

# AN AMERICAN LAWYER IN TOKYO: PROBLEMS OF ESTABLISHING A PRACTICE

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## I. INTRODUCTION

Since 1977, controversy has grown in Japan concerning what has been labeled the "foreign lawyer problem."<sup>1</sup> The "problem" arises from the demands by foreign attorneys that they be permitted to practice law in Japan and to open branch offices.<sup>2</sup> This comment will focus on the legal issues concerning the foreign lawyer situation<sup>3</sup> in Japan taken in the context of the growing interna-

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1. In 1977, two foreign law firms, one from New York and the other from Hong Kong, opened offices in Tokyo amid vehement protests from the Japanese attorneys. *The Wall Street Journal*, Oct. 31, 1977, at 1. The law firms staffed their offices with non-Japanese bar members while making arguments similar to those that will be discussed. Since then, a review of Martindale-Hubbell Law Directory indicates that no other foreign law firms have established offices in Japan. The fact that these two firms have been permitted to remain is somewhat of an anomaly.

2. The American Bar Association's and the U.S. government's demands relate to three points. First, they urge the Japanese government to recognize that the rendering of legal advice in Japan as to U.S. law does not constitute the practice of law in Japan and therefore, does not require a Japanese lawyer's license. Second, if the above interpretation is not acceptable, the U.S. side is urging the Japanese government to change the statutes or adopt regulations to permit U.S. attorneys to render advice as to U.S. law in Japan. This avenue may be more acceptable to the Japanese since it would allow them to require reciprocal treatment of Japanese attorneys in the U.S. Finally, the U.S. is demanding that the process of granting a working visa to U.S. attorneys wishing to work in Japan be expedited. Amano, *Beikoku Bengoshi Mondai ni Tsuite (Concerning the U.S. Lawyer Problem)*, 721 *KEIZAI TO GAIKŌ (FOREIGN & INT'L ECON. AFF.)* 28, 29 (June, 1982).

3. The primary emphasis of this article will be on the scope of activities permitted by a foreign attorney who renders advice primarily as to foreign and international law, rather than on matters concerning Japanese law. Furthermore, the activities of a foreign attorney who temporarily visits Japan merely to negotiate or execute a contract with Japanese companies will not be discussed. Although such activities create theoretical concerns, nations have allowed such activities on the basis of need, convenience, implied permission of the court and even international comity. *See*

tionalization of the legal profession.<sup>4</sup> It will begin with an overview of the Japanese bar admission requirements to determine whether opportunities exist for foreigners to become full members of the Japanese bar. The comment will then turn to consider the extent to which U.S. attorneys may practice in Japan without a lawyer's license. Problem areas and ambiguities under the Japanese statutes and the U.S.-Japan Treaty of Friendship, Commerce and Navigation<sup>5</sup> (FCN) will be discussed.

Before U.S. attorneys are permitted to practice law and establish branch offices in Japan, observers anticipate that Japan will demand reciprocal rights for Japanese attorneys.<sup>6</sup> The United States may have problems meeting this demand for reciprocity because bar admission requirements are set by the individual states and thus vary considerably.<sup>7</sup> So long as these requirements vary, true reciprocity cannot be met. Japanese attorneys will be prohibited from practicing in those states which continue to impose strict admission requirements on foreign attorneys while any U.S. attorney, by becoming a member of the bar of a state with liberal admission requirements (or otherwise becoming licensed to practice within such state), would be able to practice throughout Japan.

This comment recommends that the United States enact federal legislation creating a uniform law with respect to foreign attorneys which would permit them to conduct certain limited legal activities in the United States upon meeting their respective home bar admission requirements. The legislation should be patterned after the New York statute. In addition, it should be subject to reciprocal treatment. Not only will this legislation eliminate a potential snag in any agreement between the two countries concern-

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Fukuda, *Japan*, in *TRANSNATIONAL LEGAL PRACTICE, A SURVEY OF SELECTED COUNTRIES* 201, 216 (D. Campbell ed. 1982).

4. With the growth in international business, the various service industries, including the legal profession, have expanded to meet the needs of multinational businesses. In 1972, an international conference on foreign lawyers was held under the sponsorship of the International Bar Association and the Union International des Avocats. The conference recommended that:

1. Subject to proper controls, any lawyer should be permitted to consult on legal matters in a foreign country. Proper controls may include limiting the permissible legal advice to the lawyer's native law and requiring the retention of local counsel when giving advice as to local laws, and
2. Subject to proper controls, lawyers should be permitted to establish offices abroad.

See Kosugi, *Regulation of Practice by Foreign Lawyers*, 27 *AM. J. COMP. L.* 678, 685 (1979).

5. Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863.

6. See *infra* notes 78-80 and accompanying text.

7. The variation is especially noticeable as to the admission of out-of-state attorneys. See *infra* notes 82-91 and accompanying text.

ing the activities of foreign attorneys, but it may help bring about a resolution to the problem by persuading the Japanese government to follow the lead and enact similar legislation.

## II. THE PRACTICE OF LAW IN JAPAN: OBSTACLES FOR THE FOREIGN ATTORNEY

### A. The Japanese Bar Admission Requirements

The Japanese counterpart to an American attorney is the *bengoshi*.<sup>8</sup> To become a *bengoshi*, a person must meet the requirements of Article 4 of the Bengoshi Law of 1949,<sup>9</sup> which provides that "a person who has completed the courses of the judicial apprentice shall be qualified for a lawyer." In essence, this means the person must pass the Legal Examination, complete a two-year course of studies at the Legal Training and Research Institute (the Institute) and pass the final examination at the Institute.

The Legal Examination, which is the closest thing to a bar examination in Japan, but which is actually the admissions examination for the Institute, is taken by nearly 30,000 applicants every year.<sup>10</sup> Of these, a mere handful of approximately 500 applicants are chosen for admission to the Institute.<sup>11</sup> This results in a pass rate of less than two-percent.

