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An Analysis of the Japanese American Dispute over Foreign Legal Consultants: The Lawyer Model Approach

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I Introduction

> "I would like to write the history of this prison, with all the political investment of the body that it gathers together in its closed architecture. Why? Simply because I am interested in the past? No, if one means by that writing a history of the past in terms of the present. Yes, if one means writing the history of the present."[1]

One may wonder what can be gained from yet another analysis of the Japanese-American dispute over foreign legal consultants (FLC). Little can be gained from an examination of the nuts and bolts of the dispute, since there are already many papers that give an accurate and detailed description of the legal questions and problems in relation to the FLC dispute. However, previous analysis of the FLC dispute is limited to strict legal, economic and anthropologic analysis and there needs to be a multi-disciplinary approach in order to bring out the ideological and historical context of the dispute.

My goal in writing this paper is to move away from advocacy and structure a historical narrative or "story"[2]. However, I did not have the resources to carry out the extensive primary source research and interviews that would be necessary to fully bring out such a narrative. Instead, I hope to create a framework for future analysis by reviewing the materials both in Japanese and English concerning the issue. Specifically, I wanted to bring to light the hidden agenda approach that seeks to look behind the statements of the various parties for secret motives and the apologetic approach that can be seen as a reaction to the hidden agenda approach.

My analysis of the FLC dispute revolves around three distinct models of the legal profession. The first model is the public role lawyer model. In this model, the lawyer serves a public role. Radical lawyers see this role as political and professional lawyers see this role as apolitical. In the professional lawyer's view, the lawyer is an officer of the court and has to maintain a demeanor, level of scholarship and dignity in keeping with this role. In the business professionalism model, the lawyer maintains the view of herself as a professional while admitting that she serves private interests, not the public. The "business servant" or big firm lawyer serves big business and uses the professional model to achieve elite status. In contrast, the lawyer-entrepreneur opposes the professional model's restrictions on innovation, but accepts that the idealism of the professional model is still important. Finally, market economists see the lawyer as a legal service provider and any discussion of professionalism as a rationalization of anti-competitive behavior.

The term "FLC dispute" is unfortunate, because it suggests that the question of the position of foreign lawyers in Japan has been a constant irritant in Japanese American relations. In reality, the position of foreign lawyers in Japan was not an issue for either side until the 1970's. In this paper, this period is called "Stage One: No Issue". Even in the 1970's, the American and Japanese governments were only slightly concerned about the issue. This period is covered in "Stage Two: The Foreign Lawyer Issue".

The starting point of the dispute is natu-

1 M. Foucault (trans. Alan Sheridan), *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1995) at 31.

2 I was greatly influenced by the works of Richard Delago in deciding to create a narrative of the FLC dispute.

rally a matter of much controversy, because the definition of the starting point is a declaration of ideology[3]. I would assert that the Japanese American dispute over FLCs began when the United States Trade Representative (USTR) listed Japan's ban on foreign lawyers establishing offices in Japan as a non-tariff trade barrier in 1982. However, this declaration does not trivialize the background events before 1982, but rather stresses that forces converged in the early 1980's to make the FLC situation in Japan a major point of contention between Japan and the U.S.. This history is examined in "Stage Three: The Dispute". The dispute was resolved with the Gaiben Law[4] that allowed foreign lawyers to establish offices with certain conditions and restrictions. To say that the dispute was resolved does not mean that there were not any disagreements left. There were and are many disagreements left, but the course towards liberalization was set with Gaiben Law, so the debate or discussion was and is only about scope. This debate concerning liberalization is covered in "Stage Four: Frustration, Reconciliation and Final Resolution." The American side became quite frustrated with the pace of liberalization in the 1990's. However, on the Japanese side, for various reasons, there was an acceptance of the need to liberalize the FLC regime and there were many amendments to the Gaiben Law. However, the issue of association, the ability to have partnership with and employ other lawyers, remains and the process by which this issue will be resolved is unclear.

II Myths of the Hidden Agenda

The search for the hidden agenda is an approach filled with difficulty, since there is no objective method to determine the truth of such assertions. In this way, the hidden agenda approach is different from a structuralist approach. The structuralist approach asserts that the individual and her beliefs or motivation are not important compared to the structure that dictates her views. The hidden agenda approach makes assertions about the secret or unspoken motivations of the participants in a dispute. In the end, the evaluation of the assertions of the hidden agenda approach is based on the reader's personal experience and since with the FLC dispute most of the audience for the material has little experience with Japan much less Japanese lawyers, the hidden agenda is an appeal to the prejudices or images of the reader.

The result is vilification and confrontation. One side is a paragon of good and the opposite side is cynically pursuing self-interest or "self-aggrandizing regulation"[5]. The opposing side becomes the "other" or the repository of the completely opposite traits. In this situation, compromise is not acceptable, because one cannot compromise with an opponent acting in such bad faith. This vilification is the main cause of the heated rhetoric. The myths of the hidden agenda will be examined below. The term myth is used here to denote that although these explanations cannot be readily proved or

3 H. Ooms, *Tokugawa Ideology: Early Constructs 1570-1680* (Ann Arbor, Michigan, Center for Japanese Studies: 1998) at 12.

4 Gaikoku Bengoshi ni yoru Horitsujimu no Toriatsukai ni Kansuru Tokubetsu Sochi Ho (Act Providing Special Measures for Handling Legal Business by Foreign Lawyers) 1985 Law No. 66 hereinafter called the "Gaiben Law".

5 D. Hood, "Exclusivity and the Japanese Bar: Ethics or Self-Interest" (1997) 6 Pacific Rim Law and Policy 199 at 214.

disproved, they have taken on an importance in the debate and have become touchstones for those commenting on the FLC dispute.

A. Xenophobia

Some analysis of the FLC dispute gives Japanese xenophobia as one of the causes of the dispute[6]. Some of this rhetoric is coached in academic terms:

> "The Japanese view all foreigners, but especially westerners, to be, unlike them in many respects. Thus, foreigners are only very begrudgingly accepted into institutions of Japanese society and only extremely rarely into more intimate groups. It is not surprising, then, that the Japanese lawyers are extremely hostile to the idea of foreigners entering their group."[7]

Other rhetoric is quite blunt:

> "... The campaign against free relationships with foreign lawyers has its roots in the wider context of a deep-seated tradition of xenophobia in Japan, a fear of cultural contamination reflected, in this case, by a need to protect the pure blood of the Japanese legal profession against defilement by mixture with the foreign barbarians of old... To those of us who consider ourselves committed internationalists, the continued existence of a Japanese policy of isolating foreign lawyers, especially in what is supposed to be an enlightened profession, is simply abhorrent."[8]

In either case, the message is that the Japanese have an irrational dislike for foreigners that prevented and still prevents them from resolving the FLC dispute in a rational manner.

Since the main opponent of the liberalization of the regime for foreign lawyers is the Japanese Federation of Bar Associations[9], the implication is that most bengoshi[10] hold this xenophobic view of foreigners. This suggestion runs contrary to the work of bengoshi in advancing social causes such as environmental protection, freedom from sexual harassment, and the protection of civil and political rights[11] including the rights of foreigners in Japan[12]. One would expect that the bengoshi would have more progressive views and attitudes than the average Japanese person[13]. Ivan Hall does not see the holding of progressive views and the distrust of foreigners as being incongruous:

> "There has always been among Japan's acknowledged experts on the West a certain defensiveness toward real flesh-and-blood Westerners who threaten to enter the Japanese system. The single most striking difference between the two systems is, indeed, that in America we don't find the entire U.S. legal professional massively engaged in trying to keep non-Americans out."[14]

6 I. Hall, *Cartels of the Mind* (New York: W. W. Norton, 1998) at 36; L. Ciano, "Japan's Changes to Its Foreign Lawyer Law: Black Ships Revisited or Did Someone Miss the Boat?" (1994) 27 Hosei Riron 1 at 29.

7 C.Sheehey, "Japan's New Foreign Lawyer Law"(1987) Law and Policy International Business 361 at 378.

8 *Hall Supra.* note 6 at 36.

9 Nihon Bengoshi Rengokai or Nichibenren hereinafter called the JFBA.

10 Japanese lawyers will be referred to as "bengoshi" in order to avoid confusion, since there are several professions: shiho shoshi (judicial scrivener), gyosei shoshi(administrative scrivener), benrishi (patent attorney) zeirishi (tax agent), kosho nin (notaries) and kigyo homu in (in-house counsel), that act as lawyers in the American sense of the term.

11 F. Upham, *Law and Social Change in Postwar Japan* (Harvard: Harvard University Press, 1987).

12 K. Azusawa, "Gaikokujin no jinken to Asu no Bengoshi" (The rights of Foreigners and Tomorrow's Lawyer) in K. Miyakawa, and M. Koyama, (eds) *Henkaku no Naka no Bengoshi - Sono rinen to Jissen* (The Lawyer in the Process of Change - The Ideal and Practice) (Tokyo: Yuhaikaku, 1993).

13 "Progressive-reform lawyers dominate the national Federation of Bar Associations as well as many local bar associations". J. Haley, *The Spirit of Japanese Law* (Athens: The University of Georgia Press, 1998) at 51.

14 *Hall Supra.* note 6 at 36.

Statements such as Hall's show that the xenophobia argument is merely an *ad hominem* attack against the bengoshi's position.

The failure of the proponents of the xenophobia argument to compare the history of the Japanese bar and American bar in regards to the receptiveness to foreigners further shows the *ad hominem* nature of their argument. The requirement of citizenship for lawyers in the U.S. began in the 1900's as a reaction against immigrants from southern and eastern Europe, especially Jews, and by 1946 all forty-eight states and the District of Columbia had a ban on non-citizen lawyers[15] and for the most part this ban remained in place until In *Re Griffith*[16] in 1973. Moreover, until the 1974 New York Foreign Legal Consultant Law, foreign qualified lawyers were essentially blocked from pursuing any type of legal practice in the U.S[17]. This history gives the American lawyer little moral high ground on the issue of xenophobia.

The treatment of foreign lawyers in Japan was mixed, but for the most part more liberal than the American treatment of foreign lawyers. Foreign lawyers were allowed to represent foreigners and handle international transactions under the Bengoshi Law of 1893, however, this right was effectively lost with the Bengoshi Law of 1933[18]. In 1949, under the Japanese Practicing Attorneys Act, citizenship requirements were removed[19] and foreign lawyers were also allowed to practice as full members if they showed an adequate understanding of Japanese law or as quasi-members (junkaiin) restricted to advising on foreign law and representing foreigners. Under the 1953 Friendship, Commerce and Navigation Treaty (FCN Treaty) Art.VIII para.2, the U.S. had an opportunity to reciprocate the liberal Japanese law and provide Japanese citizens with an opportunity to become lawyers in the U.S., however, the treaty was ratified with a reservation to this clause. Due to this reservation and a desire of the Japanese to assert their independence the section allowing the practice of foreign lawyers was repealed with 1955 Law No. 155[20]. However, one can readily see that the question of which country is xenophobic cannot be so easily resolved[21].

15 R. Abel, *American Lawyers* (Oxford: Oxford University Press: 1989) at 69.

16 In re Griffith 413 U.S. 717 (1973); In 1964, the states of Tennesse and Virgina allowed non-citizens to become lawyers. K. Ohira, and G. Neef Steven, "Alien Lawyers in the United States and Japan- A Comparative Study" (1964) 39 Washington Law Review 412 at 415.

17 J. Ramseyer, "Lawyers, Foreign Lawyers, and Lawyer-Substitutes: The Market for Regulation in Japan" (1986) 27 Harvard International Law Journal 499 at 505.

18 *Ciano Supra.* note 6 at 5.

19 The 1949 Law's removal of the citizenship requirement was never amended, however, in 1955, the Supreme Court made citizenship a grounds for denying entry to the Law Training and Research Institute (LRTI), since only graduates of this institute can become lawyers the Supreme Court essentially prevented foreigners from becoming bengoshi. This grounds for denial was effectively removed in 1977. T. Kosugi, "Regulation of Practice by Foreign Lawyers"(1979) 27 The American Journal of Comparative Law 678 at 690.

