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敵対的買収防衛策の新局面

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金融商品取引法研究会

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（敬称略）

敵対的買収防衛策の新局面

神作会長　それでは、定刻になりましたので、ただいまから第 17 回金融商品取引法研究会を始めさせていただきます。

既にご案内を差し上げておりますとおり、今日は中東正文先生より、「敵対的買収防衛策の新局面」というテーマでご報告をいただくこととなっております。

それでは、中東先生、ご報告をよろしくお願いいたします。

［中東委員の報告］

中東報告者　名古屋大学の中東でございます。レジュメをそのまま共有させていただきます。

Ⅰ．序論

ご案内のように、この間、敵対的買収による支配争奪戦が非常に増えてきており、上場会社の支配権市場が新しい時代に突入したことが示唆されています。これまで敵対的買収防衛策を導入している企業については、防衛策の継続・更新を試みようとする傾向にあります。

こういった会社支配争奪戦は、事業会社によるものもあれば、アクティビストによるものもありますが、いずれにせよ、構造的な利益相反という法的問題が生じることについては共通しています。

この課題に向き合うために、公開買付規制や大量保有開示制度を通して金商法による対処もなされてきております。このため、買収防衛策を非継続あるいは廃止するといったリリースの中では、金商法で十分に対応されたからもう買収防衛策は要らないのだという形の説明がされた上で、非継続あるいは廃止されるということもありました。

他方で、公開買付規制の枠組みについては、発行会社が買収防衛策を導入

できることを前提としており、新しい時代の会社支配権市場に対応するためには十分ではなく、規制の見直しが必要ではないかという見解が弁護士の石綿先生からも示されているところです。

また、近時、アクティビストの活動が活発になっておりまして、この関係で買収防衛策のあり方も再検討する必要が生じてきています。

敵対的買収の文脈では、会社のパーパス（存在意義）が争点になる事例も出てきていると理解しております。こういった中で、ステークホルダーの利益を対象会社の経営陣が考慮することが許されるかということが伝統的な議論としてありましたが、ここにも新しい視点が持ち込まれつつあると言えます。折しも、資本主義のあり方そのものが改めて問われているところでもあります。

パーパスと買収防衛策との関係は、従来の枠組みにも合致すると考えております。詳しくは後で述べさせていただきますが、買収防衛策（対抗措置）の発動が許されるのは、強圧性の排除を理由とする場合に限られるか否かが問われています。

強圧性の排除という観点であれば、オール・オア・ナッシングオファーの場合、つまり、公開買付けの下限として、キャッシュアウトできるだけの株式数を取得します、そうでなかったら何も買い付けませんという形のコミットメントをする。定義は脚注６のところで書かせていただいておりますが、こういった場合については買収防衛策に限界があるのではないかとされております。あるいは、パーパスの維持という観点でも、現株主たちがこのパーパスを維持したいと言っても、全ての株式を買われてしまうのであれば、そのパーパスを維持する意義は何だということになります。

そういった意味で、強圧性の排除という観点から見ても、パーパスの維持という観点から見ても、オール・オア・ナッシングオファーの場合に買収防衛策の発動を認めてよいかということが共通していると言えそうです。

今日の報告では、今述べたような問題意識から、買収防衛策の導入状況、アクティビストの活動、会社支配市場法制の改正の必要性等を概観し、その

上で、パーパス経営との関係についても若干の検討をさせていただければと思っています。

Ⅱ．事前警告型買収防衛策の導入状況

１．買収防衛策の導入状況の変化

買収防衛策の導入状況の変化ですが、以前に公表したAlan Koh助教授とDan Puchniak准教授との共著論文では、買収防衛策の有効期間の満了を迎えた会社のうち、どれだけの会社が自主的に廃止したかに注目しています。この基礎データは、三井住友信託銀行さんが取りまとめたものによっています。

とりわけ廃止率に注目しますと、資料1でつけさせていただきましたが、2013年を境に上がっています。つまり、2013年までは導入が進んで、その後は少なくなっているという状況を表しているわけですが、2018年以降を別途エクセルに入れたところ、2019年は引き続き上がっているものの、2020年では30％弱と少し減っています。

