55 The acronym UPOV is derived from the French name of the organization, which is "Union Internationale pour la Protection des Obtentions Végétales."
56 Robinson, *supra*.
57 Tunya Sukpanich, 'Repelling the Biological Pirates', *Bangkok Post* 16 May 1999.
58 Jakkrit Kuanpoth, 'Legal Protection of Traditional Knowledge: A Thai Perspective', *Asia Pacific Tech Monitor* 24 (2), 2007, pp. 34–41.

10 Globalization and Japanese regulation

A commercial dispute case study

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Introduction

Japan has undergone extensive legal and regulatory reform since 1989, when Japan's "bubble economy" collapsed. Since then, Japanese government and industry have embarked on deregulatory policy and economic restructuring, in the process explicitly turning to formal law, legal institutions, and lawyers as regulatory mechanisms.[1] As a result, we have seen a surge in rule-based, hierarchical controls in Japan, including more regulatory law but, at the same time, the emergence (or reshaping) of informal forms of regulation such as industry practices and codes of conduct and ethics. I call this process the "re-regulation" of Japan.[2]

My approach to understanding the last two decades of regulatory reform in Japan owes much to Haley's theories of the Japanese legal system.[3] Haley argues that, despite having a highly developed legal system, the Japanese state has relied heavily on informal social ordering and norm enforcement in order to achieve its policy goals. Moreover, he argues, the mix of formal and informal legal sanctions is the result of strong historical continuity in the evolution of social, economic, and legal institutions in Japan.[4]

In his depiction of mutually interdependent formal and informal modes of ordering within Japan, Haley seems to anticipate the pluralism that is the focus of much contemporary regulatory theory.[5] However, he articulated this paradigm in *Authority Without Power*[6] at precisely the time that Japan's high-growth economy began to falter and as many of the modes of regulation thought to be distinctively Japanese started to unravel. What has followed is a series of debates across different disciplines about whether, and to what extent, Japanese regulation since the 1990s represents a paradigm shift, and if so, towards what. Within the field of law, Haley argues that the twenty-first-century legal and regulatory mechanisms of governance in Japan represent, on balance, continuity rather than a dramatic rupture with the past.[7]

In this chapter, I examine Haley's claim that we see more continuity than change, testing it against a case study: the failed banking merger between Sumitomo and UFJ financial groups (as they then were). The transaction breakdown made international headlines in 2004 when Sumitomo sought a court injunction to prevent UFJ from: (i) reneging on its formal agreement to negotiate with Sumitomo; and (ii) pursuing an alternative tie-up with the Mitsubishi Tokyo Financial Group.

When all Sumitomo's alternative avenues had failed, it then sued UFJ for breaching obligations under their agreement to negotiate, documented in a letter of intent. On appeal from that lawsuit in 2006, the parties settled, with Sumitomo gaining JPY2.5 billion (US$21 million) in damages.

I argue that, on one hand, the failed merger illustrates the salience of Haley's paradigm of Japanese law. Litigation between very large commercial entities in Japan is atypical—we would usually expect to see their differences settled behind closed doors, perhaps with the help of bureaucratic mediation. Sumitomo, in particular, draws on both the "formal" and the "informal" techniques of dispute resolution offered in the Haley paradigm, claiming the moral high ground, while at the same time pursuing all available strategies, including litigation. The courts, in turn, rely on familiar legal and social norms of transactional continuity as they frame the dispute. Consistent with Haley's thesis, we also see here a "private" commercial transaction overlaid with a "public" character because it involves the future shape of a key Japanese industry. Thus, the transaction acts as a lightning rod for a longstanding domestic debate about the appropriate form and pace of deregulation.

On the other hand, the transaction underscores the limitations of Haley's model when applied to a globalized, re-regulating Japan. All the parties in this transaction and dispute were large banking groups, subject to the regulatory effect of multiple levels of globalization. Their transactional breakdown plays out against a decade of glacial progress in banking reform, where the Ministry of Finance had been displaced as industry regulator by the Financial Supervisory (later Services) Authority (the FSA); global regulatory standards have become increasingly influential; and where government was urging industry to restructure itself using "the market." The ultimate shape of the restructuring was determined not by a tacit government–industry agreement, but in a public, contested arena among new regulatory players, including commercial lawyers as transactional intermediaries, foreign investors, and the courts as arbiters and—in effect—economic regulators.[8]

Haley's Japan

Haley's Japanese state is characterized by "authority without power," a state in possession of a highly developed system of legal rules, standards, and mechanisms for formal adjudication that nevertheless chooses to harness social norms and rely heavily on informal social ordering and norm enforcement in order to achieve its policy goals.[9]

> Legislators, bureaucrats, and judges may continue to articulate and apply, and thus legitimate, new rules and standards of conduct. The norms thus created and legitimized may have significant impact. To the extent that legal sanctions are weak, however, their validity depends upon consensus, and thus as "living" law, they become nearly indistinguishable from non-legal or customary norms.[10]

The corollary of this is "the myth of the reluctant litigant"—the state's deliberate rationing of formal legal adjudication and sanctions through institutional design.[11]

Haley presents the paradox of a highly credentialed and independent Japanese judiciary, procuracy, and bar whose size is deliberately constrained by the state so that their capacity to deliver formal sanctions and their accessibility to citizens are limited. This controlled mix of formal legal sanctions and informal social ordering represents, he argues, a strong historical continuity in the evolution of social and legal institutions in Japan. While stressing these historical antecedents, Haley also acknowledges that culture is fluid and that the norms underpinning these policy choices and institutional design choices are subject to change.

In his depiction of mutually interdependent formal and informal modes of ordering within Japan, Haley seems to anticipate the pluralist focus of contemporary regulatory theory.[12] However, his paradigm is also the product of its time; where it focuses on the (then) representative social institutions such as large corporations, lifetime employment, organized crime, and local community bodies, the snapshot is of Japan at the end of a prolonged high-growth period. This is an economy that is "internationalized" in the sense of being export-oriented and in which the "international" inputs—standards, labor, and capital—are controlled and controllable. Within the legal system, too, there is a strong sense of Japanese exceptionalism, reflected in the relatively small number of legal professionals, the minimalist design of contract transactions, and the relatively low levels of commercial litigation. Haley represents the duality thus:

> The demand for ways to reduce the risk and costs intrinsic to a volatile social and economic environment is also manifest in the prevalence of dependency and relational contracting. The oft-repeated Japanese penchant for informal, long-term contractual relationships, in which "goodwill" and personal trust are more important than written contacts, is symptomatic of transactional relationships in which the parties rely more on morals and markets than laws for enforcement ... On the other hand, when contracting abroad within legal systems Japanese believe are likely to enforce their agreements, they negotiate and draft with extreme care. Similarly a Japanese firm will assiduously abide by adverse commitments to its contact partners in cases where sanctions—either informal, arising out of either their relative bargaining positions or the promise of an ongoing relationship, or formal, such as the likelihood of legal action—are perceived to be strong.[13]

However, as Japan's high-growth economy began to slump after the collapse of its economic "bubble" in 1989, many of these institutional arrangements and modes of regulation begin to unravel or become the subject of extensive rethinking by government, corporate, and professional elites.

Japan's legal and regulatory reform since 1989

The 1990s were called the "lost decade" by Japanese and foreign scholars of Japanese politics and economics because of the perceived failure by the governing triumvirate of the Liberal Democratic Party, career bureaucrats, and big business to deregulate a stalled economy.[14] Others argued that the deregulatory push in Japan, albeit fitful between the Nakasone (1982–87) and Koizumi (2001–6) cabinets, induced important and enduring institutional changes.[15] By 2008, many commentators agreed that the Japanese government and industry *had* significantly restructured key political, economic, and social institutions since 1989,[16] but they continued to disagree about the pace of regulatory reform and its effects. Recent studies in political science have argued that Japan has been "remodeled"[17] or "reprogrammed"[18] or has adopted "aggressive legalism"[19] in spheres such as industrial policy, technology, and trade.

My own hypothesis is that Japan is shifting from being a "developmental state" to being a "new regulatory state."[20] For the purposes of this chapter, I highlight three changes in policy and practice that seem to mark departures from earlier paradigms of the Japanese state and that seem to signal a new approach to legal regulation.

The first of these changes is the separation (and delegation) by the state of some of its traditional functions and services to private actors or quasi-state actors.[21] Although a core component of the "new regulatory state,"[22] the reliance of the state on private actors in Japan is not new. What changes in the 1990s, however, is both the mode of harnessing private actors and the language used to describe this. So, for example, in the commercial sphere in Japan, we see a downplaying of "administrative guidance" as top-down, albeit "informal," state direction. This is further undercut by changes to administrative law and jurisprudence that require more formal and more transparent signaling from the bureaucracy. At the same time, we see a host of induced enhancements of self-regulation for business, bolstered by legislative reform, court decisions, and government exhortation. The new modes of regulation are, for the most part, concepts and terms taken directly from American, British, and European discourse on corporate regulation.

