Foreign Attorneys in Japan: The International Practice of Law as a Question of Unfair Trade Practices

Masako C. Shiono

Follow this and additional works at: http://digitalcommons.wcl.american.edu/auilr

Part of the International Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University International Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.
FOREIGN ATTORNEYS IN JAPAN: THE INTERNATIONAL PRACTICE OF LAW AS A QUESTION OF UNFAIR TRADE PRACTICES

Masako C. Shiono*

INTRODUCTION

After World War II, Japan enacted a statute allowing foreign attorneys to practice law in Japan.¹ In 1955, the Japanese government repealed that statute.² Since that time, Japanese officials have argued with officials from the United States over whether to allow attorneys from the United States to open offices in Japan. Attorneys from the United States contend that Japan should permit foreign attorneys to provide counsel to American companies operating in Japan.

In April 1986, a group of attorneys from the United States filed a petition (Section 301 Petition) with the Office of the United States Trade Representative (USTR)³ under section 301 of the Trade Act of 1974.⁴ The petitioners alleged that the Japanese regulations preventing foreign attorneys from practicing law constituted illegal nontariff trade barriers to legal services, and violated treaty agreements between Japan and the United States.⁵ The attorneys wanted to assist United States businesses in the development of markets through export and

---

² THE JAPANESE LEGAL SYSTEM, supra note 1, at 596.
³ Petition under section 301 of the Trade Act of 1974, as amended, for action against unfair trade practices of the Government of Japan in the international trade facilitation services industry and the international legal services industry [hereinafter Section 301 Petition], petition filed, Apr. 11, 1986, petition denied, June 9, 1986 (available at the Office of the United States Trade Representative, Washington, D.C.).
⁵ Section 301 Petition, supra note 3, at 15. The petition alleged that the Japanese government was restricting the ability of attorneys from the United States to provide services because Japan freezes or denies visas to those attorneys. Id.; see infra note 119 (discussing the origin of the “visa freeze”).
investment in Japan. Their action represented an effort to eliminate the trade deficit between Japan and the United States. The petitioners asked the USTR to initiate an investigation to determine whether the United States should retaliate against Japan.

At the time of the petition, Japan had not allowed foreign attorneys to open offices in Japan since 1956, except for the few attorneys who were able to practice law pursuant to a grandfather clause in the 1956 regulations and one attorney who opened a Tokyo office in 1977. The petitioners, who read and speak fluent Japanese, had extensive business interests in Japan and were familiar with Japanese culture and business customs. They claimed that if Japan permitted foreign attorneys to practice foreign law in Japan, the foreign attorneys could help clients in the United States work with Japan in the international business world. These attorneys also argued that the strong role of Japan in the world market and the increased trade imbalance between Japan and the United States necessitated this change. The petitioners alleged that the Japanese government was denying the attorneys from the United States their rights of national treatment and establishment. Japan, however, while recognizing the international trade as-

7. Id. at 56. The petitioners concluded that the failure of the United States to implement section 301 measures will result in a continued $50 billion trade deficit. Id.
8. Id. at 52.
10. Id. Japan gave United States partnerships special membership status prior to 1955. Id. Under the 1956 regulations, Japan admitted a few attorneys from the United States to practice law under a grandfather clause. Id.
12. Section 301 Petition, supra note 3, at 2. The petitioners claimed that the American businesses in Japan desperately need the trade and legal services that attorneys from the United States can provide. Id.
13. Id. at 50.
14. Id. at 10-13 (discussing the provisions under the Treaty of Friendship, Commerce, and Navigation that cover the rights of national treatment and establishment). Article VII(1) states:

1. Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly by agent or through the medium of any form of lawful juridical entry. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party; and (c) to control and manage enterprises which they have established or acquired. Moreover, enterprises which
pect of the issue, considered the issue a question of domestic law involving the right to regulate foreign professionals.¹⁰

On March 28, 1986, the Japanese Ministry of Justice introduced a bill in the Diet¹⁶ amending the Bengoshi Ho,¹² the law regulating practicing attorneys in Japan.¹⁸ After months of negotiations between officials of the Japanese Ministry of Justice and negotiators from the office of the USTR, the Japanese government agreed to modify its restrictions against foreign attorneys. The petitioners objected to the proposed law¹⁹ and filed a Section 301 Petition in response to the bill.²⁰ The petitioners believed that the new regulations would not remove barriers against foreign attorneys and in fact would make it more difficult for foreign businesses and foreign attorneys to function in the Japanese

---

¹⁰ They control, whether in the form of individual proprietorships, companies or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party.

Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, art. VII, para. 1, 4 U.S.T. 2063, 2069, T.I.A.S. No. 2863, at 8, 206 U.N.T.S. 143, 198 [hereinafter FCN Treaty]. Article XXII(1) defines "national treatment" as "treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party." FCN Treaty, supra, art. XXII, para. 1.

¹⁶ The Japanese Diet is the equivalent of the United States Congress. THE JAPANESE LEGAL SYSTEM, supra note 1, at 38. The Diet is a bicameral legislature composed of the Shugi-in (House of Representatives) and the Sangi-in (House of Councillors).

¹⁷ Section 301 Petition, supra note 3, at 34.

¹⁸ Bengoshi Ho, Law No. 205 of 1949, cited in Fukuhara, supra note 1, at 595. The Bengoshi Ho is the statute governing bengoshi, or practicing attorneys. Id.; see infra notes 46 and 51 (providing the origins of the term "bengoshi," and describing the process of becoming a bengoshi).


²⁰ See Section 301 Petition, supra note 3, at 9 (alleging that the bill will attach restrictions on the petitioners' ability to provide legal services).
market. On June 9, 1986, the USTR dismissed the petition without prejudice and decided not to initiate an investigation into the alleged unfair trade barriers. The USTR based its decision on progress in negotiations on foreign access to the legal services market and the bill the Diet passed on May 16, 1986.

The number of attorneys practicing international law has increased to meet the needs of a growing international business community. Many law firms maintain offices in foreign countries. Those offices must comply with the restrictions of the host country on the scope of the foreign attorney’s legal practice. The Section 301 Petition was an unusual attempt to change these restrictions because it framed the foreign practice of law as an issue of unfair trade restrictions between two countries.

---

21. Id.
22. See Notice, 51 Fed. Reg. 21,037 (1986) (posting notice of the denial of the petition). Although the Office of the United States Trade Representative denied the petition, it made its determination without prejudice to any future petition on the same subject. Id.
23. Id.
24. See Comment, Providing Legal Services in Foreign Countries: Making Room for the American Attorney, 83 COLUM. L. REV. 1767, 1767 (1983) [hereinafter Comment, Providing Legal Services] (noting the reasons for the rise of attorneys from the United States in the international sphere). Among the reasons for the rise in the number of attorneys from the United States are native fluency in English, which has become the language of international negotiations and contracts; experience in international business transactions; and the American attorney’s unique style of commercial-oriented creative legal skills that is helpful in facilitating international business deals. Id. at 1768.
25. Id. at 1767.
26. See Lund, Problems and Developments in Foreign Practice, 59 A.B.A. J. 1154, 1154 (1973) (noting that foreign attorneys who want to conduct business in a foreign country confront the interest of that nation in protecting the public from incompetence, maintaining national standards of professional integrity, and satisfying members of the local legal profession that they will not lose business to the foreign legal professionals); see also Comment, Providing Legal Services, supra note 24, at 1776 n.43 (comparing the restrictions of eighteen countries on the admission of attorneys from the United States to practice law, based on criteria such as years of schooling, years of training, citizenship, or additional examinations).
27. See Kanter, supra note 11, at 340 (noting that the difference in the willingness of the two countries to accommodate reciprocal business institutions is a serious trade issue). Attorneys in the United States allege that Japan denies visas to keep attorneys from the United States out of Japan. U.S. Lawyers Allege Trade Barriers, supra note 9, at 35, col. 2; see Hayden, To Be or Not to Bengoshi in Japan, 59 LAW INST. J. 118, 119 (1985) (noting the expansion of a visa dispute into the broad issue of the right of the attorney from the United States to practice in Japan). In March 1982, the United States officially informed the Japanese government that it considered the Japanese restrictions on foreign law offices in Japan a nontariff barrier to trade in legal services. Shapiro, Reclaiming a Place for Foreign Lawyers in Japan, Japan Times, Oct. 17, 1982, at 12, col. 2 [hereinafter Shapiro, Reclaiming A Place], cited in Kanter, supra note 11, at 342 n.21.
This Comment provides an overview of some important aspects of Japanese culture that affect “doing business” in Japan. Part I looks at the background of the dispute over the foreign practice of law in Japan and discusses the role of the law and attorneys in Japan. Part II examines restrictions the United States places on foreign attorneys and the status of foreign attorneys in Japan at the time of the Section 301 Petition. Part III discusses section 301 of the Trade Act of 1974 and the petitioners’ arguments. Part III also discusses the arguments of the European Business Council and the American Chamber of Commerce in Japan opposing the revision to the Practicing Attorneys’ Law. Part IV discusses why the decision of the USTR not to initiate an investigation was correct, considering both the cultural and professional factors relevant in this dispute.

I. HISTORICAL PERSPECTIVE

A. ATTORNEYS AND THE LAW IN JAPAN

To understand the opposition of the Japanese legal profession to foreign legal professionals practicing in Japan, it is necessary to understand the conceptual differences between the practice of law in the United States and in Japan. Both the law and attorneys have different roles in their respective cultural settings.28 The view of the law in Japanese society and the different roles of Japanese legal professionals and foreign attorneys contribute to the history of the restrictions on foreign attorneys.

1. The Japanese Concept of Law

In Western societies, the term “law” usually implies both a body of legal rules and the protection of an individual’s subjective interests.29 In Japan, however, hō or hōritsu, which is translated as “law,” means only an objective body of legal rules.30 This term, therefore, does not imply the protection of an individual’s subjective interests, as in Western societies.

In Japanese society, a person must follow traditional rules of con-

28. See Kanter, supra note 11, at 340-41 (noting that the Japanese business enterprises depend on the sōgō shōsha, or trading companies, for international trade facilitation services, whereas companies in the United States depend on attorneys to provide these services).
29. YOSHIYUKI NODA, INTRODUCTION TO JAPANESE LAW 159 (1976). The legal rules are objective, and individual interests subjective. Id.
30. Id. To the Japanese, objective law as the Western nations define it implies constraints and is therefore undesirable. Id.
duct, sometimes called the rules of *giri*. Under *giri*, a person’s social status determines the way society expects a person to behave toward others. There are six main characteristics of *giri*: (1) *giri* is a duty to behave in a certain way toward another person, depending on the situation; (2) the person to whom *giri* is owed does not have the right to demand fulfillment of *giri*; (3) the relations of *giri* are perpetual — even after a person fulfills an obligation, new duties constantly arise; (4) *ninjo*, or feelings of affection, form the basis of *giri* relationships — a person acts, or at least a person should appear to act, for reasons of *ninjo* as well as *giri*; (5) *giri* relationships derive from a hierarchical order similar to feudalism; and (6) a concept of honor, not public constraint, enforces *giri*. Japanese society seriously dishonors those who do not fulfill *giri*.

Japanese society perceives subjective interests differently than Western society. The Japanese word for subjective interests, *kenri*, developed around 1870, when Western law was first introduced into Japan. Enforcement of *kenri* assumes the equality of all people before the law. This conflicts with the feudalistic pattern of social relationships under *giri* because having a body of social rules based on rank in society necessarily implies inequality.

The Japanese “nonlitigious ethos,” implying that recourse to courts for dispute resolution is selfish and against Japanese cultural norms, is another cultural difference between Japan and the United States.

