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FOREIGN ATTORNEYS IN JAPAN:
PAST POLICIES, THE NEW *SPECIAL MEASURES*
LAW AND FUTURE EXPECTATIONS

Megan Ryan MacMullin*

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I. INTRODUCTION

The increase in business and financial commitments by foreign enterprises in Japan created a need for foreign attorneys and a need for Japan to reexamine its policy of excluding foreign attorneys. Foreign attorneys watched Japan experience rapid growth in its international businesses accompanied by an increase in demand for international legal services. The foreign lawyers had a problem, however,

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despite the demand for such legal services, Japan prohibited foreign attorneys from practicing in Japan. The Japanese government recently responded to mounting pressure in Japan regarding its "foreign lawyer problem."¹ The pressure is two-fold and stems primarily from Tokyo's rapid growth as a major international financial center.² One reason for Japan's concern flows from internal pressure created by the international business activity itself.³ The second reason is the pressure from abroad, primarily American lawyers and American trade officials, to open the Japanese legal market to foreign lawyers.⁴ As a result, Japanese officials recently passed the *Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers*, that allows foreign lawyers to practice in Japan as "foreign law business lawyers."⁵ Although as many as two hundred American lawyers were initially estimated to be considering applying after the law went into effect, only a handful of attorneys had been admitted from a pool of roughly thirty applicants.⁶

1. Comment, *An American Lawyer in Tokyo: Problems of Establishing a Practice*, 2 UCLA PAC. BASIN L.J. 180 (1983). The reception of foreign lawyers in Japan has vacillated between periods when an open-door policy allowed foreign lawyers to practice law in Japan and periods when such practice of law by foreign lawyers was completely prohibited. See Haley, *The New Regulatory Regime for Foreign Lawyers in Japan: An Escape from Freedom*, 5 UCLA PAC. BASIN L.J. 1 (1986) (The new legislation for allowing foreign lawyers in Japan was promulgated on May 23, 1986.); Note, *Japan's New Foreign Lawyer Law*, 19 L. POLY INTL BUS. 361, 362 (1987).

2. See, e.g., Kitagawa, *Doing Business in Japan* § 1.06 (1987).

3. *Id.* at § 1-2; Moffat, *American Lawyers in Japan: Still Waiting in the Genkan*, J. AM. CHAM. COM. JAPAN, Apr. 1985, at 9, 11.

4. Moffat, *supra* note 3, at 9, 11; Comment, *supra* note 1, at 180.

5. The law is commonly referred to as *Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers*, Law No. 66 of 1986, introduced in the House of Representatives of the Diet of Japan on Mar. 28, 1986 [hereinafter *Special Measures Law*] (unofficial translation). The new law went into effect on April 1, 1987. Coyle, *A Slow, Steady Japan Push Starts*, Nat'l L.J., May 18, 1987, at 1, col. 1; Comment, *Foreign Lawyers: Regulation of Foreign Lawyers in Japan*, 28 HARV. INTL L.J. 123 (1987).

6. Auerbach, *Japan Said to Renege on Pledge to Let U.S. Lawyers Open Offices*, Wash. Post, Dec. 23, 1986, at C1, col. 2, & C2, col. 2. See *A Law Unto Itself*, THE ECONOMIST, Aug. 22, 1987, at 32. Four months after the law went into effect, four foreign firms, all American, had been admitted, and roughly two dozen other applicants were waiting to find out whether they would be admitted. *Id.* See also Marcotte, *First U.S. Attorneys in Japan*, 73 A.B.A. J. 28 (1987). In May of 1987, the first three American lawyers were admitted. *Id.* They were Edward Greene & Robert Greig of New York's Cleary, Gottlieb, Steen & Hamilton, and E. Anthony Zaloom of New York's Skadden, Arps, Slate, Meagher & Flom. *Id.*

The *Special Measures Law* indicates that Japan is adapting to its own growth and image as a major world trade center and is willing to admit foreign lawyers to accommodate the needs of its expanding business and legal markets.⁷ This growth has not gone unnoticed by foreigners, Americans in particular, who have been eagerly awaiting an opening to Japan's legal market.⁸ American firms expect to provide their Japanese clients with better and more personal services for their investments in the United States and their American clients with more knowledge about penetrating the Japanese market, as well as a variety of other legal services.⁹ Several American firms have expressed reservations about the *Special Measures Law*, citing the severe restrictions and tough requirements that must be satisfied before a foreign lawyer will be allowed to practice law in Japan.¹⁰ Despite the remaining restrictions, the new law provides an opening for foreign lawyers to get a foot in the door to the legal services industry in Japan and is likely to lead to other opportunities.¹¹

This Comment begins with a summary of the development of the Japanese legal system and the effects of Japanese culture on its development in order that the reader may better understand the *Special Measures Law* and its implications. The second section focuses on the

7. See Kanter, *The Japan-United States Treaty of Friendship, Commerce and Navigation: Lawyers as Treaty Traders*, 8 U. HAW. L. REV. 339, 342 (1986). The United States Trade Representative applied pressure, based on economic and political arguments, to the Japanese government to allow American lawyers to open offices in Japan. *Id.* at 342 n.21. The Japanese government has passed the *Special Measures Law* primarily because of political reasons. *Id.* at 342. See also Work, Lord & Bork, *How to Beat the Japanese*, U.S. NEWS & WORLD REP., Aug. 24, 1987, at 38. Japan has encouraged the greater presence of foreign business in Japan, allowing financial barriers to tumble. *Id.* Large Japanese companies have begun sending their young employees to foreign law schools to prepare in-house legal departments to meet the increased complexities accompanying international business transactions. Moffat, *supra* note 3, at 11. In the past, these same companies had been sending their employees to foreign business schools. *Id.* According to Professor Hideo Tanaka of Tokyo University, "Japan needs 50,000, not 12,000 lawyers." *Id.* See also Work, Black, Cook, Dworkin, Tharp, Sherrid, Lawday, Doder & Bartal, *Business Without Borders*, U.S. NEWS & WORLD REP., June 20, 1988, at 49.

8. Snyder, *Gearing Up for the Second Opening of Japan*, 8 AM. LAW. 15 (1986). See Kanter, *supra* note 7, at 341-43. Although American lawyers were unable to practice in Japan, some two hundred American lawyers are knowledgeable about doing business in Japan, understand the Japanese culture and business customs, and have been waiting for the chance to open offices in Japan. *Id.* See also Moritsugu, *Japan Beckons*, 10 CAN. LAW. 14 (1986). Although many large law firms in Canada are very interested in opening offices in Japan because of the enormous potential for expanding their legal services, they have found that entrance at this time is nearly impossible. *Id.*

9. Coyle, *supra* note 5, at 15, col. 1; Snyder, *supra* note 8, at 15; Note, *supra* note 1, at 361.

10. See *infra* notes 129-57 and accompanying text.

11. See Note, *supra* note 1, at 361; Comment, *supra* note 5, at 130.

foreign lawyer situation and its background, problems that remain under the *Special Measures Law*, and the potential benefits of the law. The third section discusses the effect of the *Special Measures Law* to date, and formulates a hypothesis regarding reasonable expectations about future regulation.

II. DEVELOPMENT OF THE JAPANESE LEGAL SYSTEM AND CULTURAL INFLUENCES

During the Tokugawa Era, stretching from the early 1500s, Imperial Japan had a decentralized legal structure of justice administration.¹² As this era progressed, a military leader, the Tokugawa shogun, emerged as a focal point of political power.¹³ The period that followed the Tokugawa Era, the Meiji Restoration, in 1868, was the basis for transition from the decentralized feudal structure to a more centralized judicial system.¹⁴ In the mid-1800s, events occurring during the Meiji Restoration exerted pressure on Japan to take steps to import foreign law into Japan.¹⁵ At this time, foreign attorneys were invited to Japan by the new Japanese government in order to modernize the legal system.¹⁶

12. Brown, *A Lawyer By Any Other Name: Legal Advisors in Japan*, in LEGAL ASPECTS OF DOING BUSINESS IN JAPAN 201, 214 (1983).

13. *Id.* at 214; Hahn, *An Overview of the Japanese Legal System*, 5 NW. J. INT'L L. & BUS. 517, 518-19 nn. 7, 11 (1983) (noting the Tokugawa Era, from 1503-1868, was a period when the shogun exercised political domination and the concept of individual rights was beyond the comprehension of the Japanese).

14. Brown, *supra* note 12, at 312, 353. Although a centralized national government existed prior to the Tokugawa Era, the judicial system was decentralized, and the drafting of official documents was performed by samurai or military retainers. *Id.* at 353. Until the Meiji Restoration, the legal profession was not officially recognized in Japan. *Id.* at 227, 262; Hahn, *supra* note 13, at 518. Japanese social values were reflected in the legal and political systems which discouraged litigation and aggressively encouraged potential litigants to settle the dispute among themselves. *Id.*

15. Hahn, *supra* note 13, at 521. The pressure on Japan to modernize its legal system peaked when Japan entered into two treaties with some Western powers that adversely effected Japan. *Id.* at 521 n.17. (citing Treaty of Edo, July 29, 1858, Japan-United States, 12 Stat. 1051, T.S. No. 185; Treaty of Kanagoma, Mar. 31, 1854, Japan-United States, 11 Stat. 597, T.S. No. 183). The treaties included unfavorable terms toward Japan, and thus placed Japan in an undesirable position. *Id.* Japan accepted the unfavorable terms under a variety of unfortunate circumstances, for instance, inexperience in the area of international law and unequal bargaining power. Stevens, *Japanese Law and the Japanese Legal System: Perspectives for the American Business Lawyer*, 27 BUS. LAW. 1259 (1972). Furthermore, one of the treaties specifically addressed the problem of Japan's "barbaric" legal system. Hahn, *supra* note 13, at 521.

16. Brown, *supra* note 12, at 440; see also *infra* notes 36-42 and accompanying text.

Following the Meiji Restoration, foreign attorneys entered and remained active in Japan, although in an increasingly limited scope. In 1936, however, foreign attorneys were precluded from practicing in Japan when the practice of law by foreign attorneys became a criminal offense.¹⁷ Later, after World War II, foreign attorneys were again permitted to practice in Japan, at least until the end of the Allied Occupation.¹⁸ An understanding of the history of Japan's divergent attitudes and policies toward foreign attorneys is important because it gives insight to the reasoning behind the policies, provides the background and development of the foreign lawyer problem, and puts the new agreement in a historical context.

A. *The Early Stages*

Prior to the Meiji Restoration in 1868, Japan was heavily influenced by traditional Chinese law, particularly in the areas of public and criminal law.¹⁹ The commercial aspects of the early legal system, however, were based on Japanese custom.²⁰ Thus, Japan's system of commercial law was almost totally indigenous, enabling the commercial community to rely on these customs in the event of a conflict.²¹ The concept of self-regulation and informal dispute resolution was reinforced by Japan's adoption of Confucianism.²² The premise of Confucianism, as adopted by the Japanese, is the acceptance of the individual's own position in the social hierarchy and *wa* or harmony.²³ These societal concepts conditioned the people of Japan to accept their position within society, to refrain from trying to enforce their individual rights in court, and to promote social harmony by encouraging out of court settlements.²⁴

17. See, e.g., Brown, *supra* note 12, at 443; see also *infra* notes 43-52 and accompanying text.

18. Brown, *supra* note 12, at 362, 365; see also *infra* note 53.

19. Stevens, *supra* note 15, at 1259. See also Hahn, *supra* note 13, at 518.

20. Stevens, *supra* note 15, at 1259. The development of Japan's rice trade created the need for a law merchant as well as guidelines for developing the commercial law system. *Id.*

21. *Id.* Since customs were commonly used and understood throughout Japan, the commercial community could rely on them in the event of a dispute when the customs would be enforced by self-regulatory trade associations and guilds and government courts if necessary. *Id.* See also, Hahn, *supra* note 13, at 518. Now, however, these "unwritten understandings that are the glue of the Japanese domestic business community" are no longer practical nor effective in Japan where business on the international level is becoming the norm. Moffat, *supra* note 3, at 11.

