11 and 12. These reservations are set forth in the Annexes to NAFTA.

1. NAFTA Chapters 11 and 12

The transnational provision of services is treated in two separate chapters in NAFTA. Chapter 11 addresses those services which are provided across a border by means of an investment established in the host country.³⁰ In contrast, Chapter 12 addresses those services which are provided across a border but which are provided by some means short of an actual investment.³¹ Both chapters set forth the basic rules by which the NAFTA governments agree to regulate services which originate, or services providers who originate, in one of the other NAFTA countries.

Essentially, the chapters address a number of important concepts. First, they guarantee that NAFTA nationals will be treated with most-favored-nation treatment and thus will be treated no less favorably than nationals from other countries.³² Second, they guarantee that NAFTA nationals will be treated no

30. Conceptually, Chapter 11 is both a "goods" and "services" chapter because it covers both investment in services providers and in manufacturing or processing entities.

31. One common example of this "cross-border" provision of services includes transmission of a product across a border by some telecommunications medium. Another example would be delivery of a service by a temporary business visitor while in the host country.

32. See NAFTA, *supra* note 1, arts. 1103, 1203, at 639, 649.

less favorably than nationals of the host country.³³ Further, they guarantee that, in the event that one standard of treatment is better than the other, the better standard applies to NAFTA nationals.³⁴

With respect to professional services, Article 1210 sets forth some additional assurances. Article 1210 provides that individual licensing decisions should be based upon objective and transparent criteria, such as competence, and that they should not be unnecessarily burdensome or purely protectionist in nature.³⁵ It addresses the prospect of unilateral or mutual recognition agreements, whereby a licensing body determines that a class of individuals licensed outside the host country will be able to use their foreign license to practice in the host country.³⁶ Finally, it requires that the opportunity to negotiate such agreements be open to all NAFTA jurisdictions who show an interest in negotiating such agreements.³⁷

The licensing of professional services providers is further addressed in Annex 1210.5 to Chapter 12 (the "Annex"). The Annex addresses a procedural issue and provides that, in processing an application for a professional license, the host country government should render a decision on the application without undue delay.³⁸ This provision complements Article 1210(1) and the concern expressed in that Article about disguised restrictions on trade in services. The Annex also provides a road-map to guide the NAFTA governments and their sub-national governments in their negotiation of mutual recognition agreements or other forms of trade liberalization.³⁹

Section A of the Annex applies to the various professions which require licensure as a prerequisite to practice of the profession. Section A recognizes that some professions may be self-regulating and that the appropriate relevant body charged with addressing the issue of licensure may not be a governmental entity, but may be a professional association or board.⁴⁰ The nego-

33. *See id.* arts. 1102, 1202, at 639, 649.

34. *See id.* arts. 1104, 1204, at 639, 649.

35. *Id.* art. 1210(1), at 650.

36. *Id.* art. 1210(2), at 650.

37. *Id.* art. 1210(2), at 650.

38. *Id.* at Annex 1210.5, sec. A, ¶ 1, at 651.

39. *Id.* at Annex 1210.5, sec. A, ¶ 2-4, at 652.

40. *Id.* at Annex 1210.5, sec. A, ¶ 2, at 652.

tiators intended to allow these groups to meet on a trilateral basis, develop proposals for mutual recognition or temporary licensure, and submit these proposals to the NAFTA governments, which together comprise NAFTA's governing body (the "NAFTA Commission").⁴¹ Once the NAFTA Commission reviews the proposals to ensure consistency with the agreement, the NAFTA governments agreed to have the relevant regulatory bodies adopt the proposals.⁴²

While the approach outlined by this road-map may appear to be cumbersome, it actually reflects a delicate balance that the negotiators had to strike between the desire for further liberalization of barriers to professionals and the recognition that much of the regulatory authority was not, strictly speaking, in the hands of the federal governments of the three NAFTA members. As a practical matter, this approach appears to be working well. Groups of professionals, among them engineers, architects, accountants, and nurses, have formed trilateral NAFTA committees for their respective professions in response to the Annex and have made varying degrees of progress towards developing proposals for submission to the NAFTA Commission.

Technically speaking, the legal profession falls within the scope of Section A of the Annex. However, the task for the legal profession is complicated by an additional component of the road-map set forth in Section B of the Annex. This additional section was added to the Annex due to the importance the negotiators attached to the issue of legal services and in recognition of the fact that the treatment of foreign legal consultants ("FLCs") was not uniform among the United States, Canada, and Mexico.⁴³

Section B of the Annex aims to accomplish the goal of ensuring that FLCs can effectively practice the law of their home country in the host country.⁴⁴ Section B also contemplates that the regulators and practitioners in the legal profession will meet

41. *Id.* at Annex 1210.5, sec. A, ¶ 2, at 652.

