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ACCJ LEGAL SERVICES COMMITTEE

WHY UNRESTRICTED FREEDOM OF ASSOCIATION BETWEEN *BENGOSHI* AND *GAIBEN* SHOULD BE PERMITTED

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TABLE OF CONTENTS

ACCJ REPORT

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I. INTRODUCTION

A. The Final Report of the Judicial Reform Council

On June 12, 2001, the government of Japan, through its Judicial Reform Council, issued a final report entitled "Recommendations of the Judicial Reform Council – For a Justice System to Support Japan in the 21st Century" (the "JRC Report"). The JRC Report contains many recommendations that the American Chamber of Commerce in Japan (the "ACCJ") finds positive and constructive. In particular, the JRC Report recognizes that:

"In the areas of personal activities and business activities, one can easily foresee that international legal problems will increase in quantity and will become more complicated and diversified in content. Therefore, lawyers should be enabled to offer quality legal services to meet legal demands in a time of internationalization. From this standpoint, lawyers' responses to globalization should be thoroughly strengthened by greatly increasing the number of lawyers, strengthening the business structure of law offices, promoting international exchange of lawyers, promoting collaborations and cooperation with foreign law solicitors (*gaikokuho jimu bengoshi*; hereinafter referred to as "*gaiben*"), etc., and promoting attention to the demands of internationalization in the legal training stage. As for the review of the *gaiben* system and the management thereof, prompt and thorough consideration should be given from the users' point of view, bearing in mind international discussion. Specifically, from the standpoint of actively promoting collaborations and cooperation between Japanese lawyers and *gaiben*, requisites for specified joint enterprises (under the existing system, these are joint ventures for the purpose of having Japanese lawyers and *gaiben* perform legal work involving an international aspect under certain conditions stipulated by law) should be relaxed. Continued consideration should be given to abolishing the prohibition on the employment of Japanese lawyers by *gaiben*, as a matter for the future, paying heed to the international discussion."

JRC Report Chapter II, Part 3.4 ("Internationalization of Lawyers (the Legal Profession)"); see also Chapter III, Part 3.5 ("Internationalization of Lawyers; Cooperation and Coordination with *Gaikokuho Jimu Bengoshi*").

B. Implementation of Recommendations is Needed as Soon as Possible

(1) Prime Minister Koizumi has publicly vowed to closely follow the recommendations in the JRC Report, and indicated that

legislation should be enacted within three years to implement these recommendations. He has further emphatically stated, "no structural reforms, no recovery or development for Japan." Towards that end, an Office for Preparation for Judicial Reform ("Judicial Reform Preparation Office") was established within the Cabinet Secretariat on July 1, 2001. Because the members of the ACCJ have a long history of and strong commitment to doing business in Japan, we commend and support this effort.

(2) The necessary progress cannot be achieved if Japan continues to prevent foreign lawyers from joining freely with Japanese lawyers to offer comprehensive legal services. Japanese and foreign persons and enterprises must be able to obtain fully integrated transnational legal services to carry out domestic and cross-border transactions efficiently. Unless the government of Japan enacts urgently needed reforms to the legal services sector and shifts to a new regulatory paradigm to address this market deficiency, Japan will never achieve its goal of becoming a recognized international business center. Both the business community and the national economy will lose.

(3) In addition, Japan's economic restructuring process (particularly in the financial services sector, but also in the fields of securities, mergers and acquisitions and other foreign direct investment-related activities, the Internet and e-commerce) will continue to be seriously hampered if the government of Japan fails to create a globally competitive legal services market to support Japan's liberalized business sector.

(4) The ACCJ believes, therefore, that the Judicial Reform Preparation Office should move as swiftly as possible to secure implementation of necessary reforms. Japan's legal services infrastructure must be quickly reformed so that it can better respond to the needs of Japanese and foreign persons and enterprises.

(5) The *Keidanren* has similarly pressed the government of Japan to accelerate its proposed three-year plan for structural reform to just 12 months. Some have termed the 1990's a "lost decade" for Japan, and attributed this in part to delays in enacting true structural reform. For the sake of all domestic and foreign businesses in Japan, further delay should not be tolerated.

C. <u>Shortage of International Commercial Lawyers in Japan</u>

As the JRC Report recognizes, Japan, the world's second largest economy, has a severe shortage of international commercial lawyers. At present there are fewer than 1,000 domestic and foreign lawyers in

Japan who can advise on and prepare the documentation for complex cross-border transactions.

