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Educating Lawyers for the Global Economy

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EDUCATING LAWYERS FOR THE GLOBAL ECONOMY

LAW AND INVESTMENT IN JAPAN: CASES AND MATERIALS (Yukio Yanagida, Daniel H. Foote, Edward S. Johnson, Jr., J. Mark Ramseyer & Hugh T. Scogin, Jr. eds.). Cambridge, Massachusetts: East Asian Legal Studies Program, Harvard Law School, distributed by Harvard University Press, 1994. xxxi + 734 pp.

Reviewed by John O. Haley[*]

A review of a casebook may seem unusual to some, but *Law and Investment in Japan: Cases and Materials* merits attention by almost any measure. The principal author, Yukio Yanagida, is an international lawyer of high standing and reputation. This book is the product of his design for a course and the accompanying set of teaching materials that he originally taught at Harvard in 1991. His aim was to introduce students to the variety of legal problems lawyers face everyday when advising clients involved with investment in Japan. Selecting a typical investment transaction — a cooperative venture between Japanese and U.S. companies for the manufacture and sale of an industrial product — as the "principal case," Yanagida harnessed a set of documents based on actual transactions with readings that would enable students to familiarize themselves with the panoply of Japanese legal problems that lawyers representing both Japanese and non-Japanese clients would encounter. The experiment worked. Subsequently, he and four outstanding younger legal scholars — all Harvard graduates — rewrote and reedited the original materials into their present form.

The book was an instant success. Few, if any casebooks on foreign law have been adopted so quickly by so many. Within days after its publication, it was used as the principal text in courses on Japanese law at the universities of Chicago, George Washington, Harvard, the University of Washington, and Temple in Japan. Both teachers and their students were fulsome in their praise and rightly so.

Readers familiar with the published research of Dan Foote, Mark Ramseyer, and Hugh Scogin will appreciate the diversity of approaches

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and interests that combined to produce this volume. To their credit, however, whatever their differences, their collaboration results in a coherent presentation that exposes their students and other readers to the full range of legal aspects of foreign investment in Japan. Concise, well-written chapters cover every relevant field of law. The book begins with an introduction to the basic economic and political issues. It continues with separate chapters that provide an overview of the Japanese legal system with welcome emphasis on its civil law heritage, the Japanese business environment, administrative process, regulation of foreign investment, negotiating and drafting, corporate forms and company law, taxation, intellectual property, antitrust, and dispute resolution. An entire chapter is devoted to publicly traded corporations and the attendant issues of shareholder control and mergers and acquisitions, including a glimpse at the Pickens-Koito dispute. Each chapter relates to the principal case, but the authors have written and organized the material so that each chapter can be used as effectively without reference to the model transaction. Superb translations of a substantial corpus of code and statutory material are also included in an appendix.

One of the authors' most impressive achievements is their effective integration of readings from a wide variety of disciplines — especially those on Japan's industrial structure, corporate organization, and business practices — interposed with translated cases and other legal materials. For example, the book begins with an excerpt from a 1991 report prepared by A.T. Kearney, International, Inc. for the American Chamber of Commerce in Tokyo on the prospects and problems of foreign investment in Japan. Among the variety of factors that limit foreign investment in Japan today, the report duly notes the high cost of land, the difficulties in recruiting the most able Japanese employees, the seemingly impenetrable density of ongoing business relationships in Japan against the backdrop of past public policies, and formal barriers to foreign investment.[1] Juxtaposed with this account are a 1967 *Daily Yomiuri* editorial on failing joint ventures and portions of a 1990 *Harvard Business Review* essay in which Robert B. Reich, the current secretary of labor, questions the distinction between foreign and domestically-owned corporations. The three pieces not only represent provocative perspectives on Japan's postwar experience with foreign investment, but succinctly introduce the reader to the range of questions that have surrounded the issue for two generations.

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1. YUKIO YANAGIDA ET AL., LAW AND INVESTMENT IN JAPAN: CASES AND MATERIALS 3–5 (1994).

