Some years ago I was sitting in the Tokyo office of an old attorney whom I greatly admired. He was one of the few remaining Americans who had been allowed to practice law in Japan during the postwar era. Then, as now, there were rumors about Japan “opening” its market to foreign lawyers. I mentioned these rumors to my friend, who responded with uncharacteristic irritability: “That will just make it easier for the Japanese to buy us out.”

At first I thought he was being a bit cynical, perhaps afraid of more competition on his own turf. As time went on, I realized that he was right. If and when American lawyers are given greater access to the Japanese market, it will not help the American trade deficit with Japan. The overwhelming majority of American law firms interested in the Japanese market want to serve Japanese clients. They care little about helping American companies gain market access in Japan. It is a simple calculation for them: the Japanese have more money and they can make more profit helping the Japanese than the Americans.

Between 1949 and 1955, American lawyers benefited from the provisions of Japan’s Law No. 205 (“1949 Lawyer’s Law”), which allowed a number of American lawyers to set up shop in Japan. These lawyers (jun-kai’in) served Japanese and foreign clients doing business in Japan. In 1955, the Diet passed Law No. 155, which repealed part of the 1949 Lawyer’s Law and effectively banned foreign attorneys from practicing in Japan. Jun-kai’in already resident in Japan were grandfathered in, and a few still practice in Japan.

Japanese Lawyers in the U.S.

Meanwhile, Japan’s growing economic presence in the U.S. made it inevitable that Japanese lawyers would attempt to obtain law licenses in the U.S. Almost all states require a candidate to graduate from an accredited law school before he or she can sit for the bar examination. This is an onerous restriction for foreigners because it requires a candidate to get admitted to and graduate from an accredited American law school.

Few bengoshi (Japanese attorneys) are interested in spending three years of gruelling study to get the necessary American qualifications.

However, some states, including New York, allow foreign attorneys to take the bar exam without first completing law school in the U.S. Many Japanese lawyers have been admitted to the New York Bar and have then proceeded to serve Japanese companies doing business
in the U.S. An interesting sidelight to this trend is that Japan has successfully maintained
that *benrishi* (patent agents) and other Japanese who are not bengoshi are also eligible for
the New York exception. The Japanese bar thus has the best of both worlds. Japan often
scolds the U.S. that it has too many lawyers while Japan gets by with only
14,000 *bengoshi*. However, Japanese who have never been near the *bengoshi* exam are
able to claim they are lawyers in order to take advantage of the New York exception.

Passing the New York bar exam is no small achievement, especially when your native
language is Japanese. However, the structure of most state bar exams, including New
York’s, makes it possible for a non-native English speaker to pass. One day of the exam is
a computer-graded, multiple-choice test given throughout the U.S. on the same day. Poor
English writing skills have no effect on this score; diligent cramming does. The other day
involves short essays based on New York State law. The bar examiners generally do not
fail a candidate for poor writing; they are looking for the right answer, not the packaging.
This is at variance with what actually goes on in an American law firm, where endless
writing and rewriting of documents is often the bread and butter of the billing machine.

A Japanese candidate who reads English well and takes a cram course has a chance of
passing the New York Bar Exam. A few years ago I received a New Year’s letter from a
Japanese *bengoshi* announcing that he had passed and crowing about how easy the exam
had been. The letter was written in execrable English; there was not a single correct
sentence in it. Such lawyers may not be able to do the work required in the American legal
world; however, they can serve as magnets for Japanese clients, and they can delegate the
research and drafting to American lawyers working for them. Many large American law
firms have Japanese partners who fit this profile.

**American Lawyers in Japan**

The situation is very different in Japan. The *bengoshi* exam is the mother of all bar exams.
It is given annually and consists of three parts. Approximately 7,000 of the 35,000 who
take the multiple-choice section pass. Of these, about 800 pass the short essay exam given
two months later. The final part, a personal interview, eliminates about 70 more of the
remaining candidates. Many Japanese believe that the personal interview is actually
designed to weed out “undesirables,” such as *burakumin* and Koreans. The people who
pass then attend classes at the Legal Training and Research Institute and are admitted to
the bar.

An examination system with a 2 per cent pass rate leaves little margin for error, and a
candidate who does not write Japanese perfectly will never pass. Only one American has
passed the Japanese Bar Exam: an individual who was born and raised in Japan with a
Japanese mother and an American father.

Greater access for American lawyers in Japan has been a recurrent theme in the endless
trade negotiations between Japan and the U.S. The Nichibenren (Federation of Japanese
Bar Associations) has grudgingly allowed foreign lawyers to apply for licenses
as *gaikokuho jimu bengoshi* (foreign law office attorneys), or *gaiben*. This exception
allows foreign lawyers to render advice on the law of their own country’s jurisdiction. Earlier, more draconian rules that restricted advice to the state where the lawyer was licensed have been relaxed. Still, the restrictions are endless. Gaiben cannot render advice on Japanese law, appear in court, petition ministries, hire Japanese bengoshi, or form partnerships with bengoshi. Japanese law firms, by contrast, can and do hire American lawyers and provide one-stop shopping for clients with multinational problems.

