ARTICLES

THE NEW REGULATORY REGIME FOR FOREIGN LAWYERS IN JAPAN: AN ESCAPE FROM FREEDOM

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On May 23, 1986 the Nakasone Cabinet promulgated long-awaited legislation for licensing foreign lawyers in Japan. Somewhat inelegantly entitled the Special Measures Law Concerning the Handling of Legal Practice by Foreign Lawyers,[1] the new statute permits the Minister of Justice to license persons qualified as lawyers in jurisdictions outside of Japan to provide a narrowly confined range of legal services in Japan, but also subjects foreign lawyers so licensed to regulation by both the Ministry of Justice and the Japanese bar. Within a few months after the statute as well as new Ministry of Justice and Bar Association regulations became effective in the spring of 1987, over a dozen foreign law firms, the vast majority based in New York City, had filed applications for admission.[2]

The new legislation culminated over a decade of contentious and often frustrating bilateral negotiations as dispute over the establishment of American law offices in Tokyo escalated into a widely publicized trade issue. Initially only a handful of lawyers on either side of the Pacific seemed to care very much about the issue of licensing foreign lawyers in Japan, but their political influence be-

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1. GAIKOKU BENGOSHI NI YORU HŌRITSU JIMU NO TORIATSUKAE NI KANSURU TOKUREI SOCHI HŌ, Law No. 66 of 1986 [hereinafter cited as 1986 Foreign Lawyers Practice Law].

2. The first firms to file included, from New York, Cleary, Gottlieb, Steen & Hamilton; Davis, Polk & Wardwell; Shearman & Sterling; Skadden, Arps, Slate, Meagher & Flom; and Sullivan & Cromwell; and, from San Francisco, Morrison & Foerster. NAT'L L.J., May 18, 1987, at 14-15. The cost of establishing and maintaining even a small office in Toyko has discouraged all but the largest firms from seeking to establish an office with a licensed resident partner in Tokyo.

came increasingly evident first in the reluctance of Japanese government authorities to act and later in the intervention of the Office of the United States Trade Representative (USTR). However, the compromise represented by the 1986 statute should satisfy no one. It constitutes a radical departure from past Japanese practice with unwelcome potential consequences as much for the Japanese legal profession as for foreign lawyers in Japan. It also raises serious doubts with respect to the capacity of the United States and Japan to engage in effective trade negotiations. Above all, however, the new law reflects a disturbing paradox in American lawyers' insistence on a formal, legally ordered regime to legitimate their services in Japan but apparent unwillingness to rely on the existing law and legal avenues for relief in asserting their claim to establish offices in Japan.

I. THE FOREIGN LAWYER LICENSING STATUTE IN HISTORICAL CONTEXT

The history of the regulation of the Japanese bar, including foreign lawyers in Japan, is relatively well-known[3] and thus may be summarized briefly. Professional representation in judicial proceedings was recognized for the first time in Japan in 1872 in regulations governing judicial affairs.[4] Four years later the Japanese government issued more detailed regulations that in effect defined the legal profession as trial advocates (*daigennin*) on behalf of parties in civil litigation. Under these 1876 regulations the capacity of a person to act as a *daigennin* was limited to a specific district or high court based on an examination.[5] Revision of the *daigennin* regulations in 1880 instituted a system of admission to practice before any court in Japan based upon an examination to be administered entirely by the Ministry of Justice. The new regulations also required organization of the profession with bar associations established for each district

3. Three of the best studies available in any language are: Hattori, *The Legal Profession in Japan: Its Historical Development and Present State*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY, 111-152 (A. von Mehren ed. 1963); Rabinowitz, *The Historical Development of the Japanese Bar*, 70 HARV. L. REV. 65 (1956), and Fukuhara, *The Status of Foreign Lawyers in Japan*, JAPANESE ANN. INT'L L. 21 (1973).

Fukuhara is credited with having drafted the 1949 Lawyers Law as a government attorney (procurator) with the Ministry of Justice and was recognized as the most authoritative source as to its interpretation. *See* T. FUKUHARA, BENGOSHI HŌ [LAWYERS LAW] (1976). It should be noted that his 1973 essay (*see supra* note 3) is an amplified version of an expert opinion that provided the basis for the organization of the Baker & McKenzie liaison office. (Author's conversation with Rex Coleman, Tokyo, Spring 1972).

4. *See* SHIHŌ SHOKUMU TEISEI, c.10 § 12; *cited in* Rabinowitz, *supra* note 3, at 67; Hattori, *supra* note 3, at 117.