22. Brown, *supra* note 12, at 214. Although Japan adopted Chinese Confucianism, its application was strongly influenced by Japan's martial atmosphere and thus Japanese Confucianism became more authoritarian. *Id.*

23. Hahn, *supra* note 13, at 519.

24. Brown, *supra* note 12, at 214-15; Comment, *Japanese Thought and Western Law: A*

The Confucian tradition stressed harmonious social order which discouraged people from pursuing litigation to protect individual rights,²⁵ and also discouraged them from pursuing positions with the government, including its legal branches.²⁶ Because Japanese Confucianism did not support the theory that an autonomous science of law could exist, Japan never developed its own system of politics and ethics.²⁷ Additionally, any attempts to develop such a system or to propose rules of a purely legal nature, such as recognizing individual freedom, met with significant opposition from the Japanese.²⁸ The lack of any formal development of law and ethics allowed Japan to continue to suppress the role of the "attorney" and to refuse to clearly distinguish between judicial officials and government officials.²⁹

Along with the ideals of Confucianism that discouraged people from pursuing a position within the legal system of the government, the low social status that accompanied the title of "attorney" was also undesirable.³⁰ During the Tokugawa Era,³¹ the concept of the modern lawyer or *bengoshi* began to appear in the guise of *kujishi* or innkeepers.³² The *kujishi*, whose inns were conveniently located near the local

Tangential View of the Japanese Bengoshi and the Japanese American Attorney, 8 LOY. L.A. INT'L & COMP. L.J. 301, 306-13 (1986).

25. Comment, *supra* note 24, at 306 (citing Y. NODA, INTRODUCTION TO JAPANESE LAW 174 (1976)). A system of non-legal social rules developed from the philosophy of Confucianism, providing the individual with a sense of duty to behave in a certain way and to accept the social hierarchy. *Id.* To illustrate the juxtaposition of this concept with the Westerner's values, imagine the reaction in Japan to a Westerner who naturally asserts his individual rights, a concept which the Japanese discourage because such an assertion would disturb the social harmony and challenge the social hierarchy. *See id.* at 313 (observing that a peasant who sought a legal resolution to a joint ownership dispute was condemned by his village).

26. Brown, *supra*, note 12, at 214 (citing YOSIYUKI NODA, INTRODUCTION TO JAPANESE LAW 37 (1976)).

27. Comment, *supra* note 24, at 304-05.

28. *Id.* at 307.

29. *Id.* at 313-14. In Japan, a person performing legal services as a litigator is referred to as a *bengoshi*, derived from the "British Barrister-attorneys." Yamamoto & Hartnett, *The Changing Role of the Japanese Attorney*, J. AM. CHAM. COM. (Dec. 1979/Jan. 1980), reprinted in 10 COMMON L. LAW. 5 (1985). Thus, the term *bengoshi* is actually more narrow in scope than the American term "attorney" which includes a person providing a wide variety of legal services beyond the function of a courtroom litigator. *Id.*; *see infra* notes 43-46 and accompanying text.

30. Rabinowitz, *The Historical Development of the Japanese Bar*, 70 HARV. L. REV. 61, 62-63 (1956).

31. The Tokugawa Era, beginning in 1503, lasted until 1868. Hahn, *supra* note 13, at 519 n.7; Rabinowitz, *supra* note 30, at 62. *See supra* notes 12-13 and accompanying text.

32. The term *kujishi* developed during the Genroku Era and was used to identify innkeepers who provided legal advice to litigants. Rabinowitz, *supra* note 30, at 63. The services provided were similar to those of the British solicitor. *Id.*

courthouse, provided legal counseling and assistance in preparing legal documents to the litigants staying at their inns.³³ The aggressive solicitation and prolonged litigation by the *kujishi* contributed to the poor reputation attributed to the legal profession.³⁴ Furthermore, the government did not approve of the resulting litigation and the public did not approve of the unethical activities associated with the *kujishi*, such as bribing government officials.³⁵

Arguably, the traditional values of Japanese Confucianism, social hierarchy and harmony, were the basis for Japan's rapid progress in modernizing its legal system. These beliefs provided a foundation for focus and productivity among the homogeneous Japanese. While these values persisted throughout the modernization, the low status attributed to the *kujishi* changed as the role of the lawyer changed.

B. *Modern Japan — The Early Stages to 1955*

During the early stages of modernization,³⁶ Japan recognized the need to revamp its legal system as quickly as possible.³⁷ Accordingly, Japan promulgated the first regulations concerning lawyers in 1876, thereby professionalizing the role of the *kujishi*.³⁸ Japan also invited foreign lawyers to come and help implement a Western legal system.³⁹ The new law, *Daigennin Kisoku* [Advocate Regulations], set forth regulations regarding the newly-named "lawyers" or *daigennin* as prescribed by the Ministry of Justice.⁴⁰ Article 16 of the new law permitted foreign lawyers to represent clients in court in civil cases, in addition to the teaching and drafting of laws that foreign lawyers were already

33. *Id.*; Brown, *supra* note 12, at 222.

34. Rabinowitz, *supra* note 30, at 64.

35. Comment, *supra* note 24, at 314. This lack of respect for the profession also reflected the character of those persons attracted to that line of work. *Id.*; Rabinowitz, *supra* note 30, at 64.

36. Greenberg, *American Legal Services in Japan*, 58 N.Y. ST. B.J. 28 (1986). The Meiji Restoration in 1868 signifies the establishment of a modern constitutional state and is thus often referred to as the beginning of modern Japan. *Id.*; Hahn, *supra* note 13, at 518.

37. Hahn, *supra* note 13, at 521. Japan's efforts to incorporate aspects of a Western legal system into Japan's system were an attempt to avoid the undesirable effects of two treaties between Japan and the Western nations. *Id.*; see *supra* note 15.

38. Greenberg, *supra* note 36, at 28. After the regulations were promulgated, lawyers in Japan were called *daigennin* [sic] or licensed proxies. *Id.*; see *infra* note 40 and accompanying text.

39. Stevens, *supra* note 15, 1259-60. Japan's efforts to import foreign law into Japan involved sending Japanese scholars abroad to study and inviting foreign lawyers to Japan to help in drafting its constitution and statutes. *Id.*

40. See, e.g., Note, *supra* note 1, at 362-63 n.14; Rabinowitz, *supra* note 30, at 65. The Ministry of Justice's new regulations required applicants to pass two examinations as a demonstration of their competence to practice as *daigennin*. *Id.*

doing in Japan.⁴¹ Despite Japan's efforts, the emerging role of the "attorney" remained tainted because the *daigennin* continued to carry the stigma of unprofessionalism that originally plagued the *kujishi*, compounded further by the lack of any structured legal training.⁴²

Recognizing both the government's and the public's continued disdain for the *daigennin*, the Diet (the Japanese legislature) enacted the *Attorneys Law* of 1893, officially *Bengoshi Ho*.⁴³ The law authorized greater governmental evaluation and control of the lawyer's role, created the title *bengoshi* for those who demonstrated their formal legal knowledge, and maintained the traditional open-door policy toward foreign lawyers.⁴⁴ Although it appeared to address various factors causing the "respectability" problem, the law displeased the *bengoshi* because they perceived the law as treating them as inferior to judges and procurators.⁴⁵ Dissatisfaction increased over the years, forcing the *bengoshi* to take steps to change the 1893 law, a struggle with the Diet which lasted more than twenty years.⁴⁶

The turning point for the Japanese bar came in 1933, when the *Attorneys Law* was revised again.⁴⁷ Although the revised law did not change the essential function of the profession,⁴⁸ it did require that a foreign attorney obtain a license from the Ministry of Justice and that the foreign attorney's home country provide the same rights to the

41. Brown, *supra* note 12, at 441.

42. Rabinowitz, *supra* note 30, at 65. The resistance to Japan's attempt to professionalize the attorney's role came from the new law's difficult exams which few individuals could pass and its failure to prevent non-licensed attorneys or non-*daigennin* from continuing to practice as representatives. *Id.*

43. Brown, *supra* note 12, at 441. Although the new law was intended to improve the government's and the public's perceptions of the profession, the law did not affect the scope of the services performed by foreign attorneys. *Id.*

44. *Id.* The creation of the new title, *bengoshi*, was inspired by the English "barrister" and illustrated the legal profession's lack of self-respect and its desire to identify itself with a respected role model. *Id.* See also Comment, *supra* note 24, at 314-15; Note, *supra* note 1, at 363.

45. Comment, *supra* note 24, at 315. Part of the problem leading to the continued distinction in status between the "attorneys" and judges and procurators was the examination. Both the administration and the level of difficulty of the exam were different for "attorneys." *Id.*

46. Note, *supra* note 1, at 363-64. The *bengoshi* finally achieved some results when their diligence provoked the Ministry of Justice to draft a Revised *Attorneys Law* in 1929. *Id.* at 363 n.19. The Ministry of Justice's 1929 draft is officially recognized as *Dai Ichiji Shiho-sho Kaisei Bengoshi Hoan*. *Id.*

47. See, e.g., Rabinowitz, *supra* note 30, at 73. See also Comment, *supra* note 24, at 316.

48. Comment, *supra* note 24, at 316. One minor change was the oath of honesty required of lawyers, but not of judges or government officials. *Id.*

Japanese attorneys.⁴⁹ The foreign attorney practicing in Japan was limited to representation of foreign clients only.⁵⁰ Before foreign attorneys could review and assess the effects of the new restrictions, they were shut out of Japan completely in 1936 by the *Law Concerning Control of the Handling of Legal Affairs*.⁵¹ The result of this new law was to prohibit foreign attorneys from practicing law in Japan and to punish those who did.⁵²

After World War II, significant changes were made regarding the practice of foreign attorneys in Japan.⁵³ In 1949, the *Attorneys Law* included an open-door policy that permitted foreign attorneys to practice in Japan under restrictions similar to those enacted in 1933.⁵⁴ One change to the 1933 policy was the new law's removal of the long-standing requirement of Japanese nationality for practicing law.⁵⁵ Second, the open-door policy incorporated special rules for qualified foreign attorneys to follow.⁵⁶ Other major changes to the practice of law were

49. Brown, *supra* note 12, at 442. The licensing requirement was a controversial issue leading to further controversy in Japan. *Id.* The reciprocity requirement was a later addition to the original draft of 1929. *Id.*

An alien, who is qualified as a foreign attorney, may obtain the validation of the Ministry of Justice and perform matters prescribed in Article 1 (regarding the professional activities of an attorney) in regard to aliens of foreign law as long as there is a guaranty of reciprocity. [Parenthetical statement added by Brown.]

Id. at 442-43 (citing Article 6, *Bengoshi Hoo* [sic] *Attorneys Law*, Law No. 53 (1933)). See also Note, *supra* note 1, at 364.