Recent amendments to the Lawyer’s Law (bengoshi-ho) allow Japanese and foreign lawyers to form joint enterprises and to share the profits therefrom. The French firm of Gides, Loyrette & Nouel recently announced such a tie-up with a Japanese firm, and the Japanese firm of TMI—a rising star on the Tokyo legal horizon—is also contemplating such an affiliation. However, this “concession” is still a long way from a true partnership. The cumbersome procedures require the Japanese and foreign lawyers to keep separate books for the joint enterprise and for their own independent activities. Nearly all of the American law firms that have opened Tokyo offices have lost money.

Even this limited access has sparked resentment in Japan. Turf-conscious bengoshi have whipped up opposition to litigation-mad foreigners spreading their poison in harmonious Japan. One prominent member of the Japanese legal community compared American lawyers entering Japan to Saddam Hussein invading Kuwait. This bengoshi apparently saw no contradiction in his firm’s decision to open an office in London.

The Nichibenren and the Japanese business community are split on the issue of foreign legal access. Shogai bengoshi (international lawyers) are loathe to relinquish control of their lucrative monopoly. However, a survey of Japanese business leaders conducted by the Nihon Keizai Shimbun revealed strong support for allowing foreign lawyers greater access. This would allow Japanese companies to secure better American legal advice on their home turf. Now they must rely on the spotty expertise of Japanese law firms or the tiny outposts of large foreign law firms, which are often little more than sales offices.

How to Level the Playing-Field?

American trade negotiators have fumbled chances to further open the Japanese legal market. In 1994, chief U.S. GATT negotiator John Schmidt brokered a last-minute compromise that allowed the restriction on forming partnerships with Japanese lawyers to remain intact. Schmidt’s former law firm, Skadden, Arps, Slate, Meagher and Flom, has a large roster of Japanese clients and one of the largest presences in Tokyo of any foreign law firm. Some American lawyers suspected that Schmidt was more diligent about representing Skadden, Arps than the U.S.

Pressure also seems not to be forthcoming from higher up in the U.S. government, where top people are hardly setting a good example when deciding whether to help the U.S. or their own bank accounts. Secretary of State Warren Christopher was instrumental, as managing partner of California’s giant law firm O’Gelveny & Myers, in formulating that firm’s policy to attract Japanese clients. Commerce Secretary Ron Brown was the principal lobbyist for Japan Air Lines and represented twenty-one Japanese electronics companies.
Former U.S. Trade Representatives Carla Hills, Clayton Yeutter and Robert Strauss have been severely criticized for energetically seeking Japanese clients after they left office. The way the game is being played now, demanding greater access to the Japanese legal market will benefit Japanese interests more than American interests. The relatively few American lawyers with Japanese expertise are interested in representing the Japanese, not Americans.

Representing both sides is usually not possible. The legal world is already bifurcated between plaintiffs and defendants, debtors and creditors, labor and management. Firms are also finding they must specialize and not cross over the line to represent clients with conflicting priorities. A few years ago I received a call from one of the largest Chicago law firms. The firm was interested in hiring a Japanese-speaking lawyer and wanted me to come in for an interview. I was not too thrilled with the idea, but I made the appointment and soon was meeting with the managing partner. He began the discussion with the comment: “We understand that you have had some success developing the American side of these transactions. I want you to know, we represent the Japanese here.” It was a short meeting. Some months later, I was chatting with a prominent antitrust expert. He was spinning a war story of how he was helping his Japanese client put the screws to a smaller American company. I asked him why he wanted to help the Japanese. Didn’t he want to help his own country? He thought for a second and said, “I suppose it’s a little crass, Tom, but think of the money you could be making!”

Most of the lawyers voicing such opinions have a dim view of Japan’s mercantilist policies. They know first-hand of Japanese policies to keep foreigners in general and Americans in particular out of large segments of the Japanese economy. In principle, they would like to see this changed, but it is someone else’s problem. Voicing concerns over Japanese protectionism is hardly the way to build a book of Japanese business. Bringing home big game like Mitsubishi is a way to shine at a partnership meeting or to get into the meeting in the first place.

Access to the Japanese legal market is sure to rear its ugly head in future trade negotiations. Pressure from the American side could yield concessions, particularly if friendly fire from the Keidanren is properly aimed at the negotiating table. Captains of Japanese industry would love to bypass the Japanese bar and bring in the A-team from Skadden and other top firms, who have experience in helping the Japanese in the U.S. market and are itching for more. But that will just help the Japanese in the U.S. It will only increase, not decrease, the U.S. trade deficit with Japan.

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