(1) This situation exists for two principal reasons:

(a) The restrictions imposed on the practice of law in Japan by registered foreign lawyers (*gaikokuho jimu bengoshi* or "*gaiben*") and on their ability to completely and freely associate with Japanese lawyers (*bengoshi*) (which is referred to as "Restricted Freedom of Association" for purposes of this Report). The operative principle should be unrestricted freedom of association (including freedom of employment) between and among legal professionals on an equal basis, as is permitted in other countries with sophisticated business communities such as Germany, France, England, Belgium and the United States, as well as in Japan itself among Japanese *bengoshi* ("Unrestricted Freedom of Association").

(b) The failure of the Japanese legal education system to produce qualified *bengoshi* with appropriate business law and language skills in the numbers required to satisfy the current demands of international business.

(2) The JRC Report recommends a substantial increase in the number of lawyers in Japan -- from approximately 20,000 at present to approximately 50,000 by 2018 through the establishment of a "law school" system in Japan (JRC Report Chapter III, Part 1.1). The ACCJ believes this is a sound recommendation but one that is inevitably a long-term endeavor. It is likely to be a number of years before any such changes begin to meet the legal demands of globalization.

(3) On the other hand, the ability to have Unrestricted Freedom of Association between *bengoshi* and *gaiben* and the resulting availability of fully integrated transnational legal services in Japan will result in significant improvements in the provision of legal services to domestic and international clients in Japan within a very short period of time. This is a structural reform that can be implemented today at absolutely no cost, and that will have an immediate beneficial impact on the development of a legal infrastructure to support and facilitate foreign direct investment in Japan and, thereby, "recovery and development for Japan" as advocated by Prime Minister Koizumi.

D. Uniqueness of Japan's Restrictions on Foreign Lawyers

Among the G-7 countries, Japan is unique in the severe restrictions it imposes on the practice of law in Japan by foreign lawyers and its prohibitions on freedom of association among legal professionals.

These restrictions have kept the population of foreign lawyers in Tokyo very small in comparison with such numbers in other comparable international financial centers such as New York, London or Frankfurt. Similarly, Tokyo compares most unfavorably in this respect with smaller regional financial centers such as Hong Kong and Singapore, and even Bangkok. This shortage in turn has contributed to the severe shortage of *bengoshi* who are sophisticated in international legal matters.

E. Scope of this Report

This Report focuses on the issue of Unrestricted Freedom of Association and is not intended to address related issues of continuing concern to the ACCJ, such as increasing transparency and participation in *gaiben* regulation, allowing foreign lawyers full credit for their work experience in Japan, removing discriminatory restrictions on *gaiben* advising on "third country" law, increasing the number of qualified legal professionals in Japan, allowing *gaiben* to consult with Japanese government agencies on behalf of their clients and the ability to have Unrestricted Freedom of Association with quasi-legal professionals. These important issues are addressed in a separate ACCJ Report entitled "The Legal Services Committee Response to the Recommendations of the June 12, 2001 Judicial Reform Council's Final Report on Reforms to Japan's Civil Judicial System and Legal Services System."

In this Report, the ACCJ respectfully offers its comments on why Unrestricted Freedom of Association between *bengoshi* and *gaiben* should be permitted and why the existing restrictions should be immediately lifted.

II. BARRIERS TO UNRESTRICTED FREEDOM OF ASSOCIATION

A. Articles 27 and 72 of the *Bengoshi* Law[1]

(1) Article 27 of the *Bengoshi* Law ("Prohibition against acting together with persons who are non-lawyers") provides that "a practicing attorney (*bengoshi*) shall neither undertake any cases introduced by any person who violates any of the provisions of Articles 72 to 74 inclusive (that is, a non-lawyer), nor allow such person to make use of his name."

(2) Article 72 of the *Bengoshi* Law ("Prohibition of the practice of law by non-lawyers") provides that "a person other than a practicing attorney (*bengoshi*) shall not, for payment, and as an occupation, engage in the practice of law by giving legal advice, providing legal representation, arbitrating, settling disputes amicably, or performing any like acts in respect of lawsuits,

[1] The *Bengoshi* Law (Law No. 205, 1949) is the law that governs the practice of law by *bengoshi*.

non-contentious matters, or appeals filed with administrative agencies, etc."

B. <u>*Nichibenren*'s Restrictive Interpretation of these Articles</u>

(1) Although the *Bengoshi* Law contains some limiting language against Unrestricted Freedom of Association, the primary barrier to *bengoshi* freely associating with *gaiben* is a restrictive, outdated and unjustified interpretation of this language by the *Nichibenren*.

