1986

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Government Trade Policy and the Professional Regulation of Foreign Lawyers

Sydney M. Cone, III†

This paper discusses United States government trade policy and the regulation of foreign lawyers. Although the expression "trade policy" implies a settled course of action adopted and followed by the United States government, in the area of legal services the formulation of government trade policy has been a rather fortuitous occurrence. Further, while the term "regulation," particularly in the context of the legal profession, suggests a recognizable and ordered system, the rules and procedures for the regulation of foreign lawyers in various jurisdictions do not fall readily into any pattern; instead they appear to be quite random.

The regulation of foreign lawyers antedates the emergence of trade policy in the area of legal services; while the pertinent regulations are rather comprehensive, the trade policy which underlies them is relatively undeveloped. It therefore seems appropriate to begin by considering the diverse regulations lawyers encounter in various jurisdictions when they establish offices outside of their home countries. This paper will then analyze the effective absence of U.S. trade policy regarding legal services. Finally, the paper will discuss the increased priority given to this issue in recent negotiations with Japan. It will conclude by arguing that U.S. governmental interest in the presence of American lawyers in Japan ought not portend a decision by the United States to promote legal services as a "trade issue" other than in the special circumstances of Japan.

I. FOREIGN LAWYER REGULATION

A. General Framework

The "regulation of foreign lawyers" is used here to refer to the regulation by a host state of lawyers from other jurisdictions who seek to establish themselves in the host state and to practice there

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on a regular basis.\(^1\) To a significant extent, the restrictiveness of local rules governing foreign lawyers will turn on three factors: the scope of professional activity reserved exclusively to qualified local lawyers,\(^2\) local barriers to and requirements for attaining the status of lawyer, and local rules governing association between local and foreign lawyers. These factors are far from uniform in the relevant jurisdictions of the international community.\(^3\)

Whatever the local rules, however, lawyers outside their countries of origin generally do not seek to conduct a courtroom practice, but limit themselves to legal consultation and advice, including the negotiation and preparation of legal documents; for convenience, this type of practice will be referred to as a "consulting practice."

In some localities, notably the states of the United States, locally licensed lawyers enjoy a broad monopoly;\(^4\) while in other countries, for example, England—where one might expect to find a legal system akin to America's—the conduct of a consulting practice is largely unrestricted.\(^5\) In countries of the latter type, foreign

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1 See Sydney M. Cone, III, The Regulation of Foreign Lawyers 1-2 (3d ed. 1984) ("ABA Study"). This study was published by the Section of International Law and Practice of the American Bar Association.

2 The operative question is how a country defines the "practice of law" which is reserved for local lawyers. If the definition is narrow, numerous services will fall outside the scope of what is reserved to a local lawyer, leaving room for entry by foreign lawyers to perform most activities involved in a consulting practice. A broad definition of the practice of law, on the other hand, can be a significant barrier to entry by foreign lawyers.

3 See generally, ABA Study (cited in note 1); Note, Providing Legal Services in Foreign Countries: Making Room for the American Attorney, 83 Colum. L. Rev. 1767, 1770-87 (1983). Regrettably, this Note is occasionally inaccurate or inconsistent. At pages 1792-93, for example, it pronounces against foreign lawyers advising on local law, notwithstanding that the preponderance of the materials it cites (in footnotes 64 and 216-31) supports the opposite conclusion.

4 "In the United States, where the single class of 'lawyer' has the exclusive right to practice 'law,' powerful state bar associations have influenced the development of a very broad definition of the practice of law, leaving a very narrow scope of activity for non-lawyers, including foreign lawyers." Note, Colum. L. Rev. at 1781 (cited in note 3). See also Geza Feketekuty, Trade in Professional Services: An Overview, 1986 U. Chi. Legal F. 1, 13 (observing that the practice of law is often defined to include foreign law so that a foreign lawyer is prohibited even from advising on the law of his home country).

5 "Use of the title 'barrister' or 'solicitor' and a limited number of 'reserved activities'—principally, rights of audience before the courts, the preparation of certain documents (namely those transferring land), and the undertaking of probate work—are reserved to qualified barristers or solicitors. Otherwise, the practice of law in England is not restricted to qualified English lawyers, nor is there any statutory or other system for licensing foreign lawyers to practice in England. In consequence, an American lawyer who has obtained the relevant immigration consent or employment permit to take up residence in England as a self-employed or employed practitioner is free to practice the law of the United States or any other jurisdiction, including England, subject only to the above-mentioned matters
lawyers, while unable to plead in the local courts, can often establish a consulting practice of substantial scope.

Local barriers and requirements confronting foreign lawyers are found not only in published rules, but also in the manner in which local administrative, judicial and rule-making authorities exercise their discretion. In West Germany, for example, where the formal requirements for becoming a Rechtsanwalt (member of the Bar) are forbidding, the seeming alternative of Rechtsbeistand (legal consultant) may, in practice, be largely illusory for a foreigner. In Switzerland, a general government policy requiring a showing of "need" for the foreign lawyer has also resulted in American lawyers being prevented from establishing consulting practices there. On the other hand, discretion can be used to facilitate the establishment of law offices abroad: Hong Kong, for example, has not strictly enforced its limitation on the number of foreign firms permitted to open offices there.

which are reserved to the English profession." ABA Study at 63-64 (cited in note 1).

* Typical local requirements include: local citizenship, passage of a local examination, a number of years of education in the country, and practical experience in the country. The ABA Study describes the requirements imposed by each of the jurisdictions it covers. Even in countries where legal consultant status is available, foreign lawyers often find themselves facing substantial barriers in the form of examination and education requirements, limitations on the activities in which they may engage, or regulations which vary among jurisdictions within one country.

7 See ABA Study at 71 (cited in note 1) (requirements for becoming a Rechtsanwalt include the successful completion of two arduous and lengthy examinations, a minimum of three and one-half to five years of study at a university, and two and one-half years of practical training—a process which takes from seven to nine years). See also Note, 83 Colum. L. Rev. at 1776-77 (cited in note 3).