20 K. Tadaki, "The Gaikoho Jimu Bengoshi System: Circumstances of Acceptance and Scope of Practice" (1988) 21 Law in Japan at 123.

21 *Ramseyer, Supra.* note 17 at 505 "Notwithstanding the American rhetoric of free trade, dearly held principles are not at issue."

B. JFBA as Cartel

Another name-calling tactic is the constant references to the JFBA as a cartel or monopoly. Mark Ramseyer, Law and Economics academic, made referring to the JFBA as a monopoly or cartel popular with his article "Lawyers, Foreign Lawyers, and Lawyer-Substitutes: The Market for Regulation in Japan" The term has since been used in numerous articles and one Japanese commentator has even written a book about the subject[22]. The problem with the use of "cartel" or "monopoly" is that the commentators fail to indicate that the "monopoly" of the JFBA is a publicly sanctioned legal cartel. Although the audience for such articles is sophisticated enough to make the distinction, the mental association to the collusion and pressure tactics of illegal cartels remains.

The same commentators do not use the terms cartel or monopoly to describe the U.S. state bars. Of course, America's State bars no longer have the internal restrictions, such as advertising bans and minimum fee schedules, since such restrictions were found unconstitutional, however, the U.S. bars still effectively restrict the number of lawyers and hence competition. Undeniably, the Japanese bar's requirements for entry are far more draconian[23], but the U.S. requirements are also unnecessarily high, when compared to the routine tasks that most lawyers perform[24]. Moreover, foreign legal consultant laws still regulate the supply of advice on foreign and international law, although economists would argue that only minimal regulation is necessary in this field[25]. Finally, although superficially bengoshi appear to control or monopolize legal services, they are actually in competition with a large number of legal professionals and non-legal processes and in this sense a claim could be made that American lawyers enjoy a better monopoly than bengoshi[26]. Still the pejorative of cartel or monopoly is almost never used to describe the U.S. State bars.

C. Shogaibengoshi

Another hidden agenda myth is that a small cabal of shogaibengoshi (lawyers specializing in international transactions) has fought to prevent the entry of the FLC. The start of this myth was the Rand Report statement that shogaibengoshi had four times the income of regular bengoshi[27]. The potential for income analysis was then picked up by Mark Ramseyer:

> "And what of the American international lawyers? They are, after all, one of the primary stimuli to change in the industry. The Japanese Bar's opposition to their activities amounts to little more than an unprincipled attempt to protect what little potential for monopoly rents remains in the industry"[28]

Richard Kanter, an American lawyer who has

22 M. Shingo "Bengoshi Karuteru: Girudo-ka suru 'Zaiya' Hoso no Jitsuzo" (Lawyers' Cartel: The True Image of Our "Non-Establishment" Legal Profession that Is Becoming a Guild) (Tokyo: Shinzansha Shuppan, 1995).

23 The pass rate for admission to the Legal Research and Training Institute, graduation from which is necessary to become a bengoshi, is now about 3 percent.

24 *American Lawyers Supra.* note 15 at 21-23.

25 R. Abel, "Transnational Law Practice" (1994) 44 Case Western Reserve Law Review 737 at 751.

26 S. Nishimura, "Kokusai Horitsu Jimu to Bengoshi no yaku wari" (International Law Offices and the Role of Bengoshi) No.1030 Juristo 114 at 118-119; E. Tsukahara, "Jiyu Kyoso no Naka no Bengoshi-zo to 'Minshu no Bengoshi'" "'The People's Lawyers' and the Image of Bengoshi in the Era of Free Competition" in *Atarashii Seiki e no Bengoshi-zo* (The Image of the Bengoshi in the New Century) (Tokyo, Yuihikaku, 1997) at 53-54.

27 A. Alexander and H. Tan, H, "Case Studies for U.S. Service Trade in Japan" Rand Note N-2169 (1984) at 52-53.

28 *Ramseyer, Supra.* note 17 at 539.

written extensively about the FLC issue, also stated, "While the basis of bengoshi opposition is in the final analysis economic, it is expressed primarily in cultural terms"[29]. The gauntlet was thrown down for an economic analysis of the incomes of shogaibengoshi and the effect of their incomes on the foreign lawyer issue.

The Rand Corporation took up this gauntlet with the publication of "Entry Restriction and Japanese Lawyers' Incomes in International Legal Practice"[30] and stated, "In summary, clear economic motives exist for those already in international practice to restrict further entry by foreign lawyers." This economic evidence then convinced some commentators that shogaibengoshi were responsible for the resistance against FLC[31].

However, if even one accepted the Law and Economic premise that non-economic based explanations are primarily "rhetoric and legitimization"[32], the problem of how a small number of shogaibengoshi could so easily control the JFBA remained. Susan Moffat, a Kyodo News Service reporter, provided the clue to how shogaibengoshi might control the issue:"The majority of Japanese lawyers, who are involved in purely domestic practice, have little interest in the dispute."[33] This opinion was then extrapolated to confirm the myth that shogaibengoshi were one of the main causes of the dispute in several subsequent law review articles and comments:

> "It is widely believed that the JFBA's previously strict stance regarding foreign lawyers had been maintained out of deference to the economic motives of a group of some 400 Japanese attorneys who handle international business transactions. The remaining 97% of Japanese lawyers were *ambivalent* regarding whether foreign lawyers should be allowed to practice in Japan"[34] (Italics added)

The change from "little interest" to "ambivalent" is a careless semantic error. The average person may have little interest in human rights, but this lack of interest does not mean the average person is ambivalent about human rights. However, the change from "little interest" to "ambivalent" opened up the gates for more articles[35] and the myth of the shogaibengoshi as the source of the dispute was solidified.

The attraction of the myth of the shogaibengoshi is its simplicity and this simplicity is also the problem with the myth. The story presented is clear-cut:"On the Japanese side, the strategic considerations were simple: Japanese international lawyers earn high incomes and sought to exclude potential competi-

29 R. Kanter, "The Japan-United States Treaty of Friendship, Commerce and Navigation - Lawyers as Treaty Traders" (1986) 8 University of Hawaii Law Review 339 at 351.

30 A. Alexander and H. Tan, "Entry Restrictions and Japanese Lawyers' Incomes in International Legal Practice" Rand Note R-3498-SSRC／RC 28 (1987).

31 S. Kigawa, "Gaikoku Bengoshi Ho, Foreign Lawyers In Japan: The Dynamics Behind Law 66" (1989) 62 Southern California Law Review 1489 at 1514: M. Young, "Foreign Lawyers in Japan: A Case Study in Transnational Dispute Resolution and Marginal Reform" 21 Law in Japan 84 at 88.

32 *Ramseyer Supra* note 17 at 537.

33 S. Moffat, "American Lawyers in Japan: Still Waiting in the Genkan" Journal of the American Chamber of Commerce in Japan April, 1985.

34 Finn "Foreign Lawyers: Regulation of Foreign Lawyers" (1987) 28 Harvard International Law Journal 123 at 126; R. MacMullin, "Foreign Attorneys in Japan: Past Policies, The New Special Measure Law and Future Expectation"(1988) 4 Florida International Law Journal 51 at 74.

35 C. Kim and S. Siemer, "Foreign Lawyers in Japan and the United States" (1992) 20 The Korean Journal of Comparative Law 67 at 81; A. Pardieck, "Foreign Legal Consultants - The Changing Role of the Lawyer in a Global Economy" (1996) Indiana Journal of Global Legal Studies.
http://www.law.indiana.edu/glsj/vol3/no2/pardieck.html.

tors."[36] However, in the desire to have a simple and logical explanation many factors are left unexamined. The main problem is how did such a small number of shogaibengoshi dominate the debate within the JFBA on the subject. The reality was that they could not and they did not control the JFBA's policy on foreign lawyers:

> "Unfortunately, JFBA does not represent a single unified opinion. JFBA consists of regional bar associations, each having an equal voice on important decisions of the JFBA. This structure makes the solution of the present foreign lawyers issue very difficult because regional lawyers who are not actually affected by the activities of Foreign Law Solicitors are numerically dominant. Since the JFBA is not supervised or controlled by Supreme Court or the Ministry of Justice there is no outside moderating influence over the process."[37]

Notably, Glen Fukushima, a key U.S. government negotiator in the negotiations leading up to the passage of the Gaiben Law, does not mention the pressure of shogaibengoshi as a significant factor in the negotiations[38]. Although, shogaibengoshi did express reservations about their ability to face direct competition from foreign lawyers and the need for some protection to prepare to face such competition[39], there is no evidence that shogaibengoshi, as a group, were completely opposed to any entry by foreign lawyers as suggested by the previously mentioned commentators.

Another reason that the shogaibengoshi were not the main cause of the FLC dispute is that shogaibengoshi are more sophisticated in their understanding of business than other bengoshi. The shogaibengoshi tend to be "business lawyers" and see themselves as serving their clients rather than fulfilling a public role[40]. Therefore, they are more accepting of economic and business analysis, unlike most bengoshi, who are hostile to such analysis[41]. The acceptance of such analysis has two results. First, shogaibengoshi are more likely to accept that liberalization is unavoidable in the long term:

> "'Companies are starting to meet their legal needs without lawyers by sending their own legal department employees abroad to study. And the number of litigations overall in Japan is decreasing. The role of lawyers in Japan has to change- it's a matter of survival' said Takeo Kosugi, a Japanese lawyer in international practice"[42]

In addition, shogaibengoshi also face increasing supranational competition due to technological advancements. Japanese companies can easily consult with lawyers in the U.S., U.K. or other foreign countries and foreign law offices in Japan can use their home offices to do the bulk of their work[43]. Second, they tend to accept

36 J. Ramseyer, and M. Nakazato, *Japanese Law: An Economic Approach* (Chicago: The University of Chicago Press (1999)) at 16.

37 T. Kosugi, "Liberalization of the Activities of Gaikokuho Jimubengoshi (Foreign Law Solicitors) in Japan" (1992) 35 The Japanese Annual of International Law 94 at 103.

38 G. Fukushima, "The Liberalization of Legal Services in Japan: A U.S. Government Negotiator's Perspective" (1988) 21 Law in Japan 5 at 7-10; "Chapter 2 Background" in *Practice by Foreign Lawyers in Japan* (American Bar Association 1989).

39 *Kosugi Supra*. note 37 at 109; M. Shimatani, "Gaikoku Bengoshi Mondai" (Foreign Lawyers Problem) 35. 2 Jiyu to Seigi 20 at 27. *Ciano Supra*. note 6 at 28; S. Ota and K.Rokumoto "Issues of the Lawyer Population-Japan" (1993) 25 Case W. Res. J. Int'l L. 315 at 330.

40 R. Hamano, "Japanese Lawyers in Transition" (1998) 49 Rikkyo Hougaku 325 at 323; *Kosugi Supra* note 37 at 102-103.

41 *Ibid*. 103; S. Ota, "Law and Economics in Japan: Hatching Stage" 11 International Review of Law and Economics (1991) 301 at 306 "...many lawyers think law has nothing to do with economics".

42 *Moffat Supra*. note 33 at 13.

43 *Transnational Law Practice Supra*. note 25 at 761-767.

the view that FLCs will increase their business due to increased overall international transactions and referrals of clients from FLCs[44].

Finally, the belief that shogaibengoshi were the main cause of the FLC dispute overlooks the reality that bengoshi and Japanese legal academics see the FLC issue as one issue among many issues facing bengoshi. First, the FLC issue is seen as affecting issues of competition and deregulation[45], such as lawyer population, the entrance examination for the Legal Research and Training Institution (LRTI), advertising and fee schedules. Second, the FLC issue is seen as impacting on issues of the structure of the legal profession, such as firm size, specialization, the role of lawyers in society and professional identity[46]. Finally, bengoshi and legal academics speculate that the FLC will for better or worse affect the growing "legalization" of Japanese legal culture[47]. Given this environment, although most bengoshi have not been immediately affected by the FLCs, they are certainly not ambivalent.