(2) Nothing in either Article 27 or Article 72 expressly prohibits *bengoshi* from freely associating with *gaiben.* Indeed, Article 27 of the *Bengoshi* Law is unchanged from its original enactment in 1949 and thus predated the enactment of the *gaiben* qualification system in 1986. Moreover, according to the provisions of Article 6, Paragraph (2) of the Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers[2] ("*Gaiben* Law"), the provisions of Article 72 of the *Bengoshi* Law do not apply to *gaiben*,[3] but no corresponding amendment was made to Article 27 of the *Bengoshi* Law which governs *bengoshi*. As appears from the drafting of *Bengoshi* Law Article 27 and Article 72, these articles are intended to prevent the growth of a second tier or middleman attorney referral/solicitation industry by non-lawyers and to prohibit the practice of law by non-lawyers. However, the *Nichibenren* has interpreted these articles as a prohibition on *bengoshi* sharing the profits that may be generated from the *bengoshi*'s work with any persons who are not registered as *bengoshi* in Japan, including foreign lawyers even though they may be fully qualified in their home jurisdictions as well as foreign lawyers who are registered in Japan as *gaiben*. In practice, this prevents *bengoshi* from freely associating with non-lawyers by entering into full partnerships where each partner shares the profits generated from his or her work with each of the other partners, in other words, by, , forming partnerships among Japanese and foreign lawyers.

(3) The *Nichibenren* has long argued that *gaiben* are not true "lawyers" in Japan because the foreign lawyer registration is a qualification different from the Japanese lawyer qualification and that the *Nichibenren* cannot determine what non-Japanese legal professionals can be classified as the equivalent to a Japanese lawyer for the purposes of Articles 27 and 72. [Therefore, it simply treats all non-Japanese legal professionals as falling within the prohibited category of "non-lawyer."] But,

[2] Law No. 66 of 1986, as amended.
[3] That is, *gaiben* are not "non-lawyers" for purposes of Article 72.

if *gaiben* are not true lawyers, why are they required to be members of the *Nichibenren*? The *gaiben* registration process itself focuses on the fact that these applicants are fully qualified (foreign) lawyers. The *Nichibenren* responds speciously that, "while they could probably determine that U.S., U.K., German and certain other legal professionals are *bengoshi* equivalents, there would be many others too difficult to classify." Therefore, they will make no such classification in the cases of such jurisdictions either, and insist upon re-performing the determination in each case for lawyers from major jurisdictions.

C. Purported Justification for Restricted Freedom of Association

The primary justification given for Restricted Freedom of Association is that *bengoshi* have a special social mission to fulfill and therefore they are expected to maintain a stronger, more ethical and independent professional character than *gaiben* in order to fulfill that mission. This mission is stated as "protecting fundamental human rights, realizing social justice, maintaining social order and improving the legal system" (Article 1 of the *Bengoshi* Law). The JRC Report acknowledges the important social role that lawyers play in Japan, and refers to lawyers as "doctors for the people's social life" (JRC Report Chapter III, Part 3.1).

D. Article 49 of the *Gaiben* Law

(1) The *Gaiben* Law specifically prohibits *gaiben* from employing or sharing business, fees or profits with *bengoshi* except as otherwise permitted by the "Specified Joint Enterprise" or "*tokutei kyodo jigyo*".

(2) Article 49 of the *Gaiben* Law ("Prohibition of Employment of a *Bengoshi*, etc.") provides that a *gaikokuho jimu bengoshi* shall not:

(a) employ a *bengoshi*, or

(b) under a *kumiai* contract or other kind of contract, run a joint enterprise with a specific *bengoshi*, which has as its object the conduct of legal business, or receive a share of the fees or other profits which a specific *bengoshi* gains for the performance of legal business.

III. FLAWS IN THE *NICHIBENREN*/MINISTRY OF JUSTICE LOGIC

A. *Nichibenren's* Interpretation of Article 72 of the *Bengoshi* Law extends also to *Gaiben* the Application of Provisions Intended to Apply to True "Non-Lawyers"

(1) Under Article 27 of the *Bengoshi* Law, the term "non-lawyer" is indirectly defined by reference to Article 72 of the *Bengoshi* Law as a person who is not permitted to engage in the practice

of law as an occupation. A "non-lawyer" is defined under Article 72 as a person who "shall not, for payment, and as an occupation, engage in the practice of law by giving legal advice, providing legal representation, arbitrating, settling disputes amicably, or performing any like acts in respect of lawsuits, non-contentious matter, or appeals filed with administrative agencies, etc." There is no reference to jurisdiction, nationality or licensing entity. While a few of the acts described in Article 72 are purely domestic and appropriately not within the scope of practice of *gaiben*, the majority of the functions listed accurately describe the legally sanctioned practice of *gaikokuho jimu bengoshi*, the tasks which *gaiben* regularly perform as licensed attorneys in their home jurisdictions..