42. *Id.* at Annex 1210.5, sec. A, ¶ 4, at 652.

43. While the term "foreign legal consultant" is not defined in the NAFTA, the meaning of the term can be construed from paragraph 1 of Section B to mean nationals of a NAFTA country who are authorized to practice or advise on the law of their home country (or a third country) under the licensing authority of that jurisdiction and who seek to provide their legal expertise to consumers in another NAFTA country. *Id.* at Annex 1210.5, sec. B, ¶ 1, at 652.

44. *Id.* Annex 1210.5, sec. B, ¶ 1, at 652.

trilaterally to address two main concerns which were raised during the NAFTA negotiations. These concerns address the types of associations forged between FLCs and locally-licensed lawyers and the development of mutually-acceptable standards for the FLC licensing process.⁴⁵ Any proposals resulting from this trilateral process are to be forwarded to the NAFTA Commission to ensure consistency with NAFTA as a whole.⁴⁶ In addition, Section B charges the NAFTA governments with the task of developing common procedures throughout their respective territories for the licensure of FLCs.⁴⁷

3. The Reservations

One of the reasons for the negotiators' concern regarding legal services, and the impetus for the resulting road-map in Annex 1210.5, can be found by reviewing the complicated set of reservations filed by the U.S., Canadian, and Mexican governments in the legal services area.

Reservations with respect to legal services can be found in three of NAFTA's annexes. Annex I contains reservations taken by a NAFTA government for existing measures⁴⁸ which do not conform to a Chapter 11 or 12 obligation.⁴⁹ Once listed as a reserved measure in Annex I, the measure can remain in existence indefinitely. However, it cannot be made more restrictive at any future time. In addition, if it is amended and becomes less restrictive, the reservation will be limited to the scope of the new measure. Thus, there is, in effect, a one-way ratchet to the reservation process. A much smaller list of reservations occurs in Annex II.⁵⁰ Reservations in this annex are for sectoral areas in which a NAFTA government wanted freedom to make or adopt more restrictive measures than would be allowed under the relevant obligations of Chapters 11 and 12. Annex VI sets out com-

45. *Id.* Annex 1210.5, sec. B, ¶ 2 and 3, at 652.

46. *Id.* Annex 1210.5, sec. B, ¶ 5, at 652.

47. *Id.* Annex 1210.5, sec. B, ¶ 4 and 6, at 652. As a practical matter, the development of common procedures has been considered by the negotiating group as integrally related to the other issues under discussion. Consequently, the federal governments have delayed action on Paragraph 4 pending receipt of the group's proposals.

48. A "measure" is defined in NAFTA to include laws, regulations, procedures, requirements or practices of a governmental entity. NAFTA, *supra* note 1, art. 201(1), at 649.

49. *See generally id.* arts. 1108, 1206, at 640, 650.

50. *See generally id.* arts. 1108(3), 1206(3), at 640, 650.

mitments to guarantee certain non-discriminatory measures, such as licensing measures, used by each of the NAFTA governments.⁵¹

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. With respect to the United States, an entry in Annex II provides the potential for the future development of more restrictive measures with respect to the practice of Mexican FLCs in the United States.⁵² This reservation was taken in response to the Mexican entry in Annex II which establishes a similar right for the Mexican government to regulate more restrictively U.S. FLCs practicing in Mexico.⁵³

The Mexicans and the Canadians negotiated a slightly different result, which is reflected in Mexico's Annex I entry. The reservation⁵⁴ allows partnership between licensed Mexican attorneys and Canadian FLCs as long as control of the joint enterprise remains in the hands of the Mexican partners. It also allows these transnational partnerships to employ Mexican lawyers as employees. Based on the scant terms of the reservation, however, it is difficult to conceive how such a partnership would work in an operational sense. These operational concerns, as well as an objection to the concept of requiring Mexican control of a transnational legal partnership, led U.S. negotiators to reject the same terms when they were offered to the United States during the negotiations.

Annex VI contains an additional set of entries which recognize that FLC licensure was only available in certain sub-national jurisdictions at the time NAFTA began. The Canadian and U.S. entries simply guarantee that procedures in place for licensing FLCs in a number of states and provinces would not be removed or become more restrictively applied under the NAFTA.⁵⁵ Due to the fact that FLC licensure in Mexico is considered a federal matter, the Mexican entry in this annex conditions access to the process of FLC licensure on the conditions in the applicant's

51. *Id.* art. 1208, at 650.

52. *Id.* Annex II, at 748.

53. *Id.* Annex II, at 748.

54. *Id.* Annex I, at 704.