D. Foreign Lawyers and the Trade Deficit

The connection between the trade deficit and the FLC issue may not be readily apparent, but the U.S's trade deficit with Japan started the process of resolving the issue of foreign lawyers in Japan. When the USTR initially listed barriers to American lawyers as a non-tariff barrier in 1982, the concept of trade in services was still quite novel[48], so part of the promotion of the concept was the idea that lawyers could reduce the deficit not only by selling their services, but also in acting as "trade facilitators" who could provide access to the Japanese market for American business[49]. With the recovery of the American economy since early nineties, interest in the trade facilitator concept has waned, but there are still some commentator supporting this role for the FLC.

The trade facilitator concept is part of the hidden agenda approach because with in the trade facilitator concept is the unspoken idea that the Japanese government or Japan Inc. keeps out foreign lawyers to maintain the trade deficit. Although this idea is not mentioned in the law review and journal articles, writings for wide public consumption put forward the idea in very clear terms:

> "Most of the lawyers voicing such opinion 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"[50]

Aside from keeping Americans out of the

44 K. Rokumoto, "Nihon no bengoshi gyomu to kokusaika" 1036 Juristo 87 at 90-91: *Ciano Supra.* note 6 at 28.

45 R. Hamano "Gaikokuho Jimu Bengoshi Seido no Donyu to sono inpakuto" (Japan's New Foreign Lawyer Law and Its Impact) (1989) 41 Ho shakaigaku 168 at 169; *Rokumoto Supra* note 44 at 90.

46 *Hamano Supra.* note 45 at 169-170.

47 *Hamano Supra* note 45 at 171, *Ciano Supra.* note 6 at 177-176, A. Kawamura, "WTO Taisei Ka Ni Okeru Bengoshi Gyo no Hoteki Wakigumi" (The Legal Framework of the Legal Profession under the WTO System) in *Atarashii Seiki e no Bengoshi-zo* (The Image of the Bengoshi in the New Century) (Tokyo: Yuhikai, 1997) at 94-95.

48 The concept of exporting lawyers met with ridicule, since lawyers were thought to be part of the "American disease".
"...some of America's best humorists, noting that Japan supposedly has far fewer lawyers than the United States, have mined the dispute, suggesting that shipping large numbers of American lawyers to Japan will redress the trade balance, ruin the Japanese economy..." C. O'Keefe, "Legal Education in Japan" (1993) 72 Oregon Law Review 1009 at 1016.

49 *Kanter Supra.* note 29 at 340.

Japanese market, there is also the belief that the Gaiben Law gives the Japanese an unfair advantage in penetrating the U.S. market:

> "That opened the limited (though very lucrative) business of assisting Japanese firms with their penetration of the U.S. economy through acquisitions, mergers and other investments and by defending them in American courts against accusations of dumping or discriminatory hiring policies."[51]

These views are both flawed. First, the idea that lawyers could change the structural elements that perpetuate the trade deficit is quite questionable. Second, Japanese would have still "penetrated" the U.S. economy even without FLCs by using domestic American lawyers, although their cost would have been slightly higher. Issues of investment and trade are really only background factors.

III Apologetics

The vilification of the bengoshi in the hidden agenda approach created an "apologetics approach"[52]. The term "apologetics" here simply means a desire to give answer to the claims against the bengoshi and should not be misunderstood as meaning "foreign apologists" as referred to in Hall's *Cartels of the Mind*. The authors of the articles obviously did not write their articles simply to curry favor with the Japanese. The authors of the articles probably wrote them out of a desire to create some balance and possibly a desire to write a novel or distinctive analysis.

The apologetic approach relies heavily on Sherill Leonard's "Attorney Ethics and the Size of the Japanese Bar". Her article avoids looking for the hidden agenda behind the bengoshi's desire to restrict their numbers and instead examines the historical and social roots of this desire. In doing so, she uncovers many of the key reasons behind the exclusivity of the JBFA. These key reasons are a desire for and insecurity about social status, the desire for community and the desire to maintain independence. These views are then reinforced through education and socialization. The main problem with her analysis and the subsequent analysis relying on her work is that too much emphasis is put on history and Japanese culture. Although the Japanese and the bengoshi are not to "blame", they are still essentially the cause of the FLC problem. The infusion of the cultural relativism of the anthropological approach cannot cover up the fact that there is a struggle between different sets of values or ideologies. When one sees that the American and Japanese legal professions have much in common and the ideological struggle that took place in America is now taking place in Japan then the true value of examining the FLC dispute is revealed.

IV Analysis of Professional Groups

The existence of professional groups is a perplexing problem. On the surface, practitioners of any profession usually state two reasons for the existence of their professional group. One reason is the aspiration to lofty ideals of public service. The professional

50 T. Flannigan, "Opening up to American Lawyers" 2 no. 9 JPRI Critique 1 at 2. http://www.jpri.org/jpri/public/crit2.9html

51 *Hall Supra.* note 6 at 25.

52 The key "apologetics" articles are: L. Coulter, "Japan's Gaiben Law: Economic Protectionism or Cultural Perfectionism" (1995) 17 Houston Journal of International Law 431; G. Dal Pont, "The Social Status of the Legal Professions in Japan and the United States: Structural and Cultural Analysis" (1995) 72 University of Detroit Mercy Law Review 291; S. Leonard, "Attorney Ethics and the Size of the Japanese Bar" (1992) 39 Japan Quarterly 86.

believes that they have a public trust to use their specialized skill and knowledge for the good of humanity. However, such claims to lofty idealism are easily criticized and are hard to maintain even within the profession, since even many professionals are quite open about their desire for prestige and high incomes.

The second reason is public protection.The idea that professional groups exist for public or consumer protection is more pragmatic and more widely accepted. The public at large is at a disadvantage in assessing the value of the skills offered by professionals and the professional group offers them the advantage of finding skilled practitioners without difficulty. Moreover, the public is protected from incompetent or fraudulent practitioners who might easily cause much damage[53]. This public protection rationale is also widely criticized. The requirements of the professional group are usually more than the requirements of the actual job. For example, in most U.S. states, lawyers are required to go to law school for 3 years, which usually requires at least two years of undergraduate university, and they must also pass a bar examination on a full range of legal topics. However, most lawyers' practices are either specialized into one area or involve routine processes or transactions. As well, many consumers, such as large corporations, are not at a disadvantage in assessing skill, yet these consumers are subjected to the same controls. Finally, the protection of the public is limited, especially in the case of lawyers. The monopoly will result in higher prices which in turn means that poorer consumers will left be with the choice of not having any service, or using the services of "black market" operators, or "do it yourself" books[54].

Obviously, a superficial view based on the profession's stated official *raison d'être*, which often is called the functionalist approach[55], sheds little light on the role of professional groups. However, as stated previously, the hidden agenda approach is full of difficulties. Thus, in the following examination of the different models for lawyers, I will primarily use Richard Abel's pragmatic mixture of Weberian, Durkhiem's structural functionalism and Marxist class analysis[56]. There are four functions of the professional organization that are relevant to the FLC dispute. First, the professional organization must create and sell a commodity. The creation of the commodity involves establishing and controlling a body of knowledge[57]. Also, the producer of the commodity must be able to convince consumers not to produce the commodity themselves or to use other producers. This control requires some legitimating factor. For lawyers, the legitimating factors are tradition and specialized knowledge. However, in the case of America and especially Japan, tradition does not provide much authority. Bengoshi do have an advantage with specialized knowledge since the vocabulary of law is largely outside the vocabulary of ordinary Japanese people, how-

53 Nelson, Robert and D. Trubek, "Arenas of Professionalism" in *Lawyers' Ideals/Lawyers' Practices* (Ithaca: Cornell University, 1992).

54 *Ramseyer Supra.* note 17 at 511.

55 The functionalist analysis essentially follows the work of Emile Durkheim. However, under Talcott Parsons, the approach became reduced to "little more than professional apologetics". *American Lawyers Supra* note 15 at 16.

56 *Ibid.* Chapter 2.

57 E. Freidson and A. Abbot "New Problems and New Paradigms in Studies of the Legal Profession" in *Lawyers' Ideals/Lawyers' Practices* (Ithaca: Cornell University, 1992) at 19.

ever, access to non-professional legal education is much wider than the U.S. In the end, lawyers must rely on law to maintain control i.e. punishment for unauthorized practice and exclusive access to the courts.

The second key function of the professional organizations is "social closure". The professions seek to limit the number of practitioners in order to facilitate higher incomes and social status. In Japan, the JFBA negotiates with the Ministry of Justice to decide the number of entrants to the LRTI. American lawyers have never had the ability to set numerical targets, but the educational requirements and bar exams have limited the number of producers.

Lawyers give four rationales for artificially raising their incomes. First, they claim that higher incomes will attract higher quality persons and improve the legal practice. Second, they claim that income insecurity will lead to aggressive and unethical practices that will damage the image of the profession. Third, they claim that they will lose independence in having to rely on a few clients. Finally, they claim that they will not be able to take on human rights and other cases on behalf of the poor and oppressed without a secure income[58]. Both lawyers in Japan and the U.S. have mentioned these rationales at different times. However, since the rise of the consumer movement, American lawyers have stopped discussing the income raising effect of their professional groups. Bengoshi have also become reluctant to state such rationales for their numerical controls.

Raising social status is not as simple as raising incomes. However, the two are often combined, as one can see from the above rationales mentioned above. Restrictions on advertising and solicitation, and minimum fee schedules are designed to prevent aggressive or cut-rate lawyers, who are seen as damaging the dignity of the profession. These practices also restrict competition, and therefore, raise income. The lawyer associations in Japan and especially in the U.S. actively engage in advertising, lobbying and media campaigns to try to improve their image. In the end, factors of social status change quickly and are difficult to control. In the fifties, lawyers in America gained prestige from their association with big business, however, in the sixties and seventies, ties to big business were a drawback and lawyers' ties to fighting for consumers and oppressed groups gained them prestige. Such changes create the need for lawyers to recreate their image.

The third function that professional groups try to fulfill is the desire for independence. Many professionals have the idea that the professional should seek to advise and to not serve their clients. As Elihu Root, noted American jurist, stated, "About half the practice of decent lawyer consists in telling would-be clients that they are damned fools and should stop"[59] The idea is that a lawyer must put aside her own self-interest and her client's interests for the public interest. For this reason, some lawyers have asserted that the sole practitioner is the ideal model. There is always a tension between this desire for independence and the need for commercial success. Lawyers also seek to be independent from the government.

58 A. Kawamura, "Justice for All" *Japan Scope* Autumn 1994 at 69.

59 S. Linowitz, *The Betrayed Profession* (New York: Charles Scribner's Sons, 1994) at 4.

Both the U.S. and Japanese bar have had to struggle to get the power of self-regulation and they guard it jealously.

Finally, professional groups seek to give their members community and identity. Both in Japan and U.S., education and socialization are the means of creating community and identity. However, in both Japan and the U.S., lawyers tend to associate more closely with immediate peers than the profession at large[60]. In the U.S., especially, stratification in incomes, divisions in specialization and regionalism make cohesion difficult[61]. In Japan, the increase of business bengoshi and shogaibengoshi has caused a rift in an otherwise homogeneous bar. The increasing importance of subgroups within the legal profession will likely be a trend in both the U.S. and Japan.

V Lawyer Models

A. Public role lawyer

Since most people can readily see that the occupation of lawyer is a political institution, the public dimension of legislation and rules empowering lawyers is not surprising. The 1949 Lawyer Law of Japan states in Art.1 (1) that "The mission of a lawyer is to protect fundamental human rights and realize social justice"[62] The preamble to the American Bar Association Model Rules of Professional Conduct states:

> "A lawyer is an officer of the legal system, a representative of clients and a public citizen having special responsibility for the quality of justice..."[63]

The public role of the lawyer is a point of contention among lawyers and academics. Some lawyers quite bluntly reject the public role, but there are two models of lawyers where the public role is the main focus.