(2) Taken at face value, Articles 27 and 72 are no different from legal practice laws in the United States or most other countries. Throughout the world the public policy behind these laws is to protect consumers of legal services by preventing non-lawyers from practicing law, injecting themselves into the attorney/client relationship, or exercising a financial influence over the legal profession. The issue really only arises as a result of the *Nichibenren's* interpretation of the definition of "non-lawyer" under Article 72 to include the international law firms to which *gaiben*, that is registered foreign lawyers, belong, rather than the originally intended lay person.

(3) The *Nichibenren's* implausible contention that it cannot determine which non-Japanese legal professionals can be classified as *bengoshi* equivalents for the purposes of Articles 27 and 72 of the *Bengoshi* Law is contradictory to the *Nichibenren*'s requirements for a *gaiben*'s registration. The lengthy (ranging from several months to one year) and expensive (approximately ¥170,000) registration process is justified according to the *Nichibenren* because it takes time to investigate which non-Japanese legal professional is the equivalent of a Japanese lawyer in his or her home jurisdiction and thus worthy of the foreign lawyer qualification. Since its inception, the *gaiben* registration has never been a separate qualification (like that of a *bengoshi)*, but, as the name implies, the registration of *gaikokuho jimu bengoshi* (an approximate literal translation of which is "foreign law lawyer") is supposed to be an acknowledgment of the *gaiben's* "attorney" status and permission to practice the law of his or her home jurisdiction,. and otherwise while in Japan. It can be said that all or most of the overseas partners of a *gaiben* registered in Japan will possess similar qualifications and status.

(4) The outdated and unjustified nature of this interpretation and contention requires lifting of all prohibitions on Unrestricted Freedom of Association.

B. *Nichibenren* and Local Bar Associations Permit *Bengoshi* to be Employed by Non-*Bengoshi* as In-House Legal Counsel

(1) The Nichibenren interprets the *Bengoshi* Law to prohibit a *bengoshi* resident in Japan from forming a partnership with a foreign lawyer outside Japan or a *gaiben* within Japan, or being employed by, a foreign lawyer outside Japan or a *gaiben* within Japan, even though *bengoshi* outside Japan are allowed to form partnerships with and to employ foreign lawyers in many other countries.

(2) The reported rationale for this prohibition is that a partnership or an employment relationship between a *bengoshi* and a foreign lawyer or *gaiben* will impede *bengoshi* from fulfilling their social mission and might lead *bengoshi* and/or *gaiben* to engage in unethical behavior, denigrate the professional independence of *bengoshi*, or require *bengoshi* to spend significant time policing the activities of *gaiben* to ensure that they comply with the *Gaiben* Law.

(3) While the social mission of *bengoshi* is worthy of respect, the assumption that Unrestricted Freedom of Association between *bengoshi* and *gaiben* will impede *bengoshi* from achieving this mission is entirely based on a fundamentally erroneous foundation. The other aforementioned concerns are similarly lacking in a rational foundation. Indeed, the *Nichibenren* and the various local bar associations have already admitted this *de facto* by permitting *bengoshi* to become employees of non-*bengoshi* as in-house legal counsel of foreign and domestic companies in Japan. *Bengoshi* are still able to fulfill their social mission while under the supervision, instruction and regulations of their non-*bengoshi* business employers, and while receiving monetary incentives such as stock options, which are akin to profit sharing. While this sort of employment is still limited, it is inconsistent for the *Nichibenren* to argue on one hand that in-house *bengoshi* can fulfill their social mission as attorneys while acting as employees of a corporation, whereas *bengoshi* who wish to engage in Unrestricted Freedom of Association with *gaiben* cannot.

(4) In comparing the ethical foundations of *gaiben* and corporations, it is fundamental that corporations are not bound by any specific code of legal ethics, as are *gaiben* through both the Nichibenren's Code of Ethics for Practicing Attorneys (*Bengoshi Rinri*) ("Nichibenren Code of Ethics") and the

ethical requirements of their home jurisdiction. Corporations, driven by management's and shareholders' financial objectives, are guided ethically by the confidence public investors place on a corporation's reputation. While most corporations generally lack the affirmative objectives of protecting fundamental human rights, realizing social justice, maintaining the social order or improving the legal system, their reputations, and hence their share price, are at risk when public sentiment disapproves of their ethics.