Japanese citizenship is not required to take the Legal Examination.<sup>12</sup> However, because of the difficulty of the examination process even for native applicants and because of the added burden of a language barrier,<sup>13</sup> a foreigner would have little or no

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8. The term "*bengoshi*" literally means "one who defends or pleads." As will be discussed, the range of legal activities reserved exclusively for the *bengoshi* is much narrower than that for the U.S. attorney. See *infra* notes 30-40 and accompanying text. In this sense, the two cannot be directly compared.

9. Bengoshi hō (Bengoshi Law), Law No. 205 of 1949. All translations are from the Ministry of Justice's official translation as contained in EHS Law Bulletin Series No. 2040 (1976).

10. D. HENDERSON & J. HALEY, LAW & THE LEGAL PROCESS IN JAPAN 436 (1978).

11. *Id.* at 435.

12. The Bengoshi Law is silent as to whether Japanese citizenship is a prerequisite to taking the Legal Examination or to becoming a *bengoshi*. But see *infra* notes 15-20 and accompanying text.

13. It is true that a growing number of Americans, including American attorneys, are becoming fluent in the Japanese language. However, as one commentator noted:

[the examination] requires [the] ability to write the two Japanese syllabaries and Chinese characters in the cursive form (*sōsho*) at an extremely rapid rate. Ability to write in the cursive form can be acquired only by writing a great deal of Japanese daily for many years as experienced by the Japanese middle and high school student. The western foreigner, no matter how able he is to speak and read Japanese and how well he knows the writing system, is rarely required to write Japanese at length under time pressure and therefore he never attains the requisite

chance of passing the exam.<sup>14</sup> Furthermore, in 1955, the Japanese Supreme Court stated that although citizenship was not required to take the Legal Examination, citizenship was required for admission into the Institute.<sup>15</sup> The Court's rule, given as part of its administrative duties over the Institute, requires a foreigner who has successfully completed the examinations to become a Japanese citizen before he may commence his studies at the Institute.<sup>16</sup> This rule went untested until 1977, when a Korean national who had been born and raised in Japan<sup>17</sup> and was a permanent resident of Japan, passed the examination and refused to become a Japanese citizen.<sup>18</sup> After making an exception in his case, the Supreme Court amended the admission requirements and passed a resolution guaranteeing that foreigners "may be admitted to the Legal Institute in an appropriate instance."<sup>19</sup> The qualifier "in an appropriate instance" presumably permits the Court the right to deny admission based on citizenship.<sup>20</sup> Thus, although the Court's position has softened, the possibility remains that an alien could be denied admission to the Institute.

Although study at the Legal Training and Research Institute is the usual means for qualifying as a *bengoshi*, it is not the only means. Article 5(3),<sup>21</sup> for example, provides that professors or assistant professors of law at certain specified undergraduate and graduate law departments automatically qualify to become a *bengoshi* after serving at least five years at their posts.<sup>22</sup> Although

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skill in writing the characters cursively that is necessary to pass the examination.

Fukuhara, *The Status of Foreign Lawyers in Japan*, 1973 JAPANESE ANN. INT'L L. 21, n.23 at 29.

14. No westerner has ever passed the examination. Fukuda, *supra* note 3, at 210.

15. The Supreme Court reasoned that students at the Institute should be treated as judges and other public servants because they receive a salary from the government. The Court therefore applied the requirement that public servants be Japanese citizens to students at the Institute. Fukuhara, *supra* note 13, at 30.

16. This was required of a Formosan citizen who passed the Legal Examination in 1957. Kosugi, *supra* note 4, at 690.

17. Under Japanese law, the nationality of the father, rather than the place of birth, determines the citizenship of a new born child. Kokuseki hō (Nationality Law), Law No. 147 of 1950, art. 2(1).

18. Fukuda, *supra* note 3, at 210.

19. Kosugi, *supra* note 4, at 690, citing the Asahi Shimbun, Sep. 22, 1977 (morning edition).

20. *Id.*

21. Bengoshi hō (Bengoshi Law), Law No. 205 of 1949.

22. Article 5 of the Bengoshi Law provides in full:

The following persons may be qualified for a lawyer, notwithstanding the provisions of the preceding Article:

1. A person who has been a judge of the Supreme Court;
2. A person who has, after obtaining the qualifications for a judicial apprentice, been a Summary Court judge, a public procurator, a court secretary, a secretary of the Ministry of Justice, an instructor of the Ju-

some foreigners have taught courses at qualified Japanese universities, no qualified university offered a professorship route available to foreigners until 1983 when national universities were permitted to hire foreigners as staff professors for the first time.<sup>23</sup> Even if a foreigner became a professor of law at a qualified university and taught for five years, he would face one final obstacle. The law requires that a *bengoshi* register with the Japan Federation of Bar Associations before he may practice.<sup>24</sup> The Federation has great discretion over the approval of an applicant who has qualified under Article 5<sup>25</sup> and is unlikely to approve the application of a foreigner.<sup>26</sup>

The bar admission requirements in Japan thus present a number of obstacles for a foreigner to become a licensed *bengoshi*.<sup>27</sup> A foreign attorney wishing to practice law in Japan

dicial Research and Training Institute, the Research and Training Institute for Court Clerks or the Research and Training Institute of the Ministry of Justice, a secretary (*Sanji*) of the Legislative Bureau of the House of Representatives or the House of Councillors or a counsellor (*Sanji-kan*) of the Legislative Bureau of the Cabinet for not less than five years;

3. A person who has been a professor or an assistant professor of jurisprudence in a faculty, post-graduate course, or a master's course of the universities as provided for by separate law for not less than five years;

4. A person who has assumed two or more of the posts as mentioned in the preceding two items for not less than five years in total; Provided that as to the posts mentioned in item (2), only the years of service after he obtained the qualifications for a judicial apprentice shall be counted.