次の表も論文に載せたものに継ぎ足しているのですが、これがバックデータになります。2021年についてはまだ集計できていませんが、レコフのデータを使った日経の記事によると、2021年は6月16日時点ですけれども、買収防衛策の減少ペースが鈍化しているとされており、他にも同様の記事がありました。つまり防衛策が必要、こういう話になっているということです。

２．買収防衛策の設計の変化

有事における株主意思の確認のための手続を組み込む形が増えています。これは、ブルドックソース事件の最高裁決定の影響と、機関投資家の賛同を得るため、そのどちらもあると分析されていますが、買収防衛策の発動時に株主意思確認総会を開くことを予定している会社が増えているということです。

導入についてはいろいろ議論があるところですが、基本的には株主総会で

導入するけれども、取締役会で導入する場合もあります。とりわけ特定標的型の買収防衛策、特定のターゲットを狙い撃ちするようなものについては一定の考察が必要だと思います。

これは太田洋先生のご意見ですが､従来の事前警告型買収防衛策のように、発動の時点まで敵対的買収者が特定されていないのであれば、事前に総会で決議をとっておくことにどれだけ意味があるのか。むしろ発動時に、誰かわかっていることを前提に、敵対的買収者を選ぶのか、あるいは現経営陣を支持するのか、そういった株主意思確認のほうが重要ではないかという問題提起をされています。

Ⅲ．アクティビストの活動の活発化

１．アクティビストの活動への懸念

日本企業におけるアクティビストに対する警戒感が高まっています。このベースには、アクティビストといっても玉石混交であり、建設的で企業価値向上に資する提案をするアクティビストばかりではない、こうしたアクティビストの活動が企業価値向上につながっているかというと疑問があるという見解が示されています。

このような状況に対応するため、一般的には、上場会社が買収防衛策を具備する必要性はこれまで以上に高まっていると思います。平時導入型の買収防衛策については、株式保有比率、株主構成等の関係で、漫然と導入・更新することは許されない状況です。

２．アクティビストによる Bumpitrage

それとともに、このところ関心が高まっているのがアクティビストによるBumpitrage です。「Bumpitrage」というのは造語で、これにはいろんな説明がありますけれども、「bump」を語幹として、株価上昇（bump in stock price）とさや取り（arbitrage）から成るものだという理解もできます。

最前線の実務家の太田洋先生らによりますと、ご論文自体は富士フイルム

ホールディングスの事件に関するものですが、そこでは、アクティビストによるBumpitrageはもはや対岸の火事といったレベルの問題ではないとか、例えばMBOや上場子会社の完全子会社化等の構造的な利益相反取引が行われると、アクティビストが介入し、Bumpitrageの標的となるリスク（条件変更や取引不成立リスク）が生じてしまうということが指摘されています。

同じ法律事務所の松原先生らも同様のご見解です。アクティビストといっても経営権取得を目的とする手法はまれであり、むしろ、株式の一定割合を保有した上で、他の株主の賛同を得るためにさまざまな手法を駆使する、こういった形でM&A取引に介入することも散見される。また、MBOや完全子会社化等の利益相反取引を機会に、TOB価格の引き上げやストラクチャーの変更等を要求する。およそこういう理解が共有されているのだと思います。

実務家の先生方のこのような懸念が顕在化したのが、東芝機械（現・芝浦機械）、また日本アジアグループについて行われた支配争奪戦だと思います。いずれもシティインデックスイレブンス（以下「シティ」）によって敵対的な公開買付けがなされた点が共通しています。東芝機械事件は、事前警告型買収防衛策を廃止した直後にアクティビストに標的にされた事例であると理解されています。完全子会社化しようとしたところを狙われました。日本アジアグループ事件はMBOの実施中にターゲットにされたということで、先ほど述べた「完全子会社化」「MBO」というキーワードが出てきます。