5. DAIGENNIN KISOKU, Dajōkan Futatsu No. 274 (1876); *cited in* Rabinowitz, *supra* note 3, at 67; Hattori, *supra* note 3, at 117.

court.[6] Concomitant with the organization of the judiciary and other institutional reforms under the Meiji Constitution (1889), these fragmentary efforts toward the recognition and regulation of an organized bar culminated in the enactment of the 1893 Lawyers Law.[7] The 1893 statute represented Japan's first comprehensive legislation governing the legal profession, in which the term *bengoshi*, a translation of the English title "barrister," replaced the previously used *daigennin* label.[8] The 1893 Lawyers Law remained in force with few significant amendments until the mid-1930's with enactment of a revised Lawyers Law,[9] which was enacted in 1933 but did not become effective until 1934. Under the Allied Occupation (1945-1952) the 1933 statute was repealed with the enactment of the 1949 Lawyers Law,[10] which currently regulates the legal profession in Japan.

Three features of the historical development of the legal profession in Japan are especially relevant, however, in assessing the new legislation on foreign lawyers.

First, as the term *bengoshi* itself implies, the definition of the Japanese lawyer as barrister—that is, trial lawyer—was not seriously questioned until the 1970's. The scope of practice is currently defined in articles 3 and 72 of the 1949 Lawyers Law (emphasis added):

> Article 3. A lawyer shall, upon the request of a party and other persons concerned, or a government or public office, perform acts and other general legal business *related to* lawsuits, noncontentious cases, appeals of dispositions by administrative offices such as requests for investigation, objections, petitions for review.
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> Article 72. No person other than a lawyer shall, with the aim of obtaining compensation, engage in the presentation of legal opinions, representation, mediation or conciliation and other legal business (*hōritsu*) *in connection with* lawsuits or noncontentious cases, and such appeals filed with administrative offices as requests for investigation, objections, petitions for review and *other general legal cases*, or act as other agent therefor; provided that this shall not apply in such cases as otherwise provided for in this Law.

More evident perhaps in the original Japanese than in the English translation is limitation of the lawyer's monopoly of formal judicial or administrative proceedings. Excluded from both articles is

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6. Rabinowitz, *supra* note 3, at 69.

7. BENGOSHI HŌ, Law No. 7 of 1893, [hereinafter cited as 1893 Lawyers Law].

8. Rabinowitz, *supra* note 3, at 67. Other terms considered included "*benhōshi*," "*hōritsushi*," "*shihōshi*." K. KANAME, KAISEI BENGOSHI HŌ SEIGI [DETAILED EXPLANATION OF THE REVISED LAWYERS LAW] 7 (1934).

9. BENGOSHI HŌ, Law No. 53 of 1933 [hereinafter cited as 1933 Lawyers Law].

10. BENGOSHI HŌ, Law No. 205 of 1949 [hereinafter cited as 1949 Lawyers Law].

the variety of counseling, drafting and negotiating tasks performed by the lawyer unrelated to litigation and other "legal cases" (*hōritsu jiken*). The phrase "legal business" (*hōritsu jiken*) as used in both articles 3 and 72 is conditional. It does not stand alone as a separate category in the definition of the scope of practice. Rather, the bar's monopoly over the performance of "legal business" and the provision of legal services generally is restricted to matters related to a legal case. In effect, the Lawyers Law includes a sort of "case and controversy"—or in Japanese, *jikensei*—requirement.[11] Examples of "case-related" activities have included assistance in filing petitions to have criminal execution delayed,[12] and debt collection,[13] but Japanese courts have consistently held that legal advice, the drafting of contracts and other legal documents as well as other services involving legal matters unrelated to a legal dispute or formal proceedings as listed in articles 3 and 72 are not covered by either provision of the 1949 Lawyers Law.[14]

The limited scope of practice as defined in the 1949 law becomes more apparent, however, when these provisions are read in the context of the 1893 and 1933 statutes. Of all three statutes, the 1893 Lawyers Law was the most restrictive. Article 1 of the 1893 law limited the scope of practice by *bengoshi* "to performing matters dependent on laws in ordinary courts." Representation of parties before special courts, such as the newly-established Administrative Court and military tribunals, was expressly excluded.[15]

In the 1920's, a rapid—and to some alarming—increase in both the number of *bengoshi* and litigation[16] added to dissatisfaction with the 1893 law and a series of legislative proposals initiated within the bar and the government to revise the 1893 legislation.[17] One of several proposals put forward was a redefinition of the scope

11. Fukuhara *supra* note 3, at 262. Sugio v. Japan, Ke Keishū, 418 (Sup. Ct., 1st P.B., Oct. 4, 1962); Ozaki v. Japan, 21 Kōsai Keishū 80 (Osaka High Ct., Feb. 19, 1968).

