Toward Institutionalization of Reciprocity in Transnational Legal Services: A Proposal for a Multilateral Convention Under the Auspices of GATT

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I. INTRODUCTION

Most countries or jurisdictions impose limitations on a lawyer’s right to practice abroad. Such barriers are as diverse as the number of countries on the globe and effectively impede lawyers wishing to do business in a foreign country. Foreign operations of modern lawyers do not generate many disputes between jurisdictions when such operations are temporary in nature and do not involve the permanent establishment of branch offices.

The need to develop an international market for legal services is growing because business transactions increasingly involve multinational parties. When two or more parties of different nations are involved in a transaction or a dispute, or when one party

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1 See generally S. Cone, The Regulation of Foreign Lawyers (3d ed. 1984) (discussions on eleven United States jurisdictions, sixteen countries, and the European Community); see generally Transnational Legal Services: A Survey of Selected Countries (D. Campbell ed. 1982) [hereinafter Transnational] (elaborations on the status of laws in thirty countries). Presently, there is no uniform regulation of the attorneys practicing in foreign countries, and this Comment seeks to address the need for a special regulation of foreign attorneys.

2 See S. Cone, supra note 1; Transnational, supra note 1. These restrictions purport to protect the public from incompetent foreign lawyers and to protect the local bar association from loss of business. France has various procedures for testing the competence of foreign lawyers. See Debost, France, in Transnational, supra note 1, at 113 [hereinafter France]. The Nichibenren (Japan Federation of Bar Associations) strongly objected to the opening of foreign law firms in Japan. It played a vital role in limiting the practice area of foreign attorneys in Japan. See generally Haley, The New Regulatory Regime for Foreign Lawyers in Japan: An Escape from Freedom, 5 UCLA Pac. Basin L.J. 1 (1986).

3 Transnational legal practice in this Comment refers to lawyers who permanently establish themselves in foreign countries, as distinguished from ad hoc practice by traveling lawyers who do not have foreign offices but follow their clients on a special needs basis. See Lund, Problems and Developments in Foreign Practice, 59 A.B.A.J. 1154, 1155 (1973).

desires to enter into a transaction in a foreign jurisdiction, more than one law may govern the situation. The need for both domestic and foreign legal advice may then arise.5

The practice of a lawyer in a foreign country usually consists of advising its citizens of the laws governing business conduct in that country, or advising the domestic clients who desire to conduct business in the law firm's home country.6 Instead of corresponding with a foreign law firm on a different continent, it is more convenient and economically efficient for a business to retain a law firm close to its headquarters, so that the law firm is readily accessible to give the business advice on the laws of its jurisdiction.7 Consequently, liberalization of trade in legal services seems to be in the best interest of the host country's own citizens.8

Although governmental policies vary from country to country, an increasing number of states support the elimination of unnecessary protectionist barriers.9 Various international bodies, such as the International Bar Association and the Union Internationale des Avocats,10 have tried to bring about some uniformity in restrictions on the foreign lawyer's right to establish abroad.

5 When a business seeks advice on complex transactions, indivisible into concrete issues applicable to particular jurisdictions, the lawyer will have to identify the issues and synthesize the applicable laws of various jurisdictions, perhaps consulting with foreign lawyers. "The client will need complete advice cutting across the laws of several jurisdictions, not advice fragmented piecemeal along lines irrelevant to a transaction viewed as a whole." See Cone, Foreign Lawyers in France and New York, 9 INT'L LAW. 465, 473 (1975).
6 See Campbell, TRANSNATIONAL, supra note 1.
7 Overend, Opening to Tokyo, CAL. LAW. 36, 39 (Jan.-Feb. 1988).
8 Id.
9 The U.S. Supreme Court waived the citizenship requirement in In re Griffiths, 413 U.S. 717 (1973). In re Griffiths involved a foreign applicant for admission to the Connecticut bar. Although she graduated from an American law school and was eligible to become a U.S. citizen, she elected to remain a citizen of the Netherlands. The U.S. Supreme Court, in applying a strict scrutiny test for excluding aliens from the practice of law, waived the citizenship requirement for the first time. 413 U.S. at 718. The Council Directive No. 771/249/EEC of March 22, 1977, O.J. L78, which was influenced by the landmark case of Reyners v. Belgian State, 1974 E. Comm. J. Rep. 631, 2 COMMON Mkt. L.R. 305 (1974), also eliminated the citizenship requirement among member states of the EEC. The waiver of the citizenship requirement for admission to the local bar is indicative of the progress towards liberalization of restrictions on transnational legal services.
10 See Hoppe & Snow, International Legal Practice Restrictions on the Migrant Attorney, 15 HARV. INT'L L.J. 298, 299 (1974). In April 1972, an international conference of representatives from thirty-two countries (Algeria, Austria, Belgium, Canada, Denmark, England, France, Greece, Holland, Ireland, Israel, Italy, Jamaica, Lebanon, Mexico, Norway, Portugal, Scotland, Singapore, Spain, South Africa, South Korea, Sweden, Switzerland, Tanzania, Thailand, Trinidad, Tunisia, United States, West Germany, Yugoslavia, and Zambia) was held under the auspices of the International Bar Association and the Union
Despite the greater global awareness of the need for a multilateral agreement regulating transnational legal practice, many jurisdictions have enacted reciprocity statutes.\textsuperscript{11} Reciprocity requirements started when France threatened the practice of foreign law firms in Paris by instituting a reciprocal treatment requirement in 1971.\textsuperscript{12} New York responded by adopting its foreign legal consultant provision in 1974.\textsuperscript{13} Following Japan's legislation in 1986 which also required reciprocal treatment, other jurisdictions in the United States promptly provided for admission of foreign lawyers.\textsuperscript{14}

Both France and Japan require reciprocal treatment of their lawyers by other countries which seek to send their own lawyers to France or Japan.\textsuperscript{15} Substantive reciprocity accorded by these

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\textsuperscript{11} Belgium, Brazil, France, Japan, Spain, and the Republic of Korea, among other countries, have reciprocity provisions. See Law No. 66 of 1986 (Japan); S. Cone, supra note 1, at 48 (Belgium), 50 (Brazil), 69 (France); Echegoyen, Spain, in Transnational, supra note 1. The Republic of Korea has a provision in its Lawyers Law, Law No. 63 of 1949, art. 6(2), designed to permit foreign lawyers to practice in Korea if they come from a country which accords reciprocal treatment to Korean lawyers, but no foreign law firm presently has an office in Korea. Id. at art. 6. This only illustrates the fact that even when there is a statute that provides for foreign legal practice, these statutes are ineffective. For a discussion of the U.S. effort to raise the services issue in the Uruguay Round of the General Agreement on Trade and Tariffs (GATT), see Berg, Trade in Services: Toward a "Development Round" of GATT Negotiations Benefiting Both Developing and Industrialized States, 28 Harv. Int'l L.J. 1 (1987); Bradley, Intellectual Property Rights, Investment, and Trade in Services in the Uruguay Round: Laying the Foundations, 23 Stan. Int'l L. 57 (1987); Rivets, Slater & Paolini, Putting Services on the Table: The New GATT Round, 23 Stan. J. Int'l L. 13 (1987); Schott & Mazza, Trade in Services and Developing Countries, 20 J. World Trade L. 253 (1986).

\textsuperscript{12} Under article 55 of the French Law Number 71-1130, foreign lawyers can practice law in France only if they come from a member state of the European Community or if they are from a country which permits the same level of freedom to French lawyers as France accords to the foreign lawyers. Loi No. 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques, J.O. 131 (1972) (Law No. 71-1130 of December 31, 1971 concerning reformation of certain legal professions) [hereinafter French Law of 1971]. This law came into effect on September 16, 1972. Décret No. 72-670 du 13 Juillet 1972 relatif à l'usage du titre de conseil juridique, J.O. 7556 (1972) (Decree No. 72-670 of July 13, 1972, relating to the use of the title of legal consultants) [hereinafter Decree of July 1972].

\textsuperscript{13} N.Y. Jud. Law, § 53(6) (McKinney 1979).

\textsuperscript{14} The following states, among others, have followed the New York precedent and presently provide for the admission of foreign attorneys as legal consultants: California, California Rules of Court, Cal. R. Ct. r. 988 (West 1989); District of Columbia, Rules of the District of Columbia Court of Appeals, D.C. Ct. R. Ann. r. 46 (Michie 1989); Hawaii, Rules of the Supreme Court of the State of Hawaii, Haw. Rev. Stat. Ann. r. 14 (Michie 1988).

\textsuperscript{15} See infra notes 44, 104 and accompanying text.
countries, however, illustrates the extreme positions on regulation of foreign lawyers.16 Japan is representative of countries which place very strict barriers on the practice of foreign lawyers.17 This is in contrast to those countries like France which have been relatively open in permitting foreign lawyers to practice in their territories.18 The New York statute does not require any reciprocal treatment from other countries and accords privileges to qualified foreign lawyers regardless of their citizenship.19 Examples of treatment of foreign lawyers in France, Japan, and New York demonstrate that not every country affords the equivalent levels of reciprocal treatment.