8 Note, 83 Colum. L. Rev. at 1781-82 (cited in note 3). There is no citizenship requirement for obtaining a license as a legal consultant (Rechtsbeistand) and "the applicant must show only professional competence and good character." However, the scope of permissible activities for the 'legal consultant' is narrowly circumscribed: "[a]n American attorney who obtained such a license might be restricted to advising on matters of international or American law." Furthermore, a Rechtsbeistand may only advise within the district where he is admitted, and is subject to any limitation set down by the chief judge of the district court in that district. ABA Study at 71-72 (cited in note 1). Ian S. Forrester and Hans-Michael Ilgen, The German Legal System (1972), written expressly for an American readership, does not even mention the Rechtsbeistand.

9 In Switzerland, the government has strictly applied its policy of permitting American lawyers to work in Switzerland as 'legal advisors' "only if a competent Swiss citizen cannot be found to fill the same position and the American is considered indispensable to the firm for which he is employed." Note, 83 Colum. L. Rev. at 1774-75 (cited in note 3).

10 Guidelines for foreign lawyers seeking to practice in Hong Kong "provide a limit of two firms from any country, unless the applicant presents 'evidence of a very substantial demand' for advice on its country's laws." ABA Study at 75 (cited in note 1). But ten American firms had opened branches in Hong Kong by May of 1984. To the author's knowledge, such showing of substantial demand for advice on American law was not required of all these firms.
A related factor is the ease with which a foreign lawyer may associate with local lawyers in order to be able to carry on a practice involving local law. While France and Belgium have been relatively welcoming in this respect, the Paris and Brussels Bars forbid their members (avocats) from associating with foreign law firms, and require them to resign from the Bar upon accepting employment or partnership in a foreign law firm.\(^1\) Thus, lawyers in foreign law offices in Belgium typically advise on Belgian law only in their capacity as members of the unregulated profession of conseillers juridiques;\(^2\) and in France, subject to rather elaborate rules, many foreign law firms and lawyers have qualified as members of the regulated profession of conseils juridiques, but not as full-fledged members of the Bar.\(^3\)

Foreign law firms have tended to establish offices in four of the jurisdictions referred to above—Belgium, England, France and Hong Kong—for essentially two reasons. First, each includes a major city where businessmen or bankers find it logical to consult lawyers. Second, each has permissive local rules regulating the conduct of an international consulting practice. The emergence of these cities as international legal centers has been a product of historical accident and commercial convenience: a matter of foreign lawyers discovering whither they can follow their clients and of local authorities acknowledging the regulatory lacunae in which the foreign lawyers' consulting practices can be made to fit. While the local Bars have not always been enthusiastic about the presence of foreign lawyers, the local governments have typically been loath to disturb foreign professionals whose activities have facilitated profitable trade and investment.\(^4\)

\(^1\) To the author's knowledge, this prohibition has been applied in all instances in which an American law firm employed an avocat in Paris or Brussels. The regulations of the Brussels Bar have recently become more liberal in this regard, and permit foreigners to associate with Brussels firms of avocats. Reglement d'Ordre Interieur de l'Ordre des Avocats du Barreau de Bruxelles, arts. 69-79 (1984). See ABA Study at 48 (cited in note 1). A parallel liberalization is found in French Decree No. 85-1123 of October 22, 1985, [1985] Journal Officiel de la Republique Francaise 12255 (October 23, 1985).

\(^2\) The profession of conseillers juridiques is not formally organized or subject to legal regulation and may be practiced by all Belgians as well as by non-Belgians who have been authorized to reside and work in Belgium. ABA Study at 47-48 (cited in note 1). Conseillers Juridiques are entitled to give legal advice, but may not practice before Belgian courts of general jurisdiction.

\(^3\) See id. at 68-70; see also Sydney M. Cone, III, Foreign Lawyers in France and New York, 9 Int'l Law. 465, 466-68 (1975).

\(^4\) In the debate on 1971 French legislation according rights to foreign lawyers, Rene Pleven, the Minister of Justice, emphasized the importance of attracting foreign lawyers: "[W]e have the ambition of developing Paris as a major legal center. . . . That will attract to
Lack of regulation or narrow definitions of the practice of law have sometimes sufficed to enable foreign lawyers to establish consulting practices. In other cases, more than official tolerance has been required in order to permit foreign law firms to establish offices out of which they can conduct a consulting practice. The monopoly of the legal profession in the United States is so broad that in 1974, New York, desiring to enhance its status as a leading international center, had to enact special legislation and adopt a special set of rules in order to provide for the licensing of legal consultants from foreign countries without subjecting applicants to the bar examination. These rules for licensing without examination were authorized by a decisive majority of the New York legislature. The large number of licenses issued under the rules, with a single license often representing a significant office of a foreign law firm, suggests that the rules have been serving the purpose sought by the New York legislature.

B. Reciprocity; Applicable Law

Although the foregoing illustrations set out the general framework of foreign lawyer regulation, proceeding to an analysis of American policy on trade as it affects legal services requires that two specific regulatory issues be discussed: the problems of reciprocity and of applicable law.

The issue of reciprocity seems to arise almost as a natural reflex: why should country A allow lawyers from country B to estab-
lish offices in A if B does not reciprocate? The meaning and enforceability of reciprocity seem to be called into question, however, by the fact that several major jurisdictions have avoided the reflex: Belgium, England, Hong Kong and New York have never adopted reciprocity requirements, although they have permitted the local establishment of large numbers of foreign law firms. In addition, the French government has never invoked its reciprocity requirement during the ten years since its inception.