12. Ozaki v. Japan, *supra* note 11.

13. Sugio v. Japan, *supra* note 11.

14. *See, e.g.*, Japan v. [unnamed defendant], 865 Hanrei jihō 110, 112-113 (Matsugama Dist. Ct., Jan. 18, 1977) and [unnamed plaintiff] v. [unnamed defendant], 251 HANREI TAIMUZU 305 (Sapporo Dist. Ct., April 24, 1970), each involving legal estate transactions, *cited in* Ramseyer, *Lawyers, Foreign Lawyers, and Lawyer Substitutes: The Market for Regulation in Japan*, 27 HARV. INT'L L.J., (Special Issue) 499, 500 n.3(b) (1986).

15. Proviso to 1893 Lawyers Law art. 1. *See* note 7, *supra*.

16. Between 1920 and 1930, for example, the number of *bengoshi* more than doubled, increasing from 3082 to 6599. SHIHŌ HAKUSHO [WHITE PAPER ON THE LEGAL SYSTEM] 102-103 (Nihon Bengoshi Rengōkai ed., 1971). During the same period there was an even greater increase in litigation, *id.* at 19. *See also*, Rabinowitz, *supra* note 3.

17. Kaname, *supra* note 8, at 102-115.

of practice to include legal advice and counsel apart from representation in judicial and other proceedings—in other words, to expand the role of the *bengoshi* to include the functions of solicitor as well as barrister.[18] As enacted, however, the 1933 statute reflected the view that the monopoly should continue to be constrained.[19] First, the limitations of the 1893 statute were deleted and the language used in the new article 1 of the 1933 statute had an open-ended ambiguity. As enacted it provided:

> Article 1: Lawyers perform the business of performing acts of litigation (*soshō ni kansuru kōi*) and other general legal matters pursuant to the request (*ishoku*) of a party or other interested persons or appointment by government office.

However, the exclusivity of the lawyer's role was defined much more narrowly. By separate statute enacted simultaneously with the new Lawyers Law—the Law Concerning the Regulation of Legal Practice[20]—persons not admitted to practice were prohibited from—

> engaging regularly and for compensation in the business of providing expert opinions, representation, arbitration or compromise related to litigation involving other persons or disputes involving noncontentious cases between other persons or other related acts; provided, however, this shall not apply to acts carried out pursuant to otherwise legitimate business activities.

The 1933 Lawyers Law can thus be understood to have significantly expanded the scope of permissible practice without restricting the capacity of non-lawyers to provide a wide variety of legal services including negotiating and drafting contracts, incorporation of companies and general legal counseling.[21]

In this context the 1949 statute merely confirmed existing standards by defining the scope of practice (article 3) in language that coincided with the lawyer's monopoly (article 72). The detailed listing of various categories of formal procedures and proceedings—from civil noncontentious cases (*hishō jiken*) to administrative petitions for review (*fufuku moshitate jiken*) in both articles reflect the drafters' intent to clarify what was meant by the more general phrase "other general legal matters" used in the 1933 law.[22] No evidence known to me suggests that a broader expansion of the scope of practice exclusive to *bengoshi* was intended.

On a different front, the 1949 law did reflect a major victory for

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18. *Id.* at 100.

19. *Id.* at 107-115.

20. HŌRITSU JIMU TORIATSUKAI NO TORISHIMERI NI KANSURU HŌRITSU [The Law Concerning the Regulation of Legal Practice], Law No. 54 of 1933.

21. Kaname, *supra* note 8, at 115.

22. K. SAKURADA, HANREI BENGOSHI HŌ NO KENKYŪ [STUDY OF THE LAWYERS LAW CASE LAW] (1970).

the Japanese bar. After decades of effort, in 1949 the bar achieved regulatory autonomy at least from the Ministry of Justice. For the first time since 1876, the Ministry of Justice no longer regulated the profession. The qualification, training and admission of lawyers to the bar was entrusted to the Supreme Court with disciplinary control subject to the autonomous regulations of the organized bar.[23] Reflecting American practice,[24] article 77 of the postwar Constitution expressly granted the Supreme Court rule-making powers to determine "matters relating to attorneys."[25] The Supreme Court also acquired the authority to regulate the admission of foreign lawyers previously exercised by the Ministry of Justice.

