1 RISE OF LAW IN FOREIGN TRADE POLITICS

THIS IS A STUDY OF LAW in foreign trade politics and the forces that bring it about and give it shape. No one can deny that law is a distinct part of the whole process of internationalization or globalization in the twenty-first century.[1] Legal rules underpin and facilitate global economic relations among sovereign states in a way that makes clear their scope is more likely to expand than reverse in the foreseeable future.[2] In international institutions and processes, legal rules have risen analytically as first among definitional equals.[3] The emphasis on law is especially relevant for the trade arena, where the high-profile role played by the rules of the World Trade Organization (WTO) is unprecedented at many levels in the international system.[4] The advent of law in international trade is surely heady on many fronts, but its causal mechanics in concrete cases and for real actors is poorly understood. This is even truer for cases outside the ambit of European, American, and other Western countries.

How, then, do we go from the significance of all this legal evolution to showing that law is, in fact, a major if not always obvious force in influencing relations in international trade? This book describes how and why law manifests itself unevenly in foreign trade relations by advancing an interest-based explanation constructed over time. To do so requires connecting critical strands across disciplines. Unlike legal scholars and policy makers, those in some disciplines question the very focus on law as a central element in international economic relations. Law has had a particularly uneasy existence in political science, specifically in the study of international relations. From its inception, the school of realism has pointedly questioned the usefulness of law in affecting state behavior. With a focus on power as the primary and ultimate

arbiter of interstate outcomes, the proponents of the realist school cynically see law as always beholden to national interests, something disposable whenever it becomes inconvenient for states.[5] This reasoning is fortified by the lack of political integration on a global scale and the persistence of anarchy in the sense of no central formal governance.

The school of liberalism, and its variants, has defended law's importance to the world political economy. But this is a relatively new development for the school as it has largely eschewed analyses of international law over the postwar period, perhaps in a self-conscious effort to distinguish itself from the high grounds of legal-moralism in the interwar period. Legal analyses of international economic relations in the 1990s were disregarded much in the same way that political analyses of economic issues in the 1950s and 1960s were bypassed.[6] To be sure, this school has accounted for legal developments with an emphasis on the theory and practice of international regimes. But international law was relegated to the back burner, even though some legal scholars pointed out quite correctly that international regimes, with their definitional emphasis on principles, norms, rules, and decision-making procedures, were nothing more than international law by another name.[7] Earlier analyses of the trade regime in this genre remained broad—why it existed, what made it stable, how its elements led to the convergence of expectations among sovereign actors, and all the general ways it could matter.[8] While certainly interesting, from a lawyer's perspective all this was far removed from the realities of law's operations in the real world.

Fortunately, the impact of the trade regime on state behavior moved away early on from merely assessing the impact on liberalization and commercial policies to identifying winners and losers in the domestic political arena and the prospects for further legalization of trade relations.[9] This avenue of inquiry, with its focus on the demands by organized interests and responding supply by representative governments, is a promising departure point for understanding why law advances or halts, is aggressive or not in international trade relations.[10] By focusing on what I specifically call the transnational motivations of *trade-dominant industries*—those that indisputably dominate exports and/or investment flows, global market shares, global competitiveness, technology rankings, and so on—this same interest-based logic can be transposed to understand the progress or reversion of law in foreign trade relations.[11] If it is true that government trade policy responds to demands by such interests within sovereign boundaries, it is also likely to respond to demands to protect those interests within or from cross-border economic flows. The point is simple: in content, shape, and extent, aggressive uses of the law should

reflect the transnational interests of trade-dominant industries. Why and how might this be true?

The motivation for trade-dominant industries to turn to the law can be put more formally: as market participants and corporations embed themselves in economic transactions across borders, a credible legal framework helps to guarantee their property rights in the broader sense, and in turn, brings a measure of calculability and predictability necessary to the success of their continued operations.[12] Once they acquire heavier stakes in material economic advantages in cross-national settings, such industries obviously then have strong incentives to see those advantages being sustained over time. This echoes the influential repeat player thesis, which correctly draws attention to the attributes of different kinds of actors advantaged in domestic legal systems, specifically those "haves" with resources and experience.[13] The thesis also has a neglected corollary in the international setting. Repeat playing—not just in terms of the outcomes of litigation but also with the very contents of rules on which litigation and decisions turn in the first place—is equally important for actors whose economic interests naturally extend and need to be safeguarded across borders and over time.