These beliefs and attitudes explain why there are fewer lawsuits in Ja-

---

31. *Id.* at 174-79. The “rules” of *giri* are social rules of conduct, of a nonlegal nature. *Id.* at 174.
32. *Id.* at 175.
33. *Id.* A person must fulfill *giri* voluntarily. If that person does not satisfy *giri*, he or she is seriously dishonored. *Id.* The beneficiaries of *giri*, however, cannot influence the first party without violating their own *giri*. *Id.*
34. See *id.* at 174-79 (listing the characteristics of *giri*). The idea of “losing face,” or not being able to look the world in the face because of a feeling of shame for having violated one’s personal honor, is a very important part of *giri* and of Japanese society in general. *Id.* at 178. In a well-known book about Japanese culture, Ruth Benedict describes two types of civilizations: “shame culture” and “guilt culture.” R. BENEDICT, THE CHRYSANTHEMUM AND THE SWORD: PATTERNS OF JAPANESE CULTURE 222-23 (1947), reprinted in YOSHIYUKI NODA, *supra* note 29, at 179 n.70. The “guilt culture” relies on an internalized conception of sin, while the “shame culture” relies on external sanctions for bad behavior. *Id.* The shame comes from outside criticism of one’s behavior. See *id.* (giving a more detailed discussion of the concept of *giri*).
35. YOSHIYUKI NODA, *supra* note 29, at 159.
36. *Id.* at 179. Enforcement of subjective rights causes duties under *giri* to lose their existing emotional force. *Id.*
pan than in the United States. This ethos also illustrates the traditional Japanese perception of Japanese society as exceptionally consensual and harmonious.

2. Institutional Barriers

Institutional barriers within Japanese legal institutions also explain the Japanese person's aversion to using the court system to resolve conflicts. These institutional barriers include the lack of a remedy similar to class actions in the United States and ineffective discovery procedures. Institutional barriers such as the limited number of attorneys, high fee structures, and a shortage of judges also decrease the number of lawsuits in Japan.

3. Japanese Attorneys and Legal Professionals

In 1986, Japan had approximately 12,840 bengoshi, or practicing

38. Id. at 607; see id. at 607-09 (discussing why the Japanese culture favors non-litigation, and how this relates to institutional barriers to antitrust litigation in Japan). See generally Mayer, Japan: Behind the Myth of Japanese Justice, Am. Law., July-Aug. 1984, at 113 (discussing the cultural and institutional barriers in the Japanese system of adjudication).

39. Ramseyer, supra note 37, at 637.

40. Id. at 631-34 (discussing institutional barriers to litigation).

41. Id. at 631. The Japanese civil procedure code does not permit class actions, although it does allow representative plaintiffs to litigate common issues. Id. Such decisions, however, bind only those defendants who have agreed to be bound. Id.

42. Id. at 630-31. There are few effective means of civil discovery either before or during trial, therefore defendants who control access to information have a significant advantage. Id. at 631-32.

43. Id. at 632. The government has placed limits on the number of individuals permitted to practice law. See infra notes 49-50 (discussing the relatively low number of practicing attorneys in Japan).

44. Ramseyer, supra note 37, at 632. Most attorneys live in metropolitan Tokyo or Osaka. Id. Attorneys are thus unavailable to most people outside of those cities, and the cost of legal services is very high. Id. at 632-33. Many Japanese attorneys use a retainer fee. Id. at 633. The retainer is based on the amount in controversy in the lawsuit. Id.

45. See id. at 633-34 & nn.177-79 (noting that in 1977, Japan had less than 2,000 judges of general jurisdiction, compared to more than 600 federal and 6,000 state judges in the United States). The Japanese judicial system creates further delays because, unlike the system in the United States, Japanese civil procedure entitles civil litigants to a trial de novo on appeal, with new evidence, and a full review of issues at the Supreme Court. Id.

46. Shapiro, Reclaiming a Place, supra note 27, at 12, col. 1, cited in Kanter, supra note 11, at 350 n.34. "Bengoshi" is the Japanese term that describes the closest Japanese equivalent of the "attorney" or "lawyer" in the United States. Kanter, supra note 11, at 350. According to one author, the term resulted from an attempt to translate the English term "barrister" into Japanese. Id. "Bengo-suru," meaning to defend or speak for a third person, was joined with "shi," meaning samurai or gentleman,
attorneys. The legal profession in the United States, in comparison, had over 653,600 members. On a per capita basis, Japan has fewer attorneys than the United States. Comparing the number of attorneys in the United States with the number of bengoshi in Japan, however, can be misleading. Part of the explanation for the fewer number of attorneys in Japan is that only a limited number of people can study to become a bengoshi. Furthermore, Japanese paraprofessionals handle tasks that attorneys in the United States typically perform.

creating the term "bengoshi." Id. 47. Kanter, supra note 11, at 350. 48. Id. 49. Michaud, Correcting a Popular Misconception about the Legal Profession in Japan, N.Y. St. B.J., Apr.-May 1986, at 26 (stating that in 1986 Japan had 11,000 attorneys for a population of over 120 million or one attorney for every 10,000 people, while the United States had over 400,000 attorneys for a population of 235 million or one attorney for every 500 persons). 50. See id. (noting that it is impossible to get an accurate impression of the size of the Japanese legal profession by counting only the number of lawyers). In his 1983 report to the Harvard Board of Overseers, President Derek Bok of Harvard University made a lawyer-per-capita comparison between the United States and Japan. Id. Bok reported that the United States suffers from too many exceptionally talented people entering the legal profession. Id. Implicit in his report was the idea that the United States could benefit from following the Japanese example of limiting the number of individuals permitted to become lawyers. Id. 51. See Hahn, An Overview of the Japanese Legal System, 5 Nw. J. Int'l L. & Bus. 517, 522 (1983) (noting that Japan has so few attorneys because there is only one law school in Japan). The Legal Training and Research Institute, or Shihō Kenshushō, located in Tokyo, accepts approximately 500 applicants per year. Id. at 522-23. Under Article 4 of the Bengoshi Hō, one must graduate from the Institute before he or she is admitted to practice law in Japan as a bengoshi. Id. at 524 & n.38. The Institute accepts less than two percent of the people who apply for admission and take the entrance examination. Id. If admitted to the Institute, a candidate then studies for two years as a shishū-sei (legal apprentice), and then must pass a second examination. See id. (commenting that although the Institute gives a second test before an apprentice graduates from the Institute, students rarely fail, and those who do fail may retake the examination after an additional year of study). The Ministry of Justice considers the students employees of the Ministry, and pays them a salary during their studies at the Institute. Id. at 522. 52. Id. at 530; see also Brown, A Lawyer By Any Other Name: Legal Advisors in Japan, in Doing Business in Japan (1983) (discussing a statistical study of the various types of legal professionals in Japan), cited in Michaud, supra note 49, at 26-28. There are many other types of legal professionals who are not bengoshi, but who perform work an attorney in the United States normally performs. First, legal specialists in the government bureaucracy perform many functions of attorneys in the United States. Michaud, supra note 49, at 28. They usually have undergraduate law degrees. Id. They are responsible for drafting legislation for the Diet, as well as the rules and regulations needed to interpret those laws. Id. There are approximately 2,000 civil servants working as legal specialists. Id. Second, the Japanese sōgō shōsha, or trading companies, employ in-house legal advisors. Id. The in-house legal advisors, like the government legal specialists, usually have undergraduate degrees in law. Id. The in-house legal advisors perform all legal work for the company other than litigation. Id. The trading companies must rely on in-house
The attorney plays a different and smaller role in Japanese life than in American life. For example, in the United States the attorney is an important actor in contract negotiations. A client in the United States relies on the attorney's talents not only for drafting contracts, but also for providing advice and counseling on business matters. The attorney legal advisors because they cannot employ bengoshi without special permission from the Japanese bar association. Id. at 28 n.2. There are approximately 6,000 in-house legal advisors. Id. at 28.

Third, shihō shoshi are judicial scriveners who draft court documents, take the necessary actions relating to title transfer for land, and give legal advice on related matters, similar to attorneys in the United States. SHIHŌ-SHOSHI HÔ (Judicial Scriveners Act) (1950 c. 197), art. 1(1), cited in THE JAPANESE LEGAL SYSTEM, supra note 1, at 563 & n.1. The office of the Ministry of Justice in the location where the candidate wants to practice administers an examination for people who wish to become shihō shoshi. Id. Candidates for the job of shihō shoshi then are nominated from among those who have served for more than five years as clerks of courts or as administrative officers in the courts, in the Ministry of Justice or public procurators' offices. Id. People with equivalent learning and ability as clerks and administrative officers mentioned above are also nominated. Id. at 563. There were approximately 15,000 people in 1982 who acted primarily as shihō shoshi. Michaud, supra note 49, at 28 & n.3 (noting that there are over 30,000 people qualified as shihō shoshi, but that this figure includes individuals qualified in other legal professions).

Fourth, benrishi are similar to United States patent attorneys and have the power to give legal advice on patent, trademark, and trade name work. BENRISHI HÔ (Patent Attorneys Act) (1921 c. 100), art. 1, cited in THE JAPANESE LEGAL SYSTEM, supra note 1, at 564 & n.4. The law permits benrishi to represent clients in court on patent and trademark matters. BENRISHI HÔ (Patent Attorneys Act) (1921 c. 100), art. 9.2, cited in THE JAPANESE LEGAL SYSTEM, supra note 1, at 564 & n.5. In 1982, there were approximately 2,500 benrishi. Michaud, supra note 49, at 28.

Fifth, zeirishi are tax attorneys who can give legal advice on tax matters and represent clients before the Tax Office. ZEI-SHOSHI (Tax Attorneys Act) (1951 c. 237), art. 2, cited in THE JAPANESE LEGAL SYSTEM, supra note 1, at 564 & n.8. Zeirishi must pass a difficult five-part examination. Michaud, supra note 49, at 28. Certified public accountants and bengoshi qualify ipso facto as zeirishi. ZEI-SHOSHI HÔ (Tax Attorneys Act) (1951 c. 237) art. 3, cited in THE JAPANESE LEGAL SYSTEM, supra note 1, at 564 n.9. In general, the three professions are distinct. Michaud, supra note 49, at 28. There were about 35,000 zeirishi (not including bengoshi and certified public accountants) in 1982. Id.

Sixth, gyosei shoshi specialize in preparing and recording nonjudicial documents filed with the government, a task attorneys in the United States often perform. Id. Instead of a national examination, individuals take an exam in the local prefecture. Id. There were approximately 16,000 people in Japan acting primarily as gyosei shoshi in 1982. Id.

Finally, law professors represent another distinct group of legal professionals. In Japan, professors rarely practice as bengoshi. Id. They are, however, often asked to render opinions on legal matters, particularly in the area of litigation, as are their counterparts in the United States. Id. Japan had approximately 2,500 law professors in 1982. Id.

53. See Hahn, supra note 51, at 532 (comparing the role of an attorney in business deals in the United States with his or her Japanese counterpart).