A third feature of the profession's past that deserves special emphasis is the remarkably liberal treatment of the foreign lawyer in Japan. Until 1955, Japanese law had consistently permitted qualified foreign lawyers to be admitted to the bar with authority to represent at least alien clients in Japanese court proceedings. Even without formal admission to the bar, the foreign attorney's capacity to provide commercial counseling services was undisputed. As early as 1876, *daigennin* regulations included the provision (article 16) that "a defendant, for example, shall not be precluded from presenting his answer through an alien as his advocate as long as there is an alien plaintiff."[26] As Fukuhara notes, under the 1893 statute, foreign lawyers remained fully authorized to continue to handle all legal affairs, including in-court representation within Japan related to cases involving aliens and international transactions.[27] Indeed, foreign lawyers practicing in Yokohama and Kobe are reported to have represented parties in 432 first instance trials, thirty-nine *kōso* appeals and twenty *jōkoku* appeals in 1929 alone.[28]

The 1933 legislation did not alter the status of foreign lawyers in Japan. Under article 6(1), the statute provided for Ministry of Justice licensing of foreign lawyers on a reciprocal basis to represent parties in ordinary courts.[29] Like other non-*bengoshi*, as noted, unlicensed foreign attorneys in Japan were also permitted to provide counseling services to disputes unrelated to formal proceedings. The 1949 statute modified the prior system only slightly. Article 7 provided:

Article 7(1) A person who is qualified to become an attorney of a

23. *See* Hattori, *supra* note 3, at 137.

24. For an excellent summary of the American approach, *see* C. WILFRAM, MODERN LEGAL ETHICS 22-23 (1986).

25. KENPŌ (Constitution) art. 77 (Japan).

26. *Cited in* Fukuhara, *supra* note 3, at 22.

27. *Id.*

28. *Id.* at 24, *citing* Nishimura, *Bengoshi hō no Kaisei ni Tsuite* [*Concerning Revision of the Lawyers Law*], in 15 SHIHŌ KENKYŪ 81 (1932).

29. Fukuhara, *supra* note 3, at 23.

> foreign country and who possesses an adequate knowledge of the laws of Japan may obtain the recognition of the Supreme Court and conduct the affairs prescribed in article 3. . . .
> (2) A person who is qualified to become an attorney of a foreign country may obtain the recognition of the Supreme Court and conduct the affairs prescribed in article 3 in regard to aliens or foreign law. Provided, however, that this does not apply to the persons listed in the prior article.
> (3) The Supreme Court may impose an examination or screening in those cases where it grants the recognition of the prior two paragraphs. . . .

Under article 7, in keeping with the denial to Ministry of Justice of regulatory control over the profession, the jurisdiction over admission of foreign lawyers was vested in the Supreme Court. In addition, two categories of licensed foreign lawyers were instituted: the first included those who were fully admitted after having evidenced knowledge of Japanese law, and the second covered foreign lawyers not required to demonstrate a knowledge of Japanese law, whose admission was limited accordingly to cases involving aliens and foreign law. Otherwise, under the language of article 3 in both instances, admission entitled the foreign lawyer to represent parties in formal proceedings. Thus article 7 of the 1949 law did not expand the recognition of foreign lawyers to engage in practice in Japan and cannot be reasonably considered an example of "imposed" legislation for the benefit of Occupation lawyers (as sometimes argued and often presumed).

Eventually, sixty-eight foreign lawyers—mostly Americans—were admitted to practice in Japan under article 7 of the 1949 Lawyers Law.[30] Only two, however, passed a special examination on Japanese law and received full *bengoshi* status under article 7(1).[31] In fact, it appears most did not remain long in Japan. Probably less than half of the newly-licensed foreign lawyers actually began active practice in Japan either by entering existing firms or establishing new law offices.[32] Their presence, however, coupled with the rising demand for legal services by foreign business enterprises as Japan's economic recovery gained momentum, contributed to the emergence of a new form of legal practice in Japan—the international law firm or *shōgai jimusho.*

The availability of American lawyers and demand for customary legal counseling by American enterprises engaged in business in Japan in effect produced an American-style law firm offering a relatively broad range of legal services, from routine preventative law counseling and documentary drafting and review to corporate regis-

30. *Id.* at 32.

31. Thomas L. Blakemore and Sasakawa Khiji.

32. The exact number of those who remained to practice in Japan is unclear from bar association lists since all had to maintain a local office address.

trations and administrative agency filings, services that with the exception of patent and other industrial property issues, Japanese business enterprises rarely handled with the assistance of a *bengoshi*. As the offices the newly-licensed foreign lawyers entered or established grew and prospered, they also introduced an increasing number of young Japanese *bengoshi* to international practice, and in so doing, helped to train a new breed of Japanese lawyer as outside counsel or *shōgai bengoshi*.