From the perspective of both industries and governments enmeshed in transnational economic settings, law becomes not only the most legitimate but also the most efficient weapon to wield. Operationally, interacting on the basis of pre-agreed rules allows actors to take the high moral ground and voids the need to reinvent rules all the times when troubles do arise in foreign trade politics. Realistically, law is also the only means through which home actors can hope to exert some control over rule-making and litigation outcomes in their favor in global and foreign contexts.

Trade-dominant industries seek then to perpetuate their position of economic advantages through stable transnational legal rules—rules that stabilize market access, guarantee favorable investment environments, shelter their direct and indirect assets and personnel, reduce discriminatory treatment, and generally protect against the arbitrary whims of foreign governments. Home governments, confronted with lobbying efforts by such trade-dominant industries in the domestic political marketplace, seek in turn to interact on or provide such rules—rules that allow them to monitor shirking and opportunism abroad, exert diplomatic and reputational pressures that constrain their trade partners as needed, and strategically ensure a pivotal role for themselves in mediating the forces of economic globalization. The lineup of these incentives makes it clear that the greater the concrete economic advantages to defend in the global

political economy, the more we can expect to see the appropriate actors resort to aggressive interaction on the basis of law across borders.

Interests, however, do not operate in a vacuum. While trade-dominant industries may well be the principal force behind the way *legalism*—the extent, use, or invocation of law and legal processes—manifests itself aggressively in foreign trade relations, their presence or absence alone is insufficient as an explanation. As in analyses of the advance of law elsewhere, no one single explanation is or can be sufficient by itself in understanding legal evolution.[14] The trade-dominant industry thesis is a way of centering the narrative in this book; but it is empty without an understanding of the history and context in which it is embedded, not only across cases but also especially over time.[15]

Law's uneasy fit in political science stems primarily from the fact that the broad realist versus liberal debates and even the more precise rationalist political economy ones still have little to do with the actual legal processes that affect corporations, governments, litigants, and judges; that also structure the flesh and blood of concrete cases making their way through judiciaries; and that influence the often invisible channels through which law can manifest itself to affect outcomes in the international arena. To connect, solidify, and interpret the pathways through which law actually stumbles and progresses in foreign trade relations requires a very careful understanding of the spatial and temporal processes through which it takes shape.

LAW IN JAPAN'S FOREIGN TRADE RELATIONS

Context is especially important in non-Western settings, where law and legal processes, especially in foreign trade relations, are either little understood or outright ignored. This continues to be true even for the world's second largest economy—Japan. Although Japanese trade relations have been widely studied, they have never been analyzed across the board under the uniform framework of law and legal processes. By assessing the patterns in and the impact of Japan's legalism, this book seeks to advance our understanding of the role of law in Japan's foreign trade politics at several levels—how it makes an entry, what its causal mechanics are, and what it may mean for Japan's interaction with trade partners at both the regional and global level.

Why Japan? Over the course of the 1990s, Japan moved increasingly to emphasizing law and legal processes across a wide range of its foreign trade relations—an ongoing phenomenon that remains widely unappreciated in both academic and policy circles. Japan's reliance on a rule-based trade