いずれの場合も、対象会社は、特定標的型の買収防衛策を導入してシティの買収を阻止しようとしたわけですが、東芝機械事件では、買収防衛策が取締役会の決議で導入され、買収防衛策に基づく対抗措置の発動が株主意思確認総会で承認されたという事情もあり、シティは公開買付けを撤回しています。

日本アジアグループ事件については、差止め仮処分が認められましたので、結局、対抗措置の発動、つまり新株予約権の無償割当てが中止されています。シティはその後、予告していたとおり公開買付けを開始していますが、まだ終了していないと認識しています。

Ⅳ．会社支配市場法制の改正の必要性

１．買収防衛策の必要性

先ほど申しましたように、東芝機械事件においては、敵対的買収者であるシティが公開買付けを撤回したため、司法判断を受けていません。しかし、シティが適法だと考えた可能性はありますので、買収防衛策が必要とされ、しかも一定の効果があったと言えると思います。

また、日本アジアグループ事件においては違法とされていますが、ほぼ同じ設計の買収防衛策がどのような場合でも違法として差止め仮処分の対象になるかというと、そうでもない感じがしております。というのは、保全抗告を棄却した東京高裁の令和３年４月23日決定でも、①MBOの開始、②シティによる競合する敵対的公開買付けの開始、③MBOの撤回、④日本アジアグループによる特別配当、重要な子会社株式の譲渡の公表、⑤シティの公開買付けの撤回、⑥買収防衛策の導入、⑦シティによる市場内外における大量買付けの継続、⑧買収防衛策の発動ということで、一連の支配権をめぐる争いが強調されているからです。

裏返して言うと、こういった背景がない、あるいは重視されない事例であれば、新株予約権の無償割当ての差止め仮処分が認められなかった可能性もあります。あまり個別の事件について申し上げるつもりはありませんが、そのように考えております。

実際、東京高裁は次のように判示し、強圧性の議論については理解を示していると思います。

一般的に、株主が買収に応じるような圧力を受けるという事態は理論上想定されるところであり、強圧性のある買収手法に一定の対処をすべきという日本アジアグループの主張そのものは理解できる面がある。しかし、強圧性の程度を実証的かつ定量的に把握することは困難である上、買収手法等により強圧性の程度には差があり得る。そして、シティは、再公開買付けを実施する予定である旨公表した際、市場内外買付けによる強圧性については相応

の配慮をしていたと。つまり、３分の１までしか買わずに、その後は公開買付けによるということで、裁判所はそれでよいと言ったということかと思います。

また、再公開買付けについては、買付予定数に下限が設定されていないものの、他方で上限も設定されず、再公開買付け終了後の議決権割合が３分の２以上になった場合には、公開買付価格と同額によるスクイーズアウトをするということなので、強圧性の程度は必ずしも高くないか、または強圧性の減少のために相応の措置がとられていると言えるということで、個別判断ということかと思います。

したがって、客観的には抗告人に強圧性のある買収手法を排除する目的があった可能性は否定することができないが、仮にこれがあるとしても、その目的自体弱く、買収防衛策（対抗措置）を発動する根拠にはならないということです。

ただ、裏返せば、一定の場合には、裁判所としても買収防衛策の発動を認める余地があることを示していると理解することができると思います。そして、これも同じことの裏返しですが、発動を認めるべき場合の１つとして、強圧性が高いにもかかわらず、その減少のための相応の措置がとられていない場合が想定されていると思われます。

また、日邦産業事件においては、株主意思確認総会を経ずに取締役限りで対抗措置の発動を決定しています。ご案内のとおり、最初の地裁決定については、批判が強いところです。単独で差止め仮処分を認めましたが、それ以降は差止め仮処分を認めないという決定が続いており、今、最高裁への特別抗告が２件係属していると理解しております。

以上のように、一定の場合については買収防衛策を導入・発動する必要があり、しかも、法的に許容され得ることが近時の裁判例においても示されていると考えます。これは、会社支配市場に関する法制度が、制定法だけでは十分に整備されていないと理解することも可能かと思います。