(1) Radical Lawyer

One type of lawyer model giving emphasis to the public role is the "radical lawyer". The radical lawyer fights for a public cause such as civil or political rights, environmental protection, labor standards, racial or sexual equality etc., but their key identifying feature is that they do not see the legal system as being legitimate[64]. They have the Critical Legal Studies view that there is no boundary between law and politics and that law is usually a reactionary force. In the early post-war period in Japan, this radical lawyer ideal was the model for the dominant *Zaiya* or "opposition camp". In both the U.S. and Japan, radical lawyers eventually diminish in number because the establishment in both Japan and the U.S. usually co-opts the issues of the radical lawyers. This tendency is especially apparent in the case, as for example with pollution, where there is widespread discontent[65]. Radical lawyers are also often censured or disbarred for their tactics or actions. In Japan, the JFBA had to apologize for the actions of radical lawyers in defending clients during the trials of the Japan-U.S. Mutual Security Treaty rioters[66]. Thus, being a radical lawyer is not for the faint of heart.

(2) Professional Model

A more conservative approach to the public role lawyer model is the "professional model". The professional model lawyer con-

60 *American Lawyers Supra.* note 15 at 37.
61 *Ibid.* at 10.
62 *Hall Supra.* note 6 at 30.
63 *American Lawyers Supra.* note 15 at 17.
64 A famous example of a radical lawyer is William Knustler see W. Knustler *My Life as a Radical Lawyer* (Secaucus, N.J.: Carol Pub., 1994).
65 *Upham Supra.* note 11.
66 *Leonard Supra.* note 52 at 89.

siders herself to be an officer of the court, therefore, she accepts the legal system as legitimate and works within it. The officer of the court concept arose due to the special powers given to the litigator in the common law system. However, the professional model asserts that all lawyers have this role, since they advise on law and if they had no loyalty to the courts, they could easily advise their clients to break the law[67]. In her role as officer of the court, the professional model lawyer stresses the need for independence from the client and from government:

> "Whatever the erosion of the officer-of-the-court role, the overwhelming proportion of the legal profession rejects both the denigrated role of the advocate and counselor that renders him a lackey to the client and the alien idea that he is an agent of government."[68]

Thus, the lawyer mediates between various interests, but remains a disinterested party.

The officer of the court idea has fallen out of favor in Anglo-American legal circles, because as Madame Justice McLachlin states:

> "While lawyers clearly play an important role in our society, it cannot be contended that the practice of law involves performing a state or government function...the role of lawyers may be distinguished from that of legislators, judges, civil servants and policemen. The practice of law is first and foremost a private profession."[69]

However, despite the rejection of the officer of the court model, many lawyers still support the ideal of lawyers as neutral mediators contained in the officer of the court model.

The professional lawyer is very concerned about the image of lawyers or the dignity of the profession, however, the actual substance of their practice is often quite far from their ideal. The professional model stresses scholarship and dedication to public service[70]. However, the professional model's public service is a chamber of commerce view of public service and only involves being conscientious[71] and occasionally doing some charitable or pro bono work, which will hopefully be well publicized[72]. Both in Japan and the U.S., the rural lawyer, as sole practitioner or in a small firm, is held as the romanticized ideal of the profession[73], however, most lawyers practice in large cities and many belong to large firms. Particularly, adherents of the professional model abhor the idea of commercialism:

> "'Lawyers today are held in lower esteem than many other professionals and members of the work force despite the noble service they provide.' Others have gone so far as to query whether the legal profession merits the title 'profession' as opposed to *merely a trade*"[74] (Italics added)

However, most lawyers receive the bulk of their income from and spend most of their time on commercial matters. These contradictions between ideal and practice cause widespread charges of hypocrisy from both inside and outside of the legal profession.

In practical terms, the professional model lawyer whole-heartedly embraces all the previ-

67 In *Re Griffiths* 413 US 717 at 732.

68 *Ibid.* at 732.

69 *Law Society of British Columbia* v. *Andrews* 56 D.L.R (4th) 1. In P. MacKlem (ed) *Canadian Constitutional Law* (Toronto: Emond Montgomery, 1994) Vol.II at 623.

70 K. Miyakawa, "Asu no Bengoshi" (Bengoshi of Tomorrow) in K. Miyakawa, and M. Koyama (eds) *Henkaku no Naka no Bengoshi—Sono Rinen to Jissen* (The Lawyer in the Process of Change—The Ideal and Practice) (Tokyo: Yuhaikaku, 1993) at 6.

71 *Linowitz Supra.* note 59 at 5.

72 *American Lawyers Supra.* note 15 at 139.

73 K. Yonemoto, "The Shimane Bar Association: All Twenty-One Members Strong" 24 Law in Japan 115.

74 *Dal Pont Supra.* note 52 at 293-294.

ously mentioned restrictions on the production of legal services. The professional model is attractive because it allows the lawyer to pursue economic success, but at the same time maintain social status and a belief in one's own idealism.

In Japan, the professional model gained prominence around 1970[75]. The adoption of the professional model was a reaction to the "opposition camp" or radical model. The image of the bengoshi was damaged with the average Japanese person due to the bengoshi's association with radical elements in Japanese society and their supposedly un-lawyer-like conduct. More importantly, the hostility of the Ministry of Justice was threatening the autonomy of the JFBA[76]. As well, the importation of this Anglo-American law conception of the lawyer was evidence of the growing movement in Japanese law and legal scholarship towards Anglo-American law[77]. The Anglo-American law version of professionalism also included the officer of the court ideal, which appealed to bengoshi who had an inferiority complex due to the pre-war inferior status of the lawyer compared to judges and procurators and the continuing perception of an inferior status after the 1949 Bengoshi Law, despite the unification of the profession[78]. These are the straightforward influences that led to the adoption of the professional model among many bengoshi.

In America, the professional model was dominant from the time of the Great Depression[79], but this dominance gradually has been eroded. By the start of the 1990's, the professional model was clearly in trouble. Although, the professional model has gone through many "crises"[80], by the 1990's the transformation of the world of lawyers in America was readily apparent[81]. The first obvious sign of the erosion of the professional model was a series of Supreme Court cases in the seventies in which lawyers were forced to end bans against advertising[82] and abolish minimum fee schedules[83]. These changes can be attributed to the pressure of the consumer movement and the "lawyer entrepreneur"[84]. However, the erosion of the professional model started much earlier with the rise of the big firm, in-house legal staffs and innovations such as contingency fees, class action, etc. and due to such factors, American lawyers involved in the FLC dispute had discarded the classic professional model.

B.Business Professional

In the business professional model, the lawyer maintains the view of herself as professional while admitting that she primarily serves private interests, not the public. Thus, the lawyer is a businessperson, but a businessperson who is restricted in pursuing her self-interest, so the client can still trust the lawyer. This compromise between the professional

75 *Miyakawa Supra* note 70 at 5-6.
76 *Fukushima Supra*. note 38 at 8.
77 *Japanese Lawyers in Transition Supra*. note 40 at 323.
78 D. Henderson, "The Role of Lawyers in Japan" in H. Baum (ed) *Japan: Economic Success and Legal System* (New York: Walter de Gruyter, 1997) at 56.
79 *American Lawyers Supra*. note 15 at 8.
80 R. Solomon, "Five Crisis or One: The Concept of Legal Professionalism, 1925-1960" in Nelson, Trubek and Solomon (eds) *Lawyers' Ideals/ Lawyers' Practices* (Ithaca: Cornell University Press, 1992) at 154-160.
81 J. Heilemann, "Survey of the Legal Profession" *Economist* (18 July, 1992); R. Pearce, "The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar" (1995) 70 New York University Law Review 1167.
82 *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975).
83 *Bates* v. *State Bar of Arizona* 433 U.S. 350 (1977).
84 *Pearce Supra*. note 81 at 1247-1248.

model and a free market approach is where most American lawyers stand today[85].

The common law lawyer has always had a close identification with the client. The rules of attorney client privilege and fiduciary duty developed in the nineteenth century assumed that the duty to the client would come first[86]. The role of officer of the court was likely developed as a balance to this close identification with the client. The common law also has a strong bias towards property and individualism. Particularly, in America, this bias was combined with a desire to create rules that would facilitate the growth of modern business. American lawyers adopted the pragmatic nature of common law to foster a "can-do" attitude toward law. The American lawyer is more than willing to use ambiguity in the law to the advantage of the client[87] and the American lawyer takes great pride in having business acumen[88].

(1) Big Firm Lawyer: Business Servant

Lawyers prefer to ally themselves to the elite and in the case of America, this trend has a created a strong connection between lawyers and corporate America[89]. There is class of lawyers who are business servants or "servant(s) of the wealthy"[90]. In the U.S., the business servants are the "big firms" that formed around the turn of the twentieth century[91], although from the start lawyers in America were necessarily business servants because only the wealthy could afford their services[92]. The basic concept of the big firm is to provide clients with specialized advice from a team of lawyers with a large efficient support staff[93]. As Roscoe Pound, a noted American practitioner, pointed out in 1908, the big firm challenged the core beliefs of professionalism:

> "The leaders of the American bars are... chiefly client caretakers... They devote themselves to study of the interests of particular clients, urging and defending those interests in all their varying forms, before legislatures, councils... Their interest centers wholly in an individual client or set of clients, not in the general administration of justice."[94]

The inherent contradictions of professionalism were beginning to show.

However, the big firm lawyers became the main supporters of the professional model due to a combination of factors. The big firms were composed of the elite of the top law schools in America, and therefore, were overwhelmingly Anglo-Saxon and many were "American blue bloods"[95] Such people had a distaste for commercialism. Law was an acceptable way to make money, because it was an intellectual pursuit. Ironically, since a lawyer's fees were dictated by reputation, those with contempt for commercialism would often have the highest incomes because of their professionalism[96]. Professionalism also made the entrance of new competitors difficult and kept out immigrants with barriers to entry and restrictions on competition[97]. Finally, one

85 *Ibid.* at 1259.
86 M. Osiel "Lawyers as Monopolists, Aristocrats, and Entrepreneurs" (1990) 103 Harvard Law Review 2009 at 2019.
87 *Ibid.* at 2058.
88 K. C. Crabb, "Providing Legal Services in Foreign Countries: Making Room for the American Attorney" (1983) 83 Columbia Law Review 1767 at 1768.
89 *Osiel Supra.* note 86 at 2018.
90 *Pearce Supra.* note 81 at 1243.
91 M. Galanter and T. Palay *Tournament of Lawyers* (Chicago: The University of Chicago Press, 1991) at 2.
92 *Pearce Supra.* note 81 at 1244.
93 *Galanter Supra.* note 91 at 5-8.
94 *Ibid.* at 6-7.
95 There were few Jews in big firms until after the Second World and few Catholics until the 1970's. *Ibid.* 91 at 26.
96 *Pearce Supra.* note 81 at 1245.
97 *Ibid.* at 1247.

should also consider that as members of the upper class, big firm lawyers had an interest in restricting the access to law, since law could be used to challenge authority.

From the 1970's several changes occurred that forced the big firm lawyers to move away from the professional model. The most significant change for big firms was the increased use of in-house legal departments. This change caused big firms to become more specialized and broke down the long-term relationship between the big firms and large corporations. In-house counsel also removed the asymmetry in information and forced the big firms to compete for business and pushed them further from the professional model by forcing them to become more business-like[98]. However, due to the explosion of litigation, the real estate boom and large profits from mergers and acquisitions, the size and number of big firms grew dramatically. With this growth came the end of the gentleman's agreements against lateral hiring and fixed salaries for associates. Finally, the taboo against discussing business broke down and information about salaries, fees and clients became widely available[99]. "Rainmakers" or associates or partners that bought in business became more important than those with legal skills[100]. These changes and others marked the move from the big firm as pillar of the professional model to pillar of business professional model.

