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Charles R. Irish
University of Wisconsin Law School in Madison, Wisconsin

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Looking Toward the Third Millennium: The Practice of Transnational Business Law in 2001

Charles R. Irish*

Making predictions can be a dangerous exercise with the risk of serious injury to one's credibility when the predictions prove wildly inaccurate. Abraham Lincoln predicted the United States population would reach 252 million by 1930. He was off by 130 million, and almost 60 years later we still have not reached his figure.[1] Even near-term predictions can be pathetically inaccurate: After receiving word the Titanic had hit an iceberg, the manager of the White Star Line, which owned the Titanic, optimistically declared that the Titanic was

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* Mr. Irish is Volkman-Bascom Distinguished Teaching Professor of Law at the University of Wisconsin Law School in Madison, Wisconsin. Professor Irish also is of counsel to the Madison law firm of Stafford, Rosenbaum, Rieser and Hansen where he works on tax, transnational tax, and transnational business matters. Professor Irish wishes to acknowledge three student papers written for his International Business Transactions course in Fall 1988 as especially helpful in the writing of this article: "Canada-United States Free Trade Agreement and the EEC 1992 Program," by Christiane M. Loidl; "A Comparative Analysis of the European Community Real Estate Markets: Focusing on the Need for Harmonization to Achieve a Single Market," by Elaine Worzala; and "The Canadian-U.S. Free Trade Agreement and the Canadian Perspective," by Kevin J. Demet.

1. Schlesinger, *Future Always Outwits Political Pundits*, Wall St.J., Feb. 8, 1989, at A16, col. 3. Of course, Lincoln's reputation has survived without serious injury in part because Lincoln was not a specialist in demography. A major forecasting error is likely to have more adverse consequences for a person claiming some measure of expertise in the area under examination.

unsinkable and predicted the ship would make it to port under its own power.[2]

Of course, we all have a strong desire to know the future and who better to seek predictions about the future from than an academic with time on his hands to stare at the ceiling and think about the future—which apparently is why the editors of *The Transnational Lawyer* asked me to write this article. So, mindful of the limitations of my foresight, and with the timidity of a person first venturing onto black ice, I offer some thoughts on what the practice of a transnational business lawyer will be like at the beginning of the third millennium, the year 2001.

As we look toward the beginning of the third millennium, there are some things we can feel comfortable in predicting: *Rocky XIX*, *Friday the Thirteenth—Part 23*, Japan with a trade deficit, and the United States with a trade surplus. In contrast, predicting what it will be like to practice transnational business law at the beginning of the third millennium is somewhat less clear. To get some glimpse of the practice in 2001, it is useful to begin by looking at the practice as it exists today (this is done in Section II) and then to identify the trends and events likely to affect the practice in the waning years of the second millennium (this is done in Section III). The concluding section (Section IV) attempts to develop a composite picture of the transnational business lawyer in 2001. The conclusion also offers some thoughts on unusual specialties in transnational business law that may emerge.

I offer a final introductory note. This article is written in a sanguine mode. In early 1989, the world seems to be less tense than it has been for quite some time; and, there are good reasons to think we may have several years of relative peace and possibly greater global prosperity. The shadow of brutal and cataclysmic hostilities remains, however, especially given the high levels of conventional armaments, chemical and nuclear weapons, and the proliferation of the capacity to manufacture chemical and nuclear weaponry. The "greenhouse effect" and other environmental problems may press us with drought, famine, and disease, and give us a world much less hospitable than the world in 1989. Additionally, heightened economic competition may result in severe social dislocations and an increased risk of

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2. *Titanic Sinks Four Hours After Hitting Iceberg; 866 Rescued by Carpathia, Probably 1250 Perish; Ismay Safe, Mrs. Astor Maybe, Noted Names Missing*, N.Y. Times, Apr. 16, 1912, at 1, col. 1.

political instability. Nonetheless, in early 1989, there seems to be more cause for optimism than pessimism; so, it is the optimistic view that prevails in this article.

I. 1989 AND THE TRANSNATIONAL BUSINESS LAWYER

A. *The Practice*

United States lawyers, including transnational business lawyers, sell three things: information, representation, and judgment (where the information is less than complete or a single strategy of representation is not apparent). In a transnational business setting, the information dispensed tends to center on: (i) the structure of agreements involving the purchase, sale, financing, shipping, insuring, and installation of capital and consumer goods; (ii) the structure of agreements involving the purchase, sale, financing, and insuring of services; (iii) United States and (occasionally) foreign government regulation of inbound and outbound trade in goods and services; (iv) the advantages and disadvantages of investing overseas through domestic or foreign corporations, branches, partnerships, joint ventures, business trusts, leases, licenses, and franchises; (v) the legal environment affecting new or existing foreign direct and portfolio investment in the United States (including mergers and acquisitions); (vi) the interaction between United States laws and laws of foreign jurisdictions in such areas as tax, antitrust, environmental regulation, securities regulation, and labor; and (vii) special problems of United States employees of foreign based transnational enterprises, such as immigration, housing purchases and sales, estate and family tax planning, family law, and private tort actions.

The representation offered by a United States based transnational business lawyer often involves negotiating with the other private parties to the transnational transaction.[3] Thus, United States transnational business lawyers commonly would be part of the team negotiating the terms of inbound and outbound trade, investment, and licensing transactions. United States based transnational lawyers also frequently are involved in representing domestic and foreign

3. In actively participating in the negotiations of transnational business transactions, United States lawyers play a somewhat broader role than lawyers in many other countries, where the role may be limited to the drafting of relevant documents and representation of the client in formal adversarial proceedings in court or before government regulatory agencies. *See* Vagts, *Transnational Business Problems* 145-46 (1986).

clients before local, state, and federal regulatory agencies. Quite a number of transnational lawyers in Washington, D.C., for example, are engaged in representing domestic and foreign clients before the various United States government agencies responsible for regulating inbound and outbound trade in goods, services, and intangibles. On the local level, when a foreign based transnational enterprise makes a "greenfield" direct investment in the United States, the United States lawyer often assists in securing local tax and financial concessions, land use and environmental permits, and assured supplies of water and energy.

