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A Statutory Analysis of the Right of U.S. Lawyers to Practice in Japan

Cecelia Norman*

Recent American investment in Japan and the increasingly complex transnational legal problems faced by companies doing business there have generated a need for resident lawyers well versed in the law of the United States.¹ Wishing to exploit these business opportunities, Americans are eager to establish law offices in Japan.² The Japanese Federation of Bar Associations (JFBA)³ maintains, however, that foreign lawyers who are not qualified as *bengoshi*⁴ under the Lawyer Law of 1949⁵ and, consequently, are not members of the Japanese bar, which is made up exclusively of *bengoshi* and which

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1. See U.S.-Japan Trade Study Group, Progress Report: 1984, at 46 (Sept. 1984) [hereinafter cited as Trade Study Group]; Meyerson, *Legal Services Relating to Doing Business in Japan*, in LEGAL ASPECTS OF DOING BUSINESS IN JAPAN 1983, at 7, 21-23 (Practicing Law Inst. 1983).

2. Since early 1975, representatives of the American Bar Association (ABA) and the Japanese Federation of Bar Associations (JFBA) have been carrying on a dialogue aimed at resolving the political issues that are in large part responsible for barring the establishment of Japanese branch offices by U.S. law firms. Myerson, *supra* note 1, at 23.

3. The JFBA is the national bar association to which anyone "who wants to become a lawyer," (*bengoshi*) must belong. Lawyer Law, Law No. 205 of 1949, art. 8, translated in 2 EHS LAW BULLETIN SERIES, CA (1962); see also *id.* at arts. 9, 17(3), 45, 47; Fukuda, *Japan*, in TRANSNATIONAL LEGAL PRACTICE 201, 203 (D. Campbell ed. 1982).

4. The term *bengoshi* was coined in 1893 in an attempt to translate the English word barrister into Japanese. It is generally translated as attorney and designates those persons who have been admitted to the JFBA. Fukuhara, *The Status of Foreign Lawyers in Japan*, 17 JAPANESE ANN. INT'L L. 21, 22 (1973). For the American reader, however, such a translation is misleading. The practice of Japanese *bengoshi* differs significantly from that of U.S. attorneys. For a complete discussion, see *infra* text accompanying notes 17-44.

5. "Lawyer Law" is one translation of the title of the law regulating Japanese lawyers, the current Japanese version of which appears at Bengoshi Ho, 1 ROPPO ZENSHO 175 (1984) (in Japanese). The law is referred to by commentators variously as the Barristers Law, Attorneys Law, or Bengoshi Law. Except when quoting other commentators, this note will refer to the law as the Lawyer Law.

practicing attorneys must join,⁶ may not lawfully provide services or establish offices in Japan.⁷

Although the Japanese Government does not appear to espouse this position,⁸ it has, since 1977, effectively curtailed the practice of law by foreign lawyers. The Ministry of Justice, seemingly in reaction to vigorous objections by the

6. Under the Lawyer Law of 1949, there are five avenues by which a person can qualify as a lawyer and be admitted to the Japanese bar. First, under article 4, prospective lawyers may complete the courses of a judicial apprentice. Lawyer Law, *supra* note 3, at art. 4. The two year course is offered by the Legal Training and Research Institute. Apprentices are selected by the Supreme Court from among those who have passed an entrance exam administered by the government. Fukuda, *supra* note 3, at 209. Graduation requires passage of a final examination administered by the Institute. See Fukahara, *supra* note 4, at 29.

Article 5 enumerates four additional paths that a potential lawyer can follow. It states:

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

- (1) A person who has been a judge of the Supreme Court;
- (2) A person who has, after obtaining the qualifications for a judicial apprentice, been a Summary Court judge, a public procurator, a court research official, court secretary, a secretary of the Ministry of Justice, an instructor of the Judicial Research and Training Institute, the Research and Training Institute for Court Clerks or the Research and Training Institute of the Ministry of Justice, a secretary (Sanji) of the Legislative Bureau of the House of Representatives or the House of Councillors, or a counsellor (Sanji-kan) of the Legislative Branch of Cabinet for not less than five years;
- (3) A person who has been a professor or assistant professor of jurisprudence in a faculty, post-graduate course or masters' course of the universities as provided for by separate law for not less than five years;
- (4) A person who has assumed two or more of the posts as mentioned in the preceding two items for not less than five years in total: Provided that as to the posts mentioned in item (2), only the years of service after he obtained the qualifications for a judicial apprentice shall be counted.

Lawyer Law, *supra* note 3, at art. 5.

The extremely low pass rate among Japanese applicants taking the qualifying examination almost guarantees the failure of a U.S. attorney. In 1983, only 448 of the 25,138 applicants, or 1.78 percent, passed the examination. Trade Study Group, *supra* note 1, at 46-47. This percentage is typical of the passing rate in previous years. See Brown, *A Lawyer By Any Other Name: Legal Advisors in Japan*, in LEGAL ASPECTS OF DOING BUSINESS IN JAPAN 1983, at 201, 239 (Practicing Law Inst. 1983) (chart 4-3 gives statistics for the passing rate for the years 1949 through 1976). Language is probably the greatest bar to passage of the exam by non-Japanese attorneys: "The western foreigner, no matter how well he knows the writing system, is rarely required to write Japanese at length under time pressure and therefore he never attains the requisite skill in writing the characters cursorily that is necessary to pass the examination." Fukuhara, *supra* note 4, at 29 n.23.