In the chapters that follow, the authors continue to give their readers a sense of the historical complexity of Japanese postwar legislation on antitrust, trade, and investment. Much of the legislation related to foreign trade and investment, like Japan's foreign exchange and foreign trade controls, reflect the unintended uses of early postwar emergency legislation. Other statutes, like the new Administrative Procedure Act, are the result of carefully considered and, at times, fiercely negotiated choice. Those involved in drafting Japan's antitrust law, for example, probably did not anticipate the use of Article 6 — designed to prevent Japanese firms from participating in international cartels — as a means, since 1968, of protecting Japanese licensees of foreign technology against overreaching foreign licensors. The presentation of these issues is faithful to the reality being depicted. No single pattern of creation or change is evident or advocated.

Not only do the authors thereby demonstrate the effectiveness of an interdisciplinary approach, they also substantiate the relevance of Japanese law to many of the most vexing issues of postwar Japanese economic and political change. Again with remarkable economy, the authors include in Chapter 6, entitled "Regulation of Foreign Investment," carefully edited selections that trace the variety of postwar legal controls that were used through the mid-1960s to restrict or channel foreign investment. The authors discuss the staged liberalization of these controls from 1968 through 1973 and the 1979 reform (effective in 1980) of the 1949 Foreign Exchange and Foreign Trade Control Law and the 1950 Foreign Investment Law, the statutory pillars of these controls. More on the origins of these statutes could have been added. Nevertheless, read together with the chapters on "Intellectual Property Law" (Chapter 9) and "The Antimonopoly Act" (Chapter 10), these materials cover the Japanese legal rules that have been and continue to be the most important in regulating foreign investment and trade, and should be required reading for all students of Japan's postwar political economy.

A fuller understanding of the legal aspects of foreign investment in Japan engendered here would, one hopes, allow for a more accurate and dispassionate discussion of Japan's postwar economic "miracle." The "principal case" is, in effect, a study of how Japanese officials resorted to emergency regulations leftover from the Occupation in response to initiatives by Japanese firms to gain access to foreign technology and by foreign firms to gain access to the Japanese market. From this vantage point, it becomes difficult to argue that Japan's economic success was solely the result of prescient, proactive strategies, and planning by officials, given the reactive use of an assortment of legal controls to channel

foreign trade and investment transactions. The extent to which both market forces and government intervention (often driven more by the narrowest sort of paternalist protectionism than by a strategic plan with implementing legislation) coincided to produce what we now label an "industrial policy" is laid bare in the details presented here.

Law and Investment in Japan is best evaluated, however, from the perspective of past efforts to teach Japanese law in American law schools. As a casebook, it represents the culmination of two-and-a-half decades of effort and achievement as well as the promise and prospect of Japanese legal studies in the United States.

Writing twenty-five years ago, Charles Stevens gave three reasons for the study of Japanese law in American law schools. First, as a blend of European, American, and indigenous influences, the Japanese legal system provides an especially rich source for comparative study. Second, Japanese law reflects the dynamics of change in a developing legal order. Finally, the importance of Japan as a commercial center requires that an increasing number of American lawyers engaged in international practice be familiar with at least the basics of Japanese law and practice related to trade and investment.[2] Echoes of Stevens' plea for the study of Japanese law continue.[3] The principal justifications remain both pedagogical and practical. Japanese law is worth studying, we are told, because of the comparative insights it offers as a hybrid system in which elements of a traditional East Asian system merge with those derived from European and even American models. In addition, the study of Japanese law provides valuable lessons as a possible model for other nations seeking to use law as a tool of economic and political transformation, or seeking to ameliorate the social and environmental consequences of industrial growth. Lastly, it prepares students for practice in an increasingly complex world economy.

In 1971, as Stevens noted, only two law schools in the United States (indeed, anywhere outside of Japan) — Columbia and the University of Washington — included courses on Japanese law as part of their regularly taught offerings.[4] Much has changed since 1971. Courses on Japanese law are routinely taught today at over a dozen law schools in the United States and at least half as many law faculties in other English-speaking countries.[5]

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2. Charles R. Stevens, *Modern Japanese Law as an Instrument of Comparison*, 19 AM. J. COMP. L. 665 (1971).