This Comment examines the failure of reciprocal agreements in transnational legal services. The Comment first examines the effect of unilateral reciprocity requirements through the specific illustrations of France,20 New York,21 and Japan.22 Next, the Com-
ment reviews the historical treatment of foreign lawyers in these countries and compares their recent foreign lawyers statutes. In concluding that unilateral reciprocity requirements can be replaced by a better regulatory scheme, the Comment proposes that GATT serve as a multilateral negotiation medium for the liberalization of restrictions on transnational legal practice and discusses GATT's progress on legal services issues to date.

II. RECIPROCITY REQUIREMENTS IN FOREIGN LEGAL SERVICES STATUTES

Reciprocal treatment of foreign lawyers by the host country means according the foreign lawyers the same privileges the host country desires its lawyers to enjoy in the foreign lawyer's country of origin. Because each nation's legal practice is deeply imbedded in its respective cultural values and norms, and since no two legal systems are identical, it is difficult to identify the true value of concessions. Reciprocity, however, presupposes common values and similar social conditions among the countries involved.

Foreign lawyers statutes in France, New York, and Japan impose various requirements on individuals who seek to qualify as foreign consultants. France represents one of the most liberal countries in Europe with respect to foreign lawyers. Japan's prosperous economy has attracted the subsidiaries from many international businesses and consequently, their lawyers. Under pressure from the United States Trade Representatives (USTR) and the U.S. bar associations to lessen restrictions on foreign lawyers, Japan enacted a statute that also has a reciprocity provision. The Japanese statute, however, is unlikely to meet reciprocity requirements of other countries such as France. On the other hand, the New York statute has no reciprocity provision, but has various rules and requirements for qualifying as a legal

centers in the world. Japan's legal system, however, is much monopolized by the Nichibenren and its foreign legal services statute seems very restrictive. See infra notes 119–149 and accompanying text.

23 See Menegas, GATT as a Framework for Multilateral Negotiations on Trade in Legal Services, 7 Mich. Y.B. Int'l Legal Stud. 277, 288 (1985); Comment, supra note 17, at 1810.

24 See Shapiro, Cultural Barriers to Delivery Services, in BUSINESS TRANSACTIONS WITH CHINA, JAPAN, AND SOUTH KOREA, § 8.08 (P. Saney & H. Smit eds. 1983).


26 Special Measures Law, supra note 17, at art. 1.
consultant.27 Although New York does not demand reciprocal treatment of its lawyers from France and Japan, it will nonetheless have to accord French and Japanese legal consultants the privileges New York conseils juridiques28 or New York foreign law jimu-bengoshi29 seek to enjoy in France and Japan, respectively. Vast differences between the statutes of these countries necessitate some uniformity in the legal services area.

A. France

Under the French Law of 1971, reciprocity exists "if the foreign lawyer's country permits French lawyers to conduct there the same legal practice that lawyers from that country propose to conduct in France."30 The French legal profession was not completely regulated before this legislation.31 Although the government regulated the legal professions of avocat32 and notaire33 by giving them a monopoly over court appearances and the preparation of legal documents, it did not regulate another category of the French legal profession, conseil juridique (legal counselor).34 Individuals and legal entities with some legal expertise practiced certain aspects of law under the title of conseil juridique without any qualifications.35 Foreign lawyers, mostly Americans, also practiced under this title.36 A regulatory scheme of the French Law

27 See infra notes 82-97 and accompanying text.
28 See infra note 34.
29 See infra note 105.
31 See Debost, supra note 2, at 113; Kosugi, supra note 10, at 679.
32 Avocats traditionally represented clients in courtrooms. In 1972, avoué and agréé were merged into avocat. Avocat presently has a monopoly of practice before the highest courts and is regulated by an independent bar association. Cone, supra note 5, at 465; Herzog & Herzog, The Reform of the Legal Professions and of Legal Aid in France, 22 Int'l & Comp. L.Q. 462, 463-64 (1973).
33 Notaire has a monopoly on drafting wills and certain other formal legal documents in the field of matrimonial property, land transactions and succession. See Cone, supra note 5, at 465.
34 The French bar has traditionally regulated other categories of legal professions other than conseil juridique. One of the reasons for not regulating the practice of the conseils juridiques prior to 1971 was the preference of the courtroom practice over the rendering of legal advice on business activities. See Kosugi, supra note 10, at 680.
35 Id. Therefore, any foreign lawyer could also give advice as to both her home law and French law without obtaining any special qualifications. Id.
36 See Cone, supra note 5, at 466. France has been the leading center for legal establish­ments in Europe for many years with the most foreign lawyers and law firms. There are over fifty law firms engaged in international practice in conjunction with French lawyers. Id.
of 1971 on the use of the title *conseil juridique* achieved the legislative goal of protecting the public from unqualified advice.\(^{37}\)

1. Foreign Lawyers in an Historical Context

Historically, Paris always welcomed foreign lawyers.\(^{38}\) The French bar associations did not subject foreign lawyers who practiced under the title of *conseil juridique* to any work permit requirements or regulations.\(^{39}\) Although this prohibition did not permit foreign lawyers to represent clients in court, it did not place much limitation on the scope of their practice, because they were primarily engaged in counseling and drafting services and could always retain a French lawyer for the purpose of court appearances.\(^{40}\) Favorable treatment of *conseils juridiques* by the French government attracted lawyers from many countries.\(^{41}\) The local bar found the competition unsatisfactory, especially since other countries did not afford French lawyers the same level of freedom.\(^{42}\)

The French Law of 1971 responded to the dissatisfaction of French lawyers by changing the status of foreign lawyers who had not commenced practice in France before July 1, 1971.\(^{43}\) The major impact of the law is that it requires other countries to accord reciprocal treatment to French lawyers. Thus, a French lawyer can conduct abroad the practice which she is authorized

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\(^{37}\) *See* Hoppe & Snow, *supra* note 10, at 305. The goal of the French Law of 1971 is to unify the French legal profession and thereby provide efficient legal services to clients. *Id.* The legislation was largely supported by those who felt that litigation and the rendering of legal advice were closely related in advising clients. Herzog & Herzog, *supra* note 32, at 465. The following are the means for achieving unification of the legal profession: merger of *avoué* into *avocat*; restructuring of *avocat*; and the gradual elimination of *notaire*. Comment, *The Reform of the French Legal Profession: A Comment on the Changed Status of Foreign Lawyers*, 11 *COLUM. J. TRANSNAT'L L.* 435, 441 (1972).

\(^{38}\) *Conne, supra* note 5, at 466.

\(^{39}\) Comment, *supra* note 37, at 437. *Avocat, avoué, and notaire*, however, were open only to French citizens. *Id.*

\(^{40}\) *Id.*

\(^{41}\) *Conne, supra* note 5, at 466. *See also supra* note 36 and accompanying text.

\(^{42}\) *See Kosugi, supra* note 10, at 682. By 1972, soon after the enactment of the French Law of 1971, there were at least twenty-two U.S. law firms in Paris. *Id.* at 680. Unlike the freedom of permanent establishment which the U.S. lawyers enjoyed in France, the French lawyers in the United States were permitted to give advice only to French citizens regarding international law or French law, and they could not open any branch offices. *Id.* at 682.

\(^{43}\) *See infra* notes 44–81 and accompanying text.
to conduct in France.\textsuperscript{44} Generally, the law maintains the traditional attitude of allowing broad latitude of foreigner's legal practice.\textsuperscript{45} During the parliamentary debate of preliminary bills, the French government reaffirmed this open-door policy by expressing its desire to develop Paris into a legal center from which foreign attorneys could easily move to other European countries.\textsuperscript{46}

2. Impediments to Transnational Legal Practice

To be admitted as a \textit{conseil juridique}, a foreign lawyer has to satisfy the educational, good moral character, financial resources, and residency requirements.\textsuperscript{47} The primary purpose of these requirements is to protect the public from incompetent foreign lawyers.\textsuperscript{48} Unlike foreign lawyer regulations of many countries, the French law appears not to protect domestic lawyers from foreign competition.\textsuperscript{49} Although \textit{Procureur de la République} (local attorney general) within each jurisdiction regulates \textit{conseils juridiques}, local bar committees do not have disciplinary jurisdiction over them.\textsuperscript{50} \textit{Conseils juridiques} are supervised by the Ministry of Justice.\textsuperscript{51} Moreover, the law does not place any restrictions on partnerships between domestic and foreign lawyers.\textsuperscript{52}