Because the position of professor or assistant professor need not be a government position, and because Japanese public servants must be citizens, subsection (3) presents the only possible route available to a foreigner under Article 5 to become a *bengoshi*. See Kosugi, *supra* note 4, at 690.

23. The Los Angeles Times Mar. 4, 1984, at 31, col. 1.

24. *Bengoshi hō* (Bengoshi Law), Law No. 205 of 1949, art. 8.

25. Kosugi, *supra* note 4, at 691.

26. *Id.*

27. Prior to 1955, Japan granted a special status, known as *junkaiin*, for foreign attorneys practicing in Japan. Former Article 7 of the *Bengoshi Law*, which was repealed by Law No. 155 of 1955, stated

1. A person who is qualified to become an attorney of a 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 (the affairs of a *bengoshi*) . . .

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 . . .

3. The Supreme Court may impose an examination or screening in those cases where it grants the recognition of the prior two paragraphs. . . .

Foreign attorneys who had been granted a license to practice prior to 1955 were allowed to continue their practice in Japan. Sixty-eight attorneys, nearly all of whom had been admitted under subsection (2), were thus grandfathered in. Of them, approximately thirty were still in practice as of 1973. See Fukuhara, *supra* note 13, at 32.

must find an alternative basis to permit his practice.

### B. The Role of Non-Bar Members in the Japanese Legal System

A person who is not a licensed *bengoshi* is restricted from conducting certain legal activities by Article 72 of the Bengoshi Law. It provides:

No person other than a lawyer shall, with the aim of obtaining compensation, perform legal business such as presentation of legal opinion, representation, mediation or conciliation and the like in connection with law suits or non-contentious matters, and such appeal filed with the administrative agencies as request for investigation, raise of objection, request for review against dispositions made thereby, and other general legal cases, or act as agent therefor.

Violations of Article 72 are punishable by up to two years in prison or a fine of up to 50,000 yen.<sup>28</sup>

Despite the broad language of Article 72, some Japanese courts have interpreted the article so as not to grant the *bengoshi* a monopoly<sup>29</sup> on all aspects of legal practice.<sup>30</sup> Such an interpretation is based primarily on the ground that any limitation on the practice of law must be for the public's benefit.<sup>31</sup> One Japanese scholar contends that a restriction on the activities of foreign lawyers as to issues of foreign law serves no public interest, but rather contravenes public interest to the extent clients in Japan are unable to secure adequate advice concerning foreign law.<sup>32</sup>

Any interpretation of Article 72 should recognize that legal

28. Bengoshi hō (Bengoshi Law), Law No. 205 of 1949, art. 77.

29. Japan is a civil-law country. As a result, court decisions do not have the precedential value they have in common-law countries.

30. In *Kato v. Japan*, 25 Sai-han Keishū No. 5 (Sup. Ct. July 14, 1971), the Supreme Court stated that the strict requirements for qualification as *bengoshi* (and thus its monopoly) must be justified under Article 1 of the Bengoshi Law. That article provides that "the mission of a lawyer is to protect the fundamental human rights and to realize social justice." Although acknowledging that the practice of law by non-licensed persons may interfere with another's legal practice, the Court held that only repeated incidents of misconduct will interfere with the mission of the *bengoshi*. Thus, single or infrequent incidents of legal practice by non-licensed persons do not fall within the scope of Articles 72 and 77 of the Bengoshi Law.

Furthermore, a Sapporo District Court held that legal advice regarding a simple matter as to which an attorney ordinarily would not be retained, such as a small claims case, was not within the scope of Article 72. Like *Kato v. Japan*, the rationale of the decision was based upon public policy. Although an appeals court later reversed the decision, Kosugi notes that "the judge's grasp of the situation of Japanese lawyers and his evaluation of the relationship between attorneys and society points out a serious and unavoidable problem." Kosugi, *supra* note 4, at 696.

31. *Id.*

32. K. Shindo, Opinions on Legal Activities in Japan of a Foreign Lawyer (March 15, 1977) (unpublished opinion prepared by Professor Koji Shindo of Tokyo University on behalf of Milbank, Tweed, Hadley & McCloy).

activities in Japan are often handled by persons other than licensed *bengoshi*. Employees of corporations, for example, customarily perform law-related activities without a *bengoshi* license.<sup>33</sup> These employees are typically graduates of undergraduate departments of law who have gone directly to business and government jobs without entering the Legal Institute.<sup>34</sup> Because of this accepted practice, it seems clear that a U.S. attorney may perform law-related activities in Japan as an employee of a Japanese or American company.<sup>35</sup>

In addition, some Japanese courts have limited the *bengoshi*'s monopoly<sup>36</sup> to matters that involve a court-related<sup>37</sup> dispute or are likely to result in such a dispute or to acts creating legal rights, such as the representation of parties to a contract. Such an interpretation results from the interaction of the Bengoshi Law<sup>38</sup> with provisions under other statutes<sup>39</sup> giving the *bengoshi* the exclusive right to serve as advocates in civil, criminal and government related matters in court. The Bengoshi Law may merely prohibit activities which fall under this exclusive right.<sup>40</sup> Under this limited reading of Article 72, a U.S. attorney may be able to give

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33. Fukuda, *supra* note 3, at 216.

34. This fact, in part, accounts for the great discrepancy between the number of licensed attorneys in the U.S. and the number of licensed *bengoshi* in Japan. In 1980, there were less than 12,000 *bengoshi* in Japan serving a population of approximately 120 million. Fukuda, *supra* note 3, at 204. This was in comparison to approximately 547,000 attorneys in the U.S. for a population of 226 million. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE ABSTRACT OF THE UNITED STATES 5, 402 (1981). When the number of graduates from Japanese law departments (which offer non-professional, undergraduate curriculums in law) are compared with the number of graduates from American law schools, however, the figures become more balanced.