50. Brown, *supra* note 12, at 443.

51. *Id.* (citing Article 6, *Bengoshi Hoo* [sic] (*Attorneys Law*), Law No. 53 (1933)). This law was passed in response to international criticism of Japan's attempts to branch out, particularly the criticism of its activities in Manchuria. *Id.* See Note, *supra* note 1, at 364.

52. Brown, *supra* note 12, at 443. Although practice was prohibited, subject to criminal punishment, many foreign attorneys continued to practice and no one was ever subjected to criminal charges. *Id.*

performed by foreign attorneys. *Id.*

53. See, e.g., Woodruff, *The Japanese Lawyer*, 35 NEB. L. REV. 429, 453 (1956).

54. Brown, *supra* note 12, at 443-44.

55. *Id.*

56. *Id.* at 444. Article 7 contains the following:

1. A person who is qualified to become an attorney of a foreign country and who possesses an adequate knowledge of the laws of Japan may obtain the recognition of the Supreme Court and conduct the affairs prescribed in Article 3.

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

Id. (citing *Bengoshi Ho* (*Attorneys Law*), Law No. 205 (June 10, 1949)).

the Japanese bar's independence from the Ministry of Justice and the establishment of the Supreme Court's Judicial Research and Training Institute.⁵⁷

During the United States' military occupation, Japan was heavily influenced by the American legal system.⁵⁸ The effects of that influence are reflected in Japan's current Constitution.⁵⁹ In addition to American constitutional law, other areas of law, such as civil rights, corporations, securities regulation, income tax, labor, and antitrust, were incorporated into Japan's legal system.⁶⁰ Shortly after the Allied Occupation, however, foreign lawyers were once again barred from practicing law in Japan as set forth in *The Law Concerning the Partial Amendment of the Attorneys Law*.⁶¹ Although this 1955 amendment repealed article 7 of the *Attorneys Law*, those attorneys who were already registered were allowed to continue to practice as *jun kaiin* under a grandfather clause.⁶² One reason suggested for the change was that foreigners, who desired to practice law in Japan, could do so by becoming Japanese attorneys after satisfying all of the requirements, including passing the national legal exam.⁶³ Another reason advanced for the change was that Japan was the only country offering such an open-door pol-

57. See, e.g., Rabinowitz, *supra* note 30, at 76-77. The bar's freedom from the Ministry of Justice enabled the bar association to control the admission and disciplinary proceedings rather than the government. *Id.* The profession, however, was not completely independent since it was still subject to the rule making power of the Supreme Court (citing Japanese Constitution art. 77(1) stating, "The Supreme Court is vested with the rule making power under which it determines the rules of procedure and of practice, and of matters relating to attorneys, the internal discipline of the courts and administration of judicial affairs."). *Id.* at 76 n.26. It is the bar's independence and autonomy that has become a major issue in the struggle of foreign attorneys seeking access to Japan's legal industry. Moffat, *supra* note 3, at 13.

58. Stevens, *supra* note 15, at 1260.

59. *Id.*

60. *Id.*

61. Brown, *supra* note 12, at 447.

62. *Id.* See *supra* note 56. The sixty-eight American lawyers who were licensed under article 7, before its repeal, had been providing legal advice on American law and representing American clients. Kanter, *supra* note 7, at 349. These American lawyers could continue to practice provided they maintained their residence in Japan. *Id.* at 350. This grandfather clause appeared in Supplemental Provision 3 of *The Act Concerning the Partial Amendment of the Bengoshi Act*, Act No. 155 of 1955. *Id.* at 350 n.56.

63. See, e.g., Kanter, *supra* note 7, at 349. The purpose of deleting article 7 was to prevent foreign lawyers from entering Japan, opening offices, and from advising foreign clients in Japan. *Id.* Foreign lawyers who wanted to practice in Japan would then have to qualify in the same manner as the Japanese. *Id.* See also Brown, *supra* note 12, at 447 (eliminating the nationality requirement in 1949).

icy.⁶⁴ Regardless of the reason, it was clear that foreign attorneys were not allowed to open offices in Japan, nor were they allowed to advise foreign clients in Japan.⁶⁵

C. Modern Japan — 1955 to Present

Approximately seventy-six⁶⁶ foreign attorneys, *jun kaiin*,⁶⁷ continued to practice in Japan under the grandfather clause of the 1955 amendment. Since then, several hundred American attorneys have been able to go to Japan to work for these grandfathered attorneys and for *bengoshi* as legal “trainees.”⁶⁸ The scope of the trainees’ practice is not clear because originally trainees were allowed to draft and edit documents in English for their employers and advise them on American law, but the scope was later redefined.⁶⁹ Initially, such limited access to the Japanese legal market satisfied the relatively few attorneys desiring to practice in Japan; most of the American law firms were not interested in practicing in Japan.⁷⁰

64. See Kanter, *supra* note 7, at 349-50 n.55; Brown, *supra* note 12, at 447. The problem with these reasons is neither one is accurate. Brown, *supra* note 12, at 447-49. The level of difficulty of the entrance exam for the Institute is reflected in a passing rate of less than two percent and the applicants to the Institute must be Japanese citizens; there was one exception, Kyeong Kim, of Korean nationality, who was born and raised in Japan. *Id.* at 448; see *infra* notes 125-26 and accompanying text; Moffat, *supra* note 3, at 13 (It is practically impossible for a Westerner to pass the exam; no Westerner has passed to date.). The second argument fails because several U.S. states and other nations were allowing foreign attorneys to practice law at that time. Brown, *supra* note 12, at 449 (citing Tadao Fukuhara, *The Status of Foreign Lawyers in Japan*, 17 THE JAPANESE ANNUAL OF INTERNATIONAL LAW 21 (1973); Isaac Shapiro, *Reclaiming a Place for Foreign Lawyers in Japan*, The Japan Times, Oct. 17, 1982, p.12.

65. Kanter, *supra* note 7, at 349.

66. See, e.g., Comment, *supra* note 5, at 129 n.49; see also Brown, *supra* note 12, at 446 (total of seventy-three); Kanter, *supra* note 7, at 349 (total of sixty-eight Americans).

67. See Brown, *supra* note 12, at 446.

68. Kanter, *supra* note 7, at 350.

69. Ramseyer, *Lawyers, Foreign Lawyers, and Lawyer Substitutes: The Market for Regulation in Japan*, 27 HARV. INTL L.J. 499, 502 (1986). The trainees were no longer permitted to draft documents without supervision, render legal opinions, or meet with clients as a result of action taken by the JFBA in 1972. *Id.* at 502 n.10 (citing *Nihon bengoshi rengo kai, Gaikokujin hiben katsudo boshi in kansura kijun* (Standards for the prevention of unauthorized practice by foreign lawyers) (Feb. 19, 1972), reprinted in *JIYU TO SEIGI*, Feb. 1985, at 120, 124; Matsumoto, *Kokusai horitsu gyomu to bengoshi ho* (The Attorneys Act and international law practice), 681 JURISUTO 77, 80-81 (1979)). See Loder, *Ray Connell's Rising Son*, 7 CAN. LAW. 20, 22 (1983) (most of the trainee's time is spent translating the proposed international contracts, most of which use the English language).

70. See, e.g., Ramseyer, *supra* note 69, at 502.

This indifference toward Japan's prohibition against foreign attorneys practicing in Japan rapidly shifted to an attitude of interest when awareness of Japan's economic progress increased.⁷¹ As the desire to enter the Japanese legal industry grew, arguments were made which appeared to authorize the performance of certain legal services by foreign attorneys.⁷² One argument relied on the interpretation of the wording of article 72 of the *Attorneys Law (Bengoshi Ho)*, that it only prevents *non-bengoshi* from providing legal services involving case representation and courtroom work — the article, however, does not prevent *non bengoshi* from providing advice on a variety of other legal issues.⁷³ The thrust of the argument is that the monopoly given to the *bengoshi*, as recognized by the *Attorneys Law* and tradition, is limited to a few areas of legal services.⁷⁴ The other argument relied on the 1953 Treaty of Friendship, Commerce and Navigation (FCN) between Japan and the United States which suggests that foreign attorneys may practice in Japan.⁷⁵ These two arguments were fueled further when the Japanese Immigration Bureau of the Ministry of Justice issued a one-year visa to Isaac Shapiro of New York's Milbank, Tweed, Hadley & McCloy so that the firm could open an office in Japan.⁷⁶

These events forced the Japanese Federation of Bar Associations (JFBA or *Nichibenren*), officially to clarify the scope of non-attorneys' duties.⁷⁷ The *JFBA Standards Concerning the Prevention of Non-At-*

71. See, e.g., *id.* at 502-03.

72. Note, *supra* note 1, at 366.

73. Kanter, *supra* note 7, at 355; Note, *supra* note 1, at 366. See also Crabb, *Providing Legal Services in Foreign Countries: Making Room for the American Attorney*, 83 COLUM. L. REV. 1767, 1814-15 (1983).

74. Brown, *supra* note 12, at 455; Kanter, *supra* note 7, at 355. See Lehner, *U.S. Lawyers Allege Tokyo Barriers*, Wall St. J., Apr. 20, 1982, at 35, col. 2. Japanese legal experts, including Tadao Fukuhara, one of the drafters of the *Attorneys Law*, have supported the theory behind this argument that the law intended to give Japanese lawyers a monopoly limited to courtroom representation. *Id.*

75. See Brown, *supra* note 12, at 451; Crabb, *supra* note 73, at 1814-15 n.255 (citing The Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, art. VIII, 4 U.S.T. 2063, T.I.A.S. No. 2863 (United States-Japan Treaty)) [hereinafter FCN Treaty]. The sections of the treaty that are cited in support of this argument are paragraphs (1) and (2) of article VIII. See Brown, *supra* note 12, at 451-52; Crabb, *supra* note 73, at 1814-15 n.255.

76. Brown, *supra* note 12, at 458. Also the Hong Kong firm of Johnson, Stokes & Master was successful in officially opening an office in Japan, while other foreign law firms opened offices unofficially. *Id.* See also Crabb, *supra* note 73, at 1815 n.255.

77. See, e.g., Brown, *supra* note 12, at 453 [hereinafter JFBA].

torney Activities by Foreigners were issued in March 1972.⁷⁸ Applying to all foreigners, lawyers, and others, these standards explicitly restricted the activities of foreigners with respect to legal services.⁷⁹ The standards were criticized by foreigners because the rules did not address the limited monopoly given to attorneys in Japan as recognized by both the *Attorneys Law* and custom.⁸⁰ Furthermore, the rules failed to acknowledge the right given to foreign attorneys to perform on behalf of foreign companies as authorized by article VIII of the FCN Treaty between Japan and the United States.⁸¹

After several years of both internal and foreign debate,⁸² in 1984, the JFBA issued a report that proposed liberalization of the Japanese legal practice allowing foreign attorneys to practice in a limited scope.⁸³ The proposal included several strict requirements that had to be satisfied before a foreign attorney could begin providing the few legal services permitted.⁸⁴ This proposal was not well received in the United States, and thus, the pressure from the United States continued to build against Japan.⁸⁵ In response to the JFBA's proposal, some attor-

78. *Id.* at 453-54 (citing *Gaikokujin Hiben Katsudo boshi Ni Kansuru Kijun (Standards Concerning the Prevention of Non Attorney Activities By Foreigners)* (Tokyo: Nihon Bengoshi Tengokai, 1972)). The JFBA's standards provided the following rules for all foreigners:

1. Activities such as the drafting and rewording of the text of technical assistance and joint venture contracts must be performed under the direction and supervision of a Japanese attorney or a foreign attorney recognized under former Article 7 of the *Attorneys Law*.
2. An unqualified alien may not independently express a legal opinion regarding such matters as the drafting or revision of a contract because to do so constitutes an act resembling the rendering of legal advice.
3. An unqualified alien may not meet independently with a client for purposes of legal consultation and express a legal opinion or give independent legal advice.