Five-year professorships have also been unavailable to U.S. lawyers. Until recently, there has been a policy among state universities against hiring foreign nationals as full or associate professors. Similarly, private universities have hired few, if any, foreigners. Fukuda, *supra* note 3, at 210. As of 1983, no foreign national has ever achieved the status of *bengoshi* by completing a five-year professorship. Meyerson, *supra* note 1, at 16.

7. See *infra* note 22 and accompanying text.

8. In 1977, a representative of the New York firm of Milbank, Tweed, Hadly, & McCloy applied for a visa to open a branch office in Tokyo. Abrahams, *Japan's Bar to U.S. Lawyers*, Nat'l L.J., July

Japanese bar to the 1977 award of a visa to a U.S. law firm, has frozen all long-term visa applications made by foreign attorneys.⁹ Furthermore, the JFBA exerted pressure on potential clients of non-bengoshi foreign attorneys not to use the services of these unlicensed foreigners.¹⁰ As a result, U.S. attorneys are generally limited to giving legal advice from the United States by means of telephone, telex, or mail, and to making trips to Japan as the needs of their non-Japanese clients require.¹¹

This note argues that the JFBA's position is legally untenable. There is no legal bar to the establishment of firms by U.S. attorneys unlicensed to practice in Japan, provided they restrict their activities to advising non-Japanese companies on foreign and international law. Two central issues shape this debate: (1) the extent of the *bengoshi* monopoly conferred by the Lawyer Law; and (2) the scope of Japan's obligation to the United States under the Treaty of Friendship, Commerce, and Navigation (FCN Treaty) concluded in 1953.¹²

Bengoshi contend that the Lawyer Law of 1949 gives them a nearly complete monopoly over the provision of legal services in Japan.¹³ They acknowledge only six legislatively-defined areas of practice for non-bengoshi legal professionals. Judicial scriveners, administrative scriveners, patent attorneys, tax attorneys, certified public accountants, and public notaries may perform certain legal functions,¹⁴ however, with the exception of the work reserved for certified public accountants, *bengoshi* are qualified to perform all of these activities.¹⁵ Because of the almost all-encompassing scope of practice allowed *bengoshi*, they are considered the most important legal practitioners in Japan.¹⁶

Part I of this note argues that while the Lawyer Law grants *bengoshi* a broad right to practice almost all of the activities associated with the various legal professions, the area which it proscribes to non-bengoshi is relatively narrow. It

4, 1983, at 1. The Ministry of Justice approved the request. *Id.* at 33. Milbank, Tweed wanted to open the office in order to better serve one of its chief clients, the Chase Manhattan Bank. *Id.* at 1. Apparently the Ministry of Justice did not conclude that such a practice would violate article 72 or any other domestic statute. The Ministry of Justice's renewal of Milbank, Tweed's visa in 1979, *id.* at 36, indicated continued governmental recognition of the legality of foreign law offices. Currently five foreign law firms, in addition to Milbank, Tweed, operate offices in Japan under the name of a partner or the name of their home office. See Brown, *supra* note 6, at 461-63. This also supports the notion that the government has not concluded that practice by foreigners is illegal.

9. See Abrahams, *supra* note 8, at 33.

10. The JFBA sent a questionnaire to numerous international businesses located in Japan asking if they had any contacts with foreign law firms operating in Japan. See *id.* at 34.

11. See Kosugi, *Regulation of Practice by Foreign Lawyers*, 27 AM. J. COMP. L. 678, 697 (1979); Fukuda, *supra* note 3, at 216.

12. Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, T.I.A.S. No. 2863, 4 U.S.T. 2063 [hereinafter cited as FCN Treaty].

13. See Fukuda, *supra* note 3, at 213.

14. See *id.* at 206-09.

15. See *id.* at 206.

16. See *id.* at 204.

argues that the activities which most foreign lawyers, including U.S. lawyers, wish to pursue in Japan fall outside that proscribed area. Foreign attorneys giving legal advice on international commercial and financial transactions infringe neither the exclusive monopoly conferred on *bengoshi* by the Lawyer Law, nor the areas in which *bengoshi*, by tradition, dominate. Part II examines the rights of U.S. attorneys specifically. It argues that the Treaty of friendship, commerce and navigation, which Japan concluded with the United States in 1953, gives U.S. lawyers the right to establish offices for the purpose of providing legal services not prohibited by Japanese law.

I. THE LIMITS OF THE BENGOSHI MONOPOLY: ROOM FOR THE FOREIGN ATTORNEY

A. Domestic Legislation

The Lawyer Law authorizes *bengoshi* to provide a nearly complete range of legal services. Thus, it might be characterized as regulating the practice of law in Japan. Examination of two of its provisions, articles 3¹⁷ and 72,¹⁸ is necessary to determine whether the law prohibits foreign attorneys from establishing a practice in Japan. Article 3 grants *bengoshi* the right to practice law. Article 72 prohibits non-*bengoshi* from providing certain legal services.

The JFBA argues that articles 3 and 72 are coextensive: everything permitted to *bengoshi* under article 3 is prohibited to non-*bengoshi* under article 72.¹⁹ Article 3, describing the duties and obligations of *bengoshi*, provides:

A lawyer [*bengoshi*] shall, upon the request of a party and other persons concerned, or a government or public office, perform the business relating to law suits, non-contentious matters, and appeal to dispositions made by administrative offices in such forms as request for investigation, raise of objection, request for review, and other general legal business.²⁰

Article 72, describing the activities prohibited to non-*bengoshi* and thus defining the areas of practice reserved for *bengoshi*, states:

No person other than a lawyer [*bengoshi*] shall, with the aim of obtaining compensation, perform legal business such as presentation of legal opinion, representation, mediation or conciliation and the like in connection with law suits or non-contentious matters, and such appeal filed with the administrative agencies as request for investigation, raise of objection, request for review against dispositions made thereby, and other general legal cases, or act as agent therefor [sic]: Provided that this shall not apply in such cases as otherwise provided for in this Law.²¹

17. Lawyer Law, *supra* note 3, at art. 3.

18. *Id.* at art. 72.