Thus, "corporate governance" (*kooporeeto gabanansu*) is operationalized in Japan through extensive legislative reform to governance structures of corporations, the introduction of consolidated accounting, and the enhancement of the role of the statutory auditor. "Transparency" (*toransupeeranshii/tōmeika*) is bolstered in the commercial sphere by lowering court filing fees to permit shareholder actions against company directors and auditors, including demands for the production of documents.[23] "Contract" is now understood in Japan as a regulatory institution,[24] and we see considerably more formalization of high-value contracts through the intermediation of attorneys. We also see a clear normative clash between different modes of regulation: private law visions of freedom of contract collide with court-designed rules that embody established business customs and the courts' preferred social norms. These are both overlaid with new legislative intervention by the state, which emphasizes efficiency and formal dispute resolution forums.[25] "Due diligence" (*dyū dirijiensu*) is new and used, as in the case study below, in the context of a market in which merger and acquisitions (M&A) activity, both friendly and hostile, begins to intensify after a long period of relative corporate stability in Japan. "Risk management" (*risuku kanri*) has been embraced by Japanese corporations battered by record levels of corporate insolvency and facing new

challenges that range from dependence on information technology to the aggressive use of intellectual property rights by US trade competitors. "Compliance" (*kompuraiansu*) is suddenly in vogue as corporations establish compliance departments to either supplement or stand for in-house legal departments. The primary driver here is an upsurge in legislation that has a direct impact on corporations or that, like the *Antimonopoly Law*, is being enforced more vigorously than was the case historically. Reinforcing this is a new line of corporate law cases that spell out the obligation for listed companies to implement internal corporate controls and what the financial consequences of not doing so are likely to be.[26]

This range of state and private, voluntary, and induced regulatory techniques is consistent both with Parker and Braithwaite's observation that post-industrial states tend to show pluralization of regulation[27] and with Haley's earlier work on the mix of formal and informal social ordering in Japan.

A second feature of the new regulatory state is the proliferation of players who compete for regulatory traction in what Scott has termed "the regulatory space."[28] The regulatory space metaphor is illuminating because it suggests a suspended sphere with multiple planes, rather than the vertical channel of state–citizen command and control regulation, or a purely horizontal axis of private player interactions. For Scott, the appeal of the regulatory space is that:

> [It] is capable of drawing in perspectives which question the capacities of instrumental law and regulation and envisage greater reflexivity or responsiveness in systems characterized variously as post-bureaucratic or post-interventionist.[29]

While it is not yet clear whether Japan is either "post-bureaucratic" or "post-interventionist," the emergence of new regulatory players seems to be forcing open the developmental state's "iron triangle" of decision-making that privileged politicians, bureaucrats, and big business. The newly prominent players include consumer advocates, non-governmental organizations (NGOs), lawyers, prudential regulators, shareholder activists, and electronic commerce networks.[30] Most of these players existed prior to 1989 but have benefited from, and have grown more prominent as a result of, enabling legislation and policy changes that endow them with a new status or the ability to organize more effectively.[31]

Significantly, as the *Sumitomo v. UFJ* case illustrates, the Japanese "regulatory space" has become porous and many of the new stakeholders are non-Japanese. Prior to 1989, mobilizing *gaiatsu* or "foreign pressure" was a standard play in Japanese regulatory politics, as was invoking the threat of foreign domination, takeover, or destruction.[32] What is different in the contemporary period, as I discuss below, is that foreign stakeholders—in this case shareholders—are now *inside* the regulatory space and likely to stay there.

A third systemic shift visible in post-1989 Japan has been the elevation of formal law and legal institutions as legitimized regulatory tools available to both the state and its citizens. This development departs from accounts of the Japanese state in which legislation, courts, independent regulatory agencies, and legal professions play a marginal role. In those narratives, bureaucrats dominate politicians or (in Ramseyer and Rosenbluth's agency theory) are controlled by them.[33] In either case, bureaucrats exercise "authority without power,"[34] harnessing informal social norms to achieve their desired regulatory objectives. Business is steered through administrative guidance and government-supported self-regulation[35] or "cooperative regulation,"[36] "cooperative capitalism"[37] or "communitarian capitalism."[38] Emphasizing the minimal traction of direct legal regulation on corporations, Hirowatari calls this policy setting "corporatism" or law restrained in the service of economic growth.[39]

Consistent with these accounts, Haley's paradigm suggests that litigation in Japan was designed to be a regulatory technique of last resort.[40] This immediately begs the question of how we account for a long and crowded history of active litigation of commercial, private, and public interest matters in Japan. Despite the apparent paradox, the history and the theory are not inconsistent. In a system of interlocking formal and informal controls that limits access to the courts, litigation can be a highly effective way of exposing lack of consensus or challenging government or powerful interests in a public way.[41] Nonetheless, it is the relative lack of litigation in Japan in comparison to Western industrialized states that is the dominant characteristic in the varieties of capitalism literature[42] and in comparative regulatory studies,[43] as well as in older literature such as Chalmers Johnson's account of the Japanese "developmental state."[44] Suddenly, however, after an apparently short policy gestation, the Japanese government announced in 2001 that it is, in fact, law and legal institutions—including litigation—that are the "final linchpin" in the restructuring of "the shape of our country."[45] On the streets, public slogans, campaigns, and banners announce that it is now formal regulation ("rules") that will now govern, in preference to informal social ordering ("manners").[46]

Without data, it is difficult to argue that Japan's regulatory patterns have changed in the twenty-first century or to pinpoint the degree to which they replicate or deviate from those of other industrialized states. In this chapter, I take the failed Sumitomo–UFJ merger of 2004 as my smallest unit of analysis—a single transaction—and try to discern whether it evidences any influence from a new regulatory mix in Japan, the emergence of new regulatory players, and/or a new turn to formal law.

The proposed Sumitomo–UFJ merger

The Sumitomo–UFJ merger agreement and the litigation that followed are widely recognized as one of the high watermarks in business disputation in Japan in the 2000s. The core transaction began as a consensual merger negotiation between two major financial institutions in Japan. It was a negotiation fraught with some pressure: UFJ was one of two city banks at the time that was severely undercapitalized (and possibly substantively insolvent), within a Japanese banking industry that had chalked up ten consecutive years of losses.[47]

Japan suffered a banking crisis in 1997 when three large financial institutions failed, including city bank Hokkaido Takushoku Bank, followed by the 1998 failures of the Long-Term Credit Bank of Japan and Nippon Credit Bank. This prompted the re-regulation of the industry through the creation of the Financial Supervision (later "Services") Agency (the FSA) in 1998 to replace the Ministry of Finance's jurisdiction over the industry. The FSA was charged with the application of stringent global standards including new accounting rules to implement the Basel capital adequacy requirements for banks. A wave of industry restructuring followed: between 2000 and 2002, seven mergers had occurred among major banks.[48] By 2004, Sumitomo and UFJ were looking for merger partners at the tail end of this process and within a market that analysts predicted could only support a finite number of truly global banks. Thus the stakes in the Sumitomo–UFJ transaction were high.

On 21 May 2004, Sumitomo announced its intention to purchase UFJ's trust banking unit. This was one of UFJ's only profitable operations at the time. The value of the transaction was JPY300 billion (US$2.76 billion).[49] This was underpinned by a letter of intent between Sumitomo Trust and Banking Co.[50] and the UFJ Holdings Group—as they then were—in respect of the UFJ Trust Bank (hereafter "Sumitomo" and "UFJ"). The letter of intent was a formally drafted agreement reviewed by the parties' attorneys. Article 8 of the agreement provided that each party was to negotiate in good faith to conclude a basic agreement on the detailed terms of the business integration by the end of July 2004 and conclude a final agreement on integration as soon as practicable. The duration of the negotiations contemplated by the agreement was reported as two years.[51]

Article 12 of the agreement further obliged the parties to (i) negotiate in good faith on matters stipulated in the letter of intent and any matters arising but not stipulated in the agreement and (ii) prohibited the parties from either directly or indirectly providing information to, or negotiating with, third parties in relation to any matters that were the subject of this agreement.[52] The undertakings to negotiate in good faith were, of course, applications of Civil Code Article 1 (2), "[R]ights must be exercised and … obligations be performed in good faith," which applies to all legal acts in Japan, whether explicitly incorporated in the terms of the agreement or not.

