

## Henderson: Foreign Enterprise in Japan: Laws and Policies

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*Foreign Enterprise in Japan: Laws and Policies.* By Dan Fenno Henderson. Chapel Hill: University of North Carolina Press, 1973. Pp. xvii, 574. Appendices, Glossary, Bibliography, \$17.95.

by JEROME ALAN COHEN\*

"Encyclopedic" is perhaps the best way to describe this long-awaited, valuable study of Japan, which strives "to describe and analyze the legal institutions and practices that govern the participation of foreign capital and technology in economic development. . . ."<sup>1</sup> The volume is the fifth and last of a series, commissioned by the American Society of International Law, on the legal environment for foreign investment in selected countries. Countries that have previously received similar treatment are India, Colombia, Nigeria, and Mexico.<sup>2</sup>

Yet Professor Henderson, who teaches at the University of Washington's School of Law, does not contrast Japan's distinctive legal culture with that of "developing" countries. Rather, at times explicitly and at times implicitly, he interprets Japan in light of the situation in the United States, the only capitalist nation whose gross national product still exceeds Japan's. Both the author and the sponsoring institution, after all, are American. So too is the bulk of the anticipated audience — and for good reason. The Japanese-American economic relationship, currently totalling roughly \$20 billion per year in trade alone, is the largest overseas interaction the world has known. Moreover, American and Japanese capitalists have increasingly sought to invest in each other's country.

Those who are willing to wade through this tightly-packed and occasionally impenetrable text will find a comprehensive introduction that cuts across both public and private domestic law and public and private international law. But the book goes beyond its promised focus upon "legal institutions and practices."<sup>3</sup> It begins with an historical overview of the nature and role of foreign enterprises in Japan. Chapters two and three, respectively, provide excellent summaries of Japan's political process and its phenomenal economic growth. Then follows a socio-economic synthesis of the components of the business environment: companies and their decision-making characteris-

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<sup>1</sup> Foreword by Stephen M. Schwebel, ix (hereinafter cited as Schwebel).

<sup>2</sup> See M. KUST, FOREIGN ENTERPRISE IN INDIA (1964 & 1966 Supp.); S. WURFEL, FOREIGN ENTERPRISE IN COLUMBIA (1965); P. PROEHL, FOREIGN ENTERPRISE IN NIGERIA (1965); H. WRIGHT, FOREIGN ENTERPRISE IN MEXICO (1971).

<sup>3</sup> Schwebel, *infra* note 1, at 11.

tics; union and labor-management problems; types of company groupings, trade associations and cartels; the relations of government to business; and the variety of institutions, such as the Ministry of Finance, the Ministry of International Trade and Industry, and the Fair Trade Commission, that constitute "government" for purposes of economic regulation.

At this point Henderson completes his delineation of the context by skillfully encapsulating: Japan's legal traditions; their modification through the adaptation of European and, later, American law; legal education, the court system, the bar, and the other kinds of persons who in Japan perform functions that would often be allocated to lawyers in the United States — quasi-professional corporation employees, patent agents, tax agents, CPAs, judicial and administrative scriveners, and European-style notaries.

Having thus devoted over half of the book to background, the author then addresses himself to the "nitty gritty," beginning with the governmental hurdles confronting different kinds of would-be capital entrants into Japan. He discusses in detail the two basic statutes, the Foreign Investment Law<sup>4</sup> and the Foreign Exchange and Foreign Trade Control Law,<sup>5</sup> and their application by an almost all-powerful bureaucracy whose exercise of discretion is virtually unassailable in the courts. Here Henderson dwells upon "administrative guidance" — the subtle, protean and effective congeries of influences by which officialdom, while taking care to maintain consensus with the business community, presides over Japan's unique version of a free enterprise system.

The succeeding chapter examines: the steps which Japan, under international pressure, has taken since 1967 to "liberalize" its threshold barriers to foreign investments; the host of countermeasures which the Japanese have adopted as a second line of defense to minimize the impact that new foreign entrants can have upon the national economy; and the extent to which Japan can currently be said to have complied with the multilateral obligations assumed by joining the Organization for Economic Cooperation and Development in 1964<sup>6</sup> and with the bilateral obligations undertaken in her 1953 friendship, com-

<sup>4</sup> 5 *E.H.S. Law Bulletin Service* No. 5410 (hereinafter cited as *E.H.S.*); (Japanese: *Gaishi ni kansaru horitsu*, Law No. 163, 10 May 1950), as cited in D. HENDERSON, *FOREIGN ENTERPRISE IN JAPAN: LAWS AND POLICIES* 195 & 403, n.5 (1973) (hereinafter cited as HENDERSON).