Because legal systems generally, and the regulation of the legal profession in particular, vary so widely from country to country, what would constitute reciprocity as between any two jurisdictions is rarely self-evident. Moreover, enforcing reciprocity would mean obtaining affirmative evidence on the availability of reciprocal treatment, an issue that is likely to involve difficult questions. If the United States is being judged, for example, what weight does one give the relative ease with which many foreigners have gained full-fledged admission to the Bar in some, but not all, American

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80 Chief Justice Burger had this reflex in his dissent in In re Griffiths, 413 U.S. 717 (1973). The majority in that case ruled that, under the Fourteenth Amendment's Equal Protection Clause, a state may not deny admission to the Bar solely on grounds of citizenship. The Chief Justice, dissenting, said that "[s]ince the Court now strikes down a power of the States accepted as fundamental since 1787, even if States sometimes elected not to exercise it, . . . the States may well move to adopt . . . a reciprocal proviso . . . under [which] a state would admit to the practice of law the nationals of such other countries as admit American citizens to practice." 413 U.S. at 733 (Burger, C.J., dissenting).

When France codified the status of foreign lawyers in 1971, a reciprocity provision was included, specifying that beginning in 1977, if registered foreign law firms were neither from other European Community countries nor from nations accorded reciprocal treatment to French lawyers, the French government would have discretionary authority to limit their activities to a legal counseling practice involving principally foreign and international law. French Law No. 71-1130 of Dec. 31, 1971, especially Title II, Ch. I of the Law; Title IV, Ch. I, § 111 of Decree No. 72-670 of July 13, 1972. See generally Professions Judiciaires et Juridiques—Reforme, Brochure No. 1388, Journaux Officiels (1983).

81 A proposed California Rule of Court concerning registered foreign legal consultants, recommended by the Board of Governors of the State Bar of California, also contains no requirement of reciprocity. Proposed Rule 988, Registered Foreign Legal Consultants (August 23, 1986) ("California Proposal") (copy on file with the University of Chicago Legal Forum). Similarly, a proposal for amending the Illinois rules governing admission of foreign lawyers also rejects reciprocity requirements, because of the restrictive standards already embodied in the rules and because "application by the State of Illinois of a law that is in the public interest should not be made to depend upon the action of the authorities of a foreign country." Petition for the Adoption of Supreme Court Rules Relating to the Licensing of Foreign Legal Consultants, No. 3552, in the Supreme Court of Illinois (March 1, 1985) ("Illinois Petition").

82 Although this reciprocity requirement was directed at American law firms, see [1971] Journal Officiel de la Republique Francaise 6596 (December 9, 1971), the French government has never indicated an intention to make use of its discretionary authority to limit American law firms in France in this manner.
jurisdictions? What difference should it make that the nation’s principal commercial legal center, New York, treats foreign lawyers quite liberally, but that they are treated less liberally in certain other American jurisdictions?

Attempting to focus inquiry into reciprocity in order to make it a functional concept, rules recently adopted in the District of Columbia, Hawaii and Michigan for the licensing of legal consultants without a bar examination try to come to grips with some of the problems inherent in a reciprocity requirement. Under these rules, a court evaluating an application for a license would have discretion to consider whether, in the applicant’s home country, a D.C. or Hawaii or Michigan lawyer would have a reasonable and practical opportunity to establish an office for the giving of legal advice. Yet the court would have this discretionary authority only if there was pending with the court a request, from a member of the D.C. or Hawaii or Michigan Bar actively seeking to establish such an office in that foreign country, to take this factor into account, and then only if the request raised a serious question as to the adequacy of the opportunity for the D.C. or Hawaii or Michigan lawyer to establish such an office.3

At least as vexing as reciprocity is the subject of applicable law, a subject which arises in two related ways. First, if a lawyer is advising on a transaction, his advice will depend upon the law governing the transaction. Second, if he is carrying out a consulting practice while established in a foreign jurisdiction, he may be prohibited from advising on the law of that jurisdiction. To the extent that exogenous forces require that the law of a particular jurisdiction govern certain transactions, a local restriction preventing foreign lawyers from advising on that law will effectively prevent them from working on those transactions even though the Bar rules permit them to advise on other law.

Although the proper law for a transaction will sometimes be self-evident, a choice can frequently be made; indeed, the legal principles governing a transaction will often be the same no matter what law is selected to govern it. But jurisprudential considerations do not always determine the selection of applicable law even

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The Office of the United States Trade Representative has suggested that the Japanese Government use the reciprocity provision in the D.C. Rule as a model for Japan. Office of the United States Trade Representative, USTR Statement on Foreign Lawyers in Japan (December 17, 1985) (copy on file with the University of Chicago Legal Forum).
when the choice of law does in fact matter. Governmental agencies and other interest groups may attempt to influence the choice of law for certain types of transactions, either generally or on an ad hoc basis. While it might seem sensible to select the lawyers and the geographical legal center for a transaction after the applicable law has been determined, the opposite may occur: applicable law may sometimes be a function of the choice of lawyers and geographical legal center. The politics of international legal centers is therefore not without its struggles over applicable law: if one law is chosen, one type of lawyer or legal center will be used; if a different law is chosen, a different type of lawyer or legal center will be used.

Not surprisingly, then, local Bars have a tendency to argue that a consulting practice, insofar as it relates to local law, should be reserved to members of the local Bar. Much ink has been spilt both advocating and criticizing this position. Proponents of such restrictions argue the risk to local citizens of unreliable advice given by foreign lawyers not well versed in local law, as well as the risk to the local Bar of losing business to foreign competition. Critics of such limitations argue that lawyers must be able to advise their clients on the totality of their transactional problems, and not just on such portions of those problems as are governed by a particular foreign law; and that “[t]he interweaving of [the laws of different jurisdictions pertinent to an international transaction] makes it difficult for a foreign lawyer to give the best advice unless he is able to give advice on the total legal situation.” While representatives of a local Bar can wax prolix if not eloquent on the need

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24 See Note, 83 Colum. L. Rev. at 1788-93 (cited in note 3).
25 Id. at 1806-08.
26 Id. at 1792 n. 130, quoting testimony of J. Eugene Marans, Cleary, Gottlieb, Steen & Hamilton, at a District of Columbia Bar panel discussion on international law practice. See also the Statement by Francis T. P. Plimpton on Proposed New York Rule for the Licensing of Legal Consultants as transmitted by the Clerk of the New York Court of Appeals, February 16, 1973 at 2-3 (copy on file with the University of Chicago Legal Forum):