Significantly, the agreement contained no penalties for non-performance:

> "We suggested a breakup fee to Sumitomo Trust," says one lawyer who worked on the deal. "But they rejected it, saying the business must be based on trust."[53]

On 13 July 2004, UFJ unilaterally broke off merger talks with Sumitomo and, on 14 July, it entered into full merger talks with the Mitsubishi Tokyo Financial Group (MTFG, as it then was)[54] in which the latter would acquire UFJ group, including the UFJ Trust Bank, creating the world's largest bank with US$1.75 trillion in assets.[55] That merger took place in 2005, creating the Mitsubishi UFJ Financial Group (MUFG), of which the Bank of Tokyo–Mitsubishi UFJ, Mitsubishi–UFJ Trust, and Banking and Mitsubishi–UFJ Securities are subsidiary units.[56]

Sumitomo responded to this breakdown in negotiations by calling the press. UFJ's termination of the letter of intent was widely reported:

> "They just told us all of a sudden," Sumitomo Trust spokesman Naoki Sugihara said. "We were shocked that they would cancel something so critical without at least consulting us first."[57]

On the same day, 14 July 2004, UFJ and Tokyo–Mitsubishi shares were suspended on the basis that they may be seeking a merger, and Sumitomo's share price subsequently fell by about 14 percent.[58] Two days later, on 16 July 2004, UFJ and Tokyo–Mitsubishi announced talks aimed at effecting a merger. Sumitomo issued a formal objection to this and, on the same day, sought an interim injunction from the Tokyo District Court restraining UFJ from both providing information to third parties and negotiating with third parties.[59]

Sumitomo's multitrack approach to the negotiation breakdown

Sumitomo responded to UFJ's termination of the negotiation by pursuing a multitrack strategy. First, it sought injunctive relief to prevent UFJ from proceeding with merger talks with Tokyo–Mitsubishi, a move that was successful in the short term but was overturned on appeal. Second, it sought to convince UFJ's shareholders, through media announcements, that the Sumitomo merger, including a one-for-one share exchange, represented better value for UFJ than the proposed rival merger.[60] This was significant because any merger of a business of this size would require a special resolution (two-thirds approval) by shareholders at a general meeting.[61] At the time, about one-third of UFJ's shares were reportedly owned by foreign investors.[62]

In support of its claim that it represented a better tie-up partner, Sumitomo launched a counteroffer to the Tokyo–Mitsubishi proposal on 9 August 2004, announcing that it was ready to offer a JPY500 billion (US$4.48 billion) tranche of fresh capital to help write off UFJ's bad loans, in addition to reserving management positions for UFJ executives in the new merged entity.[63] At the same time, Sumitomo Mitsui Financial Group announced on 7 October 2004 that they had purchased 300 shares in UFJ Holdings, "raising the prospect of a proxy fight at the weaker rival's annual meeting."[64] Part of this strategy was aimed at increasing foreign press opinion, foreign shareholder, and outside director pressure on UFJ to consider Sumitomo's counteroffer and recommence negotiations. This reportedly resulted in a letter-writing campaign from shareholders to UFJ management, asking them to consider alternative proposals to the Tokyo–Mitsubishi deal.[65]

UFJ was under intense financial pressure at this point. Having posted losses for three years in a row, it was carrying significant debt from bad loans, which accounted for 10.24 percent of its loan portfolio in August 2004.[66] Press reports speculated that UFJ would be subject to government pressure to resolve these problems quickly and seek a large capital infusion to prevent its capital levels from dwindling to dangerous lows.[67] In October 2004, it also became the target of a criminal complaint against UFJ's banking unit and former executives for allegedly obstructing an investigation by hiding and destroying documents, resulting in the suspension of some of its banking operations by regulators.[68]

When UFJ announced it plans to go with Tokyo–Mitsubishi, Sumitomo turned to a third strategy—consideration of a hostile takeover of UFJ. This in turn prompted a JPY700 billion (US$6.28 billion) capital injection into UFJ's commercial bank by Tokyo–Mitsubishi and, on 10 September 2004, UFJ issued a new class of preferred shares to MTFG, giving MTFG veto power over major business decisions by UFJ Bank—in effect, a poison pill defense.[69]

The fourth and final strategy employed by Sumitomo was litigation for damages for loss suffered during the breakdown of the negotiations and its protracted attempt to restart them.

The court injunction track

At the same time as the business strategies of the two parties were playing out, Sumitomo had initiated a parallel legal track seeking formal injunctive relief from the courts in order to force UFJ back to the negotiating table.

On 27 July 2004, the Tokyo District Court granted the injunctive relief sought by Sumitomo. The basis for that decision was that the parties had evidenced their agreement in writing and, therefore, in the absence of other compelling reasons, this should be treated as binding. Moreover, the draft of the letter of intent including the lock-in clause had been prepared by the applicant (Sumitomo) and had been reviewed by the lawyer for UFJ Holdings, modified by agreement of those responsible on behalf of the parties, and then signed and sealed by the parties' representative directors. It was, therefore, treated as legally binding. Clearly, if the respondent were to embark on negotiations with a third party, this would cause serious damage and immediate danger to the applicant[70] and, to avoid this, injunctive relief was necessary.

In response to UFJ's formal objection to the injunction, the Tokyo District Court confirmed its original injunction and issued an injunction for preservation on 4 August 2004.[71] UFJ appealed the original injunction to the Tokyo High Court, which set the injunction aside on 11 August 2004. Within hours, the boards of directors of MTFG and UFJ approved a merger of the two groups.[72]

In setting aside the injunction, the Tokyo High Court confirmed that Article 12 of the letter of intent was legally valid and could be the basis for a restraining injunction. Moreover, the declaration by UFJ dated 14 July 2004 that it was terminating the agreement had no legal basis. However, the court found that:

> In relation to the said agreement, the major precondition was a mutual trust relationship supported by good faith efforts to bring about a cooperative enterprise. When the applicants decided to overcome their difficult situation by setting aside the agreement [lit. returning the agreement to a blank piece of paper] and announced this publicly and when the respondent reacted by seeking the injunction and in that initial hearing and in this hearing both arguments have been in opposition, the trust relationship has significantly eroded and we are in a situation where it is difficult to bridge the parties' [differences]. As of today, viewed objectively, the trust relationship between the parties has already broken down; moreover, we have to assume that it is

already impossible for the parties to negotiate in good faith to reach a final agreement. Consequently, at the very latest, we would view the final day of the examination, August 10, 2004, as being the point at which the article in question, substantively has lost its prospective binding effect and that at this point there is no leeway to allow a restraining injunction.[73]

On further appeal by Sumitomo, the Supreme Court on 30 August 2004 affirmed the High Court decision to set aside the injunction.[74] First, the Supreme Court concurred with the High Court that the letter of intent was legally valid, could be the basis for an injunction, and that subsequent events did not cause it to lose its legally binding power. The Supreme Court then adopted almost identical wording to that of the Tokyo High Court decision in describing the breakdown of the parties' relationship as the reason for leaving no leeway to grant a restraining injunction. The Court then noted that, by this time, UFJ had announced a merger with Tokyo–Mitsubishi and a plan to complete that transaction by 1 October 2004.

On the question of whether the lock-in agreement had lost its legal effect, the Supreme Court held that the purpose of the clause was to make good faith negotiation possible, and thus it was intimately linked to the negotiation itself. Thus, when it was judged that the possibility of a final agreement no longer existed, the obligation underlying the article in question was extinguished. Reviewing the chronology of events to that point, the Court judged the likelihood of reaching a final agreement to be "low." However, the Court then continued:

> However, in light of the overall chronology in this case, it is not possible to say that all fluid factors have completely disappeared and so, from a social sense (*shakaitsūnen*) [lit. conventional wisdom of society] we cannot say that the possibility referred to above does not exist. Thus the obligation underlying the article in question must be treated as not having been extinguished.[75]

On the question of whether sufficient dispute existed between the parties to justify injunctive relief in order to avoid serious damage or immediate danger to one of the parties, the Court held that the letter of intent did not compel the conclusion of a final agreement, but only made possible the conditions for the negotiations that might have that result. Therefore, Sumitomo had only a hope of reaching a binding agreement. Consequently, any damage suffered to Sumitomo should not be assessed as resulting from the loss of profits or benefits that would have accrued from a final agreement. In light of the low likelihood of a final agreement being reached and the passage of time up until this point, the Court then found no serious damage or immediate danger sufficient to justify granting a restraining injunction.

UFJ and Mitsubishi finally concluded their contract of merger on 18 February 2005, becoming MUFG on 1 October 2005.

The litigated damages claim

Once it became clear that the transaction was dead and that the injunctive track was exhausted, Sumitomo then launched a suit for tort damages in the amount

of JPY100 billion for breach of the duty of good faith in the letter of intent of 7 March 2005 and the failure to conclude a final agreement. The points at issue in the case were:

(a) Was there an obligation under the letter of intent to conclude a final agreement?
(b) Could Article 130 of the Civil Code be applied directly or analogously as the basis for an estoppel that required the UFJ group to conclude a final agreement?
(c) Did the UFJ group have an obligation to negotiate in good faith and exclusively with Sumitomo?
(d) Did UFJ group's obligation to negotiate in good faith and exclusively with Sumitomo expire on 13 July 2004, had they breached these obligations, and was there a non-performance of an obligation or a tort?
(e) If there was non-performance of an obligation or a tort, what was the amount of foreseeable damages?