Id. at 454.

79. *Id.*

80. *Id.*

81. See Crabb, *supra* note 73, at 1782-83 n.84, 1814 n.255; Kanter, *supra* note 7, at 362-63.

82. See, e.g., Brown, *supra* note 12, at 459; Kanter, *supra* note 7, at 363-64. Japan felt some coercion from abroad, particularly from the United States, and this was compounded by domestic political battles. Moffat, *supra* note 3, at 13. These domestic political battles focused on the issues of the foreign lawyers' cultural differences, and their desire to dominate, and the JFBA's independence from the Japanese government. *Id.*

83. Ramseyer, *supra* note 69, at 503 (citing *Gaikoku bengoshi taisaku iinkai, "Gaikoko bengoshi ni tsuite" no toshin* (Report "on foreign lawyers") (Dec. 7, 1984), reprinted in *JYU TO SEIGI*, Feb. 1985, at 114).

84. *Id.* For example, the proposal included a reciprocity requirement, as well as a five-year domestic experience requirement and further limitations on activities. *Id.* See *infra* notes 129-33.

85. *Id.* at 504.

neys from the United States circulated a section 301 petition⁸⁶ from the Trade Agreement Act of 1979 that called attention to the United States' power to retaliate against the entry barriers.⁸⁷

The United States Special Trade Representative's Office became involved on behalf of the American legal community and submitted a proposal for the authorization of foreign lawyers in Japan.⁸⁸ In 1985, the JFBA responded with a proposal of its own by providing a regulatory scheme in which foreign attorneys could practice in Japan.⁸⁹ The JFBA's proposal, after some modification, was submitted to the Japanese Diet in March of 1986.⁹⁰ On May 16, 1986, the Japanese Diet passed the *Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers*.⁹¹

III. THE FOREIGN LAWYER PROBLEM

A historical review of the professional role of the attorney in Japan leads to the conclusion that the development of the profession was weak and lacked traditional and cultural importance.⁹² These deficiencies have caused problems of identity for Japanese attorneys as well as for the profession itself. In an effort to alleviate some of these problems, Japanese attorneys began looking to foreign attorneys who enjoy a respected profession with a traditional foundation and a sense of importance as role models. Despite Japan's need for foreign lawyers practicing locally, Japan has exhibited traits of a schizophrenic when setting policies regarding foreign lawyers, probably due to a conflict of interests. For example, the need for internationalization and the

86. *Id.* at 504 n.14 (citing Trade Agreement Act of 1979, 19 U.S.C. §§ 2411-16 (1980)).

87. *Id.* (stating that under § 301, the President has the "power to retaliate against foreign trade restrictions which prevent or limit the sale of American products or services."). *See also* McAbee, *Foreign Lawyers Rights: The Debate Intensifies*, 7 E. ASIAN EXEC. REP. 16 (1985).

88. *See, e.g.*, Greenberg, *supra* note 36, at 29.

89. *Id.* at 30. The regulatory scheme included four major points: (1) a reciprocity requirement; (2) foreign attorneys' compliance with the JFBA's regulations; (3) a scope of practice limited to the law of the foreign attorney's home jurisdiction; and (4) a prohibition against foreign lawyers' hiring Japanese *bengoshi* or forming partnerships with Japanese lawyers. *Id.* It is believed that the JFBA's proposal was triggered by the domestic political threats to its independence from the government. *See, e.g.*, Moffat, *supra* note 3, at 13. A delayed response from the JFBA would have meant that the Japanese government could respond and submit its own proposal. *Id.*

90. Greenberg, *supra* note 36, at 31.

91. *See supra* note 5.

92. *See, e.g.*, Rabinowitz, *supra* note 30, at 78-81.

need for foreign attorneys contrasts sharply with Japan's desire to preserve traditional values and the *bengoshi's* monopoly.⁹³

A. *The Foreign Lawyer Problem — 1955 to Present*

The "foreign lawyer problem" has intensified since 1977 when two foreign firms officially opened offices in Japan under the authority of the Ministry of Justice.⁹⁴ These two firms represent the exception to the rule, as stated in the 1955 amendment to the *Attorneys Law*, that prohibited foreign lawyers from opening offices and from practicing law in Japan.⁹⁵ Although foreign lawyers were prevented from such activities, they were not prevented from making "ad hoc" visits to Japan on behalf of their clients.⁹⁶ These visits became increasingly difficult to perform as opposition to the presence of foreign attorneys led to the practice of denying visas to foreign lawyers.⁹⁷ The discrepancy in the positions toward admitting foreign lawyers arises because of the different views of the Japanese government and the JFBA.⁹⁸

The JFBA and the American Bar Association [ABA] negotiated in an effort to resolve the increasing tension compounded by the visa

93. See Coyle, *supra* note 5, at 15; Coyle, *Practice in Japan OK'd for U.S. Lawyers*, Nat'l L.J., Mar. 16, 1987, at 3, col. 1; Kanter, *supra* note 7, at 339-40; Ramseyer, *supra* note 69, at 503; see *infra* note 107 and accompanying text.

94. See, e.g., Brown, *supra* note 12, at 458; see *supra* notes 75-76 and accompanying text.

95. See, e.g., Lehner, *supra* note 74, at 35; see also *supra* note 62. During the 1970's Japan's exclusionary practice focused on preventing the opening of offices. *Id.* See also Comment, *supra* note 1, at 180.

96. See Crabb, *supra* note 73, at 1770; Lehner, *supra* note 74, at 35. See generally Lund, *Problems and Developments in Foreign Practice*, 59 A.B.A. J. 1154, 1155 (1973) (explaining the phrase "ad hoc" traveling lawyer as a lawyer who travels to his client's country to provide legal assistance because the lawyer does not have an office in this country).

97. See, e.g., Brown, *supra* note 12, at 458. Although the Ministry of Foreign Affairs reacted favorably to the official openings of the two foreign firms, New York's Milbank, Tweed, Hadley & McCloy and Hong Kong's Johnson, Stokes & Master, the JFBA reacted in strong opposition which led to the practice of denying visas to foreign attorneys. *Id.* See generally Lehner, *supra* note 74, at 35 (stating that first, harsh conditions had to be satisfied before a foreign attorney could be issued a visa, and then visas were rejected altogether). See also Tell, *ABA Halts Japan Bar Talks*, Nat'l L.J., July 5, 1982, at 21, col. 1 (The State Department responded by making the issuance of visas to foreign attorneys "part of a Reagan administration campaign to remove barriers to U.S.-Japan trade.").

98. See, e.g., Abrahams, *Japan's Bar to U.S. Lawyers*, Nat'l L.J., July 4, 1983, at 1, col. 3, and at 34, cols. 1-2 (The JFBA's strong reaction affected the Ministry of Justice's position on the issue.); Lehner, *supra* note 74, at 35 (stating that the Japanese government denies any change in its policy despite the lawyers' complaints about the tougher requirements for getting a visa); Moffat, *supra* note 3, at 13; Ramseyer, *supra* note 69, at 503.

restrictions.⁹⁹ In 1982, three weeks before the scheduled meeting between the two national bars, the ABA cancelled its trip to Japan and withdrew from the negotiations.¹⁰⁰ The ABA reasoned that the negotiations with the Japanese should be conducted by either the state bar associations or the United States government.¹⁰¹ Although the ABA reconsidered and decided to send a delegation to Tokyo five months later, trade negotiations between the two governments had already begun, including the issue of access to Japan for those persons interested in providing services.¹⁰²

The JFBA has continued to maintain its hard-line position against admitting Americans; thus, the Japanese prohibition against American lawyers has become a significant trade issue.¹⁰³ While Japanese businesses have enjoyed virtually unrestricted access to Japanese trade facilitators in the United States, American companies have struggled to obtain trade facilitation in Japan.¹⁰⁴ The United States government has advanced both economic and political reasons stating why Japan's growth in international trade demands the services of American lawyers.¹⁰⁵ Japan's new law allowing American lawyers to set up offices and practice foreign law in Japan may be interpreted as a response to this reasoning.

B. *The Resolution* — The Special Measures Law¹⁰⁶

The *Special Measures Law* states that foreign lawyers may be admitted to practice in Japan as "foreign law business lawyers,"

99. See, e.g., Brown, *supra* note 12, at 458-59.

100. *Id.* at 459; Tell, *supra* note 97, at 21, col. 1 (explaining that the ABA was not the appropriate organization to be making government policy).

101. See, e.g., Brown, *supra* note 12, at 459. First the ABA argued that each state, with its own bar, could better represent that respective state. *Id.* The ABA also stated that the Japanese and American trade representatives were in a better position to resolve the matter. *Id.* See also Tell, *supra* note 97, at 21, col. 2 (The ABA did not have official authority.). The JFBA, however, requested that the problem be handled by its own organization rather than by the Japanese government to avoid government-to-government negotiations. Moffat, *supra* note 3, at 13, 15.

102. See, e.g., Brown, *supra* note 12, at 459-60. See also Coyle, *supra* note 5, at 15, col. 1 (noting the ABA's eight year struggle to gain access to the legal services industry before the United States placed the issue on its trade agenda in 1982).

103. See, e.g., Brown, *supra* note 12, at 460. See also Coyle, *supra* note 93, at 38, col. 2.

104. Kanter, *supra* note 7, at 341.

105. *Id.* at 342. See also Work, Lord & Bork, *supra* note 7, at 38.

106. See, e.g., Ramseyer, *supra* note 69, at 504 n.17 (citing *Gaikoku bengoshi ni noyu horitsu jimu no toriatsukai ni kansuru tokubetsu sochiho*). Cf. note 5 and accompanying text.

gaikoku ho jimubengoshi.¹⁰⁷ Although the *Special Measures Law* is purported by the Japanese to be a resolution to the foreign lawyer problem, the law has incorporated the JFBA's exclusionary policies by imposing such strict requirements that one may wonder if it is a resolution at all.¹⁰⁸ As a result, the resolution has received mixed reviews.¹⁰⁹ Nevertheless, the law does provide American attorneys with some access to the Japanese legal services industry, through which American law firms can enter Japan, and hopefully better serve their clients, both Japanese and American.¹¹⁰

Once a foreign attorney is admitted,¹¹¹ a "foreign law business lawyer," or *jimubengoshi*, will define the scope of the foreign attorney's practice in relation to his/her own qualifications.¹¹² For example, the *jimubengoshi* has the authority to advise clients in Japan on the law of the *jimubengoshi's* own home jurisdiction or licensing state.¹¹³ In addition, the *jimubengoshi* may also advise clients about federal law and the laws of any other state or country for which he/she is qualified or shows expertise in the law of that state or country.¹¹⁴ This practice inhibits the *jimubengoshi's* performance in advising Japanese clients about state-specific laws.¹¹⁵ The *jimubengoshi's* services to clients are limited by qualifications, and by the restrictions which prevent counseling on or practicing Japanese law.¹¹⁶

107. See, e.g., Coyle, *supra* note 5, at 15, col. 1; Kanter, *supra* note 7, at 342; Ramseyer, *supra* note 69, at 503-04 (Japan's response is a "strange resolution."). See *infra* notes 129-57, 200-14 and accompanying text.