19. Fukuda, *supra* note 3, at 213.

20. Lawyer Law, *supra* note 3, at art. 3.

21. *Id.* at art. 72.

The JFBA argues that since article 3 authorizes the conduct of "other general legal business," legal consultation on international transactions, which arguably falls within the meaning of the phrase, is prohibited to non-bengoshi under article 72.²² This argument is untenable.

A careful reading of the language of these articles together with an interpretation put forth by the primary drafter of the Lawyer Law suggests that the area of practice prohibited to non-bengoshi under article 72 is much narrower than the area permitted *bengoshi* by article 3. The contrast between the language of the two provisions discredits the JFBA's assertion that articles 3 and 72 are coextensive. In article 3, the drafters summarized the activities permitted *bengoshi* as "general legal business." In contrast, they characterized the legal activities prohibited to non-bengoshi as "general legal cases." Use of the phrase "legal business" to describe the activities permitted to *bengoshi*, when compared to the narrower phrase "general cases" used to describe the activities prohibited to non-bengoshi, suggests that the drafters intended to proscribe a narrower range of activities than they authorized.

The proscriptive language of article 72 and the lack of proscriptive language in article 3 also weakens the JFBA's argument that articles 3 and 72 are coextensive. Article 3 is a statement of the business that "a *bengoshi* shall . . . perform." The language imposes duties and obligations on one who is a *bengoshi*, but does not give *bengoshi* an exclusive right to practice in any area of the law. Article 72 does. It states that "[n]o person other than a [*bengoshi*] shall . . . perform" certain activities. Given the inclusion of this explicitly proscriptive provision in the Lawyer Law, there is no logical reason to rely on the non-proscriptive text of article 3 to demarcate the area of legal practice prohibited to non-bengoshi. Were article 3 to perform the dual role of stating what a *bengoshi* must do, and by inference, what a non-bengoshi may not do, article 72 would be superfluous.

One Japanese legal scholar's interpretation of the language of article 3 casts additional doubt on the JFBA's assertion that by authorizing *bengoshi* to perform "other general legal business," article 3 necessarily prohibits foreign non-bengoshi from giving legal advice on international transactions. He argues that the right to perform "other general legal business" probably authorizes the conduct of other Japanese legal business, not that involving foreign law.²³ While admitting that this interpretation is not supported by statute or judicial holding,

22. In March 1972, the JFBA issued Standards Concerning the Prevention of Non-Attorney Activities by Foreigners. In these standards, the JFBA set forth guidelines describing what it considers to be unlawful conduct on the part of unlicensed foreign attorneys. Among the prohibited activities are the independent expression of a legal opinion and the giving of legal advice to a client. These standards are not legally binding, however; they merely express the opinion of the JFBA. See Fukuhara, *supra* note 4, at 35-36.

23. See Fukuda, *supra* note 3, at 214.

he argues that it is reasonable given that *bengoshi* are neither trained nor examined in foreign law.²⁴ According to this argument, even if the prohibitions of article 72 are coextensive with the authorizations of article 3, thereby prohibiting foreign lawyers from giving legal advice on commercial and financial matters, the prohibitions extend only to Japanese law. Thus, foreign lawyers in Japan may advise on the effect of non-Japanese law on the operation of business.²⁵

The interpretation that articles 3 and 72 are not coextensive raises the question of which activities are actually proscribed to non-*bengoshi* by article 72. Two high courts have held that the language of article 72 prohibits non-*bengoshi* from conducting legal activities associated with a case or facts from which "actual disputes will definitely develop."²⁶ These decisions seem to hold that the *bengoshi* monopoly is limited to activities associated with representing clients in court or before administrative tribunals. However, someone with only the language of the statute before her might argue that the phrase in article 72 proscribing the "presentation of legal opinion . . . in connection with . . . non-contentious matters" extends the article's proscription to the giving of legal advice on commercial and financial transactions. In other words, it might be argued that "non-contentious matters" are matters not marked by argument and thus include questions of business planning. This interpretation is incorrect.

Tadao Fukuhara, the primary drafter of the Lawyer Law,²⁷ translates the phrase "non-contentious matters" as "non-litigious cases."²⁸ Given that the Japanese legal system was modeled after the Federal Republic of Germany's,²⁹ the definition accorded non-litigious case in civil law countries is applicable to Japan. In Germany, a non-litigious case is a proceeding before a court or other tribunal in which there are no adversarial parties.³⁰ Fukuhara's translation suggests, therefore, that the phrase "non-contentious matters" refers to proceedings before courts and tribunals, and does not include the giving of legal advice on commercial and financial transactions. Under this interpretation, article 72 does not prohibit the provision of business advice by non-*bengoshi* foreign practitioners.

The foregoing analysis of the language of articles 3 and 72 suggests that the Lawyer Law only prohibits non-*bengoshi* from conducting legal activities in court or before administrative bodies. Acting as legal counsel for foreign companies doing business in Japan, if such consultation does not concern an adver-

24. *Id.*; see also Fukuhara, *supra* note 4, at 33 n.38.

25. See Fukuhara, *supra* note 4, at 32.

26. Fukuda, *supra* note 3, at 213 n.39 (citing Decision of Tokyo High Court, Sept. 29, 1974, and Decision of Sapporo High Court, Nov. 30, 1971); see also Fukuhara, *supra* note 4, at 32.