The French Law of 1971 restricts foreign law firms more than it does individual foreign attorneys. Law firms which were not carrying on the activities of \textit{conseils juridiques} prior to July 1, 1971 cannot register under that profession.\textsuperscript{53} To qualify as \textit{conseils juridiques}, foreign law firms have to form a special entity called \textit{société civile professionnelle} (professional companies) and each of the members have to qualify as a \textit{conseil juridique}.\textsuperscript{54}

\textsuperscript{44} See \textit{supra} note 30 and accompanying text.
\textsuperscript{45} The initial bill (\textit{Avant-Projet de Loi}) limited the scope of practice to the foreigners' domestic law and international law, even when they had begun their practice before 1971. This restriction was waived in the final law. Comment, \textit{supra} note 37, at 443.
\textsuperscript{46} Id. at 443-44.
\textsuperscript{47} See \textit{infra} notes 61–74 and accompanying text.
\textsuperscript{48} Comment, \textit{supra} note 37, at 442.
\textsuperscript{49} For discussions on this matter, see \textit{infra} notes 50–56 and accompanying text.
\textsuperscript{50} Debost, \textit{supra} note 2, at 119.
\textsuperscript{51} Herzog & Herzog, \textit{supra} note 32, at 482. On the other hand, disciplinary sanction against \textit{avocats} is exercised by their own bar associations, and not by \textit{Procureur de la République}.
\textsuperscript{52} French Law of 1971, \textit{supra} note 12, at art. 58; Debost, \textit{supra} note 2, at 125.
\textsuperscript{53} French Law of 1971, \textit{supra} note 12, at art. 64.
\textsuperscript{54} Id. at art. 58; see also Debost, \textit{supra} note 2, at 124.
In addition to waiver of various requirements for foreign lawyers or law firms which have been practicing in France prior to 1971, many statutory provisions are subject to exceptions and qualifications for nationals of the European Community and citizens from countries according reciprocal treatment to French lawyers. Further, various requirements for qualification are generally not difficult to satisfy and there are many exceptions within each category.

a. Restrictions to Protect the Public Against Incompetent Foreign Lawyers

The primary impact of the French Law of 1971 is to limit the scope of practice of foreign lawyers and law firms that have not established themselves in France before July 1, 1971. The purpose of this law with regard to conseil juridique was to regulate the use of the title of conseil juridique. Therefore, any French individual or organization can render legal advice and draft legal documents as long as they do not use the title conseil juridique or any other designation which is likely to lead to confusion with that title. Under the French Law of 1971, foreign lawyers have to be registered as conseils juridiques in order to give legal advice or draft legal documents. Furthermore, unless the foreign lawyer fits within the grandfather clause which exempts foreign lawyers who have commenced practice in France before July 1, 1971, or is from a member state or from a country which grants French lawyers the scope of practice its lawyers intend to exercise in France, lawyers from other countries can give legal advice and prepare documents only in matters concerning foreign or international law.

The French Law of 1971 imposes educational and experience requirements on conseils juridiques for qualification. An applicant for conseil juridique has to satisfy certain degree requirements for admission. Like other provisions of this law, the requirement is

55 Cone, supra note 5, at 466–68. Such foreign lawyers are not required to register as conseils juridiques and are not restricted on the scope of practice. Id.
56 See infra notes 62–67 and accompanying text.
57 See Herzog & Herzog, supra note 32, at 478.
58 Id.
60 Id. at art. 55, para. 1.
61 Id. at art. 54, para. 1.
easily met. A law school degree or bar admission in the applicant’s
country are generally recognized as equivalent to a French law
degree.62 Many degrees such as French accounting and business
administration are satisfactory.63 Also, there are various prior
status exceptions for certain judges, avocats, notaires, civil servants,
and certain professors of law, economics, or business administra-
tion who have taught for at least five years.64 The educational
degree requirement is also waived for applicants who have legal
experience of more than fifteen years, provided that they pass a
special examination.65 As part of the experience requirement, an
applicant must have practiced law for a minimum of three years,
half of this time as an employee of a conseil juridique or as a clerk
to an avocat or a notaire.66 As with the degree requirement, the
three-year experience requirement provides for exemption to
applicants with prior experience in other classes of legal profes-
sions.67

As a further protection of the public, there are additional
provisions which apply to both French and foreign conseils juri-
diques. To qualify as a conseil juridique, an applicant must not have
been convicted, disbarred, or expelled from a profession.68 An
applicant also must not have been reprimanded for improper
conduct in the management of a bankrupt or insolvent enter-
prise.69 The good moral character requirement also applies to
persons not using the title conseils juridiques. Persons convicted of
a crime or misdemeanor involving moral wrong, persons sus-
pended from some profession or formerly subject to a discipli-
nary penalty, or persons declared bankrupt may not give legal
advice or prepare legal documents.70 Conseils juridiques are also
subject to disciplinary sanctions, exercised by le tribunal de grande

62 Kosugi, supra note 10, at 681.
63 French Law of 1971, supra note 12, at art. 54, para. 1; Decree of July 1972, supra
note 12, at art. 2. Degrees equivalent to master or doctor of law in a French law school
are listed in this article. Id.
64 Decree of July 1972, supra note 12, at art. 5; see also Debost, supra note 2, at 120.
65 Decree of July 1972, supra note 12, at art. 6; see also Debost, supra note 2, at 120.
66 Decree of July 1972, supra note 12, at art. 3; see also Debost, supra note 2, at 119.
67 Professional experience requirements are also waived for applicants who satisfy the
degree requirement and who have worked in the legal field for over eight years. Decree
of July 1972, supra note 12, at art. 5; see also Debost, supra note 2, at 120.
68 French Law of 1972, supra note 12, at art. 11, para. 5.
69 Id. at art. 11, para. 6.
70 French Law of 1971, supra note 12, at art. 67; see Herzog & Herzog, supra note 32,
at 478–79.
instance (the court of first instance) at the request of the Procureur de la République.\textsuperscript{71}

Both avocat and conseil juridique are required to maintain sufficient financial resources. Foreign lawyers who practice as conseils juridiques must therefore carry malpractice insurance and bonding in case they need to indemnify their clients.\textsuperscript{72} If a nonmember state foreign applicant has not practiced in France prior to 1971 but has met the above requirements, she then has to register as a conseil juridique with the Procureur de la République of the jurisdiction in which she intends to establish her professional domicile.\textsuperscript{73} She has to establish her practice within three months of such registration.\textsuperscript{74}

\begin{itemize}
  \item[b.] \textit{Reciprocity}
  
  Although the French Law of 1971 does not significantly change the status of foreign lawyers who were licensed prior to 1971, the law’s importance lies in its reciprocity requirement.\textsuperscript{75} This requirement contributed to the liberalization of transnational legal services.\textsuperscript{76} Except for individual conseils juridiques who were practicing prior to 1971, nonmember states had to grant French lawyers reciprocal treatment.\textsuperscript{77} The law firms engaged in practice as conseils juridiques prior to July 1971 enjoyed a grace period of five years to continue their practice, including advising clients on domestic law and international law. In case the firm’s country did not grant reciprocal treatment to French lawyers by the end of five years, the French Law of 1971 authorized the Ministry of Justice to revoke the grandfather clause of article 64 to the foreign firm’s country.\textsuperscript{78}

  The threat of losing their branch offices in Paris by the reciprocity requirement motivated the lawyers of certain New York

\begin{footnotes}
\item[71] French Law of 1971, supra note 12, at art. 60; Decree of July 1972, supra note 12, at art. 78. Bar associations exercise disciplinary power over their own avocats members. Herzog & Herzog, supra note 32, at 482.
\item[72] French Law of 1971, supra note 12, at art. 59; Herzog & Herzog, supra note 32, at 482.
\item[73] Decree of July 1972, supra note 19.
\item[74] Debost, supra note 2, at 119.
\item[75] French Law of 1971, supra note 12, at art. 55.
\item[76] After the enactment of the French Law of 1971, many states in the United States lessened the restrictions on foreign lawyers’ practice in their states. See supra note 14.
\item[77] French Law of 1971, supra note 12, at art. 55.
\item[78] Id. at art. 64, para. 2.
\end{footnotes}
firms to draft proposals for special rules concerning foreign legal consultants. The impact of the French Law of 1971 and the waiver of the U.S. citizenship requirement in In re Griffiths led the New York legislature to liberalize restrictions on transnational legal services.

B. New York

1. Foreign Lawyers in an Historical Context

In 1974, the New York legislature created a special category for foreign lawyers to practice as "legal consultants" without having to take the bar examination. This was a significant departure from the traditional stance taken by American courts and legislatures. Prior to In re Griffiths, In re Roel had assured the U.S. bar of a monopoly by holding that foreigners were completely barred from advising on any law or preparing any legal documents.