<sup>5</sup> 5 *E.H.S.* No. 5010; (Japanese: *Gaikoku kawase ovobi gaikoku boeki kanriho*, Law No. 228, 1 Dec. 1949), as cited in HENDERSON, *infra* note 4, at 195.

<sup>6</sup> See HENDERSON, *infra* note 4, at 237, citing *Memorandum of Understanding between the Organization for Economic Cooperation and Development and the Government of Japan Concerning the Assumption by the Government of Japan of the Obligations of Membership of the Organization* (Paris: OECD, 1963).

merce and navigation treaty with the United States.<sup>7</sup> In Henderson's view, Japan's foot-dragging is contrary to the spirit but not the letter of her OECD commitments and actually violates the provisions of the FCN treaty.

The penultimate chapter reviews problems in contracts, corporation law and conflicts of law that arise in organizing U.S.-Japanese joint ventures in Japan and presents numerous suggestions about the most useful ways to meet anticipated contingencies. The final chapter deals with dispute resolution. It emphasizes the superiority of arbitration to litigation in the U.S.-Japanese business setting, analyzes at length the complexities of relevant treaties, domestic legislation, arbitration rules, court decisions, and contract clauses, and offers a sample arbitration clause that is designed to take account of the problems discussed.

One who reads this work is inevitably struck by Japan's pertinacity and ingenuity in managing to gain the benefits of increasing economic integration with the rest of the world while successfully resisting foreign efforts to acquire significant control over her own economy. Japan's extraordinary industrial achievements have taken her far down the path of Westernization, but not at the price of semi-colonization.

One is also struck by the fact that, although bureaucratic politics and perceived national interest continue to be more important factors than legal provisions in determining whether foreign investors will be granted access to Japan, the law is not irrelevant. Indeed, the struggle is often articulated in the language of law, even though the forum is usually informal and administrative rather than formal and judicial. Given the gradual decline of the threshold barriers to the entry of foreign capital, the principal legal impediment to foreign operation in Japan seems increasingly to be anti-monopoly legislation. As Henderson points out, it is not used primarily against domestic concentration of industry, which, if anything, is being enhanced as protection against foreign incursions, but against the "unfair business practices" of incoming foreign competition. In view of the fact that Japan's American-style anti-monopoly legislation was originally forced on her during the U.S. Occupation, its selective application against American and other foreign firms is ironic. Yet the Japanese may argue that even here they are following the American model, for Japanese firms

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<sup>7</sup> See HENDERSON, *infra* note 4, at 237, citing Treaty of Friendship, Commerce and Navigation, April 2, 1953, 4 U.S.T. 2063, T.I.A.S. 2863, 206 U.N.T.S. 143 (effective Oct. 30, 1953).

have been made aware of the limitations which our antitrust laws impose upon their desire to invest in our country.

This book leaves the reader with no doubts about the dynamism of Japan's development and the speed with which change follows change. Professor Henderson confesses to the difficulties and delays he experienced in being regularly overtaken by events. Indeed, the principal flaw in the final manuscript is the unevenness with which it reflects the significant liberalization measures of May 1, 1973. And, to add insult to injury, the Japanese economy suffered profound shock as a result of the energy crisis that broke at approximately the time of the book's publication in late 1973. This has altered the situation in unexpected ways for both foreign and Japanese investors.

Yet, despite this dynamism, another dominant impression is that the hold of tradition continues to be strong and to shape important facets of the environment confronting foreign enterprises in Japan. The negotiation of contracts and the modes of settling contract disputes are the most obvious illustrations of the abiding impact of Tokugawa (1603-1868) legal culture and the Confucian value system that it reflected. Emphasis upon personal relations and good faith, a preference for harmony and compromise, a distaste for either anticipating disputes or resorting to litigation once they arise, are all examples of how the past is ever present.

Henderson's previous work, *Conciliation and Japanese Law*,<sup>3</sup> the product of over a decade of scholarship, told us much about the relation of the Tokugawa era to the past century of legal modernization. The current volume, a similarly Promethean labor, tells us much about the implications of the Japanese legal system for foreign business. It would be excellent if the author would turn his attention during the next decade to analyzing the role that law has played in the overall economic development of Japan. The task is formidable, but, based on the record, Henderson is the person who can take it on.

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<sup>3</sup> D. HENDERSON, *CONCILIATION AND JAPANESE LAW, TOKUGAWA AND MODERN* (1965). See, e.g. Cohen, Book Review, 30 HARV. L. REV. 489 (1966).