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QUESTION, *Professor King*: Would you comment on the experience of U.S. lawyers in Japanese courts?

ANSWER, *Mr. Haley*: The new regulations simply bring American lawyers into a regulated system which licenses them to do what they otherwise could have done without the license, if they had been given a visa or been allowed to enter the country. I think the issues are visa issues, not licensing issues, in terms of negotiating with the Japanese government.

The experience of American firms has been, and the future experience will be, beneficial to the American lawyer but not to the Japanese lawyer. Japanese lawyers will continue to have a monopoly on offering legal services, and non-legal, law related services to foreign clients in Japan. But an American firm with an office in Japan will be able to provide a significant degree of Japanese law related counseling for its U.S. clients or other non-Japanese clients in New York City, Cleveland, Chicago, San Francisco, or Los Angeles, but not in Tokyo; even though much of the information is coming out of Tokyo. Also, there will clearly be contact between American counsel in Tokyo and representatives of their basic clients who happen to be in Tokyo at the same time. Therefore, I am not sure that the Japanese lawyers will be able to exercise that full monopoly that they believe the new law will insure.

QUESTION, *Mr. Smith*: Could you examine the ways in which the United States relates to Japan, and make comparisons, or contrasts that we ought to be drawing in terms of those relationships?

ANSWER, *Mr. Haley*: The area I know best in terms of comparisons concerns how the Canadians have related to Japan in the forestry industry. The Canadians have been much more effective in selling their product in Japan than has the United States. The success can be attributed to the long-term activities of very effective representatives in Tokyo, understanding the market, and making sure that the information about that market was communicated to potential suppliers.

There are some areas where I think both Canada and the United States have failed. These failures are in areas in which there are cultural differences. Until very recently, we have not taken Japan seriously. Japan was a world power and an economic power prior to World War II. It simply reemerged in the post-World War II era.

QUESTION, *MR. Whitehill*: Could you speak more on the congestion in Japanese court dockets and how negotiators resolve financial disagreements in Japan. Are they willing to accept ADR provisions in a contract?

ANSWER, *Mr. Haley*: There is no question that the Japanese prefer not to take their disputes to court. But I think that is also true in Canada and the United States. The studies I have seen of Canadian and U.S. businesses show that they prefer to resolve differences through a process of negotiation between the parties. If negotiations between the parties fail, third parties are brought in to provide either mediation, to facilitate negotiations, or to provide different leverage. Likewise, Japanese businesses prefer negotiation. They prefer it for the same reasons that were described this morning in terms of government-to-government negotiations. They do not want to give up their sovereignty, their individual independence or autonomy, or their control over the decisions that they are making. Adjudication always, whether it is arbitration or litigation, means giving up that control to a third-party. Therefore, the Japanese do not like to arbitrate. Arbitration is almost unheard of in domestic disputes. It is a foreign import that is used almost exclusively in terms of international commercial relationships.

When the Japanese perceive there is something to be gained by litigation, they will litigate.

The difficulty in Japan is that most business relationships are ongoing, continuing relationships and no one files suit in those cases.

QUESTION, *Professor King*: What about the objectivity of the Japanese courts toward foreign parties?

ANSWER, *Mr. Haley*: There are studies about Japanese courts and judges and how they respond to foreign parties. These studies are unanimous in their conclusion that Japanese judges tend to be, if anything, favorable to the foreign party. The Japanese complaint is that the judges go out of their way to be fair to the foreign party and in doing so, they end up to some degree being slightly unfair to the Japanese party.

It is clear that the rules that are being litigated in many cases, particularly regulatory rules, tend to favor the Japanese side. If the case is not in court, but before an administrative agency, it must be expected that the administrative agency is pursuing certain policies, and that it is enforcing those policies. To the extent that those policies coincide with the interest of a Japanese firm with whom the foreign parties are dealing, it is likely that the agency will favor the Japanese firm to that extent.

QUESTION, *Mr. Robinson*: I have heard it alleged that there is a structural discriminatory practice in Japan concerning prospective intellectual property, in particular, patent applications. For example, foreign patent applications are put on the shelf and delayed. If this is true, is there any remedy? What can one do? Who can you complain to?

ANSWER, *Mr. Haley*: If it is true, the remedy is to do exactly what the people in Seattle did when the City of Victoria dumped its sewage into its lovely sound. People should run to put it in the newspaper, and should

scream and holler. We should quickly go to the U.S. government and say, "You better do something. Look how unfair it is."

I have spent some time looking at this issue of intellectual property protection and the allegations against Japan for a variety of unfair practices. My conclusion is that, yes, there may be an isolated case or two of discriminatory practice. *Texas Instruments* is the case people often point to but I think that is an exceptional case. The Japanese system is like the European system. It is a system in which legal protection is given the moment you file. It is not from the moment the patent is granted. Your legal protection is confirmed once the patent is granted. So if there is a difference in the scope, there are some risks that you take.

