

FOREIGN LAWYER PROVISIONS IN HONG KONG AND THE REPUBLIC OF CHINA ON TAIWAN

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I. INTRODUCTION

Despite a popular belief that America's competitive edge in the global market has been dulled by the rise of Asian economic competition,¹ the United States has maintained its comparative advantage in at least one area: legal services.² American commercial law is extremely developed in a vast array of substantive fields.³ American law schools attract some of the nation's best minds⁴ and the culture of the law has even come to dominate American television programs, novels, and films over the past ten years.⁵ Since the late 1970s, American law firms have been

1. JAMES C. ABEGLLEN, *SEA CHANGE: PACIFIC ASIA AS THE NEW WORLD INDUSTRIAL CENTER* (1994); see, e.g., *Japanese Trade Surplus Rises 3.3% to Record \$130 Billion*, L.A. TIMES, May 10, 1994, at D2; *Japan's Sun Hasn't Set, the Economic Bubble Hasn't Burst; Western Pundits, Eager to Gloat, Have to Change Course—Again*, SAN DIEGO UNION-TRIB., Apr. 24, 1994, at I3; *Ill Trade Winds*, WASH. TIMES, May 23, 1993, at A14; *Taking the Offense on Managed Trade*, WASH. POST, May 21, 1993, at G1; *Remarks of Secretary of Treasury Lloyd Bentsen to the American Petroleum Institute*, FED. NEWS SERVICE, May 14, 1993, available in LEXIS, News Library, ARCNWS File.

2. The United States is home to the world's largest and largest-grossing law firms, including Baker & McKenzie (1604 lawyers; US\$503,500,000 gross revenue; US\$196,000,000 net operating income); Skadden, Arps, Slate, Meagher & Flom ("Skadden Arps") (920 lawyers; US\$440,000,000 gross revenue; US\$190,000,000 net operating income); and Jones, Day, Reavis & Pogue ("Jones Day") (1179 lawyers; US\$394,500,000 gross revenue; US\$126,000,000 net operating income). All of these firms have extensive worldwide operations. *The Amlaw 100*, AM. LAW. (Supp.), July-Aug. 1992.

3. The common choice of New York or California law as the governing law for international commercial contracts is a testament to these jurisdictions' perceived legal sophistication in commercial law. The *Restatement (Second) of Conflict of Laws* states that parties to a contract should be able to choose the law of a jurisdiction with no substantial contacts to the contract as long as some "other reasonable basis" exists for their choice. Parties should be able to choose the law of a "neutral jurisdiction" (such as New York) when they are contracting or performing in jurisdictions whose laws are either unfamiliar to the parties or relatively undeveloped in the legal area around which the transaction revolves. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. f (Supp. 1988). The rule is intended to advance the ideal of protecting parties' justified expectations, where the choice of a "well-developed" governing law can serve as a proxy for explicit contractual provisions regarding issues addressed by the governing law. *Id.* § 187(1).

4. The American Bar Association ("ABA") reported that in 1993 there were 128,210 law students in the nation's 176 ABA-approved law schools. This figure represents a 1.1% drop from 1992's record of 129,580, but is still an 8% increase from five years ago. Ken Myers, *Statistics Show Minorities Have Bigger Share of Lower Enrollment*, NAT'L L.J., Mar. 22, 1993, at 4.

5. Popular television programs have included *L.A. Law*, *Reasonable Doubts*, *Law & Order*, *Perry Mason*, *Equal Justice*, *Divorce Court*, *The People's Court*, and *Court TV*. Novels include Scott Turow's *One-L*, *Presumed Innocent* and *Burden of*

increasing their attempts to capitalize on this comparative advantage by exporting legal services to Europe, South America, the Middle East, and the Pacific Rim.⁶ U.S. firms have created networks,⁷ affiliations,⁸ and partnerships with foreign firms,⁹ and several firms have opened their own branch offices overseas.¹⁰ Over the past decade Hong Kong and the Republic of China on Taiwan ("ROC") have been major targets of this American expansion.¹¹ U.S. businesses and law firms are attracted to Hong Kong and the ROC¹² because these jurisdictions have active

Proof, Richard Kahlenberg's *Broken Contract*, and John Grisham's *The Firm* and *The Pelican Brief*. Films include *Presumed Innocent*, *The Firm*, *Class Action*, and *A Few Good Men*.

6. See Katherine Wilson, *Law Firms Move into Asia*, L. INST. J., June 1990, at 513-15; Charley Roberts, *Globalization: Worldwide Law Firms on Tap for '90s*, P.A. L.J.-REP., Jan. 8, 1990, at 12; Charley Roberts, *Globalization: Law Firms Gird for '90s*, L.A. DAILY J., Dec. 29, 1989, at 1; Ron Smith, *California Law Firms Reaching Across the Atlantic*, L.A. DAILY J. (Supp.), July 10, 1989, at 1; Joe Fasbinder & Ron Smith, *California Lawyers Bridging Pacific*, L.A. DAILY J., (Supp.), May 2, 1988, at 1; Robert Lever, *American Attorneys in Paris*, NAT'L L. J., June 22, 1987, at 1; Harriet Chiang, *Firms Reap Benefits from Foreign Offices*, L.A. DAILY J., Feb. 26, 1986, at 5; Deborah Graham, *Two Decades See Growth in Overseas Branching*, LEGAL TIMES, May 28, 1984, at 9; Deborah Graham, *Firms Branching Abroad Display Aggressiveness*, LEGAL TIMES, May 28, 1984, at 1; *U.S. Lawyers Frustrated in Saudi Arabia: Practice There has to Rely on Arab Sponsors*, N.Y. TIMES, May 26, 1981, at D3.

7. "Networks" are international consortia of firms that agree to refer work to other member firms. Popular networks include Lex Mundi, Interlaw, and Terralex. Rosalind Resnick, *Networks: Low Cost, Worldwide; Firms Find it Cheaper than Foreign Offices*, NAT'L L.J., Aug. 17, 1992, at 1.

8. The San Francisco-based firm of Graham & James has developed an extensive set of affiliations with foreign firms to share clients over their global network, to exchange attorneys across offices, and to be each other's "counsel of choice." The network embraces over 1000 attorneys worldwide. Graham & James' affiliates include Deacons (Hong Kong), Sly & Weigall (Australia), Taylor Joynson & Garrett (United Kingdom), and Haarman, Hemmelrath & Partner (Germany). James Evans, *The World According to Graham & James*, CAL. LAW., NOV. 1992, at 42-43.

9. Chicago-based Baker & McKenzie often takes this route in opening foreign offices. *Id.* at 45.

10. San Francisco-based Morrison & Foerster has chosen this strategy for most of its overseas branches. *Id.*

11. As of May 1994, there were over fifteen U.S., Australian, and Canadian firms in Taiwan, most of which opened their offices within the past five years. In Hong Kong, there are over sixty U.S., English, Australian, Canadian, French, and mainland Chinese firms that have established branches. I MARTINDALE-HUBBELL INTERNATIONAL LAW DIRECTORY (1994).

12. U.S. and other foreign firms have established offices in Singapore for many of the same reasons they opened offices in Hong Kong and Taiwan. Today there are approximately twenty foreign firms operating in Singapore, including branches of U.S., English, Australian, and Malaysian firms. *Id.* However, Singapore's foreign lawyer provisions are fairly similar to Hong Kong's restrictive pre-1995 system. Although the two jurisdictions share a similar British Commonwealth legal heritage, Hong Kong has been actively attempting to reform its system over the past several years, while Singapore has decided not to pursue a liberalization of its system in any substantial way. See COMMITTEE ON THE SUPPLY OF LAWYERS, REPORT ON THE

commercial sectors, relative infrastructural sophistication,¹³ and geographical proximity to larger emerging markets such as the People's Republic of China ("PRC") and the resource-rich developing nations of Southeast Asia.¹⁴ In turn, Hong Kong and the ROC have continuously competed with each other to become regional financial and commercial centers, spurred by the lucrative rewards of servicing multinational companies.¹⁵

U.S. law firms seeking to take their business to Hong Kong and the ROC should recognize the differences between the respective foreign lawyer practice regimes in these markets. Each jurisdiction has distinct statutory, regulatory, and customary restrictions on the foreign-licensed lawyers' scope of practice. Hong Kong and the ROC are interesting comparisons in this regard because their respective foreign lawyer provisions are based on different legal traditions: Hong Kong has modeled its approach after the British Commonwealth's, while the ROC has been heavily influenced by the U.S. and Japanese models. Of

[SINGAPORE] LEGAL PROFESSION, 25-26 (1993). This Article focuses on Hong Kong and Taiwan, where dynamic reforms are being undertaken, rather than on the more static Singaporean model. However, interesting Singaporean contrasts to the Hong Kong model will be discussed where pertinent.

13. Despite their differences, Hong Kong and Taiwan share many common traits that make them attractive to foreign firms. Since the 1970s, Hong Kong has developed a communications and telecommunications infrastructure that rivals Europe's, in part due to the heavy English and European influence in the colony. See, e.g., Michael J. Moser, *Hong Kong's Role as a Regional Dispute Resolution Centre*, EUROMONEY SUPP., July 16, 1991, available in LEXIS, Asiapc Library, ALLASI File. Taiwan has spent millions improving its infrastructure over the past twenty years as well. In addition, Hong Kong and Taiwan both have well-educated labor forces, a high percentage of which speak English. Hong Kong's population is particularly accustomed to dealing with Western business and legal practices, as Hong Kong remains a British colony today. Taiwan is heavily steeped in American culture, in part due to the U.S.'s influence as Taiwan's prime Western ally after most other Western nations recognized the People's Republic of China ("PRC") as the official government of China and broke official diplomatic ties with Taiwan.

14. See, e.g., Joan M. Cheever, *The Legal Community Withdraws Its Welcome in Hong Kong*, NAT'L L.J., Jan. 9, 1989, at 22; James S. Altschul, *Eastern Retreat: U.S. Firms Pulling Out of Hong Kong*, LEGAL TIMES, Nov. 19, 1990, at 1 (reporting on Skadden Arps's use of its Hong Kong office to service PRC clients); Agnes Wee, *Cornering the Business in Fast-Growing Asia-Pacific*, BUS. TIMES, Feb. 3, 1994, at 14, available in LEXIS, Asiapc Library, ALLASI File.

15. See, e.g., Barry Riley, *Hong Kong as a Financial Centre: A Question of Survival*, FIN. TIMES, Oct. 26, 1988, at 1; Cheever, *supra* note 14; *Singapore: Foreign Lawyers Admitted to Aid Financial Community*, E. ASIAN EXECUTIVE REP., July 15, 1980, available in LEXIS, Asiapc Library, ALLASI File [hereinafter *Admitted to Aid*]; *What Has Happened to Freshfields in Singapore Highlights the Problems That Firms Can Face When Opening Offices in Other Jurisdictions*, EUROMONEY INT'L FIN. L. REV., Apr. 10, 1986, at 6, available in LEXIS, Asiapc Library, ALLASI File [hereinafter *Freshfields Singapore Problems*]; *The Far Eastern Economic Review Has Reported on the Singapore Government's Decision to Order the British Law Firm, Freshfields, to Stop Practising Under Singapore Jurisdiction*, FAR E. ECON. REV., Nov. 8, 1986, available in LEXIS, Asiapc Library, ALLASI File.

course, Hong Kong and the ROC have also introduced novel variations to their respective systems.

Finally, the Hong Kong and ROC legal professions have been undergoing rapid development and change over the past ten years, resulting in a concomitant flux in their respective foreign lawyer regulations. The Legislative Council in Hong Kong ("LegCo"), for instance, enacted significant amendments to the Hong Kong Legal Practitioners Ordinance¹⁶ in August and September of 1994, based on recommendations for reform that had been debated by the colony's legal practitioners and legislators since 1988. Meanwhile, in late 1992 the ROC promulgated an amended Lawyers Law and implemented a new set of regulations affecting foreign lawyers. In late 1994 the ROC's Ministry of Justice began contemplating a new, comprehensive foreign lawyer registration and licensing system, accepting input from both the ROC National Bar Association, which has proposed a restrictive regulatory regime, and the foreign community, which hopes to prevent the promulgation of a harsh Japanese-style foreign lawyer statute. The ramifications of these new statutes and proposed laws are of great importance to American firms already in Hong Kong and the ROC, as well as to those firms that may wish to establish a presence in those jurisdictions in the future.

This Article provides an overview of the current foreign lawyer provisions in Hong Kong and the ROC. It analyzes the Hong Kong and ROC provisions by comparing them to previous laws and to proposed rules that were never enacted—illustrating the various models that have been considered and the policy concerns that led Hong Kong and the ROC to utilize their current systems. Where appropriate, this Article compares and contrasts the approaches taken in Hong Kong and the ROC to those used in the United States, Singapore, and Japan. Finally, the Article attempts to outline the future prospects and long-term trends of enforcement and reform in both jurisdictions. The goal of this piece is to provide an overall sense of the possibilities, pitfalls, and promise of U.S. law firm practice in both Hong Kong and the ROC.

II. HONG KONG

A. INTRODUCTION

Hong Kong's reputation as a major global commercial center is the result of the free trade policies of its *laissez-faire*

16. Legal Practitioners Ordinance (Cap. 159) (1993).

British colonial government.¹⁷ As a regional hub for many multinational businesses, Hong Kong naturally attracts many international law firms hoping to offer their services to such businesses.¹⁸ English firms, for instance, have been established in Hong Kong since the colony's inception.¹⁹ However, unlike most other foreign firms, the English firms have always enjoyed a special, quasi-local status in the territory because of Britain's sovereignty over Hong Kong.²⁰ American and other foreign firms that do not share the English firms' historical and political ties to Hong Kong first opened branch offices in the territory in 1972, as Hong Kong's economic importance in the global economy became manifest.²¹

Most foreign firms in Hong Kong practice international banking, corporate, transactional, and tax law. Many foreign firms also engage in joint venture work involving parties in the PRC, or otherwise use Hong Kong as a convenient springboard for servicing China-based businesses.²² In the 1980s, several foreign firms also tried to capitalize on the regional syndicated loan boom.²³ For many firms, Hong Kong is still considered the most

17. See, e.g., Chris Dobson, *Hong Kong: U.S. Upset with Restrictions Placed on Law Firms*, S. CHINA MORNING POST, July 29, 1990, available in LEXIS, Asiapc Library, ALLASI File.

18. "[A]s long as Hong Kong holds attractions for potential clients it will hold attractions for law firms, and the Hong Kong government appears to be trying to create an attractive commercial environment . . ." *Hong Kong: The Future for Lawyers in the Colony*, EUROMONEY INT'L FIN. L. REV., Nov. 21, 1989, at 11, available in LEXIS, Asiapc Library, ALLASI File [hereinafter *Future*].

19. The venerable law firms of Johnson Stokes & Master and Deacons, for instance, were established by Britons in 1863 and 1880, respectively (and are now considered local, Hong Kong firms). I MARTINDALE-HUBBELL INTERNATIONAL LAW DIRECTORY (1994), *supra* note 11. Even among English firms with home offices in Britain, Hong Kong has been the most favored overseas jurisdiction in which to establish branch offices, due mostly to the ease with which such branches can be set up. *Future*, *supra* note 18.

20. Upon application, English barristers and solicitors are allowed to automatically "waive" in as licensed lawyers in Hong Kong. Legal Practitioners Ordinance § 4(1)(a)(ii); see also Alison E.W. Conner, *Debate Heats Up on Proposal to Allow Foreign Law Firms to Hire Hong Kong Lawyers*, E. ASIAN EXECUTIVE REP., Nov. 1988, available in LEXIS, Asiapc Library, ALLASI File.

21. Cheever, *supra* note 14.

22. *Id.*

23. Syndicate lending involves a group of banks forming a consortium to extend a loan, either because of single-customer limits on lending or because no single bank in the consortium wants to undertake all of the risk. Preparing the loan documents for such transactions can be complex because there is a relationship not only between the lender and the borrower, but also between the various banks. Ramesh Divyanathan, *Foreign Law Firms Find Singapore a Good Place to Operate In*, BUS. TIMES (Sing.), Oct. 14, 1992, at 16, available in LEXIS, Asiapc Library, ALLASI File. Unfortunately for many of the firms that established syndicate loan practices in Hong Kong, the territory did not become the major capital-market center that they had hoped it would be, and a number of these firms (including New York's

attractive regional economic center in which to establish an office because of its free-market economy and geographic location.²⁴ Hong Kong's international flavor, widespread use of the English language, developed infrastructure, sophisticated service sector, and British Commonwealth legal system have all combined to make the colony an attractive place to open a regional office.²⁵

The discussion below first outlines Hong Kong's pre-1995²⁶ system for regulating foreign lawyers and the controversy over the various reforms that have been proposed since 1988. The discussion then turns to the new legislation enacted by LegCo in late 1994, which substantially overhauls the previous regulatory regime. The analysis concludes by considering the new scheme's possible impact and suggesting further reforms.

B. THE PRE-1995 SYSTEM FOR REGULATING FOREIGN LAWYERS IN HONG KONG

Hong Kong's pre-1995 foreign lawyer system was created in the early 1970s. Under that system, most foreign lawyers in Hong Kong—especially Americans—were significantly limited in the scope of their practices.²⁷ First, unlike foreign bar candidates in many American jurisdictions such as New York and California,²⁸ foreign candidates for the Hong Kong bar faced education, legal experience, and residency prerequisites that were extremely difficult to fulfill. Hong Kong's pre-1995 system

Shearman & Sterling and Simpson Thacher & Bartlett) closed their Hong Kong offices when loan and project finance business dropped off in the late 1980s. (Simpson Thacher & Bartlett, as well as San Francisco's Heller, Ehrman, White & McAuliffe, have since reopened their Hong Kong branches.) Other firms such as New York's Skadden Arps, and San Francisco's Morrison & Foerster, have been more optimistic about their Hong Kong offices and have tried different strategies to diversify their practice areas in those offices. Altschul, *supra* note 14.

24. *Future*, *supra* note 18.

25. Moser, *supra* note 13.

26. The bulk of the August-September 1994 amendments to the Hong Kong Legal Practitioners Ordinance concerning foreign lawyers have an effective date of January 1, 1995. Thus, for purposes of this discussion, this Article will refer to the foreign lawyer regulatory regime existing prior to the amendments as the "pre-1995" system. See Legal Practitioners (Amendment) Ordinance of 1994, at B1753 [hereinafter Amendment Ordinance].

27. As noted earlier, English lawyers have occupied a special, quasi-local status so that many of the restrictions on foreign lawyers did not apply to them. The restrictions discussed herein applied mainly to Americans, Europeans, and even various other British Commonwealth nations—all of which are considered foreign in Hong Kong.

28. Both California and New York allow graduates of foreign law schools to sit for their state bar examinations without having first obtained a U.S. law degree if the candidate's degree is from a certain list of approved common-law jurisdictions, or upon individual evaluation of the equivalency of the candidate's qualifications. ABA, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 30-32 (1993-94).

effectively prevented most foreign lawyers from gaining admission to the Hong Kong bar to practice as locally licensed solicitors or barristers.²⁹

For instance, to become locally licensed under the pre-1995 system, a foreign lawyer had to either (1) qualify as a solicitor or barrister in the United Kingdom and then apply for automatic admission in Hong Kong; or (2) obtain the Postgraduate Certificate in Laws ("P.C.L.L."), which requires one year of study at the University of Hong Kong's Law Department, plus completion of a two-year work period as an articled clerk.³⁰ In addition, non-British Commonwealth³¹ citizens were required to be "ordinarily

29. Like England, Hong Kong maintains a divided bar consisting of solicitors and barristers, with the former providing general legal counsel (and appearing in the lower courts) and the latter being advocates admitted to plead at the bar (particularly the Supreme Court). The English and Hong Kong lawyers' professional regulatory associations are the Law Society (for solicitors) and the Bar Association (for barristers). See Alison E.W. Conner, *New Regulations Proposed for Foreign Lawyers*, E. ASIAN EXECUTIVE REP., June 15, 1992, available in LEXIS, Asiapc Library, ALLASI File. Recently, however, Hong Kong Law Society President Ambrose Lau has suggested that Hong Kong's divided system should be reexamined to determine whether it best serves the interests of the public. *Barriers in Profession May Need Dismantling*, S. CHINA MORNING POST, Jan. 12, 1993, available in LEXIS, Asiapc Library, ALLASI File [hereinafter *Barriers*]. To become locally licensed lawyers, Hong Kong residents ordinarily take a three-year Bachelor of Laws degree (LL.B.) followed by a one-year Postgraduate Certificate in Laws course (P.C.L.L.). Trainee solicitors then do two years of practical training (formerly known as "articles," akin to an apprenticeship with a licensed solicitor) while trainee barristers do one year of pupillage. Solicitors and barristers may then apply for "conditional practising certificates" (subject to additional continuing legal education requirements), which allow them to practice under the supervision of an experienced solicitor, but which prevent them from practicing on their own account (as sole practitioners) or in partnership until they have completed two years of supervised practice. Once they have fulfilled their two-year practice requirement, solicitors are eligible for "unconditional practising certificates," which must be renewed annually. Legal Practitioners Ordinance § 4(1)(a)(i); Trainee Solicitors Rules (Cap. 159 sub. leg. J) §§ 6, 9, sched. pt. I (1993); see also Chris Dobson, *UK: Lifting of Work Rule for Solicitors Will Allow Automatic Acceptance to the Roll for [Hongkong Lawyers]*, S. CHINA MORNING POST, Nov. 11, 1990, available in LEXIS, Asiapc Library, ALLASI File.

30. Legal Practitioners Ordinance §§ 4(1)(a)(i), 4(1)(a)(ii), 3(1AB), 3(1AD). As a practical matter, it was nearly impossible for U.S. lawyers to gain admission to Hong Kong P.C.L.L. courses, as spaces in such courses are limited and preference is given to Commonwealth law degree holders. Conner, *supra* note 20. In addition, U.S. lawyers would have had difficulty obtaining articled clerkships from Hong Kong firms, which had little incentive to train such clerks, who could then become their future competitors. *Id.* Finally, even after a two-year clerkship, a solicitor is merely given a "conditional practising certificate," requiring the solicitor to practice under the supervision of an experienced solicitor for another two years before gaining an "unconditional" license to practice as a sole practitioner or a law firm partner. Legal Practitioners Ordinance § 4(1)(a)(i).