[Although it would be neither practicable nor in the interest of the client to limit any lawyer to advising on the law of his own jurisdiction, the proposed rule would not permit licensed legal consultants to render legal advice on the law of New York or of the United States except on the basis of advice from a person duly qualified and entitled (other than by virtue of the proposed new rule) to render professional legal advice in New York on such law. Thus, licensed legal consultants would in the normal course seek the advice of New York lawyers on questions of New York and United States law and practice, including such areas as American administrative law and Federal and State taxation. The proposed rule does not restrict the practice by consultant[s] before administrative tribunal[s] since they can and do determine their own standards of admission.
to protect the public from foreigners, this sentiment has not always been shared by the public itself, because the opening up of the local market enables citizens to obtain a wider range of services at lower cost, or by local governments, because they value the new business which foreign lawyers often bring into the country.\(^7\)

Several jurisdictions have relatively liberal laws allowing foreign lawyers to engage in a consulting practice involving local law. France actually licenses foreigners as *conseils juridiques* authorized to carry on a consulting practice in French law.\(^8\) Legal consultants licensed in New York are authorized to advise their clients on a broad range of New York and federal law, provided their advice is based on advice given them by members of the Bar.\(^9\) In the District of Columbia, a licensed legal consultant is permitted to give advice on District of Columbia law, federal law, or the law of any state of the United States, on the basis of advice from a member of the Bar “who has been consulted in the particular matter at hand and has been identified to the client by name.”\(^10\)

Representing a sharp departure from these approaches are the recently adopted Michigan Rule, as well as the pending California Proposal. The Michigan Rule authorizes a licensed special legal consultant only to “render professional legal advice [in Michigan] on the law of the foreign country where the legal consultant is admitted to practice.”\(^11\) The intent of the Michigan Rule is unclear, however; it was adopted on the basis of “memoranda of the Court staff [which] are confidential.”\(^12\) Unlike the New York rules, which authorize legal consultants to “render legal services,”\(^13\) the Michi-

\(^7\) See, for example, the remarks of Rene Pleven, the French Minister of Justice, quoted in note 14. Pleven argued that transforming Paris into an international legal center was wise because it would attract many other important “activities” to France. [1971] *Journal Officiel de la Republique Française* 4587 (October 14, 1971) (author’s translation). Similarly, Governor Thompson of Illinois has urged the adoption of Bar rules in his state enabling foreign lawyers to engage in a variety of activities in Illinois, arguing that such rules “would encourage foreign investment in our state.” Letter of Gov. James R. Thompson to Hon. Joseph H. Goldenhersh (May 7, 1985), reprinted in Illinois Petition, at Exhibit D (cited in note 21).

\(^8\) See ABA Study at 69-70 (cited in note 1); Cone, 9 Int’l Law. at 468 (cited in note 13).

\(^9\) See ABA Study at 69-70 (cited in note 1); Cone, 9 Int’l Law. at 468 (cited in note 13).


\(^11\) Letter from Michigan State Board of Law Examiners to J. Eugene Marans, Cleary, Gottlieb, Steen & Hamilton (Dec. 5, 1985) (copy on file with the University of Chicago Legal Forum).

\(^12\) Letter from Michigan State Board of Law Examiners to J. Eugene Marans, Cleary, Gottlieb, Steen & Hamilton (Dec. 5, 1985) (copy on file with the University of Chicago Legal Forum).

gan Rule speaks only of rendering "advice" confined to the laws of the legal consultant's "foreign country." Presumably, "advice" will be given a suitable interpretation to allow the Michigan legal consultant to negotiate and draft legal documents.

The Michigan Rule and the California Proposal (if adopted) will test the contention "that limiting the scope of practice to the law of the lawyer's own country discourages him from setting up a foreign office."

II. U.S. GOVERNMENT POLICY AND LEGAL SERVICES

A. The Legal Profession: An Atypical Service Industry

For purposes of United States government trade policy, the legal profession is classed as a "service industry." As such, however, it is an oddity, composed principally of private partnerships of individual legal practitioners. Fortune magazine does not mention the legal profession in its report on the "Service 500" for 1985, nor would the profession fit in any of Fortune's eight categories for service industries (commercial banking, insurance, savings institutions, diversified financial companies, diversified service companies, transportation, utilities and retailing). A ninth category would have to be added, in part because rules applicable to the legal profession would probably prevent a law firm from acquiring or being acquired by a "diversified service company" and thus coming within that category. It seems questionable whether such a ninth category (including and potentially dominated by accountants) could measure up to the other eight: even though law firms do not publish their financial results, journalistic data (which seem unlikely to be understated) suggest that the revenues of law firms do not approach the revenues of Fortune's service companies.

Analysis of data for international trade in services suggests

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34 Note, 83 Colum. L. Rev. at 1792 (cited in note 3).
37 The American Lawyer shows "America's Seventy-Five Highest-Grossing [Law] Firms" to have had fiscal 1985 and 1986 gross revenues in the range of $39 million to $169 million. Am. Law. 37-71 (July/August, 1986). The ranking of Fortune's "Service 500" for 1985 is by billions of dollars of sales (two categories), operating revenues (one category), or assets (five categories). The Fortune Service 500: Directory of the Largest U.S. Non-Industrial Corporations, Fortune 175 (June 10, 1985).
that law firms are at the lowest end of the spectrum in terms of the relative importance of their "sales outside the United States." Of the $27.83 billion of "gross receipts" attributed to the United States "legal service industry" in 1980, $278 million, or not more than one percent, is attributed to "gross receipts from foreign operations." Because this statistic includes only gross receipts, it seems unlikely that even one-third of one percent of the gross receipts of the U.S. "legal service industry" represents income earned abroad and repatriated to the United States: not only must law offices pay rent, salaries to lawyers who are not partners and other expenses of operation, but partners residing abroad can also be expected to keep and spend much of their income abroad. Therefore, while it seems fairly certain that the United States does not run a deficit in "trade" in legal services, it also seems clear that the relevant "net trade balance" in legal services, as set out in any table showing U.S. balance of payments data in billions of dollars, will always be to the right of the decimal point.