27. Fukuhara, *supra* note 4, at 21 n.*.

28. *Id.* at 32 n.34.

29. Fukuda, *supra* note 3, at 201. For a discussion of the civil law tradition in Japan, see Takayanagi, *A Century of Innovation: The Development of Japanese Law, 1868-1961*, in *LAW IN JAPAN* 5, 23-33 (A. von Mehren ed. 1963).

30. See E. BORCHARD, *GUIDE TO THE LAW OF GERMANY* 151-52 (1913).

serial case or facts likely to give rise to one, does not fall within the proscriptions of article 72 and thus is not prohibited to non-bengoshi.

The only provision of the Lawyer Law that foreign lawyers establishing a practice in Japan might violate is article 74, paragraph two. It states: "No person who is not a lawyer shall, with an aim to obtain profits, put up a sign, or make an entry indicating that he handles the business of giving legal consultation and other legal affairs."³¹ This provision seems to place a significant barrier before foreign attorneys seeking to establish offices in Japan. However, although the provision refers to "legal consultation" and "other legal affairs," its proscriptions should not be interpreted as being any more extensive than those of article 72. Even though the language of article 74 is not limited to litigious and non-litigious cases (as is that of article 72),³² its proscriptive effect should nevertheless reflect that of article 72. To interpret article 74 more broadly would lead to an absurd result: non-bengoshi attorneys, while permitted to give legal advice on commercial and financial transactions not involving representation before courts or tribunals, would not be permitted to establish offices for that purpose. Under the narrow interpretation, article 74 only prohibits the posting of a sign indicating that one handles legal consultation in regard to litigious and non-litigious matters.

Article 79³³ of the Lawyer Law also supports a narrow construction of article 74. Article 79 is part of the section of the Attorney's law entitled "Penal Provisions."³⁴ It is a common rule of construction that in cases of doubt criminal laws should be narrowly construed.³⁵ Because of the criminal penalty imposed for violations of article 74, that rule of construction should apply.

The presence of foreign law offices in Japan provides further evidence that article 74 does not, in practice, prohibit the establishment of foreign law offices, but merely regulates offices once they are established. In 1983, six out of thirteen branch offices in Japan operated under the same name as their home office or under the name of a resident partner.³⁶ The existence of these branch offices is evidence that article 74 does not effectively prohibit their establishment. Moreover, the operation of these branch offices under the name of a foreign-based firm or of an individual not licensed to practice in Japan suggests that the putting of such names on the door of an office does not violate article 74.

31. Lawyer Law, *supra* note 3, at art. 74, para. 2.

32. See *supra* text accompanying notes 20-21.

33. Lawyer Law, *supra* note 3, at art. 79.

34. *Id.* at arts. 75-92.

35. The Japanese Penal Code of 1880 provided that no action could be punished except when expressly prohibited by law. See Penal Code of 1880, art. 2 (in French), reprinted in JAPANESE LEGAL SYSTEM: INTRODUCTORY CASES AND MATERIALS 163 (H. Tanaka ed. 1976); see also G. KOSHI, THE JAPANESE LEGAL ADVISOR 61 (1970) ("Under Japanese law, only those acts described by law for which punishment is prescribed may be deemed criminal." *Id.*).

36. Brown, *supra* note 6, at 461-64.

Some foreign firms, bowing to political pressure exerted by the JFBA, have not opened Japanese offices under their own name, but, instead, have adopted the name of a Japanese law firm.³⁷ Foreign offices using this technique are staffed predominantly by non-bengoshi foreign attorneys and have as their client base companies and organizations represented by their home offices that are doing business in Japan.³⁸ The predominantly foreign nationality of the staff attorneys of these offices and the retention of a client base similar to that of their home office suggest that article 74 does not effectively bar the establishment of branch offices of foreign law firms in Japan.

B. Domestic Custom

The traditional practice of Japanese *bengoshi* also supports the argument that they have an incomplete monopoly on the right to provide legal services in Japan. Traditionally, *bengoshi* have restricted their legal practice to actions before courts of law and other tribunals.³⁹ Legal consultation on the commercial and financial operation of businesses has not typically constituted part of their practice.⁴⁰

Graduates from the legal departments of Japanese universities who have not undergone the post-graduate training and examination required of *bengoshi* provide financial and commercial advice to large companies.⁴¹ They draft and review contracts, assist in contract negotiations, explain the legal consequences of particular operations contemplated by the officers of companies, comply with filing requirements for new investments and securities transactions, conduct tax planning, and register and protect patents and trademarks.⁴² In effect, the work of these legal professionals resembles that of U.S. corporate attorneys.⁴³

Neither the Japanese Government nor the JFBA has ever challenged the activities of these Japanese legal advisers.⁴⁴ This inaction on the part of the Jap-

37. See *id.* at 463; Abrahams, *supra* note 8, at 34.

38. Telephone conversation with Professor Michael Young, Director, Japanese Legal Studies Center, Columbia University School of Law (Mar. 1, 1985) (notes on file, Michigan Yearbook of International Legal Studies); see Brown, *supra* note 6, at 463.

39. See Hattori, *The Legal Profession in Japan: Its Historical Development and Present State*, in LAW IN JAPAN 111, 138 (A. von Mehren ed. 1963); see also Kosugi, *supra* note 11, at 695; Fukuda, *supra* note 3, at 204.