(5) Notwithstanding the statutory ethical obligations of *gaiben*, the *Nichibenren* has ostensibly concluded that *bengoshi* can exercise their independent judgment and ethics while receiving stock options and other profit related compensation incentives acting as in-house legal counsel, but cannot through unrestricted association in a law firm setting with *gaiben*. This is true even though stock options and other compensation tied to corporate profits received by *bengoshi* working as in-house legal counsel are arguably similar to sharing profits with a "non-lawyer" *gaiben* (prohibited under Article 27 of the *Bengoshi* Law).

(6) The JRC Report supports permitting *bengoshi* to become employees of non-bengoshi as in-house counsel of companies in Japan and recommends liberalizing the means by which a *bengoshi* may accept such a position by recommending the adoption of an after the fact reporting requirement coupled with the taking of appropriate steps to ensure ethical activity in lieu of requiring *bengoshi* to obtain the permission of their local bar association.[1]

(7) In addition, most non-Japanese lawyers are expected to fulfill a similar social mission.

(8) The fact that these assumptions are fundamentally lacking in foundation requires lifting of all prohibitions on Unrestricted Freedom of Association.

C. <u>Ethical Concerns are Unwarranted</u>

(1) The *Nichibenren* and the Ministry of Justice have also repeatedly asserted that Unrestricted Freedom of Association between *bengoshi* and *gaiben* is not possible because *bengoshi* would otherwise be required to spend an inordinate amount of time policing the *gaiben* to ensure ethical compliance. This assertion is based on three erroneous presumptions: (i) the Nichibenren Code of Ethics is more stringent than attorney ethics laws of foreign countries; (ii) *bengoshi* are more ethical than *gaiben*; and (iii) *bengoshi* who employ *gaiben* do not monitor their ethics.

(2) The Nichibenren Code of Ethics was first adopted in 1990, modeled after the American Bar Association's ("ABA") Model Rules on Professional Conduct and contains 61 short summary articles. By contrast, attorney ethics laws in, for example, the State of California first set forth in the Business and Professions Code in 1928 and currently codified in the California Rules of Professional Conduct, [1] also modeled after the ABA's Model Rules on Professional Conduct ("California Ethics Law"), contain 40 lengthy detailed rules. Both the Nichibenren Code of Ethics and the California Ethics Law contain provisions dealing with (i) attorney integrity in general; (ii) relationships among attorneys; (iii) relationships with clients; (iv) relationships with opposing parties; and (v) relationships with the court. A summary comparison of both laws reveals numerous common themes. A careful comparison establishes that the California Ethics Law covers a much broader range of ethical considerations and is far more detailed in its applications. In short, the presumption that foreign ethics laws are less stringent than those in Japan cannot be supported and, to the contrary, there is strong evidence to support the position that the Nichibenren Code of Ethics is vague and less comprehensive. Indeed, the JRC Report recognizes this issue by advocating greater transparency in the disciplinary actions of the bar associations against *bengoshi* (JRC Report Chapter III, Part 3.6).

(3) With regard to monitoring lawyers to ensure ethical compliance, all law partnerships, with or without *gaiben* partners, have an affirmative obligation to ensure that each lawyer individually and lawyers as a group conducts their practice in an appropriate manner. Finally, if and to the extent that ethical violations were committed by a *gaiben*, such misconduct could be handled through disciplinary proceedings identical to those imposed on *bengoshi*.

(4) If, notwithstanding the affirmative obligation of all law partnerships to conduct their business in an ethical manner and the fact that any such misconduct could be handled through disciplinary proceedings, the *Nichibenren* and the Ministry of Justice remain concerned about the ethical compliance of partnerships between *bengoshi* and *gaiben*, then the *bengoshi* partners in such partnerships could be subject to the same reporting requirements and other steps that the JRC Report has recommended for *bengoshi* employed as in-house legal counsel of foreign and domestic companies in Japan.