55. *Id.* Annex VI, at 766. Since NAFTA entered into force on January 1, 1994, a few additional states and provinces have adopted FLC licensing procedures.

home state or province.⁵⁶ By framing its Annex VI entry in this way, the Mexicans felt that they would be limiting the benefits of FLC licensure to those jurisdictions that would allow Mexican FLCs to apply for licensure in the United States and Canada.⁵⁷

B. *Trilateral Progress on the Annex 1201.5 Directives*

After NAFTA went into effect on January 1, 1994, members of various professional associations began to act under the provisions of Annex 1201.5. In the legal services area, members of the profession and regulators from the three NAFTA countries agreed to meet in the form of a working group to address the Annex 1201.5 directives (the "Trilateral Lawyers Working Group" or "TLWG"). While the composition of each country delegation to the TLWG varied somewhat, each delegation was comprised of members representing state, provincial, or federal bar associations, some representation on behalf of the regulatory authorities, and some federal government representation.

The group met most recently in March 1996, having met twice in 1995 and once in 1994. The group has been preparing a set of joint recommendations for submission to their respective governments with a goal of submitting the proposals sometime in early 1998. The main proposal under consideration is the drafting of a "model" FLC licensing process which each licensing jurisdiction will be encouraged to adopt. The TLWG has been drafting its proposal with the following model in mind. If a licensing jurisdiction, for example, State X in the United States, agrees to adopt the model FLC process, then licensed attorneys from State X will be guaranteed the same process for licensure in Mexican and Canadian jurisdictions which have also adopted the model FLC process. In exchange, State X will allow those

56. *Id.* Annex VI, at 766.

57. There are two additional annex entries which, at least in theory, become non-operative as of January 1, 1996. A U.S. entry reserves practice before the U.S. Patent and Trademark Office to U.S. citizens or lawfully resident aliens. *Id.* Annex I, at 704. A Mexican reservation limits access to Mexican professional licenses, including legal licenses, to Mexican nationals. *Id.* at Annex I, at 704. Pursuant to the provisions of NAFTA Article 1210(3), all citizenship and permanent residency requirements maintained by any NAFTA country are to be phased out by January 1, 1996. While some states and provinces still have on their books citizenship and residency requirements which must be met before membership in the local bar is permitted, these requirements are also subject to the Article 1210(3) phase-out.

applicants from foreign jurisdictions which have adopted the model FLC process to benefit from that process in State X.

The model process being developed by the TLWG does not guarantee that an FLC license will be granted. Regulators will still be allowed to examine each applicant to determine if the applicant meets the requirements for good standing, good character, previous practice experience, and adequate liability coverage, among other things. However, the goal of the development of the model process is (i) to ensure that the application process itself, by becoming standardized between the three countries, will not represent an obstacle to licensure as an FLC, and (ii) to ensure that the process is available in all sub-national jurisdictions in the NAFTA region.

If the TLWG agrees to propose the model process to each of the NAFTA governments, it is likely that the federal governments will actively encourage adoption of the model process by the various regulatory bodies that license the practice of law in the various sub-national jurisdictions. In each jurisdiction, however, the task of actually getting the appropriate regulators to act will likely fall to those members of the local legal community with an interest in facilitating the transnational practice of law.

III. *CHALLENGES AND OPPORTUNITIES FOR LEGAL EDUCATION*

A detailed analysis of cross-border practice of law provides a microcosm of the current international challenges and opportunities for legal education. It also provides a basis for development of materials for International Business Law, Professional Responsibility Comparative Law, and other courses.

The large number of foreign law students currently enrolled in LL.M. programs throughout the United States also provide a unique and valuable source of information that can be utilized in seminar or traditional classes. The interest of foreign students in practice qualification rules in the United States, and conversely, the interest of U.S. students in practice qualification rules abroad, generates enthusiasm for exchange of information on the subject. Foreign students can bring their expertise to bear on original source materials, as well as the usual secondary types of materials generally available.

Integration of foreign students into the general J.D. classes

provides a forum for development of lines of communication not present in courses where foreign LL.M. students are segregated and set apart from the mainstream. Immersion of foreign students into general legal research and writing courses should be extended into researching specific areas of the law such as cross-border practice. Coupled with faculty team-teaching and cooperative research projects by faculty from different legal systems, immersion and integration of students and faculty will facilitate development of a new generation of lawyers possessing skills to serve the expanding international community.