3. *See, e.g.*, Kenneth L. Port, *The Case for Teaching Japanese Law at American Law Schools*, 43 DEPAUL L. REV. 643 (1994).

4. Stevens, *supra* note 2, at 665.

5. Law schools (and tenured or tenure-track faculty with Japanese language ability and established research interest) that offer or at least have the potential to offer courses on

The first regularly offered course and related teaching materials on Japanese law were developed at the University of Washington in the mid-1960s by Dan F. Henderson, the director of the Asian Law Program (founded in 1962 with substantial funding from the Ford Foundation). Although Henderson's two-volume historical study of conciliation in Japanese law[6] established him as the preeminent American scholar of Tokugawa law, the first edition of the materials used for the introductory course in Japanese law tended to stress both the formal structure of the Japanese legal system and features that it shared with other European-derived systems. Reedited and refined in 1978 and 1988 to include additional historical material and fuller treatment of judicial, administrative, and criminal processes in contemporary Japan, these materials were

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Japanese law include Albany (Alex Y. Seita), Arizona State (Dennis S. Karjala), Arkansas, Fayetteville Campus (Robert B. Leflar), Chicago (J. Mark Ramseyer), Colorado (Hiroshi Motomura), Columbia (Michael K. Young), Hastings (Dan F. Henderson and Leo Kanowitz), Loyola, New Orleans (Dan Rosen), Marquette (Kenneth L. Port), New York Law School (James B. George, Jr., emeritus since 1993), New York University (Frank K. Upham and Harry First), North Carolina Central (Percy R. Luney, Jr.), UCLA (Taimie L. Bryant), Washington University (Curtis J. Milhaupt), and the University of Washington (Daniel H. Foote and John O. Haley). The list could be expanded to include courses on Japanese constitutional law taught by specialists such as Lawrence W. Beer and Hiroshi Itoh in political science departments, as well as faculty such as Tony A. Freyer at Alabama, Ronald Brown at Hawaii, Arthur I. Rosett at UCLA, and Jack Huston, Richard O. Kummert, and Linda Hume at the University of Washington who, despite their lack of Japanese language skills, engage in research or teaching with a Japanese focus. Both Harvard and Michigan have endowed professorships or chairs in Japanese law and regularly offer courses taught by visiting Japanese and American scholars. Harvard's visitors have also included many of Japan's most prominent international lawyers such as Toshio Miyatake, Yasuharu Nagashima, Richard W. Rabinowitz, and Yukio Yanagida. In addition, Whitmore Gray has offered a comprehensive course on Asian law at Michigan for many years. For many years Berkeley, Duke, the University of San Francisco, and USC have offered Japanese law courses taught by adjunct faculty, including some of the leading lawyers in the field, such as Hobart Birmingham, Sandy Calhoun, Tom Ratcliffe, and Yasuhiro Fujita. George Washington (Jean H. Grier) is a recent addition to this list. Also since 1971 visiting faculty — both American and Japanese — have taught courses on Japanese law at various American law schools, including Cornell, the University of Pennsylvania, and Yale. Outside of the United States, the University of British Columbia (Stephan Salzberg), Melbourne University (Malcolm Smith), Australian National University (Veronica Taylor), and the University of London in both the law faculty (Hiroshi Oda) and the School of Oriental and African Studies (Frank Bennett) offer courses on Japanese law as part of their regular curricula. The University of Santa Clara (George Alexander) and Temple University (Vicki Beyer) have established instructional programs in Japan for American students interested in Japanese legal studies. With a regular faculty that includes two Americans with Japanese language ability and a program of short-term international faculty that includes three leading Japanese legal scholars, New York University has created the newest and one of the most exciting centers in Japanese legal studies outside of Japan. The University of Washington, however, remains the leading center for Japanese legal studies. Its curriculum includes over a half dozen courses on Japanese law taught by two Japanese law specialists and three other members of the tenured faculty in addition to visiting Japanese scholars, judges, and lawyers.