108. Ramseyer, *supra* note 69, at 504-05; Auerbach, *supra* note 6, at C1, col. 2; McAbee, *Foreign Businessmen Critical of New Lawyers' Rights Law*, 8 E. ASIAN EXEC. REP. 18 (1986).

109. See, e.g., Berger, *Tokyo Considers a New Import — U.S. Lawyers*, Bus. Wk, Apr. 28, 1986, at 40; Coyle, *supra* note 93, at 38, col. 3. Theoretically, the presence of foreign attorneys means better service to their clients, but the adequacy of the representation is dependent on the scope of practice permitted by the Japanese.

110. Comment, *supra* note 5, at 123.

111. See *infra* notes 129-50 and accompanying text.

112. See Casey, *Texans Eye Tokyo Practice*, TEX. LAW., Mar. 23, 1987, at 1, col. 3, at 11, cols. 3-4 (citing the guidelines for foreign attorneys practicing in Japan as outlined by Glen Fukushima, director of Japanese affairs for the U.S. Trade Representative).

113. See, e.g., *id.*; Coyle, *supra* note 5, at 16, col. 1; Comment, *supra* note 5, at 123 n.2 (citing *Special Measures Law*, art. 3).

114. See, e.g., Casey, *supra* note 112, at 11, cols. 3-4; see also *infra* notes 148-49 and accompanying text.

115. Note, *supra* note 1, at 370. See also Auerbach, *supra* note 6, at C2, col. 3 (The restrictions are too severe, especially in light of the U.S. attorneys' ability to advise clients on the laws of every state because the basic system is the same and any state-specific issues can easily be resolved.).

116. See Casey, *supra* note 112, at 11, cols. 3-4; Note, *supra* note 1, at 370-71.

Further limitations include preventing the *jimubengoshi* from representing clients in a Japanese court or before a Japanese administrative agency and from serving documents to the court or the agencies.¹¹⁷ The *jimubengoshi* is prohibited from acting as counsel in a criminal case,¹¹⁸ and from acting as counsel in any case involving real property in Japan when the principal motive is a change of rights.¹¹⁹ If the *jimubengoshi* should encounter these prohibited activities while performing his/her own authorized practice, the law states that he/she must defer the matter to a Japanese attorney.¹²⁰ The interaction between the foreign attorney and the Japanese attorney, however, is limited because the law expressly states that foreign firms may not hire Japanese partners or form partnerships with Japanese firms.¹²¹

Before the new law, foreigners participated in Japan's legal industry in various capacities, such as trainees, "grandfathered" lawyers, and foreign lawyers making ad hoc visits.¹²² In addition, a foreign attorney wishing to practice Japanese law has always had the option of taking the Japanese bar.¹²³ Foreigners, however, complain that passing the exam is nearly impossible because of the difficulty presented by the language barrier.¹²⁴ The difficulty of the exam is also reflected in a national passing rate of less than two percent.¹²⁵ Although some thirty thousand applicants take the exam each year, most of whom

117. See, e.g., Comment, *supra* note 5, at 123-24 n.4 (citing *Special Measures Law*, art. 3.1.1).

118. See *id.* at 124 n.5 (citing *Special Measures Law*, art. 3.1.2, which includes a prohibition against representing fugitive criminals facing extradition).

119. See *id.* at 124 n.6 (citing *Special Measures Law*, art. 3.1.6). See also *U.S., Tokyo Debate Letting U.S. Lawyers Practice in Japan*, Wall St. J., Nov. 22, 1985, at 35, col. 1 (explaining that lawyers expect opportunities in a variety of transactions, such as mergers and acquisitions, joint ventures and overseas real-estate investments, as Tokyo becomes more open in its financial market) [hereinafter *U.S., Tokyo Debate*]. But see Note, *supra* note 1, at 371 (stating that cases involving real property in Japan are of little interest to foreign attorneys).

120. See, e.g., Comment, *supra* note 5, at 124 n.7 (citing *Special Measures Law*, art. 3.2); see also *infra* note 147 and accompanying text.

121. See *id.* at 124 n.8 (citing *Special Measures Law*, art. 49); Berger, *supra* note 109, at 40 (noting a potential problem that the restriction will keep out young American lawyers unable to meet the cost of entering the market).

122. See *supra* notes 62-69, 96-97 and accompanying text.

123. Brown, *supra* note 12, at 447. Another method available to those individuals desiring to become attorneys in Japan is by being found exempt, for instance, being a law professor. *Id.* See also Ramseyer, *supra* note 69, at 505.

124. See, e.g., Brown, *supra* note 12, at 449; Ramseyer, *supra* note 69, at 505.

125. See, e.g., Coyle, *supra* note 93, at 38. See also *A Law Unto Itself*, *supra* note 6, at 32.

have taken the exam before, only five hundred pass.¹²⁶ Even if a foreigner is able to pass the exam, he/she may not be able to attend the Legal Research and Training Institute [Institute] because of his/her failure to satisfy the requirement that candidates be of Japanese nationality.¹²⁷ As a result, foreign attorneys were forced to obtain access to the Japanese legal market through bilateral trade talks with Japan.¹²⁸

C. *Problems that Remain*

In addition to the very narrow scope of practice afforded the *jimubengoshi* under the *Special Measures Law*, the law echoes Japan's long-standing policy of excluding foreign attorneys.¹²⁹ This exclusionary position appears in the form of strict requirements to be satisfied before the applicant may qualify as a *jimubengoshi*.¹³⁰ One of the significant requirements is the reciprocal arrangement in which the applicants' licensing jurisdiction must provide "foreign legal consultant" status for Japanese lawyers.¹³¹ The reciprocity requirement serves as an effective barrier against entrance by American attorneys

126. Thompson, *The Paradox of Japanese Law Schools*, 13 *STUDENT LAW* 16, 21 (1985). The reason for the low passing rate is the JFBA's desire to exclude competition. *Id.* See also Comment, *supra* note 24, at 316-17 (observing that the great level of difficulty of the exam affected the government officials' and the public's perceptions of the attorney which became more positive).

127. Brown, *supra* note 12, at 447-48. Although there is no law or regulation requiring that the Institute's applicants be Japanese citizens, the Supreme Court announces such a requirement every year. The explanation offered for this action is that the students of the Institute receive a salary from the national treasury and this justifies the requirement. *Id.* at 448. See also Moffat, *supra* note 3, at 11 (explaining that the low number of graduates from the Institute has been maintained at about five hundred for more than twenty years, despite local efforts to increase the number).

128. See McAbee, *supra* note 87, at 16. Bilateral trade talks with Japan were used to negotiate and obtain authority for a limited practice in Japan by foreign attorneys. *Id.*

129. See generally Brown, *supra* note 12, at 447 (Japan shut the door on foreign attorneys in 1955); Kanter, *supra* note 7, at 339-40. See also Auerbach, *supra* note 6, at C1, col. 2 (noting the annoyance of international lawyers and U.S. trade officials at the Japanese position after thirty years of Japan's exclusion of foreign lawyers); *U.S., Tokyo Debate*, *supra* note 119, at 35, col. 1 (pointing out that the JFBA became authorized to control the legal profession in Japan in 1955 and since then, essentially no American law firms have been permitted to practice in Japan).

130. See, e.g., Auerbach, *supra* note 6, at C2, cols. 2-3; Marcotte, *supra* note 6, at 28.

131. See Comment, *supra* note 5, at 124 n.14 (citing *Special Measures Law*, art. 10.2). See also Moritsugu, *supra* note 8, at 16 (stating that the reciprocity requirement is an effective barrier to entry by Canadian lawyers because Canada consists of a number of different and independent provinces).

because presently, only California, Hawaii, Michigan, New York, and Washington, D.C. license foreign legal consultants.¹³²

Another formidable requirement is that a foreign attorney must have five years of experience in the attorney's own country before being eligible for admission as a *jimubengoshi* in Japan.¹³³ The applicants who suffer the most as a result of this requirement are the trainees who are presently active in the Japanese legal market.¹³⁴ The problem for the young trainees is the relatively little experience they attained in their own country before their arrival in Japan. Minimal relief is provided to the trainees by a supplemental provision to the *Special Measures Law*, allowing a maximum of two years of experience credit for trainees.¹³⁵ In addition to the burden this requirement places on trainees, the provision could also lead to administrative problems in practice, such as enforcing the requirement.¹³⁶ However, the negotiations revealed that the imposition of this requirement may be relaxed in actual application.¹³⁷

The *Special Measures Law* includes three other troublesome requirements. First, once qualified, a *jimubengoshi* must reside in Japan for at least 180 days each year.¹³⁸ The trouble this requirement presents remains unclear since the effect will depend on how closely the Japanese adhere to this rule.¹³⁹ In particular, the pertinent section of the law indicates that certain circumstances, such as "illness or 'other unavoidable circumstances,'" may qualify as an exception.¹⁴⁰ Another

132. See, e.g., Marcotte, *supra* note 6, at 28. Other states, such as Illinois and Texas, are experiencing pressure from their lawyers to change their laws against foreign attorneys. *Id.* See also Casey, *supra* note 112, at 1, cols. 3-4; *In re Griffiths*, 413 U.S. 717 (1973) (holding that citizenship could no longer be a requirement for admission to the bar); N.Y. CT. RULES § 521 (McKinney 1982) (stating that foreign lawyers are permitted to practice in New York as foreign legal consultants).

133. See, e.g., Comment, *supra* note 5, at 124 n.16 (citing *Special Measures Law*, art. 10.1.1); Marcotte, *supra* note 6, at 28.

134. See, e.g., Note, *supra* note 1, at 372.

135. See *id.* Despite the two-year credit provision, trainees will have to leave Japan in order to satisfy the five year experience requirement. *Id.* In addition, young trainees will also face the burden of having to meet the high cost of entry into the Japanese market.

136. See *id.* at 372-73; see also McAbee, *supra* note 87, at 16 (noting that the U.S. Trade Representative, Clayton Yeutter, suggested that a new law be passed in order to address the administration of regulations concerning foreign lawyers).

137. Note, *supra* note 1, at 372-73 n.80; Comment, *supra* note 5, at 124-25 n.17.

138. Comment, *supra* note 5, at 124 n.15 (citing *Special Measures Law*, art. 48).

139. *Id.*

140. *Id.* The provision itself states exceptions to the requirement, such as "illness or 'other unavoidable circumstances.'" *Id.* (citing *Special Measures Law*, art. 48.2).

problem arises from a restriction that *jimubengoshi* cannot form partnerships with Japanese lawyers.¹⁴¹ This restriction, compounded by the limited services that the *jimubengoshi* can provide, requires the *jimubengoshi* to consult a *bengoshi* on issues outside his/her own scope of practice.¹⁴² Finally, the *jimubengoshi* will be subject to the JFBA not only for initial registration and approval, but also for supervision and guidance in observing the JFBA's regulations.¹⁴³

Although recent applicants have described the application process as "going smoothly,"¹⁴⁴ the process has also been described as "long and complicated."¹⁴⁵ Initially, one must file an application with the Ministry of Justice.¹⁴⁶ The application is reviewed by both the Ministry of Justice and the JFBA as required by the *Special Measures Law*.¹⁴⁷ Since the JFBA is involved in the approval procedure, its exclusionary position may be a significant factor in the decision-making process. The decision not to approve an application may result from any one of a variety of reasons.¹⁴⁸ Once approval is received, the applicant must then complete registration to determine under which foreign law the applicant will be authorized to practice.¹⁴⁹ This stage is referred to as "designation" whereby an applicant is authorized to practice foreign law in an area in which he/she has demonstrated formal legal knowledge and in which he/she has met the five-year experience require-

141. See, e.g., Berger, *supra* note 109, at 40 (stating this restriction as the major complaint of foreign attorneys); McAbee, *supra* note 87, at 16 (noting that such a restriction does not make any sense because it does not permit the attorneys to provide legal services in a more effective and efficient manner); Comment, *supra* note 5, at 124 (stating that the restriction prevents the interaction of Japanese and American lawyers).

