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While I was reviewing papers prepared by the panelists for this session as coordinator, I noted several points that might cause difficulties both to American readers and to Japanese readers.

The first point is the big difference between the American methods and the Japanese methods for gathering evidentiary facts and presenting them to courts. Such difference can be seen in regard to (i) the time when gathering of evidentiary facts is allowed, (ii) the places where evidentiary facts can be gathered, (iii) the necessity or extent of judges' participation in and control over the gathering, and (iv) the standard of relevancy.

In Japan, we do not have so-called pretrial discovery as seen in the U.S. system. The only way in Japan to gather evidentiary facts before initiation of the trial is to resort to the special procedure available for preservation of evidence (*Shoko-Hozen*). The procedure is provided for in order to secure for some limited cases a way to preserve evidence that otherwise might be lost before trial through the death or disappearance of key witnesses or parties to the case, or the like. Even in this procedure the vehicle to gather (with a certain sanction) evidentiary facts is always the court. Witnesses can be examined only at the court except in very rare cases.

Also, in Japan, authority and control over the gathering of evidentiary facts are vested only in a court, and activities for the gathering must be taken by the court itself. Such power will never be used for any purposes other than for collection of evidence for use in the civil trial. The scope of facts to be gathered must be limited by the evidentiary standard of relevancy. Consequently, the role of lawyers in gathering facts is very limited. Lawyers themselves have no power to gather facts outside of

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courts and always must ask for voluntary cooperation of third parties or the opposite party or for the court's involvement.

On the other hand, fact gathering in the U.S. system is largely made as pretrial discovery and is, generally speaking, not a public function performed by judges. Instead, it is primarily a private matter, conducted by lawyers according to certain procedures, although their rights are backed up by the law. I understand that the present U.S. discovery system places the initiation, use, and response to discovery within the control of the lawyers. Furthermore, I understand, the discovery standard of relevancy is not limited by the evidentiary standard of admissibility. It is much broader in scope and encompasses any information that relates to the subject matter of a case regardless of its admissibility at trial. Perhaps because of this broadness, we know that there has been controversy in the United States as to how to prevent abuse of discovery.

As noted above, the U.S. methods for gathering evidentiary facts are different from the Japanese methods for the same. This difference comes from the fact that Japan has no system equivalent to U.S. discovery practice. I understand that U.S. discovery practice encourages attorneys to cooperate reasonably during the exchange of discovery information. The purposes of discovery include early and thorough disclosure of information by all sides, promotion of a negotiated settlement, and equalizing of the investigative resources of both sides without allowing one side to take undue advantage of the other. If so, they are completely different from the purposes of taking of evidence in Japan. Accordingly it might create confusion if we discuss the U.S. discovery system in parallel with the Japanese system for taking evidence, and presentation thereof to courts, assuming that the systems are similar to each other and are to be subjected to the same principles or rules.

For example, it might be possible for Japanese lawyers not to be able to use results of the U.S. pretrial discovery for Japanese proceedings, even if the results are available to them. In Japan, as discussed above, taking of evidence is always required to be initiated, controlled, and conducted by a court. Also, in Japan, documents and statements that can be used as evidence are required to be submitted by voluntary cooperation or required to be obtained according to a specific procedure. Documents or statements other than those submitted voluntarily are required to be obtained by a court usually for itself by examination of witnesses, issuance of orders, and the like. Even in exceptional cases where the court requests cooperation of other governmental authorities or foreign courts, the request is required to be made by the court itself. Accordingly, any document or statement obtained by pretrial discovery conducted in the United States of America without involvement of a Japanese court and a diplomatic channel cannot be treated immediately as evidence in a Japanese

court. As to what procedure shall be followed to use them in Japan and whether or not they can be really used in Japan, there have been no serious discussions in Japan. However, some practicing lawyers question availability of such documents or statements. The only way to use a statement or document obtained by such pretrial discovery would be to submit it as an equivalent of evidence as if it is submitted voluntarily. At the time of submission to a court, it would be scrutinized by the court in connection with the issue whether it can be treated as those obtained with voluntary cooperation.

The second point of which I want to remind you is that we sometimes might have two different meanings for the same legal term, depending on which legal system we have in mind, Japanese or U.S. As noted in the discussion above, U.S. discovery rules are quite different from the rules for taking evidence in Japan. On the other hand, if Japan ratifies the Hague Evidence Convention it will be applicable to the two different systems and each legal system will have something in common.

I believe that today's discussion will be fruitful if we realize the differences between the Japanese and U.S. systems and are sensitive to the possible different meanings attributable to the same legal term.