2. Impediments to Transnational Legal Practice

a. Restrictions to Protect the Public Against Incompetent Foreign Lawyers

A foreign legal consultant licensed to practice in New York may not hold herself out as a member of the New York Bar. A foreign lawyer who has not been admitted to the New York Bar can either use the title of "legal consultant," or the authorized title and firm name in the foreign lawyer's country. Admission to the New York Bar is open to foreign lawyers who either

79 Hoppe & Snow, supra note 10, at 329.
80 See supra note 9.
82 Id. S. Cone, supra note 1, at 26. Foreign lawyers can now enter into practice in New York in one of the following ways: (1) by passing the bar examination; (2) by qualifying for admission without taking the bar examination; (3) by qualifying as a foreign legal consultant; or (4) if they are not admitted to the bar, foreign lawyers may practice in New York for the limited purpose of giving advice to New York lawyers in private practice or in the legal departments of corporations or institutions, but not to the general public. Id.
83 See supra note 9 and accompanying text.
84 In re Roel, 3 N.Y.2d 224, 165 N.Y.S.2d 31 (1957).
85 See New York Law, supra note 81, at § 521.3(f).
86 Id. at § 521.3(g).
successfully pass the bar examination or qualify for admission without having to take the bar examination. 87

According to the rules of New York, foreign legal consultants may render legal advice on the laws of New York and the United States, provided that the opinion is based upon the advice from a member of the New York Bar. 88 To achieve this, legal consultants may associate with and employ local attorneys. 89 In addition to this requirement for consultation, the statute imposes various other restrictions on the foreign legal consultants' scope of practice in New York. 90 Foreign legal consultants are prohibited from making court appearances and precluded from preparing legal instruments that relate to estate disposition and administration, marital and custody matters, and transactions affecting real property. 91

To be licensed as a legal consultant, an applicant, over twenty-six years of age, 92 must have actually practiced in good moral standing in her country as an attorney for at least five of the seven years immediately preceding application. 93 The New York Law requires a showing of good moral character and, upon licensing, the legal consultants are subject to the same disciplinary rules as the members of the New York Bar. 94 To protect clients in case of need for indemnification from malpractice, the New York Law, as in the case of the French Law of 1971, requires legal consultants to carry professional liability insurance. 95 For licensing, an applicant has to be an actual resident of New York, but is not required to show any period of prior residency. 96

b. **Reciprocity**

The New York Law does not require reciprocal treatment from foreign countries which desire to have their lawyers practice in

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87 S. Cone, supra note 1, at 26–29.
88 See New York Law, supra note 81, at § 521.3(e). The foreign legal consultant can render advice on any foreign law, without regard to whether the lawyer is qualified in the laws of the foreign country. See also Cone, supra note 5, at 471.
89 Cone, supra note 5, at 471.
90 New York, supra note 81, at § 521.3(a)–(d).
91 Id.
92 Id. at § 521.1(d).
93 Id. at § 521.2(a).
94 Id. at § 521.1(b).
95 Id. at § 521.4(2)(ii).
96 Id. at § 521.1(c); Cone, supra note 5, at 470.
New York. In reviewing an applicant for licensing as a legal consultant, New York courts do not attach any significance to the policies of the applicant's country with regard to New York Bar members. This seems to be consistent with the notion of New York as the center of international business.

C. Japan

Since World War II, Tokyo has been one of the world's most lucrative business markets. The United States, with a comparatively large number of lawyers, supported lawyers' efforts to follow their clients to Japan. As a result of pressure from the New York Bar Association and the American Bar Association, the USTR negotiated with the Japanese government to open their legal market. The result of this negotiation was the enactment of an Act Providing Special Measures for the Treatment of Legal Business by Foreign Lawyers (Special Measures Law) in May 1986. As the somewhat derogatory title of the literal translation, Special Measures Law Concerning the Handling of Legal Businesses by Foreign Lawyers, may suggest, this law is far from lessening the extent of restriction on foreign lawyers' ability to practice in Japan.

The Special Measures Law requires reciprocal treatment from other countries. The substantive reciprocity provision states that the Minister of Justice may not grant approval unless treat-

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97 Cone, supra note 5, at 472.
99 Japan has about 12,000 lawyers in a population of approximately 110 million. The United States has twice as many citizens and fifty times as many lawyers as Japan. Hahn, An Overview of the Japanese Legal System, 5 Nw. J. Int'l L. & Bus. 517, 522 (1983).
100 Haley, supra note 2, at 1. The dispute between the United States and Japan over the issue of establishing American law offices in Tokyo resulted in a trade conflict. Id.
101 Id. at 2.
102 See Special Measures Law, supra note 17 and accompanying text.
104 Article 1 of the Special Measures Law states:

The purpose of this Act is to enable a person who is qualified as a foreign lawyer to handle legal business with respect to foreign law in Japan under reciprocal endorsement and to provide special measures, etc. for the regulation of such foreign lawyer's legal business in accordance with and similar to those measures applicable to Japanese lawyers.

Special Measures Law, supra note 17, at art. 1.
ment "substantially similar" to the treatment under the Special Measures Law is accorded to a bengoshi (lawyer) by the applicant's country. The Japanese law, however, remains very restrictive and does not provide the same degree of freedom as other countries give to Japan's lawyers.

1. Foreign Lawyers in an Historical Context

An historical review of the treatment of foreign lawyers in Japan illustrates the significance of this law. During the nineteenth century, the Japanese government had an open-door policy toward foreign lawyers. The Bengoshi Law of 1893 was favorable to foreign lawyers and implemented the governmental policy of inviting these lawyers to help modernize the Japanese legal system.

The promulgation of the second Bengoshi Law of 1933 brought a minor change to this policy. Foreign lawyers had to obtain licenses, and their home country had to accord reciprocity to Japan. Three years later, the Japanese government completely shut the door on foreign attorneys. The Law Concerning Control

105 Id. at art. 10, para. 2. Bengoshi refers to Japanese lawyers. The term "foreign law business lawyer" or "foreign law jimu-bengoshi" is distinguished to mean foreign lawyers in Japan who render legal advice in the area of international business law. Comment, Japan's New Foreign Lawyer Law, 19 L. & POL'y IN INT'L BUS. 361, 370 (1987).
106 Haley, supra note 2, at 9. It is doubtful whether countries that require reciprocal treatment to their lawyers will regard the Japanese law as satisfying this requirement. For examples of restrictions, see infra notes 119–47 and accompanying text.
108 To further the policy of absorbing foreign lawyers to aid in modernizing the Japanese legal system and to introduce the Western system, Japan promulgated Diagennin Kiosoku (Advocate Regulations). Under Diagennin Kiosoku of 1878, foreign lawyers were authorized to handle legal affairs in connection with cases involving aliens and international transactions. Fukuhara, supra note 107, at 22–23; Comment, supra note 105, at 362–63.
109 The Bengoshi Law of 1933, at art. 6 states that "an alien, who is qualified as a foreign attorney, may obtain the validation of the Minister of Justice and perform the matters prescribed in Article 1 [the professional activities of an attorney] in regard to aliens or foreign law as long as there is a guaranty of reciprocity." Fukuhara, supra note 107, at 24; Comment, supra note 105, at 364 n.20.
110 This legislation responded to international criticism for Japan's involvement in the Manchuria Incident. Japan tried to expand to the Manchurian provinces by taking advantage of Chinese disunity in 1931. Fukuhara, supra note 107, at 25.
of the Handling of Legal Affairs of 1936 made it a criminal offense for foreign attorneys to practice law in Japan.\footnote{111}

The Bengoshi Law of 1949 reinstated the open-door policy toward foreign attorneys.\footnote{112} Article 7 of the law authorized foreign lawyers, upon recognition from the Supreme Court of Japan, to give legal advice to Japanese clients concerning the laws of their country and also qualified the lawyers to represent foreign clients in court.\footnote{113} These lawyers were known as junkaiin and were given associate membership in local and national bar associations.\footnote{114}

In 1955, the Bengoshi Law was partially amended and article 7 was repealed.\footnote{115} Following this repeal, the Nichibenren (Japan Federation of Bar Associations) imposed several subsequent restrictions. In 1972, the Nichibenren issued rules regarding the scope of foreign lawyers' practice in Japan.\footnote{116} This regulation was a substantial restriction on foreign legal practice and demonstrates the Nichibenren's motivation to monopolize the practice.\footnote{117}