In 1955, at the height of Japan's postwar protectionist impulse, legislation[33] initiated as a private member's bill repealed article 7. Many, it appears, accepted the argument that Japan's liberal admission policies for foreign attorneys were exceptional.[34] Also underlying the arguments made by proponents of the repeal was the erroneous view that article 7 had been originally enacted in response to demands by Occupation authorities.[35]

Technically, as noted, without admission to the bar licensed foreign lawyers—commonly referred to as *jun-kai'in* or "quasi-members" of the bar—could have engaged in the type of commercial counseling practice they helped to establish in Japan. However, as lawyers accustomed to a broader definition of legal practice, in effect, they introduced into the Japanese system an uncommon, although not completely alien notion of legal services. However, their near monopoly of international practice ensured the identification with bar membership of legal counseling in ordinary business, corporate and regulatory matters. Not until Rex Coleman opened the Baker & McKenzie liaison office with the newly-created Tokyo Aoyama Law Office in the early 1970's was this identification openly challenged. By the 1970's, however, the *shōgai bengoshi* had become a recognized and well-established form of practice in Japan. Consequently, ostensibly as standards for foreign lawyers admitted in Okinawa before reversion whose rights to practice at least within Okinawa were protected by the reversion agreements, but also in response to Coleman's initiative, in 1972 the Japan Federation of Bar Associations (*Nihon Bengoshi Rengō Kai*) approved a remarkably self-serving report prepared by a small group of *shōgai bengoshi* actually involved and directly interested in international practice.[36] The original unpublished draft actually noted the ambiguity of the

33. BENGOSHI HŌ NO ICHIBU O KAISEI SUNU HŌRITSU [A Law Amending a Part of the Lawyers Law] Law No. 155 of 1955.

34. Fukuhara, *supra* note 3, at 27.

35. *See* Seno Akira, *Zainichi Beijin Bengōshi no Gyōmu Seigen Mondai* [*Problem of Restrictions on Business of American Lawyers in Japan*], 5 JIYŪ TO SEIGI 12 (1954); BENGŌSHI HŌ NO ICHIBU O KAISEI SURU HŌAN [Bill to Override Part of the Lawyers Law], 5 JIYŪ TO SEIGI 35 (1954).

36. GAIKOKU HIBEN KATSUDO BOSHI NI KANSURU KIJUN [Standards for prevention of non-attorney practices by foreigners], *reprinted in* 23(8) JIYŪ TO SEIGI 39 (1972).

Japanese definition of the scope of practice, and expressly argued for incorporation of American standards on the grounds that American lawyers should be governed by American standards even in Japan. Thus, the Japanese bar officially sanctioned for the first time a reinterpretation of the scope of practice to include the notion of legal counseling and other activities unrelated to trial practice.

In the early 1970's, increased overseas Japanese investment began to produce a demand for international legal services in Japan well beyond the available supply of qualified Japanese or licensed foreign attorneys.[37] Thus, by the mid-1970's several other major American law firms had begun to seek a presence in Japan. None, however, followed Rex Coleman's lead in establishing with apparent success a "liaison" office for legal consultation in reliance on an authoritative interpretation by Tadao Fukuhara of article VIII of the Japan-U.S. Treaty of Friendship, Commerce and Navigation (FCN Treaty) and the 1949 Lawyers Law.[38] One New York firm (Coudert Brothers) did establish a special affiliation with a Japanese firm,[39] but not until the Ministry of Justice approval in 1976 of a visa for Isaac Shapiro to open a law office on behalf of Milbank, Tweed was an American lawyer permitted to enter Japan to establish an office of a foreign law firm. Coudert Brothers attempted to follow suit,[40] but apparently under severe pressure from the bar, the Ministry of Justice closed the door, refusing to issue any other visas until the foreign lawyer issue was resolved.[41] Pressure thus mounted for a new scheme to permit the establishment of American law offices in Japan, the end result of which was the 1986 legislation.[42]

II. REDEFINING THE SCOPE OF PRACTICE AND RESUMPTION OF REGULATORY CONTROL BY THE MINISTRY OF JUSTICE

The new licensing statute is perhaps most notable for what it prohibits rather than what it allows. Under article 4 it restricts the scope of practice permitted licensed foreign lawyers to the representation of clients and the provision of legal services solely with re-

37. Within a few years law firms that had until the 1970's few if any Japanese corporate clients discovered that the majority of their clients were Japanese firms with foreign legal problems. For an interesting study of Japanese corporate responses to the American legal environment *see* Miyazawa, *Legal Departments of Japanese Corporations in the United States: A Study on Organizational Adaptation to Multiple Environments*, 20 KOBE U.L. REV. 97 (1986).