142. See Comment, *supra* note 5, at 125; Note, *supra* note 1, at 370-71. The restrictions place an additional financial burden on conducting business in Japan and on the clients needing foreign legal services. *Supra* note 1, at 370-71, 375.

143. See, e.g., Greenberg, *supra* note 36, at 30-31.

144. Coyle, *supra* note 5, at 1, col. 1, and at 15, col. 2. See also Marcotte, *supra* note 6, at 28.

145. Note, *supra* note 1, at 371. But see Coyle, *supra* note 5, at 15, col. 1, and at 16, cols. 1, 4 (explaining that despite the uncertainty about how Japan will implement the law, the agreement states that the entire application process will not take longer than three months).

146. See, e.g., Coyle, *supra* note 5, at 1, col. 1, and at 15, col. 2; Comment, *supra* note 5, at 125 n.20 (citing *Special Measures Law*, art. 9).

147. See, e.g., Comment, *supra* note 5, at 125 n.21 (citing *Special Measures Law*, arts. 10.3 & 37). See also Kanter, *supra* note 7, at 350. McAbee, *supra* note 87, at 16 (noting the United States government's preference for regulation by the Japanese government rather than the JFBA).

148. See Note, *supra* note 1, at 371 nn. 69-70 (citing *Special Measures Law*, art. 10.1.2.-10.1.3).

149. See *id.* at 373 n.84 (citing *Special Measures Law*, art. 17).

ment.¹⁵⁰ Designation is followed by registration, whereby an applicant must apply for membership with the local bar by providing the necessary documents.¹⁵¹

Even after admission and approval, the *jimubengoshi* remain under the scrutiny of the JFBA.¹⁵² This requirement has received strong opposition from foreign lawyers, particularly American lawyers.¹⁵³ Although the law provides that the *jimubengoshi* will enjoy many of the same rights and duties of the *bengoshi*,¹⁵⁴ the JFBA plans to provide an additional set of rules for regulating and disciplining the *jimubengoshi*.¹⁵⁵ The two committees supervising the discipline of the *jimubengoshi* are composed of *bengoshi*, judges, procurators, government officials, and other qualified individuals selected by the president of the JFBA.¹⁵⁶ Sanctions for misconduct include a warning, a two-year maximum suspension, a resignation order, or an expulsion.¹⁵⁷ All decisions rendered by the JFBA are final.¹⁵⁸

The costs involved in entering the Japanese legal market constitute a restriction in addition to those expressly provided for by the new law.¹⁵⁹ The activity of the yen and the weakness of the dollar, coupled with an office occupancy rate of ninety nine percent, caused the cost of real estate in Tokyo to skyrocket.¹⁶⁰ Furthermore, recent events in Japan and abroad indicate that improvement in market conditions is unlikely in the near future. Annual operating costs for a four-lawyer

150. See *id.* at 373 nn.85-86 (citing *Special Measures Law*, art. 16.1.1 to .1.2). The Japanese government provided that the designation requirements could be easily satisfied. *Id.* at n.86; see also Coyle, *supra* note 5, at 16, col. 1.

151. See Note, *supra* note 1, at 373 nn.87-88 (citing *Special Measures Law*, arts. 24 & 25.2); see also Coyle, *supra* note 5, at 16 (observing that applicants are avoiding delay and confusion by separating applications for primary and secondary designations).

152. Comment, *supra* note 5, at 125 n.24 (citing *Special Measures Law*, art. 42).

153. See, e.g., McAbee, *supra* note 87, at 16; Ramseyer, *supra* note 69, at 503.

154. See, e.g., Comment, *supra* note 5, at 125 n.25 (citing *Special Measures Law*, arts. 42 & 50.1).

155. See *id.* at 125 n.26 (citing *Special Measures Law*, art. 55).

156. Note, *supra* note 1, at 375-76. One committee is the foreign law *jimubengoshi* Discipline Actions Committee. *Id.* at 375 n.109 (citing *Special Measures Law*, art. 55). The other one is the foreign law *jimubengoshi* Discipline Maintenance Committee. *Id.* at 375 n.110 (citing *Special Measures Law*, art. 58).

157. See *id.* at 376 n.112 (citing *Special Measures Law*, art. 52).

158. See *id.* at 376.

159. See, e.g., Coyle, *supra* note 5, at 16, col. 3 (noting that the annual cost of operation ranges between one and two million dollars); Snyder, *supra* note 8, at 15 (posing the question of whether entry into the market where operating costs are the highest in the world is a profitable venture).

160. See, e.g., Coyle, *supra* note 5, at 16, cols. 2-3.

firm average between one and two million dollars,¹⁶¹ and the costs of living and housing are equally high.¹⁶² Although firms remain enthusiastic about the chance to enter the Japanese market, they must carefully weigh the costs and benefits of entry before deciding to open an office.¹⁶³

IV. OUTLOOK: FOREIGN LAWYERS IN JAPAN

Any analysis of the advantages and disadvantages of allowing foreign attorneys to practice in Japan requires an awareness of the reasoning behind the exclusion of foreign lawyers. One must also determine why a foreign attorney might want to practice in Japan. Finally, after carefully weighing the costs and benefits of opening an office in Japan, a foreign attorney must reflect on Japan's motives for admitting foreign attorneys and how these motives will affect Japan's administration of the *Special Measures Law*.

A. *Reasons for Japan's Reluctance in Admitting Foreign Attorneys*

Historically, both the Japanese government and the public have looked unfavorably upon the litigator.¹⁶⁴ In addition, Japanese culture is based on traditional values that promote group harmony and social hierarchy, but discourage litigation.¹⁶⁵ Therefore, one reason often advanced for Japan's ban on foreign attorneys is that Japan is a non-litigious society "where lawyers are unimportant" and "lawsuits are few."¹⁶⁶ Litigation is infrequent in Japan because of informal dispute resolution by settlements between the parties.¹⁶⁷ Another reason for infrequent litigation is simple economics due to the shortage of lawyers in Japan.¹⁶⁸ The shortage of lawyers is perpetuated as a matter of policy by the Japanese government and the JFBA.¹⁶⁹ Arguably, the underlying theory against admitting foreign attorneys is both culturally and economically based.

161. See, e.g., Casey, *supra* note 112, at 11, cols. 2, 4; Coyle, *supra* note 5, at 16, col. 3.

162. Coyle, *supra* note 5, at 16, cols. 2-3; Snyder, *supra* note 8, at 15.

163. See Casey, *supra* note 112, at 11, cols. 2, 4; Snyder, *supra* note 8, at 15.

164. See, e.g., Comment, *supra* note 24, at 316-17. See also *supra* notes 30-38 and accompanying text.

165. See, e.g., Ramseyer, *supra* note 69, at 506-07. See also *supra* notes 21-29 and accompanying text.

166. Ramseyer, *Japan's Myth of Non-Litigiousness*, Nat'l L.J., July 4, 1983, at 13, col. 1, and at 36, col. 1. See also *A Law Unto Itself*, *supra* note 6, at 32.

167. Ramseyer, *supra* note 166, at 13, col. 3.

168. See, e.g., *A Law Unto Itself*, *supra* note 6, at 32.

169. Moffat, *supra* note 3, at 11. See also Kanter, *supra* note 7, at 351; Note, *supra* note 1, at 378-79 (stating that the JFBA has a significant role in controlling the number of practicing attorneys and a significant interest in protecting its limited monopoly).

Apparently, the economic reasoning behind Japan's justification for the ban flows from the idea that the JFBA's exclusionary policy results from pressure from Japanese attorneys involved in international business transactions.¹⁷⁰ This relatively small group of Japanese attorneys favor prohibition because they fear that American attorneys will deprive them of their share of the lucrative international legal services market.¹⁷¹ This same group, unfortunately, fails to acknowledge that Japan's business stature as a major world competitor requires Japan to develop further its international legal services. The significance of the JFBA's role in Japan's prohibition of foreign lawyers should not be underestimated.¹⁷² Furthermore, the JFBA's roles in the application process and regulation and disciplinary process,¹⁷³ as provided by the new law, are significant in light of the JFBA's interest in protecting the limited monopoly of legal services in Japan by excluding competition.¹⁷⁴

Another defense advanced by Japanese lawyers is the fear that foreign attorneys will interfere with the administration of justice.¹⁷⁵ This apprehension stems from the belief that foreigners, particularly Americans, will not be loyal to the political and cultural values observed in Japan.¹⁷⁶ This fear of the outsider, with cultural differences, gives rise to the idea that such differences will result in a lack of uniformity and efficiency in the Japanese legal system.¹⁷⁷ To some extent this fear seems justified; however, Japan's rapid growth and continued success call for proportional growth in other services on an international level, particularly legal services. Although Japanese non-

170. See Comment, *supra* note 5, at 126. The JFBA's position is a result of pressure from some four hundred Japanese attorneys practicing international law. *Id.* See also Auerbach, *supra* note 6, at C2, col. 3; Moffat, *supra* note 3, at 13 (noting that while roughly five hundred Japanese attorneys practice international law, most of Japan's lawyers focus their practice on domestic law and thus, are not too concerned with the debate).

171. See Crabb, *supra* note 73, at 1767; Kanter, *supra* note 7, at 352 n.67; Moffat, *supra* note 3, at 11; Ramseyer, *supra* note 69, at 503 (stating that "Japanese international lawyers in Tokyo earn over four times the net income of other Japanese lawyers.").

172. See Moffat, *supra* note 3, at 11 (observing that Japan's failure to provide the necessary legal services to clients conducting international business results in inadequate representation); Note, *supra* note 1, at 379. See also Kanter, *supra* note 7, at 351; Loder, *supra* note 69, at 21 (explaining that the handful of international law firms "are hard pressed to keep up with the demand for their services.").

173. See *supra* notes 134, 146, 151-57 and accompanying text.

174. Ramseyer, *supra* note 69, at 514-15; Note, *supra* note 1, at 379.

175. See Crabb, *supra* note 73, at 1788-89; see also Note, *supra* note 1, at 377-78.

176. Crabb, *supra* note 73, at 1788-89; see also Ramseyer, *supra* note 69, at 505-06.

177. Crabb, *supra* note 73, at 1789-90.

lawyers believe that the aggressive and competitive nature of Western attorneys will challenge the harmony and social hierarchy values of the Japanese by creating and soliciting litigation, Japan cannot reasonably expect foreign companies to do business relying on Japanese traditions and customs.¹⁷⁸ In order for Japan to compete on an international level, the Japanese must have access to adequate sources of business and legal knowledge.

There are two other nonmeritorious arguments offered for Japan's exclusion of foreign attorneys: 1) since the growth of the legal profession in Japan is a recent phenomenon, the industry cannot presently accommodate the presence of foreign attorneys without jeopardizing the integrity of the system,¹⁷⁹ and 2) the Japanese believe that the reciprocal arrangement for their *bengoshi* to practice in the United States is not satisfactory and thus, have retaliated.¹⁸⁰ The effectiveness of Japan's own defenses for barring foreign attorneys has been tested, and to some extent, has failed since foreign attorneys are now being permitted to practice in Japan as foreign law business lawyers.