\footnote{111} Id.
\footnote{112} Comment, supra note 105, at 364.
\footnote{114} Kosugi, supra note 10, at 691–92. The promulgation of article 7 of the Bengoshi Law of 1949, by creating the junkaiin system, sanctioned the foreign lawyers, mostly Americans, to handle legal matters in postwar Japan. Id. Article 7 was consistent with Japan's post-World War II policy of tightening its relationship with foreign nations. In 1955, when Japan regained its complete independence, article 7 was repealed. Id.
\footnote{115} Law Concerning Partial Amendment of the Bengoshi Law, Law No. 155 of 1955. The existing junkaiin were grandfathereed into the profession. Fukuhara, supra note 107, at 27–28. Foreign lawyers became exposed to articles 72 and 74 of the Bengoshi Law of 1949, which prohibited them from performing legal business such as presentation of legal opinion, representation, mediation, or conciliation and similar legal practices in connection with suits or non-contentious matters. Comment, An American Lawyer in Tokyo: Problems of Establishing a Practice, 2 UCLA PAC. BASIN L.J. 180, 185–87 (1983).
\footnote{116} Arguments in support of foreign lawyers in Japan were that non-bengoshi were not completely prohibited from rendering legal advice by virtue of article 72 of the 1955 amendment to the Bengoshi Law, and that the U.S.-Japan Treaty of Friendship, Commerce and Navigation authorized the lawyers from both countries to practice law in the other country. Comment, supra note 107, at 366; see Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, art. VIII, 4 U.S.T. 2063, 2071. Nichibenren issued Gaikokujin Hiben Katsudo Boshi Ni Kansuru Kijin (Standards Concerning the Prevention of Non-Attorney Activities by Foreign Lawyers) as a response to these arguments. Comment, supra note 105, at 367.
\footnote{117} Under the regulation issued by the Nichibenren, foreign lawyers could only draft contracts under the direct supervision of a bengoshi, and an unqualified foreign lawyer could neither express a legal opinion on the drafting of a contract nor meet independently with a client to give legal advice. Id.
The Special Measures Law of 1986 substantially incorporates a 1984 report issued by the Nichibenren.¹¹⁸

2. Impediments to Transnational Legal Practice

Restrictions on foreign lawyer's practice in Japan under the Special Measures Law of 1986 fall into two categories: barriers intended to protect the Japanese public from incompetent foreign lawyers and monopoly by the Japanese bar.

a. Restrictions to Protect the Public Against Incompetent Foreign Lawyers

The Special Measures Law generally restricts a foreign lawyer to advising only on laws of her home state or international law.¹¹⁹ This limitation on the scope of foreign lawyers’ practice restores article 7(2) of the Bengoshi Law of 1949, which provided for admission of a foreign lawyer to the practice of law “relating to a foreign national or laws of foreign countries.”¹²⁰ The Special Measures Law also prohibits a foreign lawyer from serving documents for a court or administrative body¹²¹ and from representing clients before a court and public office.¹²²

In order to qualify for both approval and designation as a foreign law jimu-bengoshi,¹²³ the lawyer has to have at least five years of experience in the country in which she is qualified to practice.¹²⁴ Although this provision at first glance seems like an ordinary protection against incompetent lawyers who have little experience with the laws of the country in which she has obtained qualification, it has a critical impact on young foreign lawyers

¹¹⁸ See Ramseyer, supra note 98, at 503. This report proposed authorization of foreign attorneys only in severely limited circumstances. Id.
¹¹⁹ Special Measures Law, supra note 17, at art. 3, para. 1(3).
¹²⁰ Hoppe & Snow, supra note 10, at 319 & n.147; Comment, supra note 105, at 364.
¹²¹ Special Measures Law, supra note 17, at art. 3, para. 1(4).
¹²² Id. at art. 3, para. 1(1). A foreign lawyer is also prohibited from acting as counsel in a criminal case, and from representing or drafting any documents with regard to a case involving real property in Japan, or industrial property rights at an administrative agency in Japan. Id. at art. 3, paras. 1(2), (6). Subsections 1(2) and 1(6) do not have as much of an adverse effect on foreign lawyers as other prohibitions, because foreign lawyers are normally engaged in counseling business clients. Id.
¹²³ See supra note 105.
¹²⁴ Special Measures Law, supra note 17, at art. 10, para. 1(1).
who are currently practicing in Japan. To qualify as a foreign law jimu-bengoshi, these young attorneys who may have been practicing in Japan for more than two years will have to go back to their own countries for at least three years, since only a maximum of two years is credited for the time spent in Japan. These so-called trainees do not have formal recognition or authorization from the Supreme Court of Japan. They are typically young lawyers working for Japanese law firms or Japanese companies. The five-year experience requirement not only makes the practice inefficient, but also disserves Japanese citizens seeking legal advice in transactions involving a foreign law. By forcing young associates to go back to their home countries to make up the five-year experience prerequisite, the firms will have to employ highly experienced, but expensive lawyers, thereby billing at a high rate clients who do not need a veteran lawyer’s direct consultation. Moreover, the client will not only have to hire a bengoshi for advice on Japanese law and for serving documents and representation in court, but also will incur the additional legal cost of hiring an experienced foreign lawyer.

As part of the restrictions to protect the public, foreign lawyers in Japan, as in the case of conseils juridiques in France, have to show good professional standing in the foreign lawyers’ home country and sufficient financial resources. In order to receive approval and designation as a foreign lawyer, the applicant must not have been sentenced to imprisonment and not have been subject to a disciplinary action within three years prior to applying for qualification. A foreign law jimu-bengoshi also has to have sufficient capital to carry out her responsibilities properly and carefully and to indemnify her client against any loss that may arise as a result of malpractice. Furthermore, a foreign law jimu-bengoshi has a duty to reside in Japan for at least 180 days of the year. As one of the prerequisites to registration with the

125 Comment, supra note 105, at 372–73.
126 Id.
127 Trainees are young foreign lawyers or law students who come to Japan to learn about Japanese law. They actually handle a great degree of substantive international trade matters. See Kosugi, supra note 10, at 693–94.
128 Id.
129 Comment, supra note 105, at 373.
130 Special Measures Law, supra note 17, at art. 10, para. 1(2)(a)–(c).
131 Id. at art. 10, para. 1(3).
132 Id. at art. 48, para. 1.
Nichibenren, foreign firms are required to have at least a professional address in Japan.  

b. Protection of Local Lawyers from Competition

Until recently, domestic lawyers have monopolized the practice of law in their countries. With the change of the business arena from predominantly domestic to international, legal services have become a trade issue. Efforts to keep the practice of law as a monopoly have been particularly strong in Japan. The Nichibenren has forcefully supported restrictive measures concerning a foreign lawyer's practice of law. Nichibenren is an independent body not subject to any significant control by the government or the Ministry of Justice.

A foreign law firm in Japan must adhere to various responsibilities. As an example of treating foreign law firms as foreign businesses, there is an obligation not to open more than one office in Japan. Although a foreign lawyer can use her individual name for the office title, she is prohibited from using the name of any other individual or organization. Therefore, a foreign law firm cannot use its firm name, and the firm is only permitted to put its name under the lawyer's name in small letters.

Since a foreign law jimu-bengoshi can advise only on her home law, she will necessarily have to employ or enter into a partnership with a Japanese bengoshi to serve documents and give representations in court. But the law prohibits a foreign law jimu-bengoshi

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133 This delays the firm opening an office, especially since it is difficult to find office space in Tokyo. Overend, supra note 7, at 38. This duty appears to have no other purpose than to impose restrictions on foreigners from efficiently operating branch offices in Japan. Furthermore, such requirements do not seem to insure the integrity of the Japanese legal community.

134 See supra notes 99-102 and accompanying text.


136 See Comment, supra note 105, at 379.

137 Special Measures Law, supra note 17, at art. 45, para. 5.

138 Id. at art. 45, para. 2.

139 Id. See also Overend, supra note 7 at 39. A foreign law business lawyer can, however, use the name of the law firm the lawyer belongs to, if she is employed by a Japanese lawyer. Special Measures Law, supra note 14, at art. 45, para. 3. This supports the inference that the Japanese Ministry of Justice is discouraging the operation of foreign law firms in Japan.
from employing or entering into a partnership with a bengoshi. 140 This prohibition makes it expensive for the foreign lawyer’s client, because she will have to employ both a foreign law jimu-bengoshi, who will advise on “laws of [her] country of original qualification,” and a Japanese bengoshi. The Japanese bengoshi will render advice on Japanese law, serve documents, and give representation in court.