54. Id. Attorneys in the United States not only handle lawsuits, but also use their verbal and analytical training to counsel their clients on business negotiations and deci-
in the United States must often find creative answers to a client's problems.\textsuperscript{55} The \textit{bengoshi}, in contrast, assumes a more limited role in Japanese business life.\textsuperscript{56} The \textit{bengoshi} specializes in litigation,\textsuperscript{57} unlike attorneys in the United States. Therefore, Japanese clients generally do not hire \textit{bengoshi} to provide business counselling, representation in contract negotiations, or other similar business services.\textsuperscript{58} In Japan, parties to a business transaction often perceive an attorney's participation as an unfriendly action.\textsuperscript{59} In contract negotiations, the \textit{bengoshi} normally does not participate in the preliminary negotiation process.\textsuperscript{60} Instead of employing a \textit{bengoshi}, Japanese companies use their corporate legal departments.\textsuperscript{61} The members of these legal departments are the negotiators, drafters, and advisors during contract negotiations.\textsuperscript{62} A \textit{bengoshi} becomes involved in a contract, if at all, only after the parties have completed their negotiations, and then only to review the work.\textsuperscript{63}

\section*{B. Treatment of Foreign Attorneys in the United States and in Japan}

Every nation has a legitimate interest in exercising some control over individuals providing legal services within its territory.\textsuperscript{64} Specially qualified
ified individuals often enjoy a monopoly on the legal profession. In addition, domestic practitioners have an ethical obligation to maintain the integrity of the profession and to prevent competition from individuals who are not qualified to practice law. In the United States, local governments establish minimum qualifications to practice law, ethical considerations, and standards for the breadth of permissible activities.

1. Foreign Attorneys in the United States

An attorney can practice law in the United States only after passing the bar examination of a particular state. Passing the examination, however, does not automatically grant an attorney the right to practice law in another country or even in a state other than the one whose bar examination he or she passed. As a general rule, state bar associations restrict attorneys from other countries from practicing law. At the time of the Section 301 Petition, with the exception of New York, have used to justify exclusion: (1) the person from outside the jurisdiction lacks loyalty to the political and cultural values of the nation, thus disrupting the administration of justice; (2) the lawyers from the United States do not have the competence to serve the local citizens; (3) the local citizens do not have redress for possible injury that attorneys from the United States might cause; (4) the attorneys from the United States will interfere with the development and ability to compete of the local legal profession, thereby damaging the local legal profession; and (5) reciprocal privileges in the United States are not likely. Id. at 1788-89.

65. Id. at 1770 n.15. A foreign attorney confronts the state's interests in (1) protecting the public; (2) maintaining national standards of court integrity; and (3) satisfying members of the legal profession that they will not lose business to foreign attorneys. Id.

66. See Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975) (recognizing the interest of a state in regulating the practice of law within its boundaries, and the broad powers of a state to establish standards for the licensing of legal practitioners); In re Griffiths, 413 U.S. 717, 722-23 (1973) (holding that a state has a substantive interest in determining whether an applicant to the bar possesses the character required of an attorney); Schwe w. Board of Bar Examiners, 350 U.S. 232, 239 (1957) (acknowledging that a state can require various standards of qualification before it admits an applicant to the bar); cf. S. Cone, Regulation of Foreign Lawyers 42-107 (3d ed. 1984) (analyzing the regulations governing attorneys from the United States practicing law in Australia, Brazil, Canada, China, England, Federal Republic of Germany, France, Hong Kong, Israel, Italy, Japan, Mexico, Netherlands, Nigeria, Singapore, and the European Community).

67. Comment, Providing Legal Services, supra note 24, at 1772.

68. Id. at 1784.

69. See N.Y. Jud. Law § 53.6 (McKinney 1983) (allowing foreign lawyers to practice as "foreign legal consultants" without taking the New York bar examination or attending a law school in the United States); see also 22 N.Y. Admin. Code tit. 22, § 521.1(a) (1986) (permitting the licensing of applicants who are attorneys, or the equivalent, in foreign countries, and who have practiced, and have been in good standing for at least five of the immediately preceding seven years). The legal consultant may engage in a consulting practice, but may not prepare documents that affect (1)
and the District of Columbia, foreign attorneys could not practice law in the United States without first taking and passing a state bar examination.

The demand for legal services from foreign attorneys is probably high in New York because international finance is a predominant business in New York City. Kosugi, *Regulation of Practice by Foreign Lawyers*, 27 AM. J. COMP. L. 678, 687 (1979). The need for foreign attorneys in New York prompted New York to change its bar regulations. *Id.* at 688. A second motivating consideration was the desire to suspend criticism of the activities of attorneys from the United States practicing in foreign countries. At the time it enacted its new regulations, New York studied the changes to its regulations on the activities of foreign lawyers that France made in 1971. *Id.* at 687-88. The legislative history of the French statute indicates a goal of the legislation was to quiet French attorneys' criticism of foreign attorneys. *Id.* at 688.

The District of Columbia Court of Appeals adopted an amendment to Rule 46 of the District of Columbia Court of Appeals Rules in March 1986 that permits licensing foreign attorneys as special legal consultants. *Id.* The District of Columbia modeled its regulations after the New York rules. *Id.* The District of Columbia provisions allow “Special Legal Consultants” to practice law on a limited basis, primarily on foreign and international law and transactions, but the provisions do not allow these consultants to appear in court or prepare real estate documents, wills, trust agreements, or domestic relations documents. *See* D.C. Ct. APP. R. 46(c)(4)(D) (describing the scope of practice of a “Special Legal Consultant”), *reprinted in* 26 I.L.M. 986, 989 (1987). The District of Columbia does not permit “Special Legal Consultants” to give advice on United States law, unless the Consultants have relied on the advice of an attorney licensed to practice in the United States. *Id.* The District of Columbia does not permit “Special Legal Consultants” to give advice on United States law, unless the Consultants have relied on the advice of an attorney licensed to practice in the United States. *See* D.C. Ct. APP. R. 46(c)(4)(C) (noting that the court, in ruling on an application for “Special Legal Consultant” status, may consider whether a member of the District of Columbia bar could establish an office in the country where the prospective applicant was admitted to the bar), *reprinted in* 26 I.L.M. 986, 989 (1987).

*See* S. CONE, *supra* note 67, at 5-40 (analyzing the laws of a number of jurisdictions in the United States regulating foreign attorneys who want to practice law in the United States). Several states have provisions allowing either foreign attorneys or “resident aliens” to apply for admission to the state bar or to take the state bar examination. *Id.* In California, practitioners from English common law jurisdictions do not have to meet the California requirement of completing the first year law school examinations successfully, but they must pass the bar examination. *See* CAL. BUS. & PROF. CODE §§ 6060(g), 6062, foll. § 6069, Rules IV §§ 42(a)(3), 44(a) (West 1974 & Supp. 1987), *cited in* S. CONE, *supra* note 67, at 5-9. If an applicant studies four years at a law school “that is authorized to confer professional degrees and requires classroom attend-
Prior to the 1973 Supreme Court decision in *In re Griffiths*, state bar associations could prohibit aliens from taking the bar examination. The Court in *In re Griffiths* did not state explicitly that an alien attorney could offer legal services in the United States, even if the services are related strictly to the alien attorney's home country, but such an interpretation is desirable. State bar associations should allow alien attorneys to offer legal services related strictly to the alien attorney's practice of its students for a minimum of 270 hours a year,” he or she satisfies the legal education requirement for admission to the California bar. *Id.* at § 6060(e), *cited in S. Cone, supra* note 67, at 6.

In Connecticut, “an alien lawfully residing in the United States” can apply for admission to the Connecticut bar. *See Connecticut Practice Book* § 16 (First) (West 1979 & Supp. 1987), *cited in S. Cone, supra* note 67, at 10. The alien must also meet additional requirements for admission to the Connecticut bar, which include education at an institution the Bar Examining Committee has approved and passing the bar examination, or having “actually practiced” law in another United States jurisdiction for at least five years. *See id.* at §§ 16 (Fifth), 21, *cited in S. Cone, supra* note 67, at 10-11.

The Massachusetts Board of Bar Examiners can admit, without examination, a foreign lawyer who has practiced or taught law for at least five years. Massachusetts Board of Bar Examiners, Information Relating to Admission of Attorneys in Massachusetts § 6.2 (1983), *cited in S. Cone, supra* note 67, at 22. *But see S. Cone, supra* note 67, at 22 n.4 (noting that the Massachusetts Board of Bar Examiners required a foreign-educated attorney not admitted in any other state in the United States to obtain a juris doctor degree from an ABA-approved law school).

New Jersey permits foreign applicants to take the bar examination after they have met educational requirements and established that they have good standing in every other jurisdiction in which they were ever admitted to practice law. *See Rules Governing the Courts of the State of New Jersey*, Rule 1:24-2 (1987), *cited in S. Cone, supra* note 67, at 23-24.

Ohio allows foreign-educated attorneys to take the Ohio bar examination if the Ohio Supreme Court approves the attorney's educational qualifications. *Ohio Rules of Court*, Rule I, §§ 2(A)(g), 9(A)(k) (1984), *cited in S. Cone, supra* note 67, at 33.

Pennsylvania allows a foreign-educated attorney to take the bar examination after attending a law school in the United States for one year. *Pa. R. Ct.*, Bar Admission Rule 203, 205, *cited in S. Cone, supra* note 67, at 34-35.

In Texas, the Board of Law Examiners has discretionary authority to permit a “resident alien” to take the bar examination. *Tex. R. Ct.*, Rules Governing Admission to the Bar of Texas, Rule VIII, *cited in S. Cone, supra* note 67, at 38-40.

The Supreme Court of Florida previously permitted applicants to petition for waiver of the Florida statute on bar admissions. *Fla. Stat. Admission to Bar*, art. 3, § 1(b), *cited in S. Cone, supra* note 67, at 15. It no longer approves such petitions. *See In re Hale*, 433 So. 2d 969, 972 (Fla. 1983) (stating that the decision not to consider waivers of the requirement in Florida that lawyers be graduates of ABA-approved, ABA-provisionally approved, or AALS member law schools was in the best interests of the legal profession).

New York permits foreign lawyers to practice as “foreign legal consultants.” *See supra* note 70 (discussing the New York regulations).

The District of Columbia recently revised its bar regulations. *See supra* note 71 (discussing the revisions to the District of Columbia regulations permitting foreign attorneys to practice as “Special Legal Consultants”).


74. Kosugi, *supra* note 70, at 687.
home country, because attorneys from the United States want to pro-
vide similar legal services in foreign countries. At the time of the Sec-
tion 301 Petition, Hawaii, California, and Michigan were considering
changing their state bar regulations to allow foreign attorneys to prac-
tice in this limited manner.75

2. Foreign Attorneys in Japan

Many foreign attorneys went to Japan after World War II, to ad-
dress legal matters connected with the Allied occupation of Japan.76
Some of the attorneys who were in Japan to take part in the Interna-
tional Military Affairs Trials77 began to handle legal matters not di-
rectly connected with the Allied occupation.78 Responding in part to
this influx of foreign attorneys, the Japanese government enacted the
Bengoshi Hō in 1949.79

a. The Bengoshi Hō

For a country that is normally reluctant to welcome foreigners, the
Japanese government expressed a broad international viewpoint and
took an extremely open approach in the Bengoshi Hō.80 The Bengoshi
Hō eliminated the long existing requirement of Japanese nationality as
a prerequisite to qualifying as an attorney.81 Furthermore, article 7
specifically permitted foreign attorneys who were not admitted to the
Japanese bar to handle legal matters.82 The foreign attorneys who

75. See Section 301 Petition, supra note 3, at 40 (listing the United States jurisdic-
tions that, at the time of the petition, were considering revising their regulations to
allow foreign attorneys to act as "foreign legal consultants," patterned after the New
York and District of Columbia regulations); see also infra note 225 (discussing the
changes Hawaii, California, and Michigan made, after the new Japanese law went into
effect, to allow foreign attorneys to practice as foreign legal consultants).
76. Kosugi, supra note 70, at 691.
77. Id.
78. Id. In part, the postwar dependence of Japan on foreign countries, especially
the United States, resulted in the presence of the foreign attorneys. Id.
79. Id. at 691-92.
80. Fukuhara, supra note 1, at 595.
81. Id. Eliminating the nationality requirement permitted an alien to practice as a
Japanese attorney if the alien met the other requirements to be an attorney. Id. The
alien attorney still had to pass the national "legal examination," or shihō shiken,
before Japan would recognize him or her as a bengoshi. See id. at 595-96 (noting that
retention of the nationality requirement would have made it impossible for an alien to
become a bengoshi).
82. BENGOSHI Hō, supra note 1, art. 7. Article 7 stated:
(1) A person who is qualified to become an attorney of a foreign country and
who possesses an adequate knowledge of the laws of Japan may obtain the recog-
nition of the Supreme Court and conduct the affairs prescribed in Article 3 [the
could practice under the provisions of article 7 were called junkai-in.  