(5) The assumptions of the *Nichibenren's* ethical assertions being lacking in a rational basis requires lifting of all prohibitions on Unrestricted Freedom of Association between *bengoshi* and *gaiben.*

D. Unrestricted Freedom of Association Will Not Necessarily Prejudice the Financial Self-Interest of Bengoshi

(1) Some have suggested that, in the final analysis, the reason that *Nichibenren* so vehemently opposes Unrestricted Freedom of Association is not because it has serious ethical concerns about *gaiben*; neither is it because it seriously questions whether it would be possible for *bengoshi* to fulfill their statutory obligation to seek social justice. Rather, some say, the real, underlying reason is fear. Fear that Unrestricted Freedom of Association will result in the "disorderly" collapse of a comfortable and profitable environment in which free competition is non-existent. Fear that global foreign law firms having superior legal expertise, know-how and financial resources will take over the Japanese legal profession. And fear that all of this will strike the *bengoshi* where it hurts most - their "pocketbooks."

(2) Opposition to Unrestricted Freedom of Association based on claims premised on financial self-interest should not prevail over the overwhelming need for and benefits of legal deregulation and free competition. Moreover, there is good reason to believe that the above-described fear is actually unwarranted. It is noteworthy that Germany at one time restricted freedom of association between German lawyers and foreign lawyers, but that these restrictions were lifted during the 1990's. Currently, a United States "Attorney-at-law" and a Japanese "*Bengoshi*" are deemed to be equivalent in terms of qualification and professional education to a German "Rechtsanwalt" or lawyer. Also, a foreign lawyer admitted in Germany is entitled to employ German lawyers and/or establish a partnership with German lawyers without any restrictions. Despite this relaxation of the association rules, the German legal profession has steadily grown in size and strength. Any fear that deregulation of the legal services system in Germany would result in a decline of the German legal profession has been unfounded.

IV. THE FAILINGS OF THE *TOKUTEI KYODO JIGYO* SYSTEM AND THE NEED FOR UNRESTRICTED FREEDOM OF ASSOCIATION

In 1995 Japan liberalized the *gaiben* system somewhat by allowing local "joint enterprises" (*tokutei kyodo jigyo*) between Japanese lawyers and resident *gaiben* in accordance with Articles 49-2-4 of the *Gaiben* Law. However, notwithstanding the undeniable demand for such a service from domestic and international clients, neither the major international law firms nor *bengoshi* have found the joint enterprise structure an attractive means of achieving the objective of providing coordinated advice on Japanese and international legal matters. To date approximately 16 such joint enterprises have been

created, involving less than one-fourth of all the foreign firms in Tokyo. Most joint enterprise offices have remained very small, and none of them have proved to be significantly more successful in achieving growth than the Tokyo offices of the international law firms who have not entered into joint enterprises. As a result, the quality and availability of sophisticated transnational legal services in Japan are hampered.

A. Specific Problems with the *Tokutei Kyodo Jigyo* System

(1) The JRC Report recommends that "requisites for specified joint enterprises should be relaxed" (JRC Report Chapter II, Part 3.4). However, the ACCJ believes that fixing or adjusting the *tokutei kyodo jigyo* system is not the solution.

(2) Non-lawyers unfamiliar with the culture and working methods of legal partnerships sometimes find it hard to understand why the "joint enterprise" structure is so unsatisfactory and provides such an impediment to the proper development of a multi-jurisdictional practice. The ACCJ accepts that these reasons are complex, and have much to do with the way in which individual lawyers (regardless of their home jurisdiction) are motivated in their careers and the way in which lawyers cooperate together on client matters. The following specific issues may help to explain:

(a) From the point of view of *bengoshi*, membership of a major international law firm, whether as a partner or associate, through a "joint enterprise" is unsatisfactory. It denies *bengoshi* a variety of benefits in respect of status, remuneration (profit sharing), training, pensions, disability and health insurance, resources and career prospects. It also strikes at the root of the collegial and cooperative atmosphere that most major international law firms seek to cultivate.

(b) Since these benefits are a strong incentive for successful attorneys, this in turn makes it inevitably more difficult for a multi-jurisdictional practice to attract and retain qualified *bengoshi.*

(c) In addition, consumers of legal services in Japan are often frustrated by the absence of fully integrated legal services because it commonly results in (i) their inability to assemble a single integrated due diligence team with various legal specialists (which is essential in M&A transactions), (ii) difficulties obtaining advice on proactive approaches to regulatory and compliance issues that often arise when structuring and implementing sophisticated transnational transactions,

which are frequently matters of first impression, and (iii) general fragmentation of advice and increased costs resulting from the need to hire multiple firms.

(d) Foreign lawyers remain subject to discriminatory measures affecting the way in which they are permitted to practice law in Japan. These range from a restricted ability to advise on the law of countries other than that of the individual lawyer's primary qualification (no such restriction applies to *bengoshi*) to exclusion from the *Nichibenren* committees with responsibility for foreign lawyer issues.