35. This appears to be the rationale for permitting "legal trainees" in Japan. These trainees are foreign attorneys who are employees of Japanese law firms handling international transactions. Neither the Japanese government nor the bar association have voiced any opposition to the trainees so long as their role is limited to assisting a Japanese *bengoshi* on matters of foreign law under his complete supervision. Kosugi, *supra* note 4, at 693. The trainee is in effect giving legal advice directly to his employer and not to the client, much like the employee of a corporation.

36. See *supra* note 30; see also Fukuda, *supra* note 3, at 213.

37. The term "court-related disputes" refers to court-related proceedings such as administrative hearings, and proceedings which do not constitute a private dispute, such as a grand jury investigation.

38. T. Fukuhara, The Scope of Legal Activity of Foreign Attorneys in Japan (July 23, 1977) (unpublished opinion memorandum for the law firms of Milbank, Tweed, Hadley & McCloy and Johnson, Stokes & Master).

39. These include Article 79(1) of Minji Soshō hō (Code of Civil Procedure), Law No. 29 of 1890, Article 31(1) of Keiji soshō hō (Code of Criminal Procedure), Law No. 131 of 1948 and Article 7 of Gyōsei jiken soshō hō (Code of Administrative Procedures Regarding Government Matters), Law No. 139 of 1962.

40. Article 72 is often contrasted with the broader language of Article 3, which describes the activities of a *bengoshi* to include "other general legal business." Article 72 does not prohibit "general legal business" from being performed by a non-*bengoshi*.

legal advice in Japan so long as the advice does not involve a court-related dispute or constitute the making of a contract.

The presence of other licensed professionals in Japan who perform services that an attorney would normally perform in the United States also affects the scope of Article 72. These professionals include judicial scriveners (*shihō-shoshi*), who draft documents to be filed in courts; patent agents (*benrishi*), who act on behalf of clients in patent matters including patent related litigation; tax agents (*zeirishi*), who give advice on tax matters; and administrative scriveners (*gyōsei-shoshi*), who draft documents to be filed with government offices and agencies.<sup>41</sup> As with the *bengoshi*, a license is required to practice in these areas of law.<sup>42</sup> Thus, despite the limited applicability of Article 72, the existence of these licensed professions serves to limit the permissible activities of the unlicensed foreign attorney in Japan.

Article 74 presents one final obstacle to the foreign attorney wishing to establish an independent or branch office in Japan. It prohibits a person other than a *bengoshi* from putting up signs or otherwise indicating that he is an attorney,<sup>43</sup> that his office is a law office<sup>44</sup> or that he "handles the business of giving legal consultation and other legal affairs."<sup>45</sup> Because of its broad language, this article appears to apply to a U.S. attorney who may be performing activities wholly outside the activities prohibited by Article 72.<sup>46</sup>

The ambiguities as to what constitutes the practice of law in Japan for purposes of Article 72 present opportunities for the U.S. attorney who wishes to practice there. Because certain law-related activities appear to be permissible without a license, a foreign attorney could practice "law" in the American sense within these constraints. However, any such practice would be limited by Article 74. Moreover, the criminal sanctions imposed upon violations of Article 72,<sup>47</sup> as well as the threat of deportation<sup>48</sup> and financial loss, make the assertion of any rights extremely risky.<sup>49</sup>

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41. For greater details concerning these professions and their licensing requirements, see D. HENDERSON & J. HALEY, *supra* note 10, at 447-453.

42. *Id.*

43. *Bengoshi hō* (Bengoshi Law), Law No. 205 of 1949, art. 74(1).

44. *Id.*

45. *Id.* at art. 74(2).

46. Violations of Article 74 are punishable by a fine of not greater than 50,000 yen). There is no criminal sanction imposed. *Bengoshi hō* (Bengoshi Law), Law No. 205 of 1949, art. 79; *cf. Id.* at art. 77 and text accompanying note 28.

47. See *supra* text accompanying note 28.

48. The author is personally aware of one American lawyer who was recently deported from Japan for violations of Article 72.

49. In addition, the Japanese government may preclude the foreign attorney from rendering legal advice in Japan and thereby contesting the scope of Article 72 by simply refusing the attorney a visa. Amano, *supra* note 2, at 31.

### III. THE FRIENDSHIP, COMMERCE AND NAVIGATION TREATY AND ITS APPLICABILITY TO THE LEGAL PROFESSION

The U.S.-Japan Treaty of Friendship, Commerce and Navigation (FCN) contains two provisions that are relevant to the U.S. attorney. This section will discuss the extent to which the provisions provide a defense to the prohibitions of Article 72 of the Bengoshi Law.<sup>50</sup>

Article 8(1) 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.<sup>51</sup>

One commentator<sup>52</sup> suggests that the second sentence<sup>53</sup> of Article 8(1) authorizes the following activities of U.S. attorneys regardless of the prohibitions of the Bengoshi law:

1. to handle internal legal affairs<sup>54</sup> within the scope of conducting examinations and legal investigations on behalf of American nationals and corporations in connection with the planning and operation of activities in Japan;
2. to issue reports to the American national or corporation, including a proposed draft of a contract or a preparation of a form to be submitted to a court or agency, provided that the actual conclusion of the contract or submission of the form

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50. The Japanese Constitution has been interpreted so that a treaty provision preempts domestic law whenever a conflict between the two arises. Kosugi, *supra* note 4, at 698.

51. 4 U.S.T. *supra* note 5, at 2070.

52. Fukuhara, *supra* note 13, at 34-35.

53. This interpretation necessarily implies that the reference to "attorneys" in the first sentence is limited to *bengoshi*, i.e. it permits U.S. nationals to "engage" Japanese *bengoshi* of their choice. Thus, the right of a U.S. national to "engage" U.S. attorneys must be derived from the second sentence. Although Fukuda concurs on this interpretation, *supra* note 3, at 215, this author is unable to determine the basis for limiting the scope of the first sentence.