38. *See* Fukuhara, *supra* note 3.

39. Law offices of Nishi, Tanaka & Takahashi in Tokyo.

40. Letter from Charles R. Stevens to John O. Haley (February 25, 1987).

41. *Id.*

42. *See U.S. Lawyers Eye Land of Rising Sun*, 50 LEGAL TIMES 8 (May 21, 1984).

spect to matters involving the law of the licensed lawyer's own jurisdiction—in the language of the statute "the jurisdiction of primary qualification" (*genshiku kokuhō*),[43] unless one or more other jurisdictions are added through designation by the Minister of Justice upon application.[44] The licensed foreign lawyer is expressly prohibited from representing any party before a court, public procurator, or other public office in Japan and from preparing any document for submission to such agency;[45] from acting as counsel in any criminal case in Japan;[46] from expressing an expert opinion or "other legal opinion" in regard to the interpretation or application of any law other than that of the lawyer's jurisdiction of primary qualification;[47] from assisting in service of documents on behalf of a court or agency in a foreign country;[48] from representing a client with respect to the preparation of notarial deeds;[49] and from representing a client and preparing documents related to real property, industrial property rights or other registered rights in Japan.[50] Even if otherwise within the scope of practice allowed under the new law, licensed foreign lawyers are also denied the right to represent a party or prepare any documents both in regard to real property, industrial property rights, and other registered rights in Japan,[51] and with respect to family relations if a Japanese national is a party[52] and to wills and gifts at death of property located in Japan owned by a person residing in Japan.[53] The law further prohibits licensed foreign lawyers from employing or establishing a partnership or other arrangements for joint legal services with Japanese lawyers (*bengoshi*).[54] Finally, it also subjects the licensed foreign lawyer to extensive regulation by both the Ministry of Justice and the Japanese bar.[55] Thus, in return for a "license," the foreign lawyer in Japan is not only denied the right to practice law within the scope of the 1949 Lawyers Law, but also to engage in a wide variety of heretofor unproscribed and unregulated activities outside the scope of practice as defined in articles 3 and 72 of the 1949 statute. Commentary on the statute to the effect that the law reflects a new openness and "internationalism" by Japan to legal prac-

43. 1986 Foreign Lawyers Practice Law, *supra* note 1, art. 3(1).
44. *Id.* art. 5.
45. *Id.* art. 3(1)(i).
46. *Id.* art. 3(1)(i) (ii).
47. *Id.* art. 3(1)(iii).
48. *Id.* art. 3(1)(iv).
49. *Id.*
50. *Id.* art. 3(1)(vi).
51. *Id.* art. 3(2)(i).
52. *Id.* art. 3(2)(ii).
53. *Id.* art. 3(2)(iii).
54. *Id.* art. 49.
55. *Id.* arts. 6-68.

tice by foreign lawyers[56] is thus misleading. The underlying premise that licensing is required under the 1949 Lawyers Law is based not only on ignorance of the history of the role of foreign lawyers in Japan but also on an erroneous interpretation of the 1949 Lawyers Law.

Indeed, serious constitutional questions would be at stake if a broader definition of practice by the bar and Ministry of Justice were accepted. To my knowledge at least, no one has suggested, for example, that the freedom of occupation provision of article 22 of the Constitution[57] can be restricted without express legislative or judicial action. Yet acceptance of a reinterpretation of articles 3 and 72 of the 1949 Lawyers Law by the Ministry of Justice and the bar would do just that.

The acceptance of the legislation by prominent American lawyers involved in the negotiations as well as the USTR as a "better-than-nothing" alternative[58] can thus only be construed as a remarkable preference for regulation. To gain the status legitimacy of a license, they chose an extraordinarily restricted and intensely regulated regime over the unregulated, albeit ambiguous, status of lawyering outside the scope of practice. Less remarkable, perhaps, but equally noteworthy is the apparent failure by all concerned, including the Japanese bar and public, to react to the implicit recognition of an expanded monopoly by the bar as well as the implications of the explicit assumption of regulatory control by the Ministry of Justice in lieu of the judiciary over the profession. One asks: how did this happen?