(2) Lawyer-Entrepreneur

The other type of business professional lawyer is the "lawyer-entrepreneur"[101]. Unlike the big law firms, there has yet to be a comprehensive study of the lawyer-entrepreneur, likely because they are spread out of over many different practices. The defining characteristic of this lawyer-entrepreneur is the pursuit of new opportunities for herself and her clients. The lawyer-entrepreneur usually operates outside the realm of the big firm lawyer. They may like the bulk of lawyers lack the high grades from an elite law school necessary for entering a big firm. However, some may avoid the big law firms due to idealism or temperament, that is to say, they want to fight for the oppressed[102] or they are unwilling to take part in the office politics of the big firm. They often desire a more exciting and high profile practice than the largely anonymous boring big firm practice. One might say that, whereas, the big firm lawyer is like Robert McNamara, a technocrat and team player, the lawyer-entrepreneur is like Henry Ford, visionary and individualist.

Classifying both the lawyer-entrepreneur and business servant big firm lawyer in the business professional model may seem contradictory. However, both types of lawyers are attracted to the model for different reasons. The big firm lawyer is attracted by the elite status and exclusiveness of the professional model, but their purpose in serving the wealthy pushes them into the business professional model. The innovative services of the lawyer-entrepreneur, such as contingency fees, class action, group legal services, legal clinics or Alternative Dispute Resolution (ADR), are at

98 *Galanter Supra.* note 91 at 52.
99 *Heilemann Supra.* note 81 at 5.
100 *Galanter Supra.* note 91 at 53.
101 The term is from C. Seron, "Managing Entrepreneurial Legal Services: The Transformation of Small-Firm Practice" in R. Nelson, D. Trubek and R. Solomon (eds) *Lawyers' Ideals/Lawyers' Practices* (Ithaca: Cornell University Press, 1992)
102 From the late 1960's, big firms were forced to accept more pro bono work to recruit the more idealistic law graduates. *Galanter Supra.* note 91 at 56

odds with the key tenets of the professional model. However, the lawyer-entrepreneur is in the dangerous position of being perceived as a "Profit Maximizer (who) seeks as much money as possible from the client and disregards obligations to the public"[103]. The lawyer-entrepreneur does not seek elite status, but desires praise for her role as visionary. For them, professionalism is enlightened self-interest or "making things happen for the client"[104]. Thus, the lawyer-entrepreneur needs some professionalism to prevent the perception that she is simply self-aggrandizing.

(3) Business Professional Lawyers in Japan

Only a small minority of bengoshi accept the business professional model[105]. The immediate causes for this trend are found within the legal community. The most obvious reason is the restriction on the number of bengoshi. Business oriented law firms cannot expand because of the limited number of entrants[106]. As well, reduced competition has made bengoshi lethargic about change, since bengoshi have been able to focus on litigation without having to adopt innovations[107]. Bengoshi also face competition in advising and assisting businesses not only from other legal professionals particularly zeirishi (tax agents), in-house counsel and notaries, but also from non-legal mediation and business professionals such as konin kaikeishi (certified public accountants).

Japan is a continental law country and this continental law tradition has also worked against the development of business lawyers[108]. Although lawyers usually try to link themselves to the elite, in Japan, as in many continental law countries, civil servants with law degrees have taken this role and bengoshi have had a "opposition camp" mentality that has identified them with the marginalized of society. The dominance of academics in the development of continental law doctrine has caused focus on theory over the practical needs of the business community and continental law education also focuses on theory[109]. The result of this theoretical perspective is an inability to use result oriented reasoning and finessing of law that American lawyers consider essential for private practice:

> On the other hand, young bright and able pure Japanese attorneys (junsui bengoshi) often find it difficult to perform this role. Instead they find it necessary to write long memoranda explaining carefully why something desired cannot be attained."[110]

However, the role of these continental law factors should not be over estimated, because the tradition of continental law is not deeply rooted in Japan and the influence of Anglo-American law, especially in the post-war era, is strong.

Recently, both bureaucrats and business leaders have begun to stress the need for more bengoshi[111] and hence a wider function for the realm of law[112]. This recent support for reform shows that previously the power elite tacitly supported the current bengoshi system.

103 *Pearce Supra.* note 81 at 1243.

104 R. Cagle, "Japanese-American Business Negotiations: Success Through Cultural Understanding" Hokudai Hougakukai (Special Workshop in Law at the Faculty of Law, Hokkaido University) May 28, 1999; also see M. Rubiner "Cultures Crashing: A Foreign Lawyer in Japan" Arizona Attorney (February, 1996) 10.

105 *Japanese Lawyers in Transition Supra.* note 40 at 323.

106 S. Yoshikawa, "'Gurobaru Sutandado o Koete" (Beyond Global Standard) (1999) 50. 8 Jiyu to Seigi 108 at 111.

107 *Osiel Supra.* note 86 at 2041.

108 *Ibid.* at 2050.

109 *Ibid.* at 2052.

110 R. Coleman "Some of the Underlying Politics of the Dispute Involving Foreign Attorneys Under the Japanese Attorneys Law and a Plea for Future Accommodation" (1988) 21 Law in Japan 64 at 70.

Some of the possible factors involved in restricting the role of law should be mentioned here in order to more fully understand the Japanese side of the FLC issue. First, there is a view that litigation and law based procedures are incompatible with Japanese society, however, even those supporting this anthropological analysis suggest that the Japanese are becoming more receptive to law as the pre-war cultural patterns break down[113]. The "revisionist" approach suggests that the restrictions on the access to law are an intentional result of the government or power elites' attempts to limit and control societal conflict[114]. Until the recent American economic expansion, there was also a prevalent notion that lawyers are a drain on the economy[115]. This notion was buttressed by the idea that using mediation instead of litigation is a rational choice[116]. However, other economic analysis gives a more sinister view of the minimization of the role of law. This analysis states that the lack of the role of law allows business to insulate itself from risk and that mediation gives the edge to business because of its superior bargaining position vis-a-vis ordinary people[117]. These factors combined to prevent government or business from taking an active role in the FLC issue, until it became a trade dispute.

C. Legal Service Provider

The legal service provider model is an economic analysis of the activities of lawyers. Specifically, this model is critical of restrictions on competition that the legal profession in various countries use or have used. The conclusion of such studies is that such restrictions are "unfair to potential competitors and detrimental to consumers"[118] The restrictions increase prices for consumers while lowering the quality of services consumed. The increased prices are the result of lowering supply without lowering demand. The decline in quality is the result of consumers using inferior substitutes that they would not have used otherwise[119]. Most of the criticism is directed at regulation that restricts competition among producers such advertising bans, minimum fee schedules and residency restrictions[120]. Of course numerical restrictions on entry, such as in Japan, are also considered unacceptable[121]. However, educational barriers are seen as self-correcting, since the higher incomes will inevitably attract more entrants and thereby, lower prices. Overall, the logic of the legal service provider model calls for wide deregulation and free competition.

111 Keizai Doyukai, "Wagakuni Gendai Shakai no Byori to Shoho" (Malaise of Japanese Society Today and its Remedies) Tokyo: Keizai Doyukai. Administrative Reform Committee (Gyosei Kaikaku Iinkai) subcommission on deregulation (Kisei Kanwa Sho-Iinkai) *Japanese Lawyers in Transition Supra.* note 40 at 317, Keidanren, "Shiho Kaikaku ni tsuite no iken" (An Opinion on Legal Reform) LDP Kyukyo shiho seido Chosa kai (Emergency Legal System Examination Committee "21 Seiki no Shiho no Tashikana Shishin" (The Right Direction for Law in the 21st Century).

112 Hoka (legalization) see *Hamano Supra.* note 45.

113 H. Tanaka, "The Role of Law in Japanese Society: Comparisons with the West" (1985) 19 U.B.C. Law Review 375.

114 J. Haley, "The Myth of the Reluctant Litigant" (1978) 4 Journal of Japanese Studies 359; F. Upham, "Litigation and Moral Consciousness in Japan: An Interpretive Analysis of Four Japanese Pollution Suits" (1976) 10 Law and Society Review 352.

115 K. Hamada, "The Reaction of Japanese Lawyers to the New Law" (1988) 21 Law in Japan at 43 at 48, *Japanese Lawyers in Transition Supra.* note 40 at 322.

116 J. Ramseyer, "Reluctant Litigant Revisited: Rationality and Disputes in Japan" (1988) 14 Journal of Japanese Studies 111.

117 *Heilemann Supra.* note 81 at 14.

118 *American Lawyers Supra.* 15 at 24.

119 *Ramseyer Supra.* note 17 at 511-12.

120 *Ibid.* at 511.

121 *Ibid.* at 511.

The "legal service provider" is not a model widely accepted within the legal profession:

> "To make a British barrister cringe, utter the phrase "legal-services industry". One American lawyer says he did not realise he was in a service business until he saw his occupation classified that way on a census form"[122]

The terminology of the economic analysis of the legal profession is radically different from the terms used by lawyers themselves: Clients are consumers; the profession is called a service and practitioners are called providers or producers. Although, as mentioned above, American lawyers have widely acknowledged the economic nature of their profession, they still identify with professionalism. Part of the justification for any profession is that the highly educated and trained professional has some ephemeral quality beyond technical competence. Part of this ephemeral quality is idealism, even if the ideal is only enlightened self-interest: Lawyers are a "helping profession"[123]. As well, the average practitioner would lose significant income, if all routine procedures were de-regulated as the legal service provider model ultimately demands.

VI The Story

A. Stage One: No Issue

Until the 1970's the ban on the practice of foreign lawyers was not a significant issue[124]. There is a question as to why concern about the issue did not arise sooner, since international transactions and multinational corporations, which are usually cited as triggering the issue, are not a recent phenomenon[125]. The question deserves more attention, but a prima facie examination would suggest that most lawyers did not see a role for themselves on the international stage. The concept of the lawyer as an officer of the court demands that the lawyer be loyal to and work within a national tradition:

> The history of the legal profession is filled with accounts of lawyers who risked careers by asserting their independent status... The crucial factor in all these cases is that the advocates performed their dual role-officer of the court and advocate for a client-strictly within and never in derogation of high ethical standards. There is thus a reasonable, rational basis for a State to conclude that persons owing first loyalty to this country will grasp these traditions and apply our concepts more than those who seek the benefits of American citizenship while declining to accept the burdens of citizenship in this country.[126]

In more practical terms, the large national firms necessary for overseas expansion only came into existence in the 1970's[127]. Hence, the idea of international lawyers was for visionaries or dreamers[128] and the realistic lawyer was grounded in the realm of the nation-state.

Some commentators suggest that the 1955 Law No. 155's amendment of Art.7 of 1949 Law No. 205 was the start of the dispute, because it set the tone for Japan's protectionist stance[129]. The amendment of Art.7 abolished the quasi-members (junkaiin) system that allowed autho-

122 *Heilemann Supra.* note 81 at 1.
123 *Linowitz Supra.* note 59 at 19
124 M. Chapman, P. Tauber, "Liberalizing International Trade in Legal Services: A Proposal For an Annex on Legal Services Under the General Agreement on Trade in Services" (1995) 16 Michigan Journal of International Law 941 at 943.
125 *Transnational Law Practice Supra.* note 25 at 739.
126 In Re Griffiths 413 US 717 at 733.
127 P. Mallampally, "Professional Services" in P.Messerlin and K. Sauvant, "The Uruguay Round, Service in the World Economy" (Washington: The World Bank, 1990) at 99.
128 *Ohira Supra.* note 16 at 435-436.

rized foreign lawyers to advise foreign clients or about foreign law, although those who qualified under Art.7 were allowed to remain under a grandfathering clause. The amendment, as mentioned previously, was reasonable for the time, because in practical terms foreign lawyers could not practice in the U.S. and the Japanese were specifically excluded in the reservation of the FCN Treaty. Significantly, none of the early English language articles about lawyers in Japan criticized the amendment of Art. 7[130], this lack of criticism was likely because Japan was seen as a quaint peripheral country. Although the junkaiin played an important role in the development of international law offices in that many of the early shogaibengoshi trained with junkaiin and many shogaibengoshi offices descended from junkaiin offices[131], the junkaiin are really no more than a footnote in the FLC dispute because there were only 68 junkaiin in 1955 and by the 1970's there were no more than a few dozen left and they had no real position within the Japanese bar despite their prominence in international law circles.