２．買収防衛策の目的

近時は、特定の敵対的買収者を念頭に置いた「特定標的型」の買収防衛策が注目されています。最初に特定標的型の買収防衛策が用いられたのは東芝機械事件だと言われていますが、その後、日邦産業事件、日本アジアグループ事件、富士興産事件でも、特定の敵対的買収者を念頭に置いた買収防衛策が発動されています。

東芝機械事件の買収防衛策を設計した太田洋先生らによれば、基本的なコンセプトは、これまでの事前警告型買収防衛策と変わらないのだと。つまり、ターゲットの会社の株主が、大規模買付行為等がなされることを受け入れるか否かについて適切な判断を下すために十分な情報と検討時間を確保すべく、大規模買付者に対して一定の手続を遵守することを求めるものだということです。

さらに、公開買付けの強圧性を排除するという目的もあるとされています。これは、先ほどご紹介した日本アジアグループ事件に関する東京高裁決定でも示されているところです。

３．会社支配市場法制の不備と買収防衛策の許容

次に、「会社支配市場法制の不備と買収防衛策の許容」についてですが、ここからこの研究会の先生方のご見解がたくさん登場しますので、間違っていればお教えいただきたいと思います。

（１）関係法制の再構築の必要性

飯田先生は、買収防衛策の有事導入について検討され、ご自身の論文の中で次のように述べておられます。本来的には金商法で対応すべきだが、十分な対応がされているとは言えない。公開買付けの強圧性に対して買収防衛策による対処は次善の策にすぎない。現行法下では、本稿で述べた限りで買収防衛策による対応は適法と考えるべきであるが、将来的には公開買付規制によって立法的に解決され、本稿で示した買収防衛策の解釈論が過渡的なものとしての役割のみ果たすことが好ましい。

飯田先生がおっしゃることは本当にそのとおりで、関係法制を再構築することが期待されるわけですが、どのように再構築すべきかについては従来も議論があり、敵対的買収が非常に多くなった2005年あたりからいろんな論考が出たと記憶しています。しかし、それ以降、敵対的買収がなくなったこともあり、そのままみんなが議論しっ放しという状態で、収斂させる機会がなかったと思います。

また、今日の報告では便宜上、会社支配市場に関する法規制を証券法制（金商法等）と会社法制に分けていますが、ある程度パッケージで考えていかないといけないので、これだったら大丈夫というのがまだ見出されていない状況だと思います。議論もさほど深化していませんし、私もどうすればいいという定見があるわけではなく、今申しましたようにやはりいろんな選択肢があると思っておりますので、こんな議論があるということについてだけ、おさらい的に入れさせていただきました。

（2）証券法制の課題

証券法制の課題の（1）は、「公開買付規制」についてです。

まず、＜課題0＞と書かせていただきました「不断のアップデートの必要性」、これはある意味当然のことです。先ほどご紹介した石綿先生によると、現在の公開買付規制の基本的枠組みがつくられたのは2006年。2006年といえば、敵対的買収のリスクが強調され、企業がこぞって買収防衛策を導入した年である。公開買付規制の枠組みも、発行会社が買収防衛策を導入できることを前提としてバランスがとられている。したがって、状況が変わって支配争奪戦が珍しくなくなった今、我が国の公開買付規制の見直しに着手すべきではないか、こういう総論的なことも述べていらっしゃいます。

＜課題1＞として、「義務的公開買付けと全部買付義務が連動していない」というまとめ方をさせていただきました。これは、ヨーロッパ、とりわけドイツの研究者から日本の法制度はおかしいと指摘される点です。義務的公開買付けが3分の1なのに、全部買付義務はその時点では3分の2の場合だけ、ここが連動していないのではないかということで、同種のことは飯田先生も

述べていらっしゃいますし、藤田先生も、もう少し理論的なところを掘り下げて同様のご指摘をされていると理解しています。また、浜田先生は、イギリス型ですが、公開買付期間の延長に関する話をしておられますし、黒岩先生も同様に、追加応募期間を設定すべきではないかという提言をされています。