III. HOW NOT TO NEGOTIATE: THE FAILURE OF THE AMERICAN NEGOTIATIONS

From a legal perspective, the issue of American lawyers' "right" to establish offices in Japan could have been construed as a rather simple dispute with the Ministry of Justice immigration authorities. As Tadao Fukuhara argues,[59] under article VIII of the FCN Treaty, American lawyers had a treaty right to establish offices in Japan to provide legal services for U.S. clients even within

56. *See* Tadaki, *Gaikoku Bengoshi Ukeire Seido no Tembō*, [*Observations on the System for Receiving Foreign Lawyers*], 1099 SHŌJI HŌMU 54 (1987).

57. KENPŌ, *supra* note 25, art. 22(1) provides: Every person shall have freedom . . . to choose his occupation to the extent that it does not interfere with the public welfare.

58. Comment by Japanese attorney Yasuharu Nagashima, *quoted in Legal Services on Trial*, TOKYO BUS. TODAY 26 (Dec. 1986). Perhaps the most remarkable reported reaction denying any real efficacy to the restrictions the new law imposes is the comment by Isaac Shapiro who is reported as saying, "once the system is up and running, people will advise on whatever they need to in order to serve their clients." *Id.* at 23.

59. Fukuhara, *supra* note 3, at 34.

the purview of article 72 of the 1949 Lawyers Law. Article VIII of the FCN Treaty provides:

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations exclusively for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

A separate, and to me more persuasive, claim can be made under article I for American lawyers who wish to establish consulting offices outside the purview of legal practice under the Lawyers Law.[60] Article I(1) provides:

> Nationals of either Party shall be permitted to enter the territories of the other Party and to remain therein: (a) for the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities; (b) for the purpose of developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital; and (c) for other purposes subject to the laws relating to the entry and sojourn of aliens.

The denial of a visa to enter Japan for this purpose would thus constitute an infraction by the Japanese government of American treaty rights and was therefore a proper question for the U.S. government to add to the agenda of trade issues for negotiation with Japanese authorities. Indeed a number of younger American attorneys, many of whom had competence in Japanese language and some experience in Japanese law, consistently argued this.[61] Other American lawyers, including Isaac Shapiro and other influential attorneys with major American law firms, viewed the question as a licensing, not a visa, issue. Their concern, it appears, was to receive formal recognition of their status as lawyers in Japan. Many no doubt acted out of ignorance of Japanese law. Others viewed the provisions of the Lawyers Law as sufficiently vague to be construed to encom-

60. Kanter, *The Japan-United States Treaty of Friendship, Commerce and Navigation: Lawyers as Treaty Traders*, 8 HAWAII L. REV. 339 (1986).

61. *See id.* Kanter filed the first of two 301 petitions under the U.S. Trade Act of 1964, 19 U.S.C. §§ 2411 et seq. and the procedural regulations of the Office of the U.S. Trade Representative, 15 C.F.R. § 2006. The first was dismissed with the encouragement of many prominent American lawyers. The second, filed anonymously to prevent reprisals, was also denied.

pass the American definition of legal practice as asserted by the Japanese bar (or at least a vocal group within it).

Had the question been consistently treated as a visa issue, the American position would have been undeniably strong. Not only did Japanese domestic practice as well as the language of both the FCN Treaty and the 1949 Lawyers Law favor the American side, but also negotiations could have been restricted to the Ministry of Justice. The Japanese bar, it could have been argued, had no voice in deciding whether American lawyers should be allowed to enter Japan to provide services not constituting the practice of law under articles 3 and 72 that also came within the purview of article VIII.

Instead, however, those who preferred to view the question as a licensing issue prevailed. The consequence was the necessity of establishing a new legal regime for admission of foreign lawyers to practice in Japan. Once again, however, the American side failed to appreciate the significance of the 1949 Lawyers Law. Having dealt with the Ministry of Justice over visas, they continued to deal with the Ministry of Justice over licensing, ignoring the potentially more favorable alternative of judicial rulemaking. As noted previously, under the regulatory scheme introduced in 1949 it could be argued in Japan (as in the United States) that questions of qualification and admission were *solely* within the jurisdiction of the judiciary and its rulemaking powers and not that of the Ministry of Justice.

Whether the Japanese judiciary would have been more amenable to the admission of foreign lawyers is unclear, but an approach to the courts over construction of the FCN Treaty and the Lawyers Law or in the form of a request for new rules on the admission of foreign lawyers could perhaps have avoided the need for a legislative response and the predictable political deference to the international lawyers within the Japanese bar in establishing the terms for admission. Those reasonably familiar with the Japanese political process should have realized that in the legislative process, the Japanese bar, and particularly those *bengoshi* with the most at stake would play a determinative role. Consensus politics almost inevitably gives those with the greatest interest in the outcome the political leverage to obstruct any unwanted solution.