B. Stage Two: The Foreign Lawyer Issue

During the seventies, an increase in trade with and investment in the United States from other countries created a demand for American legal services abroad and an awareness of the problem of restrictions on foreign lawyers. American lawyers also began to discard their parochial attitudes and to see great opportunities for themselves in overseas markets[132]. American lawyers had the advantage of having more experience in transnational transactions due to America's predominance in international business from the Second World War until the 1970's. They also had the advantage of using the international *lingua franca* of English as their native language[133]. Aside from these practical considerations, American lawyers were already developing the business professional model and believed that they had a "unique style of commercial-oriented creative lawyering that is particularly suited to the facilitation of transactional business deals"[134] that gave them a competitive edge over lawyers from other countries[135]. These factors combined with the development of very large firms compelled American lawyers to seek their fortunes in international markets.

The junkaiin issue aside, there is discrepancy over when the foreign lawyer issue started in Japan. Some suggest that some bengoshi's concern over the activities of foreign lawyers in the 1960's was the start of the issue[136]. However, in the sixties, the issue was peripheral and academic. Peripheral because there were only a few dozen junkaiin or trainees[137] and academic because the under the FCN Treaty Japan was allowed to maintain the same restrictions as America. The U.S. only became able to

129 *Ciano Supra.* note 6 at 195-194; *Young, Supra* note 31 at 85; J. Haley, "Redefining the Scope of Practice Under Japan's New Regime for Regulating Foreign Lawyers" 21 Law in Japan 18 at 21.

130 J. Woodruff, "The Japanese Lawyer" (1956) 35 Nebraska Law Review 429; R. Rabinowitz, "The Historical Development of the Japanese Bar" (1956) 70 Harvard Law Review 61; K. *Ohira Supra.* note 16; C. Stevens, "Modern Japanese Law as an Instrument of Comparison" 19 American Journal of Comparative Law 581 (1971).

131 *Coleman Supra.* note 110 at 72-73 *Henderson Supra.* note 78 at 64-65; *Regulation of Practice by Foreign Lawyers Supra.* note 19 at 693.

132 *Crabb Supra* note 88 at 1770.

133 *Ibid.* 1768.

134 *Ibid.* 1768.

135 *Transnational Law Practice Supra.* note 25 at 445.

136 *Tadaki Supra.* note 20 at 125.

137 Lawyers employed by Japanese, junkaiin firms and now FLC firms who are not entitled to practice law without supervision.

press for change after *In re Griffith* abolished the ban on non-citizens becoming lawyers and the passage of New York State's Foreign Legal Consultant Law[138]. The bellwether of the foreign lawyers issue was the publication of Tadao Fukuhara's "The Status of Foreign Lawyers in Japan", which interpreted the existing Bengoshi Law to allow foreign lawyers to carry out activities outside of matters for litigation and also stated that Japan was required to allow foreign lawyers to practice under the FCN Treaty[139]. This article was an attempt to refute the JFBA's "Standards Concerning the Prevention of Non-Attorney Activities by Foreigners"[140] which essentially restricted foreign lawyers to acting as the American equivalent of law clerks working under the supervision of Japanese lawyers.

Due to Tadao Fukuhara's position as a leading authority on the Bengoshi Law his opinion carried strong weight[141]. Rexford Coleman established an office of Baker and McKenzie in affiliation with the Tokyo Aoyama Law Office and continued to practice there until the late 1970's on the basis of the Fukuhara opinion. After Isaac Shapiro established an office of Milbank Tweed in 1977, the JFBA protested to the Ministry of Justice against giving any more visas to practice law in a law office[142]. At the time, the Ministry of Justice was involved in difficult negotiations with the JFBA over some domestic law issues[143], so it submitted to the JFBA's request and refused to grant any more visas for foreigners aiming to establish a practice in Japan. The JFBA then further cracked down on trainees with "Standards Concerning the Prevention of the Unauthorized Practice of Law by Foreigners" in 1978 to prevent any circumvention of their interpretation of the Bengoshi Law. During this time, the ABA was negotiating with JFBA in hopes of resolving the issue, however, no agreement was reached and in March 1982, the USTR filed a complaint against the restriction on foreign lawyers as a non-tariff barrier. Thus, the issue turned into a dispute.

C. Stage Three: The Dispute

(1) Conceptions of the Dispute

Although USTR filed a trade complaint, most of the participants in the dispute did not conceptualize it as a true trade dispute, that is to say, they did not see lawyers as commodity. The initial reaction of the JFBA was the classic professional reaction: Every nation has the right to control its own legal system and the American lawyer could have no place in the Japanese legal system since she could not understand its principles and traditions[144]. Eventually, due to pressure from the Japanese government and influence from more business-oriented bengoshi, the JFBA modified its position towards the business professional model.

(a) Non-Trade Approach

Initially, the Americans, under the ABA, adopted a non-trade approach. The non-trade approach to removing the restrictions arises from the business professional model. Unlike the professional lawyer, the business profes-

138 T. Fukuhara "The Status of Foreign Lawyers in Japan" (1973) 17 Japanese Annual of International Law 21 at 34.

139 *Ibid.* at 32.

140 JFBA "Gaikokujin Hiben Katsudo Boshi ni Kan-suru Kijun" (Standards Concerning Non-Attorney Activities).

141 *Coleman Supra.* note 110 at 64-65.

142 Called the "Shapiro issue" by the Japanese see T. Kojima, "Gaikoku Bengoshi Mondai" (Foreign Lawyers Problems) (1988) 900 Jurisuto 290.

143 *Fukushima Supra.* note 38 at 8.

144 *Kigawa Supra.* note 31 at 1497.

sional accepts the practice of foreign lawyers on the basis that they are necessary for international transactions. The business professional as a professional has distaste for politics and has a preference for the certitude of rules and law. In trade, law and rules are the last resort and disputes are primarily solved through compromise. Such a method is not acceptable in the business professional model:

> "When the treaty is signed, often neither side knows exactly what is conceded or gained; the treaty merely becomes a declaration by the parties that they will begin to test the elasticity of the general standards at the heart of the treaty. The details of the treaty are therefore worked out over time in a context that is more political than legal"[145]

As Sydney Cone, a noted international lawyer and negotiator for the ABA on the FLC dispute, stated, "I...regretted that this became a trade issue. I wish it had not, but it did..."[146]

The American side was split between the big firm lawyers, who headed the ABA negotiations, seeking to have the Japanese adopt a law similar to the New York Foreign Legal Consultants Law and the lawyer-entrepreneurs, who wanted to push for the acceptance of the Fukuhara opinion. Substantially, these two approaches were seeking the same results, namely the ability to practice law outside of litigation and matters of a domestic nature. However, the experiences of the two camps caused them to have completely different approaches and motivations. The big firm lawyer's approach was informed by the negotiations in Europe and elsewhere to remove obstacles to transnational practice during the 1970's. This approach will be referred to as the "non-trade approach" because it was not concerned with the practice of foreign lawyers as a trade issue per se. The members of the "Fukuhara camp" were lawyers with backgrounds in Japanese studies or with experience in Japan as trainees. They saw the dispute as a bilateral dispute between Japan and U.S. and their approach will be referred to as the "Japanologist Approach".

The non-trade approach states that some restrictions are based on "legitimate" concerns, and thereby, implies that other restrictions are illegitimate. The legitimate concerns of a government are those "concerned with preserving the integrity of their law and the stature of their courts for the benefit of the public."[147] Crabb identifies five legitimate concerns:

> "First...lack (of) loyalty to the political and cultural values of the nation. Second,..lack (of) the necessary competence to adequately serve local citizens. Third ...the security of local citizens, who lack redress for injury... Fourth.. harm (of) the local legal profession by interfering with its development and ability to compete. Fifth.. the likelihood that reciprocal gains will not be forthcoming..."[148]

Restrictions that are rationally connected to the legitimate concerns are considered acceptable. Restrictions, such as a citizenship requirement, that are not rational are unacceptable. This "legitimacy" framework shows the typical business professional lawyer's compromise between commercial necessity and professionalism.

The JFBA quickly adapted itself to arguments within this "legitimacy" framework. This adaptation was likely due to their exhaus-

145 *Crabb Supra*. note 88 at 1816.
146 Sydney Cone, "The Future of Foreign Law Offices in Japan" (1988) 21 Law in Japan 76 at 76.
147 *Crabb Supra* note 88 at 1770.
148 *Ibid*. at 1788-1789.

tive study of the foreign legal consultant regimes in Europe[149]. There were three basic arguments presented. First, there was the suggestion that foreign lawyers would have a negative influence on bengoshi and their system, because bengoshi would be unable to develop their own international transaction and law expertise in the face of competition from foreign lawyers. As well, bengoshi would be forced to become more commercialized and have to give up the struggle for "the protection of basic human rights and the realization of social justice" Second, the foreign lawyers would be difficult to regulate, because they could easily start practicing in unauthorized areas such as matters for litigation. The foreign lawyers would not have the internal check of respect for and loyalty to the Japanese legal system. Moreover, bengoshi already had experienced a problem with junkaiin practicing outside of their authorized area. Third, foreign lawyers would alter the legal culture of Japan and make it a more litigious society[150]. These arguments against the introduction of a liberal foreign legal consultant regime gave the JFBA a better bargaining position, although they had to accept that foreign lawyers would eventually gain entry[151].

In 1985, on the basis of the above objections to a liberal regime the JFBA made a proposal for accepting foreign lawyers:

(1) reciprocity (in federal countries, a suitable number of important states must give reciprocal access for bengoshi, and only lawyers from such states may be qualified in Japan);
(2) supervision of foreign lawyers by Nichibenren; appellation of foreign lawyers by a title not confused with that of bengoshi;
(3) limitation of practice of foreign lawyers to legal advice on home country law, plus (if specially designated by the Minister of Justice) the law of a third country; and
(4) prohibition of employment of bengoshi by foreign lawyers or joint enterprises between foreign lawyers and bengoshi[152]

This proposal formed the basis for the Gaiben Law. The JFBA's position on the FLC dispute had moved from professionalism to business professionalism.

(b) Japanologist

There were four key characteristics of the Japanologist approach. First, they assumed that conditions in Japan were unique and that experts on Japan, such as themselves, were necessary for opening up Japan to foreign lawyers[153]. Second, they thought that the FLC dispute was part of the overall trade dispute with Japan in that foreign lawyers could act as trade facilitators and open up the Japanese market for American small businesses[154]. Third, they believed that the Japanese were superior in negotiating and the Americans were at a disadvantage:

> "The Foreign Lawyers Law also exemplifies the worst in American trade negotiations: the failure to engage in good lawyering by understanding and using existing Japanese law, to develop a unified, principled position, to insist on available legal rights and avenues of relief and to appreciate the pitfalls of a "political" solution in a legislative process over which one has little if any influence."[155]

149 *Tadaki Supra* note 20 at 127.
150 S. Higuchi, "Gaikoku Bengoshi Mondai" (Foreign Lawyer Issue) (1985) 842 Jurisuto 56 at 58-59.
151 Y. Iteya, "Gaikokuho Jimu Bengoshi in Japan" (1988) 21 Law in Japan 141 at 144.
152 *Ibid.* at 145.
153 *Haley Supra* note 129 at 25.
154 *Kanter Supra.* note 29 at 339-343.
155 *Haley Supra.* note 129 at 26.

Finally, they saw the process as a fight between Japan and the U.S. and not simply a dispute among American lawyers and bengoshi. As Rexford Coleman stated, "I believe that the Americans will slowly come to realize that the Japanese have won this round"[156]. These beliefs caused the Japanologists to file two 301 trade petitions. The first petition was an attempt to prevent the passage of the Gaiben Law and the second was a protest against the Gaiben Law. In the Japanologist approach one can see the visionary or dreamer quality as well as the individualism or impetuousness of the lawyer-entrepreneur.