40. See Brown, *supra* note 6, at 274-75; D. HENDERSON, FOREIGN ENTERPRISE IN JAPAN at 178-79 (1973) [hereinafter cited as D. HENDERSON, FOREIGN ENTERPRISE]; Henderson, *The Roles of Lawyers in U.S.-Japanese Business Transactions*, 38 WASH. L. REV. 1, 5 (1963) [hereinafter cited as Henderson, *The Roles of Lawyers*]. As of 1973, there were only ten Japanese *bengoshi* employed by companies in Japan. Of these, three were employed by the same foreign firm. Brown, *supra* note 6, at 340.

41. D. HENDERSON, FOREIGN ENTERPRISE, *supra* note 40, at 178; Henderson, *The Roles of Lawyers*, *supra* note 40, at 4-5, 18.

42. Brown, *supra* note 6, at 332-39.

43. See Fukuda, *supra* note 3, at 204.

44. See *id.*

anese bar suggests that it does not believe that such activities infringe on the exclusive rights of *bengoshi*. Similarly, the government's failure to challenge these activities supports the argument that the proscriptions of article 72 for non-bengoshi extend only to the conduct of legal activities associated with activities before courts or tribunals. Furthermore, since there is no law describing the treatment of foreign attorneys in Japan, the ability of non-bengoshi Japanese to give legal advice on matters of business without violating any Japanese statute or raising objections from the Japanese bar, suggests that non-bengoshi foreign attorneys should be allowed to provide the same services.

II. JAPAN'S INTERNATIONAL OBLIGATIONS UNDER THE FCN TREATY

The Lawyer Law and the traditional legal activities practiced by *bengoshi* suggest that legal consultation on commercial and financial matters is not prohibited to non-bengoshi foreign attorneys. U.S. attorneys wishing to establish offices in Japan need not, however, rely solely on tradition and the lack of prohibitive domestic legislation to justify the lawfulness of establishing a legal practice in Japan. The obligations Japan assumed in 1953 when it concluded a treaty of friendship, commerce and navigation (FCN Treaty) with the United States and its treatment of resident U.S. attorneys at that time also support the legality of current attempts at establishment by U.S. lawyers.

A. Article VIII of the FCN Treaty: Implicit Sanction of the Presence of U.S. Attorneys in Japan.

Article VIII of the FCN Treaty⁴⁵ implicitly authorizes the establishment of legal practices by U.S. attorneys in Japan. Article VIII grants American companies doing business in Japan the right to engage, within Japan, the attorney of their choice, whether or not that attorney is a licensed *bengoshi*. Article VIII, paragraph one states:

Nationals and companies of either Party shall be permitted to engage within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits, and technical investigations exclusively for, and rendering reports to, such national and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest within such territories.⁴⁶

45. FCN Treaty, *supra* note 12, at art. VIII.

46. *Id.*

The term "engage" does not refer exclusively to the hiring of salaried employees as in-house counsel; it includes the general retention of independent practitioners.⁴⁷ The phrase, "within Japan," indicates that American companies may carry out the act of retaining a lawyer in Japan. Viewed in the context of the historical circumstances, these phrases indicate governmental approval of U.S. attorneys practicing in Japan.

In 1953, when the United States and Japan concluded the FCN Treaty, over 70 foreign lawyers, most of them Americans, were practicing in Japan under article 7, a now repealed provision of the Lawyer Law governing practice by foreign attorneys.⁴⁸ Thus granting U.S. companies doing business in Japan the right to engage non-bengoshi U.S. attorneys settled in Japan, the Japanese officials who concluded the treaty and the Japanese legislators who ratified it⁴⁹ implicitly sanctioned the practice of law by unlicensed, non-bengoshi, American lawyers.

The failure of the government to disavow the provisions of article VIII weighs in favor of the view that unlicensed U.S. attorneys may lawfully establish legal practices in Japan. Some might argue that the 1955 repeal of the foreign attorney provision of the Lawyer Law could be construed as a demonstration of the government's unwillingness to allow foreign attorneys who have not obtained a *bengoshi* license to establish an independent practice in Japan. This analysis is weakened, however, by a close examination of the legislative history of the repeal and the political atmosphere of the period in which it was carried out.

Article 7 allowed foreign lawyers to obtain special permission from the Japanese Supreme Court to conduct legal activities in Japan without undergoing the training and examination required of *bengoshi*. Article 7 provided:

(1) Persons either licensed to practice law in a foreign country or having a proper knowledge of the laws of Japan, upon receiving permission from the Supreme Court, may engage in the activities provided in Article 3. . . .

(2) Persons licensed to practice law in a foreign country, upon receiving permission from the Supreme Court, may engage in activities provided in Article 3, in respect of foreign persons or foreign laws. . . .⁵⁰

47. Fukuhara, *supra* note 4, at 35.

48. See Fukuda, *supra* note 3, at 211-12; Henderson, *The Roles of Lawyers*, *supra* note 40, at 11-13. Both of these sources also describe the operation of article 7. Article 7 was repealed by Law No. 155 of 1955. Lawyer Law, *supra* note 3, at art. 7.

49. Under the Japanese Constitution, the Cabinet has the power to conclude treaties and the Diet has discretion to approve or reject them. Takano, *Conclusion and Validity of Treaties in Japan: Constitutional Requirements*, 8 JAPANESE ANN. INT'L L. 9, 9, 15 (1964).

50. Lawyer Law art. 7, translated in Kosugi, *supra* note 11, at 691-92. Paragraph one of article 7 enabled foreign lawyers who had an adequate knowledge of Japanese law to obtain permission to conduct all of the affairs of a licensed *bengoshi*, including the right to practice before Japanese courts with respect to Japanese law. Paragraph two enabled foreign lawyers who wished only to represent foreign clients and practice with respect to foreign laws to obtain permission to conduct activities of this more limited nature. Fukuda, *supra* note 3, at 211-12.