54. Fukuhara does not define the term "internal legal affairs." Presumably, it would not include a lawyer's work in a representative capacity, such as in court or during negotiations. It would include employee security checks, investigations of property damage, employee injury, etc.

is carried out by the American national or corporation or its lawful legal counsel, such as a *bengoshi*;

3. to make external contacts<sup>55</sup> for the limited purpose of conducting such examinations and investigations, issuing reports, regardless of whether they are related to a court-related dispute.

Although these views have been embraced by other commentators,<sup>56</sup> doubt remains as to whether the second sentence of the treaty provision, and in particular the phrase "accountants and other technical experts," encompasses attorneys. The first sentence contains the words "accountants and other technical experts, executive personnel, attorneys, agents and other specialists," suggesting that the term technical experts does include attorneys. However, a contrary argument is also plausible.<sup>57</sup>

Furthermore, although the scope of permissible legal activity under the article is in some respects broader than under Article 72 of the Bengoshi Law,<sup>58</sup> it contains severe limitations. For example, Article 8(1) does not contemplate the situation where a U.S. attorney is retained by a Japanese company regarding U.S. laws. In such cases, the Bengoshi Law will still be applicable.

The breadth of Article 8(1) has been further limited by the U.S. Supreme Court's recent decision in *Sumitomo Shoji*.<sup>59</sup> There, the Court held that a wholly owned U.S. subsidiary of a Japanese company was a U.S. company and therefore not a "company" within the meaning of Article 8(1).<sup>60</sup> The Court relied upon Article 22(3) of the treaty, which provides that "companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof . . . ." <sup>61</sup> Under this interpretation,<sup>62</sup> U.S. attorneys practicing for

55. The term "external contact" means contact with outside parties with whom the client has an interest, e.g. in a suit or transaction. Fukuhara, *supra* note 13, at 35.

56. See, e.g., Fukuda, *supra* note 3, at 215.

57. Kosugi states that although he personally believes that attorneys should be included within the meaning of "technical experts," the treaty provision is "awkward and unclear." Kosugi, *supra* note 4, at 699.

58. See *supra* text accompanying note 55. However, Fukuda argues that activities permitted under Article 8(1) are identical to activities which are permitted under Article 72 of the Bengoshi Law. Fukuda, *supra* note 3, at 216. This view is based on an expansive reading of Article 72 rather than a narrow reading of Article 8(1).

59. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982).

60. The case involved a suit brought by employees of Sumitomo, alleging that it had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 200(e) *et seq.* (Supp. IV 1976) by filling executive, managerial and sales positions with Japanese nationals only. The company contended that Article 8(1) of the FCN Treaty provided a defense to Title VII.

61. 4 U.S.T. *supra* note 5, at 2079-2080.

62. The *Sumitomo* decision, despite being merely U.S. law, may have repercussions on the way the treaty is interpreted in Japan. The Vienna Convention on the Law of Treaties provides that "any subsequent practice in the application of the treaty

wholly owned Japanese subsidiaries would not be protected by the treaty from the provisions of Article 72. Because the use of locally incorporated subsidiaries is a common vehicle for conducting international business and because most "international lawyers" are engaged by multi-national corporations, such an interpretation could have a serious effect on foreign legal practice in Japan.

Article 8(2) of the FCN Treaty also deals with the legal profession. It provides:

Nationals of either Party shall not be barred from practicing the professions within the territories of the other Party merely by reason of their alienage; but they shall be permitted to engage in professional activities therein upon compliance with the requirements regarding qualifications, residence and competence that are applicable to nationals of such other Party.<sup>63</sup>

Under this provision, a U.S. national will be permitted to practice law in Japan upon meeting the Japanese bar admission requirements. As discussed earlier,<sup>64</sup> the practical difficulties of meeting these requirements make it unlikely that a foreigner can become a *bengoshi*. Thus, on the surface, this provision does not appear to significantly aid the foreign attorney wishing to practice in Japan.

However, Article 8(2) is subject to reservations<sup>65</sup> by both parties to the treaty.<sup>66</sup> The United States provided that Article 8(2) was not to apply to those professions that are state licensed and reserved exclusively to U.S. citizens.<sup>67</sup> The U.S. reservation was in recognition of state autonomy in licensing various professions

which establishes the agreement of the parties" is a factor to be considered when interpreting a treaty. Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 31(3)(b). Although not binding in this case, the Convention represents a codification of customary international law. Thus, unless Japan affirmatively rejects the *Sumitomo* interpretation in its application of the FCN Treaty, that decision may constitute a practice which establishes the agreement of the parties.

63. 4 U.S.T. *supra* note 5, at 2070.

64. See *supra* notes 13-20 and accompanying text.

65. A widely recognized definition of a reservation is as follows:

[A] reservation is a formal declaration by which a state when signing, ratifying or acceding to a treaty, specifies as a condition of its willingness to become a party to the treaty certain terms which limit the effect of the treaty in so far as it may apply in the relations of that state with the other State or States which may be parties to the treaty.

*Harvard Research in International Law—Law of Treaties*, 29 AM. J. INT'L L. SUPP. 843 (1935).

66. 4 U.S.T. *supra* note 5, at 2063.

67. The U.S. reservation provides:

Article VIII, paragraph 2, shall not extend to professions which, because they involve the performance of functions in a public capacity or in the interest of public health and safety, are state-licensed and reserved by statute or constitution exclusively to citizens of the country, and no most-favored-nation clause in the said treaty shall apply to such professions.