As is true with most professional activities of United States lawyers, exercising judgment is a central part of the transnational lawyers' work. Commonly, they are asked to offer advice on whether to pursue a trade dispute, or to settle, whether the terms of an import or export sales contract are fair or appropriate under the circumstances, or whether the legal environment in one jurisdiction is more favorable to foreign investment than the legal environment in another jurisdiction. In addition, in a transnational business setting, cross cultural contacts may raise a number of sensitive judgment issues, such as the extent to which law is displaced by customary practices, how to approach and work with a foreign client, and how to assess the seriousness of purpose of a foreign business person.

B. *The Actors*

Because of the variety and complexity of the laws applicable to transnational transactions, no single lawyer could presume to give competent advice on all aspects of transnational business law. Instead, transnational business lawyers now often concentrate on sub-specialties within transnational business law. Thus, although transnational tax has been long recognized as a sub-specialty, now it is joined by sub-specialties in securities, banking, intellectual property, franchising, mergers and acquisitions, and foreign investment in United States real estate, among others.

To support a specialized transnational legal practice, a lawyer needs either a number of clients with the same problem, or one client with a recurring problem. In the former case, the lawyer will be more successful if he or she is part of a group offering a broad range of transnational legal services in a geographic area in which the services are sought. This situation translates into work within a medium or large law firm in one of the major urban areas. The most common way of fitting into the latter case is to join the

international legal department of a transnational corporation. Thus, the practice of transnational business law tends to be concentrated in the medium and large law firms in the major urban areas, and in the legal departments of transnational corporations.

II. Trends and Events Affecting the Practice of Transnational Business Law

Between 1989 and 2001, there are likely to be unforeseen events or trends which will have considerable impact on the practice of transnational business law. By definition, these events and trends cannot be anticipated and their effect cannot be predicted. There are some events or trends, however, already identifiable which will affect the practice of transnational business law in 2001. Following, are some of the major ones.

A. *The United States-Canada Free Trade Agreement*

1. *Terms of the Agreement*

The United States and Canada already enjoy a high level of economic interaction. The two countries exchange more goods and services than any other two countries in the world, and they each have substantial amounts of investment in the other country. During 1987, trade in goods and services between the two countries totaled $166 billion. About 75 percent of Canada's total exports of merchandise go to the United States, and about 68 percent of Canada's total imports are from the United States. In the United States, Canada accounts for 24 percent of the merchandise exports, and 17 percent of the total imports.[4] United States citizens also are by far the principal foreign investors in Canada; and Canadians, per capita, are even greater investors in the United States.[5]

With the entry into force of the United States-Canada Free Trade Agreement on January 1, 1989, the two governments have cleared the way for an even higher level of economic interchange. The agreement is one of the most comprehensive bilateral economic

4. H.R. Rep. No. 816, 100th Cong., 2d Sess., pt. 1, at 5 (1988).

5. H.R. Doc. No. 216, 100th Cong., 2d Sess., at v (1988) [hereinafter H.R. Doc. No. 216]. In absolute terms, Canada is the fourth largest investor in the United States, after the United Kingdom, the Netherlands, and Japan. United States Department of Commerce, Statistical Abstract of the United States 1988 [hereinafter Statistical Abstract].

agreements ever negotiated between two countries. Under the terms of the agreement, the United States and Canada will move toward establishing the world's largest internal market for goods and services; at the same time, however, they will not erect any new trade barriers with third countries. In addition, the agreement is likely to serve as the model for other bilateral trade and investment agreements, as well as significantly influencing the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) negotiations. Central features of the United States-Canada Free Trade Agreement are described below.

a. *Elimination of Tariffs*

The Free Trade Agreement provides for the elimination of all tariffs on bilateral trade by January 1, 1998. Prior to 1989, approximately 80 percent of Canadian exports were duty-free in the United States and 65 percent of United States exports were duty-free in Canada.[6] As to the dutiable goods, Canadian tariffs averaged 9.9 percent, and United States tariffs averaged 3.3 percent.[7] The staging of tariff elimination was structured so as to recognize the differing time periods local industries will need to adjust to the increased competition. In some cases where the countries have strong export interests, the tariffs were eliminated as of January 1, 1989. For many products, the tariffs are to be eliminated at the rate of 20 percent per year for five years; but for import sensitive products, the elimination period is 10 years. Of the dutiable goods, 35 percent of the Canadian exports to the United States and 53.4 percent of the United States exports to Canada are subject to the 10 year staging schedule, including such import sensitive areas as steel, rubber, agricultural products, fish, wood products, textiles and apparel, and alcoholic beverages.[8]

b. *Rules of Origin*

Although the treatment of goods under United States tariff and trade laws depends on the country in which the goods originate, the prior laws did not specify how the origin of goods was to be

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6. Demet, *The Canadian-U.S. Trade Agreement and the Canadian Perspective* 11 [*unpublished*, copy on file at the offices of the author].
7. H.R. Doc. No. 216, *supra* note 5, at 11.
8. Demet, *supra* note 6, at 11, *citing* USITC Report 2095.

determined. Instead, the origin of goods was decided by administrative agencies such as the United States Customs Service on a case-by-case basis, applying principles extrapolated from judicial decisions over the last fifty years. Because the decisions were not consistent, there has been a considerable amount of uncertainty about the origin of goods.