6. DAN F. HENDERSON, CONCILIATION AND JAPANESE LAW TOKUGAWA AND MODERN (1966).

widely distributed as a two-volume set titled *Law and the Legal Process in Japan.*

In the early 1970s, Charles R. Stevens began teaching an introductory course on Japanese law at Columbia Law School and later Harvard. For use in this course, Stevens and Kazunobu Takahashi compiled a set of basic materials on Japanese law similar to those prepared by Henderson. More topical than the Henderson approach, Stevens and Takahashi focused on a series of controversial issues, such as the debate over the constitutionality of Japan's self-defense forces under Article 9 of the Japanese Constitution and the legality of the Yawata-Fuji steel industry merger under the Japanese Antimonopoly Law, to stimulate interest in their students in Japanese law. Although Ko-Yung Tung continued the course at Columbia and for a decade at NYU, the Stevens and Takahashi materials were unfortunately never published or widely distributed.

The first commercially published set of teaching materials for an introductory course on Japanese law was Hideo Tanaka's *The Japanese Legal System*, distributed by the University of Tokyo Press in 1976. This casebook was widely used in the United States and overseas, including the course Ko-Yung Tung taught at NYU. Like Yanagida, Tanaka initially compiled the materials for a course taught at Harvard Law School. In the early 1960s, Harvard offered one of the first courses on Japanese law taught by Rex Coleman, and sponsored the first major research effort with the support of David J. Cavers and Arthur T. von Mehren. The Japanese American Society for Legal Studies was founded at Harvard in 1964 and, with Coleman as the first editor, the publication of *Law in Japan: An Annual* began as a Harvard Law School endeavor. These initiatives were short-lived, however, and interest in developing an ongoing instructional and research program focusing on Japan nearly died. By the mid-1970s, however, with support from both the Mitsubishi Corporation and the Ford Foundation, as well as the initiative of Jerome A. Cohen, Harvard's East Asian Legal Studies Program commenced a major effort to revive instruction and research on Japanese law. Tanaka's book was its first significant contribution.

During the 1980s, teaching materials on Japanese law proliferated with increased number of courses on Japanese law offered outside of Japan. Like the Stevens and Takahashi approach, most materials were designed for introductory courses, and many stressed the exceptional features of the Japanese legal system. They too remained unpublished. These efforts included materials used by Michael K. Young at Columbia and the compilations of cases and readings by Malcolm Smith, first at Monash University in Australia and later with Akio Morishima at the

University of British Columbia and Melbourne University. Frank K. Upham similarly compiled materials for courses he taught both at Boston College and Harvard and which he teaches currently at New York University. One set of materials, written by Elliott J. Hahn and used by him in a course he taught at California Western and in Santa Clara's summer program in Japan, was later published as a text rather than as a compilation of selected readings.[7] The most recent addition to this genre was the set of introductory materials, in digital format, compiled by Kenneth L. Port while visiting at Chicago-Kent, and which have recently become available from the Carolina Academic Press.[8]

These were not, however, the only available courses or teaching materials. Law schools across the country taught a variety of courses and compiled related teaching materials on specific fields of Japanese law. At the University of Washington, for example, beginning in the mid-1960s, visiting Japanese scholars working with American specialists in their primary fields of expertise developed a series of comparative law courses in the most important areas of law for trans-Pacific practice. These included courses and teaching materials on transnational litigation by Dan Henderson and Yasuhirō Fujita; United States and Japanese sales and contract law by the late Warren Shattuck and Zentaro Kitagawa; comparative intellectual property law by Teruo Doi; United States and Japanese corporation law by Misao Tatsuta and Richard Kummert; Japanese administrative law originally by Yasuhirō Fujita; and Japanese antitrust law, which began as a project with Mitsuo Matsushita. Work on most of these materials continues in order to keep them up-to-date. Few have been distributed outside of the Asian Law Program, and only one has been published — those materials prepared for a course on United States and Japanese tax law compiled by Jack Huston, Griffith Way, and Toshio Miyatake. It was published in 1983 by Matthew Bender under the title *Japanese International Taxation.*

The widely acclaimed book on *Japanese Environmental Law* by Akio Morishima, Kōichirō Fujikura, and Julian Gresser, published by the M.I.T. Press in 1981, represented the second significant contribution by Harvard Law School's East Asian Legal Studies Program. However, due to the absence of a regularly taught course on the subject, *Japanese Environmental Law* became more of a reference than a set of teaching materials. Nonetheless, by presenting in great detail the Japanese legal responses to pollution, this work invited its readers to learn from the

7. ELLIOT J. HAHN, JAPANESE BUSINESS LAW AND THE LEGAL SYSTEM (1984).

8. KENNETH L. PORT, COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN (1996).

Japanese experience. Japanese law thus became relevant for others seeking solutions to similar problems. As such, these materials represent the most welcome trend in the field of Japanese studies.