b. The Repeal of Article 7

On August 10, 1955, the Japanese legislature repealed article 7. The repealing legislation did not state explicitly why the legislature repealed article 7. The repealing statute contained a grandfather clause, however, that permitted attorneys previously qualified to practice law under article 7 to continue to practice law. The repeal of article 7

affairs of an attorney]; Provided, however, that this does not apply to the persons listed in the prior article [persons disqualified for various reasons such as disciplinary action by a practicing attorneys' association, bankruptcy, and being sentenced to punishment by imprisonment or greater]. (2) A person who is qualified to become an attorney of a foreign country may obtain the recognition of the Supreme Court and conduct the affairs prescribed in Article 3 in regard to aliens or foreign law; Provided, however, that this does not apply to the persons listed in the prior article. (3) The Supreme Court may impose an examination or screening in those cases where it grants the recognition of the prior two paragraphs...
meant that the eligible foreign attorneys had a monopoly among foreigners on the international practice of law in Japan.\footnote{87} These few attorneys enjoyed a privileged position because Japanese law protected them from foreign competition.\footnote{88} Thus, Japanese law effectively precluded other foreign attorneys and those Japanese attorneys who wanted a more international scope of practice from competing with this select group of attorneys.\footnote{89}

In addition to those foreign attorneys practicing as junkai-in, Japanese law firms employed many foreign attorneys as legal trainees.\footnote{90} Both the law firms and the foreigners, however, usually found this experience unsatisfying.\footnote{91} The foreign attorneys, many of whom speak Japanese, knew that they could not practice in Japan independently.\footnote{92} Many trainees wanted to learn about Japanese domestic law, but instead found themselves merely drafting Japanese documents into English and assisting with international trade issues.\footnote{93}

The Japanese argued that supervising the trainees was important because the trainee attorneys, many of whom come to Japan immediately after completing law school, often lacked experience and training in their home countries.\footnote{94} The Japanese attorneys became concerned that

\footnote{87} See Fukuhara, supra note 1, at 598 n.19 (noting that there is no other example of the Japanese legislature granting such a valuable economic privilege to a limited group of people through the recognition of their vested right); see also Kosugi, supra note 70, at 692-93 (pointing out that so-called "foreign trade legal activities" were outside the realm of a bengoshi's work, and that the junkai-in thus filled a gap in the Japanese legal profession during the postwar period).

\footnote{88} Kosugi, supra note 70, at 692-93. The bengoshi criticize the junkai-in, the foreign attorneys who continue to practice in Japan under the repealed article 7 provisions, for ignoring article 5(2) of the Bengoshi Ho, which states that the Supreme Court of Japan prescribes the scope of the foreign attorneys' activities. See \textit{id.} at 693 (citing Kodama, \textit{Nihon ni Okeru Gaikokujin Bengoshi no Shomondai (Problems Concerning Foreign Lawyers in Japan)}, 427 \textit{JURIST} 67 (1969) and Senoo, \textit{Zainichi Gaikokujin no Jittai (The Situation of Foreign Lawyers in Japan)}, 309 \textit{JURIST} 70 (1964)). The bengoshi also criticize the junkai-in for practicing the law of other countries, including Japanese law. \textit{Id.} One could see the repeal of article 7 as helping Japanese attorneys who want to practice in the field of international trade because it prevented an influx of foreign attorneys. Kosugi, supra note 70, at 693. Realistically, however, a Japanese attorney requiring assistance on a question of foreign law would prefer to seek the advice of a foreign attorney who is more knowledgeable. \textit{Id.} at 696-97. Because the junkai-in are the only professionals qualified to give such advice, they maintain a competitive advantage in the area of international transactions.

\footnote{89} Kosugi, supra note 70, at 696-97.

\footnote{90} Hahn, supra note 51, at 538. A Japanese lawyer usually supervises the work because the foreigners themselves cannot practice law. \textit{Id.} These internships normally last two years. \textit{Id.}

\footnote{91} \textit{Id.}

\footnote{92} \textit{Id.}

\footnote{93} \textit{Id.}

\footnote{94} Kosugi, supra note 70, at 694.
these foreign trainees were engaged in substantive legal work associated with international transactions, either because the supervising Japanese attorney could not speak English well or was too busy to supervise the trainees adequately. The Japanese attorneys expected these trainees to handle international trade matters to a limited extent. The problem, however, involved the content of the work these foreign trainees performed.

c. The Interpretation of Article 72 of the Bengoshi Hō

Article 72 of the Bengoshi Hō prohibits aliens from engaging in certain activities that would constitute the unauthorized practice of law.97 The interpretation of article 72 was a critical matter in the dispute over whether foreign attorneys should practice law in Japan. Article 72 prohibits unauthorized persons from handling matters that have become or are likely to become a jiken, or case.98 Under article 77, violators of article 72 may face criminal sanctions.99

The Supreme Court of Japan, however, declared that articles 72 and 77 do not cover all legal business that nonlawyers perform.100 Argua-
bly, as long as the client in the United States handles the final details of a contract or form submission, nothing in the regulations prevents a foreign practitioner from submitting a draft contract or form to the government. The provisions of article 72, therefore, appear to permit alien attorneys to engage in a limited scope of activities.

In 1972, however, the Nihon Bengoshi Rengokai’s (Nichibenren) Gaikoku Bengoshi Taisaku Inikai (Japanese Federation of Bar Association’s Committee to Oppose Foreign Lawyers) published its Gaikokujin Hiben Katsudo Boshi ni Kansuru Kijun (Standards Concerning the Prevention of Non-Attorney Activities by Foreigners). This document enumerated the activities that the Nichibenren believed the Bengoshi Hō should prohibit or restrict foreign attorneys from performing, and classified all aliens who were not allowed to practice law in Japan as “unqualified aliens.” In summary, the standards said: (1) a Japanese attorney or a foreign attorney recognized under former article 7 of the Practicing Attorneys Act must direct or supervise activities such as the drafting and rewording of the text of technical assistance and joint venture contracts; (2) an unqualified alien may not express independently a legal opinion on matters such as the drafting or revision of a contract because the attorneys would consider such an act the rendering of legal advice; and (3) an unqualified alien may not give independent legal advice or meet independently with a client to provide legal consultation or to express a legal opinion.

Critics of these “standards” have noted several inconsistencies. For
example, the standards do not distinguish between legal services and nonlegal services, or between legal services and legal matters.\textsuperscript{107} Furthermore, the standards do not consider the wording of the prohibition in article 72 of the Bengoshi Hö regarding the unauthorized practice of law,\textsuperscript{108} because the standards are not restricted to legal affairs involving Japanese jiken (cases).\textsuperscript{109} Finally, the standards do not take into consideration the wording of article VIII of the Treaty of Friendship, Commerce, and Navigation (FCN Treaty) between Japan and the United States.\textsuperscript{110} These standards, although not legally binding,\textsuperscript{111} represent the opinion of the Nichibenren. They are important, however, because they represent the attitude of some members of the Nichibenren on whether to allow foreign attorneys to practice in Japan. In addition, the Japanese government has formally recognized the autonomy of the Nichibenren over the legal profession regarding the issue of permitting foreign attorneys to open offices in Japan.\textsuperscript{112}

C. The "Visa Freeze"

Japan can benefit from having foreign attorneys offer legal services on foreign law matters, either directly or in conjunction with a Japanese attorney.\textsuperscript{113} Japan, however, as a sovereign, has the right to decide whether to allow foreign attorneys to practice within its borders. Even

\begin{itemize}
  \item \textsuperscript{107} Kanter, \textit{supra} note 11, at 362.
  \item \textsuperscript{108} See \textit{supra} note 97 (giving the text of article 72).
  \item \textsuperscript{109} Fukuhara, \textit{supra} note 1, at 606-07.
  \item \textsuperscript{110} FCN Treaty, \textit{supra} note 14, art. VIII, para. 1. Article VIII of the FCN Treaty deals with the practice in each state of professionals from the other state. Article VIII(1) provides that:
    \begin{quote}
    1. Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within their territories of such other Party for the particular purpose of making examinations, audits and technical investigations exclusively for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises in which they have a financial interest, within such territories.
    \end{quote}
    \textit{Id.} Article VIII thus appears to establish grounds for allowing foreign attorneys to practice in Japan under special circumstances, such as foreign attorneys who represent United States nationals and companies.
  \item \textsuperscript{111} Fukuhara, \textit{supra} note 1, at 607 (noting that the jurisdiction of the Nichibenren is limited to the bengoshi only).
  \item \textsuperscript{112} Kore made no Keika (Chronology of Events to Date), Toben Shimbun, Aug. 10, 1985, at 4, \textit{cited in} Section 301 Petition, \textit{supra} note 3, at 32.
  \item \textsuperscript{113} Kosugi, \textit{supra} note 70, at 697. Kosugi adds that officials should interpret the Bengoshi Hö to allow such activity and should not render such activity unlawful under articles 72 and 77. \textit{Id.}
\end{itemize}
if it permits foreign professionals to practice as attorneys, Japan still may regulate their activities.

Japan has been reluctant to allow attorneys from the United States to open offices in Japan. At the time of the Section 301 Petition, only one law firm had opened an office in Japan since the repeal of article 7 in 1955. In April 1977, the government of Japan issued a visa to Isaac Shapiro, a partner of the law firm of Milbank, Tweed, Hadley & McCloy.\(^{114}\) Shapiro’s visa permitted him to enter Japan under article VIII of the FCN Treaty.\(^{115}\) On June 10, 1977, eighty-seven bengoshi filed a petition asking the Nichibenren to investigate Shapiro’s activities.\(^{116}\) The Nichibenren issued a formal letter of warning to Shapiro on June 17, 1977, and sent a copy of this letter to the Japanese Ministry of Justice.\(^{117}\) Shapiro ignored the Nichibenren warning letter and proceeded to open a law office in Tokyo on July 1, 1977.\(^{118}\)

The ensuing discussions between the Nichibenren and the Ministry of Justice led to a “visa freeze.”\(^{119}\) The Nichibenren and the Ministry of Justice began discussing the “Shapiro problem” in June 1977.\(^{120}\) The Nichibenren originally requested that the Ministry of Justice prosecute Shapiro for the unauthorized practice of law.\(^{121}\) According to the section 301 petitioners, there is indirect evidence that the Nichibenren agreed not to ask for Shapiro’s prosecution in exchange for an agreement from the Ministry of Justice to stop issuing visas to foreign attorneys.\(^{122}\) In December 1980, the Japanese government denied the visa

---

114. Section 301 Petition, supra note 3, at 27. Shapiro opened a Tokyo office on behalf of Milbank, Tweed, Hadley & McCloy to advise the Japanese branch of Chase Manhattan Bank on the law of the United States. Hahn, supra note 51, at 537.

115. Section 301 Petition, supra note 3, at 27. According to the Section 301 Petition, Shapiro’s visa says, “An expert mentioned in Article 8, Japan-U.S. Commerce and Navigation Treaty.” Id.