The Free Trade Agreement attempts to introduce a higher level of certainty as to the origin of goods by providing a specific set of rules. Further, because the rules apply both to goods exported to Canada and to goods imported from Canada, United States businesses engaged in import and export trade with Canada will operate under a single set of rules, presumably applied in a fairly consistent manner.

c. *National Treatment*

The Free Trade Agreement establishes a general rule of non-discrimination with respect to goods. Under this rule, which is taken from GATT's "national treatment" obligation, the United States and Canada are required to treat products originating in the other country in a fashion no less favorable than that accorded like products of domestic origin.[9] Although the rule contains a number of exceptions, the special significance of the rule lies in its extension of the national treatment obligation to state, provincial, and local government regulations. Thus, if a Canadian province gives preferential treatment to goods produced in that province—as opposed to goods produced in other provinces—(as is frequently the case), the province is required to provide similar preferential treatment for like goods of United States origin.[10]

d. *Elimination of Barriers to Agricultural Trade*

The Free Trade Agreement phases out tariffs on agricultural products over a ten year period, it prohibits both countries from providing export subsidies on agricultural goods shipped to the other country, and it exempts both countries from quantitative import restrictions imposed by the other country. Under the agreement, Canada has agreed to remove its import permit requirements applied to United States wheat and wheat products, oats and oat products, and barley

9. H.R. Doc. No. 216, *supra* note 5, at 186.
10. *Id.*

and barley products when the level of government support provided by the United States is less than or equal to the level of support provided by the Canadian government for that grain.[11]

e. *Elimination of Discriminatory Practices Involving Wine and Distilled Spirits*

Under the Free Trade Agreement, Canada has agreed to eliminate the most significant discriminatory practices affecting United States wines and distilled spirits—generally pricing and listing measures. Discriminatory pricing practices involving spirits were ended as of January 1, 1989, and for wines the practices are to end by 1995. Canada also agreed that all new regulations would not discriminate against United States wines and distilled spirits.[12]

f. *Fewer Regulations in Energy Trade*

The Free Trade Agreement removes many of the government restrictions on the binational energy trade. Under the agreement, both countries agreed to eliminate quantitative restrictions, export taxes, import tariffs, minimum export price requirements, and other regulations that inhibit free trade. The agreement also provides for nondiscriminatory access for the United States to Canadian energy supplies and secure market access for Canadian energy exports to the United States.[13]

g. *Limiting the 1965 Auto Pact Benefits to Existing Canadian Auto Manufacturers*

The 1965 Auto Pact between the United States and Canada was concluded to remove a Canadian automotive duty remissions program and to liberalize automotive trade. The Auto Pact provides that if an automaker meets a certain level of production and value-added in Canada, it becomes qualified to import finished vehicles and parts into Canada duty-free from any country in the world, including the United States. In contrast, the United States has no parallel provision; instead, duty-free status is accorded only to Canadian automotive products.[14] The most significant provision in the Free Trade Agree-

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11. *Id.* at 191-92.
12. *Id.* at 16.
13. *Id.* at 210.
14. Loidl, *Canada-United States Free Trade Agreement and the EEC 1992 Program* 15-16 [*unpublished*, copy on file at the offices of the author].

ment affecting the Auto Pact prohibits Canada from granting Auto Pact benefits to any Canadian manufacturer not currently qualified for such benefits. This means that Japanese, Korean, and other foreign automakers will be unable to gain duty-free access to the United States and Canadian markets by locating production facilities in Canada.[15]

h. *Trade in Services*

The service sector accounted for approximately half of the United States gross national product (GNP), and generated more than $7.5 billion in exports to Canada in 1987. The Free Trade Agreement continues the favorable access to Canadian markets now enjoyed by United States service providers. The Agreement requires that both countries not discriminate between Canadian and United States service providers as to any new laws or regulations affecting the services enumerated in the Agreement. As to existing laws or regulations, however, the Agreement imposes no obligation to change; instead, existing discriminatory laws and regulations are grandfathered indefinitely.[16]

The benefits of nondiscriminatory treatment are extended to a wide range of services, including: construction, tourism, insurance, real estate services, mining and metal services, agricultural and forestry services, some telecommunications and computer services, certain professional services, and management services. Financial services are covered, but are the object of several distinct provisions reviewed below. Transportation, basic telecommunication, medical, dental, legal, child-care, education, and other social services are not covered.[17]

i. *Financial Services*

The Free Trade Agreement is the first bilateral agreement concluded by the United States which covers the entire financial sector.[18] Under the Agreement, Canada and the United States have agreed to several specific commitments.[19] Canada has agreed to exempt United States commercial bank subsidiaries from the current restrictions on market

15. H.R. Doc. No. 216, *supra* note 5, at 220.
16. *Id.* at 236-37.
17. *Id.* at 459-72.
18. *Id.* at 35.
19. *Id.* at 251.

share, asset growth, and capital expansion in the same manner as Canadian commercial banks are exempt.[20] Canada also agreed to remove the current limits on foreign ownership of federally-regulated financial institutions, and to exercise its review powers governing entry of United States controlled financial institutions in a fashion consistent with the Free Trade Agreement.[21]

The United States agreed to allow Canadian, United States, and other foreign banks in the United States to deal in, underwrite, or purchase debt obligations fully backed by the Canadian government or its political subdivisions. The United States also agreed to guarantee the right of Canadian banks to retain their multi-state branches that were grandfathered under the International Banking Act (12 U.S.C. § 3102), and any amendments to the Glass-Steagall Act (12 U.S.C. § 24) would be applicable to Canadian financial institutions to the same extent they apply to United States institutions.[22]

j. *Bilateral Investment*

The Free Trade Agreement goes beyond liberalizing trade in goods and services; it also applies to investments. Under the Agreement, the United States is obligated to continue to treat Canadian investors in accord with the basic open market principles presently governing inbound investments in the United States. As to Canada, the Free Trade Agreement requires a continued liberalization of the rules regulating United States investment in Canada, and it limits the extent to which Canada can withdraw the liberalized investment rules.

