III. Report on Japanese Law Practice

BE IT RESOLVED, That the American Bar Association welcomes the enactment of the "Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers" enacted by the Diet of Japan, and urges the United States Government to continue negotiations with the Government of Japan with a view toward ensuring that the resulting system regulating foreign lawyers in Japan is liberalized to the extent consistent with appropriate professional standards; and

BE IT FURTHER RESOLVED, That it is of crucial importance to the ability of United States lawyers to establish viable offices in Japan that, in defining the scope of practice permitted to foreign lawyers under the new law, ordinances and regulations, the Government of Japan fulfill its pledge to meet the realities of norms of legal practice in the United States; and

BE IT FURTHER RESOLVED, That certain restrictive features of the new law are regrettable, and the United States Government and the Government of Japan should work toward minimizing the impact of these restrictions in the negotiations on the implementing ordinances and regulations.

REPORT

In light of the crucial role which United States lawyers play in advising clients from this and other countries on the legal and related business aspects of international transactions, the inability of United States lawyers to establish offices in Japan since 1955 has hindered the development of a balanced trade relationship between the United States and Japan. The Japanese "Trade Action Program" of July, 1985 pledged to resolve the lawyers' issue through legislation in a manner "appropriate both domestically and internationally."

As a result of negotiations between the Government of Japan ("GOJ") and the Government of the United States ("USG"), the GOJ has recently adopted a law regulating the practice of law by foreign lawyers in Japan. That law, entitled the "Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers" (and hereinafter referred to as "the Law"), was passed by the Japanese Diet on May 17, 1986.

The Law requires implementation by ordinances and regulations which the GOJ has said will be adopted no later than April 1, 1987. Negotiations between GOJ and USG over the content of the implementing ordinances and regulations are expected to take place in Washington this autumn.

We believe the recently passed Japanese legislation is a welcome step forward in the longstanding efforts by private attorneys and the USG to

expand the scope of American and international legal services available in Japan. The two sides were able to resolve the issues of reciprocity and use of the name of the home country law firm. Lawyers from states of the United States which have adopted rules permitting practice by Japanese lawyers will be allowed to establish offices in Japan. A foreign lawyer may use the name of his home country law firm so long as that name appears with his own name and the designation "foreign law attorney." Substantial progress was made on the issues of rights of association between foreign and Japanese attorneys and on ensuring fairness and transparency in the qualification and discipline of foreign lawyers. Foreign and Japanese lawyers will be permitted to share office space and expenses but not to become partners or divide profits. The Ministry of Justice ("MOJ") will be responsible for determining whether foreign attorneys are qualified to practice in Japan, with successful applicants being required to register with the Japan Federation of Bar Associations ("JFBA") and the relevant local bar association. Registration and discipline of foreign attorneys will be supervised by official committees consisting of representatives of the JFBA, judges, public prosecutors, MOJ and Ministry of Foreign Affairs.

The most fundamental issue unresolved by the Law relates to the scope of practice in which a foreign lawyer is permitted to engage in Japan. Under the provisions of the Law, the practice of a foreign lawyer is defined as "the performance of legal business concerning the laws of the country of primary qualification." This phrase is further defined as "legal business in respect of a legal case, all or a major portion of which is governed, or should be governed, by the law of the country of primary qualification." The manner in which these provisions are to be implemented is to be a subject of further negotiations between the USG and GOJ. As a condition for agreeing to postpone resolution of this issue, the USG required that the GOJ issue a letter in which it pledged, in implementing the scope of practice rules for foreign lawyers in Japan, to "meet the realities" of United States norms of legal practice.

We believe it is of crucial importance that the GOJ fulfill this pledge. If the scope of practice rules are implemented restrictively, the result would be that many transnational legal matters, including the negotiation of commercial transactions as well as litigation and arbitration involving the interaction of two or more legal systems, could be thought to exceed the permissible scope of practice. Since this is precisely the type of matter in which foreign offices of many American firms are most heavily engaged and constitutes the principal focus of most international commercial legal practice in the United States, a prohibition on representation of clients in such matters through an office in Japan would jeopardize the viability of such an office.