There is considerable opinion that the big firms took over the negotiating process at the expense of Japanologists and to the detriment of the American position[157]. There are four main problems with this view. First, as mentioned above, the goals of the big firm lawyers and the Japanologists were the same. Big firm lawyers did not likely see Japanologist lawyers as competition because the big firm lawyers and the Japanologist lawyers were hoping to have different clients. Big firm lawyers were planning to practice corporate law and Japanologists were hoping to assist small businesses and individuals interested in trading or investing in Japan. In any case, the big firms could not eliminate the Japanologists' competition, because they would continue to practice as either trainees or from their home base in America. Thus, big firm lawyers did not need to shut the Japanologists out.

Second, there is good reason to think that trade negotiators rejected the Japanologist approach, because it was seriously flawed as a negotiating position. A major problem was the reliance on the Fukuhara opinion. The Fukuhara opinion relied on the interpretation of "other technical experts" in Article VIII (1) of FCN Treaty as including foreign lawyers:

> (1) Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts..."[158]

Hiroshi Itoh[159] and Kaname Ohira rejected this interpretation:

> "However, a more careful reading and comparison of the second sentence with the first, plus the fact that the United States' reservation applies only to the second paragraph of Article VIII, leads to the conclusion that attorneys were not contemplated in the second sentence."[160]

Itoh and Ohira's interpretation follows the principles in the Vienna Convention on the Law of Treaties[161] and should, therefore, be considered the correct interpretation.

Fukuhara's interpretation of the Bengoshi Law Art.72 is also questionable. As Takeo Kosugi states:

> "Upon the 1955 repeal of Art.7 of the Bengoshiho (Bengoshi Law) and after the termination of the junkaiin system, the draftsmen of the Bengoshiho did not foresee that foreign lawyers not admitted to practice in Japan would be permitted under the existing law to engage in business activities in Japan."[162]

156 *Coleman Supra.* note 110 at 74.
157 *Haley Supra.* note 129 at 23; *Japanese Law: An Economic Approach Supra.* note 36 at 16.
158 *Fukuhara Supra.* note 138 at 34.
159 H. Itoh, "A Comment on *Lawyers as Treaty Traders*" (1986) 8 University of Hawaii Law Review 387 at 387-388.
160 *Ohira Supra.* note 16 at 427.
161 Vienna Convention on the Law of Treaties Art.31.

Thus, if Fukuhara's opinion was to mean that foreigner lawyers could establish offices in Japan that interpretation is clearly incorrect. However, if Fukuhara's opinion meant that foreign lawyers could come to Japan on a temporary basis to advise on American law and commercial matters unrelated to a legal dispute then his interpretation is quite reasonable[163]. The problem was that the Japanologists were demanding the former interpretation.

Third, the Japanologist approach would have left the American negotiators in a poor bargaining position. The main difficulty was the Japanologists' conception of the problem made the purpose of American lawyers in Japan unclear. The big firm lawyers' goal was clear: They planned to practice American corporate law. The Japanologist lawyers wanted to be trade facilitators, but the problem was that there was no clear answer as to the type of law they were planning to practice. Kanter compared American lawyers to the sogo kaisha or the Japanese trading company, however, trading companies are not allowed to give advice on law to third parties. Thus, the premise of their position was illogical: They wanted to be recognized as lawyers, so they could work as business consultants.

Finally, the Japanologist lawyers made demands that bengoshi would never accept and in doing so vastly over estimated the strength of their position. Two demands, in particular, would never have been accepted by the bengoshi. First, the Japanologist lawyers demanded to have the right to practice Japanese law, despite being aware that bengoshi closely guarded this area. The practice of unauthorized law was a complaint often leveled at junkaiin[164] and even today shiho shoshi (judicial scriveners) are often charged with unauthorized practice. The other major problem was that the Japanologist lawyers proposed no regulations and no system to protect the public from malpractice[165]. There would, therefore, be the anomalous situation of having foreigner lawyers free to practice with only minimal regulation, while bengoshi would still face numerous regulations on conduct and practice. The problem of these demands was compounded by the lack of leverage on the American side. The JFBA had little incentive to resolve the dispute, because the power elites, in the 1970's and 1980's, did not want more lawyers, especially foreign lawyers with their litigation that would interfere with Japanese legal culture. The JFBA only needed to show flexibility and they did not need to seriously compromise[166]. For these reasons, the negotiators likely did not welcome the Japanologists' proposals.

(c) Trade Approach

In 1985, Clayton Yeutter, the USTR, obtained a commitment for government-to-government negotiations to resolve the dispute. This agreement was obtained as a result of the Japanese government's Action Program, in which it promised to solve the foreign lawyer dispute based on its new commitment to liberalization:

> "A goal intended...is that Japan's market will achieve an openness exceeding the international standard... On the basic standpoint of 'freedom in principle, restrictions only as

162 *Regulation of Practice by Foreign Lawyers Supra.* note 19 at 695.
163 *Ibid.* at 695-698.
164 *Ibid.* note 19 at 695.
165 *Ibid.* 697-698.
166 *Young Supra.* note 31 at 91.

> exceptions' government intervention shall be reduced to a minimum so as to leave the choice and responsibility to consumer"[167]

Of course, the Japanese government of that time had little ability or desire to follow a course of true liberalization[168]. However, the inclusion of the foreign lawyers dispute in the Action Program marked the Japanese government's tacit acceptance of the concept of "trade in legal services".

The idea of trade in legal services grew out of the trade in services concept. During the eighties, free trade was seen by many as responsible for the loss of American manufacturing jobs. At the same time, the U.S. perceived that with the liberalization of trade in services it could increase its export of services. Thus, the supporters of free trade in the U.S. emphasized that the addition of services to the trade agenda would create jobs, thereby, allaying the fears of those concerned with job loss[169]. As well, the U.S. saw that bringing services into the GATT (General Agreement on Trade and Tariffs) would be important. Since trade in services was becoming an increasingly large part of world trade, services had to be brought into the GATT for GATT to maintain its preeminence as a trade agreement. Finally, since developed nations had largely reduced tariffs, there needed to be incentives to solve the thorny problems of non-tariff barriers and trade in politically sensitive goods such as agriculture products. Concessions in the area of trade in services were seen as one incentive for nations to eliminate non-tariff barriers and liberalize trade in general[170]. These concerns solidified the American view that obstacles to foreign lawyers were barriers to trade, and therefore, the Americans insisted that legal services be included in the Uruguay Round of the GATT.

As bengoshi would discover to their surprise[171], the trade in legal services approach tolerates far fewer restrictions than the non-trade approach, because the trade oriented approach demands a higher level of justification:

> "While the regulations of certain professional services must be considered a legitimate governmental activity, not all regulations can be *fully justified* as *necessary* to protect the welfare of consumers. Much of the debate over barriers to trade in professional services centers on whether or not certain regulations are necessary to protect consumers and whether such regulations *unnecessarily* discriminate against foreigners."[172] (Italics added)

Thus, there are two significant differences in the trade oriented and non-trade approaches. First, the test for legitimacy in the non-trade approach is essentially whether a restriction is required for the "benefit of the public"[173]. The test for legitimacy in the trade-oriented approach is whether a restriction is required to "protect consumers". Second the non-trade

167 *Fukushima Supra.* note 38 at12.

168 The consensus to pursue a true course of liberalization has only been achieved recently. In the eighties, there was wide spread thought that the administrative guidance system was superior to free markets. see E. Vogel, *"Japan as Number One: Lessons for America* (New York: Harper and Row, 1980)."

169 G. Feketekuty, "Trade in Professional Services: An Overview" (1986) The University of Chicago Legal Forum.

170 F. Lazar, "Service and the GATT: U.S. motives and a Blueprint for Negotiations" (1990) Journal of World Trade 135 at 136.

171 *Kawamura Supra.* note 47 at 88. He expresses surprise that the ABA considers the entrance examination for the LRTI as a barrier to trade. *Yoshikawa Supra.* note 106, He expresses surprise at the recent USTR demand that Japan increase the number of bengoshi.

172 *Feketekuty Supra.* note 169 at 11.

173 *Crabb Supra.* note 88 at 1770.

approach looks at the needs of the nation as whole, but the trade oriented approach focuses on the consumer of the product.

The term "necessary" in trade law has a very narrow scope. Under GATT Art.XX(a), (b) and (c) a country may adopt a course of action that violates trade law if the course of action is "necessary", however, the course of action will not be accepted as "necessary" "if an alternative measure which is not inconsistent with other GATT provisions is available to it"[174] For example, the non-trade approach accepts the legitimacy of restrictions on the foreign lawyer's ability to give legal advice on the laws of third countries[175]. This restriction prevents the foreign lawyer from giving advice on laws in which she has no qualifications, and therefore, is rationally connected to protecting the public. The trade-oriented approach sees the third country restriction as unnecessary. If the foreign lawyer were subject to the discipline of her own bar and the local jurisdiction as a foreign legal consultant, there would be no reason for her to give irresponsible advice and the consumer of such legal advice would have the ability to make a rational choice. Moreover, if the third country restriction were truly necessary for public protection, it would be applied to local lawyers and not just foreign lawyers[176].

The trade-oriented approach is a continual movement towards to the bare minimum of regulation due to the three basic GATT rules. First, Transparency ensures that protectionist measures are exposed. Second, the National Treatment principle ensures that domestic and foreign producers are put on an equal footing. Market Access requirements demand that foreign producers are given the ability to enter the market. Hence, the trade-oriented approach creates pressures forever increasing liberalization and deregulation and thus, it can be considered the legal service provider model applied on an international scale.

In "Exchange of Letters Between Ambassadors Matsunaga and Yeutter", Clayton Yeutter made the American commitment to the trade process very clear:

> "My government regards this understanding on foreign attorneys as a significant step forward. At the same time, however, the law contains several restrictive provisions that are troubling...
>
> My Government finds these and other restrictions in Japanese law to be regrettable. Because of these reservations, I want to make clear that my Government does not view this arrangement...as setting a precedent for future discussions on the liberalization of trade in services.
>
> We expect that in the near future, after the new system is put into place, we can revisit these issues."[177]

Thus, the passage of the Gaiben Law ended the dispute. Many disagreements remained, but unlike before there was a framework in place to solve these disagreements based on a commitment to a process of liberalization.

Thus, the belief that bengoshi "won" and the American lawyers "lost" is incorrect. The trade process is an on going movement toward full deregulation or a consumer choice regime.

174 Panel Report on "United States- Section 3337 of Tariff Act of 1930". L/6439, adopted on 7 November 1989, para.5. 26 in *Guide to GATT Law and Practice* 6th ed (Geneva: GATT, 1994) at 522.

175 *Crabb Supra*. note 88 at 1759.

176 O. Flores, "Prospects For Liberalizing the Regulation of Foreign Lawyers Under GATT and NAFTA" (1996) 5 Minnesota Journal of Global Trade 159 at 164-167.

177 "Exchange of Letters Between Ambassadors Matsunaga and Yeutter" (1988) 21 Law in Japan 185 at 190.

The bengoshi lost out due to their stonewalling on the issue. Had they accepted foreign lawyers earlier they could have controlled them through bar regulations creating onerous requirements and possibly special testing to limit the number of foreign lawyers and control their activities. From this perspective, the belief that the bengoshi were calculating in their stance of having no foreign lawyers is unconvincing.

D. Stage Four: Frustration, Reconciliation and Final Resolution

(1) Frustration

There was much dissatisfaction with the Gaiben Law among American lawyers. The more minor complaints were that registration was too complicated and inconvenient, the 180 days residency requirement was also bothersome for international lawyers and an objection to the idea of reciprocity[178]. The major issues, which were also objected to by the EU, were:

(1) the right to have members of the Japanese bar as partners in Japan;
(2) the right to hire bengoshi as associates in Japan;
(3) the right to practice in Japan under a firm's own name
(4) the right of a U.S. lawyer to count time worked in any jurisdiction toward the five year experience requirement; and
(5) the right to handle international arbitrations in Japan[179]

As a result of the Evian negotiations, General Agreement on Trade in Services (GATS) and pressure from the Japanese Government, the Ministry of Justice, in consultation with the JFBA, passed amendments[180] to deal with issues (1), (3) and (4) seven years after the passage of the Gaiben Law.