It is true that legal services have an impact on important aspects of the balance of trade: lawyers assist and advise clients engaging in overseas investment and trade in goods and non-legal services, and these activities of their clients weigh heavily indeed in the balance of trade. Lawyers have a wide variety of foreign and domestic clients, and the net effect of their clients' total activities on the balance of trade at any time will not be predictable; nor will it necessarily be favorable to the "net trade balance" of the United States. No one knows or is likely to know whether, in a given year, the American legal profession engaged in activities that, when aggregated, had the net effect of increasing or decreasing the overall American balance of trade.

Moreover, if one reads diligently the literature on negotiating on trade in services, one can read entire articles that contain not a word that seems pertinent to "trade in legal services." The few statements that seem applicable to the legal profession underline that the profession is not a subject of "trade."

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39 See, for example, Michael C. Aho and Jonathan David Aronson, Trade Talks: America Better Listen! (1985); Joan Spero, Trade in Services: Removing Barriers, 16 PS 17 (1983), listing as the important service industries for international trade negotiations "such industries as banking, insurance, communications, data processing, engineering and shipping."
40 "Trade ministers in many countries do not have the competence or authority to negotiate in service industries because other agencies regulate these sectors. . . . To compound
B. Government Passivity

It is difficult to escape the conclusion that the United States has not developed a general policy toward international "transactions" in legal services. In fact, the U.S. quite explicitly refused to develop such a policy in the 1984 *U.S. National Study on Trade in Services* ("U.S. Study"), submitted to the General Agreement on Tariffs and Trade: "the United States feels that it is unlikely that a general approach to visa or professional practice problems would be either feasible or desirable over the foreseeable future."4

This absence of a federal policy has a number of significant manifestations. To begin with, there is no federal policy with respect to what rules the individual states of the United States should adopt to govern foreign lawyers.42 In addition, the United States has completely refrained from intervening, even in its own hemisphere, to try to curb the flagrantly discriminatory rules that frustrate the opening of offices by American law firms in such countries as Canada, Mexico and Brazil.43 In matters affecting legal services in Europe, the United States government has not involved the United States Trade Representative or other agencies responsible for trade issues as such, and instead has confined its involvement to infrequent intervention by the State Department and local embassies to defend American law offices that have already been established abroad.44 The *U.S. Study* is helpful in ex-

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the problems, modern technology is rapidly transforming many of these sectors and it is difficult to separate the trade and investment aspects of services transactions." Aho and Aronson, *Trade Talks* at 43 (cited in note 39).

41 *U.S. Study* at 39 (cited in note 35).

42 In deference to the jurisdiction of the several states over the Bar in each state, the Federal government has left the initiative with the Supreme Court of Illinois as regards the Illinois Petition (cited in note 21), with the Supreme Court of Michigan as regards the Michigan Rule (cited in note 23); and with the respective local proponents of the California Proposal (cited in note 21), the Hawaii Rule (cited in note 23), and (in its own backyard) the D.C. Rule (cited in note 23).

43 See ABA Study at 53, 91, and 49 (cited in note 1) for discussion of these discriminatory rules.

44 It should be emphasized that the United States government has on occasion been remarkably effective in protecting acquired rights. For example, on March 7, 1974, the U.S. Embassy in Brussels sent the Belgian government an *Aide-Memoire* expressing "disappointment in learning that the professional cards of many American legal counselors ('conseillers juridiques') residing in Belgium have . . . been subjected . . . to a number of conditions which would make it impractical for them to continue to practice their profession in Belgium." The *Aide-Memoire* invoked the applicable Treaty of Friendship, Establishment and Navigation, and stated "we must protest the measures" proposed by the Belgian Ministry of the Middle Classes. Embassy of the United States, Aide-Memoire, Brussels (March 7, 1974) (copy on file with the University of Chicago Legal Forum). The proposed measures were subsequently withdrawn.
plaining why the United States government has not considered the many American law firms in Europe to present trade issues:

A still different issue arises in the context of professional services, in particular professional services that require a local presence. The sale of professional services which are to be provided locally is not a trade issue as such, while the sale of professional services produced outside the importing country is clearly a trade issue. . . . [F]oreign suppliers of services given access to the local market under trade rules would have the right to contract with fully accredited local professionals to deliver the service. In other words, local professionals, as local businessmen, could have the right under trade rules to buy expertise, [or] support services from a foreign firm. Issues concerning a foreign-owned professional practice or the admission of foreign professionals to a domestic practice would not be covered by international trade rules.\(^5\)

Yet the *U.S. Study* does not ignore the fact that governments have erected barriers to trade in legal services, and it discusses three barriers in particular which have hindered “foreign lawyers [seeking] to establish themselves in major cities throughout the world.”\(^6\) First, most countries subject foreign lawyers “to exactly the same regulations and qualifications as nationals involved in domestic legal practice. Most problems in this regard center around admission to the bar. . . . In most countries, one cannot take the bar examination without being a citizen.”\(^7\) Second, although “legal adviser status would, in fact, satisfy the needs of most foreign lawyers who are only seeking to provide direct legal consultation . . . the requirements for legal adviser in most nations are very difficult to meet.”\(^8\) Finally, in some countries, “[l]ocal attorneys are not normally permitted to work for, or under, foreign attorneys, nor are foreign lawyers allowed to become partners in local firms.”\(^9\)

The *U.S. Study* neglects to point out that, when evaluated in terms of these three impediments, the United States is a paradigm of liberality: citizenship is not a requirement for taking an American bar examination; in this country’s principal legal center, attaining legal consultant status has not proved “very difficult,” and

\(^{46}\) *U.S. Study* at 38 (cited in note 35).

\(^{47}\) Id. at 148.

\(^{48}\) Id.