31. Under the pre-1995 Legal Practitioners Ordinance, "Commonwealth" was defined to include Australia, Canada (except Quebec), New Zealand, the Republic of Ireland, Zimbabwe, and Singapore. Legal Practitioners Ordinance, sched. I.

resident" in Hong Kong for seven years before they could become eligible for admission to the Hong Kong bar.³²

The pre-1995 Hong Kong system kept most foreign lawyers at a "foreign legal consultant" status under which they were only permitted to practice the law of their home jurisdiction. Furthermore, foreign legal consultants were required to sign individual, written "undertakings" with the Law Society that contractually prohibited them from entering into partnerships with or employing local solicitors.³³ Thus, prior to 1995, foreign firms in Hong Kong were precluded from offering fully integrated service³⁴ to their clients, while local Hong Kong firms were free to hire foreign lawyers as associates or consultants.

In response to such restrictive rules on foreign lawyers, American law firms have called for a reform of Hong Kong's foreign lawyer rules since 1972.³⁵ On January 4, 1988, seven American law firms³⁶ sent a strongly worded petition to then Hong

32. Legal Practitioners Ordinance § 3(1)(b). The seven-year residency requirement did not apply to Hong Kong-born Chinese Americans or to U.K. lawyers, who only needed to satisfy a three-month residency requirement before being eligible for the local bar. Conner, *supra* note 20.

33. The Law Society's general guidelines for admitting foreign legal consultants were set forth in a pamphlet, *Foreign Law Firms Establishing Themselves in Hong Kong—Guidelines to Applicants* [hereinafter *Guidelines*], originally published in 1976. The *Guidelines* required applicants to be "well-established" in their home jurisdictions and to provide detailed information regarding the "resident partner" who was to be in charge in Hong Kong. Applicants then negotiated and signed ad hoc "undertakings," which varied from firm to firm, but which the Law Society began to make more restrictive over the years as more firms began applying for foreign legal consultant status. The undertakings required foreign firms to adhere to the Hong Kong Law Society's ethical rules, but did not permit foreign lawyers to join the Law Society. If foreign lawyers were found to be in violation of Law Society ethical rules or undertakings, the Law Society would contact the Hong Kong Immigration Department, which would, as a matter of custom, revoke the work permits of foreign lawyers that the Law Society deemed "unethical." Cheever, *supra* note 14; Alison E.W. Conner, *New Rules Proposed for Foreign Law Firms*, E. ASIAN EXECUTIVE REP., July 15, 1992, available in LEXIS, Asiapc Library, ALLASI File; Conner, *supra* note 20; Jennifer Cooke, *Hong Kong: China Law Firm Status "Unethical"*, S. CHINA MORNING POST, Jan. 13, 1992, available in LEXIS, Asiapc Library, ALLASI File; *Hong Kong: Controversy Over Whether Foreign Firms Can Employ Local Lawyers and Admit Them as Partners*, EUROMONEY INT'L FIN. L. REV., Nov. 21, 1989, at 12, available in LEXIS, Asiapc Library, ALLASI File [hereinafter *Controversy*].

34. An "integrated practice" is one in which the foreign firm is able to offer advice on both the law of the jurisdiction in which the overseas branch office is located as well as the law of the firm's home jurisdiction.

35. New York's Coudert Brothers was one of the first American firms to establish an office in Hong Kong in 1972, and immediately submitted a proposal to the Hong Kong government and Law Society to formalize and liberalize the procedures for allowing foreign firms to set up practices in the colony. Until recently, such proposals were not taken seriously by Hong Kong authorities. Cheever, *supra* note 14.

36. The seven petitioning firms were New York's Coudert Brothers; Kaye, Scholer, Fierman, Hays & Handler ("Kaye Scholer"); Paul, Weiss, Rifkind, Wharton

Kong Governor Sir David Wilson, demanding a simplified process for foreign lawyers to be admitted as Hong Kong solicitors and the right of foreign firms to hire local solicitors as partners, associates, or consultants.³⁷ The petitioning firms "threatened"³⁸ to ask the U.S. Government to file a trade action against Hong Kong if the territory's legal practice rules were not reformed.³⁹

Sympathetic to the position of the petitioning firms, the Hong Kong Government proposed to bring admission and regulation of foreign legal consultants within the purview of the Legal Practitioners Ordinance, thereby eliminating the ad hoc, non-statutory admission process that had previously been administered by the Law Society.⁴⁰ Hong Kong Attorney General, Jer-

& Garrison ("Paul Weiss"); and White & Case; Los Angeles's Gibson, Dunn & Crutcher; Cleveland's Jones Day; and Minneapolis's Dorsey & Whitney. *Controversy*, *supra* note 33; Conner, *supra* note 20. The nine American firms in Hong Kong that declined to sign the petition included Chicago's Baker & McKenzie; New York's Cleary, Gottlieb, Steen & Hamilton; Haight, Gardner, Poor & Havens; Milbank, Tweed, Hadley & McCloy; Shearman & Sterling; and Walker & Corsa; and San Francisco's Graham & James; Morrison & Foerster; and Pettit & Martin. Proponents of the petition cited the unnecessary duplication of work, extra time, and added expense required to refer local law matters to wholly separate local firms, as well as the lack of progress in reforming the present system despite constant prompting by U.S. firms since 1972. Coudert Brothers partner Gage McAfee dismissed the Law Society's argument that allowing partnerships between foreign and local firms would lead to the practice of Hong Kong law by non-Hong Kong licensed lawyers. McAfee argued that it would not be cost-effective for firms like Coudert, which pays its foreign-licensed lawyers at higher rates than what local lawyers command, to assign local law matters to their foreign-licensed lawyers. Kaye Scholer's Franklin Chu also noted that the American firms in Hong Kong observe the highest possible ethical standards and go to extraordinary lengths to observe the Law Society's rules; no diminution in professional standards would thus accrue if foreign firms were allowed to engage in integrated practices. Not all American lawyers agreed with that assumption, however. Morrison & Foerster, which declined to sign the petition, felt that U.S. firms with aspirations to hire a few solicitors and advertise an "integrated service" would not be able to match the depth and sophistication of Hong Kong firms in local law matters, and would lower the quality of legal services, at least in the short-term. In addition, if U.S. firms poached top solicitors from local firms, they would only exacerbate the tension between the Law Society and the foreign lawyers. Cheever, *supra* note 14.

37. Conner, *supra* note 20.

38. There is some debate, even among the petitioning firms, as to whether the petition was meant to constitute a "threat." After the petition was submitted, a Gibson, Dunn & Crutcher partner in Hong Kong said, "I didn't think it was a threat. I consider it a reminder. It's too bad it sounds like that." Jones Day partner Benjamin Fishburn, a former Chair of the American Chamber of Commerce's legal committee and one of the drafters of the petition believed, however, that the petition was meant to be threatening, in light of the lack of progress on the issue since 1972 and in light of the time- and money-wastage that results from American firms referring all local law matters to an entirely separate firm. Cheever, *supra* note 14.

39. *Id.*

40. The Government rejected the petitioners' request for foreign lawyers to be admitted as local solicitors on motion, but decided to support the call to reform the foreign legal consultant rules. *Id.*

emy Mathews, also proposed that the courts, rather than the Law Society, administer foreign legal consultant admission procedures,⁴¹ and that the Law Society draft formal rules for the regulation and discipline of foreign lawyers.⁴² Finally, and most controversially, the Attorney General requested that foreign firms be explicitly permitted to hire local solicitors and enter into partnerships with them. This would enable the foreign firms to offer integrated services that would compete directly with local firms for Hong Kong-based work and for the employment of Hong Kong-licensed partners and associates.⁴³

Despite the Attorney General's suggested safeguards to insure quality control and to guard against a flooding of the Hong Kong market by foreign legal consultants, including specific experience and lawyer ratio⁴⁴ requirements, the Law Society vigorously opposed the Attorney General's partnership proposal.⁴⁵ At the September 1988 Law Society extraordinary general meeting, which sixty percent of Hong Kong's 1800 solicitors attended, local lawyers openly gave anti-American speeches and voted overwhelmingly to oppose the Attorney General's plan.⁴⁶ The Law Society then launched a media campaign against the government's position,⁴⁷ claiming that relaxation of the foreign lawyer

41. *Id.* Some jurisdictions admit foreign legal consultants through the court system at least in part because the local bar associations have a potential conflict of interest if they are given discretion over the process. The local bar might have the incentive to act in a protectionist manner if it perceived the foreign legal consultants as competitors who would diminish the local firms' business. For example, New York's Foreign Legal Consultant system is administered by the Appellate Division of the State Supreme Court. N.Y. R. Ct. § 521.1(a).

42. Conner, *supra* note 20.

43. *Id.*

44. Ratio requirements typically provide that foreign firms must maintain a certain ratio between the number of local solicitors and the number of foreign lawyers in a given firm to prevent "domination" by the foreign lawyers. Several foreign firms objected to the inclusion of such requirements in the Government's proposal. Jennifer Cooke, *Hong Kong: Law Society Plan "Likely to be Adopted,"* S. CHINA MORNING POST, Oct. 17, 1989, available in LEXIS, Asiapc Library, ALLASI File; Vicky Wong, *Hong Kong: Government to Reopen Law Talks on Foreign Firms,* S. CHINA MORNING POST, Dec. 24, 1989, available in LEXIS, Asiapc Library, ALLASI File.

45. However, the Law Society did welcome the Government's proposal that foreign lawyers be brought under the Legal Practitioners Ordinance and the full disciplinary jurisdiction of the Law Society. LAW SOCIETY OF HONG KONG, OUTLINE PROPOSALS FOR THE REGULATION OF FOREIGN LAWYERS AND FOREIGN LAW FIRMS: FINAL REPORT § A.1 (Oct. 1991) [hereinafter FINAL REPORT].

46. The Law Society voted 1068 to 23 to resist the Attorney General's reforms. *Controversy, supra* note 33. Johnson Stokes & Master partner Simon S.O. Ip, then president of the Law Society, stated that the U.S. firms were "biting the hand that's fed [them]" and "abusing" Hong Kong's hospitality to increase their own material gain. Cheever, *supra* note 14.

47. The Law Society retained a public relations firm and established a fund to finance its effort to block the government's proposal. It then proceeded to saturate

restrictions would adversely affect the standards,⁴⁸ political independence,⁴⁹ and strength⁵⁰ of the local profession.

U.S. firms argued that dismantling the Law Society's "protectionist" monopoly of integrated legal services would enhance Hong Kong's global commercial status and prosperity,⁵¹ reduce Hong Kong's "brain drain,"⁵² lower overall legal fees,⁵³ and im-

local English-language newspapers with letters warning of the detrimental effects of allowing more foreign lawyers to enter the Hong Kong market. Cheever, *supra* note 14.

48. "Members of the local bar are warning residents that the government proposal will result in the escalation of legal fees and the immigration of floods of money-hungry, ambulance-chasing American lawyers." Cheever, *supra* note 14, at 22; see also Conner, *supra* note 20; *Future*, *supra* note 18; *Hong Kong: Foreign Law Firms to be Allowed to Hire Local Lawyers*, FAR E. ECON. REV., Aug. 18, 1988, available in LEXIS, Asiapc Library, ALLASI File.

49. Some Law Society members warned ominously that relaxation of the foreign lawyer provisions would permit socialist PRC lawyers to infiltrate the local legal community, resulting not only in a possible lowering of professional standards, but also a diminution in the local profession's political independence. This fear was particularly strong in the wake of the 1989 Tiananmen Square Massacre, when Hong Kong residents openly worried that the Beijing regime could not be trusted to keep Hong Kong a free market territory. *Future*, *supra* note 18. Pursuant to the Joint Declaration between Great Britain and the PRC, as well as Hong Kong's Basic Law, the legal systems in Hong Kong and the PRC are to be kept separate for at least fifty years after the PRC assumes sovereignty over Hong Kong in 1997. *Hong Kong: Law Society "Afraid" of China's Lawyers*, S. CHINA MORNING POST, Sept. 9, 1990, available in LEXIS, Asiapc Library, ALLASI File. However, then president of the Law Society, Donald Yap, officially stated that the Law Society was not merely fighting for foreign lawyer restrictions as a means of reducing PRC control. He remarked that it was "totally wrong" to assume that either PRC or U.S. lawyers were the intended targets of the Law Society's arguments. Instead, the Law Society's position "doesn't single out anybody, it's just across the board." *Id.* Mr. Yap's statements may have been aimed at avoiding charges that the Law Society was advocating discrimination in trade-in-services, in contravention of the principles enumerated under the multilateral General Agreement on Tariffs and Trade ("GATT") and the General Agreement on Trade in Services ("GATS"). He no doubt wanted to avoid friction with the PRC government as well, with 1997 approaching.

50. The Law Society claimed that consideration of the Government's unilateral proposal—drafted without consulting the Law Society—would create a bad precedent of bypassing an important element of public debate prior to a significant amendment of Hong Kong law. The Law Society also feared that the government's willingness to appease U.S. firms would encourage future U.S. and PRC "strong-arm" tactics. *Hong Kong: Law Society Responds to Proposals to Allow Foreign Firms to Employ Local Lawyers*, EUROMONEY INT'L FIN. L. REV., July 18, 1989, available in LEXIS, Asiapc Library, ALLASI File; Conner, *supra* note 20.

51. *Controversy*, *supra* note 33.

52. U.S. lawyers argued that if the 1988 Proposed Amendments were passed, the feared "flood" of foreign firms would not deluge Hong Kong, as the sheer cost of opening a Hong Kong office would prevent most firms from entering the market. Those firms that enter the market to provide integrated services would not have the incentive to use their foreign-licensed lawyers on local law matters because it would be more cost-effective to hire extra Hong Kong solicitors to do the work. Hong Kong solicitors are generally paid less than their foreign-licensed counterparts. American lawyers thus argued that an increased number of integrated firms would actually provide more career opportunities for local solicitors, encourage more

prove ethical standards⁵⁴ in the territory. Despite the efforts of both the Hong Kong Government and the U.S. law firms, the Law Society⁵⁵ ultimately convinced the Attorney General's Office to drop the 1988 Proposed Amendments and to support instead a plan drafted by the Law Society.⁵⁶

In 1989 the Law Society's sixteen-member Council proposed a highly restrictive foreign lawyer system and sent copies of its proposal to the Law Society membership for comment.⁵⁷ The Law Society membership rejected the proposal⁵⁸ because its strictures would have impinged on the ability of local lawyers to hire foreign legal consultants and were widely considered to con-

Hong Kong natives to enter the legal profession, and stem some of the professional "brain drain" that has left the territory with what the head of the Hong Kong bar considered too few lawyers "to service its needs as a major financial centre." *Id.*

53. American lawyers argued that integrated foreign-based firms would not inflate legal fees in Hong Kong, but would rather lower fees overall by creating competition for local legal business. Cheever, *supra* note 14. Of course, U.S.-based integrated firms would probably raise overall solicitors' salaries and partnership draws in attempts to attract talented lawyers away from local firms. It is uncertain at what point the raise in salaries would result in concomitant fee hikes that would mitigate whatever savings clients would enjoy from the increased competition produced by the foreign firms' presence in the market.

54. U.S. firms asserted that local solicitors would not only learn substantive lawyering skills by working with and for them, but that their ethical standards could be raised—not lowered—through closer contact with the American bar. The expatriate Americans insisted that their firms were well-known and of the highest repute, and individual U.S. lawyers stressed that they scrupulously observe all of the Law Society's ethical rules. Cheever, *supra* note 14. U.S. attorneys also noted that it was the local bar, not the foreign lawyers, that had been rocked over the past several years by kickback and touting scandals. Conner, *supra* note 20.

55. The Law Society was backed by eight other Hong Kong professional associations in opposing the Attorney General. Conner, *supra* note 20.

56. Cooke, *supra* note 44; Wong, *supra* note 44; Jennifer Cooke, *Hong Kong: U.S. Law Firms Disappointed by End to Liberalisation Plan*, S. CHINA MORNING POST, July 26, 1990, available in LEXIS, Asiapc Library, ALLASI File.

57. The Law Society Council outlined the following scheme: (1) foreign firms and local solicitors would be prohibited from forming partnerships; (2) instead, foreign firms and local solicitors could form "close associations," but only with the Law Society's "consent"; (3) local firms would be prohibited from employing any partner, associate, consultant, or employee from a foreign firm or any lawyer who has filled one of those capacities with a foreign firm associated with the local firm (foreign lawyers and firms would be prohibited from employing any local solicitors as well); (4) local lawyers and firms would be prohibited from sharing offices, facilities, or staff with any foreign lawyers or firms; (5) but associated firms would be allowed to share fees. These rules were to be enacted either as Law Society practice directions or as amendments to the Legal Practitioners Ordinance. Cheever, *U.S.-Hong Kong Deals Shaky? Trans-Pacific Law Firms*, NAT'L L.J., Aug. 20, 1990, at 3; Jennifer Cooke, *Hong Kong: Proposals May Upset Foreign Law Firm Links*, S. CHINA MORNING POST, Aug. 7, 1990, available in LEXIS, Asiapc Library, ALLASI File; Joan M. Cooke, *supra* note 44.

58. Jennifer Cooke, *Hong Kong: Lawyers to Scrap "No Sharing" Plan*, S. CHINA MORNING POST, Nov. 19, 1990, available in LEXIS, Asiapc Library, ALLASI File.

travene the General Agreement on Tariffs and Trade ("GATT").⁵⁹ The Law Society Council agreed to relax its proposal, apparently swayed when the impetus for relaxation came from its own membership rather than the Attorney General's Office.⁶⁰

By October 1991, the Law Society Council issued its "Outline Proposals for the Regulation of Foreign Lawyers and Foreign Law Firms: Final Report" ("Report"),⁶¹ where the Law Society retreated substantially from its previous hard-line stance.⁶² First, the Report embraced the Government's original proposal that called for formalization of the foreign lawyer admission and regulation process through statutory amendments to the Legal Practitioners Ordinance and Law Society regulations.⁶³ While the Report proposed that partnerships between local and foreign firms remain prohibited in general, it expressly provided for office and fee sharing among "associated" firms.⁶⁴ More importantly, the Report provided that after being established in Hong Kong for a specified period, foreign law firms would be allowed to establish integrated practices under the name of the foreign firm, subject to certain restrictions on the ratio of foreign-to-local lawyers employed.⁶⁵ Almost all the proposals outlined in

59. The Hong Kong Attorney General's Office stressed that any proposal to restrict foreign lawyers in Hong Kong "will have to take into consideration any multilateral agreements regarding the free trade in services to which Hong Kong must adhere [such as the Uruguay Round of GATT]." *Hong Kong Drops Plan to Let Foreign Law Firms Hire Local Lawyers*, BNA DAILY REP. FOR EXECUTIVES, Aug. 29, 1990, available in LEXIS, Asiapc Library, ALLASI File. Local lawyers seemed convinced that the GATS, which was being negotiated during the GATT's Uruguay Round, would "wipe out the proposed rules." Cooke, *supra* note 58.

60. Jennifer Cooke, *Hong Kong: Lawyers Set for Rule Change*, S. CHINA MORNING POST, Nov. 21, 1990, available in LEXIS, Asiapc Library, ALLASI File. *Hong Kong: Rumours Abound that the Law Society is to Relax its Position on Foreign Firms*, EUROMONEY INT'L FIN. L. REV., Jan. 5, 1991, at 5, available in LEXIS, Asiapc Library, ALLASI File.

61. The Law Society Council formed two committees in 1990 to draft proposals on foreign lawyers. The Accreditation Committee drafted rules for admission of foreign lawyers as local solicitors, while the Foreign Lawyers Committee drafted rules for the admission of foreign legal consultants and the regulation of foreign firms and associations. The Accreditation Committee was able to come to agreement on a foreign lawyers' transfer test scheme after only six meetings, publishing its report in July 1991. The Foreign Lawyers Committee faced a more controversial issue and met no less than thirty-nine times between September 1990 and October 1991, when it finally published its report. Conner, *supra* note 33.

62. When the Law Society's 1991 Report was issued, Donald Yap, then president of the Society, admitted that the Society's position had changed dramatically since 1989. Jennifer Cooke, *Hong Kong: Proposals on Foreign Law Links Hailed*, S. CHINA MORNING POST, Sept. 18, 1991, available in LEXIS, Asiapc Library, ALLASI File.

63. FINAL REPORT, *supra* note 45, § A.1.

64. *Id.* § C.2.

65. *Id.* § F.

the Report were included in the Legal Practitioners (Amendment) Ordinance of 1994 ("Amendment Ordinance") and its accompanying regulations, which are discussed in detail below.

C. THE 1994 AMENDMENTS TO THE LEGAL PRACTITIONERS
ORDINANCE AND THE REGULATIONS FOR THE
ADMISSION AND PRACTICE OF FOREIGN
LAWYERS

1. Goals of the Amendment Ordinance

The Amendment Ordinance and its subsidiary Rules⁶⁶ represent the compromise scheme that resulted from the public debate between the Attorney General and the Law Society. According to the Amendment Bill's Explanatory Memorandum, the Amendment's main purposes are:

- (a) to bring foreign lawyers, foreign law firms and associations between Hong Kong firms and foreign law firms within the regulatory structure of the [Legal Practitioners] Ordinance;
- (b) to revise the admission criteria for admission as a solicitor by providing for common residency requirements . . . regardless of citizenship; and providing power to the Council of the Law Society to make rules respecting the admission requirements for various categories of legal qualification and experience;
- (c) to grant powers to an inspector appointed by the Law Society to investigate the conduct of solicitors, foreign lawyers, employees of solicitors and foreign lawyers and trainee solicitors to verify compliance with the Ordinance and rules of conduct.⁶⁷

2. Bringing Foreign Lawyers Under the Regulatory Structure of the Legal Practitioners Ordinance

The Amendment Ordinance brings foreign lawyers and firms under the regulatory structure of the Legal Practitioners

66. Pursuant to the amended section 73(1) of the Legal Practitioners Ordinance, the Law Society Council is empowered to make rules regulating the admission, practice, conduct, and discipline of solicitors, foreign lawyers, foreign firms, associations, employees of solicitors and foreign lawyers, and trainee solicitors. Amendment Ordinance § 73(1), at A916-17. The Law Society has thus drafted Foreign Lawyers Registration Rules, Foreign Lawyers Practice Rules, and Overseas Lawyers (Qualification for Admission) Rules, discussed below.