*Id.* at 2132.

and reflected a desire not to cause federal-state tensions.<sup>68</sup> Japan then responded with its own reservation, which provides:

Japan reserves the right to impose prohibitions or restrictions on nationals of the United States of America with respect to practicing the professions referred to in Article VIII, paragraph 2, to the same extent as States, Territories or possessions of the United States of America, including the District of Columbia, to which such nationals belong impose prohibitions or restrictions on nationals of Japan with respect to practicing such professions.<sup>69</sup>

At the time of the treaty, many states imposed a citizenship requirement for admission to the state bar. Thus, Japanese nationals were completely prohibited from practicing law in those states. The U.S. reservation endorsed such prohibitions. In 1973, however, the U.S. Supreme Court decided the case of *In Re Griffiths*.<sup>70</sup> It held that a Connecticut statute requiring citizenship as a prerequisite for admission to the bar violated the Equal Protection clause of the Fourteenth Amendment because it had no rational relation to the applicant's qualifications or character.<sup>71</sup> As a result of *Griffiths*, the U.S. reservation is no longer applicable to the legal profession.

Whether or not the Japanese reservation is still applicable is not so clear. The commonly accepted view<sup>72</sup> is that both reservations refer only to citizenship requirements so that Japan has only the right to impose a citizenship requirement on certain professions, and then only so long as the U.S. imposes a similar requirement.<sup>73</sup> Thus, after *Griffiths*, the Japanese reservation would no longer be applicable to the legal profession. However, it is also possible to interpret the words "prohibitions and restrictions" in the Japanese reservation broadly to encompass bar admission re-

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68. 99 CONG. REC. 9313-9314 (1953) (statement of Sen. Hickenlooper).

69. 4 U.S.T. *supra* note 5, at 2132.

70. *In re Griffiths*, 413 U.S. 717 (1973).

71. Since the decision in *Griffiths*, citizenship requirements for many other professions have been held invalid. *See, e.g.*, *Taggart v. Mandel*, 391 F. Supp. 733 (D. Md. 1975) (notary public) and *Norwick v. Nyquist*, 417 F. Supp. 913 (S.D.N.Y. 1976) (public school teacher); *but see Foley v. Connelie*, 419 F. Supp. 889 (S.D.N.Y. 1976), where the court upheld a New York statute requiring that members of the state police force be U.S. citizens.

72. Fukuhara and Kosugi both adopt this view. *See Fukuhara, supra* note 13, at 34 and Kosugi, *supra* note 4, at 699-700.

73. Normally, a reservation by one party that is accepted by another party becomes binding equally as to both parties. *See, e.g.*, Vienna Convention on the Law of Treaties, *supra* note 62, at art. 21(1). Thus, a reciprocal reservation is unnecessary. However, the U.S. reservation, with its reference to state-licensed professions, would have been meaningless when asserted by the Japanese side. Thus, this view would hold that the Japanese reservation was made merely to insure that Japan was to have reciprocal rights vis-a-vis the U.S. reservation.

quirements other than citizenship.<sup>74</sup> Japan may, for example, impose a bar examination or residency requirement on U.S. attorneys so long as states impose the same requirements on Japanese attorneys.<sup>75</sup> Under this less accepted view, the Japanese reservation grants general reciprocal rights.<sup>76</sup>

As this discussion illustrates, the FCN treaty fails to clearly define the rights of a foreign attorney practicing in Japan. Any solution to the problem must come from a new agreement between the two nations or a change in the existing laws. Before discussing a possible solution, U.S. barriers to foreign attorneys will first be explored.

#### IV. THE PRACTICE OF LAW IN THE U.S.: PROBLEMS OF FEDERALISM

Parties from both sides, including the respective governments and bar associations, have at various times attempted to negotiate an easing of the restrictions on foreign attorneys.<sup>77</sup> Observers<sup>78</sup> agree that if and when Japan formally permits U.S. attorneys to practice law and open offices in Japan, it will demand a guarantee or right of reciprocity<sup>79</sup> for Japanese attorneys to engage in similar

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74. Although such an interpretation of the words is quite plausible, this view does not fit comfortably with the rest of the language in the Japanese reservation. Significantly, the reservation states that Japan may impose prohibitions or restrictions on *nationals* of the U.S. to the extent states impose prohibitions or restrictions on *nationals* of Japan with respect to practicing such profession. If the aforementioned view is correct, a better wording of the reservation would have been that Japan may impose prohibitions or restrictions on *professionals* licensed in the U.S. to the extent states impose prohibitions or restrictions on *professionals* licensed in Japan with respect to practicing such profession.

75. Conversely, if the states in the U.S. stopped imposing a bar examination or residency requirement for *bengoshi* licensed in Japan before they can practice law in the U.S., Japan could no longer impose similar requirements on attorneys licensed in the U.S. without violating the FCN Treaty.

76. If this is the case, the Japanese reservation would be in conflict with Article 8(2) itself, which grants national treatment for foreign attorneys. In a bilateral treaty, such as the FCN Treaty, any differences between the parties will normally be negotiated and resolved in the treaty provisions themselves (if at all). A reservation in the context of a bilateral treaty is said to be a counter-offer of a provision of the treaty, which, if accepted, becomes a part of the "contract" or treaty. See J. SWEENEY, C. OLIVER & N. LEECH, *THE INTERNATIONAL LEGAL SYSTEM* 967 (1981). Thus, the conflict between the reservation and Article 8(2) could arguably be settled in favor of the reservation.

77. See *supra* note 2.

78. Author's personal conversation with Anthony Zaloom of the California Bar and Geze Feketekuty of the Office of the United States Trade Representative. See also Weber, *Reciprocity's the Rub*, CAL. LAWYER at 29 (Nov. 1983).

79. Reciprocity is currently not being demanded by the Japanese government or bar association. This is reasonable in light of their position that foreign lawyers should not be allowed to practice law or open offices in Japan. If such activities are made permissible, it is reasonable that at that time, Japan will fall back on a requirement of reciprocity.

activities in the U.S.<sup>80</sup> Because regulations concerning the practice of law in the U.S. are determined by the individual states, the U.S. may find it difficult to meet this demand. This would especially be true if the Japanese reject state-by-state reciprocity.<sup>81</sup>

The difficulty presented by federalism can be seen from the fact that bar admission requirements for out-of-state and foreign attorneys vary widely from state to state. The California and New York bar admission requirements are examples of the two extremes. The state of California requires all out-of-state and foreign attorneys to pass an examination before they are permitted to practice law in the state.<sup>82</sup> Attorneys previously admitted to practice in a country where "the common law of England does not constitute the basis of jurisdiction," must pass the general bar examination given to law school graduates.<sup>83</sup>

The state of New York, by contrast, has greatly liberalized the practice of law by out-of-state attorneys. Any attorney admitted to practice for five years or more<sup>84</sup> in another state or country whose "jurisdiction is based upon the principles of the English Common Law"<sup>85</sup> may be admitted to practice in New York without examination at the discretion of the Appellate Division.