116. Id.

117. Id. The Nichibenren warned Shapiro they would consider his opening of the Milbank Tokyo office the unauthorized practice of law under article 72. Id.

118. Id. The firm argued opening the Tokyo office would not constitute the unauthorized practice of law, because the firm’s members would give advice on foreign law and not on Japanese law. Hahn, supra note 51, at 537.

119. See Section 301 Petition, supra note 3, at 28-30 (discussing an apparent agreement between the Nichibenren and the Ministry of Justice not to prosecute Shapiro in exchange for two promises: to freeze visa applications of attorneys from the United States, and not to issue an interpretation of article 72 that would be unfavorable to the Nichibenren). This visa freeze was one of the reasons the attorneys from the United States petitioned for relief under section 301 of the Trade Act of 1974. Id. at 29-31.

120. See id. at 28 (noting that a Ministry of Justice official involved in the matter confirmed the existence of such a dialogue).

121. Id.

122. See id. (quoting a February 2, 1982 letter from Shapiro to Shintaro Abe, who was the Minister of International Trade and Industry at the time, and who is now
application of an attorney from Milbank, Tweed, Hadley & McCloy.\textsuperscript{123} The Japanese government claimed that it was maintaining the status quo until it could establish a policy regarding foreign attorneys.\textsuperscript{124}

In March 1982, the United States informed the Japanese government officially that it considered the Japanese restrictions on law firms from the United States that wanted to establish offices a nontariff barrier to trade in legal services.\textsuperscript{125} The USTR submitted a proposal in April 1985 to allow attorneys from the United States to open offices in Japan.\textsuperscript{126} On July 30, 1985, however, the Japanese government announced its "Action Programme Concerning the Foreign Lawyers Problem," which ignored the April 1985 USTR proposal.\textsuperscript{127} In December 1985, the Nichibenren adopted a resolution defining a policy for a "foreign lawyers' system."\textsuperscript{128} The Ministry of Justice then introduced a bill in the Diet, to amend the Bengoshi Hō on March 28, 1986, prompting the Section 301 Petition.\textsuperscript{129}

II. THE SECTION 301 PETITION

The attorneys from the United States who want to open offices in

Foreign Minister). This letter noted the Nichibenren's protest and stated that Shapiro understood that the presence of Milbank, Tweed, Hadley & McCloy in Japan had been accepted, but that the Ministry of Justice would not issue additional visas to foreign attorneys. Id. It is unclear who accepted the presence of Milbank: the Ministry of Justice or the Nichibenren.

123. See id. at 29-30 (quoting the response of the Japanese Embassy to a visa application from one of the attorneys from the Milbank firm).

124. Id. at 29. The letter from the Japanese Embassy to the attorneys said:
The question whether a visa should be issued to [applicant] is not simply a matter of procedure; it raises the question of whether foreign attorneys should be allowed to practice in our country, and this is a basic and crucial question concerning the nature of the Japanese bar system. We have felt accordingly that it is necessary for the Japanese Government to work out a reasonable conclusion on this matter, paying due consideration to the intent of the Japanese Federation of Bar Associations . . . but until such time as a conclusion can be reached it has been decided that it will be best to freeze the status quo with regard to this problem and, accordingly, to withhold judgment on this particular application.


125. Shapiro, Reclaiming a Place, supra note 27, at 12, col. 2, cited in Section 301 Petition, supra note 3, at 31.

126. Section 301 Petition, supra note 3, at 32; see id. Exhibit E (giving the text of the USTR proposal).

127. Id. at 32. In the "Action Programme," the government said it would devise an appropriate solution, with the aim of revising the Practicing Attorneys' Law in the next session of the Diet. Id.

128. Id.; see id. Exhibit F (giving a translation of the resolution). The USTR immediately condemned the resolution in a press release on December 17, 1986. Id. at 33; see id. Exhibit G (giving the text of the press release).

129. Id. at 34.
Japan argued that their presence in Japan will help companies from the United States reduce the huge trade imbalance. The USTR agrees that improvement in the international legal services area is an important aspect of eliminating the trade frictions between Japan and the United States. The issue is intertwined with the deep cultural differences between Japan and the United States. The cultural differences involved in this dispute include: perceptions of the different scope of activities of attorneys in the two countries, Japan’s perception of attorneys from the United States, the right of a nation to regulate legal services, fear of disruption of the domestic legal and social sys-

130. See Berger, Tokyo Considers a New Import — U.S. Lawyers, Bus. Wk., Apr. 28, 1986, at 40 (discussing the attorney imbalance between the United States and Japan). An attorney who represents the American Electronics Association in Tokyo stated that an army of attorneys from the United States could help companies from the United States in Japan track pending legislation, patent and copyright regulations, customs procedures, and product standards. Id.; see also Section 301 Petition, supra note 3, at 23 (calling the lack of more than a handful of law offices of United States firms in Japan a major reason for the $50 billion United States trade deficit and trade friction with Japan).

131. Office of the United States Trade Representative, USTR Statement on Foreign Lawyers in Japan, Dec. 17, 1985, reprinted in Section 301 Petition, supra note 3, Exhibit G. The Office of the United States Trade Representative believes that through the liberalization of trade in legal services the lawyers from the United States can “provide vital trade facilitation services.” Id.

132. See Kanter, supra note 11, at 355-57 (discussing the cultural aspects of the dispute over the presence of foreign attorneys in Japan, such as the different roles of the attorney in the United States and the bengoshi and sōgō shōsha employee in Japan, and the different scope of their duties and responsibilities).

133. See supra notes 52-63 (comparing the attorney’s role in the two countries).

134. See For or Against - Gaikoku Bengoshi e no Horitsu Gyomu no Kaiho (For or Against - The Opening of Legal Services to Foreign Lawyers), Nichibenren Shimbun, Jan. 1, 1984, at 2 (stating in relevant part that the aggressive high-handed nature of certain attorneys and big law firms does not fit the social milieu of Japan), cited in Kanter, supra note 11, at 355 n.63; see also Symkowiak, Oranges, Beef and . . . Lawyers?: A Strange Case of Trade Barrier Politics, Japan Times, Dec. 28, 1983, at 11, col. 6, cited in Kanter, supra note 11, at 355 n.63 (quoting bengoshi Kunio Hamada as saying that it was somewhat imperialistic of the attorneys from the United States to contend that they could do whatever they wanted to do). The Japanese legal press portrays the attorneys from the United States as aggressive, highly competitive, and somewhat arrogant. Kanter, supra note 11, at 355 & n.63.

135. See Kanter, supra note 11, at 355 n.64 (quoting the 1985 position paper of the Japanese government, which stated that the right to regulate is a domestic law question and a matter of a country’s legal system). The position paper said:

Every country has . . . its own peculiar system of lawyers based on its historical background. Being a part of the fundamental structure of a state, the lawyer system of each country should be paid due respect. The introduction of a new system to accept foreign lawyers needs to be made with a basic recognition that this issue is tantamount to the reformation of the lawyer system itself which is deeply related to legal activities of the people.

Position Paper of the Japanese Side on Foreign Lawyers Issue for the Coming Consultation 7, (enclosed with an undated letter of approximately October 25, 1985 from Michihiko Kunihiro, Director General, Economic Affairs Bureau, Minister of Foreign
and fear that attorneys from the United States eventually will control the international legal services market.137

A. Section 301 of the Trade Act of 1974

Congress enacted section 301 of the Trade Act of 1974 to combat practices of foreign governments that block United States goods or services from overseas markets, or that artificially divert goods or services to the United States.138 After a petitioner files a petition, the USTR must determine within forty-five days whether to initiate an investigation.139 If the USTR commences an investigation and determines that action is appropriate, the President may take countermeasures against the imports of an offender nation or impose similar restrictions on the right of that nation to engage in services in the United States.140

Affairs, to Michael B. Smith, Deputy United States Trade Representative), cited in Kanter, supra note 11, at 355 n.64. Similarly, it is unlikely that the American Bar Association would welcome criticism from foreign countries regarding domestic regulation of attorneys in the United States.

136. See Kanter, supra note 11, at 356 n.66 (citing statements of several bengoshi that the presence of attorneys from the United States would cause “culture shock” because the attorneys would introduce an “alien culture”).

137. See id. at 356 n.67 (noting the fears of bengoshi that American and other international law firms with enormous organizational and economic backing will disrupt the international legal community in Japan, and the “liaison business” in Japan will lose business to foreign attorneys).


Section 301 of the Trade Act of 1974, as amended, authorizes the President to provide remedies for acts, policies or practices of foreign governments which are inconsistent with international trade agreements, or otherwise unreasonable, unjustifiable or discriminatory and burden or restrict U.S. commerce, or against failure of a foreign government to grant United States rights under a trade agreement.

Id. § 2006.0(a). One of the 1984 amendments makes the provision of section 301 expressly applicable to services. 19 U.S.C. § 2411(e)(1)(a) (Supp. III 1985).

139. 19 U.S.C. § 2412(a)(2) (Supp. III 1985). Any “interested person” can file a petition with the office of the USTR under 19 U.S.C. § 2412(a). The Trade Representative must review the allegations and decide whether to take any action. Id. § 2412(a)(1). Under 15 C.F.R. § 2006.3, “[w]ithin 45 days after the day on which the petition is received, the U.S. Trade Representative shall determine, after receiving the advice of the 301 Committee, whether to initiate an investigation.” 15 C.F.R. § 2006.3 (1986).

140. See 19 U.S.C. § 2411(a), (b) (Supp. III 1985) (defining the possible actions the President can take); see also Sandler, supra note 138, at 779 (discussing retaliation as a method of protecting United States trade).
B. Petitioners' Allegations

On March 28, 1986, the Ministry of Justice introduced a bill in the Diet proposing amendments to the regulations on foreign attorneys practicing law.\textsuperscript{141} For over a year before the introduction of the bill, negotiators from the Ministry of Justice and the USTR tried to negotiate an agreement that would allow attorneys from the United States to open offices in Japan.\textsuperscript{142} In response to the introduction of the Japanese bill, a group of attorneys from the United States submitted a petition pursuant to section 301 of the Trade Act of 1974.\textsuperscript{143} The petitioners objected to the wording of the March 28, 1986 bill, claiming that it was an unacceptable basis for allowing attorneys from the United States to open offices in Japan.\textsuperscript{144}

1. Reasons for Filing the Section 301 Petition

The petitioners had three purposes in filing the Section 301 Petition. First, they wanted to keep the "lawyers issue" on the agenda as a trade issue.\textsuperscript{145} Second, they wanted to prevent Japan from believing mistakenly that the issue had been resolved on Japan's terms.\textsuperscript{146} Third, they wanted to prevent Japan from believing incorrectly that the United States viewed the March 28, 1986 bill as the exclusive means for allowing attorneys from the United States to open offices in Japan.\textsuperscript{147}

The petitioners were attorneys from the United States who wanted to provide legal and international trade facilitation services in Japan, and to compete with bengoshi and sōgō shōsha (trading companies).\textsuperscript{148} The petitioners argued that to penetrate the Japanese market, businesses from the United States need access to attorneys from the United States.\textsuperscript{149} If the United States could penetrate the Japanese market, the petitioners argued, the United States would help Japan convert the yen into an international currency and make Tokyo an international finance center.\textsuperscript{150}

\textsuperscript{141} Section 301 Petition, supra note 3, at 3.
\textsuperscript{142} Id.
\textsuperscript{143} See id. at 1 (noting the motivation of the attorneys from the United States in submitting the petition).
\textsuperscript{144} See id. at 8 (asserting that the bill would make it extremely difficult or impossible for the petitioners or other attorneys from the United States to open law offices in Japan to give advice on United States law).
\textsuperscript{145} Id. at 6.
\textsuperscript{146} Id. at 7.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id. at 9.
\textsuperscript{150} Id.