The Tokyo District Court responded to these questions as follows:

(a) The letter of intent was concluded at a relatively early stage in the parties' negotiations, on the basis of limited information exchanged. It included no provision that clearly required a final agreement to be reached, and so the parties could not be treated as having assumed an obligation to conclude a final agreement. Moreover, this was something that could only be done as the result of a decision reached after further negotiation and due diligence.[76]
(b) As the content of a final contract was not determined and no final contract was validly created, the necessary prerequisite for the direct application or application by analogy of Article 130 of the Civil Code was lacking.
(c) The UFJ group was under an obligation to negotiate exclusively with Sumitomo and to negotiate in good faith.
(d) As the letter of intent was a process for forming a final agreement, when the possibility for creating a final contract through repeated negotiation between Sumitomo and the UFJ group no longer existed, then their obligations would also be extinguished; however, in the case where the UFJ group had—without negotiation or consultation—announced that it would set aside the letter of intent, it could not be said that no possibility of forming a final contract existed.[77] Thus, the obligation to negotiate exclusively and the obligation to negotiate in good faith could not be said to expire; moreover, when UFJ group unilaterally took merger discussions with the Mitsubishi Tokyo Financial Group (MTFG), in doing so they assumed the burden of breaching these obligations or committing a tort.
(e) To the extent that a final contract did not exist, a foreseeable relationship between the breach of the obligations to negotiate exclusively and to negotiate in good faith and the profit that would have arisen under a final contract could not be established and, as Sumitomo was unable to show or prove damages arising from the breach of obligation or the tort, the claim for damages was dismissed.

The Tokyo District Court dismissed Sumitomo's damages claim on 13 February 2006.[78] On appeal to the Tokyo High Court on 24 February 2006, Sumitomo reduced its claim to JPY10 billion. On 21 November 2006, Sumitomo and MTFG settled in the Tokyo High Court for JPY2.5 billion (US$21 million), payable by MTFG.

Significance of the litigation

Settlement during commercial litigation is a well-established pattern in Japan as it is in most industrialized economies' legal systems. Earlier studies of Japanese courts also suggest that the judge frequently takes an active role in encouraging settlement and in providing a clear indication of what the damages award is likely to be if the parties persist to judgment. Thus, although the appeal does not result in a damages award per se, it is likely to be read as a strong indicator of the court's stance in the case. The ultimate obligation to pay damages could not have been a surprise for UFJ and its takeover partner, Tokyo–Mitsubishi. Already in 2004, when Sumitomo succeeded in its injunction at first instance:

> [o]fficials at UFJ and Mitsubishi Tokyo said the most likely outcome would be for UFJ to try to strike some out-of-court deal with Sumitomo Trust, possibly involving payment of compensation.[79]

Their prediction was consistent with contract law jurisprudence in Japan on the Civil Code Article 1 (2) duty of good faith, which applies to all legal acts, regardless of whether the duty is directly referenced or documented by the parties. It is well established as applying to the pre-contractual negotiation period. Parties are at liberty to terminate a pre-contractual negotiation but, if they terminate unilaterally, in the absence of a serious reason for doing so that absolves them of fault, they will be liable for damages. What distinguishes *Sumitomo v. UFJ* as a decision in the first instance is that it makes clear that breach of a duty to negotiate exclusively under a letter of intent (the lock-in provision) is a breach of an obligation or a tort.[80]

As a commercial dispute, what made *Sumitomo v. UFJ* unusual at the District Court level, however, was the inability to reach an early settlement, coupled with the size of the parties, the size of the final settlement, and the question of how damages would be calculated in subsequent cases.

This was an atypical transaction in the sense that it is the first case in the post-war period in Japan (perhaps ever) in which one Japanese financial institution sued another for breach of good faith in negotiation and the failure to consummate a consensual merger. Even in the deregulatory decade and a half since 1989, Japan has had relatively little litigation around M&A activity and very few attempted hostile takeovers.[81] As Ahmadjian comments, there is still a strong sense of stigma about overtly aggressive pressure toward corporate targets in Japan, even among foreign investors:[82]

> The propensity of foreigners to take a gentle approach to governance and not to rely on legal recourse or aggressive shareholder activism seems more a case of social norms than to [sic] institutional and legal barriers to action. Shareholder derivative suits were available for use, but though numbers of these suits had increased after a decrease in the filing fee in the early 1990s, foreign shareholders did not use them ... foreign shareholders that I interviewed suggested that they were concerned about not appearing too aggressive and demanding ... There was also, among foreign investors, especially the investment banks, a concern that over-aggressive behavior would be punished. A fear of government reprisal was likely one of the reasons that foreign investors remained low-key in their activism.[83]

Thus, at one level, *Sumitomo v. UFJ* provides an interesting twist on the perennial theme of Japanese litigiousness or lack thereof, with Sumitomo pressing forward with litigation that may or may not have been the direct preference of its foreign shareholders.[84]

Litigating commercial transactional breakdowns in a deregulating Japan, however, is not at all unusual. Injunctions are frequently used as a tool by commercial lawyers and their clients in Japan, although this pattern has not attracted much analysis by foreign scholars.[85] From 1989 onwards, Japanese case reports are full of contract termination litigation as the economy slid into a prolonged downturn.[86] A parallel body of commercial litigation is also propelled by personal bankruptcy and corporate insolvencies, which reached historically high levels during the same period.[87] It is also worth noting that *Sumitomo v. UFJ* is not the average unilateral termination case where a vulnerable injured party pleads breach of good faith as a way of invoking the protective paternalism of the court. Here, we have commercial banking groups: large entities operating in a global market, subject to a host of global and domestic regulatory standards and statutory controls, and accustomed to calculating transactional risk. This feature of the transaction is reflected in its formalism, also characteristic of the banking sector. Banks are accustomed to drafting and adopting legally binding agreements, as they did here with the letter of intent, notwithstanding the fact that it did not anticipate failure of the negotiation.

What is interesting about the courts' analyses in both the injunction claim and the damages claim, however, is the way in which they view the fundamental obligations of the parties in relational terms: to negotiate in good faith and build a trust relationship that would be the basis for the business integration. Thus, for example, although the transaction breakdown occurs at the beginning of a potential business tie-up (rather than midway through a continuing contract), the court acknowledges and weighs the duration of the extended period of the negotiation and the likelihood (however slight) of the relationship being resuscitated. As it weighs the nature of the relationship, the Supreme Court in its determination about injunctive relief makes a not unusual reference to social norms (*shakaitsūnen*). Here, we see the court preference for preserving commercial relationships (or encouraging the parties to do so) if at all possible. This is consistent with much contract jurisprudence in Japan and also consistent with the high value of this transaction and its significance for both the banking industry and the national economy.

Doctrinally, the case is unremarkable because the background statute (the Civil Code) and related case decisions are relatively clear; this is not a situation in which new regulatory law is being tested.[88] What contributes interest from a practice perspective is that the District Court's treatment of the damages claim raises some uncertainty about how those damages should be calculated.[89] The court seems to treat the calculation of damages as limited to Sumitomo's expectation interest in the to-be-negotiated "basic agreement" regarding the merger, probably because this was the basis on which the claim was argued. Predictably, the court finds neither an obligation to finalize that agreement, nor a high probability that the agreement could be reached, particularly as the negotiations and the parties' relationship began to unravel. A stronger basis for arguing the case would have been the plaintiff's reliance interest, or damage incurred as a result of entering into the negotiation and having it unilaterally terminated. Presumably, this was an element in the eventual settlement.

What also distinguishes this case is the parties' inability (or unwillingness) to settle at an early stage of the dispute. We see two large banks exercising choices about how to structure the contract and navigate its breakdown, using both formal legal and informal social strategies. This reliance on litigation is atypical for large corporations or financial institutions. While Sumitomo clearly suffered economic loss from the UFJ termination of the proposed merger, until recently, Japan has no history of shareholders punishing directors for losses that arise simply from the exercise of business judgment, as opposed to fraud or illegal acts.[90] Nevertheless, it seems as though the damages litigation was intended to have a prophylactic, as well as a substantive, effect. The social and economic significance of the case is analyzed below.

Regulation, reactions, and risk management

As we noted above, the regulatory backdrop to this failed merger was a decade of malaise in Japan's banking sector. While this is popularly attributed to the collapse of Japan's "bubble" economy in 1989 and the financial institution and corporate failures that were precipitated by bad loans, Hoshi and Kashyap argue that the causes were much older and deeper. They suggest that the Japanese banking industry has never been globally competitive and that its core features (lack of private capital; misallocation of credit and continuous renewal of non-performing loans; a sector that is too large to allow adequate returns; and an inability to make profit because of government restraints on types of financial products) have been visible since at least the 1980s. When Japan's economic downturn predictably resulted in bank failures and hollowing out of assets, the government's response was a "muddling through" strategy of forbearance, injections of public funds, and selective and intermittent application of global banking standards and procedures through the FSA.[91] The "informal" channel of regulation continued with extensive communication between banks and their regulator, with the government signaling its preferred results by, for example, offering public funds to buy subordinated debt and preferred shares of major banks.