A study undertaken by the Association of American Law Schools ("AALS") Section on Graduate Programs for Foreign Lawyers indicates a positive trend that international and comparative course offerings exist at almost all U.S. law schools and appear to be growing.⁵⁸ Unfortunately, the study also indicates that far too few students are taking these courses. It concludes that the most promising route to educating and sensitizing tomorrow's lawyers to the importance of international and comparative matters would seem to be through inserting international and comparative components into the many domestic courses law students favor.⁵⁹

In the September 1996 *Journal of Legal Education*, Dean John B. Attanasio observes that "[s]ervicing the global community will require new approaches for practicing law and for training lawyers."⁶⁰ Jay Vogelsson, former Chairman of the ABA's Section of International Law and Practice and current Chairman of the ABA's Standing Committee on World Order Under Law, notes that the International Law Section "... would like to see in American law schools not just a greater emphasis on teaching international law, but on teaching international aspects of every subject."⁶¹ Describing the Global Law School program at New York University, John Sexton, Dean and President Elect of the

58. Mary Kate Cox, *ABA Survey Update*, AALS SEC. NEWSL. GRADUATE PROGRAMS FOR FOREIGN LAW (1996).

59. *Id.* The AALS Section on Graduate Programs for Foreign Lawyers has therefore undertaken a project to develop teaching modules for distribution of such course materials to all law schools. *Id.* This project is currently chaired by Professor John Barrett, University of Toledo College of Law. *Id.*

60. John B. Attanasio, *The Globalization of the American Law School*, 46 J. OF LEGAL EDUC. 311, 312 (1996).

61. Jay M. Vogelsson, *A Practitioner Look at Globalization*, 46 J. OF LEGAL EDUC. 315 (1996).

AALS, notes that "it is now necessary to recruit a truly global faculty, one that draws together on a continuing basis legal minds from many different regions of the world to teach and learn together."⁶² He also reports that foreign scholars enrolled in the program will be "integrated into the life of the law school taking most of their courses with American J.D. students."⁶³

International/comparative law programs have significantly expanded during the past ten years. We see this expansion in LL.M. programs for foreign lawyers, summer overseas and semester abroad programs, teacher and student exchanges, immersion of foreign students into J.D. programs, team teaching and cooperative research with foreign colleagues, continuing legal education, international and comparative law programs, and an increase in new international and comparative law courses.

Much work nevertheless needs to be done as we meet new challenges and opportunities. Professor Helen Hartnell, a visiting researcher at the Harvard Law School European Law Research Center, appropriately concluded in a recent Section Newsletter of the AALS Section on Graduate Programs for Foreign Lawyers that ". . . it is archaic to go on ghettoizing 'internationalists' within [our] faculties. All faculty members should be encouraged to incorporate a comparative approach into their teaching. . . ."⁶⁴

In the January 1996 Program of the AALS Section on Graduate Programs for Foreign Lawyers, then Section Chair Jorge Esquirol commented on the need "to transcend the disconnection between internationalists/comparativists and U.S. focused academics in our law school faculties."⁶⁵ He described a new Harvard Law School Comparative Law project and an S.J.D. program aimed at training future law teachers with special skills and interests required for effective international and comparative law teaching and research. Professor Boris Kozalchyk addressed the challenge of achieving effective harmonization of legal

62. John Edward Sexton, *The Global Law School Program at New York University*, 46 J. OF LEGAL EDUC. 329, 332 (1996).

63. *Id.* at 332.

64. Helen Hartnell, *Restructuring Legal Education*, AALS SEC. NEWSL. GRADUATE PROGRAMS FOR FOREIGN LAW (1996).

65. Jorge Esquirol, Audiotape of Annual Meeting of the Association of American Law Schools (Jan.1996) [hereinafter Audiotape] (available from AALS).

norms rather than mere verbal congruency of international texts in the harmonization of legal systems.⁶⁶

Many issues which need to be addressed also exist in the accreditation process. Accreditation standards have been enriched by inclusion of writing skills and clinical education components.⁶⁷ Inclusion of an international/comparative law component in the accreditation standards has been discussed but has not yet materialized.⁶⁸ Should we continue such discussion? Does the proposal made by groups such as the ABA International Law Section that bar exams should address the international/comparative law area merit consideration?⁶⁹ Should the accreditation standards include a twenty to twenty-four credit hour requirement for granting an LL.M. degree or as is presently the case remain silent? These and many other issues are before us as we evaluate individual courses, the overall curriculum and the legal education system in its entirety to make it responsive to the needs of the global community. Analysis, evaluation, and development of cross border practice rules is an important part of this ongoing process.

66. Boris Kozalchyk, Audiotape, *supra* note 65.

67. ASSOC. OF AMERICAN LAW SCHOOLS: 1996 HANDBOOK, BY-LAWS OF THE AALS, INC., Section 6-9, at 34 [hereinafter AALS HANDBOOK].

68. *See* sec. 6-9, at 34.

69. Vogelsson, *supra* note 61, at 315.