In the view of the American lawyers, the amendments only partially resolved the issues. The FLCs gained the right to form "special joint enterprises" with bengoshi. However, the special joint enterprises only allowed the bengoshi and FLC to work along side one another and not together. A key criticism was that since the special joint enterprise were only client-sharing arrangements and not true partnerships, the joint enterprises did not create any long-term commitment for cooperation between the bengoshi and FLC. As well, the joint enterprises could not handle domestic law cases and litigation, although this condition was not surprising considering that the ban on hiring bengoshi remained in place. The experience requirements were relaxed slightly to include practice in Japan as a trainee, although practice in jurisdictions other than the home jurisdiction did not count. Thus, the American lawyers remained unsatisfied with the pace of liberalization.

Some of the controversy over the Gaiben Law amendments was likely due to the failure of most FLC firms in Japan to make a profit:

> "...at the 10 year mark, most American firms have fled for more profitable Far East venues, such as Hong Kong and Singapore. As the resident partner for New York's Simpson Thacher and Bartlett, David A. Sneider, expressed it, 'Tokyo certainly hasn't lived up to a lot of people's expectations'"[181]

178 The reciprocity requirement was removed with 1994 amendments. Since most of the major international law centers in the U.S. already had or soon passed FLC legislation, this point did not really affect American lawyers.

179 *Pardieck Supra.* note 35.

180 1994 Law No.65.

181 J. Eiperin, "Noh-Go For Tokyo Firms" The National Law Journal April 28, 1997.

Only four firms consided their practice to be successful[182] during the 1990's and this situation caused many American lawyers to put the blame squarely on the Japanese side.

However, one also needs to consider some more prosaic reasons for the failure of American law firms in Japan. The market for legal services for the FLC in Japan is not as developed as in other international transactions centers. Japanese businesses are generally still not accustomed to using lawyers in planning and negotiations[183]. Aside from large international corporations, Japanese businesses still prefer to operate on an idea of trust and lawyers are unwelcome in this process[184]. As well, lawyers' advice is most effective when the decision making process is controlled by a few people. The lawyer then can give a detailed analysis of the proposal and the plan can then be altered to suit the legal advice. In Japan, the decision making process is consensus driven, so at the start of the decision making process, the lawyer only has vague hypotheticals to work with. When the decision is finally made, the lawyer's advice may be unwelcome because the consensual decision is hard to change[185]. Another important consideration is that international arbitrations were rare in Japan, due to the archaic nature of Japanese arbitration law and the language barrier. Compared to other centers such as New York and London, Japanese international arbitrations were time-consuming and expensive[186].

Firms without significant experience in Japan were at a fundamental disadvantage. The expense of operating an office in Japan is high to due the high cost of office space and staff, so firms must generate high revenue. However, most firms did not have a significant client base to generate such revenue. The large corporations accustomed to doing business with lawyers already had connections to firms in America, so the lawyers in new offices had to spend much of their time trying to find clients[187]. This lack of a client base created a vicious circle for finding a staff of quality lawyers. There are few American lawyers proficient in Japanese, so there are few lawyers with a strong incentive to go to Japan. Many lawyers also have spouses with careers in the U.S., so they are reluctant to travel abroad, especially to Japan. Even in the 1980's, Japan was peripheral to big firm practice, so gaining promotion from Japan was difficult and obviously the failure of the Japanese offices in 1990's did not improve this situation[188].

(2) Reconciliation

The 1997 amendments to the international arbitration restriction were to the complete satisfaction of the U.S. and E.U. and represented a significant change of approach. A FLC or a foreign lawyer with a foreign firm can represent parties at international arbitrations for civil matters where there are foreign parties and foreign affiliates[189]. Since international arbitrations are rare in Japan, there is a ques-

182 *Ibid.*

183 J. Davis, *Dispute Resolution in Japan* (Kluwer Law International, 1996) at 108-109; A. Zaloom, "An American Lawyer Comes to Japan" 35 Japan Quarterly 49 at 50.

184 *Davis Supra.* note 183 at 108-109.

185 *Zaloom Supra.* note 183 at 51.

186 C.Ragan, "Arbitration in Japan: Caveat Foreign Drafter and Other Lessons" 7 Arbitration International 93; R. Greig, "International Commercial Arbitration in Japan: A User's Report" 6 Journal of International Arbitration 21 (1989). Japan recently passed a new international arbitration law, but it remains to be seen whether Japan can be a center for international arbitrations.

187 *Davis Supra.* note 183 at 114.

188 *Zaloom Supra.* note 183 at 51.

189 "Gaibenho no Kaisei ni tsuite" (1996) 119 Minjiho joho 2 at 3.

tion as to why this amendment was not passed earlier. The likely answer is that the bengoshi were concerned about the theoretical possibility that foreign lawyers might consult on Japanese law[190]. The JFBA's yielding on this issue shows that there were significant changes occurring on the Japanese side of the FLC issue.

The 1997 amendments were a change in process and a change in thinking. First, rather than simply negotiating directly with the JFBA, the Ministry of Justice established the International Arbitration Research Committee (IARC) composed of academics and others parties with an interest in the issue, in addition to the JFBA. The reasoning behind the recommendations of IARC, which were the basis for the amendments, showed a significant change from the JFBA reasoning. Instead of considering how the issue would affect bengoshi or the legal culture, the IARC focused on the client and on balancing the client's needs with the need for protection. In the case of international arbitration, the applicable law will not always be clear, however, demanding joint representation by a bengoshi and a foreign lawyer would not advance the facilitation of international transactions. There is not much of chance of actual damage because the foreign lawyer will be bound by ethics and clients will act rationally. That is to say, the foreign lawyer will not accept a case in which she has no competence, because in doing so she would violate an ethical provision common to all bar associations and a rational client would not appoint an obviously incompetent representative[191]. In this analysis of the issue, one can see that the gap between the American and Japanese approaches was shrinking.

The gap became even smaller with the 1998 amendments to the Gaiben Law. The starting point for the 1998 amendments was a radical change from previous amendment processes, because the starting point was deregulation rather than "re-regulation". The previous amendment processes worked from the view of fine-tuning the Gaiben Law to make it more acceptable to the U.S. and E.U. The primary pressure for the 1998 amendments came from the U.S and E.U. in the form of the "Submission on Deregulation", however, for the first time there was also significant domestic pressure from the Committee on Administrative Reform and from the Keidanren. The Ministry of Justice with the JFBA established the Foreign Lawyer Issue Research Committee (FLRC) (Gaikoku Bengoshi Mondai Kenkyu Kai) which included academics, economists and the media, instead of only persons from legal circles. On the recommendation of this committee three significant amendments to the Gaiben Law were made. First, the experience requirement was reduced from five years to three years of which only two years is required to be in the home jurisdiction. Second, FLC may give advice on third country law with a written opinion from a lawyer qualified in that country's law. Third, bengoshi and FLCs may work together on problems involving foreign parties with the exception of litigation and submissions to public organizations[192]. Thus, the only remaining significant issues are the inability of FLC to form partnerships with

190 T. Kojima, "Gaikoku Bengoshi ukeire ni kan suru Kisei Kanwa" (1996) 1082 Jurisuto 135 at 137-138.

191 *Ibid.* at 138.

192 M. Yoshida, "Gaibenho kaisei no Gaiyo" (An Outline of the Amendments to the Gaiben Law) (1998) 1520 Kinyu Homu Jiho 24 at 24-29.

bengoshi or to hire bengoshi.

(3) The Final Resolution of the FLC Issue

The process used for the 1998 amendment to the Gaiben Law cannot resolve the remaining significant issues of partnership and hiring, since the JBFA is solidly opposed to partnership and hiring. Although, American critics suggest that the bengoshi are opposed to partnership and hiring because they are afraid of competition, I think that the JFBA's opposition is more based on ideology. Partnership and hiring are really symbolic issues, because the number of bengoshi with experience in business and international transactions who would be willing or able to form and partnerships with or be employed by FLC firms are few. Rather, since the FLC would have control of the bengoshi in a partnership or employment situation, the assertion is that the bengoshi would no longer be able to give independent advice and thus, the FLC would be practicing Japanese law in violation of the Bengoshi Law[193]. The rejection of partnership and hiring is, therefore, based in professional ideology: The lawyer must be independent and the foreigner cannot play a role in domestic law. Thus, there needs to be a final shift towards a business professional model.

I think that the necessary shift will occur and these final major issues will be resolved. The key to resolving the remaining issues will be an increase in the lawyer population. The lawyer population increased steadily in the 1990s with the number of entrants to the LRTI increasing from 500 to 700 in 1990 and finally to 1000 in 1999. In all likelihood, the number of entrants will be increased to 1 500 in a few years[194]. The new lawyers will likely have very different attitudes from their seniors for many reasons. Within the law faculties of Japan, there has been significant growth of the interdisciplinary approach to law and thus in the future lawyers will not be so resistant to economic analysis. Further, reinforcing this trend is the decline in respect for bureaucrats and salary men and increasing respect for entrepreneurs[195]. Finally, many of new bengoshi will be trained in business-oriented law offices. These new business-oriented bengoshi will form firms of their own and they will demand further increases in lawyer population to meet new demand for legal services resulting from increases in litigation[196], the break down of the keiretsu system and reduced reliance on administrative guidance. Thus, the majority of the lawyers in the JBFA will eventually become business professionals and the professional and Zaiya lawyers will be the minority. The business professional lawyers will be attracted to the profits from free association with FCLs and the remaining association barriers will be removed.

VII Conclusion

I think that the main lesson to be learned from studying the FLC dispute is that the lawyer, like Foucault's prison, is a social construction. However, the prison does not seem artificial to most people, but most people can readily see that the lawyers do not have a natural right to their powers. A society, such as Japan, may give a marginal role to lawyers, and another society, such as the U.S., may give the lawyer a central role. The lawyer may be seen as part

193 *Ibid.* at 29; *Kojima Supra.* note 190 at 139.

194 *Japanese Lawyers in Transitions Supra.* note 40 at 318-317.

195 *Ibid.* at 317-316.

196 *Ibid* at 325.

of the solution to economic malaise, or the cause of it. In 1997, *Japan: Economic Success and Legal System*[197] was published and in the same year, *Hoka shakai e Nihon ga Kawaru* (Japan: Changing Toward a Legalized Society)[198] was also published. Thus, the social construct of the lawyer is both ambiguous and malleable.

The lawyer is not only the result of external factors. Given the opportunity, lawyers will create their own identity. Lawyers in Japan and the U.S. have struggled against the government, poor image, and the intrusions of other professions to create a niche for themselves. They have the capacity to create a compromise between their ideal and the demands of external forces. In America, despite the "death of professionalism", one continues to see signs of the professional model and in Japan, business lawyers are functioning within the "noble profession".

A question for future examination is what will be the construct of the FLC. Both the Japanese and Americans see the FLC as the epitome of the legal service provider:

> Transnational lawyers are significantly deprofessionalized. In this they increasingly resemble their competitors in offices of house counsel and accounting firms, as well as their predecessors-lawyers before the emergence of strong professional associations[199].

The deprofessionalized lawyer is always in danger of becoming the "Profit Maximizer" or the lawyer profiting at the expense of her client. Bengoshi have some justification in being apprehensive about the role of the FCL in this regard. However, one should not forget that even recently foreign lawyers, such as Richard Rabinowitz, Dan Henderson and Charles Stevens, have contributed to the scholarship of law in Japan and the development of Japanese skill in international law. The potential for the FLC to contribute to the development of Japanese law and the legal profession and should be explored further.

197 *Supra.* note 78.

198 K. Hideaki, *Hoka Shakai E Nihon ga Kawaru* (Japan: Changing Towards a Legalized Society) (Tokyo: Toyokeizai Shinhosha, 1997).

199 *Transnational Law Practice Supra.* note 25 at 750.