The petitioners argued that when the government of Japan denied long-term commercial visas to the petitioners, the government prevented them from providing trade facilitation services and violated the petitioners' rights under articles VII and XXII of the FCN Treaty. The petitioners objected to the restrictions that the bill placed on their ability to provide legal services in Japan on questions of United States law or United States "legal matters." According to the petitioners, the Nichibenren dictated the conditions that allowed attorneys from the United States to open offices.

The petition alleged that the Japanese government violated Article VIII of the FCN Treaty because the government had not granted visas to attorneys from the United States since March 4, 1978. The petitioners argued that the Japanese government succumbed to the influence of the Nichibenren in denying their visa applications. According to the petitioners, the Nichibenren opposed attorneys from the United States opening offices either as trade consultants or trading companies. The petitioners argued that Article VIII(1) supersedes any Japanese professional licensing requirements. Because Japan must fol-

151. Id. at 2. The petitioners alleged that the Japanese government either "froze" or denied visa applications if the petitioners revealed their intention to engage in legal work exclusively for United States nationals and companies in Japan. Id. at 1. They further alleged that when the Japanese government denied their visa requests, it was violating the FCN Treaty, which gave the petitioners the rights of national treatment and establishment. Id. at 8; see also supra note 14 (discussing the FCN Treaty provisions covering the rights of national treatment and establishment).

152. See Section 301 Petition, supra note 3, at 1 (noting the restrictive effects of the proposed bill).

153. Id. at 8.

154. Id.; see also supra note 110 (quoting the text of article VIII).

155. See supra notes 102-12, 116-22 and accompanying text (discussing the influence of the Nichibenren on the Ministry of Justice).

156. See Section 301 Petition, supra note 3, at 23-34 (recapping the history of the Nichibenren's opposition to foreign attorneys and its influence on Japanese policy). In their analysis of the Nichibenren's opposition, the petitioners included the 1972 Standards. See supra notes 102-12 and accompanying text (discussing the 1972 Standards). The petitioners also discussed the dispute over Isaac Shapiro's arrival in Japan. See supra notes 114-23 and accompanying text (explaining the dispute over Isaac Shapiro and the presence in Japan of the law firm of Milbank, Tweed, Hadley & McCloy).

157. Section 301 Petition, supra note 3, at 14. The Japanese Constitution does not clearly define the effect of treaties on domestic law. The Japanese Legal System, supra note 1, at 57. Under Japanese law, self-executing treaties should have force as domestic law as well as international law and take precedence over previously enacted domestic law in case of a conflict. Id. Other treaties, depending on the subject matter, are subject to provisions of the constitution covering their effect on domestic law. Id.; see also Fukuhara, supra note 1, at 603 (noting article 98(2) of the Japanese Constitution, which says treaties shall be faithfully observed, in support of the argument that an
low the FCN Treaty provisions, it must grant the requested visas.\textsuperscript{168}

The petitioners argued that preparing legal reports and examinations in fulfillment of their duties as trade facilitators did not constitute the unauthorized practice of law in violation of article 72 of the \textit{Bengoshi Ho},\textsuperscript{169} unless they prepared the reports or examinations for a hōritsu jiken (legal case).\textsuperscript{160}

The petitioners argued that attorneys perform virtually the same functions for American businesses that the sōgō shōsha employees perform for Japanese businesses.\textsuperscript{161} These activities include collecting information on the market; monitoring laws, regulations, and government policies; understanding business practices; and acting as representatives in negotiations.\textsuperscript{162} The activities of the sōgō shōsha in the United

\textsuperscript{158} Section 301 Petition, \textit{supra} note 3, at 14.

\textsuperscript{159} \textit{Id.} at 10.

\textsuperscript{160} \textit{See supra} note 110 (quoting the text of article VIII(1)); \textit{see also supra} notes 97-101 and accompanying text (discussing the scope of article 72). The petitioners argued that the omission of the word "attorneys" in the second sentence of article VIII(1) did not indicate that the treaty excluded legal professionals from the provisions of the second sentence. Section 301 Petition, \textit{supra} note 3, at 13-14. The petitioners argued such an interpretation would be improper because:

(1) the FCN Treaty must be interpreted as a whole in light of its purpose to promote trade (see \textit{Vienna Convention on the Law of Treaties}, 81 I.L.M. (1969) art. 31(1)); (2) use of the principle \textit{[expressio unius est exclusio alterius (expression of one excludes other)]} must not be utilized to defeat the purpose of the FCN Treaty to promote trade (see \textit{2A C. Sands, Sutherland's Statutes and Statutory Construction} §§ 476.23-.35 (4th ed. 1984)); (3) it is inconceivable that the State Department, which drafted the treaty, intended that American business abroad be prohibited from obtaining American professional legal advice, which was as essential to American business in 1953 as it is now (see Exhibit B [of the Section 301 Petition]); (4) the negotiating history of the FCN Treaty, which must be referred to to clarify ambiguity (see \textit{Vienna Convention}, art. 32; E. Fukatsu, Kokusai Ho Soron (General Theory of International Law) 224; S. Kyozuka, Zoku Joyakuho no Kenkyu (Continued Research on the Law of Treaties) 276 (1977)) clearly shows that both the American and Japanese negotiators understood the term "profession" to include all professions, including the legal profession, for the limited purpose of providing examinations and reports; (5) the term "accountants and other technical experts" simply means "professional persons" and (6) the term "attorneys" simply means "locally licensed legal representative" for court appearances and other legal representation.

Section 301 Petition, \textit{supra} note 3, at 13-14. The petition also noted that the United States Department of State inserted an identical paragraph in the FCN Treaty with the Federal Republic of Germany to allow investigators to conduct special investigations without accusations that the investigators are illegally invading the regulated profession. \textit{See id.} at 12-13 (comparing the clause in the Japan-United States FCN Treaty with the virtually identical clause in the FCN Treaty between the Federal Republic of Germany and the United States).

\textsuperscript{161} Section 301 Petition, \textit{supra} note 3, at 15.

\textsuperscript{162} \textit{Id.} at 16 (discussing international trade facilitation services that lawyers from the United States provide); \textit{see also id.} at 17-21 (noting the remarkable degree of
States constitute legal services because attorneys provide the same services in the United States.\textsuperscript{163} The petitioners argued that in Japan, however, the sōgō shōsha cannot provide the type of trade facilitation services that businesses in the United States require.\textsuperscript{164}

The sōgō shōsha employees work in the United States under “treaty trader” visas.\textsuperscript{165} The petitioners argued that attorneys from the United States are entitled to the closest Japanese equivalent to the “treaty trader” visas.\textsuperscript{166} According to the petitioners, Japan was not willing to extend privileges that the United States already had extended to the employees of the sōgō shōsha.\textsuperscript{167} The proposed regulations indicated to the petitioners that the Japanese Ministry of Justice had disregarded the needs of the United States for assistance in trade facilitation

\begin{itemize}
\item similarity between the Japanese sōgō shōsha employee and the American international attorney).
\item \textsuperscript{163} Id. at 19. These services include information about health and safety standards, import duties, advertising restrictions, local regulations, and maintenance of records and documentation. Id.
\item \textsuperscript{164} Id. at 21.
\item \textsuperscript{165} See id. at 14-15 (comparing long-term commercial visas with “treaty trader” visas). The United States Code defines a treaty trader as:
\begin{itemize}
\item an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such aliens if accompanying or following to join him: (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national;
\end{itemize}
\item \textsuperscript{166} Section 301 Petition, supra note 3, at 14-15.
\item \textsuperscript{167} Id.
\end{itemize}
services.168

3. Petitioners' Objections to Specific Provisions of the Proposed Law

The petitioners claimed the bill was not acceptable for a number of reasons.169 Among other things, the petitioners argued that the Nichibenren had total discretion to decide to admit a foreign attorney.170 Second, the bill created special committees, separate from disciplinary procedures for Japanese attorneys and composed of only Japanese attorneys, to control and discipline the foreign attorneys.171 Third, the bill permitted foreign attorneys to give advice only on the law of the state in which the attorney had practiced for five years.172 Fourth,

168. Id. at 33.
169. Id. at 34. The petitioners said the bill violated their right to “national treatment and right of establishment,” and was “unfair, inequitable, unjustifiable, unreasonable, and discriminatory.” Id.
170. Id. at 35. Article 10.3 states, “The Ministry of Justice shall, before granting approval, ask the opinion of the Japanese Bengoshi Federation.” Foreign Attorneys’ Law, supra note 19, art. 10.3. The petitioners were concerned that Nichibenren will exclude foreign attorneys because the Nichibenren fears economic competition, or because the foreign attorneys will cause “culture shock.” Section 301 Petition, supra note 3, at 36-37. This fear has been a recurring theme in discussions about allowing foreign attorneys to practice in Japan. See id. at 37 (quoting several bengoshi on the consequences of allowing the attorneys and law firms from the United States to practice in Japan).

Article 10.3 states only that the Ministry of Justice shall “ask the opinion” of the Nichibenren before approving an application. Foreign Attorneys’ Law, supra note 19, art. 10.3. It does not expressly grant the Nichibenren the authority to veto a Ministry of Justice decision nor does any other provision in the new law give the Nichibenren such authority. But see Foreign Attorneys’ Law, supra note 19, art. 26 (allowing the Nichibenren to refuse to accept the registration of a “foreign-law jimu-bengoshi”). Article 26 states that if the Nichibenren finds that an applicant will “disturb the order or injure the reputation of a bengoshi association or the Japanese Bengoshi Federation,” it can deny registration. Id.

171. See Section 301 Petition, supra note 3, at 39-40 (noting articles 55 and 56, which establish the “foreign-law jimu-bengoshi” disciplinary committee, and article 58, which establishes the “foreign-law jimu-bengoshi” discipline maintenance committee). The petitioners argued that because separate disciplinary committees oversee foreign attorneys, the committees will regulate the foreign attorneys in a different manner from other Nichibenren members, unlike the regulation of foreign attorneys in the United States. See id. (stating that national treatment and basic notions of fairness require the Nichibenren to use the same committees for regulating Japanese and foreign attorneys). This argument is flawed because the “foreign-law jimu-bengoshi” would not conduct the same activities as the regular bengoshi, and therefore the Nichibenren could discipline them separately.

172. Id. at 40. Article 3.1 states that, “the practice of a ‘foreign-law jimu-bengoshi’ shall consist of the performance of legal business concerning the law of the country of primary qualification.” Foreign Attorneys’ Law, supra note 19, art. 3.1. Article 2.0.2 defines “foreign country” as the states, territories, and other constituent units of a federal country. Id. art. 2.0.2. The petitioners interpreted these two articles as limiting the scope of the foreign attorney’s practice to giving advice on the law of the home jurisdiction. See Section 301 Petition, supra note 3, at 40-41 (noting the
the petitioners argued that the limitation on the scope of practice also violated the FCN Treaty because the regulation treated the nationals of the two countries differently.\textsuperscript{173} Fifth, the reciprocity requirements excluded qualified attorneys from the United States who were not from states that allow bengoshi to practice.\textsuperscript{174} Sixth, the requirement of five years of actual experience excluded many "trainee" attorneys currently in Japan.\textsuperscript{175} Seventh, the financial resources requirement violated national treatment because the regulations did not impose a similar requirement on bengoshi.\textsuperscript{176} Eighth, the bill forbade foreign attorneys from employing bengoshi, but did not prohibit bengoshi from hiring foreign attorneys.\textsuperscript{177} Finally, the bill prohibited foreign attorneys from accepting employment from a business enterprise or from serving as a director or officer of such an enterprise.\textsuperscript{178}

restrictive effect of the two articles).