(e) Finally, for those intrepid enough to undertake a "joint enterprise" notwithstanding these difficulties, the regulations requiring separation of what would otherwise be a single organization give rise to serious management and administrative problems. The complexity of all billing and accounting matters is more than doubled in order to deal with the existence of three distinct entities: the joint enterprise, the Japanese law firm member and the foreign law firm member.

B. <u>The Need for Unrestricted Freedom of Association is Client/Consumer Driven</u>

(1) The experience of those practicing commercial law, particularly in Europe, but also in major Asian centers such as Hong Kong and Bangkok, is that clients engaged in international business have a strong and distinct preference for being able to retain a single law firm which is capable of handling all aspects of a transaction.

(2) In most cases, clients require a combination of highly specialized experience in the particular type of transaction, advice on legal issues arising in the jurisdiction where the assets or business is located, and advice on the governing law (which is not always Japanese law and, in the vast majority of major financial transactions, is either English or New York law). The firms able to provide the complete range of such advice "under one roof" are most likely to be chosen to handle the transaction and are best able to offer clients the best service.

(3) The JRC Report recognizes this in two ways, first, when it recommends that review of the regulatory restrictions on *gaiben* must be reviewed from the <u>user's point of view</u> (JRC Report, Chapter III, Part 3.5), and second when it refers to the merits of "one-stop services (comprehensive legal and economic firms))" achievable through cooperation between lawyers, quasi-legal professionals and others (JRC Report,

Chapter III, Part 3.7). Further, the validity of this contention has been amply demonstrated in a number of European jurisdictions, France and Germany being the most obvious examples, as well as in Asia. It has also clearly been a significant factor in the recent decision of the Singaporean Government to permit the establishment of joint Singaporean and foreign law firms by the creation of joint ventures between Singapore's best known law firms and a number of the world's leading international law firms.

C. Reform of the *Tokutei Kyodo Jigyo* System is Not the Solution

Thus, it is obvious that neither reform of the *tokutei kyodo jigyo* system nor the introduction of a new type of professional business organization in which both *bengoshi* and *gaiben* would participate will resolve this unmet need. To the extent that the JRC Report advocates mere deregulation of the conditions for *bengoshi* and *gaiben* to enter into a *tokutei kyodo jigyo*, this will not be sufficient. To seek true reform by further adjusting the *tokutei kyodo jigyo* system would be a wasteful and time-consuming exercise that would not only delay the process of deregulation and enabling providers of legal services in Japan to meet the needs of a globalized economy, but also would give yet another opportunity for those opposed to reform to introduce further regulations inhibiting freedom of association.

D. Multi-Jurisdictional Practice

(1) Rather, the objective should be to permit multi-jurisdictional practice under exactly the same rules that already govern the separate operation of *bengoshi* law firms in Japan and their foreign lawyer counterparts, without the need to distinguish between the two. The concept of a multi-jurisdictional practice is in fact already acknowledged and recognized under existing legislation. Lawyers in many of the foreign law firms in Tokyo are qualified to practice the law of more than one country (other than Japan) and *bengoshi* law firms are not restricted by legislation from advising on the law of any foreign country should they wish to do so.

(2) In short, all attorneys need to be completely free to engage in associations with legal professionals through any form they see fit. For example, there could be instances of partnerships being formed by *bengoshi* and *gaiben* locally in Japan under Japanese law, and *gaiben* becoming partners in Japanese law firms. The common theme is the need for complete Unrestricted Freedom of Association among legal professionals.[1]

V. PROPOSED AMENDMENTS TO *BENGOSHI* LAW AND *GAIBEN* LAW

It should be emphasized that the ACCJ is not seeking any relaxation of the rules that prohibit *gaiben* from practicing Japanese law. The essence of the reforms sought is simply the removal of unnecessary regulations that inhibit the provision of fully integrated transnational legal services and impede the provision of legal services in a globalized economy.

A. Minimal Regulatory Changes Required to Achieve the Objective

The regulatory changes required are minimal. They are, the ACCJ believes, limited to the following:

(1) The reinterpretation of Article 49 of the *Gaiben* Law on employment and enterprise relations between *bengoshi* and *gaiben* together with the consequential deletion of the *tokutei kyodo jigyo* regime.

(2) The amendment of Article 72 of the *Bengoshi Law* to clarify that persons other than (i) *bengoshi* and (ii) *gaiben* shall not engage in the practice of law.

With these minimal changes to the existing regulations, lawyers would be free to organize themselves so as to be able to respond to the needs of both Japanese and foreign clients conducting international business. And an important step would have been taken in the internationalization of the legal profession in Japan.