In addition, New York has created a special status for foreign lawyers known as foreign legal consultants.<sup>86</sup> A foreign attorney who has been admitted to practice and has actually practiced in a foreign country for at least five of the previous seven years may be licensed to practice as a foreign legal consultant without examination.<sup>87</sup> Although the legal consultant may not appear in any court on behalf of a client,<sup>88</sup> he may freely give advice as to foreign and

80. Article 6(1) of the former Bengoshi Law of 1933 provided that a foreign attorney may obtain the permission of the Ministry of Justice to perform legal activities in Japan with respect to foreigners or foreign law provided there was a guaranty of reciprocity. The provision was repealed in 1936.

81. This would be the most logical fall back position for the Japanese if they are forced to permit activities by U.S. attorneys in Japan. *See also* Weber, *supra* note 78, at 29, stating that the Japanese have taken the position that state-by-state reciprocity is unacceptable because Japan is a unified national jurisdiction.

In addition, a questionnaire entitled *Gaikoku Bengoshi ni Kansuru Mondai Ten* (Issues Concerning Foreign Lawyers) dated September 1, 1983, was sent by the First Tokyo Bar Association, a local chapter of the Japanese Bar Association. It asked its members, among other things, whether they would accept reciprocity by states or whether they would require reciprocity by the national government. The author is unaware of the results of the survey.

82. CAL. BUS. & PROF. CODE §§ 6062(c)-6062(d) (West 1974).

83. *Id.* at § 6062(d).

84. 22 N.Y.C.R.R. § 520.7(a)(2) (1981).

85. *Id.* at § 520.7(a)(1).

86. N.Y. JUD. LAW § 53(6) (Consol. 1983).

87. 22 N.Y.C.R.R. § 521.1 (1981).

88. The legal consultant is also prohibited from preparing pleadings, deeds affecting title to real property in the U.S., wills affecting property located in the U.S., or

international law, and may opine as to U.S. and New York law provided it is on the basis of advice from a member of the New York bar.<sup>89</sup> Three additional safeguards are imposed: the legal consultant is required to (1) observe the Code of Professional Responsibility of the New York State Bar Association, (2) undertake professional liability insurance, and (3) appoint an agent for service of process.<sup>90</sup> As of 1980, approximately thirty foreign attorneys have been licensed by the state of New York as foreign legal consultants with no apparent ill effects.<sup>91</sup>

In contrast to these differences among states, the bar admission requirements in Japan are set at the national level and are therefore uniform throughout the country.<sup>92</sup> As a result of differing standards in the United States, nationwide reciprocity is impossible as long as the states differ in their admission requirements for foreign attorneys. Otherwise, any U.S. attorney would be able to practice law in Japan by becoming a member of the bar of a state which permits Japanese lawyers to practice without examination, i.e. grants reciprocal treatment. A California attorney, for example, could become a member of the New York bar by application or examination and be permitted to practice law throughout Japan<sup>93</sup> without meeting the Japanese bar admission requirements. Japanese attorneys, on the other hand, would not be able to practice in certain states, such as California, without meeting the local bar admission requirements. For this reason, state-by-state reciprocity would probably be unacceptable to the Japanese.<sup>94</sup>

## V. RECOMMENDATIONS: UNIFORMITY THROUGH FEDERAL LEGISLATION

In order to help clarify the scope of practice permitted by U.S. attorneys in Japan as well as by Japanese attorneys in the U.S. and to move closer to a workable bilateral agreement establishing the right to practice as a foreign attorney in either country, the United States must take steps to unify its laws concerning the

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instruments in respect of the marital relations of a resident of the U.S. *Id.* at § 521.3(a)-521.3(d).

89. *Id.* at § 521.3(e).

90. *Id.* at § 521.4(a)(2).

91. Salkin, *United States*, in *TRANSNATIONAL LEGAL PRACTICE, A SURVEY OF SELECTED COUNTRIES* 355, 365 (D. Campbell ed. 1982).

92. In fact, Japan has only one "law school" which offers a professional degree; see *supra* text accompanying note 11.

93. The ability to practice throughout Japan may not be of great concern since international business is to a large extent centered in Tokyo. However, the Osaka area and the emerging economies in Kyūshū and Hokkaidō may present some opportunities for the U.S. attorney.

94. See *supra* note 81.

admission of a foreign attorney. This comment recommends that Congress enact federal legislation similar to the New York statute providing for the licensing of foreign legal consultants. The legislation would be subject to reciprocal treatment by the foreign attorney's home government and bar association.<sup>95</sup> Admission requirements for all other full-fledged members of the bar would remain in the hands of the states. In addition, the foreign attorneys could be required to register with a state bar association, so that the states would retain the right to impose disciplinary actions upon foreign attorneys to the same extent it can impose them upon full-fledged bar members.

The constitutionality of this federal legislation in an area traditionally reserved to the states may be grounded on the federal government's power to regulate foreign and interstate commerce.<sup>96</sup> The provision of legal services by an attorney admitted in another country as to that country's laws clearly affects foreign and interstate commerce and therefore should be subject to Congressional authority.<sup>97</sup> At the same time, by subjecting the foreign attorneys to state disciplinary actions, by limiting the scope of their permitted legal activities and by requiring certain minimum qualification standards (such as good moral character and qualification to practice in the attorney's home country for a minimum number of years), the encroachment on state interests would be minimal.<sup>98</sup>

An additional aim of the legislation is to persuade Japan (and other countries with similar restrictions upon U.S. attorneys) to

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95. "Reciprocity legislation" provides that foreign nationals have certain rights in this country only if the foreign national's home government accords the same rights to U.S. nationals. Such legislation is not uncommon among federal statutes. See H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 631 (1976).