As the end product of lengthy bilateral negotiations, the 1986 law is also indicative of the negotiating failure by the American bar and the Office of the U.S. Trade Representative. The USTR was not involved in the negotiations with Japanese authorities in the Ministry of Justice until quite late in the process. A select committee of the American Bar Association—with New York lawyers in the lead—was formed in the mid-1970's. They met with counterparts in the Japanese Federation of Bar Associations over several years without any apparent progress. Nearly a decade later, in 1982, the USTR agreed to place legal services on the list of trade

issues. Still, little headway was made until September 1985 when U.S. Trade Representative Clayton Yeutter was able to secure Ministry of Justice agreement to attempt to resolve the issue.[62] The foreign lawyers issue was never, it seems, very high on the USTR list of priorities. Although negotiations began, no one in the office appears to have been well-versed on the full history of the problem in Japan, and for the most part, it appears, those involved chose to ignore the views of the American lawyers most familiar with Japanese law. Personalities too might have been determinative. Rex Coleman, for example, was all but completely ignored. Younger American lawyers working in Japanese law firms were also excluded. Moreover, without a reasoned position of its own, the USTR could only react to pressure from the most dominant outside constituencies, and, in effect, became captive to the interests of the most politically influential. American lawyers were divided, but instead of assisting in establishing a unified position or even waiting until consensus was reached, the USTR negotiators merely represented the views of those who exerted the most pressure.[63] The effect was a weakened position and inability to argue for a more comprehensive solution.

IV. CONCLUSION

I believe the 1986 statute represents a setback for both Japanese and foreign lawyers as well, needless to say, as the international business community in general. All, I believe, would have gained from broad opening of international practice with greater competition among lawyers regardless of nationality. In the case of international commercial practice, there is little apparent need for close regulation of legal services, little cause not to let the market—that is, the client—decide. Indeed, it is disingenuous to argue that strict qualifications are needed to protect the likes of Mitsubishi Bank and IBM, as the consumers of legal services, from incompetent lawyers. More important is recognition that Japanese, American and other lawyers have much to offer each other and their clients in partnership and other cooperative arrangements. The fragmentation of legal services into small, separate offices of American and Japanese lawyers benefits no one. Until Japan truly opens, the best international legal services for Japanese and American clients involved in trans-Pacific commerce will continue to be offered by American firms in the United States, particularly those on the

62. *See* Office of the United States Trade Representative, Press Release of February 27, 1987.

63. *See* A. Finn, Suggestions for the U.S. Trade Representative as a Negotiator in the Services Area: A Case Study of the Regulation of Foreign Lawyers in Japan (May 6, 1987) (unpublished manuscript, Harvard Law School).

West Coast that have in increasing numbers begun to include Japanese *bengoshi* as full partners. Such firms can provide both the general introductory or threshold advice needed to overcome erroneous culture-bound assumptions as well as specialized expertise on specific facets of either U.S. or Japanese law.

The 1986 Foreign Lawyers Practice Law also exemplifies the worst in American trade negotiations: the failure to engage in good lawyering by understanding and using existing Japanese law, to develop a unified, principled position, to insist on available legal rights and avenues of relief, and to appreciate the pitfalls of a "political" solution in a legislative process over which one has little, if any, influence.

Underlying these handicaps is also a profound difference in attitudes toward law and legal control. At least those directly involved in negotiations with Japan on this issue demanded a clear definition of their status. Although they refused to recognize the applicability of existing Japanese law and tended to view the process in exclusively political terms, they sought a legal definition of their role and a license to legitimate their position. Not content with the ambiguity of a status as non-lawyers engaged in commercial counseling, they were willing to accept a regime that subjects them to close regulation and severely restricts their activities. They chose to escape from freedom.

Fortunately, the new law does not necessarily foreclose the "visa" approach—although it makes it more difficult. I would hope, therefore, that more far-sighted Japanese attorneys will seize the opportunity to invite American lawyers to participate in their firms as partners—not in the representation of clients in formal proceedings but in routine international commercial counseling tasks that, so long as the 1949 statute is not amended, remains, I believe, outside of the purview of "legal practice" in Japan. Perhaps the judiciary too will reassert its authority in this area with new rules to permit expansion of the profession. Until then, however, the best to be expected is gradual transformation of the new protectionist law into a more hospitable and mutually beneficial regime for international commercial practice.