The unpublished materials on foreign investment in Japan compiled by Richard W. Rabinowitz for the course he taught at Harvard in 1988 remain the most extensive collection on the postwar application of Japan's Foreign Investment Law and Foreign Trade and Foreign Exchange Control Law. Over 2000 pages of translations of the relevant statutes and regulations, law firm memoranda, and selected articles and essays cover the critical postwar years from the late 1940s through the early 1980s. Having practiced law in Japan through most of this period, Rabinowitz brought to the subject a wealth of personal experience and insight.

By the end of the 1970s, with initial funding from the Japan-United States Friendship Commission and later an endowment from the Fuyo group of Japanese companies, the Japanese Legal Studies Center was established at Columbia under the direction of Michael Young. Like the University of Washington and Harvard, a series of courses and teaching materials in specific areas of law and practice was developed by visiting Japanese faculty, such as Tasuku Matsuo and Mitsuo Matsushita.

More specialized courses were also being taught by visiting Japanese faculty elsewhere. At the University of Pennsylvania, for example, former Japanese Fair Trade Commissioner Michiko Ariga developed and taught a course on Japanese competition law based on translations of major commission and court decisions, which were subsequently incorporated into the materials used by Mitsuo Matsushita at the University of Washington, Harvard, and Columbia.

By the end of the 1980s, many American scholars with Japanese language ability had begun to concentrate their research and teaching efforts on more specific areas for comparative study. At UCLA, Taimie Bryant expanded her early work on family court conciliation to encompass a wide variety of issues and problems related to family law and registration. Robert Leflar at Arkansas and Stephan Salzberg at the University of British Columbia had become North America's leading experts on the legal aspects of Japanese health care and medical practice. Percy Luney at Duke and North Carolina Central concentrated on constitutional and environmental law issues. Mark Ramseyer had introduced a "law and economic" perspective into the field. At the University of Washington, Dan Foote rapidly established himself as the leading U.S. specialist on Japanese criminal justice as well as labor law. Trade and investment issues, however, were rarely the principal focus. Georgetown's adjuncts and visiting faculty like Amy Porges, Jeff Lepon,

and Alex Seita were exceptional in their emphasis on trade issues. None of these scholars, however, developed publishable materials for wider use.

Attempts were made in the early 1980s by the principal American scholars in the field to develop more specialized materials that could be used in conjunction with comparative law and other courses without a Japanese focus as well as in an introductory course on Japan. Through the efforts of Arthur Rosett, UCLA provided a center for this activity by sponsoring a series of workshops on Japanese law. An unpublished exercise on Japanese corporation law by Mark Ramseyer was its principal achievement. At these workshops, those in the field shared syllabi, reading units, and teaching approaches, all of which led to a greater insight and awareness of materials that others had developed. However valuable the workshops were in other respects, this particular effort to develop teaching materials failed.

As a result, except for Columbia, Harvard, NYU, and the University of Washington — which, as established centers for research and instruction on Japanese law, have been able to offer on a regular basis more than a single introductory course — American law students today rarely have any exposure to the variety of areas of Japanese law they are most likely to encounter in practice. Few introductory courses even attempt to teach law students about the diversity of real problems and legal issues encountered in everyday transnational commercial practice. Unless followed by more specialized courses in contract, competition, and corporation law, in tax and trade regulation, or in labor and licensing issues, such courses risk misleading students to a false sense of the tangential role of legal rules in most transactions involving Japan. Therefore, the publication of *Law and Investment in Japan* does more than merely fill a vacuum. It adds a corrective focus and direction.