67. Legal Practitioners (Amendment) Bill 1993, Explanatory Memorandum, at C468. Interestingly, the Law Society's 1991 Report also enumerated three similar goals, but the third of these enumerated purposes differs from that listed in (c) above. The Report's third goal was to "permit foreign law firms to establish Hong Kong law practices," a matter that the Amendment Bill does not directly address. Instead, a proposed amendment to the Solicitors Practice Rules raises the issue. Consequential Amendments, Solicitors Practice Rules (Cap. 159 sub. leg. H) (Sept. 5, 1994).

Ordinance by adding the terms "foreign lawyer," "foreign firm," and "association" throughout the Ordinance's provisions governing solicitors. The new terms are defined and amplified in a new section of the Ordinance devoted exclusively to foreign lawyers.⁶⁸ The Amendment Ordinance has an effective date of July 22, 1994, except for the new section devoted to foreign lawyers, which has an effective date of January 1, 1995.⁶⁹ The qualifications for registering as a foreign lawyer, a foreign firm, and an association are enumerated in the Foreign Lawyers Registration Rules.⁷⁰

a. "Foreign Lawyer," "Foreign Firm," and
"Association" Defined

Under the Amendment Ordinance, a "foreign lawyer" is defined as "a person who, not being a solicitor who holds a practising certificate or a barrister who holds a practising certificate, is qualified to practise foreign law."⁷¹ Thus, foreign legal consultants or foreign-licensed lawyers are simply called "foreign lawyers." This is a confusing use of terminology since the phrase "foreign lawyer" may evoke images of a lawyer who is not a Hong Kong citizen, but does not, on its face, explain whether the non-Hong Kong citizen is solely foreign-licensed, or whether she is also Hong Kong-licensed despite her non-Hong Kong citizenship status. Under the Amendment Ordinance, however, foreign lawyers who become qualified as Hong Kong-licensed solicitors shed their "foreign" label even if they remain citizens of a jurisdiction other than Hong Kong. This is analogous to lawyers who enter the United States as "foreign legal consultants," and while maintaining their non-U.S. citizenship, nevertheless become "New York lawyers" once they pass the New York state bar exam.

The Amendment Ordinance defines "foreign firm" as one "in which all of the partners who intend to practise in Hong Kong are foreign lawyers or the sole practitioner of which is a foreign lawyer; and that intends to have within two months after registration, a place of business in Hong Kong."⁷² Again, the terminol-

68. Amendment Ordinance, pt. IIIA: Foreign Lawyers and Foreign Firms, at A911.

69. Amendment Ordinance, (Commencement) Notice 1994, at B1753.

70. Foreign Lawyers Registration Rules (Cap. 159 sub. leg.) (Sept. 5, 1994) [hereinafter Registration Rules].

71. Amendment Ordinance § 39A(1), at A911.

72. Amendment Ordinance § 39B(1)(a),(b), at A912. Under the Registration Rules, the partners of a "foreign firm" are prohibited from offering or permitting to be offered to the public the services of any employee as a practitioner of foreign law unless that employee is a registered "foreign lawyer" or a solicitor who does not hold a current practising certificate. Registration Rules § 13(2)(a).

ogy is somewhat confusing. Baker & McKenzie, for instance, is registered as a "local firm" in Hong Kong (all of its partners are Hong Kong solicitors), but most Americans would initially assume it to be a foreign firm in Hong Kong since Baker & McKenzie is of U.S. origin. The Law Society has drafted regulations that would allow foreign firms to establish integrated Hong Kong practices upon meeting certain temporal and employment ratio requirements, to be discussed in Part II.C.5.c. Upon establishing an integrated "local practice," the foreign firm would lose its "foreign" label and become a local firm subject to the Solicitors Practice Rules since the draft regulations would require that at least one of the firm's partners be a local solicitor.⁷³

Finally, the Amendment Ordinance defines an "association" as a Hong Kong firm and one or more foreign firms that "have, or intend to have within two months after . . . registration [with the Law Society as an "association"] an agreement under which fees, profits, premises, management or employees are shared. . . ."⁷⁴

The Amendment Ordinance gives the Law Society official power to register foreign lawyers, foreign firms, and associations.⁷⁵ Only those firms or lawyers registered by the Law Society are defined as foreign lawyers, foreign firms, or associations.⁷⁶ Those who do not register, but who hold themselves out as foreign lawyers are guilty of an offense under the Ordinance and are subject to a HK\$500,000 fine.⁷⁷ Similarly, those who are not licensed Hong Kong solicitors but who hold themselves out as such are also guilty of an offense and are liable on summary conviction to a HK\$500,000 fine, as well as imprisonment of two years if they had carried on any suits or actions while holding themselves out as a solicitor.⁷⁸

However, under the Amendment Ordinance, a foreign lawyer who provides services on a business trip to Hong Kong through a registered firm on a merely short-term basis need not register individually as a foreign lawyer. Unregistered foreign lawyers who offer their services in Hong Kong through a registered foreign firm or a local Hong Kong firm are not guilty of an

73. Solicitors Practice Rules § 2A (promulgated in Registration Rules § 14, at B1958); FINAL REPORT, *supra* note 45, § F(2).

74. Amendment Ordinance § 39C, at A912.

75. *Id.* §§ 39A(1), 39B(1), at A911-12.

76. *Id.* § 2(1), at A901.

77. *Id.* § 50B(1),(5),(6). The fine is roughly equivalent to US\$62,000.

78. *Id.* § 34, at A912.

offense so long as they do not offer their services for more than three continuous months in any one-year period.⁷⁹

b. Qualifications for Registration as a Foreign Lawyer

The 1994 Foreign Lawyers Registration Rules ("Registration Rules") set forth the qualifications for applicants who wish to register as foreign lawyers or foreign firms.⁸⁰ Applicants are qualified for foreign lawyer status if they satisfy four basic prerequisites.

First, the applicant must be "a person of good standing in the foreign jurisdiction in which he is qualified to practise law."⁸¹ Second, the applicant must establish to the Law Society that "he is a fit and proper person to be so registered."⁸² Third, the applicant must produce documentary evidence of professional indemnity insurance "in a manner and to the extent similar to the indemnity provided to a solicitor under the fund established under section 3 of the Solicitors (Professional Indemnity) Rules (Cap. 159 sub. leg.)."⁸³ Finally, the applicant must have at least two years of full-time, post-qualification experience practicing the law of her home jurisdiction. The Law Society is given the discretion to determine on a case-by-case basis what experience can qualify as the "equivalent" of "two years of post-qualification experience."⁸⁴

If the applicant does not meet the experience requirement, she can still receive a certificate of registration, subject to the limitation that she shall not practice foreign law as an employee of a Hong Kong firm. The limitation applies unless she is super-

79. *Id.* § 50B(2), at A914. However, unregistered foreign lawyers who offer their services in a capacity other than as a practitioner in a registered foreign firm or Hong Kong firm are guilty of an offense regardless of how brief a period of time they offer such services. *Id.* § 50B(3), at A914.

80. Once applicants have registered as foreign lawyers, foreign firms, or associations, they receive certificates of registration, which must be renewed annually by May 15th of the year in which the certificate expires. Registration Rules § 10.

81. *Id.* § 3(a).

82. *Id.* § 3(b).

83. *Id.* §§ 4, 6(1). Contributions to the Solicitors Professional Indemnity Fund are calculated pursuant to Schedule 1 of the Solicitors (Professional Indemnity) Rules and include a base contribution, plus adjustments upward according to the lawyer/firms' annual gross fee income, number of principals, and number of associates, employees, and consultants. The base contribution is approximately HK\$20,000 (or roughly US\$2,500). For firms with gross annual fee incomes between, e.g., HK\$75 million and HK\$100 million, additional contributions entail at least 0.38% of gross fee income (subject to a maximum of HK\$310,000 or roughly US\$38,000). Solicitors (Professional Indemnity) Rules (Cap. 159 sub. leg. M), sched. 1, §§ 2(1)(a), 2(3) (1993). Failure by a foreign lawyer to maintain indemnity insurance once registered will result in suspension of the lawyer's registration certificate. Registration Rules § 6(1).

84. Registration Rules § 5(1),(3).

vised as an employee of a Hong Kong firm in such manner and for such period as the Law Society may specify, or unless and until she has completed such further period of full-time practice of foreign law as the Law Society may specify but not to exceed an aggregate period of two years total experience.⁸⁵

The above requirements are quite liberal when compared to, for example, the California foreign legal consultant rules.⁸⁶ California requires a similar showing of "good standing," as well as a requirement that the applicant "possess the good moral character requisite for a member of the bar of this state."⁸⁷ Furthermore, California requires that the applicant have practiced the law of his home jurisdiction for four of the past six years, compared to the Hong Kong two-year requirement.⁸⁸ The California rule, unlike Hong Kong's Registration Rules, is nondiscretionary. It does not authorize courts to consider equivalent experience that may satisfy the requirement. Finally, California requires proof of malpractice insurance, with a minimum coverage of US\$350,000.⁸⁹

In addition, Hong Kong imposes no reciprocity requirement. There is no requirement that an applicant for foreign lawyer status be allowed to register only if Hong Kong-licensed solicitors are given similar privileges in the applicant's home jurisdiction. New York and Japan both require some form of reciprocity.⁹⁰

c. Qualifications for Registration as a Foreign Firm

Hong Kong's Registration Rules also specify the requirements for registration as a foreign firm.⁹¹ There is no analog to these requirements under U.S. law. Under the Registration Rules, a branch of an overseas firm seeking registration as a foreign firm in Hong Kong must lawfully carry on the practice of law in its home jurisdiction. The Law Society also requires that

85. *Id.* § 5(3),(4).

86. CAL. R. CT. 988.

87. *Id.* Rule 988(c)(1)-(2).

88. *Id.* Rule 988(c)(1). Until 1994, New York required practice experience for five of the last seven years. In an effort to liberalize its Foreign Legal Consultant regime, New York now only requires practice experience for three of the last five years. N.Y. R. Ct. § 521.1(a)(2).

89. Security can be established through insurance, an escrow account, trust, or letter of credit and must cover each foreign legal consultant. Sandra Bodovitz, *California's Barriers for Foreign Attorneys are Tough, Too*, L.A. DAILY J. (Supp.), Feb. 11, 1991, at 18; see CAL. R. CT. 988(c)(3).

90. The New York rule allows the Court, "in its discretion," to take into account whether a New York-licensed lawyer would have a "reasonable and practical opportunity to establish an office" as a foreign legal consultant in the applicant's country. N.Y. R. Ct. § 521.1(b). Japan's reciprocity requirement is discussed in part III *infra*.

91. The term "foreign firm" includes "sole practitioners." Amendment Ordinance § 2(1), at A901. All foreign lawyers must register their foreign firms too.

the firm be in good standing in every jurisdiction in which the firm has engaged in the practice of law during the past five years.⁹² In addition, at least one of the firm's partners intending to practice in Hong Kong must (1) be stationed in the Hong Kong firm; (2) have been associated full-time with the firm for the immediately preceding year and have been associated with the firm for an additional year during the four-year period immediately preceding the last year; and (3) have five years of practice experience in her home jurisdiction.⁹³

Requiring the partner to have been associated with the firm for at least two years, including the immediately preceding year, is a potentially cumbersome barrier for lateral partners. On the other hand, the five-year experience requirement for the resident partner may not be overly onerous, as most partners have well in excess of five years of practice experience. The five-year experience requirement is presumably meant to ensure that at least one of the resident partners is well-known to the firm's other partners, and the partner is someone they trust to represent the firm in Hong Kong. Considering that only one of the resident partners in Hong Kong needs to fulfill the five-year experience requirement, while the firm's other Hong Kong-based partners and associates merely need to satisfy a two-year experience requirement, the scheme as a whole is probably not unduly restrictive.

The Hong Kong provisions seem better suited to meet the needs of international firms than the rules of New York or California. Under the Hong Kong rules, both experienced partners and less experienced associates can practice in the Hong Kong branch office, permitting a replication of the typical law firm partner-associate hierarchy. Firms are thus allowed to train younger associates overseas.⁹⁴ The California rules, on the other

92. Registration Rules § 7(1)(a)(i)-(ii).

93. *Id.* § 7(1)(a)(iii).

94. If the applicant firm is not a branch of an overseas firm then the following rules apply: (1) each of the resident partners must demonstrate to the Law Society that he is of good standing in his home jurisdiction and any other jurisdiction in which he has practiced within the past five years; (2) one of the resident partners must be of "substantial reputation" in his home jurisdiction or in a jurisdiction in which he has practiced that law during the past five years; and (3) each of the resident partners must have three years of practice experience. *Id.* § 7(1)(b). This rule is apparently aimed at firms that are not internationally known, "global" firms. While all of the partners must fulfill a three-year experience requirement, no individual partner needs to fulfill a five-year requirement, perhaps in recognition that the rules already require one of the partners to be of "substantial reputation" and the fact that such non-global firms will likely be involved in relatively smaller matters that may not require supervision by a partner with over five years of experience. A previous draft of this rule did require at least one of the resident partners to have over five years of experience, but apparently the drafters felt that such a requirement would be prohibitive.

hand, require *all* foreign legal consultants to have a minimum of four years' experience,⁹⁵ while New York requires three years.⁹⁶ This means that only partners and mid-level associates can work in foreign firms' U.S. branch offices. The New York and California rules aim at ensuring that all foreign legal consultants are experienced before they arrive in the United States, but fail to provide foreign associates with enough latitude to gain their experience in the United States, which in today's globalized setting is not necessarily a poorer training ground for the practice of the law of their home jurisdictions.

The Hong Kong rules allow the Law Society to exercise flexibility in applying these experience requirements by explicitly giving the Law Society the right to waive any of those requirements on a case-by-case basis.⁹⁷ Again, the analogous New York and California rules are more rigid and do not permit deviation from the listed requirements.

d. Qualifications for Registration as an Association

Under the Draft Registration Rules, foreign firms are not eligible to register in an association with more than one Hong Kong firm, unless the Law Society consents to such an arrangement.⁹⁸ Hong Kong firms may form associations with more than one foreign firm, as this might be useful to the local firm for expanding its global network by affiliating not only with a U.S. firm, for instance, but also with English, Australian, French, and German firms.⁹⁹

95. CAL. R. CT. 988(c)(1).

96. N.Y. R. CT. § 521.1(a)(2).

97. Registration Rules § 7(2). The Law Society envisions, for instance, that certain multi-jurisdictional firms and international partnerships may need case-by-case review. The Law Society has even stated that it would consider waiving the registration requirement altogether in certain cases, e.g. when a foreign lawyer is sent to the Hong Kong branch of an international firm for a short rotation of a few months. FINAL REPORT, *supra* note 45, § D.1.

98. Registration Rules § 8. The Rules presume either that there is no need for foreign firms to affiliate with more than one local firm, or that permitting such multiple associations would generally be undesirable. It is conceivable that a foreign firm would want to affiliate with several small, local "boutique" firms, each offering highly specialized expertise. The Rules provide the Law Society the discretion to permit such multiple associations on a case-by-case basis. In general, however, the Law Society seems concerned that associations between one foreign firm and several local firms would confuse the public. See FINAL REPORT, *supra* note 45, § E.3, 8.

99. Amendment Ordinance § 39C(1), at A912.

3. *Bringing Foreign Lawyers Under the Law Society's Professional Discipline Rules*

Once registered with the Law Society, foreign lawyers are subject to the Law Society's disciplinary rules.¹⁰⁰ Upon the filing of a complaint against a foreign lawyer, the Law Society's Solicitors Disciplinary Committee may conduct an investigation of the foreign lawyer.¹⁰¹ The Law Society Council may appoint an investigator to exercise prosecutorial powers, including the power to compel the foreign lawyer to produce all documents that the inspector "reasonably suspects to be relevant," either particularly or generally.¹⁰² The Law Society's enhanced inspection and discipline powers are not facially discriminatory against foreign lawyers: they apply to *all* lawyers in Hong Kong and are part of a general campaign to increase public confidence in the legal profession.¹⁰³

In addition to investigating a practitioner following a complaint, the Law Society is also authorized by the Amendment Ordinance to hold a hearing and to revoke, suspend, or impose conditions on a foreign lawyer's registration. Other penalties include ordered payment by the foreign lawyer of restitution to the complainant, payment of a penalty to the government not exceeding HK\$500,000, or censure of the foreign lawyer.¹⁰⁴

While such disciplinary power of the local bar association is not unusual,¹⁰⁵ the foreign lawyers face one major problem—they cannot become members of the Law Society because they are not Hong Kong-licensed solicitors. As a result, foreign lawyers have no representation in a professional organization whose members wield disciplinary powers over them and who generally perceive them as competitors.¹⁰⁶ However, the Law Society has included representatives of foreign firms in its rule-drafting process and does not appear to be blocking foreign lawyers from

100. *Id.* § 10(2)(bb), (h)-(m), at A906-07.

101. *Id.* § 8AA, at A904-05.

102. *Id.* § 8AA(1)-(2), at A904-05.

103. Law Society President Ambrose Lau stated that increased monitoring to insure that all practitioners were complying with the Legal Practitioners Ordinance "would be both intrusive and expensive but . . . would give the public more confidence." Other areas that are being reformed to enhance public confidence include increased malpractice insurance requirements and a compensation fund to protect clients who were defrauded by solicitors. *Barriers*, *supra* note 29.

104. Amendment Ordinance § 10(2)(bb), (h)-(m).

105. The ROC's foreign lawyer provisions are similar but the ROC requires that foreign lawyers become members of the local bar association. *See infra* part III.

106. As noted earlier, the Government's 1988 proposal would have given the court, rather than the potentially self-interested Law Society, the power to regulate the admission and discipline of foreign lawyers. Both New York and California use a judicially based foreign lawyer regulatory system.

representation entirely.¹⁰⁷ In addition, as more foreign-licensed lawyers opt to take the new Overseas Lawyers Qualification Examination, which will allow them to become Hong Kong-licensed solicitors,¹⁰⁸ more expatriate lawyers will be able to join the Law Society and influence its decision-making process.

Because of the Law Society's fear that automatic membership and voting rights for foreign lawyers would result in U.S. or PRC domination, it is unlikely that the Law Society will change its current membership policies. Both U.S. and PRC lobbying already influence the Law Society's actions even without official U.S. or PRC representation. Ironically, however, the situation of foreign lawyers vis-a-vis the Law Society today is somewhat analogous to the Law Society's situation vis-a-vis the Attorney General's Office in 1988. In both cases the governing bodies were in a position to make decisions affecting the livelihood of a group of professionals without having to consult the professionals being regulated.

The Law Society's current informal consultation with the foreign lawyers has apparently been sufficient to stem protest. However, the Law Society should probably move towards formalizing foreign lawyer representation in the Law Society, even if foreign firm members are merely there to "consult" and attend meetings but not to vote. Movement in the direction of formalization of foreign firm representation in the Law Society would mirror the beneficial formalization of other aspects of the foreign lawyer regulatory process and would provide a greater sense of process, participation, and predictability.

4. *Limits on the Scope of the Foreign Lawyer's Practice*

a. The "Practice of Hong Kong Law" Defined

Although they are registered to practice the law of their home jurisdiction, foreign lawyers and foreign firms are prohibited by the Legal Practitioners Ordinance from practicing Hong Kong law since only Hong Kong-licensed solicitors and their firms are permitted to do so.¹⁰⁹ The Registration Rules add an explicit definition of the "practice of [Hong Kong] law" to provide general guidance as to what foreign lawyers and firms may

107. S.Y. Yue, "Hired Gun" Fear for Law Firms, S. CHINA MORNING POST, Mar. 14, 1994, at 6, available in LEXIS, Asiapc Library, ALLASI File.

108. See *infra* part II.C.5.b.

109. Under the Legal Practitioners Ordinance and Amendment Ordinance, an "unqualified person" is defined as anyone who is not a solicitor. All unqualified persons are prohibited from acting or holding themselves out as solicitors, or performing various enumerated functions such as preparing certain legal instruments, papers, and so forth. Legal Practitioners Ordinance §§ 2(1), 44-48; Amendment Ordinance §§ 47-48.

not do.¹¹⁰ Using wording similar to that provided in the Law Society's 1991 Report, the Registration Rules state:

- (1) [A] foreign lawyer shall not provide or offer any legal service which, having regard to all the circumstances of the case, can properly be regarded as a service customarily provided by a solicitor in his capacity as such.
- (2) A foreign lawyer may give advice on or handle any matter which—
 - (a) is expected to be subject to the law of a jurisdiction other than Hong Kong; or
 - (b) involves private or public international law or conflict of laws.¹¹¹

Unfortunately, the above definition of the "practice of [Hong Kong] law" is extremely broad and is based on "custom" rather than on expertise. Professor Tan Yock Lin of the National University of Singapore has criticized Singapore's similar "custom"-based formulation of the "practice of law."¹¹² Professor Tan analyzed the case of *Turner (East Asia) Pte. Ltd. v. Builders Federal (Hong Kong) Ltd.*,¹¹³ in which the Singapore Supreme Court held that the U.S. firm of Debevoise & Plimpton could be enjoined from representing its client in arbitration proceedings in Singapore.¹¹⁴ The court stated that "an act is an act of an advo-

110. The pre-1994 Legal Practitioners Ordinance did not include such a definition. It merely listed certain specified functions that unqualified individuals could not perform.

111. Registration Rules § 12. The Law Society's 1991 Report would have gone further than the Draft Registration Rules and would have included, "without prejudice to" the general "custom"-based definition, an additional list of specific acts that foreign lawyers would be prohibited from performing, including the drafting of (or the taking of instructions or giving advice with respect to any matter which could potentially involve) any instrument that (a) is a will or testamentary instrument; (b) affects *inter vivos* transfers of property; (c) concerns a person's political or civil rights; (d) affects marital or custodial rights; (e) creates or affects any rights by way of contract, trust, or any other means; or (f) relates to an existing or prospective legal proceeding. FINAL REPORT, *supra* note 45, § B.2(a)-(b).

112. YOCK LIN TAN, THE LAW OF ADVOCATES AND SOLICITORS IN SINGAPORE AND WEST MALAYSIA 46-51 (1991).

113. 2 M.L.J. 280 (1988) (Sing.).