\(^{49}\) Id.
legal consultants are free to associate with, or to employ, members of the Bar. 50 Instead, the U.S. Study discussion of trade in legal services concludes rather passively that “[g]overnments have [a] legitimate interest in strictly regulating who may provide legal services and in determining their qualifications, but may also carry a bias against foreigners.” 51

The U.S. Study begins its discussion of legal services in the United States with generalizations about various requirements for admission to the Bars of the states and the District of Columbia. After noting that the 1973 Griffiths decision prevents states from requiring U.S. citizenship for admission to their bars,52 the U.S. Study refers to the adoption by “[o]ne state, New York, in 1974” of rules for licensing legal consultants without examination.53 This modest entry is the source of a self-inflicted wound, for it officially endorses and therefore strengthens the argument that the United States is universally hostile to foreign lawyers, “with New York as the only exception.” 54 The U.S. Study fails to recognize that international competition in legal services takes place between international legal centers, of which there are but a few and of which New York is quite probably the most important.

As a “vehicle for exchanging points of view . . . meant to stimulate international discussion,” 55 the U.S. Study might have noted that, in the context of competing legal centers, New York is not merely “one state” (for that matter, foreign lawyers are mainly interested in New York not as “one state” but as one borough), but is the most important single place in the United States for foreign lawyers to find liberal rules under which to be licensed. Indeed, the United States government might have put New York forward as a reason for according liberal treatment to American service industries abroad.

Nevertheless, advocates of a more robust governmental attitude toward eliminating “impediments to trade in legal services” must recognize that the American Bar is far from united behind an activist governmental policy to this end. 56 Diverse attitudes be-

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50 ABA Study at 31 (cited in note 1); Cone, 9 Int’l Law. at 471 (cited in note 13).
51 U.S. Study at 148 (cited in note 35).
52 Id. at 32-33. Griffiths is discussed in note 20.
53 Id. at 33. Not mentioned are the Massachusetts and New York rules allowing admission to the Bar without examination of certain foreigners who have practiced in “English Common Law” jurisdictions. See Note, 83 Colum. L. Rev. at 1786 n. 107 (cited in note 3).
54 Note, 83 Colum. L. Rev. at 1786 (cited in note 3).
55 In 1977, for example, representatives of a Washington D.C. law firm, breaking ranks
come critical when the United States government is contemplating an affirmative policy that would promote “trade” in legal services, i.e., the activities of American lawyers established abroad. The U.S. must consider whether foreign governments will find it feasible to influence their own legal practitioners to refrain from frustrating the efforts of American law firms seeking to establish offices in their jurisdictions. The opposition of certain American law firms to the establishment of foreign law offices in places like Chicago makes the U.S. government less willing to adopt such an affirmative policy, because it realizes that such opposition will be ammunition in the hands of foreign lawyers who object to the opening of their jurisdictions to American lawyers.

C. Japan: A Unique Government Initiative?

Despite this absence of a general federal policy, the U.S. Government (in particular, the United States Trade Representative) has, in one instance, affirmatively deemed transactions in legal services to constitute a “trade” issue: in the context of bilateral trade negotiations with Japan.

...with other D.C. firms, wrote a letter to the Chief Judge of the D.C. Court of Appeals opposing the predecessor proposal for what has since become the D.C. Rule (cited in note 23). Taking what one commentator has called an “extreme position,” this letter argued that foreign lawyers should be required to satisfy the same education and certification requirements as any local lawyer. Note, 83 Colum. L. Rev. at 1796 (cited in note 3) (citing June 3, 1977 letter from Samuel Efron and Robert Neuman to Chief Judge Theodore Newman). This predecessor proposal was not adopted by the Court, which may have been discouraged by the opposing letter.

Eight years later, a more dramatic divergence occurred in Illinois. When four partners in the Chicago law firm of Mayer, Brown & Platt (including a former U.S. Senator and a former President of the American Bar Association) filed the Illinois Petition on March 1, 1985, urging the Supreme Court of Illinois to adopt rules patterned on the New York legal consultant rules, four partners in the Chicago firm of Baker & McKenzie filed a Response in opposition. The Response in turn drew a Reply Memorandum from the four original petitioners. Reply Memorandum in Support of the Petition for Adoption of Supreme Court Rules Relating to the Licensing of Foreign Legal Consultants, No. 3552, in the Supreme Court of Illinois (May 17, 1985) (copy on file with the University of Chicago Legal Forum). The Reply Memorandum stated bluntly that the “Baker & McKenzie Response seeks to block the adoption of a comprehensive and balanced approach which would obtain for Illinois the benefits of attracting foreign legal consultants to the State,” and that the Response not only mischaracterized the Illinois Petition but also rested on a baseless “floodgates” argument. Reply Memorandum at 26 and 29. On May 7, 1985, the Governor of Illinois had written to the Court to “strongly recommend” adoption of the Illinois Petition as a measure “which would encourage foreign investment in our state.” Letter of Gov. James R. Thompson to Hon. Joseph H. Goldenhersh (May 7, 1985), reprinted in Illinois Petition at Exhibit D (cited in note 21). What impression this row between two major Chicago firms had on the Court is left to the imagination, for the Illinois Petition was denied without opinion on June 5, 1985.
Why Japan? Several factors fortuitously converge in the U.S.-Japanese relationship which make Japan truly unique in the select arena of international legal centers. These factors can be summarized under the four headings of geography, recent history, bar admission in Japan, and trade relations with Japan.

1. Geography. Japan is a leading industrial and financial power located a great distance from any other place that can serve as an international legal center, and a very great distance from any place likely to be the situs of regular meetings between major clients and their lawyers regarding matters involving Japan. Even in an age of instantaneous transmission of legal documents, there is no substitute for the face-to-face meeting at which views are exchanged, advice is given, negotiations occur, strategies evolve, and transactions are "structured." Such meetings take place most efficiently if lawyers are located where they can do research, prepare documents and generally perform the services expected of them, invariably on a demanding schedule. While such international legal centers are found in Europe, and the United States can apparently provide the necessary legal centers for the Western Hemisphere, there is no satisfactory extra-Nipponese legal center to serve Japan.