The Free Trade Agreement establishes four basic rules governing investments:

> (1) Each country is to treat investors of the other country at least as favorably as its own investors in the establishment of new businesses, the acquisition of existing businesses, the operation of businesses, and the sale of businesses. As in the services area, however, existing laws and regulations are grandfathered, so the national treatment requirement really is extended only to new laws and regulations.
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> (2) Neither country may impose trade distorting performance requirements, such as export standards and local content requirements. In addition, United States "greenfield" investments will not be

20. H.R. Doc. No. 216, *supra* note 5, at 251.
21. *Id.*
22. *Id.*

subject to review by Investment Canada (the Canadian investment review board), thus exempting those investments from the performance requirements commonly arising from such reviews.
(3) Neither country may expropriate an investment from the other country except in accordance with generally accepted principles of international law, which include prompt compensation at the value of the investment.
(4) Neither country may prevent an investor from withdrawing earnings from an investment or proceeds from the liquidation or sale of an investment.

k. *Binational Dispute Resolution*

The Free Trade Agreement establishes general procedures for dispute resolution and special rules for resolving disputes under the antidumping and countervailing duty laws. The general dispute resolution procedures are drawn from GATT. For antidumping and countervailing duty cases, the Free Trade Agreement provides for referral to a binational panel in lieu of appeal to the domestic courts of one country or the other.[23]

2. *Effects of the Agreement*

As noted, the United States-Canada Free Trade Agreement is one of the most comprehensive bilateral economic agreements ever negotiated between two countries. Although a high level of economic interchange already exists between the two countries, the Free Trade Agreement should produce an even higher level of trade and investment. The Agreement will increase the opportunities for United States exports of agricultural products and wines, Canadian exports of energy, and United States and Canadian trade in a wide range of services—including mining, construction, engineering, architecture, insurance, real estate, advertising, and tourism services. Additionally, the agreement will give United States banks and other financial enterprises greater access to Canadian markets, and provide for a general improvement of the conditions under which United States businesses are able to invest in Canada. The overall impact of the Agreement is to remove many of the barriers that previously inhibited the development of the United States and Canada as a single market with free movement of goods, services, capital, and people.

23. *Id.* at 38.

In addition to its impact on economic relations between the United States and Canada, the Free Trade Agreement will serve as a stimulus for broad based agreement in the Uruguay Round of GATT. The Agreement also may act as a model in bilateral trade and investment discussions between the United States and Mexico, Japan, and possibly Taiwan and Korea.[24]

B. *1992 and the Single European Act*

Led by its President, Jacques Delors, the current Commission of the European Community decided that Europe would be able to meet the economic challenges of the United States and Japan only through the establishment of a truly unified and integrated market. In a 1985 "White Paper," the Commission identified approximately 300 Directives (European Laws) to remove physical, technical, and fiscal barriers between member states, so as to create a single internal market by the end of 1992.[25] The objectives of the White Paper were formalized in 1986 by the adoption of the Single European Act, which amends the European Community's 1957 Treaty of Rome by making the passing of Directives easier.[26]

The purpose of White Paper, the Single European Act, and the Directives is to dissolve the economic borders of the twelve nations of the European Community so as to form a single market of 320 million people in which the free movement of goods, persons, services, and capital is guaranteed.[27] The date set for the establishment of the internal market is December 31, 1992.[28]

Chronologically, the European Community is about halfway toward the establishment of the internal market. The prospect of an internal market has produced much, although not unanimous, enthusiasm within the twelve member states.[29] The concept of an internal market also has stimulated an enormous amount of debate within

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24. *Baucus Urges Bush to Seek Talks on 1992 Plan, Use Trade Law's New 'Super 301' Provisions*, 5 Int'l Trade Rep. (BNA), No. 49, at 1631 (Dec. 14, 1988).

25. *Completing the Internal Market*, identified as Com(85) 310 final, Commission of the European Communities, Brussels, June 14, 1985.

26. Single European Act, *done* at The Hague, Feb. 17-28, 1986, *reprinted in* 25 I.L.M. 503 (1986). Section II(1) of Title II of the Single European Act deals with the establishment of the internal market. *Id.* at 510-12.

27. The Single European Act amends the Treaty of Rome by adding new Article 8A which defines the "internal market" as an area without frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of the EEC Treaty. *Id.*

28. *Id.* at 511.

29. Pletka, *Cover Story*, INSIGHT ON THE NEWS, June 20, 1988, at 8-17.

the European Community and its major trading partners, including the United States and Japan.[30] The actual shape of the internal market is far from certain, as many critical Directives have not been introduced and some of the proposals that have been introduced have been met with considerable hostility.[31] So, it is not at all clear what will happen after 1992.

Nonetheless, businesses both within the European Community and outside it are taking 1992 very seriously. Within the European Community, businesses are responding with a frenzy of mergers and takeovers.[32] Small banks in Spain are merging with other small banks to become big banks, which are taking over medium sized banks in Belgium. Insurance companies in France are taking over insurance companies in Great Britain, then merging with other companies in France.[33] During 1983, there were 117 takeovers or mergers within the twelve countries of the European Community; in 1987, the European Commission estimated there were 300 combinations.[34] The general sense within the European Community is that the larger the company, the greater the possibility of surviving the move toward an internal market.[35]

Outside of the European Community, the possibility of the internal market becoming "Fortress Europe" is causing companies to scramble to establish a presence within the Community. Japanese manufacturers, for example, fearful of increasing protection in the European Community after 1992, are moving to establish major production facilities within the Community. Toyota is considering manufacturing cars in Great Britain, and Fujitsu and Toshiba are looking at the establishment of semiconductor plants in Europe.[36]

C. *The Uruguay Round of GATT*

Some critics of the General Agreement on Tariffs and Trade claim "GATT is dead."[37] They point to the ways in which the United

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30. *Lawson Lobs a 'Great Boulder' Towards Europe*, Fin. Times, Jan. 27, 1989, at 2, col. 3.