114. Although some Singaporean lawyers argued that the *Turner* holding should be construed narrowly and that it did not mean that foreign-licensed lawyers could never represent their clients in Singaporean arbitration proceedings, most lawyers and businesspeople began avoiding Singapore as an arbitration venue. Foreign-licensed lawyers began writing Singapore out of arbitration clauses because of the uncertainty engendered by *Turner*, and Singapore's arbitration business dropped precipitously, going to Kuala Lumpur and Hong Kong instead. This caused an uproar in the Singaporean legal and business community. *Singapore: Turner Case Instills Apprehension amongst Foreign Clients Regarding Arbitration*, EUROMONEY INT'L FIN. L. REV., Sept. 7, 1991, available in LEXIS, Asiapc Library, ALLASI File [hereinafter *Turner Case*]. *Singapore: Foreign Lawyers to be Admitted for Arbitrations*, BUS. TIMES (Sing.), July 30, 1991, available in LEXIS, Asiapc Library, ALLASI File. However, when the Singapore International Arbitration Centre ("SIAC") was established in 1991 as the Attorney General's "pet project," the Sin-

cate or solicitor when it is customarily (whether by history or tradition) within his exclusive function to provide."¹¹⁵ Representing a client at an arbitration proceeding was held to be a service customarily provided by solicitors and thus constituted the "practice of [Singapore] law," in which foreign-licensed lawyers are not permitted to engage. Professor Tan notes that a "custom"-based approach, while flexible enough to accommodate society's changing notions of "the practice of law," suffers from a lack of certainty. Professor Tan asks,

[a]t what point has a custom been established? Custom, being essentially backward-looking, seems ill-designed to cope with novel forays of the legal profession into hitherto unserved areas. It appears a little difficult therefore to see how reliance on custom can furnish a clear answer as to what is practice of law and what is not.¹¹⁶

Instead of turning to custom, Professor Tan suggests following an alternative approach fashioned by the Florida Supreme Court in the 1962 case of *State ex rel. Florida Bar v. Sperry*,¹¹⁷ and subsequently adopted by many common-law jurisdictions in the United States and the Commonwealth.¹¹⁸ *Sperry* acknowledges that "the practice of law" encompasses more than representation in court and can include the giving of legal advice and the preparation of various legal instruments that may never become the subject of court proceedings. As Professor Tan notes, *Sperry* proposes "a rule of law which requires satisfaction of two

gapore Legal Profession Act was amended to explicitly permit foreign-licensed lawyers to represent their clients in Singaporean arbitration proceedings. *Turner Case*, *supra*. Specifically, a new clause was added to the Singapore Legal Profession Act in July 1992, stating that "[f]or the avoidance of doubt, it is hereby declared that Sections 32 and 33 [which enumerate activities that 'unauthorized persons,' i.e., those not holding Singapore Practising Certificates, are prohibited from performing] shall not extend to" Singaporean arbitration proceedings in which foreign law governs. Statutes of the Republic of Singapore, Legal Profession Act (Cap. 161) § 34A(1)(a) (1994). Even in arbitrations where Singapore law governs, foreign-licensed lawyers will still be permitted to represent their clients, so long as they appear jointly with a Singaporean solicitor. *Id.* § 34A(1)(b). For the reactions of U.S. lawyers to the Singaporean arbitration amendments, see David Gabriel, *Singapore: Legal Professions Act Still has Limitations for Foreign Lawyers*, BUS. TIMES (Sing.), Apr. 29, 1992, available in LEXIS, Asiapc Library, ALLASI File (arguing that the arbitration reforms do not go far enough, and that foreign-licensed lawyers should be given the right to exclusively represent clients in Singaporean arbitration proceedings regardless of what law is applicable); Henrik Hansen, *Singapore: Small Opening for Foreign Lawyers?*, E. ASIAN EXECUTIVE REP., Sept. 15, 1991, at 6, available in LEXIS, Asiapc Library, ALLASI File (welcoming reforms but noting other barriers to foreign lawyers' scope of practice in Singapore).

115. 2 M.L.J. at 284.

116. TAN, *supra* note 112, at 50.

117. 140 So.2d 587 (Fla. 1962), *vacated on other grounds*, *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379 (1963).

118. TAN, *supra* note 112, at 48-49.

criteria, namely, that the act in question must be capable of affecting important rights of a person under law, and second, that the act itself must presuppose the possession of legal knowledge above that of an average person."¹¹⁹

The *Sperry* approach would bolster Hong Kong's position as a global economic center. *Sperry's* focus on "important rights" and "legal expertise" not only defines "practice of law" more precisely, it also narrows the definition to only those acts that a lawyer *should* have a monopoly on performing because of her expertise, thereby furthering the policy of protecting the public. Adopting the *Sperry* model would help to avoid conferring unnecessary monopolies on legal professionals in areas where the protection from incompetent legal services is not applicable. Application of the *Sperry* model would also reduce accusations that the local legal profession is protectionist and wants merely to safeguard certain traditional windfalls. If Hong Kong is serious about enhancing its reputation for free trade and its position as a global economic center, it should consider adopting the *Sperry* approach favored by Professor Tan.

b. Attorney-Client Privilege

The Amendment Ordinance also places certain explicit limits on foreign lawyers' practice of foreign law. Foreign lawyers, for instance, will enjoy attorney-client privilege only to the extent that the privilege exists between Hong Kong solicitors and their clients.¹²⁰ Foreign lawyers must, therefore, determine whether their home jurisdiction's attorney-client privilege rules are more or less liberal than Hong Kong's before relying on the privilege.

c. The Prohibition on Partnerships Between Foreign Lawyers and Local Solicitors

Foreign lawyers and foreign firms are further limited in the scope of their practices by the Amendment Ordinance's explicit prohibition against their employing or forming partnerships with solicitors or barristers who hold practising certificates.¹²¹ Thus, foreign firms can technically hire solicitors and barristers, but only those who are not holding practising certificates. As a result, lawyers that are qualified in both the United States and Hong Kong¹²² cannot be employed by foreign firms to practice Hong Kong law. Those foreign firms that become eligible to es-

119. *Id.* at 49.

120. Amendment Ordinance § 39A(2), at A911.

121. *Id.* § 50B(4), at A914.

122. For example, this includes some Hong Kong-born lawyers who are admitted in Hong Kong, and who also studied in the U.S. and passed a U.S. bar exam.

establish local Hong Kong law practices pursuant to the Consequential Amendments to the Solicitors Practise Rules,¹²³ however, will be able to employ both locally-licensed and foreign-licensed lawyers and to form integrated partnerships.¹²⁴

d. Lawyer Ratio Requirements

To prevent "domination" of local firms by foreign lawyers or foreign firms, the Registration Rules impose a ratio requirement under which the number of foreign lawyers shall not exceed the number of local solicitors in either (1) local firms¹²⁵ that have hired foreign lawyers as employees, associates, or consultants or (2) associations between local and foreign firms.¹²⁶ However, the 1:1 ratio of foreign lawyers to local solicitors can be adjusted to allow more foreign lawyers if the Law Society deems it appropriate in a particular case, thus providing a measure of flexibility that was not contemplated in the Law Society's 1991 Report.¹²⁷

The 1:1 ratio is a device unique to Hong Kong's scheme, as neither the U.S. jurisdictions, the United Kingdom, the ROC, nor Japan has imposed such a requirement. The 1:1 ratio requirement has been criticized for being overly mechanical, because other factors besides the absolute numerical balance of lawyers may influence the power dynamic in a law firm: for example, the respective lawyers' "rainmaking" abilities, financial clout, reputation, prestige, and leadership skills.¹²⁸ Nevertheless, the ratio requirement does guarantee one element of leverage for the local lawyers. If there is any merit to the fear of domination by U.S. or PRC lawyers, the ratio requirement might force the expatriate lawyers to become more familiar with the current Hong Kong style of practice among their own partners and associates, resulting in a greater likelihood of mutual cultural influence instead of unilateral influence by the foreign lawyers.¹²⁹

123. See *infra* part II.C.5.c.

124. FINAL REPORT, *supra* note 45, § F. The Amendment Ordinance explicitly allows local Hong Kong firms to employ foreign lawyers. Amendment Ordinance § 39D, at A912.

125. The term "local firms" includes those foreign firms that have converted to "local practices." Telephone Interview with Jonothan Abbott, Deputy Principal Crown Counsel, Hong Kong Attorney General's Chambers, Law Drafting Division (May 9, 1994).

126. Registration Rules § 13(1), (3)-(5). See also FINAL REPORT, *supra* note 45, §§ E.2, 7; F.2.

127. Registration Rules § 13(1), (3).

128. Conner, *supra* note 33.

129. While the ratio requirement imposes a "quota"—something that U.S.-style Affirmative Action does not do—the ratio requirement may create some of the same salutary, as well as detrimental, effects as Affirmative Action. If it is assumed that local solicitors will be at a disadvantage vis-à-vis the foreign lawyers, the ratio requirement will have the benefit of forcing firms to consider the number of local

As a practical matter, the ratio requirement should not be too onerous in the near term as the current number of foreign lawyers is far below the number of local solicitors in most associations. In the future, foreign lawyers who become locally-licensed through the Overseas Lawyers Qualification Examination will qualify as "local lawyers" for ratio purposes as well. Finally, if the ratio requirement seems particularly burdensome or inappropriate in a given case—for instance, in an integrated firm that focuses ninety percent of its work on U.S. securities law but that wishes to retain a small number of solicitors for the ten percent of the firm's work that involves local law—the Law Society is explicitly empowered to increase the number of foreign lawyers approved to work in the firm.¹³⁰ In light of Hong Kong's desire to maintain its reputation as a center of free trade, as well as its desire to comply with the General Agreement on Trade in Services ("GATS"), it is unlikely that the Law Society would be politically able to sustain a rigid policy of limiting the number of foreign lawyers by refusing to make case-by-case ratio adjustments.

e. Non-Lawyer Employee Ratio Requirements

The Foreign Lawyers Practice Rules¹³¹ ("Practice Rules") impose an additional ratio requirement on the foreign lawyer to ensure that she does not employ an excess number of assistants who are "unqualified persons" (i.e., persons who are not registered foreign lawyers). The Law Society imposes this requirement to prevent foreign firms from hiring so many assistants that the foreign lawyers cannot adequately supervise them and cannot properly oversee the legal work they are doing.¹³² Specifically, foreign firms cannot employ unqualified persons¹³³ in a number

solicitors to be a primary issue and will not let them ignore the concerns of the local profession. On the other hand, local solicitors might become viewed as "second-class," or the mere beneficiaries of a quota system, rather than as qualified lawyers whose numerical representation in every firm is important for the maintenance of the local legal culture.

130. Registration Rules § 13(1).

131. Foreign Lawyers Practice Rules [hereinafter Practice Rules].

132. Telephone Interview with Jonathan Abbott, Deputy Principal Crown Counsel, Hong Kong Attorney General's Chambers, Law Drafting Division (May 9, 1994).

133. For purposes of determining who is an unqualified person to be counted in the ratio calculation, the Practice Rules state that (1) persons who are technically not employees of the firm, but who are employees of a "service company" set up by the firm "for the purposes of the firm" will be counted in the ratio calculation; but (2) full-time law students working part-time (or full-time during vacations) will not be counted in the ratio calculation. Practice Rules § 8(2)(a)-(b).

greater than six plus eight times the number of resident principals and full-time foreign lawyers in the firm.¹³⁴

f. Sharing of Office Premises, Staff, Personnel, and Facilities

Under the Practice Rules, a foreign lawyer must conduct his practice "in self-contained premises, and shall have exclusive control over his staff and facilities."¹³⁵ However, subject to the restrictions of client confidentiality, a foreign lawyer may share with another foreign lawyer or a third party certain support services "reasonably regarded as those of an independent contractor."¹³⁶ In addition, a foreign lawyer is permitted to "share premises, personnel, and facilities with any other firm . . . [forming part of an] Association."¹³⁷

g. The Law Society's Power to Waive the Requirements of the Foreign Lawyers Practice Rules

It should be noted that "[t]he [Law Society] Council shall have power to waive in writing any of the provisions of [the Foreign Lawyers Practice] Rules in any particular case or cases, either unconditionally or subject to such conditions as the Council may think fit to impose."¹³⁸ Again, the Law Society has explicitly reserved its power to make case-by-case adjustments to provide flexibility to the otherwise rigid rules binding foreign lawyers.

5. *The Admission of Foreign-Licensed Lawyers to the Local Bar*

a. A Non-Discriminatory Residency Requirement for Foreign Applicants to the Hong Kong Bar

Besides addressing the regulatory structure for foreign-licensed lawyers to practice the law of their home jurisdiction, the Amendment Ordinance also reforms the process by which foreign-licensed lawyers can become locally-licensed Hong Kong solicitors. The Amendment Ordinance eliminates the Legal Practitioners Ordinance's discriminatory residency requirements for those foreign-licensed lawyers who wish to take the Overseas Lawyers Qualification Examination to be admitted as local solicitors. Under the Amendment Ordinance, an otherwise qualified applicant who satisfies *any* of the following four residency re-

134. *Id.* § 8(1).

135. *Id.* § 7(1).

136. *Id.* § 7(3)(a).

137. *Id.* § 7(3)(b).

138. *Id.* § 11.

quirements is eligible for admission, regardless of nationality or citizenship, so long as he:

- (a) has resided in Hong Kong for at least 3 months immediately before his admission; [or]
- (b) intends to reside in Hong Kong for at least 3 months immediately after his admission; [or]
- (c) has been ordinarily resident in Hong Kong for at least 7 years; or
- (d) has been present in Hong Kong for at least 180 days of each of at least 7 years.¹³⁹

Although requirements (c) and (d) appear to be somewhat redundant since requirements (a) and (b) are temporally so much easier to satisfy, the four alternative requirements are disjunctive rather than conjunctive.¹⁴⁰ As a result, an applicant for admission as a solicitor effectively faces only a three-month residency requirement. This is essentially the same residency requirement enjoyed by U.K. solicitors seeking admission as Hong Kong solicitors under the pre-1995 Ordinance.¹⁴¹ In order to comply with GATT/GATS principles, the Law Society and LegCo agreed to lower the residency requirement for all applicants to three months rather than to raise the requirement for all applicants to seven years.¹⁴² As a practical matter, it would no doubt have been difficult to strip U.K. lawyers of their current favorable residency requirement without political cost. In addition, raising every applicant's residency requirement would contravene the GATS core principle of reducing barriers to trade-in-services and would injure Hong Kong's reputation as a regional

139. Amendment Ordinance § 4(1A), at A902.

140. Telephone Interview with Albert P.W. Li, Clerk to the Bills Committee to Study the Legal Practitioners (Amendment) Bill 1993 (May 4, 1994). See also *Legal Practitioners (Amendment) Bill 1993*, Explanatory Memorandum (b), at C468.

141. Section 3(1AA)(a) of the *Legal Practitioners Ordinance*, required that a U.K. solicitor applying for a Hong Kong license must have resided in Hong Kong for at least three months immediately before his admission. *Legal Practitioners Ordinance* § 3(1AA)(a). The Amendment Ordinance liberalizes the three-month requirement by allowing for the three-month residency to occur *after* admission. Under section 4(d)(3) of the Amendment Ordinance, if a lawyer is admitted on condition that he or she reside in Hong Kong for three months immediately after his or her admission, but then fails to fulfill this condition, the Court may remove the person from the roll of solicitors upon application by the Law Society. Amendment Ordinance § 4(d)(3).

142. It may be questioned why Hong Kong should require any residency requirement for its local solicitors at all. The U.S. Supreme Court, for instance, has declared it unconstitutional for states to impose residency requirements for admission to state bars. *Supreme Ct. of N.H. v. Piper*, 470 U.S. 274 (1985). The Supreme Court also held that residency requirements are unconstitutional as a prerequisite for licensing under a reciprocal admissions rule (a rule which permits the admission of experienced, licensed lawyers from one state to the bar of another state pursuant to motion rather than bar examination). *Supreme Ct. of Va. v. Friedman*, 487 U.S. 59 (1988).

economic center, a consideration acknowledged as "important" to the Law Society in its 1991 Report.¹⁴³

b. The Overseas Lawyers Qualification Examination for Foreign-Licensed Lawyers to Be Admitted as Hong Kong Solicitors

The Overseas Lawyers (Qualification for Admission) Rules¹⁴⁴ ("Admission Rules") set out new, liberalized requirements for foreign-licensed lawyers to become Hong Kong-licensed solicitors. Under the Admission Rules, foreign-licensed lawyers receive "credit" for the legal education and experience they accrued in their home jurisdictions, expediting their admission as Hong Kong solicitors. Rather than having to fulfill all the educational and examination requirements to which Hong Kong applicants are subject, "qualified" foreign-licensed lawyers are permitted to sit for the Overseas Lawyers Qualification Examination ("Qualification Exam"), which tests their written knowledge of Hong Kong's conveyancing law, civil and criminal procedure, commercial and company law, and accounts and professional conduct.¹⁴⁵ The Qualification Exam also includes an oral test on the "Principles of Common Law."¹⁴⁶

The Admission Rules distinguish between lawyers from "common law jurisdictions" and those from "non-common law jurisdictions,"¹⁴⁷ and permit common law lawyers to "waive" many of the Qualification Exam's subjects.¹⁴⁸ Nevertheless, the

143. FINAL REPORT, *supra* note 45, § A.8.

144. Overseas Lawyers (Qualification for Admission) Rules (Cap. 159 sub. leg.) (Aug. 8, 1994) [hereinafter Admission Rules].

145. *Id.* § 7(1)(a).

146. *Id.* § 7(1)(b).

147. *Id.* §§ 2, 4-5. The Admission Rules define "common law jurisdiction" as "a jurisdiction in which the law is substantially based on the common law" and merely states that the term " 'non-common law jurisdiction' shall be construed accordingly." *Id.* § 1. The Admission Rules thus provide only a vague definition of "common law jurisdiction," which may need clarification in the case of a lawyer from, for example, the U.S. state of Louisiana. Such a lawyer would be licensed to practice Louisiana state law (which is based on French Civil Law), as well as U.S. Federal law. The Admission Rules' use of the term "substantially based" is particularly vague. Considering that the Admission Rules' procedures for "common law" lawyers are significantly simpler than those for "non-common law" lawyers who have less than five years of experience, the threshold categorization issue could be important for some applicants. *See Id.* § 5(2). For an interesting Philippine Supreme Court case discussing the definition of "jurisprudence based on the principles of the English common law", see *In re Shoop*, 41 Phil. Rep. 213 (1920). *See generally* RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* (5th ed. 1988).

148. It has been reported that U.K. lawyers will be exempted from the entire Overseas Lawyers Qualification Examination ("Qualification Exam"). Commonwealth lawyers will be partially exempt, but U.S. lawyers will ordinarily be required to take the entire test. Conner, *supra* note 29. Professor Alison Conner of the University of Hong Kong Law Faculty notes that the planned "waiver" for U.K. lawyers

Hong Kong scheme is open to all applicants, unlike the U.K.'s foreign lawyer qualification exam, which is only open to Commonwealth and European Union lawyers.¹⁴⁹

To become eligible to take the Qualification Exam, the applicant must apply to the Law Society for a "qualification certificate"¹⁵⁰ and must be an overseas lawyer of good standing in her home jurisdiction.¹⁵¹ If the Law Society determines that the applicant is "qualified," it will issue the certificate which enumerates all Qualification Exam subjects that the applicant will be required to pass. This certificate is valid for one year from the date of issue.¹⁵² An applicant must present a valid certificate in order to sit for the Qualification Exam.¹⁵³

There are two ways for a "qualified" applicant from a "common law jurisdiction" to become a Hong Kong solicitor, based on whether or not the applicant has five or more years of experience in the practice of law.¹⁵⁴ First, under section 4(1) of the Admission Rules, an applicant from a "common law jurisdiction" with at least five years of practice experience will be admitted as a solicitor if she has:

- (a) completed—
 - (i) a bachelor's degree in law; *or*
 - (ii) a course of study leading to a qualification which is substantially equivalent to that granted by a Hong Kong tertiary institution and in addition an examination equivalent to the Common Professional Examination Certificate of the University of Hong Kong; *or*
 - (iii) a period of not less than 5 years as a trainee solicitor or articled clerk, in the course of which, or in addition to

is due less to the similarity between Hong Kong and English law and more to residual, historical favoritism towards England. In fact, Hong Kong and English law differ substantially now, leading Professor Conner to suggest that the exemptions to the Qualification Exam should be based more on demonstrable similarities between legal systems than on atavistic notions of commonality. *Id.*

149. *Id.*

150. Admission Rules § 3(1).

151. *Id.* § 2.

152. *Id.* § 3(2)-(3).

153. *Id.* § 3(4).

154. The requirements for applicants from non-common law jurisdictions also differ according to whether or not the applicant has over five years of practice experience. Non-common law applicants with five or more years of experience can be admitted upon passing both the written Qualification Exam and the oral exam on the Principles of Common Law. *Id.* § 5(1). Applicants with less than five years of practice experience face a significantly more onerous set of requirements. They must (1) complete one year of full-time study in Contracts, Torts, Property, Criminal Law, Equity and Constitutional and Administrative Law; (2) complete the Hong Kong P.C.L.L.; (3) complete a period as a trainee solicitor or articled clerk in accordance with the requirements of his home jurisdiction, or possess not less than three years of post-admission experience in the practice of his home jurisdiction's law. *Id.* § 5(2).

which, the applicant must have completed courses in, or had practical experience in, Contract[s], Torts, Property, Criminal Law, Equity and Constitutional and Administrative Law or substantially similar subjects or areas; *or* (b) substantially completed the requirements set out in paragraph (a), and passed such other examinations as the Society may require in the particular case, *and* must also have passed the [Qualification] Examination in [Conveyancing, Commercial and Company Law, Accounts, and Professional Conduct].¹⁵⁵

Second, under section 4(2) of the Admission Rules, an applicant who has less than five years of practice experience in his home jurisdiction will be admitted as a solicitor if he has:

- (a) satisfied the requirements specified in subsection (1)(a) or
- (b) [above]; *and*
- (b) completed at least two years as a trainee solicitor or articulated clerk in that jurisdiction, *or* had not less than 2 years of post-admission experience in the practice of law, *or* has completed part of the period of service mentioned in subparagraph (i) [above] and had part of the period of experience mentioned in subparagraph (ii), and the aggregate of those periods is not less than 2 years, *and* must also have passed the [Qualification] Examination in all written subjects.¹⁵⁶

The Admission Rules thus require applicants from common law jurisdictions to satisfy three criteria: (1) practice experience; (2) educational qualification; and (3) passage of the written Qualification Exam.