Provisions dealing with broad disciplinary powers delegated to local bar associations and the Nichibenren demonstrate further protectionism. Admission to practice involves two procedural steps. To qualify as foreign law jimu-bengoshi, the applicant must obtain approval from the Ministry of Justice. 141 The second step is registration by the Nichibenren. 142 Nichibenren not only has a role in the admission process, but, along with the local bar associations, is responsible for disciplining the admitted foreign law jimu-bengoshi. 143 Two committees have disciplinary jurisdiction over foreign attorneys: the Discipline Action Committee 144 and the Discipline Maintenance Committee. 145 The president of Nichibenren appoints the staffs of these committees. 146 Nichibenren may issue a warning, a suspension, a resignation order, or an expulsion based on recommendations from the Disciplinary Action Committee. 147

Despite Japan’s protectionism and severe restrictions on qualifications for approval and registration as a foreign law jimu-bengoshi, several U.S. jurisdictions have followed the New York precedent and amended their statutes to give reciprocal treatment to the Japanese lawyers in the United States. 148 Considering the benefit U.S. law firms in Japan can derive from geographic proximity to their clients, these amendments seem logical. 149

140 Special Measures Law, supra note 17, at art. 49. According to the Japanese, the reason for preventing foreign lawyers from employing or entering into a partnership relationship with a bengoshi is to prevent the abuses alleged to have occurred as a result of the employment of bengoshi by junkain. Trindade, supra note 113, at 44.
141 Id. at art. 24.
142 Id. at arts. 55, 58.
143 Id. at art. 55.
144 Id. at art. 58.
145 Id. at art. 56, para. 2; art. 58, para. 4.
146 Id. at art. 52.
147 See supra note 14 and accompanying text.
148 See generally Overend, supra note 7. As of April 1988, there are twelve New York
III. The Inadequacy of Reciprocity Agreements in Foreign Legal Services

France, New York, and Japan have common barriers and distinctions regarding restrictions on foreign lawyers. Laws governing foreign lawyers show some uniformity in that most statutes provide for limitations on the scope of practice and manifestation of legal experience in the foreign lawyer’s country. These laws also require an exhibition of good moral character, financial resources, and residency in the jurisdiction in which the applicant desires to establish practice. Despite this ostensible congruity, a closer reading of each statute demonstrates that prerogatives foreign lawyers enjoy are very different from one country to another. Both the French Law of 1971 and the Japanese Special Measures Law of 1986 require reciprocal treatment of their lawyers from countries which purport to have their lawyers practice in France and Japan. The degree of privileges France and Japan give to foreign lawyers is nonetheless very different. France is one of the few countries with hardly any restrictions on foreign lawyers. Japan, on the other hand, has many impediments. As to licensing in New York, the treatment of New York Bar members by the foreign lawyer’s country is irrelevant. Every barrier to admitting foreign lawyers has some aspect of protectionism. Such prohibitions purport to insure that domestic lawyers will not lose business. In France, the local bar never monopolized legal counseling or the preparation of legal instruments. French lawyers traditionally concentrated on litigation; counseling and the preparation of documents were re-
served for the *avocats*. Within such a tradition, foreign lawyers have fewer barriers to admission and establishment.

In contrast, the Japanese are not litigious. Traditionally, they have preferred to solve social problems through conciliation and extrajudicial procedures. Since the Japanese have generally been reluctant to use the judiciary as a recourse to dispute resolution, the sudden influx of foreign lawyers from the adversarial system may be overwhelming to Japanese society. The protectionism is not only advocated by the *Nichibenren*, but presumably by the "international" lawyers. Both the Japanese lawyers involved in advising international transactions and the foreign lawyers who were admitted as *junkaiin* prior to repeal of article 7 and grandfathered in thereafter were against the inflow of foreign lawyers.

The legal profession in the United States has historically been monopolized by members of the state bar. The recent licensings of foreign consultants in New York, District of Columbia, California, and Hawaii were accomplished through statutory amendments to rules governing the admission of attorneys and counselors at law. State regulation of the legal profession poses some complexities for the United States when it enters into an agreement with a foreign country on a reciprocal basis. Some states with sufficient demand for foreign legal advice are more affirmative in reducing barriers to foreign lawyers' practice than other states with only a small amount of international business.

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155 Debost, *supra* note 2, at 126.
156 Hahn, *supra* note 99, at 518. During the Tokugawa era (1503–1868), the Japanese adopted Confucianism which values highly the maintenance of social hierarchy and harmony. This system, which views the assertion of individual rights as a disruption of societal harmony and discourages litigation, still has a significant influence in modern Japanese society. Id.
160 Hoppe & Snow, *supra* note 10, at 321. The provision of legal advice, the preparation of legal documents, and the representation in courts have generally been a monopoly of state bar. Id.
161 See *supra* note 14.
162 Hoppe & Snow, *supra* note 10, at 322.
163 The relaxation of monopoly by the local bar associations seems to represent contemporary efforts to respond to the needs of modern transnational business.
though states are precluded from conducting their own foreign
relations, the long tradition of independent jurisdictions has
permitted each state to formulate its own rules and policies with
regard to foreign lawyers' establishment of practice in its juris-
diction.

A. Restrictions on the Scope of Practice

Although the nature of international transactions necessitates
giving advice on the laws of the countries whose nationals are
parties to the transaction, many countries confine a foreign lawyer
to advising on the law of her own country or on general inter-
national law. Such restrictions are designed to protect the pub­
lic from receiving incompetent advice. Since most foreign law­
yers do not hold a law degree from the host country or have not
taken the local bar examination, it is likely that they do not possess
expertise about the local law. Limiting the practice to the lawyer's
home law, however, should not impose too much of a burden on
the lawyer by prohibiting employment of, or association with,
local lawyers for the purpose of advising on the local law. Such
prohibition not only inhibits foreign lawyers from giving advice
efficiently, but also places a financial burden on the host country’s
clients. The client would have to retain more than one law firm,
depending on the number of different laws involved, at high cost
and inconvenience.

The French Law of 1971 limits conseils juridiques to advising
clients only on foreign laws and international law. But this
restriction applies only to the counselor who began practicing
after July 1971, or to the lawyer who is neither from a member
state nor from a country that accords reciprocal treatment to
French lawyers. Foreign legal consultants in New York cannot
advise clients on the laws of New York and the United States,
except on the basis of advice from members of the New York

164 U.S. Const. art. I, § 10.
165 See generally S. Cone, supra note 1; Transnational, supra note 1.
166 Lund, supra note 3, at 1155.
167 Besides Japan, Belgium also restricts foreign law firms from hiring local lawyers or
forming partnerships. See generally Bertouille & Konyk, Belgium, in Transnational, supra
note 1, at 53–62.
168 See supra note 129 and accompanying text.
169 See supra note 60 and accompanying text.
170 See supra note 60 and accompanying text.
Bar.\textsuperscript{171} In view of the fact that many of the legal consultants have not passed the New York Bar examination and therefore presumably are unfamiliar with New York law, it is reasonable to require them to consult with competent lawyers before giving a legal opinion. In contrast to the French and New York laws, the Japanese Special Measures Law of 1986 prohibits advice on local law per se.\textsuperscript{172} The more detrimental aspect of this restriction is the ban against employing or entering into a partnership with a bengoshi.\textsuperscript{173}

B. Educational Requirements

The educational and experience requirements of Japan, France, and New York are all designed to warrant qualified practice by foreign lawyers.\textsuperscript{174} Since the host country has no control over the educational standard required by foreign countries for qualification of their lawyers, and since the standards and procedures for qualification are so diverse among different countries, the host country cannot evaluate and standardize the foreign credentials.\textsuperscript{175} Educational requirements for admission to local bars may be very competitive in some countries.\textsuperscript{176} An average Japanese applicant is admitted seven to eight years after graduating from college.\textsuperscript{177} Therefore, the Japanese bengoshi may fear losing business to foreign lawyers who arguably did not complete the same competitive procedure. The number of prior years of practice, however, cannot be a test for evaluating the worth of a

\textsuperscript{171} See supra note 88 and accompanying text.

\textsuperscript{172} See supra notes 119–20 and accompanying text.

\textsuperscript{173} See supra note 140 and accompanying text.

\textsuperscript{174} See supra notes 61–67, 93, 124–29. See, e.g., Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) ("A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.") 353 U.S. at 239.

\textsuperscript{175} See S. Cone, supra note 1; Transnational, supra note 1.

\textsuperscript{176} For example, the Japanese only admit four percent of bar applicants each year. Hoppe & Snow, supra note 10, at 319 & n.147. In addition, two years of training at the Legal Training and Research Institute is required before applicants can hold themselves out as bengoshi. Hahn, supra note 99, at 522. To be admitted as a bengoshi, one must graduate from the Legal Training and Research Institute in Tokyo which admits less than two percent of those who apply for admission each year. Id.

\textsuperscript{177} See id. The entrance examination to the Legal Training and Research Institute is offered once a year, and an average entrant is admitted five years after graduating from college. Id. at 523.
lawyer. Given the differences in lawyers and requirements for admission from country to country, there is no guarantee that a lawyer with more years of experience is better qualified than one with less experience.

C. Good Legal or Moral Character Requirement

Most countries require a foreign lawyer to have a good moral character as a prerequisite to admission. A country or a state has an interest in preserving the integrity of its bar. To require foreign lawyers to submit to the same disciplinary rules as any member of the local bar, as in the case of New York, further assures the public of competent legal counseling. The broad disciplinary power and discretion of the Nichibenren will undoubtedly inhibit foreign law jimu-bengoshi from rendering irresponsible advice. As an alternative to subjecting foreign lawyers to the local code of professional ethics, the International Code of Professional Responsibility adopted by the International Bar Association in 1956 may provide a universal set of rules.