2. Recent History. From 1949 until 1955, foreign lawyers established in Japan were eligible to qualify as legal practitioners and to join Japanese bar associations as special members, and many foreign lawyers gained such admission during those years. Since 1955, however, no additional foreign lawyers have been admitted as legal practitioners. A significant number of American lawyers (and to a lesser extent English solicitors) have instead established themselves in Japan as foreign legal consultants, "trainees" and inside corporate house counsel. And a substantial number of foreign lawyers regularly visit Japan on professional business. In addition, in 1977 a partner in the New York law firm of Milbank, Tweed, Hadley & McCloy obtained the necessary visa from the Japanese government and set up a law office in Tokyo. Finally, arguments have been advanced by Japanese scholars that foreign lawyers are legally entitled to engage in a consulting prac-
tice in Japan; if these arguments are correct, then the only barrier to establishing additional foreign law offices in Japan is the political decision by the Japanese government not to issue additional visas for this purpose.

3. Bar Admission in Japan. The Japanese Bar is highly autonomous and controls access to bar membership; only some 400 new bengoshi (members of the Bar) are admitted annually, fewer than two percent of Bar applicants. This restrictive admissions practice may be one of the reasons why, notwithstanding the exclusion of foreign law firms as such, a considerable number of foreign lawyers are found in Tokyo.

4. Trade Relations with Japan. The industrial and financial strength of Japan has engendered serious and frustrating trade problems for the United States government. Although the legal services “industry” is largely peripheral to these trade problems, it does constitute an activity in which the United States seems to enjoy a competitive advantage.

These factors may have produced an inherently unstable situation. They may explain why the pressure to permit foreign law offices in Japan became so great that the United States government decided to treat as a “trade” problem what was essentially a problem of professional establishment and visa issuance.

As evidenced by discussions between the Nichibenren (the Japan Federation of Bar Associations) and the American Bar Association, as well as protracted negotiations between the Japanese and United States governments, efforts to convince Japan to grant foreign lawyers the right to obtain visas and establish law offices in Japan became an exception to the policy (discussed above) to avoid formulating “a general approach to visa or professional practice problems.”

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60 ABA Study at 85-86 (cited in note 1); Note, 83 Colum. L. Rev. at 1782 n. 84 (cited in note 3).
61 J. Mark Ramseyer, Japan’s Myth of Non-Litigiousness, Nat’l L. J. 13 (July 4, 1983); Note, 83 Colum. L. Rev. 1777 n. 46 (cited in note 3).
62 See generally Note, 83 Colum. L. Rev. at 1807 (cited in note 3); ABA Study at 87 (cited in note 1), discussing the demand for foreign lawyers in Japan.
63 See text at note 41. The Japanese Bar had been divided for years on the question of whether foreign law firms should be permitted to establish offices in Japan. See ABA Study at 86-87 (cited in note 1); Note, 83 Colum. L. Rev. 1806-07 (cited in note 3). Representatives of the Japanese Bar met with delegates from the American Bar Association for several days in 1982 and 1984, as well as with European Common Market representatives in 1983, to gather information on foreign lawyer regulation. See Jurist No. 783 (Tokyo 1983); Note, 83 Colum. L. Rev. at 1813 n. 251 (cited in note 3). In addition, negotiations had been formally initiated between the American and Japanese governments, with the latter regularly consulting the Japanese Bar. A committee of the Nichibenren had submitted a Report on...
These exceptional efforts were made particularly clear by the U.S. response to the Nichibenren's adoption, in December 1985, of a resolution entitled "Approval of the Basic Policy for a 'Foreign Lawyers' System, for the Smooth and Proper Conduct of International Business." The Office of the United States Trade Representative ("USTR") issued a press release denouncing this resolution and characterizing it as a "marked step backward." Arguing that the proposal gave "little indication that U.S. concerns have been taken into account," the USTR found the "Nichibenren's restrictive position on this issue an unacceptable basis for permitting the entry of foreign lawyers into Japan."

The principal operative portions of the Nichibenren resolution can be quickly summarized: a qualified foreign lawyer is to be licensed by the Japanese Ministry of Justice, without taking the Japanese bar examination, "to engage in our country [Japan] in legal business concerning ... the laws of his or her home country and of any third country designated by the Minister of Justice;" the licensed foreign lawyer will be prohibited from appearing before Japanese courts "or other public agencies" and from "employing" or "jointly operating an office with" a bengoshi; and each licensed foreign lawyer must register as a "foreign special member" of Nichibenren, and be placed under its "guidance and supervision."

These operative provisions subsequently became the basis of the Japanese Law "Concerning the Handling of Legal Business by Foreign Lawyers on December 7, 1984, proposing a basis for licensing foreign lawyers to establish offices in Japan. The Report's proposal was highly restrictive (for example, forbidding licensed foreign lawyers to engage in "legal business where the opposite party is a resident of our country [Japan] (including a corporation or association with an office in our country))." Nichibenren Report on Foreign Lawyers § 3.2 (December 7, 1984). In addition, the first section of this proposal contained a reciprocity requirement, mandating that "a majority of the [U.S.] states have systems for receiving bengoshi" without examination, as well as a note stating that "a majority of the states" might become "a substantial number of the major states." Id. On April 9, 1985, the United States government submitted to the Japanese government a Proposal on Regulation of Foreign Legal Consultants in Japan, section 4 of which contained a reciprocity provision patterned on the corresponding provision in the D.C. Rule. See note 23 and accompanying text.

" Resolution Adopted by an Extraordinary General Meeting of Nichibenren, Approval of the Basic Policy for a "Foreign Lawyers" System (December 9, 1985) ("Nichibenren Resolution") (copy on file with the University of Chicago Legal Forum).

" See generally United States Trade Representative, Foreign Lawyers in Japan (cited in note 23).

" Id.

" Id.