Pursuant to section 4(2), an applicant with less than five years of practice experience can be admitted if she has "completed at least 2 years as a trainee solicitor . . . or had no less than 2 years post-admission experience in the practice of law." Hence, the Admission Rules impose only a two-year experience requirement on *all* applicants. In addition, all applicants face the same educational requirements. The only difference between the Admission Rules for applicants with less than five years experience is that those applicants must pass the Qualification Exam in *all* written subjects, while applicants with five or more years of experience are exempt from taking the examination in Hong Kong civil and criminal procedure.

The Admission Rules are a vast improvement over the pre-1995 system in which: (1) only U.K. lawyers could "waive" in without examination; (2) only a limited number of Commonwealth lawyers were admitted after taking certain Hong Kong courses and fulfilling certain practice requirements; and (3) very

155. *Id.* § 4(1) (emphasis added).

156. *Id.* § 4(2) (emphasis added). These requirements apply unless the Law Society "otherwise determines" on a case-by-case basis. *Id.*

little opportunity was given to American and other lawyers to be admitted, particularly in light of the onerous residency requirements to which they were subject.¹⁵⁷

The Admission Rules do not impose a reciprocity requirement to disqualify an applicant if her home jurisdiction does not offer Hong Kong solicitors a similar opportunity to be admitted to the local bar. Instead, the Admission Rules emphasize that “[i]n making a determination [regarding a foreign lawyer’s admission], the Society shall regard the nature and extent of the applicant’s practical experience in the law of Hong Kong and any academic or other qualification.”¹⁵⁸ Thus, although the Law Society is given broad power under the Admission Rules to prevent “unsuitable” applicants from taking the Qualification Exam or from being admitted as solicitors,¹⁵⁹ the Law Society is directed to conduct the admission process on the basis of experience and merit.

In any case, many more American and other foreign lawyers will finally have the chance to become Hong Kong solicitors. The result of this increase in opportunities to become local solicitors will be the overseas firms’ new ability to expand their practices in Hong Kong, as discussed in the next part.

c. Permitting Foreign Firms to Convert to Local Firms with Integrated Practices

The 1994 Consequential Amendment to the Solicitors Practice Rules (“Amended Solicitors Practice Rules”) will, for the first time, allow a foreign firm to engage in a local Hong Kong practice after meeting certain requirements. Considering the Law Society’s past rhetoric derogating the idea of partnerships between foreign and local firms, the changes to the Solicitors Practice Rules are revolutionary.

The Amended Solicitors Practice Rules provide for a somewhat complicated, four-stage metamorphosis of the foreign firm into a local firm. First, the scheme envisions that one or more partners in the foreign firm will take the Qualification Exam¹⁶⁰ to become a local solicitor.¹⁶¹ Second, the newly qualified solici-

157. Legal Practitioners Ordinance §§ 4(1)(a)(i), (ii), 3(1AB), 3(1AC), 3(1AD), 3(1AE).

158. Admission Rules § 6(1).

159. *Id.* § 10.

160. *See supra* part II.C.5.b.

161. Once the foreign lawyer passes the Qualification Exam, he will no longer be a foreign lawyer, but will be a “local solicitor.” However, as is the case with all newly admitted Hong Kong solicitors, he will hold only a “conditional practising certificate”—one that requires that he gain two years of work experience in the employ of an experienced solicitor before being allowed to practice on his own ac-

tor(s) will leave the foreign firm, since foreign firms will not be allowed to employ solicitors holding practising certificates.¹⁶² Third, the newly qualified solicitor(s), who will hold "conditional practising certificates," will be required to work for two years under the supervision of experienced solicitors in order to qualify for "unconditional practising certificates," the certification that will allow them to establish their own local firm.¹⁶³ Fourth, the solicitors, upon obtaining "unconditional practising certificates," will establish their own local firm. At this point, the new local firm can take the name of the foreign firm subject to (1) the closing of the foreign firm *qua* foreign firm and the consolidation of the firm under the local firm's aegis; and (2) the fulfillment of the requirements enumerated in the Amended Solicitors Practice Rules.¹⁶⁴

The Amended Solicitors Practice Rules will only allow a new local firm to take on the name of an overseas firm in the capacity of a branch of the overseas firm if:

(i) for the period of 3 years immediately preceding the establishing of the [local] Hong Kong firm, there had been a [registered] foreign firm of the same name practising or advising on the law of a foreign jurisdiction; [and]

(ii) at least one of the principals of the [local] Hong Kong firm is a partner in the overseas firm; [and]

(iii) one of the principals of the Hong Kong firm had, for not less than 3 years during the 5 years immediately preceding the establishing of the firm, been a partner in, or a consultant to, or employed by, the foreign firm referred to in subparagraph (i) or the overseas firm.¹⁶⁵

Each of the three requirements above is meant to address the issue of the "foreign firm's" stake or long-term commitment to Hong Kong. Subparagraph (i) aims to ensure that overseas firms cannot simply lend their names to extant local firms. Law Society Secretary-General Patrick Moss has stated that "[t]hose [overseas] firms which lend out their names would only have minimal interest in the Hong Kong practice but it would appear to the public that they have a substantial relationship with the Hong Kong firms. We want to prevent people from being misled."¹⁶⁶ As a result, the rule requires that before the name of an overseas firm can be used by a local Hong Kong firm, the overseas firm must have first demonstrated its commitment to the ter-

count (as a sole practitioner) or as a partner in a local firm. Legal Practitioners Ordinance § 6.

162. Amendment Ordinance § 50B(4), at A914.

163. Legal Practitioners Ordinance § 6.

164. Solicitors Practice Rules § 2A(aa).

165. *Id.* (emphasis added).

166. Yue, *supra* note 107.

ritory by having registered and practiced as a foreign firm in Hong Kong for three years.

In addition, the Law Society wanted to ensure that the overseas parent firm would continue to be committed financially to the local Hong Kong branch. Subparagraph (ii) thus requires that one of the local firm's lawyers be a partner in the overseas firm. The debts of the local firm then become the debts of the parent firm.

Finally, to insure that the overseas firm is familiar with the local firm's lawyers before it can lend its name to the lawyers in the new "local" practice, the Amended Solicitors Rules require some continuity in the staff of the old foreign firm and the new local firm. Thus, at least one of the partners in the new local firm must have been employed by the old foreign firm or the overseas firm for at least three of the five years immediately preceding establishment of the new local firm.

Finalization of the Amendment Ordinance and its attendant Rules was stalled in LegCo for several months in 1994 because the Law Society and representatives of the foreign firms disagreed over the three-year rule outlined above in subparagraph (i). At least one foreign lawyer suggested that the Law Society follow the system currently applicable to international accounting firms.¹⁶⁷ Following this suggestion would have meant eliminating the three-year requirement for law firms if the overseas parent firm "is supporting the [resident Hong Kong] partner as truly part of the international practice . . . since the parent company would be financially responsible for the practice in Hong Kong."¹⁶⁸

It appears that the Law Society's conservative stance is aimed more at slowing the potential influx of overseas firms offering integrated practices under prestigious, internationally known firm names than at any real danger that these firms are merely lending their names to dubious local firms. The overseas firms that have names and reputations worth lending have names and reputations worth protecting as well, and such firms would probably not lend their names out casually. Requiring these

167. The "Big Six" international accounting firms have expanded to all parts of the globe. KPMG Peat Marwick alone had offices in 123 countries in 1991, compared to the most "international" law firm in the world, Baker & McKenzie, which only had offices in 29 countries. *Singapore: Lawyers without Borders Face Wall of Conservatism*, BUS. TIMES (Sing.), Oct. 9, 1991, available in LEXIS, Asiapc Library, ALLASI File. The international accounting firms have not only globalized, they have diversified to provide service in consulting as well as law. *Singapore: Time to Reform and Rethink for Singapore's Lawyers*, EUROMONEY INT'L FIN. L. REV., Mar. 2, 1991, available in LEXIS, Asiapc Library, ALLASI File [hereinafter *Time to Reform*]; see also Cooke, *supra* note 62.

168. Yue, *supra* note 107.

firms to expend enormous amounts of capital and resources to establish a foreign firm merely to fulfill the three-year requirement appears overly rigid. The foreign firm would be forced to offer non-integrated service for three years before embarking on an integrated practice, which may not be an economically viable plan for some firms.

Even the foreign firms already in Hong Kong will be forced to wait three years before establishing local practices because the foreign firm registration structure has only been in effect since January 1, 1995.¹⁶⁹ It is hoped that in the future, the Law Society will at least add a provision providing for case-by-case waivers of the three-year requirement for foreign firms that have already demonstrated their long-term commitment to Hong Kong and their familiarity with local solicitors.

D. HONG KONG'S REFORMS IN PERSPECTIVE

While some foreign lawyers and other observers have criticized Hong Kong's seemingly slow progress towards reforming its foreign lawyer regime,¹⁷⁰ the 1994 reforms appear promising. While it is true that Hong Kong's new, comprehensive foreign lawyer system will not be as liberal as New York's in terms of permitting immediate creation of fully integrated foreign firms, Hong Kong's provisions must be viewed in cultural perspective and in comparison to those of its neighbors in East Asia.

It would be unrealistic, and perhaps unfair, to criticize Hong Kong for maintaining more safeguards than many U.S. jurisdictions against an influx of foreign lawyers. Hong Kong is small, and while its legal profession is quite sophisticated, it could be dominated by the more powerful U.S. megafirms or eventually by the growing PRC firms. There are already a large number of powerful foreign firms in the territory despite its presently restrictive system.

Hong Kong has chosen, however, to liberalize its provisions. The decision to reform is in itself laudable, especially when compared to Singapore's opposite tack. Singapore shares Hong Kong's British colonial heritage and common law legal tradition,

169. Amendment Ordinance, (Commencement) Notice 1994, at B1753.

170. See, e.g., Owen Hughes, *Hong Kong: Warning by Australian Legal Firms*, S. CHINA MORNING POST, Sept. 27, 1990, at 3, available in LEXIS, Asiapc Library, ALLASI File (reporting the protests lodged by Australian law firms and the Australian Chamber of Commerce over Hong Kong's restrictive foreign lawyer schemes); Wong, *supra* note 44 (quoting Jerome Cohen of Paul Weiss in his criticism of the fee-sharing "association" scheme); *Hong Kong: Competition Healthy, Even for Lawyers*, S. CHINA MORNING POST, July 22, 1990, at 12, available in LEXIS, Asiapc Library, ALLASI File (criticizing Hong Kong's slowness in adopting reforms that even the conservative U.K. has enacted).

as well as its excellent infrastructure, sophisticated, English-speaking population, and convenient geographical location. Singapore often competes with Hong Kong for trade, business, and the prestige of being one of the region's top financial and commercial centers. However, Singapore has affirmatively eschewed reform of its foreign lawyer regime after a brief period of experimentation in the 1980s, when it allowed the English firm of Freshfields to establish an integrated practice, but then re-trenched and revoked the firm's license.¹⁷¹ Now Singapore is on the U.S. Trade Representative's list of nations that impose trade-in-service barriers in the legal services sector.¹⁷²

Singapore maintains a foreign lawyer system very much like Hong Kong's pre-1995 regime, with a ban on foreign lawyers' forming partnerships or employing Singaporean solicitors¹⁷³ and with an informal approval process¹⁷⁴ that requires foreign firms to sign restrictive undertakings prior to being issued Immigration Department work permits.¹⁷⁵ Singapore also makes it virtually impossible for non-Commonwealth foreign-licensed lawyers to

171. In 1980, Singapore's government made a big push to promote the Republic as a regional financial center. *Admitted to Aid*, *supra* note 15. To aid in that effort, the government granted the London firm of Freshfields a license to practice local as well as foreign law. Freshfields was the sole foreign firm to receive such a license under a government "experiment" with liberalization of the legal services sector. Freshfields' partners were given expedited admission to the local bar, and the firm quickly built up a successful integrated practice. Freshfields' presence reportedly resulted in Singapore's acquiring some otherwise Hong Kong-bound business, and apparently did help local lawyers increase the sophistication of their practices. *Freshfields Singapore Problems*, *supra* note 15, at 6-7. However, in 1986, the government revoked Freshfields' local license, reportedly due to both a leaked, internal firm memo that disparaged the quality of Singaporean lawyers, and a desire to treat all foreign firms equally. *Id.* See also *Freshfields, the Only Foreign Law Firm Allowed to Practice Law in the Singapore Jurisdiction, Has Been Told by the Authorities That It Can No Longer Do So*, *BUS. TIMES (Sing.)*, Oct. 17, 1986, at 16; *Freshfields Barred from Practicing Local Law*, *JUI PRESS TICKER SERVICE*, Oct. 17, 1986, available in LEXIS, Asiapc Library, ALLASI File; *London Law Firm Freshfields, the Only Foreign Firm in Singapore Licensed to Practise Local Law There, Has Had That License Withdrawn by the Singaporean Authorities*, *EUROMONEY INT'L FIN. L. REV.*, Nov. 10, 1986, at 2.

172. OFFICE OF THE U.S. TRADE REPRESENTATIVE, NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 230 (1993). Singapore has been listed in the National Trade Estimate Report for its restrictive foreign lawyer regulations since 1991.

173. *Time to Reform*, *supra* note 167.

174. However, Singapore's Attorney General's Office, rather than its Law Society, supervises the foreign firm approval process. Ramesh Divyanathan, *Foreign Lawyer Said to be Under Probe for Dabbling in Singapore Law*, *BUS. TIMES (Sing.)*, Sept. 9, 1993, at 21, available in LEXIS, Asiapc Library, ALLASI File.

175. *Singapore—Country Marketing Plan '90*, 1991 NAT'L TRADE DATA BANK MARKET REP., June 11, 1991, available in LEXIS, Asiapc Library, ALLASI File.

become Singapore-licensed solicitors.¹⁷⁶ Singapore does not plan to liberalize entry to the jurisdiction by foreign lawyers; its latest government report on the legal profession did not consider lifting the ban on the ability of foreign firms to practice local law, and recommended a significant reduction in the number of locally-licensed solicitors over the next two decades.¹⁷⁷ Although the Singaporean government is actively reforming other aspects of its legal system¹⁷⁸ and encouraging the domestic legal profession to "go regional" by branching into other jurisdictions,¹⁷⁹ it is not permitting foreign firms to expand their scope of practice in Singapore.

Hong Kong has taken a different path—one that will no doubt enhance its reputation as a regional center of free trade and commercial activity. Although it has taken more than four years of long negotiation and struggle, Hong Kong has put into place a foreign lawyer regime that can only be rivaled in the region by the very different, but quite liberal, ROC system. Ironically, however, just as Hong Kong has liberalized its foreign lawyer regime, the ROC may be poised to restrict its current system.

III. THE REPUBLIC OF CHINA ON TAIWAN

Like Hong Kong, the ROC has been grappling with the foreign lawyer issue for the past several years and has been contemplating a comprehensive new system for regulating foreign lawyers. The discussion below describes the pre-1992 environment for foreign lawyers in the ROC, the Taipei Bar Association's restrictive 1992 Proposed Foreign Lawyers Law, and the 1992 Amended Lawyers Law that was actually enacted in lieu of

176. See Statutes of the Republic of Singapore, Legal Profession Act (Cap. 161) §§ 11-21 (1994).

177. COMMITTEE, *supra* note 12, at i-iv, 25-26, 27-36, 51-58. The Report even recommended a two-year phase-out of the current provisions that allow Hong Kong solicitors to enjoy expedited admission to the Singapore bar. *Id.* at 55. This recommendation has already been enacted into law. Singapore Legal Profession Act (Cap. 161) § 16(7) (1994).

178. The government is promoting reforms in docket management, professional indemnity coverage, legal education requirements, law firm management and organization, and publicity rules. Divyanathan, *supra* note 174; Warren Fernandez, *Go Regional and Form Bigger Firms, Jaya Challenges Lawyers*, STRAITS TIMES, Oct. 10, 1993, at 1; David Gabriel, *Singapore: Year of Change for the Legal Profession*, BUS. TIMES (Sing.), Jan. 29, 1992, available in LEXIS, Asiapc Library, ALLASI File; Wee, *supra* note 14.

179. Senior Minister Lee Kuan Yew and Law Minister S. Jayakumar have exhorted local solicitors to form larger law firms and to branch into overseas markets. Caroline Chan, *Go Regional and Support New Business Openings, Lawyers Told*, STRAITS TIMES, Sept. 10, 1992, available in LEXIS, Asiapc Library, ALLASI File; *Time to Reform*, *supra* note 167.

the Taipei Bar Association's draft law. Despite its temporary shelving in 1992, the draft Foreign Lawyers Law remains salient today because, in 1994, the ROC National Bar Association submitted a substantially unrevised version of the draft law for reconsideration by the Ministry of Justice. The Ministry of Justice hopes to introduce a comprehensive foreign lawyers bill in the Legislative Yuan as part of the ROC's bid to gain admission to the World Trade Organization and GATT. Finally, this Article provides a brief glimpse of the American Chamber of Commerce's draft counterproposal to the National Bar Association's Foreign Lawyers Law and analyzes the competing regulatory models that the ROC is now contemplating.

A. FOREIGN LAW FIRMS IN TAIWAN BEFORE 1992

1. *The Pre-1991 Era: Few Restrictions and Fast Expansion for Foreign Legal Consultants and Their Firms*¹⁸⁰

The ROC attracted many U.S. firms in the 1980s not only because Taiwan was a burgeoning center of economic activity, but also because it had some of the least restrictive foreign lawyer regulations in Asia. Unlike Japan (and Hong Kong, prior to its 1994 reforms),¹⁸¹ the ROC did not explicitly prohibit foreign firms from "cooperating"¹⁸² with local firms to form de facto "partnerships."¹⁸³ Thus, in Taiwan, firms like Baker & McKenzie

180. Part III of this Article cites various interviews conducted with foreign-licensed lawyers, ROC-licensed lawyers, and other ROC and non-ROC nationals in the legal services sector in Taiwan. As most of the interviewees requested anonymity, this Article does not refer to them by name in the footnotes below, but will specify their nationality and whether they are foreign-licensed or locally licensed.

181. In the late 1980s, Japan strictly prohibited revenue-sharing partnership arrangements between Japanese lawyers and foreign-licensed lawyers and also prevented foreign-licensed lawyers from employing Japanese lawyers or quasi-legal professionals. Richard H. Wohl, *Operating Under Japan's Foreign Lawyers Law; Japan's System for Governing Foreign Lawyers*, E. ASIAN EXECUTIVE REP., Aug. 15, 1990, at 9, available in LEXIS, Asiapc Library, ALLASI File. As discussed in part II of this Article, Hong Kong had a relatively restrictive foreign lawyer system until January 1, 1995.

182. Many foreign firms "cooperate" with local firms by setting up "consulting companies" in Taiwan that work in conjunction with local firms. The local firm may in turn license the use of the foreign firm's service mark. While the consulting companies remain technically separate from the local firm, their staffs and offices function as though they were one entity.

183. For instance, Chicago-based Baker & McKenzie set up "consulting companies" to work in a de facto partnership with a local law firm (whose Chinese name is "International Trade Law Offices"). Baker and the local firm were united in one office and the Chinese firm took on the English name "Baker & McKenzie" on its signs, letterhead, and business cards. This way, both Baker and the Chinese firm could maintain the "goodwill" associated with their respective names. Because the firm's English name was simply "Baker & McKenzie," foreign clients would understand the Taiwan office to be a fully-integrated "branch" of the American firm, in-

could offer "full-service" to their clients by providing ROC-licensed attorneys, who could advise on ROC law, as well as foreign-licensed attorneys, who could consult on foreign law. To facilitate out-bound deals, foreign firms could also set up operations as consulting companies pursuant to the ROC Company Law and Employment Service Act. Finally, several Taipei firms such as Lee & Li, Ding & Ding, and Huang & Partners, also hired foreign-licensed lawyers on an individual basis as "in-house consultants."

2. Admission of Foreign Lawyers to the ROC Bar

On the other hand, the ROC does not offer foreign lawyers a system to obtain a license to practice local law via an expedited bar admission process. Because the ROC's legal system is derived from a Continental European civil law model, and because the official language of its laws is Chinese,¹⁸⁴ the ROC is not well suited to provide such an accreditation program for U.S. lawyers. The language barrier, in particular, has made it unfeasible for most expatriate lawyers to take the ROC bar exam. Accordingly, the remainder of this Article focuses on the issue that has occupied the minds of most foreign-licensed lawyers in Taiwan: how to legally establish themselves as foreign legal consultants in full-service, integrated law firms serving an international business clientele.

B. TENSION WITH THE LOCAL BAR

The influx of non-ROC-licensed lawyers into the ROC legal market in the late 1980s and early 1990s caused a complex set of tensions to develop within the local bar.¹⁸⁵ Because there were

stead of an unfamiliar "affiliated," "associated" or "hybrid" foreign office. (In light of the Amended Lawyers Law discussed below, it appears that the U.S.-licensed Baker & McKenzie lawyers have now formally become "employees," rather than "partners," of the Chinese firm). Contrast the de facto partnerships that were possible in Taiwan in the 1980s with the Japanese law that prohibits foreign firms from merging with Japanese firms, and which (until recently) prohibited those foreign firms with branch offices in Japan from using their firm names, requiring them to use the names of the individual lawyers staffing the office instead. The Japanese restriction on the use of a firm's name was only eliminated in 1994-95. Donald L. Morgan, *Regulation of Foreign Lawyers: Modest Changes to be Made*, E. ASIAN EXECUTIVE REP., June 15, 1994, available in LEXIS, Asiapc Library, ALLASI File.

184. See generally TRADE AND INVESTMENT IN TAIWAN: THE LEGAL AND ECONOMIC ENVIRONMENT IN THE REPUBLIC OF CHINA 1-53 (Herbert H.P. Ma ed., 2d ed. 1985).