> The banks were not forced to recapitalize, but were strongly encouraged to apply for the funds. The banks, however, are expected to "return" the public funds eventually by accumulating enough internal funds to buy-back the shares and debt. Bank of Tokyo Mitsubishi and Sumitomo Trust and Banking have already bought-back the government's holdings of their subordinated debt.[92]

What these measures underscored, however, was the limits of regulatory turnaround for banks within the Japanese market, unless new sources of capital could be found or unless the economy improved dramatically and in a sustained way. Thus, foreign investment became important.

The three banking groups that feature in this case study were all globalized banks—all three traded in the US[93] and had significant foreign share ownership. As Ahmadjian notes in relation to Sumitomo Trust Bank's sister institution:

> In 2003, Goldman Sachs purchased $1.37 billion of preferred shares, convertible into regular shares in a number of years in Sumitomo Mitsui Bank. These more concentrated stakes by single funds suggested that foreign ownership would become increasingly influential over time.[94]

In the case of Sumitomo Trust Bank, its foreign ownership was reported as representing 30 percent of its issued shares at the time of the dispute.

Not surprisingly, then, we see in the media statements by Sumitomo and UFJ during this period an emphasis on shareholder value—a (then) relatively new corporate norm for Japan—and the impact of the failed transaction on foreign perceptions of the market:

UFJ said ..."We have explained to the court that Sumitomo Trust and Banking's request for a provisional injunction has no legal basis and that our group, MTFG, and Japan's economy and financial markets would suffer greatly if an injunction was granted." The group's comments came in response to a claim from Atsushi Takahashi, Sumitomo's President, that trust in Japanese law and the country's economy would be undermined if UFJ was able to pull out of the sale.[95]

Clearly, these claims were aimed at foreign investors who were likely to be more mobile in the market, rather than at the banks' own domestic institutional investors or shareholders from their own industrial groups.

Foreign shareholdings in Japan in non-financial corporations remained at very low levels after the 1950s. At the time that Haley published *Authority Without Power*, foreign share ownership by market value of all listed companies in Japan was still in single digits: about 4.2 percent in 1990. By the time of our case study dispute, foreign ownership had climbed steadily so that it was 21.8 percent in 2004 and subsequently grew to 28.0 percent in 2008.[96]

As Ahmadjian points out, foreign shareholders exercise influence in multiple ways in Japan. She codes this influence in classic corporate governance terms, as "voice" or "exit." Ahmadjian argues that exit represented a powerful option for foreign investors in the 1990s, who "had an influence over Japanese share prices far in excess of their actual stakes."[97] They were far more likely to buy and sell than

Japanese investors and "propped up share prices at a time when banks and other long-term shareholders were selling their holdings." For banks in particular,

> [l]owered stock prices had an impact on banks' shareholdings—and if the share prices went too low, they threatened to affect their capital adequacy ratios.[98]

Foreign shareholders also exercise "voice" in different ways. A 2003 survey by leading legal publisher Shōji Hōmu found that foreign and "other" shareholders exercised their voting rights against management proposals in 43.7 percent of companies surveyed in 2003, compared with 19 percent in 1999.[99] Seldom, however, have foreign investors escalated that voice to the point of being protagonists in litigation such as derivative suits.[100] More typically, Ahmadjian found in interviews that foreign shareholders exercised informal voice in meetings with corporate chief executive officers (CEOs) and corporate investor relations departments, and through representative bodies such as the American Chamber of Commerce in Japan (ACCJ).[101]

If Ahmadjian's argument is accurate, it would suggest that Sumitomo's commitment to litigation, both at the injunctive relief stage and in the later damages claim, could be read as an attempted show of strength, possibly for the benefit of foreign investors and/or industry analysts.

Media reaction to Sumitomo's actions was divided both at home and abroad. In some quarters, Sumitomo's litigation was seen as vindication of a domestic deregulatory discourse, a symbolic marker of "a more confrontational and legalistic society."[102] In other circles, Sumitomo was castigated for seeking an injunction, because it opened the door to "court intervention" in what was potentially a more lucrative rival deal for UFJ. In this case, the first court treatment of a bank merger, some observers saw "court intervention" as arresting a shift from developmental state-style planning to market-driven transactions. Some questioned whether arresting this trend was an appropriate role for the court. Yet other observers saw Sumitomo's actions as immoral—bringing a banking industry transaction into the glare of public and legal scrutiny—a reaction that aligns with the Haley paradigm.[103]

Globalization and juridification as new regulatory elements in Japan

As we consider whether *Sumitomo v. UFJ* may signal a departure from the Haley paradigm of regulation in Japan, two new elements seem to stand out. The first is globalization and the second a turn to the courts—what we might call Japan's juridification.[104]

Globalization is defined in multiple ways and features in a range of legal and regulatory discourses within and outside Japan. At the meta level, Dowdle has characterized it as a mutual, cross-system of regulatory borrowing.[105] This resonates with the account of changes in Japanese law and society described by legal sociologist Shiro Kashimura.[106] But what Kashimura stresses is that "globalization" in

Japan represents a very different phenomenon from the "internationalization" of the 1980s. Twenty-first-century "globalization" means a faster, deeper integration of Japan into the global economy in ways that are not entirely controllable, with regulatory results that provoke intense anxiety.

The Sumitomo–UFJ transaction illustrates those multiple dimensions of globalization: global markets and regulators influenced the parameters of Japanese government policy action (for example inducing government to signal that major banks should merge); the parties were already subject to direct global regulation through international banking standards and their participation in the US stock market; global intermediaries such as transaction lawyers shaped the transaction design; and the parties devised their negotiating strategies in part with an eye to how they would play with global observers.

Tokyo M&A practitioner Steven Givens points out that the rush by UFJ to accept the MTFG proposal in preference to the original merger with Sumitomo was not based on exhaustive analysis.[107] Instead, when UFJ's fiduciary duty to its shareholders and the propriety of MTFG's attempt to block Sumitomo was questioned as being possibly illegal and invalid under Delaware law,[108] this was picked up in reports by Japan's leading financial newspaper, the *Nihon Keizai Shimbun*:

> [this] in turn led all three principals in the transaction to hire prominent US law firms and investment banks to educate them, in the context of a purely domestic Japanese merger, with respect to Delaware law. Ultimately SMFG withdrew from the contest, but not before its competing bid had driven the UFJ stock price up to a level that in effect forced MTFG to pay the same premium (in relation to the price before SMFG's bid) that SMFG had offered.[109]

In Givens' account, we see not simply an opportunistic or coincidental application of global legal standards (here Delaware corporations law), but an active—and successful—push from a key legal practitioner in the Japan market to expand the application of those standards to the domestic M&A market.

The second salient feature of the transaction is the deliberate use of litigation throughout. Both the District Court decision and the appellate court-brokered settlement in *Sumitomo v. UFJ* crystallize a vigorous normative debate in Japanese legal and business circles since the mid-1990s about what business and legal norms should govern contract termination.[110] The contract jurisprudence of the 1990s, particularly in relation to long-term or continuing contracts, penalized breach of contract by calibrating damages according to factors such as:

> the process of the termination of the basic agreement; [party] motive and objectives; the degree of bad [behavior]; what legal benefits were protected under the basic agreement, etc.[111]

The other side of the debate stresses that "free competition should be permitted," and asserts that large, established businesses have no need of this kind of court paternalism, as they are both capable of devising their own transactional norms and should be permitted to do so. Here, of course, the irony is that we see one of the banking market's larger players deliberately invoking the court's role as arbiter from an early point in the transaction.

Clearly, one race to the courthouse does not a legal system transformation make. Socio-legal scholars in Japan have long been fascinated by the phenomena of "legalization" and popular "legal consciousness" and the gap between the state's use of law and the prevalence of non-legal means of social ordering. A subset of this discourse deals with the modernity of Japanese contracts and contracting practices and the apparent contradiction between a society that achieved high economic growth on the basis of contractual relationships that were often relational, undocumented, insulated from the market, and not contested in formal legal settings. This body of writing is closely aligned to Weberian notions of modernization. An alternative account is Kagan's contrast between Japan and the "adversarial legalism" typical of the US.[112]

A further element of juridification is the way in which ordinary transactions (whether commercial or consumer) are now regulated to transform them into self-consciously "legal" transactions that require support from professional intermediaries, place cost and risk on the parties or the consumer, require a documentary output, and channel disputes to a formal legal institution, whether institutionalized mediation or civil litigation.

Adjusting the Japanese regulatory paradigm to emphasize law and legal institutions has the appeal of putting law and lawyers where they like to be—at the center of things. It also offers a new platform for comparative institutional studies between Japan and legal-centric states such as the US.[113] Thus, in 2004, I saw *Sumitomo v. UFJ* as:

> [Representing] a paradigm shift on the legal side ... it shows a more legally aware business mindset in commercial dealing. The days of unspoken understandings underpinned by personal relationships are fading away.[114]

In retrospect, a more accurate characterization would be to say that it represents the expansion of the formal side of Haley's paradigm, a re-regulated Japan presents a broader menu of choices for—and a wider range of players to shape—dispute strategies and sanctions.