31. The proposal to move toward a "monetary union" is something British Prime Minister Margaret Thatcher has said would not happen during her lifetime. *The Slanging Match Resumes*, THE ECONOMIST, Jan. 28, 1989, at 48-49.

32. *Corporations Rush to Tie the European Knot*, Pletka, *supra* note 29, at 16.

33. *Id.*

34. *Id.*

35. *Id.* It is clear that largeness will be the key to survival, although many European companies are acting as if it isn't. *See Direct Impact of Single Market Legislation 'Exaggerated,'* Fin. Times, Jan. 30, 1989, at 4, col. 1.

36. *Europe Girds for Invasion by the Japanese*, Wall St.J., Feb. 3, 1989, at A8, col. 1.

37. *Businessmen's Attitudes to Free Trade: Reports of its Death*, THE ECONOMIST, Feb. 4, 1989, at 64 [hereinafter *Free Trade*].

States discriminates against foreign enterprises under its patent infringement laws,[38] the recent pressure by the major United States automakers to have a 25 percent duty on van and truck imports on top of all the existing protection,[39] the dispute over hormone injected beef between the United States and the European Community,[40] and the fairly widespread sentiment within the European Community for using 1992 to create "Fortress Europe."[41] They also recognize that the impetus for the United States-Canada Free Trade Agreement was not the lure of free trade, but instead was due to Canadian concern about increased protectionism in the United States and the desire of the Canadians to insure continued access to United States markets—irrespective of what trade barriers the United States erected against the rest of the world.[42] Further evidence of the death of GATT and free trade can be seen in the lack of either progress or consensus on major trade issues at the midterm review of the Uruguay Round of GATT in Montreal on December 5-9, 1988.[43]

There is substantial evidence, however, that GATT and the prospects of further movement toward free trade are very much alive. The best evidence is that in 1988 world trade expanded by nine percent, which is the largest increase since 1984.[44] The growing interest in bilateral free trade agreements somewhat along the lines of the United States-Canada Free Trade Agreement in Mexico, Japan, Taiwan, and Korea, may reflect frustration with GATT and fears of increased protectionism within the United States. If the agreements become a reality, however, they will have a positive impact on trade and bring about bilateral reductions in trade barriers. Perestroika and the movement toward market oriented economies in the Soviet Union and China also should improve the prospects for free trade on a global basis.[45]

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38. The GATT Dispute Panel recently ruled that the operation of the United States patent infringement laws discriminates against foreign enterprises in violation of the nondiscrimination requirements under GATT. *EC Express Satisfaction with GATT Ruling U.S. Patent Law Application Discriminatory* 6 Int'l Trade Rep. (BNA) No. 5, at 148 (Feb. 1, 1989). The Dispute Panel was reviewing United States patent infringement laws in effect prior to the Omnibus Trade Act of 1988; and, the 1988 Act increased the protectionist strain of the United States intellectual property laws. *Id.*

39. *Free Trade, supra* note 37, at 64.

40. *Brie and Hormones*, THE ECONOMIST, Jan. 7, 1989, at 21.

41. *To Be Precise, We Don't Know*, THE ECONOMIST, Jan. 28, 1989, at 48.

42. A. Wilson and G. Holliday, *Trade*, Congressional Research Service: Economics Division, May 23, 1988, at 11, *cited* in Demet, *supra* note 6, at 6.

43. *Free Trade, supra* note 37, at 64.

44. *Id.*

45. House, *The '90s and Beyond*, Wall St.J., Feb. 6, 1989, at 1, col. 1.

Of considerable longer term importance is the good possibility the Uruguay Round will lead to multilateral accords moving toward free trade in a number of sensitive areas. During the first two years of the Uruguay Round, agreements were reached on tariffs, non-tariff measures, tropical products, services, function of GATT systems, dispute settlement, review of GATT articles, multilateral trade negotiation agreements and arrangements, subsidies and countervailing duties, trade related investment measures, and natural resource based products.[46] As to tariffs, it was agreed that substantive negotiations would begin on July 1, 1989, with a target of a reduction in each member country's tariffs of 30 percent, as in the Tokyo Round.[47] As to non-tariff measures, it was agreed that they should be substantially reduced or eliminated, and, where elimination was not possible, the non-tariff barriers should be shifted to tariff barriers.[48] In the tropical products area, the GATT signatories agreed to eliminate duties on unprocessed products, and to remove or substantially reduce duties on semiprocessed and processed products. Included as tropical products are spices, flowers, rubber, vegetable oils, tropical wood, and tropical fruits and nuts.[49] With regard to trade in services, the GATT signatories agreed to the concept of national treatment, which would enable foreign service providers to compete in the local markets on the same terms as domestic service providers, and they agreed to work toward establishing a system that informed foreign service providers of all necessary laws and guidelines.[50] They also agreed to seek ways to accommodate the special needs of less developed countries in future negotiations.[51]

Notwithstanding the many areas of agreement in the Uruguay Round, an impasse over agricultural trade has created a serious block to meaningful progress. The impasse arose because of a disagreement between the United States and the European Community over agricultural subsidies. The United States wants an agreement to phase out all agricultural subsidies by a certain date, whereas the European Community favors a reduction in subsidies rather than their elimi-