As an object of comparative study, the Japanese legal system has been viewed almost exclusively in terms of its historical evolution, its reception of Western law, and the consequential tensions between law and culture. Despite the remarkable expansion of Japanese legal studies, few courses have fully satisfied Stevens' prescription. As noted, more specialized offerings covering particular fields of Japanese law that relate directly to trade and investment are occasionally taught, but nearly all introductory courses on Japanese law have emphasized only one or two of Stevens' triad of themes.

From the content of the typical first course on Japanese law, Japan's legal system appears to be largely perceived, in the words of Lawrence Beer and Hidenori Tomatsu, as a "laboratory" to test the efficacy of legal rules, processes, and institutions derived from the West in a non-

Western society.[9] Western language works by noted Japanese scholars, particularly Takeyoshi Kawashima's studies on Japanese "legal consciousness"[10] and Yosiyuki Noda's *Introduction to Japanese Law*,[11] tended to confirm this emphasis with a twist. How and why the Japanese tended to avoid the law became the central concern. Alternative dispute resolution (both formal and informal), administrative guidance, and other manifestations of governmental informality; the irrelevance of contract as a result of repeated deals; ongoing business relationships; and various patterns of intrafirm connectedness (or *keiretsu*) were presented as the characteristic features of the Japanese legal system. With few exceptions, the primary lesson seemed to be the irrelevance of law to most of the Japanese.

Japanese scholars writing in English were among the first to dispel this notion. Kyoto University Professor Zentaro Kitagawa's idea for a multi-volume treatise on Japanese law was the most ambitious effort.[12] The most recent effort is University of London Professor Hiroshi Oda's single volume work entitled *Japanese Law*.[13] These works were not, however, designed as teaching materials. They do little to shape the perceptions of those students exposed to Japanese law in the typical law school course. Also, by neglecting the social context within which legal rules and processes operate, such works simply assume law's relevance.

I should also mention the remarkable contributions made by an increasing number of German legal scholars. Because of the influence of German law in Japan, German jurists are better situated as comparativists than either Japanese or American scholars to pinpoint the distinctive features of the German derivatives found in Japan's legal system, and to describe how German legal rules and institutions have been transformed to adapt to the Japanese environment. The most recent studies stress these characteristics and their cultural context.[14]

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9. Lawrence W. Beer & Hidenori Tomatsu, *A Guide to the Study of Japanese Law*, 23 AM. J. COMP. L. 284, 285 (1975).

10. The most influential of Kawashima's works has been his study of Japanese litigiousness in the first major postwar collection of essays on Japanese law in English. Takeyoshi Kawashima, *Dispute Resolution in Japan*, *in* LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 41 (Arthur T. von Mehren ed., 1963). Kawsahima subsequently expanded this essay in a seminal Japanese language study. TAKEYOSHI KAWASHIMA, NIHONJIN NO HO ISHIKI (JAPANESE LEGAL CONSCIOUSNESS) (1967). A chapter on contracts was subsequently published in 1974. Takeyoshi Kawashima, *The Legal Consciousness of Contract in Japan*, 7 LAW IN JAPAN 1 (Charles R. Stevens trans., 1974).

11. YOSIYUKI NODA, INTRODUCTION TO JAPANESE LAW (Anthony H. Angelo trans., University of Tokyo Press 1976) (1966).

12. DOING BUSINESS IN JAPAN (Zentaro Kitagawa ed., 1980).

13. HIROSHI ODA, JAPANESE LAW (1992).

14. *See, e.g.*, 5 DAS JAPANISCHE IM JAPANISCHEN RECHT (Heinrich Menkhaus ed., 1994); DIE JAPANISIERUNG DES WESTLICHEN RECHTS (Helmut Coing et al. eds., 1990); GUNTRAM

More than any other American scholar, Mark Ramseyer has persistently argued against all accounts that emphasize the irrelevance of legal rules in Japan.[15] He pushes toward an extreme view, however, in leaching out any distinctive feature of Japanese law. Characteristics that others highlight as pivotal are themselves revealed to be irrelevant under Ramseyer's scrutiny. Whatever analytical merit such exercises may have, they tend to be overly antiseptic in treating the variety of cultural elements that enrich all national legal systems.