B. *Bengoshi* Can Employ *Gaiben* -- Why Not Mutuality?

Insofar as the relaxation of the prohibition on employment of *bengoshi* by *gaiben* is concerned, the JRC Report recognizes that this is an issue that must be continuously considered (JRC Report Chapter II, Part 3.4). In light of the fact that the *Nichibenren* currently allows *bengoshi* to be employed by non-*gaiben* companies in Japan as in-house legal counsel, there is no legitimate reason to continue the restriction on employment of *bengoshi* by *gaiben*, especially since *bengoshi* are currently permitted to employ *gaiben* and a wide variety of lawyers licensed in a variety of jurisdictions on an unrestricted basis. Indeed, the JRC Report goes so far as to say that mutual employment should be considered between lawyers and quasi-legal professionals (JRC Report, Chapter III, Part 3.7).

C. New Legal Concept of Partnership Not Required

(1) It has been argued in the past that allowing Unrestricted Freedom of Association between *bengoshi* and *gaiben* would require a new legal concept because true "partnerships" do not exist under Japanese law. The argument is unsupported because:

(a) Our definition of "Unrestricted Freedom of Association" is the same type of association currently undertaken between *bengoshi*, using the existing Japanese Civil Code *kumiai* provisions. [1]

(b) *To the extent that bengoshi* wish to join the non-Japanese partnerships of *gaiben* firms, they would join partnerships established under the law of a country other than Japan.

(2) Although Japan's *kumiai* law is not identical in detail to partnership laws in the United States or the European Union (which allow partnerships between local and foreign attorneys), the two laws are more similar than dissimilar. A *kumiai* has the four basic features of a common law partnership, namely:

(a) a contractual arrangement

(b) between two or more persons

(c) with a view to sharing profits, expenses and/or losses, and

(d) resulting in a personal relationship in a commercial or professional activity.

(3) Therefore, it is not a "new legal concept" that would permit Unrestricted Freedom of Association, but rather deregulation, or a lifting of such prohibition under Article 49 of the *Gaiben* Law, and correcting the *Nichibenren*'s interpretation of Article 27 of the *Bengoshi* Law that would allow the free association intended by the Japanese Constitution such that *bengoshi* and *gaiben* can form the associations/partnerships necessary to share work, referrals, profits and expenses and to meet the demands of their clients in an increasingly globalized economy. If these minor changes are made, then Article 49-2 of the *Gaiben* Law, which is the current exception to Article 49 of the *Bengoshi* Law allowing for the creation of the *tokutei kyodo jigyo* as the only exception to the Article 49 prohibition, should be deleted as unnecessary, or it would have to be changed to be permissive and not the only means for association between *bengoshi* and *gaiben*.

VI. FURTHER INCONSISTENT APPLICATION OF LOGIC AND LAW

A. Practice of Third-Country Law by *Bengoshi*

(1) Under Japanese law, *bengoshi* are permitted to practice the law of any foreign country in Japan ("third-country law"), while *gaiben* are prohibited from practicing third-country law in Japan (other than the law of their home jurisdiction).

(2) No exam or additional license is required for a *bengoshi* to legally practice such third-country law in Japan; the *bengoshi* simply represents himself or herself to be competent in that third-country's law.

(3) Under this system, the Ministry of Justice, the *Nichibenren* and the local bar associations limit the participation of foreign lawyers in Japan. Once again the inconsistent application of logic and law is being used to officially condone and support the control *bengoshi* have over the legal services market in Japan.

(4) The ACCJ strongly opposes any policy or law that allows individuals to practice the law of a jurisdiction when they have not been licensed to do so by that jurisdiction.

VII. CONCLUSION

The ACCJ strongly urges the immediate and final elimination of all prohibitions against freedom of association between *bengoshi* and *gaiben*. The operative principle should be unrestricted freedom of association - including freedom of employment - among legal professionals on an equal basis, as is permitted in other advanced countries such as Germany, France, England, Belgium and the United States, as well as in Japan itself among *bengoshi*. Neither the Ministry of Justice nor the *Nichibenren* can sustain the burden of proving that the disadvantages and costs of the prohibition are outweighed by any legitimate benefits or supportive of the goals set forth in the JRC Report and the needs of domestic and foreign businesses in Japan. The JRC Report calls for maximum cooperation from the *Nichibenren* to execute the measures required to reform Japan's judicial system (JRC Report Chapter V, Part 2). The ACCJ echoes this call and would be pleased to support and assist in these reforms.