diplomacy became so forceful in some cases and toward some partners that its overall conduct merited, in my judgment early on, the characterization of *aggressive legalism*. Aggressive legalism refers to the use or invocation of legal rules in consultations, negotiations, agreements, and administrative and dispute settlement procedures to counter what trade-related actors deem to be the unreasonable and economically harmful acts, requests, and practices of their major trade partners.[16] The *legalism* part of the concept is about forcefully wielding the law—echoing the emphasis on the obligation by states to an existing set of rules, the precision of those rules, and delegation to third-parties to resolve disputes based on the same rules across both interstate and transnational settings.[17] But it is also about wielding the law in the service of a particular end—rule-based protection of competitive trade and investment flows across borders. The *aggressive* part, to be absolutely clear, is about the systematic and observable use of that legalism in the interest of trade-dominant industries as articulated earlier—specifically using it for opening and keeping foreign markets open, securing and retaining economic advantages in foreign or home markets, and generally ensuring a level playing field for home firms operating transnationally. At the close of the first decade of the twenty-first century, it is safe to say that law has insinuated itself in Japan's trade politics in a way that will continue to make it be expansive and irreversible for the foreseeable future. While the original term of aggressive legalism was coined with special reference to the way Japan used the WTO dispute settlement system to solve trade disputes at the multilateral level, I show in this book that the essence of this concept has spilled well beyond the conceptual confines of the WTO forum to affect the broader nature of Japan's foreign trade relations.

What exactly is this story about? As this book details, the increasing presence of relevant legal rules since the mid-1990s has had an independent, not always expansive, but almost always unappreciated, impact on the way that negotiations are conducted, institutions changed, disputes settled, agreements approached, treaties crafted, and trade partners generally handled by Japanese actors. All this is not meant to suggest that the impact of law is straightforward or obvious—in fact, it is neither. Law never proceeds in a straight visible line. True to form, the impact of law in Japan has been uneven and, as this book reveals, has manifested itself in multiple ingenious ways and varying degrees of intensity across a wide range of its foreign trade politics. Whether country-focused, as in the cases of Japan's trade relations with the United

States and China, or issue-focused, as in the burgeoning cases of intellectual property and preferential trade agreements, the presence of the law is unmistakable. To expand briefly on the main substance of the book: It is evident in the visibly aggressive manner in which Japan is now willing to go after the United States in the controversial antidumping arena through litigation in an international tribunal like the WTO and in national courts in the United States and Japan. It is also evident in the muted way that Japan is structuring its trade relationship with China, with whom the issue of safeguards looms large on the domestic political agenda. It is evident in the aggressive way that a radical transformation in the intellectual property rights institutions within and outside Japan has spawned Japanese corporate litigation in national courts. And finally, it is evident in the assertive ways Japan has chosen to structure investment-related issues through the latest emerging turn toward preferential trade arrangements.

Virtually everywhere one looks then, the law has suffused the nature and course of Japan's trade relations to varying degrees—from aggressive to assertive and on to muted. While trade is usually conducted on some legal basis, these very same legal processes and mechanics remain poorly understood across some of the most critical issues in Japan's political economy, their consequences for foreign trade politics greatly unappreciated. This book takes a step forward by showing how core issues in Japan's foreign trade politics—antidumping, safeguards, intellectual property, investment in preferential trade arrangements—coalesce into a larger picture of aggressive legalism directed at both the developed and developing world.

If aggressive legalism is an observable phenomenon, the questions then become: What accounts for Japan's aggressive legalism? Is it consistently true across the wide gamut of Japan's trade relations? If not, when is it more likely to manifest itself in the country's foreign trade relations? These questions are difficult to answer, not just because the phenomenon is in the making or because the very idea of aggressive legalism on the part of Japan sounds strange to some ears. Rather it is because the legalism itself has not proceeded in a straight line. It has manifested itself in an uneven fashion across the broad spectrum of Japan's foreign trade relations—blurring distinctions between public international and national trade laws, crisscrossing divisions between foreign and domestic jurisdictions, and interlacing the efforts of government with the cohesive demands of corporate actors. Thus, the narrative of the book focuses on two elements: first, exposing the extent of and ways in which the forces of ag-

gressive legalism have been let loose across some of the most critical cases in Japan's trade relations, specifically in antidumping, safeguards, intellectual property, and investment in preferential trade agreements; and, second, assessing the extent to which the interest-based, trade-dominant industry thesis constructed across time explains the variations observable in all that legalism.