Most U.S. attorneys who had settled in Japan and were practicing law at the time that the FCN Treaty was signed, acquired the right to do so under this provision.⁵¹

The Japanese legislature advanced two reasons for the repeal of article 7. It cited the absence of a similar statute in the laws of any other country,⁵² and it asserted that the special provision was unnecessary as foreign nationals could establish legal practices in Japan by meeting the same qualifications required of Japanese applicants to the JFBA.⁵³ The latter reason arguably weakens the implication that the government, in failing to repeal article VIII, tacitly approved of the continuing presence of non-bengoshi foreign lawyers in Japan. Given the post-World War II political climate of Japan,⁵⁴ however, the former reason should probably be given greater weight.

Japan's concern about the lack of foreign attorney provisions enacted in other countries probably reflected an aversion to placing itself in an inferior position vis-a-vis the rest of the world following its post-World War II occupation by the United States. The bill submitting the repeal to the Japanese Diet stated that the revision was "necessary [for Japan, after enforcement of the Peace Treaty,] to be properly recognized as an independent state on the one hand, while taking an international view on the other hand."⁵⁵ Thus, the repeal probably stands only as a statement against granting all non-bengoshi foreign lawyers the unilateral right to establish a legal practice, rather than a blanket disapproval of the presence of foreign attorneys in Japan.

The legislative debate surrounding the defeat of a nearly identical provision included in a 1929 revision of the 1893 Lawyer Law supports this view.⁵⁶ Japan's desire to show itself equal to Western countries was not born in World War II. Japanese policies in the late nineteenth century were directed at preventing colonization.⁵⁷ The regulation of lawyers was no exception. Like article 7, the pro-

51. See Fukuda, *supra* note 3, at 211–12; Henderson, *The Roles of Lawyers*, *supra* note 40.

52. See Fukuhara, *supra* note 4, at 27; Fukuda, *supra* note 3, at 212.

53. See Fukuda, *supra* note 3, at 212.

54. See generally W. BEASLEY, *THE MODERN HISTORY OF JAPAN* 279–304 (1963); T. McNELLY, *CONTEMPORARY GOVERNMENT OF JAPAN* 114–53 (1963).

55. Fukuhara, *supra* note 4, at 27.

56. *Id.* at 37.

57. The proposed provision stated: "An alien, who is qualified as a foreign attorney, may obtain the validation of the Minister of Justice and conduct the matters prescribed in Article I [the professional affairs of an attorney] regarding aliens or foreign law." The First Draft Attorneys Law of 1929, art. 7, translated in Fukuhara, *supra* note 4, at 23. This proposal provided for approval by the Ministry of Justice, while article 7 provided for approval by the Supreme Court. But the difference is unimportant. In 1929, the legal profession was still regulated by the Ministry of Justice. Hattori, *supra* note 39, at 128. Consequently, it was the appropriate body to give the power to grant the special permission. In 1949, the legal profession was regulated by the Supreme Court. Therefore, that body received the task of granting special permission. See *id.* at 118, 130.

The original Lawyer Law was enacted in 1893. Revisions, first proposed in 1929, went through several drafts until a version was finally adopted in May, 1933. This 1933 version of the Lawyer Law contained a modified version of the proposed 1929 provision dealing with foreign lawyers. See Fukuhara, *supra* note 4, at 23–24.

posed revision of 1929 conferred on foreign lawyers the unilateral right to obtain permission to establish legal practices in Japan.⁵⁸ Opponents of the proposed 1929 provision argued that since no other country had enacted a statute of similar breadth, the provision would establish a policy by which Japan subordinated itself to other nations.⁵⁹

In 1933, the Japanese legislature enacted a modified version of the 1929 proposed provision. It stated that “[an] alien, who is qualified as a foreign attorney, may obtain the validation of the Ministry of Justice and perform the matters prescribed in article 1 in regard to aliens or foreign law as long as there is a guaranty of reciprocity.”⁶⁰ The inclusion of the qualifying language requiring reciprocal treatment indicates that the legislature objected to the 1929 provision primarily because it conferred a unilateral, rather than a reciprocal, right to practice. It appears that once the one-sided treatment of the 1929 provision was eliminated the idea of allowing non-bengoshi foreign lawyers to establish a legal practice in Japan became acceptable.⁶¹ Since article 7 was substantially identical to the 1929 provision, which the legislature rejected because it failed to provide for reciprocal treatment, it is reasonable to infer that the legislature repealed article 7 for similar reasons.⁶²

Article VIII of the FCN Treaty avoids the pitfalls of article 7 and of the proposed 1929 provision by providing for reciprocal treatment.⁶³ Paragraph one of article VIII confers mutual rights on American and Japanese nationals; the language always refers to “nationals of either Party” and never to one nationality to the exclusion of the other. Because article VIII provides unambiguously for reciprocal treatment, the repeal of article 7 of the Lawyer Law should not impeach the implication that the Japanese legislature, in enacting article VIII, tacitly approved of non-bengoshi foreign attorneys practicing in Japan.

The interplay of domestic and international law in Japan also discredits the assertion that the repeal of article 7 undercuts the right of establishment implied by article VIII of the FCN Treaty. The Japanese Constitution provides: “The

58. For the text of article 7, see *supra* text accompanying note 50.

59. See Fukuhara, *supra* note 4, at 23.

60. Fukuhara, *supra* note 4, at 24 (summarizing Attorneys Law of 1933, art. 6).

61. See generally Fukuhara, *supra* note 4, at 24 (asserting that the express adoption of a principle of reciprocity evinced a strong desire on the part of Japan to make western nations aware of its existence).