B. *Supply and Demand Has Foreign Attorneys More than Interested*

As a result of Japan's protectionist attitude, a foreign lawyer interested in practicing in Japan should first determine to what extent he/she will be able to practice law in that country. Once a foreign attorney determines that the *Special Measures Law* will enable him/her to practice law to a satisfactory extent, the attorney can then realistically evaluate the pros and cons of entering the legal services industry in Japan. One American attorney, whose firm planned to "hang its Tokyo shingle before the end of the year," observed that although the opening of a four-lawyer Tokyo office is expensive, "Japan is certainly where it's happening."¹⁸¹ Similar attitudes about Japan's growth of international trade and the demand for international legal expertise have led American attorneys to believe that the opportunity to practice in Japan is a very profitable one.¹⁸²

178. See Kanter, *supra* note 7, at 351-52; see also *supra* note 166 and accompanying text.

179. This argument, which suggests that firms must be sufficiently large in order to compete successfully, is referred to as the "infant industry" argument. Ramseyer, *supra* note 69, at 512 n.57; Note, *supra* note 1, at 380-81.

180. Crabb, *supra* note 73, at 1784-85, 1789; see also *supra* note 64 and accompanying text.

181. Casey, *supra* note 112, at 11, col. 4 (quoting Sydney Cone III, partner with New York's Cleary, Gottlieb, Steen & Hamilton); see also Marcotte, *supra* note 6, at 28 (noting that Edward Green and Robert Grieg of Cleary, Gottlieb, Steen & Hamilton were admitted as foreign legal consultants in Japan in May, 1987).

182. See, e.g., Coyle, *supra* note 5, at 1, col. 1; Ramseyer, *supra* note 69, at 499; Snyder, *supra* note 8, at 15.

One reason for the great earning potential for foreign attorneys is based on the steady increase in international business transactions in Japan that has generated a great demand for international legal services that cannot be met by the supply of Japanese lawyers practicing international law.¹⁸³ Although there are nearly thirteen thousand qualified lawyers practicing in Japan, there are only five hundred Japanese attorneys who practice in international business transactions.¹⁸⁴ While Japan has continued to maintain a steady number of practicing lawyers, the number of lawyers involved in international law within that total has multiplied more than eight times during the last thirty years.¹⁸⁵ Those lawyers not involved in international law are litigators and remain indifferent about the admission of foreign attorneys as foreign law business lawyers.¹⁸⁶ The litigators can afford to be indifferent because their practice is not threatened.¹⁸⁷ The demand for foreign attorneys specifically calls for American attorneys due to their skills in the English language¹⁸⁸ and their unique ability and experience in handling international business transactions.¹⁸⁹ This skill and ability in international business may even improve Japan's domestic law practice and stimulate progress in that area as well.

In addition to satisfying the demand for legal service, the admission of foreign attorneys provides other advantages. For instance, the presence of foreign attorneys will enable the lawyer and the client to

183. Crabb, *supra* note 73, at 1768-69; Ramseyer, *supra* note 69, at 508; *see also* Crabb, *supra*, at 1770 (noting that ad hoc visits by foreign attorneys can no longer satisfy the demand for their services); Moffat, *supra* note 3, at 11.

184. *See, e.g.*, Ramseyer, *supra* note 69, at 508. *See also* *A Law Unto Itself*, *supra* note 6, at 32. In Japan, there are approximately 11 lawyers per 100,000 people, while in the United States there are about 279 lawyers per 100,000 people. *Id.* The problems with stating the relatively low number of Japanese attorneys alone is that this figure fails to account for the variety of services provided by non-*bengoshi* that Americans would view as legal services. C. Wolfram, *Modern Legal Ethics* § 10.2, at 569 (prac. ed. 1986).

185. Moffat, *supra* note 3, at 11 (explaining that Tokyo University Professor Hideo Tanaka's efforts to expand Japan's community of lawyers have been resisted).

186. *See* Moffat, *supra* note 3, at 13 (noting that the majority of Japanese attorneys do not handle international legal matters and they are indifferent, and a few are even amenable, to allowing foreign attorneys in Japan); Ramseyer, *supra* note 69, at 508.

187. The *Special Measures Law* prevents foreign attorneys from appearing in court and from representing clients in criminal cases or real property transactions. *See supra* notes 117-19 and accompanying text; *see also* Shapiro, *Eliminating Barriers to Foreign Legal Services*, 6 E. ASIAN EXEC. REP. 11 (1984) (stating the demand for services, now required as a result of Tokyo's growth, is for those services that only the nonlitigating business lawyer can provide).

188. Crabb, *supra* note 73, at 1768 (noting that English is "the international language of commercial negotiations and contracts."); *see also* Shapiro, *supra* note 187, at 11.

189. Crabb, *supra* note 73, at 1768-69; *see also* Shapiro, *supra* note 187, at 11.

engage in more frequent and less formal contact, resulting in a better business relationship.¹⁹⁰ Also, foreign law firms in Japan may increase the efficiency of the services provided because of the time and money saved by avoiding time zone differences, travel, and telephone costs.¹⁹¹ The great potential for such advantages is already being tapped by Japanese companies which have been sending young employees from their in-house legal departments to foreign law schools.¹⁹²

Furthermore, a firm's presence in Japan provides that firm with the opportunity to participate to a greater extent in international business by getting involved earlier in the transactions.¹⁹³ One aspect of the foreign attorneys' role will be to serve as a trade facilitator or as a contact for a company from the attorney's home jurisdiction seeking to enter the Japanese market.¹⁹⁴ The foreign attorney will serve as an intermediary between the foreign company and the appropriate Japanese attorneys.¹⁹⁵ Finally, the presence of foreign attorneys will expedite the entry of foreign companies in Japan, the internationalization of the yen, and the future growth of Japan as an international financial center.¹⁹⁶

The admission of foreign attorneys will provide benefits to the foreign attorneys, to Japan, and its economy, and to both foreign and Japanese clients. The demand for American attorneys in Japan is evidenced by the relatively large number of American attorneys already engaged in practice in Japan, despite certain regulatory barriers.¹⁹⁷ Because the Japanese regulatory framework is designed to exclude foreign attorneys, the development of the local lawyer's skills in international law is hindered and the burden of the additional costs of legal services is passed on to the client.¹⁹⁸ Common sense and simple

190. Snyder, *supra* note 8, at 15. Importing foreign attorneys should help keep the cost of legal services down because the additional attorneys would make trade facilitation more accessible. *Id.*; see Shapiro, *supra* note 187, at 11.

191. Crabb, *supra* note 73, at 1807; Snyder, *supra* note 8, at 15.

192. Moffat, *supra* note 3, at 11. See also *supra* note 7.

193. See Snyder, *supra* note 8, at 15.

194. See, e.g., *id.* Potential clients include American companies interested in marketing their products or services, setting up joint ventures, or seeking investments in Japan. *Id.*

195. *Id.* See also Shapiro, *supra* note 187, at 11. This service by the foreign attorney is essentially an additional safeguard for the client who is ensured a more accurate interpretation of the foreign law.

196. Snyder, *supra* note 8, at 15; see also Kanter, *supra* note 7, at 339.

197. See Crabb, *supra* note 73, at 1807.

198. *Id.* See also Moffat, *supra* note 3, at 11 (stating that the present number of Japanese attorneys and services available cannot satisfy the specific demands of foreign companies).

economics suggest that a shortage of international lawyers makes such lawyers more difficult and expensive to obtain. Furthermore, once a Japanese attorney specializing in international business is obtained, the problem then arises of determining the law of the appropriate foreign jurisdiction, a process which can be costly.¹⁹⁹ The foreign law sought by the Japanese attorney would be more accessible with the presence of foreign attorneys who can readily provide that commodity with a high degree of reliability.²⁰⁰

C. *Reasons for Opening Japan to Foreign Lawyers*

Although many explanations are offered, it remains unclear which factor or set of factors actually triggered the re-opening of Japan to foreign attorneys. One reason for the new law is that Japan recognized the political significance of the issue.²⁰¹ Another reason, arguably, was the pressure applied to Japan by those individuals who argued for the economic advantages that foreign attorneys could provide.²⁰² Some commentators reason that the law is a result of political and economic concerns creating domestic pressure, compounded by foreign pressure particularly from the United States.²⁰³ Other explanations proffered include, one, that the *Special Measures Law* is Japan's response to the recent valuation of the yen,²⁰⁴ and, two, that the law is a means of securing positive development and reinforcing the integrity of Japan's legal industry.²⁰⁵ One or more of these reasons caused Japan to formally recognize the need for foreign legal services, an ever-increasing need which foreign attorneys have observed for years.

The political reasoning behind Japan's move begins with the United States government's role in negotiations. After eight years of the ABA's efforts to liberalize Japan's exclusionary policies, the ABA announced in 1982 that the negotiations should be conducted by the United States government.²⁰⁶ As a result, the United States included

199. See Crabb, *supra* note 73, at 1793, 1797, 1812; see also Comment, *supra* note 5, at 124 (noting that the new law prevents interaction between Japanese and foreign attorneys).

200. See Crabb, *supra* note 73, at 1793, 1796-97, 1812.

201. See, e.g., Kanter, *supra* note 7, at 342. See also Ramseyer, *supra* note 69, at 502-03; Note, *supra* note 1, at 376.

202. Auerbach, *supra* note 6, at C1, cols. 2-3, and at C2, col. 2; Berger, *supra* note 109, at 40.

203. See Brown, *supra* note 12, at 459; Shapiro, *supra* note 187, at 11.

204. See, e.g., Note, *supra* note 1, at 382.

205. See, e.g., *id.* See also Moffat, *supra* note 3, at 11. Attempts to stimulate Japan's legal community include efforts to increase the number of graduates from the Legal Institute, to train employees in foreign law, and to make the legal profession more competitive. *Id.*

206. See, e.g., Brown, *supra* note 12, at 459; Coyle, *supra* note 93, at 38, col. 2; Tell, *supra* note 97, at 21, col. 1.

the legal services issue in its agenda for United States-Japan trade matters.²⁰⁷ The pressure from the United States continued, and in turn, created local pressure in Japan for the Ministry of Justice to liberalize restrictions on foreign attorneys.²⁰⁸ The local political pressure was perceived by the JFBA as a threat that it would lose its power and independence if action was taken by the Ministry of Justice or the Ministry of International Trade and Industry.²⁰⁹ This fear may have been a significant factor in the JFBA's proposal to allow foreign lawyers to practice as foreign law business lawyers.²¹⁰

Similarly, the sensitive trade issues that appear in the political reasoning are also present in the economic reasoning. The inability of foreign companies to enter the Japanese market and, thus, to reduce the bilateral trade imbalance, is a proximate result of the unavailability of foreign trade facilitators.²¹¹ The solution offered by American attorneys and the United States government was for Japan to import American attorneys.²¹² The American attorneys argued that their presence in Japan would help solve the fifty billion dollar United States trade deficit with Japan by facilitating the entry of American companies and by tracking pending legislation, patent and copyright regulations, customs procedures, and product standards.²¹³ Regardless of whether Japan was influenced by this argument, Japan was forced to respond to persuasive arguments regarding its trade and currency imbalances and its fear of retaliation from the United States.²¹⁴

Still others maintain that Japan's response reflects its concern for the progress of its legal system, both domestically and internationally.²¹⁵ This is a practical concern for Japan since internationalizing

207. See, e.g., Brown, *supra* note 12, at 460; Tell, *U.S. Lawyers Want Japan to Open Door to Practice*, Nat'l L.J., May 3, 1982, at 2, col. 3, and at 39, col.2.