＜課題２＞としては「市場買付けが公開買付規制に服さない」。これも先ほどの石綿先生のご指摘に含まれていますが、太田洋先生からも、この事件を通してということだと思いますけれども、市場買付けがされると支配はすぐとられてしまうと。

＜課題３＞としては「撤回制限が厳しい」。これも飯田先生のご論文を抜粋させていただいていますが、現行法では買付価格の引き下げを認めていないため、先ほどの日本アジアグループのように特別配当されてしまうと撤回せざるを得ない。したがって、買付価格の引き下げを認めるのが端的にすぐれた解決策であろうとされています。

証券法制の課題の（２）は「大量保有報告制度」です。

これは大崎先生もご指摘されていまして、もしかすると今までの事件でもウルフパックがあったかもしれませんが、あまり表に出てこない。共同保有者概念の妥当性と、共同保有者が正しい開示を行わなかったときの法的効果が担保されていないので、他の者が歩調を合わせて買っていることがわからないし、わかってもどうしようもないという問題が残されているのではないかということです。

（３）会社法制の課題

これに対し、「会社法制の課題」の（１）として、「セル・アウト」です。

公開買付規制の改正とは必ずしも排他的ではありませんし、どちらかがあればいいという面もあるわけですが、少数株主に陥った人は株を売り抜けることができる、つまり、残存少数株主に退出する権利（セル・アウト権）を与えるということによっても、公開買付規制が実効的である場合と同じような形がつくれます。こういった形からアプローチしていらっしゃるのが黒沼

先生です。

（2）の「エンフォースメント」については、議論が分かれるところだと承知しております。平成 26 年会社法改正に向けた法制審会社法制部会での検討においても、公開買付規制に違反した場合の私法上の効果が議論されましたが、成案にならなかったということで、神作先生が主張されているように、やはりこれは入れておくべきだったのではないかという意見が強いところです。

他方で、大量保有報告については、武井先生も、大量保有報告制度違反の場合に、主要資本主義国では対応されているのに日本ではされていないということを指摘しておられます。また、飯田先生は、大量保有報告書規制に違反したことを理由に、直ちに議決権行使を差し止めるのはよくないのではないか。加藤先生も同じようなご意見で、違反行為者の議決権行使の差止めは認められるべきではないだろうとおっしゃっています。

このあたりについてはいろいろな議論があるところですし、なかなか結論を見ないと思いますので、本報告が直接の対象としているものではありません。

Ⅴ．パーパス経営と敵対的買収防衛策

1．パーパスとコーポレート・ガバナンス

ここでは、パーパスとコーポレートガバナンスに一定の関係があるのではないかということを書かせていただいています。

太田洋先生によると、日本アジアグループ事件の抗告審決定の枠組みを前提とした場合に、取締役会の機能が弱くなり過ぎていないかという問題提起が行われています。つまり、買収者としては、議決権割合の３分の１に達する直前まで株式を買い上がり、その後 TOB を公表・開始すれば、ほとんどの場合に会社支配権の奪取に成功してしまうのではないか。そうなると、会社のサステナブルな成長、企業価値の中長期的な最大化に一義的な責任を負うはずの取締役会の権能を、そこまで弱いものと考えていいのかという点に

疑問が残るということです。

こういった考え方は、近時の「パーパス経営」や「パーパス・ドリブンなガバナンス」といったキーワードとも親和的であろうかと思います。より広く言えば、「資本主義の再構築」に向けた方向性を考えるとき、パーパス、すなわち「自社は環境や人権など様々な社会課題の解決にどう役立つ存在なのか。本業で社会に役立ち、同時に長期の成長を実現するという宣言」、これが重要になってくると思います。パーパスを掲げ、それを実現するための企業統治こそが「サステナブル・ガバナンス」であるという主張もなされています。