As Scott cautions, I think correctly, both legalization and juridification are "dead-end" concepts.[115] The danger of elevating legal rules, legal institutions, and legal professionals as the "new" governance element in Japan is that this may lead us into a fairly narrow reading of regulation being effected primarily through state law and state institutions—at precisely the time when the state seems to be diversifying its regulatory modes, a globalized Japanese market has become porous, and market actors have a wider range of norms and stakeholders to consider in formulating dispute resolution strategies. This, ultimately, is the new, post-Haley regulatory reality underscored by *Sumitomo v. UFJ*.

Notes

1 For an analysis of how Japanese governance changed in response to global geopolitical and economic shifts, see economist Naoki Tanaka, *Nihon no atarashii rūru* [*Japan's New Rules*], Tokyo: Kodansha, 2004.

2 Veronica L. Taylor, 'Re-regulating Japanese Transactions: the Competition Law Dimension', in Peter Drysdale and Jennifer Amyx, eds, *Japanese Governance: Beyond Japan Inc*, New York: Routledge, 2003.

3 John O. Haley, *Authority Without Power: Law and the Japanese Paradox*, Oxford: Oxford University Press, 1991. A related paradigm that has been highly influential and remains salient is Upham's focus on litigation as an avenue of social protest: Frank K. Upham, *Law and Social Change in Postwar Japan*, Cambridge, MA: Harvard University Press, 1987. See also Feldman's application of Upham's approach to the contemporary area of health policy: Eric Feldman, *The Ritual of Rights in Japan: Law, Society and Health Policy*, Cambridge: Cambridge University Press, 2000. The third dominant paradigm from the same generation of Japanese law scholars is, of course, Ramseyer's application of Chicago School economics to Japan. For his full bibliography, see http://www.law.harvard.edu/faculty/directory/facdir.php?id=54&show=bibliography. All three scholars employ slightly different normative stances and very different methodologies, with Ramseyer's preference for statistical data and regression analysis fitting neatly with trends in US political science that emphasize "big N" style research. This essay is not an intellectual history of the field and so I limit my analysis to the contours of Haley's thesis.

4 John O. Haley, *Authority Without Power: Law and the Japanese Paradox*, Oxford: Oxford University Press, 1991.

5 For a survey, see Christine Parker and John Braithwaite, 'Regulation', in Peter Cane and Mark Tushnet, eds, *Oxford Handbook of Legal Studies*, Oxford: Oxford University Press, 2002; Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials*, Cambridge: Cambridge University Press, 2007.

6 John O. Haley, *Authority Without Power: Law and the Japanese Paradox*, Oxford: Oxford University Press, 1991.

7 John O. Haley and Veronica L. Taylor, 'Rule of Law in Japan' in Randall Peerenboom, ed., *Discourses on Rule of Law in Asia*, London: RoutledgeCurzon, 2004.

8 For a discussion of negotiation in the shadow of the law in an insolvency context, see Chapter 11 by Oh and Halliday, in this volume.

9 John O. Haley, *Authority Without Power: Law and the Japanese Paradox*, Oxford: Oxford University Press, 1991.

10 John O. Haley, *Authority Without Power: Law and the Japanese Paradox*, Oxford: Oxford University Press, 1991, p. 169.

11 John O. Haley, 'The Myth of the Reluctant Litigant', *Journal of Japanese Studies* 4 (2), 1978, pp. 359–90.

12 Christine Parker and John Braithwaite, 'Regulation', in Peter Cane and Mark Tushnet, eds, *Oxford Handbook of Legal Studies*, Oxford: Oxford University Press, 2002; Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials*, Cambridge: Cambridge University Press, 2007.

13 John O. Haley, *Authority Without Power: Law and the Japanese Paradox*, Oxford: Oxford University Press, 1991, p. 181.

14 See, for example, Edward J. Lincoln, *Arthritic Japan: The Slow Pace of Economic Reform*, Washington, DC: The Brookings Institution, 2001; Luke Nottage and Leon Wolff, 'Corporate Governance and Law Reform in Japan: from the Lost Decade to the End of History?', *CLPE Research Paper* 3, 2005. Available from http://ssrn.com (abstract_830005), 2005.

15 Peter Drysdale and Jennifer Amyx, eds, *Japanese Governance: Beyond Japan Inc*, London: Routledge, 2003.

16 For example, Gregory Noble, 'Koizumi and Neo-Liberal Economic Reform', *Social Science Japan* 34, March 2006, pp. 6–9; Steven K. Vogel, *Japan Remodeled*, Ithaca: Cornell University Press, 2006.
17 Steven K. Vogel, *Japan Remodeled*, Ithaca: Cornell University Press, 2006.
18 Marie Anchordoguy, *Reprogramming Japan*, Ithaca: Cornell University Press, 2005.
19 Saadia M. Pekkanen, 'Aggressive Legalism: The Rules of the WTO and Japan's Emerging Trade Strategy', *The World Economy* 24 (5), 2001, pp. 707–37; Saadia M. Pekkanen, 'Japan's Aggressive Legalism: Law and Foreign Trade Politics Beyond the WTO', Stanford: Stanford University Press, 2008.
20 Christine Parker and John Braithwaite, 'Regulation', in Peter Cane and Mark Tushnet, eds, *Oxford Handbook of Legal Studies*, Oxford: Oxford University Press, 2002.
21 A key example in the field of regulatory studies is the regulatory pyramid employed in "responsive regulation": Ian Ayers and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, New York: Oxford University Press, 1992. This encourages changes in state-initiated governance by building in a range of public and private stakeholders, providing mechanisms for each to monitor the other, and employing techniques such as enforced self-regulation.
22 Here, I describe the concept as it is used in the non-US literature cited for this essay; the academic discourse on "regulation" within the US has been quite different.
23 A counterpart public example is the successful use of litigation, for example in establishing bureaucratic liability for Japan's HIV epidemic: Eric Feldman, *The Ritual of Rights in Japan: Law, Society and Health Policy*, Cambridge: Cambridge University Press, 2000.
24 Hugh Collins, *Regulating Contracts*, Oxford: Oxford University Press, 1999.
25 Takashi Uchida and Veronica L. Taylor, 'Japan and the Era of Contract', in Daniel Foote, ed., *Law in Japan: A Turning Point*, Seattle: University of Washington Press, 2007. Pilot interviews that I conducted in 1996–97 with ten Japanese corporations suggested that the shape and norms of Japanese contracts were not immutable. Instead, they were affected by factors such as the parties' power differentials, perception of risk, new legislation (e.g., the then new Product Liability Law), the perceived threat of litigation, price fluctuations in the market, and interference from professional cohorts such as lawyers and insurers. This was particularly well illustrated in Visser't Hooft's study of distribution contracts in the luxury cosmetics sector, where contract and competition policy intersect: Willem M. Visser't Hooft, *Japanese Contract and Anti-Trust Law*, London: RoutledgeCurzon, 2002.
26 The explicit reference to internal corporate control is first made in the Daiwa Bank Case, discussed in Bruce Aronson, 'Reconsidering the Importance of Law in Japanese Corporate Governance: Evidence from the Daiwa Bank Shareholder Derivative Case', *Cornell International Law Journal* 36, 2003, p. 11, but is then applied in subsequent directors' liability cases.
27 For Parker and Braithwaite, the normative appeal of regulatory pluralism lies in its potential to create spaces for Dorf and Sabel's "democratic experimentalism"; Christine Parker and John Braithwaite, 'Regulation', in Peter Cane and Mark Tushnet, eds, *Oxford Handbook of Legal Studies*, Oxford: Oxford University Press, 2002.
28 Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design', *Public Law* 2001, pp. 283–305.
29 Scott, *supra*, pp. 283–305.
30 For example, Robert Pekkanen, *Japan's Dual Civil Society*, Stanford: Stanford University Press, 2006.
31 In relation to non-profit organizations, see Robert Pekkanen, *Japan's Dual Civil Society*, Stanford: Stanford University Press, 2006.
32 John O. Haley, *Authority Without Power: Law and the Japanese Paradox*, Oxford: Oxford University Press, 1991, p. 179.
33 J. Mark Ramseyer and Frances Rosenbluth, *Japan's Political Marketplace*, Cambridge, MA : Harvard University Press, 1993.