Any potential scope-of-practice problem would be exacerbated if the Law were interpreted to provide that the various States of the United States be treated as separate countries. Thus, with certain exceptions, an American lawyer in Japan could conceivably be precluded from advising a client (even an American client) on a transaction completely governed by American law, if the applicable law were that of a State in which the lawyer was not admitted to practice, even if the lawyer obtained and relied upon opinions of counsel admitted in the relevant State.

Aside from the above issues, we believe there are provisions in the Law itself that are unreasonably restrictive. We hope that the effect of some of these provisions can be ameliorated by appropriate ordinances and regulations, and serious consideration should be given to addressing these problems in subsequent legislation.

(1) Foreign lawyers, to be registered and permitted to practice as such in Japan, must have at least five years' experience practicing in their home jurisdictions. This restriction would limit the mobility of lawyers engaged in international legal practice, since such lawyers frequently spend much of their careers in foreign branch offices outside the jurisdictions in which they are admitted to practice. It would also require young American lawyers who have devoted the time and effort to learning the Japanese language and culture to interrupt the development of their practices in Japan for a sojourn in their home jurisdictions, if they wish to become licensed in Japan as foreign law attorneys. Finally, in light of the five years' experience requirement, it is important that there should be no restriction on the association of unregistered foreign lawyers with registered foreign law attorneys, so as to permit appropriate staffing of a Japanese office with American or third country associates.

(2) A prohibition exists on foreign lawyers employing or entering into partnership with Japanese lawyers by foreign lawyers or firms. This restriction would foreclose American firms from one possible avenue of entry into Japan and impose unnecessary costs on clients.

(3) The Law requires that foreign lawyers, to be registered and entitled to practice as such, be physically present in Japan at least 180 days each year. This effectively requires law firms desiring to maintain an office in Japan to commit lawyers to full-time residence in Japan and limits the amount of their time that may be spent advising clients in the United States or in the Far East outside of Japan.

We believe that none of these restrictions can be justified in terms of the legitimate interests of the Government of Japan in protecting against the unauthorized practice of law and other potential abuses. The American Bar Association should continue to monitor carefully the progress of the negotiations between the USG and GOJ, as well as the actual experience of American lawyers in Japan, with a view toward ensuring that the system

regulating foreign lawyers in Japan is liberalized to the extent consistent with appropriate professional standards.

Respectfully submitted,

Arthur W. Rovine
Chairman

September 13, 1986

The Honorable Clayton Yeutter
United States Special Trade Representative
Room 200
600 - 17th Street, N.W.
Washington, DC 20506

Dear Ambassador Yeutter:

On August 13, 1986, the House of Delegates of the American Bar Association adopted a resolution welcoming, and at the same time criticizing certain aspects of, the "Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers" recently enacted by the Japanese Diet after extended negotiations between the Governments of Japan and the United States. I enclose for your information a copy of the Recommendation and Report of the ABA Section of International Law and Practice, the text of which was adopted without change by the House of Delegates.

I am writing in connection with the second of the three paragraphs of the resolution, which reads as follows:

> BE IT FURTHER RESOLVED, That it is of crucial importance to the ability of United States lawyers to establish viable offices in Japan that, in defining the scope of practice permitted to foreign lawyers under the new law, ordinances and regulations, the Government of Japan fulfill its pledge to meet the realities of norms of legal practice in the United States.

Because of the international character of the practice in which American law offices in Japan would engage, we consider it appropriate to bring to your attention, in relation to the determination of the "realities of norms of legal practice," certain fundamental points concerning the practice of international commercial and financial law in the United States.

1. The rules defining the permissible scope of an American lawyer's practice are to be found in the laws of each State concerning practice in that State, the canons of professional ethics as adopted by the

judicial authorities of that State, and common law standards governing the professional responsibility of lawyers. The standards are generally uniform throughout the United States and follow a Model Code of Professional Responsibility adopted by the ABA. With specific regard to the permissible scope of practice, these standards do not vary materially from State to State. The requirements of the State Codes are enforced by the judicial authorities in each State. Failure to comply with these requirements can also subject a lawyer to civil liability enforced through normal judicial processes. American lawyers practicing abroad are, in addition, subject to the regulations of the host country in this regard.