D. Financial Resources Requirement

The three countries discussed in this Comment require various security devices from foreign lawyers. The underlying rationale for these requirements is to protect the public from actual losses caused by malpractice. Domestic clients may have no recourse if the foreign lawyer should leave the country and fall outside of the jurisdiction of the host country. Fear of a lack of indemnification may deter domestic clients from retaining foreign counsel. Therefore, these countries’ practice of requiring a professional address for service of process and malpractice insurance coverage serves to assure clients of indemnification.

179 Id.
180 See supra notes 69–70, 93, 130 and accompanying text.
181 See supra notes 69–70, 93, 130 and accompanying text.
182 See supra note 94 and accompanying text.
183 See Brothwood, supra note 4, at 12.
184 See supra notes 72, 95, 131 and accompanying text.
185 Comment, supra note 17, at 1801.
186 See id.
187 French Law of 1971, supra note 12, at art. 59; New York Law, supra note 81, at § 521.4(a)(2)(ii); Special Measures Law, supra note 17, at art. 10, para. 1(3).
E. Residency Requirement

Each of these three countries require foreign lawyers to have a professional address in the host country. A residency requirement "improves the prospect that the foreign lawyer will have substantial contacts and property that will in turn serve as an incentive for good conduct and insure that an injured client will be able to obtain jurisdiction over the lawyer and his assets." Although both France and New York require the applicants to be residents of their jurisdictions at the time of application for establishment, neither require any period of residency upon qualification. Japan, however, imposes a strict quota of 180 days a year residency in Japan. This provision has an adverse effect on an international lawyer who often travels back and forth between countries following the needs of her clients. Such a burdensome requirement does not bear a reasonable relationship to the object of protecting the public from incompetent foreign lawyers with no long-term interest in Japan. Moreover, Japan's goal of protecting its citizens is in large part assured by requiring a proof of financial resources in Japan and a showing of good moral standing.

Reciprocity implies that when one country makes a concession, another country is required to give a counter-concession to that country, thus according a reciprocal treatment. As the examples of France, New York, and Japan show, the difficulty of evaluating the true value of reciprocal treatment afforded by one country to another's lawyer may yield an unfair outcome among the countries involved. While reciprocity is not an answer to this growing sector of services, the multilateral approach under the auspices of the General Agreement on Tariffs and Trade (GATT)
for the elimination of trade barriers in the legal services area may offer a better solution.

IV. GATT AS A BASIS FOR TRANSNATIONAL LEGAL SERVICES DISCUSSIONS

A. The Process of Bringing Services Under the Auspices of GATT

GATT is a multinational trade treaty that has been in force since January 1948. GATT established the legal framework for negotiating and reducing trade barriers, principally in the area of international trade in goods rather than services. Since World War II, services have become an increasingly important sector in the world economy. Despite its significant role in a nation's economy, the services trade is presently not governed by any multilateral regulations, and therefore is subject to numerous nontariff trade barriers. Many developed nations, mostly members of the Organization for Economic Cooperation and Development (OECD), have been disturbed by the absence of a multilateral agreement on services trade. These nations lobbied for inclusion of services discussion in the Eighth Round of GATT.

The effort to bring the services discussion into the GATT agenda, however, met with many obstacles. The first problem...
toward reducing barriers in the services area was vehement opposition from the Less Developed Countries (LDCs). The LDCs argued that liberalization of services trade would slow their economic growth, since few of them have service oriented economies. Brazil and India strongly argued that GATT was not authorized to discuss services and was concerned only with trade in goods. Another problem with including services under GATT was the difficulty of defining services. Since services embrace a wider range of economic activities than trade in goods, it is more difficult to identify the different barriers to free trade in the services sector than in the traded goods area. This classification requires identifying barriers for each sector and providing separate rules for each barrier. Nevertheless, the USTR's contention that the broad language of article 25 of GATT also covers investment barriers was successful. Further, GATT, with

202 Berg, supra note 11, at 18. Various provisions in GATT specifically refer to goods. On the contrary, GATT does not provide for rules governing services, but it also does not specifically limit the provisions to trade in goods. There are some general reasons why the developing countries oppose freer trade: a. LDCs want to maintain independence over development of their service economies; b. They want to protect their "infant industries" in the service sector; and c. They consider foreign direct investment to be separate from trade in services. For further discussions on oppositions from the developing countries, see Ewing, Why Freed Trade in Services is in the Interest of Developing Countries, 19 J. WORLD TRADE L. 147 (1985); Schott & Mezza, supra note 11.
204 Id. For example, the service sector can be categorized into distributive services, such as wholesale and retail trade, communications, transportation, and public utilities; producer services, which include accounting, legal counseling, marketing, banking, architecture, engineering, and management consulting; consumer services, such as restaurants, hotels, laundry, and dry cleaning establishments; nonprofit and governmental services, such as education, health and national defense. Id. at 378 & n.39-42. The service sector can be divided into other segments and the list here is simply an example of categorizations. Id. at 378.
205 Article XXV of GATT under the heading "Joint Action by the Contracting Parties" does not specifically limit the GATT discussions to trade in goods: "1. Representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of this Agreement...." General Agreement on Tariffs and Trade, 55 U.N.T.S. 187 [hereinafter GATT].

USTR also contended that: a. investment barriers should be discussed under the GATT authority because they differentiate between "foreign service producers and domestic firms"; b. developments in technology make services more tradeable and; c. there was a concern as to the fact that the service sector continues to expand without any uniform standard for its treatment. Berg, supra note 11, at 9-10.
a broad membership of ninety-six member countries and a precedent for providing a forum for global trade negotiations, provides the best international forum for discussions of services issues.

B. Agreement on Legal Services under GATT

Barriers that yield economic protection, including those in the legal services area, are "contrary to the spirit of GATT." The basic aim of GATT is to liberalize world trade. Therefore, barriers that exclude foreign lawyers from the local legal community without a reasonable justification for protecting the public or maintaining national standards of court integrity are repugnant to GATT. The national treatment concept of article III can be used to analyze protectionist barriers. For example, article III may be used to formulate rules for the prohibition on employment of or partnership arrangements with local lawyers, title restrictions to law firms, and strong disciplinary powers by the local or national bar associations. Moreover, under the auspices of various GATT concepts, the GATT signatories (Contracting Parties) could form a special rule with regard to barriers.

206 From twenty-three original contracting countries, GATT's membership has now risen to ninety-six member countries. Soviets and China Might Be Allowed Into Trade Group, N.Y. Times, Sept. 7, 1989, at D21, col. 1.

207 For further discussions on the reasons for GATT as the best forum for trade in services discussion, see generally Comment, Legal Problems in Expanding the Scope of GATT to Include Trade in Services, 7 Int'l Trade L.J. 281 (1982-83).

208 Menegas, supra note 23, at 284.

209 See What It Is, supra note 194, at 1. "Its [GATT's] basic aim is to liberalize world trade and place it on a secure basis, thereby contributing to economic growth and development and to the welfare of the world's peoples." Id.

210 Lund, supra note 3, at 1155.

211 Article III of GATT provides in part:

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

GATT, supra note 205, at art. III, para. 1.

212 See infra notes 213–26 and accompanying text.
which are essentially designed to protect the public from incompetent legal advice, such as educational requirements, home law limitations, residency requirements, showing of good moral standing, and evidence of financial resources.

1. National Treatment Concept to Eliminate Protectionist Barriers

The national treatment concept requires a country to treat foreign service providers in the same manner as domestic service providers. The primary goal of national treatment is "to prevent discrimination against foreign service providers as compared with their domestic counterparts." National treatment for foreign lawyers would be treatment similar to that provided to local lawyers.

GATT, however, only requires that foreign lawyers receive "treatment no less favorable than that accorded to like [lawyers] of national origin." An argument can be made that foreign lawyers without extensive training in the foreign country are not functionally equivalent to domestic lawyers and thus do not deserve national treatment. A more reasonable approach would be to let the clients decide the worth of their counsels.

Restrictions on hiring local lawyers or entering into partnerships with domestic and foreign lawyers afford protection to domestic lawyers by effectively limiting foreign lawyers' scope of practice. Japan does not restrict its lawyers from hiring foreign lawyers, but places limitations on a foreign lawyer or law firm from hiring Japanese bengoshi. When a transaction involves both the host country's law and a foreign law, clients will go to domestic lawyers, rather than retaining both a foreign lawyer and a domestic lawyer. Such personnel restrictions are contrary to the national treatment concept which obligates a country to treat foreign lawyers the same as domestic lawyers.