185. It has been reported that foreign firms were causing tension by successfully competing for the relatively few young attorneys who were able to pass the rigorous ROC bar exam in any given year. Samantha Swiss, *Taiwan: Taiwan's About Face on Foreign Lawyers*, *Euromoney Int'l Fin. L. Rev.*, Sept. 7, 1991, available in LEXIS, Asiapc Library, ALLASI File. Prior to 1989, there were relatively few licensed law-

conflicts between different factions of the local bar, and because there remains uncertainty as to the perspectives of individual bar members, it is difficult to describe the position of the "local bar" as a whole towards the diverse community of non-ROC-licensed practitioners. However, five general issues seem to have influenced the drafting of the Foreign Lawyers Law.

1. Maintaining Professionalism and Stemming the "Back Door" Practice of ROC Law

The drafters of the Foreign Lawyers Law first targeted the problem of maintaining a proper level of professionalism in the legal market in the face of a growing class of non-ROC-licensed individuals who were in fact practicing ROC law.¹⁸⁶ This problem centered not so much on the influx of foreign-licensed *non-ROC* nationals in the legal market, but on the increasing number of foreign-licensed *ROC nationals* in the market. Indeed, some ROC nationals had started to take a "back door" into the Taiwan legal profession after failing the ROC bar exam. Some young ROC nationals who have extremely impressive academic creden-

yers available in the job market in any given year because the local bar associations had jealously guarded entry into their ranks by pressuring the Government to keep bar exam pass rates capped at one to two percent per year. Telephone Interview with ROC-licensed lawyer (May 6, 1993) (notes on file with author). While only ROC-licensed lawyers could legally litigate, and some firms' litigation departments may have become short-staffed, many successful corporate and patent practices were built by licensed lawyers who hired staffs of unlicensed "legal assistants" (ROC LL.B. degree holders who did not (yet) pass the bar) because such firms did not depend on having a full staff of licensed lawyers. Telephone Interview with foreign-licensed lawyer in Taipei (May 24, 1993) (notes on file with author). In addition, the only foreign firm that really has a significant staff of ROC-licensed lawyers is Baker & McKenzie; the others do not hire large numbers of local lawyers. According to Martindale-Hubbell's 1994 Directory listings, none of the approximately fifteen foreign firms in Taiwan has more than four ROC-licensed attorneys on their payrolls (seven of the fifteen firms have no ROC-licensed lawyers), except Baker & McKenzie, which has roughly fifteen ROC-licensed lawyers. In any case, after 1989, pass rates for the bar examination were increased so that approximately fifteen percent of exam-takers could be admitted every year, ameliorating any shortage of litigators that may have existed. Telephone Interview with foreign-licensed lawyer in Taipei (May 24, 1993) (notes on file with author). Also, pursuant to article 3 of the Lawyers Law (1992), lawyers can be licensed without passing the bar exam if they have relevant experience as ROC judges or district attorneys (who must pass their own qualifying examinations) or if they hold an ROC LL.B. degree and have taught for two or more years as a full professor or for three or more years as an associate professor in an ROC university's law faculty.

186. Increasing the "professionalism" and ethical standards of the ROC bar was one of the major concerns for M.S. Lin and Huang Chiao-fann, who were instrumental in the drafting of the proposed Foreign Lawyers Law, and whose firm, Taiwan International Patent & Law Office ("TIPLo") is known for its advocacy of higher ethics in law for the ROC bar. Correspondence with ROC law firm in Taipei (May 4, 1993); Telephone Interview with foreign-licensed lawyer in Taipei (May 24, 1993) (notes on file with author).

tials but who may not have scored well on the subjective and politicized bar exam,¹⁸⁷ have been earning Master of Laws ("LL.M."), Juris Doctor ("J.D."), or Doctor of Juridical Science ("S.J.D.") degrees at U.S. law schools. These ROC nationals pass the U.S. bar exams and return to the ROC as "foreign legal consultants" for local law firms, thereby attaining de facto "lawyer" status while circumventing the local bar requirements.¹⁸⁸ Even more alarming to some members of the local bar, these foreign legal consultants often do not limit their advice to foreign matters but instead practice ROC law. Many foreign legal consultants hold ROC Bachelor of Laws ("LL.B.") degrees and consider themselves qualified to practice even if they had never passed the ROC bar.¹⁸⁹ To many local bar members, however, the "back door" practitioners pose a threat to continued respect for the ROC bar examination requirement and to the integrity and professionalism of licensed ROC lawyers.¹⁹⁰

187. One ROC attorney who passed the bar exam on his second attempt indicated in an interview that since exam questions are both written and graded by an elite group of ROC legal scholars, exam-takers must master the art of determining which legal scholar has drafted a particular question on the exam and tailoring their answers so that they parallel the analysis found in that scholar's treatise. Overall, the attorney compared the answers required on the bar exam to the "eight-legged essays" written for the dynastic civil service examinations. He also noted that the bar exam continues to have the ubiquitous San Min Chu I Section, which appears on high school and university entrance exams as well, and which tests one's knowledge of Sun Yat-sen's (and the ruling KMT's) political doctrine, the Three Principles of the People.

188. The Japanese bar has used the fear of this type of situation to justify its stringent rules governing foreign-licensed lawyers. Michael McAbee, *Foreign Lawyers Law Faces Review*, E. ASIAN EXECUTIVE REP., Feb. 15, 1990, available in LEXIS, Asiapc Library, ALLASI File. See also Mark J. Ramseyer, *Lawyers, Foreign Lawyers, and Lawyer-Substitutes: the Market for Regulation in Japan*, 27 HARV. INT'L L.J. 499-539 (1986); Wohl, *Operating under Japan's Foreign Lawyers Law; Part II: Issues and Outlook*, E. ASIAN EXECUTIVE REP., Aug. 15, 1990, at 15, available in LEXIS, Asiapc Library, ALLASI File. It should also be noted that an older generation of foreign-licensed ROC nationals—who are now powerful partners in major ROC law firms—also exists. Although they did not necessarily seek foreign licenses for the same reasons as the younger generation, their very existence and stature subtly legitimates the route of the younger generation of foreign-licensed ROC nationals.

189. There is also a small number of foreign-licensed ROC nationals who attended both college and law school overseas and who therefore do not even hold ROC LL.B. degrees. On the other hand, their fluency in Chinese often leads them to believe that they can analyze and advise on Chinese law.

190. Another threat to the professionalism of the ROC legal services community comes from wholly unlicensed ROC nationals who are dispensing legal advice. Such individuals include experts in engineering, accounting, and business who are advising clients in specialized areas such as shipping law and patent law, serving as foreign investment or patent filing agents, or even providing opinions on the ROC Company Law. The measures in the amended Lawyers Law (1992) criminalizing practice by unlicensed individuals were in large part aimed at these people. Telephone Inter-

2. *The Internal Politics of the Taipei Bar Association*

The second problem that faced the local bar centered on the bar's internal politics and the changing power structure within the ROC. Since 1990, the Taipei Bar Association has felt the strong presence of several leading Democratic Progressive Party ("DPP") members¹⁹¹ who have opposed the hegemony of more conservative firms such as Ding & Ding, Tsar & Tsai, and, in particular, Lee & Li. The traditional firms have ties to the ruling faction of the Kuomintang Party ("KMT") and are seen by some local bar members as overly influenced by foreign interests.¹⁹² These traditional firms were not only led by many non-ROC-licensed lawyers, they are also the prime employers of the new generation of foreign-licensed ROC nationals, and were thus targeted by some local bar members as part of a "reform effort."

3. *Protecting Both the Local Bar's Economic Interests and the Public's Welfare*

A third concern may have been a desire to monitor the fast expansion of foreign firms in the Taiwan market. Consistent with the ROC government's general desire to control the community of non-ROC nationals working in business and trade in Taiwan,¹⁹³ the local bar undoubtedly wanted a say in defining more

view with foreign-licensed lawyer in Taipei (May 24, 1993) (notes on file with author).

191. The rise of DPP members in the local bar has been described as meritocratic by some and has been likened to a "coup" by others. Telephone Interview with foreign-licensed lawyer in Taipei (May 24, 1993) (notes on file with author); Telephone Interview with ROC-licensed lawyer (May 6, 1993) (notes on file with author).

192. Lee & Li's managing partner, C.V. Chen, is a prominent KMT member and headed the Straits Exchange Foundation, which has been building closer ties between Taiwan and Mainland China. Lee & Li has a staff of primarily U.S.-educated (and non-ROC admitted) attorneys: less than half of Lee & Li's attorneys in 1994 were admitted in Taiwan. Ding & Ding's powerful Mow-sung Ding is from Mainland China and is admitted in England, New York, and California—but not Taiwan. Meanwhile, Tsar & Tsai's late, name partner, Ruchin Tsar, was also a mainlander. He was Secretary of the Ministry of Communications under Chiang Kai-shek's Nanking government and had strong ties to Shanghai's British and French corporate community. Paul C. Tsai was extremely active in the KMT government, holding many subcabinet level appointments under Chiang Kai-shek, and having drafted the Statute for Encouragement of Investment, one of the principal statutes allowing an influx of foreign trade and capital into Taiwan.

193. Taiwan promulgated a new Employment Service Act on May 8, 1992 to clamp down on illegal foreign workers and to provide stricter guidelines for the management of both white- and blue-collar foreign employees. M.L. Yeh, *Focus: Employment and Service Law*, LEE & LI BULL. (Lee & Li, Taipei, Taiwan), May 1992, at 1-3; M.L. Yeh, *Labor: Follow-Up Report on Employment Act*, LEE & LI BULL. (Lee & Li, Taipei, Taiwan), July 1992, at 12-13; see also Michelle Hsu, *Taiwan: New Employment Law—Good Intentions, Uncertain Results*, BUS. TAIWAN, Aug. 31, 1992, available in LEXIS, Asiapc Library, ALLASI File.

clearly the boundaries beyond which entrepreneurial foreign law firms could not go. The "domestic" versus "foreign" dichotomy is, of course, integrally linked to the fourth and fifth problems the local bar was likely grappling with: protection of ROC-licensed lawyers' economic interests; and a desire to implement laws to regulate a foreign-licensed legal community whose activities were not being squarely dealt with by any pre-existing law.

Although not a particularly outspoken organization in the past, the Taipei Bar Association was perhaps emerging as a more influential body in determining the direction of the legal services sector in the ROC. The Taipei Bar Association thus used its proposed Foreign Lawyers Law and its draft amendments to the Lawyers Code of Ethics as a means of achieving a greater voice on the issues most directly affecting its members.¹⁹⁴

C. THE TAIPEI BAR ASSOCIATION'S PROPOSED FOREIGN LAWYERS LAW AND PROPOSED AMENDMENTS TO THE LAWYER'S CODE OF ETHICS

1. *Borrowing from the Japanese and New York Models*

The Taipei Bar Association spearheaded its reform proposals with a draft Foreign Lawyers Law that would have resolved all of the perceived problems discussed above by imposing harsh restrictions on all foreign-licensed lawyers.¹⁹⁵ The idea for a Foreign Lawyers Law was originally proposed in 1985, but was not revived until December of 1991,¹⁹⁶ after many of the problems involving "back-door" lawyers and foreign-licensed lawyers had become more prevalent and after the DPP voice in the bar association had become stronger.¹⁹⁷

In the Foreign Lawyers Law's Prefatory Remarks, the drafters explicitly acknowledge that much of the Foreign Lawyers Law is taken from a similar Japanese statute,¹⁹⁸ as well as from New York State provisions regulating practice by foreign law-

194. Telephone Interview with foreign-licensed lawyer in Taipei (May 24, 1993) (notes on file with author).

195. Foreign Lawyers Law (Draft, Feb. 7, 1992) [hereinafter Foreign Lawyers Law]. Of course, the Foreign Lawyers Law was probably meant to be "negotiable" and may have been particularly harsh so that certain "concessions" could be made by its drafters during the course of any bargaining about the terms of the law. Telephone Interview with foreign-licensed lawyer in Taipei (May 24, 1993) (notes on file with author).

196. Foreign Lawyers Law, Prefatory Remark No. 3.

197. Telephone Interview with ROC-licensed lawyer (May 6, 1993) (notes on file with author).

198. Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers, Law No. 66 of 1986 (Japan). In 1994, the Special Measures Law was amended by the Japanese Diet after several years of pressure from the U.S. Government to liberalize the law. The amendments made modest changes in the Japanese

yers.¹⁹⁹ Indeed, many of the sharpest restrictions in the Foreign Lawyers Law were copied directly from the highly protectionist Japanese model, which in 1991 prohibited foreign-licensed lawyers from employing or forming partnerships with locally-licensed lawyers; required that foreign-licensed lawyers practice for a minimum of five years in their home jurisdiction before practicing in Japan;²⁰⁰ permitted foreign-licensed lawyers to practice in Japan only if the foreign-licensed lawyer's home jurisdiction provided reciprocal rights to Japanese lawyers;²⁰¹ restricted the use of the foreign firm's name;²⁰² restricted foreign-licensed lawyers in representing clients in commercial arbitration;²⁰³ and subjected the foreign-licensed lawyer to disciplinary action by the local bar association, rather than by the central government alone.²⁰⁴ The Japanese restrictions have been the topic of extensive negotiations between the United States and Japan, and some of the above provisions were amended in 1994.²⁰⁵

provisions governing foreign lawyers' experience requirements, use of firm names, and ability to form joint ventures with Japanese lawyers. Morgan, *supra* note 183.

199. N.Y. R. Ct. § 521.1. It should be noted that the current version of these rules is generally more liberal than the version in force in the early 1990s. References to changes in the law are noted below where pertinent.

200. New York only requires that the applicant have practiced "for at least three of the five years immediately preceding the application." N.Y. R. Ct. § 521.1(a)(2). California has a similar rule requiring that the applicant have been admitted and have actually practiced in his or her home jurisdiction "for at least four of the six years immediately preceding the application." CAL. R. Ct. 988(c)(1).

201. In 1992, New York amended section 521.1(b) of its "Rules of the Court of Appeals for the Licensing of Legal Consultants" to include a "reciprocity" clause whereby the Appellate Division may, in considering whether to license an applicant, take into account "whether a member of the [New York] bar . . . would have a reasonable and practical opportunity to establish an office for the giving of legal advice to clients in the applicant's country of admission." This provision went into effect on January 28, 1993.

202. Circa 1991, the Japanese law required that the principal name of a foreign firm's branch office in Japan be limited to the names of the licensed foreign law consultants actually working there. Michael McAbee, *U.S. Continues Pressure on Japan to Amend Foreign Lawyers Law*, E. ASIAN EXECUTIVE REP., June 15, 1990, available in LEXIS, Asiapc Library, ALLASI File. As noted earlier, this name restriction was essentially eliminated in 1994. Morgan, *supra* note 183.

203. McAbee, *Foreign Lawyers Law Faces Review*, *supra* note 188, at 6.

204. Michael McAbee, *Foreign Lawyers' Rights: The Debate Intensifies*, E. ASIAN EXECUTIVE REP., Dec. 15, 1985, available in LEXIS, Asiapc Library, ALLASI File. Japan's foreign lawyer restrictions are considered so severe that the U.S. Trade Representative (USTR), ABA, and several prominent state bar associations (including New York's and California's), have all been negotiating with the Japanese government to amend the law since its enactment in 1987. The USTR has even included the issue as part of the U.S.-Japan Structural Impediments Initiative talks. Edward A. Adams, *U.S. Bar Scores [sic] Tokyo on Lawyer Restrictions*, N.Y. L. J., Feb. 1, 1990, at 1; *U.S. Pushing to Open Japan to U.S. Lawyers*, REP. FROM JAPAN, Mar 1, 1990, available in LEXIS, Asiapc Library, ALLASI File.

205. Japan has agreed to permit the sharing of legal fees, office space, and staff by foreign and local lawyers. Japan has also dropped its requirement that foreign

Because it would have marked a radical departure from past practice, the Taipei Bar Association's draft Foreign Lawyers Law caused a brief panic in the Taipei legal community in early to mid-1992.²⁰⁶ The draft Foreign Lawyers Law was temporarily shelved upon promulgation of two "compromise" laws that address the foreign-licensed lawyer issue: the amended ROC Lawyers Law in November 1992 and the Regulations Governing Approval and Control of Employment of Foreign Nationals by Lawyers in December 1992, both of which are discussed in detail below. Although the "compromise" laws are in effect today, the local bar reviewed the draft Foreign Lawyers Law in 1994. The Ministry of Justice is currently reconsidering the draft Foreign Lawyers Law, and might forward the draft bill to the Legislative Yuan in 1995. Thus, the discussion below analyzes the draft Foreign Lawyers Law with both an eye to the past, as well as to the future.

2. "Foreign Lawyer" and "Foreign Legal Matters Lawyer" ("FLM Lawyer") Defined

The final draft of the proposed Foreign Lawyers Law, dated February 7, 1992, defines "foreign lawyer" as "a lawyer who has obtained lawyer qualification in a country or territory other than the ROC."²⁰⁷ This broad definition does not distinguish between ROC nationals and non-ROC nationals: any lawyer who does not have an ROC license is considered "foreign."²⁰⁸ Thus, a sharp line is drawn between who is an "ROC lawyer" and who is not. There is no provision that takes into account the differences

lawyers only be able to practice in their individual names rather than in the name of the overseas firm with which they are affiliated. U.S. lawyers in Japan believed that these concessions were insufficient. *Japan Said to Make Concessions on Practice by Foreign Lawyers*, BNA INT'L TRADE REP., Dec. 8, 1993, available in LEXIS, Asiapac Library, ALLASI File [hereinafter *Concessions*]; Morgan, *supra* note 183.

206. Apparently both Lee & Li and Tsar & Tsai sent several of their foreign-licensed, non-ROC nationals out of the country during the height of the panic. Interview with U.S. graduate student residing in Taiwan (May 16, 1993). See also Swiss, *supra* note 185 ("Taiwan in 1991 is not the place for faint-hearted lawyers. The legal market is in a state of flux, and both foreign and local lawyers in the jurisdiction are feeling the effects. Foreign lawyers range from feeling slightly sensitive to highly paranoid about their precarious position on the island, which is threatened by a new draft law before parliament and ethical rules to be promulgated by the Taipei Bar Association.").

207. Foreign Lawyers Law, art. 2(1).

208. Often, ROC law defines "foreign" more narrowly to mean non-ROC nationals only. Indeed, ROC law is often more concerned with safeguarding the employment opportunities of ROC nationals vis-a-vis foreign nationals than with lumping a subset of ROC nationals in with foreign nationals for special restriction. See ROC Regulations Governing Approval and Control of Employment of Foreign Nationals by Lawyers (Dec. 28, 1992) [hereinafter *Regulations*]; Employment Service Act, ch. V (May 8, 1992) [hereinafter *Employment Service Act*].

between entirely foreign-trained foreign lawyers and those “back door” practitioners who actually studied law in (often elite) ROC universities. Indeed, the Foreign Lawyers Law created an uncompromising new category of lawyer: the “Foreign Legal Matters Lawyer” (“FLM Lawyer”).²⁰⁹ Pursuant to the Foreign Lawyers Law, foreign-licensed lawyers must be approved as FLM Lawyers in order to practice,²¹⁰ and must be registered with the local bar association as a special subcategory of lawyers.

3. Prerequisites for Obtaining FLM Lawyer Status

Like the Japanese foreign lawyers law, the draft Foreign Lawyers Law would place several prerequisites on any applicant for FLM Lawyer status. First, FLM Lawyer status can only be granted to those foreign-licensed lawyers whose home jurisdiction recognizes a reciprocal right for ROC lawyers to be licensed as foreign lawyers.²¹¹ Second, the foreign-licensed lawyer must have in excess of five years experience practicing in his or her home jurisdiction.²¹² Third, if initially approved by the Ministry

209. Foreign Lawyers Law, art. 2(3).

210. The Taipei Bar Association's draft amendments to its ethical rules—which were proposed at approximately the same time that the Foreign Lawyers Law was unveiled—would explicitly prohibit ROC lawyers from setting up “legal consulting companies” with foreign-licensed lawyers. Lawyers Professional Code of Ethics, art. 22 (First Draft Amendments).

211. Foreign Lawyers Law, art. 4. Such a reciprocity requirement might have caused problems for many U.S. lawyers since only approximately fifteen states (Alaska, California, Connecticut, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Michigan, New Jersey, New York, Ohio, Oregon, Texas, and Washington) currently have rules explicitly permitting foreign-licensed attorneys to practice in those jurisdictions. ABA, *supra* note 28, at 48-49. Although some U.S. jurisdictions that require “reciprocity” before approving foreign-licensed lawyers will only deny an applicant if the applicant's home jurisdiction actually prevents U.S. lawyers from practicing there, the Foreign Lawyers Law's “reciprocity” rule is probably more stringent if it follows the Japanese interpretation. In Japan, “reciprocity” is only satisfied if the applicant's home jurisdiction has enacted a rule positively permitting Japanese lawyers to practice as foreign-licensed lawyers, “regardless of whether any [Japanese lawyers] actually wish to take advantage of the rule.” Wohl, *supra* note 181, at 9. As noted earlier, such a rule would mean that only U.S. lawyers from approximately fifteen states could qualify for “foreign legal consultant” status in Taiwan.