\textsuperscript{173} See Section 301 Petition, supra note 3, at 42 (arguing that the limitation on giving advice on home state law would violate the provision for national treatment in the FCN Treaty). In the petitioners' view, the effect of the bill was to forbid attorneys from the United States to engage in activities in which the non-bengoshi are permitted to engage. \textit{Id.} It is not clear why the petitioners objected because the petitioners do not want to practice under one of the categories of non-bengoshi legal professionals.

\textsuperscript{174} See \textit{id.} at 43 (discussing the reciprocity requirement). Article 10.2 is a reciprocity provision allowing only those attorneys from jurisdictions according "substantially similar" treatment to bengoshi to practice in Japan. Foreign Attorneys' Law, supra note 19, art. 10.2. The petitioners argued there are no Japanese legal consultants in New York because the Japanese attorneys in New York have all taken the New York bar examination. Section 301 Petition, supra note 3, at 43. \textit{But see supra} notes 70-72 and accompanying text (noting that at the time of the petition, only two states allowed foreign attorneys to practice law in the United States as foreign legal consultants).

\textsuperscript{175} Section 301 Petition, supra note 3, at 44. To qualify as a "foreign-law jimu-bengoshi," Article 10.1 requires an applicant to have five years of experience in the home jurisdiction. Foreign Attorneys' Law, supra note 19, art. 10.1. There is no provision to give the "trainees" currently in Japan credit for the time already spent in Japan. Section 301 Petition, supra note 3, at 44. A supplementary provision (Supplementary Provision 2) covers trainees working for a bengoshi at the time the law goes into effect. The petitioners allege that this will not help most trainees. \textit{Id.}

\textsuperscript{176} Section 301 Petition, supra note 3, at 45 (discussing the financial resource and stability requirements for foreign attorneys).

\textsuperscript{177} \textit{Id.} at 46. Articles 49.1 and 49.2 prohibit "foreign-law jimu-bengoshi" from employing bengoshi, or from entering into any joint enterprise or partnership with a bengoshi. Foreign Attorneys' Law, supra note 19, arts. 49.1 & 49.2.

\textsuperscript{178} See Section 301 Petition, supra note 3, at 47 (noting article 50.1, which prohibits an individual or a business enterprise from employing "foreign-law jimu-bengoshi," without first obtaining the approval of the local bar federation). Article 50.1 also prohibits "foreign-law jimu-bengoshi" from acting as directors or officers of a business enterprise. Foreign Attorneys' Law, supra note 19, art. 50.1.
4. The Positions of the European Business Council and the American Chamber of Commerce in Japan

Both the European Business Council (EBC) and the American Chamber of Commerce in Japan (ACCJ) submitted position papers opposing the pending bill. The EBC and ACCJ opinions reflect the views of the European and American business communities in Japan. Both organizations criticized the bill as an inappropriate solution to the problem of foreign attorneys practicing in Japan and a setback to the liberalization of international trade-in-services. The EBC favored a system that would encourage minimal regulation of the international practice of law and reciprocal treatment. The EBC contended that such a system would indicate that the Japanese government was trying to eliminate barriers to trade, and endeavouring to make Japanese society more international. The EBC argued that the bill protected Japanese attorneys excessively and did not open the market to foreign attorneys.

179. The EBC is comprised of the Belgian, Luxembourghian, British, Danish, French, German, Irish, Italian, and Dutch chambers of commerce in Japan.

180. European Business Council's Position Paper on the Bill Pending in the Diet of Japan Concerning Practice of Foreign Lawyers in Japan, Apr. 30, 1986 [hereinafter EBC Position Paper] (attached to a letter from C.C.N. Ryder, Chairman of the EBC, on behalf of the EBC, to the offices of the Prime Minister of Japan, May 2, 1986, reprinted in Section 301 Petition, supra note 3, Exhibit K to the Second Supplement; American Chamber of Commerce in Japan, Legal Services [hereinafter ACCJ Position Paper] (attached to a letter from Herbert F. Hayde, President of the ACCJ, on behalf of the ACCJ, to Prime Minister Yasuhiro Nakasone, May 12, 1986, reprinted in Section 301 Petition, supra note 3, Exhibit J to the Second Supplement. The ACCJ and EBC sent their papers to the chairmen of the Standing Committees on Judicial Affairs in the House of Councillors and the House of Representatives, and the House of Representatives' Special Commission for International Economic Countermeasures. Id. They also sent papers to the Minister of Foreign Affairs, the Minister of Justice, the President of the ACCJ, the Head of the Delegation of the European Communities, and the Keidanren (Japan Federation of Economic Organizations).

The ACCJ also sent its position paper to officials at the American Embassy and to Clayton Yeutter, the United States Trade Representative. Id.

181. EBC Position Paper, supra note 180, at 1. On July 30, 1985, Prime Minister Nakasone announced an “Action Programme,” a portion of which pertained to the liberalization of regulations on foreign attorneys. In his announcement, Nakasone said, “[p]laying due regard to the autonomy of the Japan Federation of Bar Associations, solutions appropriate both domestically and internationally are aimed to be reached, with the expectation of necessary amendment of the lawyers law in the next regular session of the Diet.” Id. The EBC asserted that the draft law was not an internationally appropriate solution. Id. The ACCJ concurred with the EBC on that issue. Letter from Herbert F. Hayde, on behalf of the ACCJ, to Prime Minister Yasuhiro Nakasone, May 12, 1986, reprinted in Section 301 Petition, supra note 3, Exhibit J to the Second Supplement.


183. Id.

184. Id. at 1.
The EBC also criticized the provision requiring five years of experience in the home country before permitting a foreign attorney to practice in Japan. The EBC stated that proof of admission to the bar of the foreign country should suffice. The EBC also opposed the restrictions on foreign law offices in Japan hiring Japanese attorneys because no similar limitation existed for Japanese firms hiring foreign attorneys. Furthermore, the EBC strongly objected to the Nichibenren’s control over the policy “liberalization” regarding foreign attorneys. The main fear of the EBC was that the Nichibenren would be biased, and would promote the Japanese members’ interests over foreign attorneys’ interests. The EBC requested an impartial body, such as the

185. See Foreign Attorneys’ Law, supra note 19, art. 10.1.1 (stating that a foreign lawyer must engage in a practice for at least five years in the country where the foreign lawyer qualification occurred).

186. See EBC Position Paper, supra note 180, at 6 (stating that if Japan needs a short practice requirement of one year, it should be in any country, with the supervision of a locally qualified attorney, regardless of location). The EBC listed the practice requirements of several countries in the European Community. Id. The EBC noted that Belgium has no practice requirement for attorneys working as foreign legal consultants, although foreign attorneys-at-law working together with Belgian attorneys-at-law must have at least three years of practice in Belgium before a firm can make them partners. The same requirement applies to Belgian attorneys-at-law before partnership. Id. The Federal Republic of Germany has no statutory prior practice requirement for foreign legal consultants, although it may consider prior practice in the application process. Id. The United Kingdom has no practice requirement before a foreign attorney may practice. Id. France requires a foreign attorney to have three years of experience, and of this a lawyer already admitted in France must supervise one and one half years of these three years. Id. at 6.

In the opinion of the EBC, the requirement of a five-year stay in the home jurisdiction did not reflect the reality of modern international legal practice. Id. at 7. The EBC noted that most lawyers who had five years of experience had established practices they could not leave. Id.

187. See id. at 9 (arguing that the European law firm or European lawyer in Japan could not offer the comprehensive legal services that a Japanese law firm hiring European attorneys could offer). The EBC saw the denial of the right of association as a measure putting the Japanese attorneys at a competitive advantage. Id. at 11. The EBC asserted that professional ethics or malpractice liability could eliminate any concern about protecting consumers from improper legal advice of foreign lawyers. Id. at 7. The appropriate government agency, or the equivalent disciplinary authority of the foreign lawyer’s home country, could address such problems. Id.

188. See id. at 1 (describing the “inherently and obviously anti-liberal nature of the draft law”). The EBC noted that other types of legal professionals like zeirishi (tax attorneys), benrishi (patent attorneys), and könin kaikeshi (certified public accountants) are not subject to the jurisdiction of the Nichibenren, although they provide legal services to some extent. Id. at 3.

189. Id. This fear was based on the EBC’s perception of the Nichibenren’s past behavior of harassing foreign attorneys and refusing to accept foreign attorneys as the professional equivalents of the bengoshi. Id. Because the legal practice of the foreign attorney under the new system would differ significantly from that of the bengoshi, the EBC saw good reason why the Nichibenren need not supervise the foreign attorney. Id. at 4. Nichibenren supervision, they argued, would further restrict foreign attorneys
Ministry of Justice, the Ministry of International Trade and Industry, or the Supreme Court of Japan, to regulate the registered foreign attorneys.\textsuperscript{190}

Similarly, the ACCJ expressed its opposition to the pending legislation. The ACCJ position paper outlined five basic requests. The paper described why the requests were important and criticized the response of the Japanese government.\textsuperscript{191} First, for the new law truly to liberalize international legal services, the ACCJ argued that the Japanese government had to allow foreign law firms to provide comprehensive legal services.\textsuperscript{192} The bill, in the opinion of the ACCJ, would allow only firms that assist Japanese businesses in improving market access and foreign investments to enter Japan.\textsuperscript{193}

Second, the ACCJ, like the EBC, objected to the Nichibenren's control over the foreign attorneys.\textsuperscript{194} The new regulation required foreign attorneys to register with the Nichibenren and to join the national and local bar associations, but did not give the foreign attorneys voting rights in the associations.\textsuperscript{195} The Nichibenren thus would have the power to discipline the foreign attorneys, but the foreign attorneys would have no representation.

Third, the ACCJ wanted a market that would be open in principle and closed only in exceptional situations.\textsuperscript{196} The new law achieved the opposite effect, allowing a foreign lawyer to register in Japan only if the home jurisdiction gave a Japanese lawyer similar treatment.\textsuperscript{197} The

\textsuperscript{190} Id. at 7. The EBC did not accept the Nichibenren's argument that Japanese attorneys needed to place limitations on foreign legal practice to assure the quality of the legal services. Id.

\textsuperscript{191} Id. at 4. The EBC considered the Ministry of Justice an impartial body. Contra Section 301 Petition, supra note 2, at 8 (alleging that the Ministry of Justice accedes to the wishes of the Nichibenren on the issue of foreign attorneys in Japan).

\textsuperscript{192} ACCJ Position Paper, supra note 180, at 1.

\textsuperscript{193} Id. Allowing Japanese and foreign attorneys to practice together could solve the problems of access to markets and investment. Id.

\textsuperscript{194} Id. Other foreign enterprises would not receive the help of foreign law firms in Japan because the new bill prohibited foreign attorneys from giving advice about Japanese law. Id.

\textsuperscript{195} Id. at 2. In the opinion of the ACCJ, the Nichibenren was essentially the trade association of their competitors. Id. The opinion of the ACCJ noted the traditional opposition of the Nichibenren to the liberalization of the international legal services industry, and the harassment of foreign competitors through the Nichibenren's disciplinary process. Id.

\textsuperscript{196} Id.