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213 Restatement of Foreign Relations Law of the United States, Tentative Draft No. 4, Chapter 1, § 801(2) states: "National treatment by a state means according to the nationals of another state treatment equivalent to that which the state accords to its own nationals."
215 GATT, supra note 205, at art. III, para. 4.
216 See Menegas, supra note 23, at 285.
217 Id. at 284.
218 See supra note 140 and accompanying text.
219 See supra note 140 and accompanying text.
At the same time, the national treatment concept allows governments to take measures affecting services on a non-discriminatory basis in order to fulfill domestic policy goals.\textsuperscript{220} An occasional modified approach to national treatment is permissible if differences in educational structures and procedures for admission to the bar compel such modification.\textsuperscript{221} In some developing countries where the legal profession is not very sophisticated, local lawyers may suffer injury as a result of the influx of foreign lawyers from developed countries. Strict compliance with the national treatment rule may threaten local lawyers with losing their jobs. Considering the "hardship" which may result from an international agreement under GATT, it seems to be reasonable to authorize certain requirements for certification provided that they are not protectionist in nature.\textsuperscript{222} Exception to GATT obligations under the article XXV waiver provision and the article XIX escape clause would provide flexibility when necessary for legitimate national policy reasons.\textsuperscript{223} The waiver clause authorizes a Contracting Party to waive an obligation in "exceptional circumstances."\textsuperscript{224} The escape clause authorizes a Contracting Party to "suspend the obligation in whole or in part or to withdraw or modify the concession" if foreign goods or presumably services "cause or threaten serious injury" to domestic parties.\textsuperscript{225} Under this caveat, a state can provide for certain educational prerequi-

\textsuperscript{220} See Comment, supra note 207, at 288–89.

\textsuperscript{221} See Comment, supra note 207, at 288–89.


\textsuperscript{223} See Comment, supra note 207, at 289.

\textsuperscript{224} GATT article XXV, paragraph 5 states in part, "In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement...." GATT, supra note 205, at art. XXV, para. 5. An example of this waiver provision is the Generalized System of Preferences programs (GSP) where developed countries can extend duty-free treatment to certain imports from the Less Developed Countries. Comment, supra note 207, at 289.

\textsuperscript{225} Article XIX of GATT states:

1 (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

GATT, supra note 205, at art. XIX.
sites for admission and also subject foreign lawyers to local professional codes of ethics during practice. Less strict compliance with the national treatment concept is especially appropriate in the area of legal services, since many countries still consider a lawyer to be an employee of the government or of a public institution so that her duties cannot be entrusted to a foreign lawyer.226

2. Proposal for Rules to Protect the Public from Incompetent Legal Advice

Overly protectionist barriers, subject to the escape clause, could be eliminated by applying the national treatment concept. As to various requirements which serve to protect the public from incompetent legal advice, Contracting Parties could draw a multilateral agreement for each of the requirements for licensing. To further the fundamental principles of GATT—reciprocity, mutual advantage, and nondiscrimination—227 as presently applied to trade in goods, several GATT concepts, such as most-favored-nation obligations, national treatment, and transparency could be used to formulate the rules.228

Restrictions that limit a foreign lawyer to practice only in matters related to her home law where she is qualified minimize the risk of harm to the public. Most statutes for licensing legal consultants do not require foreign lawyers to pass the bar examination or to successfully complete the equivalent training in the law of the host country.229 Foreign lawyers presumably have expertise only in the laws of their jurisdiction and international trade or business law. Although a legal consultant's role in a foreign country mostly consists of advising on her home law and international

226 This view of the role of a lawyer was the rationale behind the citizenship requirement for admission to the bar. See In re Griffiths, 413 U.S. at 728; Comment, supra note 17, at 1772.

227 GATT, supra note 205, at preamble. The preamble to GATT expressly states the desires of Contracting Parties to achieve economic objectives of GATT "by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to elimination of discriminatory treatment in international commerce." Id.

228 Comment, supra note 207, at 288. Under the most-favored-nation obligations, each of the Contracting Parties must treat other members at least as well as it treats the country to which it gives the most favorable treatment. Id. at 288 & n.42. Under the transparency obligation, each of the Contracting Parties must have identifiable, visible, and regularly administrated procedures in government administrative regulations and practices. Id. at 288 & n.44.

229 See generally S. Cone, supra note 1; Transnational, supra note 1.
law, if she should render advice on the host law, it would be reasonable to require her to seek an opinion from qualified local lawyers, as in the case of New York. To achieve this end, countries such as Japan, which prohibit employment of or partnership arrangements with local lawyers, need to amend their statutes to eliminate such restrictions. Prohibiting foreign lawyers from representing clients in court or administrative proceedings does not place much limitation on the scope of their practice. Foreign lawyers will unlikely be interested in such tasks because either they do not speak the host country’s language fluently or they are more interested in corporate work.

Most jurisdictions, including France, New York, and Japan, indiscriminately require a showing of good moral character for both licensing of foreign legal consultants and bar admission of domestic lawyers. Rules and professional codes that subject a foreign lawyer to the same standard of professional responsibility as domestic lawyers promote the goal of protecting the public and are actually consistent with the concept of national treatment because the rules apply to both domestic and foreign lawyers.

As an alternative to subjecting foreign legal consultants to the same standard as local lawyers, the Contracting Parties can formulate a rule analogous to the International Code of Professional Responsibility adopted by the International Bar Association. Malpractice insurance coverage and other security bond requirements also assure the public of indemnification and motivate the foreign lawyer to render responsible advice. The Contracting Parties could reach an agreement as to the amount of insurance they will require legal consultants to carry.

Consistent with the spirit of GATT to liberalize world trade, the Contracting Parties could agree to reduce or to completely eliminate the length-of-stay regulations. Japan’s 180 days-per-year residency requirement inhibits efficient practice because the lawyer may often have to travel to and from the foreign country to follow her client’s needs. The Contracting Parties could decide to require the foreign lawyer to be a resident of the jurisdiction at the time of application.

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230 See supra notes 180–82 and accompanying text.
231 Menegas, supra note 23, at 286.
232 See supra note 183 and accompanying text.
233 See supra notes 184–87 and accompanying text.
234 See supra note 132 and accompanying text.
Although the minimum experience requirement from the applicant's country is part of the educational requirement, it presupposes that lengthy experience will insure a high quality practice.\textsuperscript{235} Considering the diversity of standards and procedures that qualify lawyers from country to country,\textsuperscript{236} the host country should not uniformly require a certain number of years of experience as a prerequisite to admission, especially when other degree requirements afford adequate protection. To the extent educational requirements further burden the foreign lawyer to prove her competency, they seem to violate national treatment.

V. Conclusion

The relaxation of restrictions on foreign lawyers' practice has been largely in response to the needs of modern practices that involve advice on complex international transactions. The primary purpose of various barriers is to provide the public with safeguards against incompetent and irresponsible lawyers. When a restriction, however, only serves a function of professional monopoly by local lawyers, the restriction diserves both the foreign lawyer and the domestic clients by depriving clients of the efficiency and convenience of having their counsel closely accessible.

Various organizations have attempted to liberalize restrictions on transnational legal practice. The European Community has made efforts to facilitate effective legal services.\textsuperscript{237} Moreover, there have been bilateral conventions between the English Bar and the Paris Bar in 1975 and also between The Law Society of England and Wales and the Paris Bar in 1976.\textsuperscript{238}

Together with the continuous growth for a potential international market for legal services, the notion that client welfare should prevail over geographic and political interests has alerted many countries to eliminate barriers and form a multilateral rule.\textsuperscript{239} The subject of legal services is on the agenda of the Uruguay Round of GATT.\textsuperscript{240} A multilateral trade agreement in

\textsuperscript{235} Menegas, \textit{supra} note 23, at 286.
\textsuperscript{236} See generally \textit{Transnational}, \textit{supra} note 1.
\textsuperscript{237} Brothwood, \textit{supra} note 4, at 11.
\textsuperscript{238} Brothwood, \textit{supra} note 4, at 11.
\textsuperscript{239} For discussions on trade in legal services on the Uruguay Round of the GATT, see generally Press Release of Nov. 1987, \textit{supra} note 214.
\textsuperscript{240} The ground rules issued by the USTR "could cover the trade of financial services, telecommunications, processing and communications technology, construction engineer-
the services area could provide for a general code with respect to the entire service sector. 241 Within this general service code, the Contracting Parties can create individual sectoral codes. 242 Whatever form the agreement on services takes within the multilateral framework, GATT's goal of liberalizing services trade will help eliminate barriers on transnational legal services. In fairness, a global agreement equally applicable to many countries seems to be a better solution for framing regulations in the legal services area. A multilateral agreement through authoritative international trade negotiation bodies such as GATT will pertain to all ninety-six member countries.

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241 See Menegas, supra note 23, at 290.
242 Comment, supra note 203, at 378 & n. 39–42. Individual sectoral codes could include codes such as distributive services code, communications code, transportation code, producer services code, accounting code, legal services code, banking code, architectural code, consumer services code, governmental services code, etc. Id.