96. The U.S. Constitution provides "the Congress shall have the power . . . [t]o regulate Commerce with foreign Nations, and among the several states . . ." U.S. CONST. art. I, § 8.

97. A number of law review articles have argued for Congressional authority to regulate bar admission requirements based upon the commerce clause. See, e.g., Special Project, *Admission to the Bar: A Constitutional Analysis*, 34 VAND. L. REV. 655, 740 (1981) and Comment, *Commerce Clause Challenge to State Restrictions on Practice by Out-of-State Attorneys*, 72 Nw. U. L. REV. 737 (1977); see also address by Chesterfield Smith, former president of the American Bar Association, before the American Judicature Society and the National Conference of Bar Presidents, reported in Smith, *Time for a National Practice of Law Act*, 64 A.B.A. J. 557 (1978).

98. State bar requirements have been justified as furthering four legitimate state interests: (1) to insure the quality of attorneys practicing in the state, (2) to insure that attorneys practicing in the state are familiar with state law, (3) to insure effective administration of the legal process, i.e. insure availability for call of docket and emergent matters, and (4) to insure state powers to discipline unethical conduct. See Comment, *Easing Multi-State Practice Restrictions—"Good Cause" Based Limited Admission*, 29 RUTGERS L. REV. 1182, 1186 (1976). A federal legislation concerning the licensing of foreign attorneys will have minimal impact on these four legitimate interests.

amend their laws concerning the treatment of U.S. attorneys. The persuasive nature of such legislation should not be underestimated. Reciprocal claims and tolerances among nations lie at the core of the process by which customary international law develops.<sup>99</sup> In addition, Japanese courts have held that reciprocity may be guaranteed by the laws and customs of foreign countries which grant treatment that is the same or more liberal than that of Japan.<sup>100</sup> Finally, if the Japanese reservation to Article 8(2) of the FCN Treaty can be interpreted broadly to grant general reciprocal rights,<sup>101</sup> Japan would be in violation of the Treaty unless it amended its laws to allow U.S. attorneys to practice in Japan to the same extent the U.S. law would permit Japanese attorneys to practice in the United States.<sup>102</sup>

## VI. CONCLUSION

The expansion of international trade and investment in the decades since World War II has brought about the need to insure greater freedom of services across national boundaries.<sup>103</sup> Legal services are no exception. The U.S. business community can ill afford to be without counsel who are familiar with the day to day operations of the company and who are available wherever business opportunities take them. Foreign investments in the United States will also be enhanced if foreign businesses have easier access to attorneys who are knowledgeable on U.S. law. The problem of meeting the demands of reciprocity because of state standards is certain to have international repercussions far beyond U.S.-Japan relations. It may prevent the United States from participating in a multilateral agreement<sup>104</sup> allowing attorneys to

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99. H. STEINER & D. VAGTS, *supra* note 95, at 627.

100. Fukuhara, *supra* note 13, at 24, 25.

101. See *supra* notes 74-76 and accompanying text.

102. On the other hand, if Japan takes the initiative by amending its laws first, the U.S. would be in violation of the Treaty under this interpretation unless Congress or the courts take action to bring about a similar treatment for Japanese attorneys in the U.S. In such a case, the federal legislation could also be constitutionally grounded on the power of Congress to enact legislation necessary to implement a treaty. See *Missouri v. Holland*, 252 U.S. 416 (1920) and *U.S. v. Washington*, 520 F.2d 676 (9th Cir. 1975) (the federal government may make treaties which give it authority and sole jurisdiction over areas otherwise reserved to the states). As an alternative, courts could invalidate state laws in conflict with the treaty. See *Asakura v. City of Seattle*, 265 U.S. 332 (1964) (a rule established by treaty cannot be "rendered nugatory in any part of the United States by municipal ordinances or state laws").

103. In recognition of this need, Article 7(2) of the FCN Treaty provides that "neither party shall deny to transportation, communications and banking companies of the other Party the right to maintain branches and agencies to perform functions necessary for essentially international operations in which they are permitted to engage." 4 U.S.T. *supra* note 5, at 2070.

104. See *supra* note 4.

practice and establish branch offices in a foreign country. For these reasons, a federal law insuring uniformity<sup>105</sup> is a necessary first step towards greater liberalization of the legal profession.

In 1955, the Japanese Diet repealed a provision in the Bengoshi Law<sup>106</sup> that permitted foreign attorneys to practice in Japan under a special status without meeting the formal Japanese bar admission requirements. During the debates, members emphasized the fact that no other country in the world had a similar law.<sup>107</sup> It is entirely possible that if the United States had a similar law in 1955, the Japanese law would never have been repealed and there would be no need for the current controversy. In any case, it is time the United States permitted foreign attorneys to practice here. This would encourage other countries to take similar action so that U.S. businesses abroad, as well as foreign businesses interested in investing in the United States, will have access to the attorney of their choice.

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105. The experience with the Uniform Commercial Code illustrates the difficulty of producing uniformity through state action.

106. Former Article 7. *See supra* note 27 and accompanying text.

107. A proponent of the 1955 Amendment stated during a Diet debate that there was no need for Article 7 because aliens were no longer prohibited from taking the Legal Examination and because no other country granted a similar status for foreign attorneys. *See Fukuhara, supra* note 13, at 30. Fukuhara notes, however, that the proponent's argument was not entirely accurate. He found that Taiwan, England and Korea, as well as the states of Illinois and New Hampshire, permitted foreign attorneys limited rights to appear in court and otherwise practice law.