I do three things in the book. First, at the empirical level, through close process tracing, I break new ground by showing coherently how law and politics have combined across these four critical areas to move Japan toward ever more aggressive legalism in its foreign trade relations. For process-tracing purposes the clunky question is this: which concrete interests, when and where in time, used what law connected to and beyond WTO law in what manner to affect the course of Japan's foreign trade politics in which way? Thus, it is important to be clear at the outset that this book is focused not on liberalization (which has been studied widely) but rather legalism (which has not commanded as much attention) of Japan's foreign trade.[18] The focus is on the use of law and its interplay with interests in affecting Japan's larger trade diplomacy. To assert and then show that law has affected Japan's conduct in foreign trade is obviously not the same as suggesting that Japan's markets are becoming more open and transparent. The latter constitutes a different research agenda than the one undertaken here, and while there are implications on that front, it is not the central focus in this book.

Second, at the analytical level, I use the evidence from Japan on the trade-dominant industry thesis as a way to pave the way forward for thinking about the drivers of legalism in international economic relations more generally. A focus on trade-dominant industries is important, not just because they represent the vanguard of legal progress in the international setting, but also because their activities serve as a relative benchmark by which to assess the progress of law in other trade cases. Their role is especially important to understand in the Japan case, where the explanatory weight given to the Japanese state in studies of the domestic political economy needs to be seriously reassessed in light of the increasing transnationalization of the very industries it helped to bring up. While the Japanese state, for example, has played a spearheading role in institutionalizing the use of law against foreign rivals and remains pivotal to structuring the use of law and legal processes with other sovereign countries, the critical drivers of legalism in Japan's foreign trade politics are market actors—principally trade-dominant industries whose economic livelihoods are at stake domestically, regionally, and globally, and who wield the law in the interest of

perpetuating their advantaged position in trade and investment flows. This focus allows me to speak directly to a concern with the expansion of aggressive legalism, not just on Japan's part, but also for other emerging and developing countries, especially in Asia, where corporate actors are increasingly enmeshing themselves in the international and regional economic order through legal means.

Finally, at the policy level, I detail ways for Japan to deal with its trade partners as a mature, legalistic, industrialized country and for other countries to deal with Japan on the basis of law and legal processes. By design and chance, in fits and starts, Japanese actors have helped let loose the importance of law in trade and economic relations, which is of consequence both globally and especially regionally in East Asia, which is striking out in unprecedented institutional directions.

With this overview in mind, the remainder of this chapter is as follows: The first part turns to the historical overview, which allows us to situate the trade-dominant industry thesis in evolutionary perspective. It focuses on the historical elements that facilitated the rise of aggressive legalism—domestic judicial reforms, which were more subtle in their influence, and the birth of the WTO, which was far more visible. Given the high-profile and transformative impact of the WTO system on Japan's foreign trade relations, the chapter also provides a closer look at the ways in which the presence of this international institution drove home the importance of law and legal processes to all trade-related Japanese actors. The next two parts focus on the agents that were sequentially critical in taking the forces of aggressive legalism forward in a concrete manner—the Japanese state, which actually spearheaded the trend toward legality with a narrow focus on the WTO, and Japan's trade-dominant industries, which today are reinforcing the scope and contents of legalism in trade in unprecedented directions. The fourth part turns briefly to a consideration of the cases in the book, making clear how legalism has varied across the spectrum of Japan's foreign trade politics. With due regard for the historical context and legal complexities that come forth in detail in the relevant chapters, it outlines the ways in which the cases lend support to the causal arrow from the presence (or absence) of trade-dominant Japanese industries in global competition and the aggressiveness (or feebleness) of legalism across the critical issues. The fourth part ends with a road map to the rest of the book that seeks to provide evidence for the trade-dominant industry thesis.

EVOLUTION AND EXPLANATIONS OF JAPAN'S AGGRESSIVE LEGALISM

This section focuses on providing an overview of the historical forces that pushed Japan toward ever more aggressive legalism in its foreign trade relations. It begins with a focus on systemic changes wrought by legal changes within Japan and the pivotal role played by the WTO in transforming the institutional landscape affecting the interests of a range of Japanese industries. It then assesses the roles by both the Japanese state and industries in forging legalistic responses, giving greater causal weight to the latter over time in explanations of why legalism varies across foreign trade cases.