However, in *Law and Investment in Japan*, Ramseyer and his co-authors present all sides. Nearly all of the persistent conundra of the field are set out for the student to resolve. The concluding chapter, "Publicly Traded Corporations," is particularly illustrative.[16] The chapter begins with a discussion of the role of shareholders, introduces the reader to the role of *sōkaiya*, the gangster-shareholder, and concludes with the Koito-Pickens dispute and the interrelationship of legal rules and business practices in explaining the dearth of hostile corporate takeovers in Japan.

The issue of whether shareholders have control is introduced with an excerpt from Abegglen and Stalk's *Kaisha, The Japanese Corporation*[17] on the ouster of Mitsukoshi department store president Shigeru Okada in 1982. For Abegglen and Stalk, the incident is the exception that proves the rule that shareholders lack control. Yet, the event itself demonstrates that shareholders ultimately do have the legal means to exert control and do exercise that ability when those individuals who they have entrusted with managerial authority cease to perform effectively in their interest. The chapter continues with the question of why hostile takeovers have been so rare in Japan. Again, Abegglen has the first word. He argues that "in Japan the concept of The Company is different . . . ."[18] Because employees are viewed as integral components, selling a company is akin to selling people. Following Abegglen's excerpt is a more structural explanation of cross-shareholding, followed by Ramseyer's rebuttal stressing the theoretical likelihood of buyouts. Two translated cases at

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RAHN, RECHTSDENKEN UND RECHTSAUFFASSUNG IN JAPAN (1990); WEGE ZUM JAPANISCHEN RECHT (Hans G. Leser & Tamotsu Isomura eds., 1992). For a survey of German scholarship prior to 1980, see John O. Haley, *The Revival of German Scholarship on Japanese Law*, 30 AM. J. COMP. L. 335 (1982).

15. Ramseyer is the most prolific scholar in the field today. He is currently working on his third book, which promises to be as interesting and iconoclastic as his previous works. MARK RAMSEYER, INTRODUCTION TO JAPANESE LAW (forthcoming).

16. YANAGIDA ET AL., *supra* note 1, at 493–530.

17. JAMES C. ABEGGLEN & GEORGE STALK, JR., KAISHA, THE JAPANESE CORPORATION (1985).

18. YANAGIDA ET AL., *supra* note 1, at 514.

the end of this chapter expose the fallacy of any single or reductionist explanation. In *Shūwa K.K. v. K.K. Chūjitsuya*,[19] the Tokyo District Court scuttled a cross-shareholding scheme to forestall a hostile takeover. In *Mizuno v. Ariyoshi*,[20] the Tokyo High Court affirmed a district court decision invalidating a subsidiary's acquisition of its parent company's shares at a premium from a major shareholder who opposed a planned merger. The facts of these cases and their outcome support the conclusion that while all three explanations have merit, they must also take into account the legal rules that regulate both managerial and shareholder behavior.

Law and Investment in Japan indeed inundates the reader with law and context. The sheer volume of judicial decisions, statutory provisions, and descriptive material presented in relation to a business transaction should dispel any lingering doubt students may have as to whether legal rules count in Japan. The authors raise questions of "legal culture" and issues of law avoidance and informality, but they do so in context. By including materials, particularly judicial decisions, they enable the reader to appreciate the varied environment within which these issues arise and have significance, particularly for lawyers working within the legal system. As a result, the student is at least exposed to the fuller complexity of law in Japan and to the relationship of legal rules and processes to the shared values, habits, and expectations of a community.

One of the best illustrations of the effectiveness of this inclusive approach is Chapter 7, titled "Negotiating and Drafting Agreements." It begins with three American views on Japanese negotiating style, including a previously unpublished Columbia Law School lecture by E. Anthony Zaloom that explains why many of these practices, from the emphasis on consensus to the tendency to avoid risks, hinder negotiations with the Japanese and the effectiveness of outside American legal counsel. *A Japanese View of American Negotiators*[21] is a superb piece in which an anonymous Japanese negotiator expresses amazement at American negotiating foibles. Duly noted are our tendencies to moralize, to dicker, and even, in the author's words, to argue among ourselves with "no shame about such embarrassing behavior."[22] Thus, we as Americans

19. Judgment of July 25, 1989, Chisai [District Court], 1317 Hanrei Jinō 28 (Japan), *translated in* YANAGIDA ET AL., *supra* note 1, at 523.