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46. *GATT Officials Decide to Postpone Conclusion of Uraguay Round Midterm Review Until April*, 5 Int'l Trade Rep. (BNA), No. 49, at 1617 (Dec. 14, 1988) [hereinafter *GATT Officials*].
47. *ITC Initatives Probe Into Economic Effect of U.S. Tariff, Non-Tariff Policy Changes*, 6 Int'l Trade Rep. (BNA), No. 3, at 68 (Jan. 18, 1989).
48. *Id.*
49. *GATT Officials*, *supra* note 46, at 1619.
50. *Id.*
51. *Id.*

nation.[52] At the midterm review in December 1988, neither side would move toward a compromise. This led to a suspension of the midterm review until April 1989. It also meant that the areas in which there was agreement were held in suspense until the conclusion of the midterm review.[53] And, it probably prevented accords in the areas of textiles and protection of intellectual property rights.[54]

Since the suspension of the midterm review, both the United States and the European Community have softened their positions.[55] Thus, although the structure of an agreement on agricultural subsidies is not yet identifiable, the probability of an agreement apparently is improving. An agreement on agricultural subsidies, in turn, will release the other agreements from their suspended status and breathe new life into the Uruguay Round. The end result may be that the Uruguay Round will bump the world a little farther along the road of free trade with agreements to eliminate or reduce protective measures in sensitive areas such as agriculture, intellectual property, trade in services, subsidies, and countervailing duties and trade related investments.

D. *The Increased Importance of East Asia in Trade and Investment Transactions Involving the United States*

East Asia is the most dynamic region in the world. Between 1960 and 1986, the real GNP annual growth rates in East Asia[56] averaged six percent, while the United States averaged three percent, and the world average was about 3.75 percent.[57] Japan has lead the economic emergence of the region, and it now is the world's largest creditor nation with $240 billion in net foreign assets.[58] The four newly industrialized countries (NICs) of Taiwan, South Korea, Singapore,

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52. *Sharp Differences Between U.S., EC Cause Breakdown in GATT Farm Talks*, 5 Int'l Trade Rep. (BNA), No. 48, at 1585 (Dec. 7, 1988).

53. *Id.*

54. *EC Stance on GATT Talks Firm, But Shift Not Impossible, Andriessen Spokesman Says*, 6 Int'l Trade Rep. (BNA), No. 3, at 65 (Jan. 18, 1989).

55. *US and EC Claim GATT Impasse Will be Ended Soon*, Fin. Times, Jan. 31, 1989, at 4, col. 1.

56. As used here, the East Asian region includes Japan, China, Australia, New Zealand, the newly industrialized countries of Taiwan, South Korea, Singapore and Hong Kong, and four members of the Association of Southeast Asian Nations (ASEAN), Indonesia, Malaysia, the Philippines, and Thailand.

57. HOUSE COMM. ON WAYS AND MEANS, EAST ASIA: CHALLENGES FOR U.S. ECONOMIC AND SECURITY INTERESTS IN THE 1990'S, H.R. DOC. No. 40, 100th Cong., 2d Sess. 16 (1988) [hereinafter EAST ASIA: CHALLENGES].

58. *Id.* at 8.

and Hong Kong have sustained growth rates averaging more than eight percent between 1960 and 1986.[59] Taiwan is now the world's tenth largest exporter and South Korea, Hong Kong, and Singapore are all in the top twenty.[60] Just behind the NICs, Indonesia, Malaysia, the Philippines, and Thailand also are growing rapidly. Their exports of manufactured goods have increased faster than those of other less developed countries outside Asia; and, in offering attractive investment opportunities, they now compete even more effectively with Japan and the East Asian NICs.[61]

The clearest evidence of the growing interdependence of the United States and East Asia lies in the dramatic growth in trade between the United States and the dynamic economies of East Asia. Between 1975 and 1986, merchandise exports to Japan grew from $9.65 billion to $26.88 billion; and, imports grew from $11.43 billion to $81.91 billion.[62] During the same period, exports to Taiwan grew from $1.66 billion to $5.52 billion, and imports rose from $1.95 billion to $19.79 billion;[63] exports to Korea increased from $1.76 billion to $6.36 billion, and imports rose from $1.44 billion to $12.73 billion;[64] exports to Hong Kong went from $810 million to $2.79 billion, and imports grew from $1.57 billion to $8.89 billion;[65] and exports to Singapore increased from $990 million to $3.38 billion and imports grew from $530 million to $4.73 billion.[66] During 1984, trans-Pacific trade surpassed trans-Atlantic trade; and, by 1987, the twelve East Asian countries accounted for more than 25 percent of United States exports, and supplied more than 40 percent of United States imports.[67] The United States also was the largest export market for eight of the twelve East Asian countries.[68]

The growing importance of East Asia to the United States also is reflected in the expansion of East Asian investment in the United States. During the period 1980-1986, Japan's foreign direct investment in the United States grew at a rate of more than 30 percent. In 1986, it stood at $23.4 billion, or 11.2 percent of the total foreign direct

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59. *Id.* at 16.
60. *Id.* at 9.
61. *Id.*
62. STATISTICAL ABSTRACT, *supra* note 5, at 772.
63. *Id.*
64. *Id.*
65. *Id.*
66. Id. at 773.
67. EAST ASIA: CHALLENGES, *supra* note 57, at 9.
68. *Id.*

investment in the United States.[69] The Japanese are investing in the United States in part to establish United States situs production facilities so as to minimize the impact of any protectionist moves by the United States. Nonetheless, they must be influenced as well by the very considerable price differentials in the United States and Japan. Based on comparative land prices in the latter part of 1988, for example, it was estimated that if the Emperor of Japan decided to sell the Imperial Palace grounds in Downtown Tokyo (an area unscientifically estimated to be about half the size of Central park in New York City), the price would be equal to the value of all the land in the State of California.[70] With foreign exchange reserves in excess of $70 billion, Taiwan also is likely to emerge as a major source of outbound investments, much of which are likely to be directed to the United States, Canada, and elsewhere in East Asia (including possibly China).