212. Foreign Lawyers Law, art. 4(1). The “five-year rule” would not necessarily prevent foreign firms from sending young associates to Taiwan as long as such associates are working under licensed FLM Lawyers. In Japan, for instance, “[t]here is no limit on the number of junior attorneys (that is, persons not licensed as foreign lawyers in Japan) from abroad that a foreign law office may employ as “trainees.” Wohl, *supra* note 181, at 9. If such “trainees” want to become full FLM Lawyers, however, it is uncertain whether their work experience in the ROC would count towards their five years of “experience” since the ROC is clearly not their “home jurisdiction.” In addition, even if working under a FLM Lawyer only entails working with U.S. law, if the “trainee” is assisting in matters involving the law of a state to which she is not admitted, the “trainee” might not be able to get “credit” for such work. The Japanese government does not usually count “trainee” experience when

of Justice ("MOJ") for FLM Lawyer status, the FLM Lawyer applicant must, within six months of approval, apply for "admission" to the local bar association,²¹³ and thereby become subject to the disciplinary rules and sanctions of the local bar.²¹⁴

4. *Restrictions on the FLM Lawyer's Scope of Practice*

Once approved, the FLM Lawyer would be bound by five preliminary restrictions. First, he would be required to represent himself as a FLM Lawyer and not simply as a "lawyer."²¹⁵ Second, he would not be permitted to establish, under any name, more than two law offices in the ROC.²¹⁶ Third, the FLM Lawyer would be required to reside in the ROC for more than 183 days per year.²¹⁷ Fourth, his authorization to practice could be revocable at any time if the MOJ determines that he is in a "poor financial situation . . . such as to cause harm to those he or she represents."²¹⁸

calculating the requisite five years of experience if the "trainee" is working for a Japanese lawyer; however, "trainees" who are merely temporarily rotating through a foreign firm's Japanese branch office can usually get "credit" for their time working in Japan. *Id.*; Wohl, *supra* note 188, at 15. Still, the question of how to calculate experience under the "five-year rule" does not seem to be entirely settled even in Japan. See Michael McAbee, *Japan's Foreign Lawyers Law: U.S.-Japan Talks Near Impasse*, E. ASIAN EXECUTIVE REP., March 15, 1991, available in LEXIS, Asiapc Library, ALLASI File. For foreign-licensed lawyers who would want to build a permanent practice in Taiwan—and who would thus seek FLM Lawyer status—a strict "five-year rule" could be a serious impediment. Eligible fifth or sixth-year associates (who would have to have obtained most of their practice experience in the U.S.) would be up for partnership consideration in another two to three years and might be loath to leave their home office to venture overseas at such a critical juncture in their careers. Sandra Bodovitz, *Practice Barriers Still Worrisome for U.S. Bar*, L.A. DAILY J. (Supp.), Feb. 11, 1991, at 18; Wohl, *supra* note 188, at 15. As a result, most candidates for FLM Lawyer status would probably end up being partners, most of whom would not have been able to spend continuous time in Taiwan prior to going there as FLM Lawyers, thus causing a potential "continuity" problem in the staffing of the ROC offices of foreign firms.

213. Foreign Lawyers Law, art. 7, 15-16. Pursuant to art. 11 of the ROC Lawyers Law (1992), the local bar association cannot reject a licensed lawyer who applies for membership. Presumably, the rule would apply *mutatis mutandis* to FLM Lawyer applicants who have been duly approved by the Ministry of Justice.

214. It is unclear from the Foreign Lawyers Law provisions whether the FLM Lawyer would be a full voting member of the local bar association, or whether "admission" to the bar association in this context would merely mean being "registered" with the association for disciplinary purposes.

215. Foreign Lawyers Law, art. 11.

216. *Id.*

217. *Id.* art. 13.

218. *Id.* art. 8(2). This "financial health" standard is quite nebulous. Whether it is more or less favorable to FLM Lawyers than a more predictable "minimum capitalization requirement" or "malpractice coverage requirement" would of course depend on how high the "minimum" was set at and how strictly the MOJ would enforce the "financial health" rule.

Fifth, and most important, the FLM Lawyer would be prohibited from employing, entering into partnership, or otherwise “cooperating” with an ROC-licensed lawyer to engage in the business of operating a law office.²¹⁹ Violation of this rule would be punishable by revocation of FLM Lawyer status,²²⁰ up to one year imprisonment, and a fine of up to NT\$500,000 (approximately US\$20,000).²²¹ This anti-cooperation rule seems to go even further than its Japanese counterpart. While Japan forbids partnership between local and foreign-licensed lawyers, “partnership” is defined narrowly as an arrangement involving the “division of revenues.”²²² Thus, in Japan, foreign-licensed lawyers are allowed to share office space and divide office expenses with Japanese lawyers, so long as no actual profit-sharing takes place.²²³ The proposed Foreign Lawyers Law, however, states that FLM Lawyers “*shall not cooperate in partnership, or any other manner, with an ROC lawyer to engage in the business of a law office,*”²²⁴ a prohibition that could be construed to rule out even office-sharing arrangements.

a. “The Practice of Law” and “The Practice of the Law of One’s Original Qualifying Country” Defined

Beyond the basic restrictions above, the FLM Lawyer would also face strict limits on the scope of her substantive law practice. The FLM Lawyer would only be allowed to “engage in practicing the law of his/her Original Qualifying Country.”²²⁵ The FLM Lawyer’s “Original Qualifying Country” is defined as the “country or territory from which a Foreign Lawyer has obtained his or her qualification.”²²⁶ For U.S. lawyers approved as FLM Lawyers, it is unclear whether they may advise on federal law plus the law of only their state(s) of admission, or whether they can practice federal law plus the law of *all* other common law states

219. *Id.* art. 12. FLM Lawyers could probably still employ Chinese personnel who are not licensed to practice ROC law, but who have ROC LL.B. degrees. In Japan, foreign-licensed lawyers are permitted to enter into such arrangements, although of course, the utility of such relationships is minimal compared to that of being able to hire locally-licensed lawyers. Wohl, *supra* note 181, at 9.

220. Foreign Lawyers Law, art. 8(5).

221. *Id.* art. 19.

222. Wohl, *supra* note 181, at 9.

223. *Id.* Again, note that Japan has agreed recently to allow fee-sharing and limited “joint enterprises” between foreign lawyers and Japanese lawyers. *Concessions*, *supra* note 205; Morgan, *supra* note 183.

224. Foreign Lawyers Law, art. 12.

225. *Id.* art. 9. Article 9(6) also states that the FLM Lawyer shall not engage in “[i]nterpreting, using, making determinations, or expressing an opinion in any other manner as to law other than the law of his or her Original Qualifying Country.”

226. Foreign Lawyers Law, art. 2(2).

in the United States.²²⁷ When this issue arose in Japan, the U.S. government and the American Bar Association were able to convince the Japanese government to adopt the more liberal interpretation of the rule, permitting FLM Lawyers to apply for and receive automatic designation to practice the laws of all U.S. common law jurisdictions.²²⁸

b. The Ban on Litigious Activities

The proposed Foreign Lawyers Law would explicitly prohibit a FLM Lawyer from serving as a litigator; an agent for compulsory execution and nonlitigious affairs;²²⁹ a trustee or supervisor in bankruptcy; a representative in a juvenile proceeding; an agent in a proceeding for administrative relief; an agent for purposes of an affidavit; or an agent in an application for registration, cancellation, or amendment of real property, patent, trademark, copyright, or any other rights before any ROC administrative agency.²³⁰

c. The Ban on Arbitration

While the above prohibitions on litigation activities are not surprising, the proposed Foreign Lawyers Law also includes a severe, Japanese-style restriction against foreign lawyers' representing clients in commercial arbitration proceedings.²³¹ In addition, the draft Foreign Lawyers Law would even prohibit FLM Lawyers from serving process on behalf of a foreign court or administrative organ.²³² FLM Lawyers would also be required to work "in conjunction with or obtain a written opinion from" an ROC-licensed lawyer when acting as an agent or preparing documents for an ROC citizen in matters concerning marriage, parent-child relationships, or ROC real property matters involving succession or inheritance.²³³

227. Louisiana is the only non-common law state.

228. Wohl, *supra* note 181, at 9; see also Marcia Coyle, *A Slow, Steady Japan Push Starts*, NAT'L L.J., May 18, 1987, at 1. Of course, U.S. lawyers are still subject to the applicable ethical obligations of their home jurisdiction with regard to professional responsibility and the unauthorized practice of law. See e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rules 5.5(a), 8.5.

229. "Non-litigious affairs" is usually defined under ROC law as "those which require the intervention of the courts, but which are not inherently adversarial in nature," such as adoption or probate. The precise interpretation of the term in the Foreign Lawyers Law is not entirely certain, however, causing concern among some foreign-licensed lawyers that it could be read broadly to include literally *all* non-litigious matters, not just probate or adoption. Swiss, *supra* note 185.

230. Foreign Lawyers Law, art. 9(1), (2), (4), (5), (7), (8).

231. *Id.* art. 9(3).

232. *Id.* art. 9(9).

233. *Id.* art. 9.1.

d. Professional Discipline of FLM Lawyers by the
Local Bar Association

Violation of any of the Foreign Lawyers Law's provisions would result in serious discipline. The Foreign Lawyers Law requires that the FLM Lawyer be a "member" of a local bar association which subjects the FLM Lawyer to the jurisdiction of the Bar Association's Lawyers Disciplinary Committee. The Committee has the power to warn, reprimand, suspend, or essentially disbar the FLM Lawyer.²³⁴ In addition, four offenses are explicitly defined in the Penal Provisions section of the Foreign Lawyers Law as punishable by prison sentences and substantial fines.²³⁵

e. Draft Amendments to the Lawyers' Professional
Code of Ethics

In 1992, the Taipei Bar Association also drafted two proposed amendments to the Lawyers' Professional Code of Ethics that would buttress the Foreign Lawyers Law. The first proposal would explicitly limit the scope of permissible duties of legal assistants (ROC LL.B. degree-holders who have not passed the ROC bar).²³⁶ The second proposal would be the analog to article 12 of the Foreign Lawyers Law (Draft, Feb. 7, 1992), which states that ROC-licensed lawyers "shall not in any form or under any name cooperate with any non-ROC licensed lawyers in setting up any law firms, consulting companies or any organizations engaged in the business of rendering legal services, nor lease, loan for use or otherwise provide third parties with his or her lawyer's

234. *Id.* arts. 15-17. The Chinese term used for "disbarment" here is "name removal." Once the FLM Lawyer's name is removed from the local bar association's roster, the FLM Lawyer would be in violation of article 3 of the Foreign Lawyers Law if he or she were to continue practicing. Violation of article 3 is a criminal offense subject to a maximum of two years imprisonment and a maximum fine of NT\$500,000 (approximately US\$20,000). Foreign Lawyers Law, art. 18.

235. Foreign Lawyers Law, arts. 18-21. Pursuant to article 18, FLM Lawyers would be subject to up to two years imprisonment and a fine of up to NT\$500,000 for practicing without MOJ approval or local bar association membership; for acting as an agent for compulsory execution and non-litigious affairs; or for acting as a trustee or supervisor in bankruptcy. Article 19, described in the text above, provides a penalty for hiring or entering into partnership with an ROC-licensed lawyer. Article 20 would subject a FLM Lawyer to up to one year imprisonment and a fine of up to NT\$500,000 for acting as a "nominee" lawyer who does not him or herself practice, but who lends his or her law office, chop(s), and certificate(s) to a third party who practices in his or her name. Finally, article 21 would subject the FLM Lawyer to up to two years imprisonment and a fine of up to NT\$500,000 for violating lawyer-client privilege.

236. Lawyers Professional Code of Ethics, art. 21.

license, law offices, specimen seal impression, certificate of membership, or mark."²³⁷

D. THE EXPATRIATE COMMUNITY'S OPPOSITION TO THE DRAFT FOREIGN LAWYERS LAW

When the Taipei Bar Association released its February 7, 1992 draft Foreign Lawyers Law, the foreign community in Taipei began a lobbying effort to prevent the draft law's enactment. Representatives from the American Institute in Taiwan ("AIT")²³⁸ spoke at length with officials from the Ministry of Economic Affairs ("MOEA") in Taipei and the Coordination Council for North American Affairs ("CCNA") in Washington, D.C., about the potential Foreign Lawyers Law's negative ramifications for foreign investment and foreign relations.²³⁹ Similarly, key members of the American Chamber of Commerce ("AmCham") in Taipei approached P.K. Chiang, the Minister of Economic Affairs, to discuss the implications of the Foreign Lawyers Law.²⁴⁰

The AIT and AmCham found a willing audience in the MOEA. The MOEA is concerned with Taiwan's foreign trade and international relations and would not want to risk the opprobrium of the U.S. Trade Act of 1974, section 301, unfair trade practices petitions, nor would it want to jeopardize the ROC's GATT membership prospects due to overly harsh foreign lawyer restrictions. In addition, the MOEA is surely concerned about the ROC's attempts to become a central hub of international commerce and finance in Asia in the wake of Hong Kong's return to the PRC in 1997. The ROC government has also been trying to attract foreign investment and to improve Taiwan's communications with its ongoing multi-billion dollar national infrastructure project.²⁴¹ The MOEA, therefore, consulted with the MOJ on the possible implications of any proposed Foreign Lawyers Law and was instrumental in cutting back on the restrictions suggested by the Taipei Bar Association. Unlike in Japan, the U.S.-licensed lawyers in the ROC apparently felt that matters were sufficiently under control and, for that reason, they did not appeal to the United States Trade Representative ("USTR") to

237. *Id.* art. 22.

238. The American Institute in Taiwan's Commercial Chief was Debbie Schwartz, wife of Tsar & Tsai associate partner Howard Schwartz (Tsar & Tsai has a profit-sharing plan that effectively makes its associates partners after a brief probationary period).

239. Telephone Interview with U.S.-licensed attorney working in Taipei (May 5, 1993) (notes on file with author).

240. *Id.*

241. *Id.*

intervene on their behalf in negotiations with the ROC government.²⁴²

Fortunately for the foreign-licensed legal community, neither the Foreign Lawyers Law nor the draft amendments to the Ethics Code were enacted in their proposed form, although amended versions are now being considered again by the MOJ. Until the MOJ and the Legislative Yuan act later this year to introduce a new foreign lawyer regime, the 1992 stop-gap compromise will continue to regulate the conduct of foreign lawyers in the ROC. It is possible that even after a comprehensive foreign lawyers law is enacted, some foreign lawyers in the ROC will eschew registration as foreign lawyers. They may instead attempt to remain as "business consultants" subject to the less stringent provisions of the 1992 amendments to the ROC Employment Service Act and Lawyers Law, and the Regulations Governing Approval and Control of Employment of Foreign Nationals by Lawyers, which are discussed below.

E. THE 1992 AMENDED LAWYERS LAW AND REGULATIONS
GOVERNING APPROVAL AND CONTROL OF
EMPLOYMENT OF FOREIGN NATIONALS BY
LAWYERS

1. *A Piecemeal Approach*

The laws and regulations eventually passed in 1992 do not comprehensively address the entire category of "foreign-licensed lawyers" in the same way the proposed Foreign Lawyers Law would. Instead, the amended Lawyers Law provides only three new provisions affecting all non-ROC-licensed individuals (including "foreign-licensed lawyers" and unlicensed professionals), while the new Regulations Governing Approval and Control of Employment of Foreign Nationals by Lawyers ("Regulations") only affect non-ROC citizens.

2. *"The Practice of Law" Defined*

a. The Ban on Handling Litigious Matters

First, the Lawyers Law now subjects non-ROC-licensed individuals to imprisonment for up to one year and a fine of between NT\$30,000 and NT\$150,000 (approximately US\$1150 to US\$5500) if they handle litigious matters with intent to seek

242. Telephone Interview with official from U.S. Trade Representative's Office, Asia and Pacific Desk (May 13, 1993) (notes on file with author). The official indicated that the USTR was not contacted by the U.S. attorneys in Taiwan and does not plan to address the Lawyers Law issue with the ROC government.

profit.²⁴³ Second, the Lawyers Law subjects ROC-licensed lawyers to up to one year of imprisonment and a fine of between NT\$30,000 and NT\$150,000 if, instead of personally practicing law, they provide a non-ROC-licensed individual with use of their offices, specimen seal, certificate of bar membership, or mark.²⁴⁴ Third, the Lawyers Law subjects non-ROC-licensed individuals to up to one year of imprisonment and a fine of between NT\$3000 and NT\$10,000 (approximately US\$115 to US\$370) if they establish a law firm in the ROC and hire ROC-licensed lawyers to practice law with the intent to seek profit.²⁴⁵

b. The Lack of Prohibitions Against Arbitration Appearances and the Handling of Non-Litigious Matters

The amended Lawyers Law's restriction on litigation is much less detailed than the prohibitions found in the proposed Foreign Lawyers Law. The Lawyers Law does not explicitly prohibit foreign-licensed lawyers from representing clients in commercial arbitration cases.²⁴⁶ Even more importantly, foreign-licensed individuals are *not* prohibited from working on "non-litigious" matters.²⁴⁷ Since most foreign-licensed lawyers in the ROC currently deal with corporate law and other "non-litigious" work, the absence of restrictions in this practice area is of great significance.²⁴⁸

c. "Cooperation" Between Foreign and Local Firms

The criminal sanctions against "nominee" or "absentee" ROC-licensed-lawyers who do not themselves practice, but merely lend out their offices and licenses,²⁴⁹ are not surprising.

243. Lawyers Law, art. 48 (1992). The statute allows for a fine to be imposed "unless [the non-ROC licensed individual] is performing his or her duties in accordance with the law." It is not entirely clear what "duties" the provision refers to.

244. *Id.* art. 49.

245. *Id.* art. 50.

246. While it is not entirely clear whether arbitration will be interpreted as a "litigious matter" for purposes of the Lawyers Law's prohibition on non-licensed individuals' handling of "litigious matters," an argument can be made that even the Taipei Bar Association would categorize arbitration as separate from "civil or criminal litigation") and that the ROC courts should interpret the two as separate types of proceedings as well. *Cf.* Foreign Lawyers Law, art. 9(1), (3).

247. *Cf.* Foreign Lawyers Law, art. 9(2), which would prohibit FLM Lawyers from acting as agents for compulsory execution and non-litigious affairs.

248. As noted earlier, even a restriction on "non-litigious" work would probably have simply meant a prohibition on handling matters "which require the intervention of the courts, but which are not inherently adversarial in nature," such as adoption or probate. *See* discussion *supra* note 229. Nevertheless, uncertainty about the precise definition of the term "non-litigious" as it was used in the Foreign Lawyers Law did cause concern among lawyers. Swiss, *supra* note 185.

249. Lawyers Law, art. 49.

On the other hand, the prohibition against non-ROC licensed individuals' opening their own law firms and hiring ROC-licensed lawyers to practice law is potentially problematic for international firms that wish to deliver integrated service.²⁵⁰ However, the extent of the prohibition is ambiguous.

First, it is unclear whether or not most foreign firms currently established in the ROC are considered "law firms" since most of them are registered under the ROC Company Law as "consulting companies." Of course, if a foreign firm *were* to hire ROC-licensed lawyers, a strong argument could be made that it had then *become* a law firm and should be subject to the penalties enumerated in the Lawyers Law.

On the other hand, foreign firms that "cooperate" with local firms by setting up consulting companies, licensing their firm names to the local firm, or sharing office space might not be "guilty of establishing a law firm." Instead, the foreign-licensed lawyers could plausibly argue that they are merely consultants who *joined* a pre-existing local firm. Unlike the proposed Foreign Lawyers Law, the amended Lawyers Law does *not* explicitly prohibit partnerships or "cooperation" between ROC and foreign firms. Under the above interpretation of the Lawyers Law, the law would arguably still be achieving the twin goals of limiting foreign-licensed lawyers' freedom to practice ROC law and ensuring that ROC-licensed lawyers are not unduly prejudiced by competition from "purely" foreign firms in the hiring of locally-licensed lawyers.²⁵¹

3. *The Regulations Governing Approval and Control of Employment of Foreign Nationals by Lawyers*²⁵²

The Regulations, promulgated one month after the amended Lawyers Law, support the above interpretation of the amended Lawyers Law. The Regulations were established pursuant to article 44 of the ROC Employment Service Act. As a result, the Regulations do not apply to ROC nationals at all (whether foreign-licensed or unlicensed), and only affect U.S. and other non-ROC citizens.²⁵³ Chapter V of the Employment Service Act,

250. *Id.* art. 50.

251. Of course, requiring foreign firms to "cooperate" with local firms before hiring more ROC lawyers does not necessarily stem the influx or influence of foreign firms. Nevertheless, giving local firms some measure of "leverage" over foreign firms allows the local bar to maintain at least some control over the number and types of foreign firms that set up in the ROC. At least foreign firms will need to offer local firms favorable terms to agree to an "arrangement" and will have to "co-opt" local lawyers rather than simply compete with them.

252. Regulations, art. 1.

253. Under articles 67 and 68 of the Employment Service Act, "people from mainland China employed to work in Taiwan," overseas Chinese, and ROC nation-

which authorized the promulgation of the Regulations, was explicitly formulated “[f]or the purpose of protecting the employment rights of domestic nationals.”²⁵⁴

a. “Cooperation” Between Local Lawyers and Foreign Consultants

The Regulations affirmatively state that “[e]ach [ROC-licensed] lawyer may employ foreign nationals to work as assistants or consultants.”²⁵⁵ As in Japan, the ROC law allows locally-licensed lawyers to hire foreign-licensed lawyers, but not vice versa.²⁵⁶ However, unlike in Japan, the ROC law does not have a concomitant anti-partnership provision, providing what seems to be a convenient loophole for foreign-licensed lawyers to form “cooperative agreements” with local firms.

b. Experience Requirements for Foreign Nationals

Instead of requiring foreign legal consultants to have five years of experience in their home jurisdiction before working in the ROC (as both Japan and the draft ROC Foreign Lawyers Law would require), the Regulations only require that the consultant have “in excess of two years relevant work experience.”²⁵⁷ Not only does article 4(2) of the Regulations demand significantly less temporal experience than the “five-year rule” would, it does not explicitly require that the “work experience” be obtained in the consultant’s home jurisdiction. It only requires that the experience be “relevant.” Although the MOJ has not made any definitive statements about whether a consultant’s previous experience working for a firm in the ROC itself would qualify as “relevant” for purposes of satisfying the “two-year rule,” at least one member of the foreign legal community in the ROC feels that the MOJ may in fact allow a fairly liberal construction of the regulation on this issue.²⁵⁸

als domiciled overseas are all treated as “foreign nationals” for purposes of the Employment Service Act.

254. Employment Service Act, art. 41.

255. Regulations, art. 3.

256. See Michael McAbee, *Foreign Businessmen Critical of New Lawyers’ Rights Law*, E. ASIAN EXECUTIVE REP., June 15, 1986, at 18, available in LEXIS, Asiapc Library, ALLASI File.