20. Judgment of July 3, 1989, Kōsai [High Court], 1188 Shōji Hōmu 36 (Japan), *translated in* YANAGIDA ET AL., *supra* note 1, at 526.

21. YANAGIDA ET AL., *supra* note 1, at 219.

22. *Id.* at 220.

learn as much about Japanese approaches and values from their observations of us as the Japanese must learn about us based upon our views of them. Interwoven with these "cultural" threads are the relevant legal rules. The chapter includes a brief introduction to the rules on contract formation from the civil and commercial codes and a translation of *Min v. Mitsui Bussan K.K.*,[23] the 1987 decision in which the Tokyo High Court rejected claims for damages in a case brought by a Malaysian businessman against Mitsui Bussan for breach of contract and violation of good faith in negotiating a joint venture.

The case is another vivid reminder that legal rules do matter. Indeed, it makes a point that is often overlooked or assumed away in discussions of why the Japanese resort to court less frequently than we do in the United States. Rarely are differences in the rules themselves noted. For example, Chapter 11, entitled "Dispute Resolution," provides an excellent description of the procedural aspects of litigation and arbitration in Japan, including the availability of "preliminary" injunctive relief, the importance of which is demonstrated in translated cases in other chapters. The chapter concludes with challenges to prevailing views that the Japanese judicial system fails because of aversion to litigation in general and the inability of judicial decisions to influence the outcome of settlements. The lack of a jury system in both civil and criminal cases, as well as the concern of Japan's career judges to ensure as much uniformity and certainty as possible, help to explain why the Japanese may be able to litigate less and still settle cases more frequently within the "shadow of the law," thus contributing to the efficiency of Japanese litigation as a means of enforcing legal rules. Missing here as elsewhere, however, are any references to the negligible amounts by U.S. standards that Japanese litigants can expect when they are successful in court or differences in judicial treatment of similar claims. We in America may sue more in part because we win a greater percentage of cases and are awarded larger monetary judgments.

In these respects, *Law and Investment in Japan* is itself a bold statement on the worth of lawyering in a world in which the nation-state seems to many to be overwhelmed by global economic forces. From contract formation to corporate forms, from controls over licensing agreements to regulation of capital markets, the legal rules of the nation-state remain the primary instrument for regulating trade and investment. *Law and Investment in Japan* reminds us that contracts and corporations are the creatures of national law and that economies prosper within

23. Judgment of March 17, 1987, Kōsai [High Court], 1232 Hanrei Jinō 110 (Japan), *translated in* YANAGIDA ET AL., *supra* note 1, at 223.

infrastructures sustained by law. It demonstrates the determinative role of national law and legal regimes.

American lawyers need to appreciate how legal rules are created, construed, and enforced beyond American shores. They need to know what the basic rules and standards are, or at least how to find them. Japan is a telling example. Its commercial importance and its influence as a model, especially in the emerging industrial states of the Asia Pacific region, are apparent. But Japan is not the only model. As Charles Stevens predicted a quarter-century ago, today's lawyers confront daily similar problems on a global scale. They need to be exposed to more than a perspective overview of civil law systems. They require knowledge of the variety of legal rules and their operation in diverse legal systems, cultures, and traditions.

American lawyers have the capacity to contribute to transactions that profoundly influence the lives of us all through the innovation, development, and diffusion of new technologies and ultimately, the creation and equitable distribution of wealth on a global basis. There is more at stake, however. To equip lawyers to facilitate transactions related to trade and investment in Japan is also to equip them to solve problems related to human rights, environmental protections, and the full array of legal rules that are subject to national enforcement. It means educating future lawyers to function professionally and to assist in solving the myriad of problems in a world made so increasingly interdependent by these same forces of trade and technology. When it is emulated by those who teach European, Latin American, African, and South Asian law, then *Law and Investment in Japan* will have served this grander aim.