" Nichibenren Resolution (cited in note 64).
REGULATION OF FOREIGN LAWYERS

Foreign Lawyers—a law which is to be put into effect by detailed implementing regulations. The new Tokyo rules promise to be far less liberal than the provisions governing foreign lawyers in New York, London, Paris or Brussels. Thus, a New York lawyer in Tokyo might generally be restricted to advising on New York law; would be forbidden to employ or enter into partnership with a member of the Japanese Bar; could not appear before any “public agency” in Japan; would be subject to the rules of the Japanese Bar, which each applicant would be obligated to join, but which could reject any application deemed “inappropriate”; could not use the name of his law firm except as “an annex” to his own name and the name of any other licensed foreign lawyer in the same Tokyo office; would be obligated to be “physically present” in Japan at least 180 days each year; and would be punishable not only by professional discipline, but also by “imprisonment at hard labor for up to two years or a fine of up to one million yen” in the event of a violation of the rules governing foreign lawyers in Japan.

There is, moreover, a major potential obstacle imbedded in the Nichibenren resolution and carried forward in the Japanese Law on Foreign Lawyers. The resolution calls for a system “based on reciprocity,” and Article 1 of the Law requires “guarantees of reciprocity.” Although the Law does not attempt to define “reciprocity” as applied to the United States, under the very first section of the resolution Japan’s reciprocity standard for the United States would require “a substantial number of the major [U.S.] states” to have “systems” for licensing bengoshi without examination; once the United States as a whole was deemed to have met this test, American lawyers “qualified” in states having such “systems” would be eligible for licensing in Japan.

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60 Japanese Law No. 66 (May 23, 1986) (copy of draft translation provided by Milbank, Tweed, Hadley & McCloy, on file with the University of Chicago Legal Forum).
61 Id. at art. 62.
62 Id. at arts. 2.0.2, 2.0.4, 3.1. The question of scope of practice as well as questions bearing on the size of foreign law offices in Japan are understood by the author to be under continuing discussions between the Japanese and U.S. governments.
63 Id. at art. 49.
64 Id. at art. 3.1.1.
65 Id. at arts. 26, 42.
66 Id. at arts. 45.2, 47.2.
67 Id. at art. 48.1.
68 Id. at art. 52.
69 Id. at arts 63-68.
70 Nichibenren Resolution (cited in note 64).
While this proposed reciprocity requirement may have been intended as a device for indefinitely excluding American law firms from Japan, it seems likely that the legal consultant rules which exist in New York, the District of Columbia, Michigan and Hawaii and which have been proposed in California will produce a more accommodating position on the part of Japan. Regardless of Japan's intentions in this regard, the United States government seems committed to obtaining concessions from Japan on the issue of reciprocity.

CONCLUSION

What is the significance of the U.S. government's willingness to play such an active role in the development of policy governing American lawyers' access to Japan? Is this willingness merely an isolated departure from the U.S. rejection, discussed above, of "a general approach to visa or professional practice problems?" Or is the United States now embarked upon a wide-ranging campaign of promoting its "legal service industry" overseas? The available information points to the former interpretation, particularly when one considers the reaction of the USTR to the basic Nichibenren resolution of December 1985, a reaction suggesting governmental frustration and disappointment over the results of "trade" negotiations aimed at assisting the "legal service industry." Except for the unique case of Japan, the United States government may have little interest in the balance-of-trade implications of the marginal and fractious activities of America's law firms, and may not embrace the American legal profession quite so energetically when other international legal centers are at issue.

Moreover, as discussed above, it was the confluence of unique considerations regarding Japan's geography, the recent history of its regulation of both foreign and domestic lawyers, and the peculiarities of the U.S. trading relationship with Japan which caused the U.S. to pursue the issue of trade in legal services with Japan. Analogous considerations are unlikely to prove compelling in respect of the U.S. trading relationship with any other country.

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80 The Proposed California Rule regarding legal consultants, if adopted, would provide for the licensing without examination of legal consultants authorized to conduct a consulting practice in California. The legal consultants could not advise on the laws of countries other than their home countries. California Proposal, at Rule 988(o)(5) (cited in note 21). The proposed rule does not contain any requirement of reciprocity.

81 See note 41 and accompanying text.

82 See notes 63-68 and accompanying text.

83 See text at notes 61-78.
It is of course possible that Japan will not be treated as unique, and that the efforts by the United States government to "open up" that country to foreign lawyers will be deemed a model for future government activity on behalf of the American legal profession. Viewed in the light of the critical issues of reciprocity and applicable law, however, such a development could be unfortunate, for the precedent of Japan may be a precedent based on narrow professional restrictions. The Japanese approach to these two issues does not seem designed to liberalize transactions in legal services: foreign law offices in Japan may be prohibited from advising on local law or associating with members of the Japanese Bar; and American law firms seeking to establish offices in Japan may be confronted with barriers erected in the name of reciprocity. Such prohibitions and barriers would be unhappy precedents, and it therefore might be prudent to concede the uniqueness of Japan to fortuity.

Even so, it is conceivable that out of this fortuity major—and sound—economic policy could develop. The United States government seems committed to the liberalization of international trade in services, meaning not legal services but certain major activities like banking, insurance, communications, data processing, engineering, and transportation. A concession by Japan over transactions in legal services, viewed alone, might be of minor significance. Yet these concessions could be parlayed by the United States into support for its position in trade negotiations involving other, more significant sectors of the service economy, where the stakes could be high indeed. If this is the ultimate outcome, the American legal profession might, willy-nilly, have rendered the country a truly beneficial service.

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84 See text at notes 20-40.
85 See text at notes 79-80. In adopting a prohibition against advising on local law, the California Proposal of August 23, 1986 mirrors the narrowness of the Japanese Law of May 23, 1986. See discussion in note 80.
86 See text at notes 70-71.
87 See U.S. Study at 3, 54-57 (cited in note 35); Spero, 16 PS 17 (cited in note 39). As one author has noted, this commitment is relatively recent. See, Ronald Kent Shelp, Beyond Industrialization: Ascendancy of the Global Service Economy 75-77 (1981).