257. Regulations, art. 4(2).

258. Telephone Interview with U.S.-licensed attorney in Taipei (May 20, 1993) (notes on file with author).

c. Employment of Writing Assistants

The Regulations also permit ROC lawyers to hire foreign nationals as “[writing] assistants,”²⁵⁹ so long as they have university degrees and have “in excess of two years relevant work experience.”²⁶⁰ ROC lawyers can also hire foreign nationals who are foreign students, although approval must be obtained from both the MOJ and the Ministry of Education.²⁶¹ Pursuant to the Employment Service Act, such students may not work in excess of twelve hours per week except during the summer and winter vacation months.²⁶²

The Regulations state that foreign nationals must restrict their “assistance” to matters within their areas of specialization, education, and work experience and that they may “not engage in litigation or other legal matters in their own name.”²⁶³ Again, the wording of the restriction is fairly loose. It seems to leave room for foreign nationals to assist ROC lawyers, even in litigation matters, so long as such work is within the foreign national’s educational or work background and the foreign national does not engage in the work under her own name. Thus, assisting in ROC litigation that involves foreign law issues would not be beyond the purview of the foreign legal consultant’s work. This situation is very different from the draft Foreign Lawyers Law’s blanket prohibition against foreign-licensed lawyers’ working on any “litigious” or “non-litigious” matters.

d. Renewal of Foreign Nationals’ Work Certificates

On the other hand, the Regulations contain two broad provisions that could be used to limit foreign nationals from working in the ROC. First, as part of the Employment Service Act, the Regulations state that foreign nationals can only be approved for two-year work terms and must apply for renewal if they wish to extend their employment.²⁶⁴ MOJ approval is necessary to ob-

259. Many ROC firms need English-speaking “writing assistants” to help draft and edit English-language correspondence written for European and American clients.

260. Regulations, art. 4(1).

261. *Id.* art. 6.

262. Employment Service Act, art. 47.

263. Regulations, art. 8.

264. *Id.* art. 9. This two-year renewal rule is less onerous than the biennial report rule for foreign-licensed lawyers in Japan. To remain approved by Japan’s MOJ, foreign lawyer-licensees must submit reports every two years attesting to such information as continued good standing in their home jurisdictions and the financial soundness of their Japanese operations. Wohl, *supra* note 181, at 9. The ROC Regulations only require proof of the applicant’s educational and bar qualifications as well as proof of two years’ work experience and do not require reports on continued good standing. Regulations, arts. 5(3), 9. It should also be noted that the Council of

tain a work certificate, visa, and residence permit.²⁶⁵ Failure to secure the required documents subjects both employer and employee to criminal penalties, including imprisonment and deportation, respectively.²⁶⁶

Even more serious is the catch-all provision in article 7 of the Regulations that allows the MOJ to decline to approve or renew any foreign national's application if, in the MOJ's judgment, "the employment of foreign nationals [is operating] to prejudice domestic nationals' employment opportunities, labor conditions, national economic development, and social security."²⁶⁷ This provision allows a swing in the political leanings of the MOJ to limit the number of foreign nationals working in ROC firms. Technically, the provision allows the MOJ to immediately stop the influx of foreign-licensed lawyers, without having to go through the legislative process. Theoretically, the MOJ has the power to eliminate the entire foreign-licensed legal community within a period of two years (since all approvals and renewals expire after two years), although doing so would obviously cause international political repercussions that would render its occurrence unlikely.

4. *The Overall Effect of the Regulations*

a. ROC Nationals Are Unaffected

Despite the theoretical harshness of article 7, the overall effect of the Regulations and the Lawyers Law is still relatively favorable towards foreign-licensed lawyers, particularly when compared to the stern restrictions of the proposed Foreign Lawyers Law, and the potential strictures of the pending Foreign Lawyer Registration Law. Since the Regulations and the Employment Service Act do not categorize ROC nationals together

Labor Affairs' General Counsel agreed at the end of April 1994 to extend the employment period provided under the Employment Service Act, so that renewals would not need to be made so frequently. Telephone Interview with ROC legal assistant (Apr. 26, 1994) (notes on file with author).

265. Regulations, arts. 10-11.

266. Article 58 of the Employment Service Act provides in relevant part that "[w]hoever is guilty of violating Article 53(1), 53(2), or 53(3) shall be subject to punishment by imprisonment for not more than six months, detention and/or a fine of not more than NT\$90,000 (approximately US\$3,500) if only one person is employed or retained, and by imprisonment for not more than three years, detention and/or a fine of not more than NT\$300,000 (approximately US\$11,500) if the number of personnel employed or retained is two or more." Employment Service Act, art. 58. Article 62 subjects employees who continue to work or reside in the ROC without proper approval to a fine of between NT\$3,000 and NT\$30,000 (approximately US\$115 to US\$1,150), as well as deportation. Employment Service Act, art. 62.

267. Regulations, art. 7; Employment Service Act, art. 41.

with foreign nationals, foreign-licensed ROC nationals are only marginally affected by the new laws.²⁶⁸

b. The Lack of a Reciprocity Requirement

Even foreign-licensed foreign nationals are saved from the most restrictive Foreign Lawyers Law measures because the 1992 laws do not impose a "reciprocity" requirement. Foreign-licensed lawyers are also not prohibited from serving process on behalf of foreign courts or agencies, nor are they required to reside in the ROC for a minimum number of days every year. The 1992 laws do not subject foreign-licensed lawyers to the jurisdiction of the local bar association's disciplinary committee, letting the MOJ handle discipline instead. Nor do they restrict the number of offices a foreign-licensed lawyer can establish, so long as no ROC nationals are employed or so long as the foreign-licensed lawyer is the "employee" of an ROC lawyer.

c. The Lack of a Malpractice Insurance Requirement

Surprisingly, the 1992 laws do not impose any certification of malpractice insurance coverage (or any equivalent to the Foreign Lawyers Law's "financial health" requirement), despite the common requirement of such certification in most other jurisdictions.²⁶⁹

d. The Lack of a Prohibition on Integrated Firms

Finally, although the 1992 laws prevent foreign-licensed lawyers who open their own firms from hiring ROC lawyers, the laws do not specifically prohibit partnerships between local and foreign firms. Thus, foreign firms may still be able to achieve the goal of offering full-service law offices to their clients.

268. Indeed, while the Employment Service Act puts many limitations on foreign nationals, the statute explicitly favors ROC citizens. Pursuant to article 43 of the Employment Service Act, "[b]efore applying for permission to employ foreign nationals to perform [the approved categories of work, including legal work], an employer shall first offer reasonable employment conditions and recruit talents from domestic nationals thereon and shall proceed to file the application for employment of foreign nationals only after the number of talents recruited from domestic nationals is insufficient to meet the employment requirements." While article 43 is difficult to enforce (an employer who hires a foreign-licensed foreign national can justifiably explain that a native English-speaker is required for the job, for instance), it does indicate that the ROC government is still willing to treat non-ROC licensed ROC nationals preferentially, even if the Taipei Bar Association is generally not willing to do so.

269. Even California, for example, has strict rules for foreign legal consultants regarding security for both claims of errors and omissions and claims resulting from dishonest conduct. Security can be established through insurance, an escrow account, trust, or letter of credit and must cover each foreign legal consultant up to US\$350,000. Bodovitz, *supra* note 89; see CAL. R. CT. 988(c)(3).

F. REACTIONS BY THE ROC FOREIGN LEGAL COMMUNITY
AND REFLECTIONS FROM A COMPARATIVE
PERSPECTIVE

1. *Strategies Used by Foreign Firms to Legally Establish
Integrated Practices*

Today there are over fifty lawyers in Taiwan who are exclusively foreign-licensed²⁷⁰ and approximately ten lawyers who are licensed in both the ROC and a foreign jurisdiction.²⁷¹ There are roughly eight firms that were formed from "cooperative" agreements between foreign and local firms²⁷² and another eight that are purely foreign firms with no ROC-licensed personnel.²⁷³ Three years after the enactment of the amended Lawyers Law and Regulations, the foreign-licensed legal community is still assessing the ramifications of the new laws.

For instance, Graham & James, which opened its Taipei office in 1993 after both laws had already been promulgated, chose a very cautious approach by circumventing the foreign-licensed lawyer issue and operating solely as a business consulting company, referring its legal work to licensed Graham & James offices in other jurisdictions. Perkins Coie, which set up operations in 1992 just before enactment of the new laws, chose to work as a "cooperative" venture between consulting companies and a local law firm. They, along with all the other foreign and "cooperative" firms, are quietly continuing to operate without change, hoping that they fall on the right side of the many "gray areas" created by the new laws. The pending foreign lawyer registration law could drastically change the situation. However, it is uncertain whether those U.S. lawyers who are currently acting more as "business consultants" than as "lawyers" could simply continue their work without registering as foreign lawyers.

270. Approximately half of these lawyers are ROC nationals who received ROC LL.B. degrees before going abroad; the other half are foreign nationals. MARTINDALE-HUBBELL LAW DIRECTORY, *supra* note 11, Professional Biographies.

271. *Id.*

272. These firms include Baker & McKenzie (U.S.); Cha & Pan (U.S.); Jones Day (U.S.); Koo, Winkler, Hsu & Hwang (Taiwan); McCutchen, Doyle, Brown & Enerson (U.S.); Perkins Coie (U.S.); Russin & Vecchi (U.S.); and Serko & Simon (U.S.). *Id.*

273. These firms include Aresty International Law Offices (U.S.); Bennett Jones Verchere/Weston (Can.); Deacons and Graham & James and Sly & Weigall (H.K.; U.S.; Austr.); Hansen International (U.S.); Mallesons Stephen Jaques (Austr.); McMillan Bull Casgrain (Can.); Shearman & Sterling (U.S.); and Stikeman, Elliott (Can.). *Id.*

2. *An Ambiguous Result*

Partly due to the ambiguities in the 1992 laws, only approximately twenty to twenty-five foreign-licensed lawyers have registered with the MOJ as consultants employed by ROC lawyers under the Regulations.²⁷⁴ Many other foreign-licensed lawyers have cautiously remained in the employment status that they qualified for prior to enactment of the new laws.²⁷⁵ Some were forced to terminate their previous contracts with large local firms such as Lee & Li and Tsar & Tsai in the wake of a “crackdown” on white-collar expatriates in the early fall of 1993.²⁷⁶ Almost all of these lawyers immediately signed new agreements with their firms—agreements carefully drafted to give them a formal status arguably within the purview of the new laws—and immediately went back to work in functionally the same capacity as before.²⁷⁷

The government’s various ministries have sent mixed messages since the new Employment Service Act provisions were put into effect. The confusion is partly attributable to the Act’s dispersion of regulatory responsibility to different ministries. There is no single ministry that promulgates uniform employment regulations applicable to all foreign nationals. Instead, individual ministries are responsible for employers and employees who fall within their “sector” of the economy. The MOJ, for example, is responsible for regulating foreign lawyers.

Unfortunately, the MOJ has begun to narrowly interpret the permitted scope of practice for legal consultants. Some MOJ officials have stated, for example, that foreign legal consultants in the employ of Taiwanese law firms should be limited to giving advice to ROC-licensed lawyers only, and should be prohibited from directly advising clients on foreign legal issues.²⁷⁸ As a result, many Taiwanese firms that employ foreign-licensed lawyers have been quietly lobbying the government to liberalize its interpretations of the Employment Service Act and Lawyers Law.

The recently reported news of a pending, restrictive foreign lawyer registration law is discouraging, and seems to be in conflict with other potential service-sector reforms in the ROC.

274. Telephone Interview with U.S.-licensed attorney in Taiwan (Apr. 25, 1994) (notes on file with author).

275. Telephone Interview with ROC legal assistant (Apr. 26, 1994) (notes on file with author).

276. George Wehrfritz, *Welcome Withdrawn: Taiwan Puts the Squeeze on Foreign Workers*, FAR E. ECON. REV., Sept. 16, 1993, available in LEXIS, Asiapc Library, ALLASI File.

277. Telephone Interview with ROC legal assistant (Apr. 26, 1994) (notes on file with author).

278. Telephone Interview with ROC legal assistant (Apr. 26, 1994) (notes on file with author).

First, the Council for Economic Planning and Development has been considering various schemes to ease the requirements for foreign professionals to become locally licensed in the legal, accounting, and architectural professions.²⁷⁹ Second, the MOEA is pushing for the various ministries to streamline their foreign employee regulations and to focus on the efficiency and predictability of their regimes. Third, the Ministry of Foreign Affairs is lobbying to consolidate the entire Employment Service Act approval process under its jurisdiction, eliminating the current dispersion of responsibility among ministries. Finally, the Council of Labor Affairs has agreed recently to extend foreign nationals' employment periods beyond the ordinary two-year renewable term, thus allowing expatriates to remain longer in the ROC before having to renew their applications.²⁸⁰ The re-introduction of potentially restrictive foreign lawyer registration provisions comes as somewhat of a surprise in light of both the aforementioned reforms and the relatively liberal 1992 Lawyers Law and Employment Services Act.

3. *The 1994 Draft Foreign Lawyers Law and the AmCham Response*

Although the details of the ROC National Bar Association's 1995 Draft Foreign Lawyers Law are uncertain at this time, the press reports indicate that some of the most restrictive provisions from the 1992 draft have been carried over to the version currently pending before the MOJ. In particular, the 1994 draft retains the ban on "cooperation" between foreign and local lawyers, and the limitation of U.S. lawyers to the practice of international law and the law of their state(s) of admission.²⁸¹ On the other hand, the MOJ may modify the previously proposed "five year experience" rule so that foreign-licensed lawyers need only have gained three of their five years of experience in their

279. *Taiwan: CEPD to Encourage More Foreign Professionals to Come Here*, CHINA ECON. NEWS SERV., Jan. 25, 1994, available in LEXIS, Asiapc Library, AL-LASI File.

280. Telephone Interview with ROC legal assistant (Apr. 26, 1994) (notes on file with author).

281. *Foreign Lawyers May Get to Practice in ROC*, CHINA POST, Oct. 18, 1994; *Taiwan to Open Door to Foreign Lawyers for GATT*, REUTERS WORLD SERV., Oct. 18, 1994. The 1994 draft Foreign Lawyers Law resembles the 1992 version at least in part because M.S. Lin, the TIPLO Attorneys-at-Law partner who first introduced the 1992 draft law when he was president of the Taipei Bar Association, is currently president of the National Bar Association and has been instrumental in reviving the draft law.

home jurisdiction.²⁸² In addition, the MOJ may eliminate the previously proposed 183-day residency requirement.²⁸³

Members of AmCham have already taken action in response to the renewed threat of a restrictive Foreign Lawyers Law. In December 1994, AmCham wrote to the MOJ expressing its serious concerns about the draft law. In January 1995, AmCham and the European Council on Commerce and Trade ("ECCT") met with the MOJ and the ROC National Bar Association to discuss the draft law. As a result of the meeting, the MOJ requested that AmCham and the ECCT submit a set of counter-proposals to the National Bar Association's Foreign Lawyers Law.²⁸⁴

In early 1995, a draft of the AmCham counter-proposal was circulated in the foreign community. The AmCham proposal would allow a foreign lawyer to practice foreign law in one of three ways: (1) as a proprietor, partner, or employee of a firm practicing only foreign law; (2) in partnership with ROC attorneys; or (3) as an employee of an ROC attorney. AmCham's draft proposal suggested maintaining the current two-year "relevant" work experience requirement for "registered foreign lawyers," with no restriction that the experience be accrued in the foreign lawyer's home jurisdiction. Under AmCham's draft proposal, a registered foreign lawyer could practice the law of her own jurisdiction, engage in any other matters not exclusively reserved to ROC-licensed lawyers, and assist ROC-licensed lawyers in their practices. ROC-licensed lawyers would also be allowed to employ foreign lawyers who are not registered foreign lawyers, but who are "consultants" or otherwise considered foreign employees under the Employment Services Act.

To address some of the ROC bar's concerns, the AmCham draft proposal would require partnerships between registered foreign lawyers and ROC-licensed lawyers to be managed by an ROC-licensed lawyer. In addition, registered foreign lawyers would be required to state their status and qualifying jurisdiction on all letterhead and correspondence. Finally, those foreign firms engaging only in the practice of foreign law would be barred from employing or sharing profits or losses with ROC-licensed lawyers.

In general, AmCham's draft proposal strikes a balance between an extremely liberal system, such as those in some U.S. states where foreign legal consultants have the unrestricted right

282. *Taiwan: Foreign Lawyers Permitted to Practice in Taiwan*, CHINA ECONOMIC NEWS SERVICE, Aug. 11 1995, available in LEXIS, Asiapc Library, ALLASI File.

283. *Taiwan: Foreign Lawyers*, CHINA ECON. NEWS SERVICE, Mar. 3, 1995.

284. Telephone Interview with U.S.-licensed lawyer working in Taipei (Feb. 12, 1995) (notes on file with author).

to become partners with or employers of U.S. lawyers, and the extremely restrictive regime proposed by the ROC National Bar Association. AmCham's draft proposal is certainly more in line with the spirit of GATT, GATS, and the WTO than the National Bar Association's draft law. These international trade agreements and organizations seek not only to create comprehensive systems for the orderly and predictable registration of foreign lawyers, but also to prevent registration systems from being mere subterfuge for protectionism by local bar associations.

IV. CONCLUSION

Hong Kong and the ROC have taken very different routes to reform their foreign lawyer laws. While the impetus for reform in Hong Kong came first from the foreign lawyers, who desired a more formal and liberal structure of regulation, the call for change in the ROC was first made by the local bar, which wanted to rein in the proliferation of unregulated foreign-licensed lawyers. In both jurisdictions, the local bar associations proposed harsh, restrictive regimes to deal with the foreign lawyer situation.

Hong Kong's Law Society offered a codified version of the stringent customary rules that it had imposed on foreign firms since the 1970s, a model replete with Commonwealth favoritism and explicit employment barriers, which Singapore continues to use today. The Taipei Bar Association proposed a restrictive, Japanese-style law that runs contrary to GATT and GATS standards.

In both jurisdictions, the foreign lawyer communities rallied to prevent the local bar from implementing their proposals, and in both locales, tensions grew. The rhetoric of professional standards and cultural autonomy was marshaled against arguments for free trade and competition. Both Hong Kong and the ROC were forced to consider how their choices would apply under GATT principles and whether they would result in U.S. Trade Act sanctions.

Ultimately, Hong Kong introduced a comprehensive, if somewhat micro-managed, system for regulating foreign lawyers. Under the new system, foreign-licensed lawyers and their firms will be required to register with the local Law Society, as will associations between foreign and local firms. While no partnerships between foreign and local firms will be allowed, the associations will provide semi-integrated service. Fully integrated service and partnerships will be allowed once foreign-licensed lawyers are admitted as local Hong Kong-licensed solicitors under the Overseas Lawyers Qualification Examination. After

admission, such solicitors will be eligible to establish local practices under the name of their overseas firms. Various experience prerequisites, temporal restrictions, conditional practice limitations, and employee ratio requirements will make the immediate formation of integrated foreign firms impossible. However, despite the myriad preconditions and requirements, almost none of the individual requirements is overly burdensome. The Law Society has also reserved for itself substantial flexibility to consider individual situations on a case-by-case basis, and to waive certain regulatory requirements if they appear inappropriate. Hong Kong's regime will thus offer a broad range of practice options for foreign firms wishing to establish themselves in arguably the region's most infrastructurally advanced and commercially sophisticated jurisdiction.

Across the Taiwan Strait, the ROC reached a different compromise. The ROC did not attempt to introduce a comprehensive system in 1992, but opted to regulate foreign lawyers by clarifying provisions in the local Lawyers Law and by using regulations promulgated under the Employment Service Act governing expatriates working in Taiwan. The ROC's regime presents a remarkable contrast to Hong Kong's system, creating very few explicit restrictions on foreign lawyers, but engendering a degree of ambiguity that makes the legal status of foreign lawyers somewhat tenuous. Adding to the uncertainty in the ROC today is the revival of a restrictive draft Foreign Lawyers Law, counter-balanced by a liberal alternative proposal by the foreign community. Both proposals are pending before the MOJ, which is eager to enact a comprehensive foreign lawyer system in 1995.

Where Hong Kong requires the fulfillment of indemnity assurances and numerical ratios on employees, Taiwan currently provides some of the least stringent prerequisites for working as a foreign-licensed lawyer. There are no reciprocity, malpractice insurance, or residency requirements in the ROC, and the loose, two-year experience requirement is one of the most liberal in the world. The ROC does not explicitly ban "cooperation," or even partnership, between foreign and local lawyers, resulting in the current proliferation of integrated foreign firms in Taiwan. On the other hand, the uncertainty created by the various ROC ministries' contradictory policy objectives, and their peaks and troughs of enforcement, exacerbate the sense of uncertainty that most foreign-licensed lawyers feel towards their official status. In addition, the ROC's immigration/work permit-based system of controlling foreign-licensed lawyers allows those with ROC citizenship or permanent residency to safely avoid the worst strictures of the Employment Service Act, but in doing so fails to regulate a large and growing section of the foreign-licensed legal

community. The looseness and liberality of the current ROC system is of course threatened by the draft Foreign Lawyers Law.

Hong Kong and Taiwan's differing approaches are an extension of their divergent historical, legal, and cultural foundations, and the distinct political positions in which they find themselves today. Hong Kong's dual-path system, providing foreign lawyers with the option of becoming local solicitors or registering as foreign legal consultants, is similar in structure to that found in many U.S. jurisdictions. The additional restrictions in Hong Kong's rules to prevent "foreign domination" may be appropriate given Hong Kong's size and its politically uncertain future after 1997. The lack of an accreditation scheme to allow foreign lawyers to become locally-licensed in the ROC is not of grave concern to Western expatriates. If an accreditation scheme did exist, it might only increase the incentive for Taiwanese students to study law in the United States or Europe, and then return to practice ROC law without having gone through a formal, ROC legal education. Meanwhile, although the ROC rules governing foreign legal consultants are far from complete, their *de facto* operation has provided foreign-licensed lawyers with the opportunity to provide integrated service, something unavailable almost anywhere else in East Asia.

Unfortunately, the relatively liberal situation in the ROC may be coming to an abrupt end. It is hoped, however, that the MOJ and the Legislative Yuan will recognize that GATT, GATS, and WTO principles aim at more than a formally comprehensive structure of foreign lawyer regulations, but seek a substantively nonprotectionist system that balances the social need to shield the public from unlicensed lawyers and the economic benefit of allowing efficient, integrated international legal service. It would be ironic, and disappointing, if the ROC were to move from a loose, liberal system to a rigidly restrictive one just as Hong Kong has switched from an informal, protectionist system to a structured yet liberal regime.

On the eve of a new era for foreign lawyers in both Hong Kong and the ROC, it seems that both jurisdictions can draw valuable examples from the other's model. Doing so could move Hong Kong towards a less formalistic approach and the ROC towards a more comprehensive, yet liberal, foundation. Foreign lawyers could then move one step closer to offering the most efficient and extensive legal service they can to our globalized economy.