SYSTEMIC CHANGES IN THE LEGAL LANDSCAPE

Any understanding of the rise of Japan's aggressive legalism in the country's foreign trade politics needs to begin by situating it in its proper evolutionary context. The landscape of Japan's trade-related actors and institutions, and particularly the way they related to the outside world on the basis of law and legal processes, was transformed by two major and almost parallel developments—the domestic reconfiguration of judicial reforms that covered specific areas of concern to actors within those sectors, and perhaps even more important, the global formation of the WTO, whose rules extended and affected actors across multiple economic sectors.

Changing Legal Landscape

It is helpful to begin by understanding some dimensions of the changes that smoothed the progress of Japan's more aggressive turn to legalism. As former USTR (United States Trade Representative) officials note, Japan has of course always been legalistic in the sense of sticking to the letter of the rules in its trade diplomacy, such as with the United States.[19] But we are no longer talking about textually precise and ad hoc responses by Japan based on agreements or understandings in a bilateral trade relationship whenever it was prodded by its more powerful trade partner, such as the United States. Japan's legalism now cuts across forums, whether domestic, bilateral, regional, or multilateral, and it cuts across trade partners, whether the United States, China, or others. It is very different in character. What is specifically different is the increasing use of the law as a sword—an offensive and proactive instrument to serve the economic interests of Japan's trade-dominant industries. What factors account for Japan's *aggressive*

legalism? When and why is Japan more likely to wield the law as a sword? When might it not? Through what pathways can we see trade-related legal rules having an effect on Japan's foreign trade politics? That is the focus of this book.

It bears mentioning at the outset that the very idea of Japan's aggressive legalism is a strange one to Japanese ears. Japan has of course been characterized as a nonlitigious society, where both the public and private sectors avoid the use of legal or judicial remedies to resolve all kinds of domestic conflicts.[20] This domestic cultural trait then, in turn, presumably also makes the Japanese unwilling to pursue litigious options in the international arena. Even today Japanese trade officials as well as corporate actors, who sometimes speak of solving problems the "Asian way," detract attention from the emergent phenomenon of aggressive legalism in Japan's foreign trade politics, and continue to fuel perceptions that Japan is one of the least litigious societies or, more broadly, legally inactive in the world political economy.

One thing that instantly commands attention is the fact that Japan has meager legal resources. Japan significantly trails other advanced industrial countries in the number of lawyers available. An oft-cited fact in terms of comparative legal resources is the total number of qualified lawyers—a mere 16,000 Japanese lawyers for a population of 120 million versus 700,000—900,000 U.S. lawyers for a population of 220 million.[21] Moreover, most of Japan's licensed private attorneys have traditionally worked in a handful of metropolitan areas; 46 percent are concentrated in Tokyo alone, which calls into question ease of access and representation for clients.[22] With respect to international law, in particular, a relatively minor role is given to it in both legal education and judicial training, which makes lawyers and especially judges wary of venturing into unfamiliar international legal territory—clearly the realm of foreign trade politics.[23] But these long-entrenched features are changing. While the maximum number of lawyers per year between 1964 and 1991 was capped at 500 due to allegedly physical capacity limitations in the LRTI, that number has been increasing, and analysts foresee an increase of up to 3,000 lawyers by 2010.[24] Although still meager in terms of comparative perspectives, these increases are nevertheless a significant change in Japanese legal circles.

As for unfamiliarity with international or foreign law, particularly for Japanese actors active in international trade, that too no longer rings as true. Contrary to widespread perceptions, recent work suggests Japan has had a long history of negotiating strategically in the context of international treaties and rules, not as a passive but as an active player watching out for its own interests.[25] More specifi-