62. There is debate as to why article 7 was enacted in the first place. Some scholars speculate that its enactment served to persuade the Allied Occupation authorities to support and accept the Attorneys Law of 1949. Others contend that article 7 was a resurrection of the proposed 1929 provision and was an expression of Japan’s “heartfelt feelings” to welcome foreign lawyers to Japan. See Fukuhara, *supra* note 4, at 26–27.

63. For a discussion of the purpose of the reciprocal treatment provision from the U.S. point of view, see *Hearings Before the Subcomm. of the Senate Comm. on Foreign Relations*, 83d Cong., 1st Sess. 27 (1953) (statement of U. Alexis Johnson, Dep. Ass’t Secretary for Far Eastern Affairs, Dep’t of State) [hereinafter cited as *Hearings*].

treaties concluded by Japan and established laws of nations shall be faithfully observed.”⁶⁴ This provision gives treaties priority over domestic statutes as sources of law.⁶⁵ This rule of priority makes the provisions of the FCN Treaty superior to those of any domestic law, including the Lawyer Law of 1949.⁶⁶ Any conflict arising between the provisions of the FCN Treaty and the Lawyer Law should be resolved in favor of the treaty. If the repeal of article 7 were interpreted to mean that only foreign lawyers who had undergone the training and examination required of *bengoshi* may establish a legal practice in Japan, it would stand in direct opposition to article VIII of the FCN Treaty.

Article VIII of the FCN Treaty and the repeal of article 7 of the Lawyer Law deal with two sides of the same transactions. The former refers to engaging an attorney. It grants U.S. companies doing business in Japan the right to engage, within Japan, non-*bengoshi* foreign attorneys. The latter removed the mechanism under which U.S. attorneys could acquire the right to practice in Japan without becoming licensed *bengoshi*. If the latter prohibited U.S. attorneys from establishing themselves as independent practitioners in Japan unless they became *bengoshi*, then the right of U.S. companies to hire, *within Japan*, the attorney of their choice would be abrogated. This result is impermissible under the Japanese Constitution. If the provisions of article VIII are to be “faithfully observed,” no effect can be given to the repeal of article 7 in the case of U.S. attorneys practicing in Japan.

B. Activities Permitted to American Lawyers Under the FCN Treaty

Article VIII of the FCN Treaty implies that the Japanese legislature approves of non-*bengoshi* U.S. attorneys establishing legal practices in Japan. An important question, however, is whether the legislature’s approval embraces the conduct of activities that enable U.S. attorneys to function effectively as legal counselors to U.S. companies doing business in Japan. The narrow proscription of article 72 of the Lawyer Law argued in this note only prohibits non-*bengoshi* from performing legal services that involve a case or facts likely to give rise to one. Presumably, then, there is no domestic bar to non-*bengoshi* attorneys performing all of the other activities associated with the legal profession, as long as they do not

64. KENPŌ (Constitution) art. 98., para. 2 (Japan), translated in MINISTRY OF JUSTICE, THE CONSTITUTION AND CRIMINAL STATUTES OF JAPAN I (1960).

65. Takakuwa, *International Treaties and Agreements*, in 11 DOING BUSINESS IN JAPAN § 203 (Z. Kitawaga ed. 1984).

66. See Fukuhara, *supra* note 4, at 33; Kosugi, *supra* note 11, at 698. Indeed, the Director General of the Cabinet Legislative Bureau stated that in light of article 98, paragraph two of the Japanese Constitution, the FCN Treaty is superior in its internal effect to any conflicting municipal legislation. Oda & Owada, *Annual Review of Japanese Practice in International Law*, II, 9 JAPANESE ANN. OF INT’L L. 101, 101 (1963).

violate any of the other professional statutes, such as the Patent Attorneys Law or the Tax Attorneys Law.⁶⁷

Article VIII, paragraph one, of the FCN Treaty provides an affirmative indication of the activities envisioned by the legislature. It states:

Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits, and technical investigations exclusively for, and rendering reports to, such nationals and companies in connection with the planning and operation to their enterprises, and enterprises in which they have a financial interest, within such territories.⁶⁸

Although the second sentence confers a number of rights on professionals practicing in Japan, it is unclear whether U.S. attorneys enjoy these rights. The first sentence of paragraph one authorizes U.S. companies to engage "accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." The second sentence mentions only "accountants and technical experts." The conspicuous omission of the word attorney has led at least one legal scholar to conclude that the drafters of article VIII deliberately excluded attorneys from the broad rights conferred in the second sentence.⁶⁹

Another Japanese legal scholar argues, however, that attorneys are subsumed under the term "technical experts":

In Japanese, the English word "expert" has the meaning of one who examines something from various aspects and then reaches a judgment, much as an appraiser would examine a work of art to judge its quality. In the U.S., a person who makes such evaluations and judgments as to foreign law is termed a "foreign law expert," and the interpretation that the term "technical expert" includes attorneys seems correct, but the treaty provision is awkward and unclear.⁷⁰

According to this reasoning, attorneys are among the recipients of the rights conferred by the second sentence of paragraph one.

Assuming that article VIII, paragraph one, of the FCN Treaty does confer on American attorneys all of the rights it confers on other American professionals, the scope of these rights remains to be determined. The second sentence lacks qualifying language restricting the making of examinations, investigations, and reports by professionals to the internal activities of their client's enterprise. The absence of such restrictive language suggests that U.S. attorneys enjoy the right

67. Fukuhara, *supra* note 4, at 32-33.

68. FCN Treaty, *supra* note 12, at art. VIII, para. 1.

69. See Ohira & Stevens, *Alien Lawyers in the United States—A Comparative Study*, 39 WASH. L. REV. 412, 426-27 (1964).

70. Kosugi, *supra* note 11, at 699.

to perform these activities on entities external to their client's business and thus possess the right to come into contact with third parties in a professional capacity.⁷¹ If U.S. attorneys were prohibited from representing their clients in dealings with third parties, they would be unable to function effectively as legal advisers to U.S. companies doing business in Japan.