However successful the individual countries in East Asia are or may become in the 1990s, it is unlikely they will bind together into a unified trading block, such as is emerging in North America and already exists to a large degree in the European Community.[71] Major cultural, racial, and religious differences complicate relations between countries.[72] Moreover, there are enormous differences in the size of the countries, the structure of their economies, and the relative levels of their industrialization.[73]

In addition, the considerable residual hostility toward the Japanese—resulting from their occupation of many of the East Asian countries during the first half of this century—makes it improbable that the Koreans, the Taiwanese, the Chinese, or other East Asians will enter into a multilateral trading and investing block with Japan as the head and dominant partner.[74]

In the years just ahead, it seems likely that trade and investment transactions between the United States and East Asia will continue

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69. U.S. DEPT. OF COMMERCE, INTERNATIONAL DIRECT INVESTMENT: GLOBAL TRENDS AND THE U.S. ROLE, at 40 (1988 ed.) In 1986, Japan ranked third among the countries with foreign direct investment in the United States. The United Kingdom was first with $51.4 billion, or 24.6 percent; and the Netherlands was second with $42.9 billion, or 20.5 percent. The figure for the Netherlands is especially high, because the Netherlands often is used by third country nationals as the situs of a base company for investing in the United States.

70. *Feeling Poor in Japan*, THE ECONOMIST, June 11, 1988, at 33.

71. *The '90s & Beyond: Though Rich, Japan is Poor in Many Elements of Global Leadership*, Wall St.J., Jan. 30, 1989, at 1, col. 1.

72. EAST ASIA: CHALLENGES, *supra* note 57, at 10.

73. *Id.*

74. *Id.*

to grow in absolute terms; and, it seems quite likely that they will grow in importance in relative terms as well. Nonetheless, due to the absence of a regional trading block, trade and investment relations probably will continue to be governed by bilateral negotiations or under multilateral agreements such as GATT.

E. *Improved Communications*

During the last decade, the improvements in communications have been so substantial that now it is possible to be in instantaneous contact with a great many places across the world. Global communications have become a reality, especially for transnational business enterprises which now regularly maintain worldwide communications networks tied together with telephones, fax machines, telexes, and computerized data retrieval and transmission equipment. In the remaining years of this century, the quality and sophistication of communications equipment are likely to improve. The really significant change, however, likely will be the drop in price for the communications equipment. This will mean that top quality, sophisticated communications equipment will be much more widely available in 2001 than in 1989.

One of the major effects of improved communications equipment being more widely available will be that large enterprises no longer will have a monopoly on current information in distant places. Small and medium sized businesses throughout the United States, for example, will be able to obtain information as current and detailed as the largest businesses in the major urban areas; and the competitive edge now given to the biggest businesses (because of their having sophisticated information gathering systems) will be diminished. The net impact may be that more small and medium sized businesses will become involved in transnational business transactions.[75]

F. *Aging, Affluence, and Leisure*

In 2001, people in the United States will be older, probably more affluent, and with more leisure time than in 1989. The aging of the American population will occur in part because medical advances

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75. *The Rise and Rise of America's Small Firms*, THE ECONOMIST, Jan. 21, 1989, at 67; *The Little Guys are Making It Big Overseas*, BUS. WK., Feb. 27, 1989, at 94 [hereinafter *The Little Guys*].

will enable more people to survive longer.[76] In addition, the aging of the "baby boomers" born just after World War II will increase substantially the ranks of the elderly.[77] From 1928 through 1988, per capita disposable income in the United States increased 2.9 times.[78] Between 1989 and 2001, per capita disposable income probably will increase even more. One of the consequences of the increased wealth may be that a lot of people will take their share of increased wealth not in the form of greater consumption of material goods, but in more frequent and longer vacations.[79] This is especially probable in the United States, because the proportion of the population at or near retirement age, correspondingly, is likely to be greater in 2001. For transnational business activities, the principal impact of an older, more affluent population with greater leisure time will be in the greater demand for international tourist services. As it becomes easier for people to move from place to place, and as more people have both the time and resources to travel, it seems likely that tourist travel to and from the United States will increase.

III. The Transnational Business Lawyer at the Beginning of the Third Millenium

Because of easier travel and improved communications facilities, along with a more affluent population with more leisure time, the world at the beginning of the third millennium is likely to be, in a sense, a smaller place than it is today. Additionally, if the promises of the United States-Canada Free Trade Agreement, 1992 and the Single European Act, and the Uruguay Round of GATT are only partially fulfilled, the beginning of the third millennium is likely to bring greater levels of transnational trade in goods, and possibly bring much greater increases in transnational services, trade, and direct and portfolio investments. Further, with East Asia in ascendancy, a large proportion of the United States trade in goods, services, and investment will have an East Asian connection. Also, it appears likely that the beginning of the third millennium will have a larger number of small and medium sized United States enterprises actively involved in transnational business practices.

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76. *See 2001 Medicine, Rebuilding the Body, Part by Part*, Discover, Nov. 1988, at 46 (discussing a developing medical technique called "free-flap surgery").

77. *Aging Baby Boomers Will Swell Elderly Ranks*, Wall St.J., Feb. 7, 1989, at B1, col. 2.