2. A lawyer admitted to practice in one of the United States and practicing in that State is not prevented by the law of that State or of any other State from advising clients as to the applicability and meaning of the laws of any other State or of any foreign country. In this connection, it should be emphasized that the scope of practice of a lawyer admitted to practice in a given State is not constrained by the entirely different rules which regulate the establishment of offices in the various States.
3. The principal requirement applicable to the furnishing of professional advice on legal matters is that the lawyer must, in fact, meet established standards of competence and diligence in advising on questions as to which he holds himself out to be competent. An American lawyer is conclusively presumed to hold himself out as competent to advise with respect to the law of the State or States in which he is admitted to practice, as well as with respect to United States federal law. If he is not admitted to practice in a State in which such admission would normally be inferred from the circumstances of his practice, he must affirmatively disclose the fact that he is not so admitted. Nonetheless, he is not prohibited from holding himself out as competent to advise on the law of States other than that of his admission and/or of foreign countries but is held responsible for the consequences of any failure to discharge his professional duties of competence and diligence in advising with respect to such law.
4. In light of the nature of the federal legal system in the United States, it is as a practical matter nearly impossible for American lawyers to discharge their duties to clients without advising with respect to the laws of other States. In appropriate cases, a lawyer admitted to practice in one State who is called upon to advise on a matter which turns in part upon the law of another State may elect to rely upon advice of a lawyer admitted to practice in the other State. Failure to do so does not constitute a violation of the rules of practice by which the first lawyer is governed but may expose him to civil re-

sponsibility in the event that he fails to exercise the competence and diligence that would be expected of a lawyer admitted to practice in the other State. The decision whether to associate with counsel in the other State is itself a matter of professional judgment governed by standards of competence and diligence as enforced by judicial authorities.

5. Similarly, American lawyers engaged in an international commercial and/or financial practice, who are regularly called upon to advise with respect to international transactions, investments, arbitrations and litigation, cannot as a practical matter discharge their obligations to their clients without advising on questions of foreign law, since the legal issues arising under the laws of each country involved are incapable of resolution in isolation from one another. In some cases, the laws of many countries require analysis on a comparative basis. In other cases, the determination as to which law or laws will apply is itself subject to different outcomes depending on the judicial or other forum in which the determination is likely to be made. In all cases, the decision whether to associate with counsel admitted to practice in any foreign countries the law of which may be involved is a matter of professional judgment governed by standards of competence and diligence as enforced, again, by judicial authorities.
6. Even with respect to international transactions or disputes of which, to quote the Japanese law, "all or a major portion . . . is governed or should be governed" by foreign law, American lawyers are frequently consulted, either because American law may nonetheless have an important bearing on the matter, or because American businessmen find that American lawyers are able to find practical legal solutions for their business problems abroad, or because American lawyers possess expertise which is of value in dealing with the complex interaction of disparate legal systems. Whatever the reasons for which they are consulted, American lawyers regularly advise on such matters relying, if and to the extent necessary in their professional judgment subject to the standards referred to above, on the advice of lawyers in the other jurisdictions involved.
7. Notwithstanding the breadth of their scope of practice, lawyers admitted to practice in one State are generally prohibited from appearing before the courts of another State without associating themselves with counsel admitted to practice in the other State, and such prohibitions of course apply in foreign countries as well. Similarly, American lawyers frequently are precluded under foreign law from preparing certain formal documents, such as wills, property transfer deeds, and other instruments requiring notarial certification or re-

cordation, in foreign countries. This does not, however, preclude the rendering of legal advice in respect of such matters.

In view of the foregoing, we believe it is clear that restrictions which would prevent the rendering by an American lawyer of advice as to a transaction or dispute solely by reason of the applicability of the law of a State other than that in which the lawyer is admitted to practice or of the law of a foreign country, or by reason of the primacy of such law in relation to the matter in question, would be fundamentally inconsistent with the relevant norms of legal practice in the United States.

We trust that, in your ongoing discussions with the Government of Japan concerning the implementation of the new law in accordance with its pledge to "meet the realities" of norms of legal practice in the United States, you will find it appropriate to emphasize the foregoing points.

Yours very truly,

Robert S. Rendell
Chairman