Paragraph two of article VIII also addresses the issue of U.S. lawyers practicing in Japan. It states:

Nationals of either Party shall not be barred from practicing the professions within the territories of the other Party merely by reason of their alienage; but they shall be permitted to engage in professional activities therein upon compliance with the requirements regarding qualifications, residence, and competence that are applicable to nationals of such other Party.⁷²

The second clause requires American professionals practicing in Japan to meet all of the qualifications demanded of their Japanese counterparts. The actual requirements imposed on a U.S. attorney depend, however, on which Japanese legal professional is seen as his or her counterpart. Looking to titles, one might equate U.S. attorneys to *bengoshi*.⁷³ However, a functional analysis of the roles of Japanese legal professionals and the activities of U.S. lawyers in Japan indicates that the true counterpart of U.S. lawyers are the Japanese legal graduates.

U.S. attorneys practicing in Japan provide substantially the same legal services as Japanese non-*bengoshi* legal graduates.⁷⁴ They advise and handle business matters for their clients. They do not appear before courts or administrative tribunals.⁷⁵ Thus, the qualifications, residence, and competence required of U.S. attorneys should be the same as those required of non-*bengoshi* legal graduates. Since Japanese law requires no special post-graduate qualifications or competence of the non-*bengoshi* legal graduate,⁷⁶ there are none with which a U.S. law school graduate must comply. Therefore, this second clause of article VIII, paragraph two does little to jeopardize the right of U.S. lawyers to practice in Japan.

At one time, paragraph two might have jeopardized the rights of U.S. attorneys because it was ratified subject to mutual reservations entered by the United States and Japan. The U.S. reservation states:

Article VIII, paragraph 2, shall not extend to professions which, because they involve the performance of functions in a public capacity or in the interest of public

71. See Fukuhara, *supra* note 4, at 34–35; Fukuda, *supra* note 3, at 215.

72. FCN Treaty, *supra* note 12, at art. VIII, para. 2.

73. For a discussion of the term *bengoshi*, see *supra* note 4.

74. For a discussion of the services provided by Japanese non-*bengoshi* legal graduates, see *supra* text accompanying notes 41–43.

75. See Brown, *supra* note 6, at 465–70 (summarizing the results of a 1981 survey of foreign attorneys in Japan, approximately 80 percent of whom are Americans).

76. See Brown, *supra* note 6, at 328–29, 339.

health and safety, are state-licensed and reserved by statute or constitution exclusively to citizens of the country, and no most-favored-nation clause in the said treaty shall apply to such professions.⁷⁷

The United States entered this reservation specifically with regard to attorneys. Recognizing that the power to license attorneys resides in the individual states and that American citizenship was a prerequisite to gaining admission to the bar in most states, the U.S. Senate was careful to defer to the states' interests in this area.⁷⁸ This reservation allowed states to use nationality as a bar to Japanese nationals wanting to practice law in the United States. The Japanese responded in kind, entering a reservation that stated:

Japan reserves the right to impose prohibitions or restrictions on nationals of the United States of America with respect to practicing the professions referred to in Article VIII, paragraph 2, to the same extent as States, Territories, or possessions of the United States of America, including the District of Columbia, to which such nationals belong impose prohibitions or restrictions on nationals of Japan with respect to practicing such profession.⁷⁹

Neither of these reservations is presently in force. In 1973, the U.S. Supreme Court held that nationality could not be required as a condition to admission to a state bar.⁸⁰ Consequently, individual states can no longer bar foreign nationals from practicing within their borders by reason of their citizenship. This ruling effectively nullified the force of the U.S. reservation.⁸¹ Likewise, since the Japanese reservation was contingent upon the restrictions on foreign legal practice in the United States, the ruling also nullified the nationality requirement imposed by the Japanese reservation. Since neither reservation has any effect as to nationality requirements for lawyers, paragraph two of article VIII can now be read as if the reservations had never been included in the FCN Treaty. Thus, it covers the practice of law.⁸²

III. CONCLUSION

The JFBA's efforts to exclude U.S. lawyers from the Japanese legal market are not supported by or justified under Japanese law. Article 72 of the Lawyer Law does not prohibit non-bengoshi U.S. attorneys from giving legal advice on the financial and commercial operation of a business. Furthermore, article VIII of the FCN Treaty implicitly sanctions the activities of U.S. lawyers in Japan. It demon-

77. FCN Treaty, *supra* note 12, at Exchange of Notes.

78. *Hearings*, *supra* note 63, at 28-31 (statements of Herman Phleger, Legal Adviser, Dep't of State and David Whatley, Member of the District of Columbia Bar).

79. FCN Treaty, *supra* note 12, at Exchange of Notes.

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

81. *See* Fukuhara, *supra* note 4, at 34.

82. *Cf.* Ohira & Stevens, *supra* note 69, at 425.

strates a willingness by the Japanese legislature to allow U.S. lawyers to practice in Japan on a permanent basis. Given these features of the Japanese legal system, the JFBA's position that U.S. attorneys may not lawfully establish in Japan is untenable. However, the JFBA's demonstrated ability to convince the Ministry of Justice to keep U.S. lawyers out of Japan through the denial of visas suggests that American attorneys should seek a political solution through negotiation rather than assert its legal rights before the Japanese Government.