78. *The Next Ages of Man*, The Economist, Dec. 24, 1988, *Survey*, at 1.

79. *Id.* at 10.

But what will this mean for the United States based transnational business lawyer? In 2001, it is quite likely that United States based transnational lawyers will be selling information, representation, and judgment where the information is less than complete or the strategy of representation is not apparent, just as they are doing today. What information, however, will be relevant? Where will representation be necessary? And, when will the lawyers be called upon to exercise their judgment?

It seems clear that even if the United States-Canada Free Trade Agreement, the Uruguay Round of GATT, and 1992 prove successful in diminishing government involvement in transnational business transactions, a substantial number of the transnational lawyers still will be providing information, representation, and judgment relating to government regulation of transnational trade and investment transactions. As they are today, transnational business lawyers will be involved in "escape clause" actions under the 21st century equivalent of Section 201 of the Trade Act of 1974. For example, they will represent both importers and domestic industries in countervailing duty and antidumping actions;[80] and, they will represent both sides in unfair trade actions.[81] International taxation is almost certainly going to continue as a discrete specialization of the transnational business lawyers. If the trend toward lower individual and corporate income taxes continues, international tax lawyers will be spending more time focusing on indirect taxes (*e.g.*, value-added tax and excise taxes), and direct taxes other than income taxes (*e.g.*, capital transfer and wealth taxes).

In the private sector, transnational lawyers will be involved in traditional areas such as trade in goods and licensing of technology. Assuming the objectives of the United States-Canada Free Trade Agreement, 1992 and the Single European Act, and the Uruguay Round of GATT are at least partially achieved, two growth areas for transnational lawyers will be in the transnational services and investment areas. Increasingly, lawyers will be called upon to help United States based service enterprises extend their activities overseas.

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80. Although there is no good indication this will happen, one would hope that between 1989 and 2001 governments and the GATT Secretariat would examine again the question whether "dumping" really is injurious to the domestic economy in which the dumping occurs. *See* Goldman, *Competition, Anti-dumping, and the Canada-U.S. Trade Negotiations*, CANADA-UNITED STATES L.J. 95 (1987).

81. Unfair trade actions involving possible infringement of intellectual property rights will be quite common in the United States if laws withstand GATT pressures for reform. *See* 5 Int'l Trade Rep. (BNA) No. 50, at 1645 (Dec. 21, 1988).

At the same time, inbound direct and portfolio investment is likely to be at such a high level that transnational lawyers will find much of their work to be associated with such transactions. Since 2001 also will see a higher level of United States direct investment in Western Europe, if only to counteract the possible effect of "Fortress Europe" after 1992, transnational lawyers will have to tend to legal issues associated with outbound direct investment. And, because of the growing prominence of East Asia in transnational trade and investment transactions, lawyers with an understanding of Japanese and Chinese languages and customs are likely to fare well.

For transnational business lawyers, having improved communications equipment more widely available[82] will have three effects. First, in 2001, access to computerized data retrieval systems with current information on global events—including events of importance to transnational lawyers—will be affordable to many more small and medium sized law firms and businesses. The large law firms and the legal departments of the biggest transnational corporations will no longer have a monopoly on current information on events with legal significance in distant places. Instead, a single lawyer located in a remote location will be able to obtain information as current and detailed as the largest law firms and the biggest businesses in the major urban areas. What may be lacking in the remote areas, however, is access to people who can analyze the information. For this, the large law firms and the legal departments of the biggest corporations may maintain an advantage; nonetheless, even here the edge may be partly eroded by the growth of services which provide detailed analyses of the information by especially qualified people.

Second, the broader availability of improved communications equipment will enable transnational business lawyers to lead businesses into the transnational business arena. Historically, transnational business transactions have been dominated by the largest enterprises. With improved communications equipment being more widely available, transnational business will become a profitable possiblity for many small and medium sized enterprises.[83] Lawyers wanting to expand their transnational practice may find that they can play a leading role in educating small and medium sized enterprises about the increased opportunities for transnational business.

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82. *See supra* note 75 and accompanying text.
83. *The Little Guys, supra* note 75, at 94-96.

Third, improved communications equipment will make international travel less necessary, and more discretionary. With easy access to computerized data retrieval systems, video telephones, fax machines, and telexes, there will be more instances in which the physical presence of a lawyer in a distant place will be unnecessary. On the one hand, this will enable transnational business lawyers to be more productive by avoiding the inefficiencies of international business travel. On the other hand, however, it will diminish the allure of a transnational legal practice, because one of the major attractions of the practice is the opportunity to live and work in a foreign environment.

As the world "shrinks" as a result of improved communications and easier travel, it is possible that lawyers will become more involved in working with the less developed parts of the world. The various transnational benefit concerts held in recent months may spawn a new specialty for transnational lawyers: legal issues associated with transnational charitable organizations and charitable contributions. This could be an especially attractive way to blend "good works" with the allure of the changing international arena.

Conclusion

At the beginning of the third millennium, the world certainly will be a smaller place, and for many people it may be a more prosperous place. A substantial portion of the transnational business law practice still will involve trade in goods; but if the probable effects of the United States-Canada Free Trade Agreement, 1992 and the Single European Act, and the Uruguay Round of GATT are realized, there should be much more work involving trade in services and direct investment—especially direct investment for the purpose of maintaining access to an attractive market. Transnational business activities also will have a distinctly East Asian flavor as that part of the world gains greater economic importance. In addition, it seems likely that the practice of transnational business law will be more diffused throughout the United States, as more and more people outside of the major urban areas become involved in transnational business. Finally, new specialties in transnational business law are likely to emerge. These specialties will involve dealing with the more fortunate part of the world population enjoying increased leisure time and greater affluence, and working with the less fortunate people facing natural or human-created disasters.