I think the patent system, generally as a legal issue, is fair. I do not think there is really any serious problem. But difficulties arise in how the Japanese use it, the competitiveness of the system, and the lack of effective enforcement power - particularly injunctive relief. The Japanese tend to negotiate, and to get cross-licensing. Therefore, there is more competition which prevents the monopoly position that would ordinarily be expected.

COMMENT, *Mr. Siber*: There is no evidence that the patent office is discriminating by setting things aside. However, there are distortions in the Japanese patent systems that cause problems. The *Texas Instrument* case is an example.

The Japanese system has a post-rank opposition practice so that you can approach the application before it is granted. If an industry is ganging-up on applicants and sequentially opposing one after another, there is certainly a lot of time before the patent is ultimately granted.

There are also other digressions, such as the inability to get an injunction. This is true not only for patents, but also for civil litigation. It is almost impossible to get an injunction, and that is a serious problem.

The other problem that the Japanese patent system poses is that the courts interpret patents extremely narrowly, which means that if you are an American or Canadian patent owner, you cannot expect the same kind of protection in Japan as you might expect in your home country. It pays to study the system and learn how to use it.

One last distortion is the exceedingly large number of applications that Japanese companies file. There are 500,000 applications filed in Japan every year. There is no way that the patent office can deal with such a large number of applications, which means it can take many years to get a patent license.

COMMENT, *Mr. Haley*: I guess I worry somewhat about the use of the word distortion because what you are describing is part of the domestic system. The foreign company is operating under more or less the same terms the Japanese companies operate under; the Japanese also experience the lack of injunction to relieve the basic system. It is only a distortion if you consider the Canadian-U.S. practice to be the norm. We are

not really the international norm. The European practice is closer to that.

QUESTION, *Mr. Miller*: Can the same things that you said about Japan be said about the Asian system, or must certain distinctions be made?

ANSWER, *Mr. Haley*: The two systems that I know best are Taiwan and South Korea. Both were introduced to Western legal institutions as their contemporary legal systems were imposed upon them by Japan. They were both colonies; Taiwan from 1895, Korea from 1910. Both countries have continued to look very closely at what the Japanese do. It is not uncommon to find a statute that is introduced in Japan several years later introduced with some changes in both South Korea and Taiwan. The basic preferences for mediation and negotiation as opposed to adjudication are the same. The most striking difference between both South Korea and Taiwan and Japan is the extent to which the system enables or enforces a cohesion within corporate groups - the corporate group in the sense of both the firm and the neighborhood. In South Korea and in Taiwan, the family and the extended family are far more significant than they are in Japan. In both South Korea and Taiwan there is not a single firm that is not dominated by a family, with a son-in-law, first son, or second son, as the president of this subsidiary and the president of that subsidiary, etc. Also the firms are not run by professional managers in either Taiwan and Korea.

From an Asian prospective, Japan seems quite western, quite litigious. Japan uses legal institutions much more readily than the Asians. It is only from our prospective that Japan looks very Asian.

QUESTION, *Mr. Reifsnyder*: The Japanese, and Japanese companies in particular, seem to be looking to establish a long-term relationship with corporate counsel or American lawyers. They also want to find people who are willing to pursue things sequentially as opposed to over-lawyering. They also want to get good value for the money invested.

The problem is that when they enter the U.S. legal establishment they find people are willing to go for the jugular faster than they are willing to, and that the fees reflect the amount of time and effort committed.

Are there any particular kinds of cases or areas where the Japanese tend to be more prone to litigate than North Americans?

ANSWER, *Mr. Haley*: To answer that question the calculation is how many disputes are there that could be litigated and what proportion of those disputes end up in court as opposed to not ending up in court. For example, most litigation in Japan, indeed most criminal actions in Japan, involve automobile accidents. Why do these get into court as opposed to commercial contract disputes? There are a lot of commercial contract disputes in Japan.

How do you explain that? First, automobile accidents are disputes

between strangers. The reasons for negotiating, mediating and reaching a settlement are different when negotiating with a stranger then if negotiating with someone that you will have to deal with for the next ten years. When dealing with friends, both parties want to reach a solution without going to court. Another factor is that in automobile litigation, there is a lot of litigation, therefore, the rules of litigation in this area are clear.

Next, it should be remembered that very few cases proceed to litigation either here or in Japan. In the United States, less than 10 percent of all disputes ever get to court. The Japanese probably have even a lower percentage. Because there are enough cases that do go to court, the Japanese know pretty well what the courts will do. Japanese judges publish their findings. If you have a loss of life because of an automobile accident, and there is fault with no comparable fault on the other side, they will use actuarial tables to determine what it is worth, and that is what you will get.

Why go to court when the insurance company will settle? They will settle for an amount which represents a discount for the cost of going to court.

However, the Japanese believe that they are non-litigious. They believe this is particularly true compared to the United States.