208. See Shapiro, *supra* note 187, at 11.

209. Moffat, *supra* note 3, at 13, 15 (stating that the Ministry of Justice was watching the JFBA and waiting for its decision).

210. See *id.*; Kanter, *supra* note 7, at 342 (stating that Japan's change in policy is a result of the government's awareness of political factors). See also Shapiro, *supra* note 187, at 11; Comment, *supra* note 5, at 126-27.

211. See Berger, *supra* note 109, at 40; Kanter, *supra* note 7, at 341.

212. See Berger, *supra* note 109, at 40; Kanter, *supra* note 7, at 341 n.11.

213. Berger, *supra* note 109, at 40.

214. See McAbee, *supra* note 87, at 16-7; Note, *supra* note 1, at 376-77; see also Work, Lord & Bork, *supra* note 7, at 38, 43.

215. Kanter, *supra* note 7, at 342 n.22; Comment, *supra* note 5, at 126 n.36. See also, Note, *supra* note 1, at 382 (indicating that the integrity of the Japanese legal system can be maintained with fewer restrictions against foreign attorneys than those contained in the *Special Measures Law*).

the country both socially and intellectually, especially in the area of international law, would better prepare Japan to monitor its economic achievements.²¹⁶ The new law implies that Japan recognized the need for more attorneys with expertise in international law. Furthermore, the Japanese believe that the restricted practice will satisfy this need, while at the same time protect the interests of local lawyers and clients.²¹⁷ The implementation and the effect of the *Special Measures Law* will be determined by the factors that motivated Japan to change its policy.

D. Reasonable Expectations Regarding the Special Measures Law

A few dozen eager foreign attorneys were ready with their applications when the *Special Measures Law* went into effect on April 1, 1987.²¹⁸ Expecting the Ministry of Justice to be very thorough in considering the applications, the attorneys completed their applications carefully, keeping in mind the Japanese penchant for detail.²¹⁹ Largely as a result of this foresight, reports indicate that the application process has been going smoothly,²²⁰ but delays can be expected because such problems are inherent in new administrative processes.²²¹ Other than Japan's apparent good faith effort in "welcoming" qualified foreign attorneys, it remains to be seen to what extent Japan will enforce the restrictions and to what extent foreign attorneys actually practice in Japan.

A look at Japan's policies on other foreign issues suggests that Japan is becoming more receptive to foreign business concerns.²²² For instance, Japan has already taken steps to remove barriers to internationalization of the yen and to foreign companies' entry into banking and financial markets in Japan.²²³ Also, the number of American com-

216. See, e.g., "The Japan Foundation Newsletter" No. 6, May 1983, reprinted in Kitamura, *The Internationalization of Higher Education in Japan*, 16 LAW IN JAPAN 135 (1983).

217. See Crabb, *supra* note 73, at 1789-93.

218. See Coyle, *supra* note 5, at 1, col. 1; Labaton, *U.S. Law Firms Courting Japanese Market*, Hous. Chron., July 12, 1987, § 5, at 5, col. 4; Marcotte, *supra* note 6, at 28; *A Law Unto Itself*, *supra* note 6, at 32.

219. Coyle, *supra* note 5, at 1, col. 1, and at 15, col. 2.

220. *Id.* at 1, col. 1, at 15, col. 2, and at 16, col. 4 (stating that the *Special Measures Law* indicates that the application process will not exceed three months).

221. *Id.* at 16, cols. 1, 4.

222. See Work, Lord & Bork, *supra* note 7, at 38.

223. Shapiro, *supra* note 187, at 11; see also Work, Lord & Bork, *supra* note 7, at 38, 40, 42-43.

panies providing manufacturing and sales facilities in Japan more than doubled between 1980 and 1985.²²⁴

Although Tokyo's recently recognized success in becoming a major international money market led to the opening of doors to foreign financial institutions, some obstacles prevent foreigners from reaching other profitable markets.²²⁵ The United States Congress is currently trying to obtain access to these other areas for American businesses and is considering a requirement that Japan reciprocate access of markets to American brokers much like Japanese brokers enjoy here.²²⁶ Further liberalization of Japanese financial markets is a real possibility, especially since foreigners have a foot in the door and have been able to alleviate some fears of the Japanese about the presence of foreigners.

An analogy can be drawn between Japan's loosening of restrictions of foreign financial companies and its *Special Measures Law*. Assuming Japan is acting in its own best interest, one can reasonably expect that Japan would protect itself against rapid change and undesirable effects by controlling the degree of change. Traditionally, the Japanese are reluctant to accept and adapt to change because of their strong, cultural background based on maintaining harmony and observing the social hierarchy.²²⁷ More recent developments, however, indicate that the younger Japanese are breaking away from these traditional values and are seeking the perceived advantages that other parts of the world have to offer.²²⁸ This change in attitude reflects the country's own break away from the isolated, island image, and the traditional social structure of its past,²²⁹ toward an attitude of interest in exploring the lifestyles of other countries and less traditional beliefs. Japan's awareness of this change has forced the country to confront and resolve foreign issues by allowing foreign financial institutions and foreign attorneys to enter Japan on a "trial basis."²³⁰

224. Work, Lord & Bork, *supra* note 7, at 38.

225. *Id.* at 40-41.

226. *Id.* at 41.

227. See *supra* notes 22-27 and accompanying text.

228. See Work, Lord & Bork, *supra* note 7, at 38; see also Stevens, *supra* note 15, at 1272; Kitamura, *supra* note 216, at 135 (stating that a recent expansion in the number of foreign students attending Japanese universities has been encouraged); Moffat, *supra* note 3, at 11, 13.

229. See, e.g., Moffat, *supra* note 3, at 9; Comment, *supra* note 24, at 302-03, 317. See also Stevens, *supra* note 15, at 1272.

230. The limited access afforded the foreign attorneys appears to be a relatively temporary situation in which Japan can examine the effects of the foreign attorneys' practice. See generally, Comment, *supra* note 5, at 123, 128-30.

Despite Japan's efforts to balance the conflicting interests by limiting access to Japan, other important questions remain unanswered. The JFBA was not able to influence the country's decision to relax barriers to financial markets. The JFBA does, however, have the power and the interest to influence Japan's decision in maintaining barriers to its legal market.²³¹ For example, the JFBA is now responsible for providing disciplinary standards and regulations regarding foreign attorneys practicing in Japan.²³² The question presented is whether the JFBA will regulate the foreign attorneys more strictly than necessary because of the potential threat of competition.²³³ The answer, most likely, is that the JFBA will be overprotective of its interests, at least in the initial stages.

Another question arises regarding the interpretation of the 180 day residency requirement.²³⁴ The law itself provides for exceptions to this requirement in the event of "unavoidable circumstances."²³⁵ The law also contains other examples of restrictive provisions, such as the five-year experience requirement, phrased ambiguously so that flexibility in interpretation could have a dramatic effect in the application and thus on foreign attorneys' practice.²³⁶ Some scholars have drawn analogies between the liberalization of the legal professions in Hong Kong and Singapore to Japan, concluding that nearly one hundred foreign lawyers may enter the Japanese legal market.²³⁷

The financial market analogy is distinguishable for another reason. This distinction is based on the idiosyncrasies of Japan's legal system, which incorporates Japanese values and maintains a limited monopoly for lawyers. Throughout the development of its legal profession, Japan has struggled to improve the attorney's reputation.²³⁸ Arguably, Japan

231. See *id.* at 125-27. The JFBA's fear of competition from foreign attorneys is one reason why some commentators feel that Japan's reciprocity requirement is part of a strategy to keep foreign attorneys from practicing in Japan. *Id.* at 127 n.41. See also *supra* notes 169-79 and accompanying text.

232. See, e.g., Comment, *supra* note 5, at 125; see also *supra* note 142 and accompanying text.

233. See, e.g., Comment, *supra* note 5, at 123, 128 n.46.

234. *Id.* at 129. See *supra* notes 138-39 and accompanying text.

235. See, e.g., Comment, *supra* note 5, at 124 n.15, 129. See also *supra* notes 138-39 and accompanying text.

236. See, e.g., Comment, *supra* note 5, at 124-25 n.17 (explaining that the term "engaged in practice" lends itself to different interpretations).

237. Moffat, *supra* note 3, at 16.

238. See Kanter, *supra* note 7, at 351-52; Note, *supra* note 1, 377-79; see also *supra* notes 34-46 and accompanying text.

expresses a legitimate concern over what effect foreign attorneys, with their foreign attitudes and loyalties, will have on the local profession.²³⁹ This concern was not an important consideration when Japan removed barriers to its financial markets.

IV. CONCLUSION

The development of the foreign attorney's role began when foreign attorneys were invited to Japan in the mid-1800s. Originally, the foreign attorneys helped develop and modernize Japan's legal system. Later, the foreign attorneys focused on international business concerns. This practice became increasingly limited, even prohibited temporarily, before becoming entirely banned for more than thirty years. Now, coming full circle, Japan is allowing foreign attorneys to practice in a limited scope again, primarily to help internationalize its — legal industry. The restricted practice clearly reflects Japan's long standing and culturally based policies of protectionism and exclusion. These traditions and customs, however, are inadequate to meet the new legal issues that have accompanied Japan's economic growth.

The United States has recently improved its ability to recognize the appropriate weaknesses in Japan's defensive theories and, thus, has been able to persuade Japan to be more liberal toward foreign businesses and foreign attorneys. This ability is the means by which the United States can monitor Japan's implementation of the *Special Measures Law*. Ideally, the results of the services provided by the foreign law business lawyers will be recognized as beneficial in the near future. The Japanese lawyers stand to gain from the promotion of growth and development of Japanese law. The whole of Japan is likely to benefit from more effective and efficient services that satisfy the new demands of one of the world's largest money markets. Both Japanese and foreign clients will be better served by the facilitation of financial transactions, investments, and general corporate advice provided by the foreign attorneys. The realization of these benefits should lead to future opportunities for Japanese and foreign attorneys to work together in a more cooperative environment and to further develop the practice of international law.

V. APPENDIX — GLOSSARY

bengoshi - modern Japanese attorney, fully admitted court practitioner or litigator. The term was derived from the English "barrister."

239. See, e.g., Kanter, *supra* note 7, at 351-53. See also Note, *supra* note 1, at 377-78, 382; Comment, *supra* note 5, at 130; *supra* note 204 and accompanying text.

daigennin - newly-named lawyer after the law *Daigennin Kisoku* (Advocates Regulation) in 1876 was passed in an attempt to professionalize the emerging role of the attorney.

Diet - Japanese Legislature

gaikoku ho kimubengoshi (or jimubengoshi) - foreign law business lawyer, a foreign attorney qualified in Japan to practice under the new *Special Measures Law*.

jun kaiin - foreign attorney who was registered to practice in Japan before the repeal of the *Attorneys Law* and who continued to practice under the grandfather clause of the 1955 amendment.

kujishi - innkeeper, located near the local courthouse, who provided legal services to litigants who were staying at his inn.

Nichibenren - The Japanese Federation of Bar Associations (JFBA)
Special Measures Law - Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers Law, No. 66 of 1986, introduced in the House of Representatives of the Diet of Japan of March 28, 1986.

wa - harmony