34 John O. Haley, *Authority Without Power: Law and the Japanese Paradox*, Oxford: Oxford University Press, 1991.
35 For example, Mark Tilton, *Restrained Trade: Cartels in Japan's Basic Materials Industries*, Ithaca: Cornell University Press, 1996.
36 Veronica L. Taylor, 'Consumer Contract Governance in a Deregulating Japan', *Victoria University of Wellington Law Review* 27 (1), 1997, pp. 99–120.
37 Ulrike Schaede, *Cooperative Capitalism: Self-Regulation, Trade Associations and the Antimonopoly Law in Japan*, Oxford: Oxford University Press, 2000.
38 Marie Anchordoguy, *Reprogramming Japan*, Ithaca: Cornell University Press, 2005.
39 Seigo Hirowatari, 'Post-war Japan and the Law: Mapping Discourses of Legalization and Modernization', *Social Science Japan Journal* 3 (2), 2000, pp. 155–69.
40 John O. Haley, *Authority Without Power: Law and the Japanese Paradox*, Oxford: Oxford University Press, 1991.
41 Frank K. Upham, *Law and Social Change in Postwar Japan*, Cambridge, MA: Harvard University Press, 1987; Eric Feldman, *The Ritual of Rights in Japan: Law, Society and Health Policy*, Cambridge: Cambridge University Press, 2000.
42 Peter A. Hall and David Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, Oxford: Oxford University Press, 2001.
43 For example, Robert Kagan, *Adversarial Legalism: The American Way of Law*, Cambridge, MA: Harvard University Press, 2001; Robert Kagan and Lee Axelrod Lee, *Regulatory Encounters: Multinational Corporations and American Adversarial Legalism*, Berkeley and Los Angeles: University of California Press, 2000.
44 Chalmers A. Johnson, *Japan: Who Governs? The Rise of the Developmental State*, New York : W.W. Norton, 1995.
45 Justice System Reform Council, *Recommendations of the Justice System Reform Council – For a Justice System to Support Japan in the 21st Century*, 12 June 2001. Available from http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html; and in Japanese as: Shihōseido kaikaku shingikai, *Shihōseido kaikaku shingikai ikensho: 21 seiki no nihon o shihaeru shihōseido* (Heisei 13 nen 6 gatsu 12 nichi), 2001.
46 For example, Chiyoda-ku, *Anzen de kaitekina chiyodaku no seikatsu kankyô no seibi ni kansuru jôrei*, Heisei 14nen6gatsu25nichi jôreidai53gô [Ordinance on providing a safe and comfortable living environment in Chiyoda-ku, 25 June 2002, Ordinance No. 53]. Available from https://www3.e-reikinet.jp/cgi-bin/chiyoda/D1W_login.exe.
47 Takeo Hoshi and Anil K. Kashyap, 'Solutions to Japan's Banking Problems: What Might Work and What Definitely Will Fail', Paper prepared for the US–Japan Conference on the Solutions for the Japanese Economy, November 2004. Available from http://www.ier.hit-u.ac.jp/~iwaisako/solutions/TokyoAgenda.html.
48 Kaoro Hosono, Koji Saki, and Kotaro Tsuru, 'Consolidation of Banks in Japan: Causes and Consequences', National Bureau of Economic Research NBER Working Paper Series, Working Paper 13399, September 2007, p. 10. Available from http://www.nber.org/papers/w13399.
49 UFJ Hits Back as Sumitomo seeks injunction, *Financial Times* 21 July 2004, p. 18.
50 Sumitomo Trust and Banking Co (http://www.sumitomotrust.co.jp/IR/company/index_en.html) was, and remains, a separate entity from Sumitomo Mitsui Financial Group (http://www.smfg.co.jp/english/aboutus/profile/), although both are part of the Sumitomo corporate group.
51 Martin Fackler and Henny Sender, 'Court Blocks Japan Bank Merger Talks', *Wall Street Journal* 28 July 2004, C5. Compare this with the Tokyo District Court reference to one year and eight months: Hanrei tokuh?: UFJ shintaku ginko kyōdōjigyōkajiken daiisshinhanketsu [UFJ Trust Bank Merger Decision of First Instance], *Hanrei Jihō* 1928, 2006, p. 4.
52 Hanketsu sokuhō: UFJ gurūpuno keieitōgō o meguru karishobunjiken kettei, [Decision on Interim Injunctions Concerning UFJ Group Integration] *Shōji Hōmu* 1708, (22–25), 15 September 2004, p. 24.

53 Martin Fackler and Henny Sender, Court Blocks Japan Bank Merger Talks, *Wall Street Journal* 28 July 2004, C5.
54 Confusingly, after the initial merger that created this bank, it was known in Japanese as Mitsubishi–Tokyo Bank and so is reported as such during this failed merger, but is officially known in English as the Bank of Tokyo–Mitsubishi.
55 Martin Fackler and Henny Sender, 'Court Blocks Japan Bank Merger Talks', *Wall Street Journal* 28 July 2004, C5.
56 http://www.mufg.jp/english/.
57 Martin Fackler and Henny Sender, 'Court Blocks Japan Bank Merger Talks', *Wall Street Journal* 28 July 2004, C5.
58 Martin Fackler and Henny Sender, 'Court Blocks Japan Bank Merger Talks', *Wall Street Journal* 28 July 2004, C5.
59 The injunction was sought by Sumitomo Bank against UFJ Holdings, UFJ Trust Bank, and UFJ Bank.
60 'Final Ratio will determine Victor in Battle for the Banks', *Financial Times* 16 February 2005, p. 16.
61 Commercial Code.
62 Andrew Morse, 'Sumitomo Mitsui Raises Heat on UFJ', *Asian Wall Street Journal* 8–10 October 2004, p. 3.
63 Andrew Morse and Martin Fackler, 'Rival Offer for UFJ Might Go Public', *Wall Street Journal* 9 August 2004, A3.
64 Andrew Morse, 'Sumitomo Mitsui Raises Heat on UFJ', *Asian Wall Street Journal* 8–10 October 2004, p. 3.
65 Andrew Morse, 'Sumitomo Mitsui Raises Heat on UFJ', *Asian Wall Street Journal* 8–10 October 2004, p. 3.
66 Andrew Morse and Martin Fackler, 'Rival Offer for UFJ Might Go Public', *Wall Street Journal* 9 August 2004, A3.
67 Andrew Morse and Martin Fackler, 'Rival Offer for UFJ Might Go Public', *Wall Street Journal* 9 August 2004, A3.
68 Andrew Morse, 'Sumitomo Mitsui Raises Heat on UFJ', *Asian Wall Street Journal* 8–10 October 2004, p. 1.
69 Andrew Morse, 'Sumitomo Mitsui Raises Heat on UFJ', *Asian Wall Street Journal* 8–10 October 2004, p. 2; 'Scramble for UFJ, Sumitomo Mitsui Seen at Dead End', *Nikkei Business* 20 September 2004, cited in Curtis J. Milhaupt, 'In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan', *Columbia Law Review* 105 (7), November 2005, p. 2171. In substance, this was a defensive measure dubbed a poison pill defense by the media, but it was adopted ahead of those actual poison pill defenses later used by other Japanese takeover targets and in advance of formal court consideration and ratification of these poison pill defenses in Japanese corporations law. For an extended discussion, see Curtis J. Milhaupt, 'In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan', *Columbia Law Review* 105 (7), November 2005, p. 2171; Cristina Alger, 'The Livedoor Looking Glass: Examining the Limits of Hostile Takeover Bids in Japan', *NYU Journal of Law and Business* 3, 2006, p. 309.
70 This repeats the language of Article 23 (2), Civil Preservation Act [*Minji Hozen Hō*]: "The court may issue an order to establish a provisional status, when it is necessary to issue an order so as to avoid the extreme damage or imminent danger to be suffered by the oblige with a disputed right."
71 Pursuant to the Civil Preservation Act [*Minji Hozen Hō*].
72 Curtis J. Milhaupt, 'In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan', *Columbia Law Review* 105 (7), November 2005, p. 2178. Presumably, this was a directors' resolution subject to confirmation at a later shareholders' meeting.
73 Hanketsu sokuhō UFJ gurūpuno keieitōgō o meguru karishobunjiken kettei, 1708 *Shōji Hōmu* 22–25, 15 September 2004, p. 23 (author's translation).