cally for the purposes of this book, beginning in 1995, all trade-related actors in Japan—whether governmental ones interested in interacting within the multilateral system or corporate ones focused on preserving their economic livelihood—have been affected to some degree by the greatly expanded scope of the rules of the WTO. Additionally, over time Japanese parties have been involved in more transnational litigation abroad than in Japan itself.[26] The lessons acquired from these experiences have surely not been lost on Japanese actors, especially corporations, who are now more aware than ever before of the centrality of law and legal processes in structuring international trade.[27] Perhaps most important of all, the emphasis on Japan's aggressive legalism in foreign trade politics is very much in keeping with a range of critical trends within Japan.[28] In fact, the assertion that the role of law as an offensive weapon is increasing in Japan's foreign trade politics does not come as a surprise to those who have been following the momentous legal changes taking place in Japan today or those tracking the vicissitudes of Japan's economic relations over the past decade. The changes deserve close attention, as they signal a seismic shift in the legal landscape in Japan, which directly affects Japan's conduct in foreign trade relations.

On the domestic front, as legal scholars have noted, in an astonishingly short period of time Japan has embarked on and put in place legal changes whose unpredictable reverberations will be felt for some time to come.[29] From the 1960s to the 1980s, legal change was incremental across diverse issues, whether domestic (such as civil procedure, constitutional law, administrative law, criminal law, and legal education) or those bearing upon international trade (such as foreign investment and regulation of multinational enterprises).[30] Against this background, the changes that took place from the 1990s onward are especially remarkable, both for their speed and their scope. These reforms were set in motion by the thirteen-member Justice System Reform Council (JSRC), which was established by the Diet in 1999.[31] The enacting statute for the JSRC made clear the lofty goals not just of improving the legal infrastructure in Japan but, more pragmatically, of instituting one that would allow litigants, as well as other citizens, easier access and participation within it. After intense public–private deliberations over a period of two years, the JSRC issued its final recommendations in 2001, which attempted to make these goals concrete along three dimensions for the Japanese justice system—meeting public expectations concerning ease of access and reliability, strengthening the legal profession both quantitatively and qualitatively, and ensuring popular participation in legal proceedings. In April 2004, the centerpiece of the reforms manifested

itself in the establishment and commencement of sixty-eight new law schools that may well make these goals a reality in the long term.[32]

What do these domestic legal reforms have to do with Japan's foreign trade politics? A great deal, because they help us to situate the timing of aggressive legalism in its proper historical context. The JSRC does not have the distinction of being the first to advocate legal reforms in postwar Japan; but it will long be credited for helping bring them about. Unlike its unsuccessful predecessor—some of whose recommendations in 1964 were strikingly similar to those issued by the JSRC almost four decades later—the work of the JSRC found the highly supportive political cabinet of Prime Minister Junichiro Koizumi. It is not an exaggeration to say that Koizumi's tenure in office has coincided with the greatest centralization of policy making and lawmaking capacity of any prime minister in the postwar period.[33] Koizumi's cabinet, which legally assumed the responsibility for guiding the implementation of the JSRC recommendations a mere six months after they were issued, treated them like gospel. Moreover, the JSRC was also fortunate enough to find itself placed at a moment in history in which a range of Japanese corporations, many of them grown-up and globally competitive in their fields, were increasingly interested in protecting their economic livelihood through legal means, whether at the domestic, regional, or global level.[34] Japanese corporations that had cut their teeth on bitter litigation with U.S. companies in the 1980s had further expanded their view of lawyers' roles from merely resolving disputes to facilitating business transactions across borders.[35] As lawyers familiar with Japan's corporate realities have remarked, it is not a surprise that large Japanese corporations have, in fact, long been complaining about the availability, cost, and quality of legal services in Japan.[36]

The combination of domestic legal reforms that eased the burdens of litigation and corporations that were willing to legalize business matters provides a rich tapestry for understanding Japan's aggressive legalism in foreign trade. This domestic tapestry took on additional hues as the Japanese government and key industries began to interact with the dispute settlement system of the WTO starting in the mid-1990s.[37] As described more closely in the next section, while the Japanese government spearheaded the move toward the use of rule-oriented diplomacy, primarily as a way of circumventing the tensions and volatility of its economic relationship with the United States, its very efforts at legalization—challenging foreign measures or defending domestic ones on the basis of the WTO rules—had the long-term effect of bringing trade-related private actors into the highly legalized global trade regime.[38]