\textsuperscript{197} Id. at 3. The ACCJ described two types of sectoral responsibility. One is when the market is open, but can close if the reciprocal market closed, and such closing was harming exporters. Id. The other is when the market is closed, and opens only if the other market is opened first. Id.
Japanese market thus was closed in principle and open only in exceptional cases.\textsuperscript{198} Fourth, the ACCJ argued that the requirement of five years experience in the home country was counterproductive because there was a critical shortage of foreigners who were both able to speak Japanese fluently and familiar with Japanese business practices.\textsuperscript{199} The ACCJ favored career paths or goals that would encourage such foreigners to spend time in Japan because it takes years of work to perfect these particular skills.\textsuperscript{200} The requirement of five years experience in the home country would force the current “trainees” to leave Japan.\textsuperscript{201} In addition, the five year obligation would not include the time the trainees had already spent in Japan.\textsuperscript{202} Finally, the ACCJ objected to the prohibition in the bill against using any part of the name of the foreign firm in the name of the office in Japan.\textsuperscript{203}

C. Petitioners’ Requested Actions

The petition contained a number of important arguments and indicated why the USTR needed to commence an investigation. The petitioners requested the USTR to inform the Japanese government that: (1) the proposed amendment did not fulfill the needs of attorneys and businesses from the United States;\textsuperscript{204} (2) the countries should recognize that the legislation was not the exclusive means of access, but merely a

\textsuperscript{198} Id. The ACCJ asserted such treatment was contrary to the idea of free trade. Id.

\textsuperscript{199} Id.

\textsuperscript{200} Id. at 4.

\textsuperscript{201} Id. This requirement would cause the trainees to lose the contacts already made, their familiarity with business customs, and their knowledge of the Japanese language, all of which would help make the trainees valuable international trade facilitators. Id.

\textsuperscript{202} Id.

\textsuperscript{203} Id. at 5. In the opinion of the ACCJ, such a restriction placed the United States firm at a competitive disadvantage. Id. They also asserted that a cultural aspect attaches to the use of the name. Id. Membership and pride in a person’s company are very important in Japan. Id. This is in part related to the concepts of \textit{giri} and personal honor. See supra notes 30-34 and accompanying text (discussing \textit{giri}). Thus, this deprivation of their rights humiliated the foreign attorneys before their Japanese colleagues. ACCJ Position Paper, supra note 180, at 6.

\textsuperscript{204} Section 301 Petition, supra note 3, at 51. Specifically, the petitioners wanted to (1) act as “consultants” on United States business; (2) advise \textit{bengoshi} on United States law, thus helping \textit{bengoshi} with Japanese and third-country clients; and (3) make legal investigations and reports for United States clients about the Japanese business dealings of the United States clients. Id. at 51-52. The attorneys from the United States argued that article VIII(1) of the FCN Treaty permits such activities, and that the activities would not violate Japanese professional licensing requirements. Furthermore, they only would make investigations for United States nationals, United States companies, or \textit{bengoshi}. Id. at 52.
means that attorneys from the United States could use directly to advise Japanese or third country nationals and companies;\textsuperscript{206} and (3) the two countries should discuss agreements about granting long-term commercial visas to attorneys from the United States.\textsuperscript{208} The petitioners requested action pursuant to section 301 of the Trade Act of 1974, if the Japanese government did not respond to the petition.\textsuperscript{207}

III. RECOMMENDATIONS

The office of the USTR denied the Section 301 Petition on June 9, 1986.\textsuperscript{208} It based its decision on the progress in negotiations with the Japanese and the Diet's enactment of the new attorneys' law on May 16, 1986.\textsuperscript{209} At least one United States firm, however, was planning to open a branch office in Japan at that time.\textsuperscript{210} The USTR's decision not

\textsuperscript{205} Id.

\textsuperscript{206} Id. at 61-62.

\textsuperscript{207} Id. at 52-55. The petitioners asked, first, that the USTR begin an investigation within 45 days of the petition. See id. at 52 (noting the requirement under 19 U.S.C. §§ 2411 and 2412(b)(2)). Second, they asked the USTR to recommend that the President order the State Department to deny the 8 U.S.C. § 1101(E), (H) and (L) visa applications of holders of law degrees from Japanese universities who are employees of the United States affiliates of the Japanese trading company branches, subsidiaries, and affiliates. They asked that the State Department continue to deny the visa applications until the Japanese government agrees to accept the visa applications of attorneys from the United States. Id. at 52-53. After the visa sanctions took effect, the petitioners wanted to begin negotiations for an amendment to the present law, or in the alternative, for a new foreign attorneys' law that would permit the licensing of attorneys from the United States in Japan. Id. at 53. The petitioners then asked the USTR to commence formal proceedings, if necessary, before the International Court of Justice, to interpret article VIII(1) of the FCN Treaty. Id. In addition, they wanted the USTR to recommend to the President that the State Department cease issuing visas in an overly broad manner to the employees of the Japanese subsidiaries incorporated in the United States. See Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176 (1982) (stating that the United States subsidiaries of a Japanese company are not companies of Japan, and that the FCN Treaty does not cover subsidiaries), noted in Section 301 Petition, supra note 3, at 53-54. The petitioners alleged that the State Department did not have the authority to decide whether a company incorporated in the United States is a company of Japan for visa purposes. Section 301 Petition, supra note 3, at 53-54. Finally, if the above measures were insufficient, they asked the USTR to recommend that the President ask the Secretary of Commerce to study violations of the FCN Treaty since 1953, to assess whether the United States should consider terminating the treaty with Japan. See id. at 54 (asking that such a study include the quantification, if possible, of the effects of such violations on the trade imbalance). If the results of the study were unsatisfactory, the petitioners wanted the President to give notice of the termination of the FCN Treaty to Japan. Id. at 55.

\textsuperscript{208} See Notice, 51 Fed. Reg. 21,037 (1986) (announcing that on June 9, 1986, the USTR decided to deny the petition).

\textsuperscript{209} Id.; see Section 301 Petition, supra note 2, Second Supplement, at 1 (noting that on May 19, 1986, the Diet passed the new law).

\textsuperscript{210} Big U.S. Law Firm to Advance Into Tokyo Next Spring, Nihon Keizai, Apr. 24, 1986, at 1, reprinted in Section 301 Petition, supra note 2, Exhibit M to Second
to conduct an investigation left attorneys from the United States uncertain how to operate under regulations they alleged were overly restrictive. The next round of General Agreement on Tariffs and Trade (GATT) negotiations may solve some trade-in-services problems because the negotiators have agreed to include trade-in-services as a topic for discussion. Creating a GATT services code, however, could take years. A GATT services code will not help the attorneys from the United States who presently want to open offices in Japan.

The foreign attorneys who want to practice law in Japan cannot force Japan to change its laws if they want a viable solution to the issue of restrictive regulations on foreign attorneys. The attorneys from the United States should not attempt to force their way into Japan with threats of abrogating the FCN treaty. An alternative is for all state bar associations in the United States to change their regulations to allow foreign attorneys to practice under guidelines similar to the regulations New York and the District of Columbia adopted. This would enable the two countries to exchange legal professionals reciprocally, as the new Japanese regulations allow. The process of amending bar regulations is a lengthy one. Several states have rejected similar proposals, or have considered changes without coming to any agreement. In addi-
tion, states with little or no connection to Japan have little incentive to modify their bar regulations.

Because most state bar associations are reluctant to allow foreign legal professionals to practice in their courts, or even to offer legal advice, attorneys from the United States should be sympathetic to the concerns of the Japanese legal profession. If the Nichibenren is anything like the state bar associations in the United States, attorneys from the United States should understand the Nichibenren's reluctance to accept change. State bar examiners have allowed aliens to take state bar examinations only since In re Griffiths in 1973. At the time of the petition, only New York and the District of Columbia had guidelines allowing a foreign attorney to offer legal services on the law of the foreign attorney's home jurisdiction.

It makes no difference to the bengoshi that foreign attorneys only want to perform international trade facilitation services and not to practice law. The bengoshi only perceive foreign attorneys trying to force themselves into Japan and the Japanese legal profession. The same fears that a state bar has about an attorney from another state or country practicing within its jurisdiction also arise between the Nichibenren and the foreign attorney. The petitioners criticize the Japanese government for not recognizing the right of the United States to be different, yet fail to recognize the right of Japan to be different. When the attorneys from the United States try to force the issue, the Japanese attorneys become increasingly convinced that attorneys from the United States are aggressive and arrogant.

CONCLUSION

As the international scope of business transactions increases, international trade-in-services increases as an important means of facilitating those transactions. The dispute between the bengoshi and the attorneys from the United States reflects the cultural and political clashes that have hindered liberalizations of international trade restrictions. Attorneys who want to practice law in a foreign country or who work with international companies must remember and respect the different cultural perceptions of the role of law in foreign countries.

The new Japanese law on foreign attorneys is a step in the direction

tants in 1976. Id. at 19.
216. See supra notes 68-75 (discussing the restrictions on foreign attorneys practicing law in the United States).
217. See supra notes 70-71 (describing the regulations in New York and the District of Columbia).
218. Section 301 Petition, supra note 3, at 5.
of opening the doors of Japan to attorneys from foreign countries. The Nichibenren is reluctant to welcome foreign legal professionals into Japan. The state bar associations in the United States also hesitate to admit foreign lawyers without requiring them to pass a state bar examination. Although the activities of the sogō shōsha employee and the international trade facilitator attorney are comparable, the debate should focus instead on a sovereign nation's right to regulate its legal profession, and the foreign attorney's willingness to work within these regulations.

**POSTSCRIPT**

On January 16, 1987, sixteen attorneys, qualified to practice law in the United States but residing in Japan, filed a second petition pursuant to section 301 of the Trade Act of 1974. They filed the petition in response to the proposed regulations of the Japanese Ministry of Justice to implement the new law regulating the foreign attorneys in Japan on December 1, 1986. In February 1987, the Japanese and United States governments announced a negotiated agreement. The new regulations allow attorneys from the United States, who are licensed in or have headquarters in jurisdictions that allow foreign attorneys to practice as "foreign legal consultants," to register for "foreign legal consultant" status in Japan. Under one concession of the agreement, Japan will allow foreign attorneys to give advice on laws of the state, federal, or international jurisdictions they list on their applications.

---


220. Second Petition, supra note 219, at 1; see also id. Exhibit 2 (setting forth the text of the proposed ordinances). The Nichibenren also proposed regulations. Id. Exhibit 3. In summary, the attorneys objected to the new laws, regulations, and ordinances for several reasons: (1) the attorneys from the United States would be placed under the control of their Japanese competitors; (2) the new system restricted the scope of the foreign attorney's practice so that he or she could not compete effectively; (3) the Japanese government used reciprocity to keep the legal services market closed; (4) the new system blocked the career paths of attorneys from the United States who wanted to be Japan specialists; and (5) the new regulations prohibited the attorneys from the United States from using their own names as the names of the Japanese offices. Id. at 1-6.


223. *First U.S. Attorneys in Japan*, supra note 222, at 28; cf. supra notes 172-73
The United States conceded the ban on partnerships with the Japanese. In addition, California, Hawaii, and Michigan amended their bar regulations to allow foreign attorneys to practice as foreign legal consultants. California, the District of Columbia, Hawaii, and Michigan all adopted their rules in response to the negotiations concerning the foreign lawyers in Japan.

and accompanying text (discussing the requirement that the “foreign-law jimu-bengoshi” only advise on the law of the “home jurisdiction”).

224. Burgess, supra note 221, at A33, col. 3; see supra note 177 and accompanying text (discussing the prohibitions on partnership). The ban on partnerships may account for the low number of attorneys applying for “foreign-law jimu-bengoshi” status. Miller, Few Foreign Lawyers Apply to Practice in Japan, Japan Times Weekly, May 23, 1987, at 5, col. 1. In addition, because the cost of opening an office in Japan is high, the initial number of law firms from the United States opening offices will be small. First U.S. Attorneys in Japan, supra note 222, at 28.


226. Foreign Legal Consultant Rules, supra note 225, at 977.