74 The original decision was reported in 58–6 *Minsh?*, p. 1763, and reproduced in: Hanketsu sokuhō UFJ gurūpuno keieitōgō o meguru karishobunjiken kettei, 1708 *Shōji Hōmu* 22–25, 15 September 2004, p. 22.
75 Hanketsu sokuhō UFJ gurūpuno keieitōgō o meguru karishobunjiken kettei, 1708 *Shōji Hōmu* 22–25, 15 September 2004, pp. 22 and 25.
76 The decision uses the legal neologism *dyū dirijiensu*.
77 The court also noted the relatively long period provided for the negotiation: the letter of intent was valid for a year and eight months.
78 1928 *Hanrei Jihō* 3.
79 Martin Fackler and Henny Sender, 'Court Blocks Japan Bank Merger Talks', *Wall Street Journal* 28 July 2004, C5.
80 1928 *Hanrei Jihō* 3, p. 4
81 Curtis J. Milhaupt, 'In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan', *Columbia Law Review* 105 (7), November 2005, p. 2171; Cristina Alger, 'The Livedoor Looking Glass: Examining the Limits of Hostile Takeover Bids in Japan', *NYU Journal of Law and Business* 3, 2006, p. 309.
82 Christina Ahmadjian, 'Foreign Investors and Corporate Governance in Japan', in Masahiko Aoki, Gregory Jackson, and Hideaki Miyajima, eds, *Corporate Governance in Japan: Institutional Change and Organization Diversity*, Oxford: Oxford University Press, 2007, Chapter 4.
83 Christina Ahmadjian, 'Foreign Investors and Corporate Governance in Japan', in Masahiko Aoki, Gregory Jackson, and Hideaki Miyajima, eds, *Corporate Governance in Japan: Institutional Change and Organization Diversity*, Oxford: Oxford University Press, 2007, Chapter 4, p. 138.
84 See, for example: Eric A. Feldman, 'Law, Culture and Conflict: Dispute Resolution in Postwar Japan', in Daniel H. Foote, ed., *Law in Japan: A Turning Point*, Seattle: University of Washington Press, 2007, Chapter 3.
85 Presumably because the dispute settles, the case is not important enough to warrant case reporting, or the injunction is a very minor part of the overall litigation strategy.
86 Willem M. Visser't Hooft, *Japanese Contract and Anti-Trust Law*, London: RoutledgeCurzon, 2002.
87 This accounts for much of what Ginsburg sees as a surge in voluntary litigation during the same period: Tom Ginsburg and Glenn P. Hoetker, 'The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation', 8 September 2004. Available from http://ssrn.com/abstract=608582. I tend to view bankruptcy-propelled civil litigation as somewhat involuntary.
88 In the wake of a series of attempted hostile takeovers of non-banking corporations that followed this case, and the spread of deliberate poison pill defenses, the government did develop a 2004 Takeovers Code, drafted by a Ministry of Trade, Economy and Industry Study Group, and corporations law jurisprudence developed on the poison pill defense. See Ken'chi Osugi, 'What is Converging? Rules on Hostile Takeovers in Japan and the Convergence Debate', *Asian Pacific Law and Policy Journal* 9 (1), Winter 2007.
89 The doctrinal aspects of this case are discussed in a forthcoming article by Doshisha University Law School scholar, Koji Takahashi, '*Walford v. Miles* in Japan: lock-in and lock-out agreements in *Sumitomo v. UFJ*', accepted for publication in *Journal of Business Law* (forthcoming).
90 Updated lists of the major shareholder derivative suits in Japan are published regularly (in Japanese); for the list current at the time of this dispute, see: 'Shuyō na kabushu daihyō soshō jiken ichiranhyō' [Major shareholder representative suits at a glance], *Shiryoban Shōjihōmu* 256, July 2005, pp. 41–51.
91 Takeo Hoshi and Anil K. Kashyap, 'Solutions to Japan's Banking Problems: What Might Work and What Definitely Will Fail', Paper prepared for the US–Japan Conference on the Solutions for the Japanese Economy, November 2004, especially p.25. Available from http://www.ier.hit-u.ac.jp/~iwaisako/solutions/TokyoAgenda.html.

92 Takeo Hoshi and Anil K. Kashyap, 'Solutions to Japan's Banking Problems: What Might Work and What Definitely Will Fail', Paper prepared for the US–Japan Conference on the Solutions for the Japanese Economy, November 2004, p. 11. Available from http://www.ier.hit-u.ac.jp/~iwaisako/solutions/TokyoAgenda.html.
93 Martin Fackler and Henny Sender, 'Court Blocks Japan Bank Merger Talks', *Wall Street Journal* 28 July 2004, C5.
94 Christina Ahmadjian, 'Foreign Investors and Corporate Governance in Japan', in Masahiko Aoki, Gregory Jackson, and Hideaki Miyajima, eds, *Corporate Governance in Japan: Institutional Change and Organization Diversity*, Oxford: Oxford University Press, 2007, Chapter 4, p. 130.
95 Barney Jopson, 'UFJ Hits Back as Sumitomo Seeks Injunction', *Financial Times* 21 July 2004, p. 18.
96 Tokyo Stock Exchange Fact Book, 2008, p. 61. Available from http://www.tse.or.jp/english/index/html.
97 Christina Ahmadjian, 'Foreign Investors and Corporate Governance in Japan', in Masahiko Aoki, Gregory Jackson, and Hideaki Miyajima, eds, *Corporate Governance in Japan: Institutional Change and Organization Diversity*, Oxford: Oxford University Press, 2007, Chapter 4, p. 133
98 Christina Ahmadjian, 'Foreign Investors and Corporate Governance in Japan', in Masahiko Aoki, Gregory Jackson, and Hideaki Miyajima, eds, *Corporate Governance in Japan: Institutional Change and Organization Diversity*, Oxford: Oxford University Press, 2007, Chapter 4.
99 Christina Ahmadjian, 'Foreign Investors and Corporate Governance in Japan', in Masahiko Aoki, Gregory Jackson, and Hideaki Miyajima, eds, *Corporate Governance in Japan: Institutional Change and Organization Diversity*, Oxford: Oxford University Press, 2007, Chapter 4, p. 135, citing the Shōji Hōmu survey in the text but not giving the citation to this in the bibliography.
100 Christina Ahmadjian, 'Foreign Investors and Corporate Governance in Japan', in Masahiko Aoki, Gregory Jackson, and Hideaki Miyajima, eds, *Corporate Governance in Japan: Institutional Change and Organization Diversity*, Oxford: Oxford University Press, 2007, Chapter 4.
101 Christina Ahmadjian, 'Foreign Investors and Corporate Governance in Japan', in Masahiko Aoki, Gregory Jackson, and Hideaki Miyajima, eds, *Corporate Governance in Japan: Institutional Change and Organization Diversity*, Oxford: Oxford University Press, 2007, Chapter 4, p. 139.
102 Martin Fackler and Henny Sender, 'Court Blocks Japan Bank Merger Talks', *Wall Street Journal* 28 July 2004, C5.
103 Interview with Bank of Tokyo Mitsubishi employee, Seattle, 2004.
104 Gunther Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions', in G. Teubner, ed., *Juridification of Social Spheres: Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law*, Berlin: European University Institute/de Gruyter, 1987. Juridification is not really a regulatory theory per se, but it may be a useful conceptual tool for exploring the ways in which formal law and formal dispute resolution processes are being deployed and understood by a range of regulatory players in Japan.
105 Dowdle, Chapter 3 in this volume.
106 Shiro Kashimura, 'Legal Dynamics: A Multi-Disciplinary Inquiry into Law in the Era of Globalization', in Shiro Kashimura and Akira Saito, eds, *Horizontal Legal Order: Law and Transaction in Economy and Society*, Singapore: LexisNexis, 2008.
107 Steven Givens, 'Corporate Governance and M&A', in Gerald McAlinn, ed., *Japanese Business Law*, Amsterdam: Wolters Kluwer, 2007, p. 160.
108 Steven Givens, 'Corporate Governance and M&A', in Gerald McAlinn, ed., *Japanese Business Law*, Amsterdam: Wolters Kluwer, 2007, p. 160.
109 Reporting Givens' own article, Steven Givens, 'Derawea-shū saikōsai de attara, konkai UFJ Horudingusugawa ga totta gappei tōgō bōshisaku ni taishite, dono yōna shihōhandan wo kudashita de arō ka?' [What Judicial Decision would have been handed down if the Defensive Measures adopted by UFJ Holdings were before the Delaware Supreme Court?], 32 *Kokusai Shōji Hōmu* 1295, 2004.

110 Key essays from this period include: Takashi Uchida, 'Zadankai: gendai keiyakuho no aratana tenkai to ippan jōkō' [Roundtable: New Developments in Contemporary Contract Law and General Clauses], *NBL* 515, 1993, p. 14; Noboru Kashiwagi, 'Nihon no torihiki to keiyakuhō: kyōdō kenkyu – keizokuteki torihiki o kangaeru' [Japanese Transactions and Contracts: Joint Research – Continuing Contracts Considered], *NBL* 500, 1992, pp. 22–23; Hiroyasu Nakata, *Keizoku baibai no kaish?* [*The Termination of Continuing Sales Contracts*], Tokyo: Yuhikaku, 1994.
111 *Hanrei tokuhō: UFJ shintaku ginko kyōdōjigyōkajiken daiisshinhanketsu* [UFJ Trust Bank Merger Decision of First Instance], *Hanrei Jihō* 1928, 2006, p. 4.
112 The changes to formal legal institutions in Japan that we are seeing at present may be both a response to and a partial embrace of Kagan's adversarial legalism, but we need time and empirical data to track this. One example is the field of intellectual property, where we see new IP courts being established as a direct response to the patent litigation strategies being adopted in the US.
113 Milhaupt and West argue, approvingly, that this elevation of law is also mirrored in the shifting career choices of professional elites, many of whom now choose to become practicing lawyers rather than bureaucrats: Curtis J, Milhaupt and Mark D, West, 'Law's Dominion and the Market for Legal Elites in Japan', 14 June 2002. Available from http://ssrn.com/abstract=316120.
114 Martin Fackler and Henny Sender, 'Court Blocks Japan Bank Merger Talks', *Wall Street Journal* 28 July 2004, C5.
115 Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design', *Public Law* 2001, pp. 283–305.