この間のコーポレートガバナンスの変容について面白い分析がありましたので、ご紹介しますと、昭和の時代は「デット（負債）ガバナンス」だった。これが平成の時代、「エクイティ（株式資本）ガバナンス」になった。そして令和の今、従業員や市民団体といった株主を含めた多様なステークホルダー、つまり、社会と対話をしながら企業は長期的に価値を上げることが求められるようになった。そういう意味では「ソサイエティ・ガバナンス」であり、時間軸で考えれば持続的な「サステナビリティ・ガバナンス」が求められているという整理です。

現在の思想として、「ステークホルダー資本主義」が一方であり、「株主アクティビズム」が一方であり、その両方の視点から考察する論者によると、これらは両立するのではないか。二者択一ではなく、資本主義のさまざまな側面（「効率性」「倫理」「正義」）を照射する１つの切り口・手がかりを与えてくれるものであるとされています。

では、本当に両立するのかということを少し確認したいと思うのですが、会社法制の観点から分析すると、松井智予先生は、株式会社制度の出発点には、経営陣や株主が交代しでも永続させるというニーズがある。こういった制度はどの限りで社会的に有用と評価できるのかという問題提起をし、いろいろ議論された上で、比較的平凡な結論に落ちつくとおっしゃっています。

今回は②に注目したのですが、全体として価値を増加させる事業活動で

あっても、その過程で許されない分配上の問題を招く場合、法令違反のほか、リスク管理不十分として経営陣が責任を追及される余地がある、こういう形でステークホルダーへの利益分配には配慮している、このように分析されていて、一般的な考え方を説得的に論じられたものだと思っています。これは結局、株主のためにならなければダメなのだということも裏面で言っているということで、株主以外の利益を考えるのであれば、法令違反、あるいはリスクマネジメントに入れ込んでいかないといけないということかと思います。

私も同様に考えていまして、気候変動の文脈にすぎないのですが、立命館大学の山田泰弘先生とブリティッシュコロンビア大学の Janis Sarra 先生とまとめた「気候変動に関する日本の取締役の義務（Directors' Duties Regarding Climate Change in Japan）」という報告書において、結局のところ、リスクマネジメント、あるいはそれに近いところでしか、取締役の義務としては言えないのではないかということを述べております。

「climate-related financial risks and opportunities」という点については、昨日の日経の朝刊で、金融庁が有価証券報告書の記載内容について、気候変動リスクの開示の義務づけに向けて検討を始めるということが紹介されていました。通常はリスクだけということでしょうけれども、リスクだけでは残念なのでといいますか、気候変動にかかわるビジネス機会もとりにいくべきで、それをとれなければ、経営判断原則のもとではあれ、一定の場合に取締役が義務違反に問われて、個人的に責任を負う場合があるのではないかということを報告書では述べております。

また、コーポレートガバナンス・コードについても、ノンバインディングであるものの、影響を与えることにはなるだろうと述べております。

この報告書を基礎とするウェビナーを開いた際には、金融庁の池田賢志チーフ・サステイナブルファイナンス・オフィサーや経団連の長谷川雅巳環境エネルギー本部長にコメントをいただき、そして石川真衣研究員にもご参加いただきました。そのときも山田先生と私は、法令、定款または株主総会

決議で明確にされていない義務については、取締役の義務は直ちに導き出せないので、やはりリスク管理に関する義務の中で理解するしかないと言ったのですが、Janis Sarra 先生は、そんなことはない、定款変更なんか必要なく、より積極的に取締役を義務づけるべきだという姿勢を示していました。でも、山田先生とは、やはり最低でも株主総会決議かなという話をしております。

結局のところ、先ほど申しましたパーパスにしても、株主総会で承認する。あるいは、開示されたパーパスをどう見るかについても、皆それに賛成しているから株を買っているのではないかという理解もできるかもしれませんが、株主総会決議の遵守義務を通して取締役の義務を具体化させるということを考えざるを得ないのではないか。その点で、先ほどの松井智予先生のご意見と同じになります。

その後、気候関連財務情報開示タスクフォース（TCFD）の影響が世界的な広がりを見せたのはご案内のとおりで、ことしの６月に施行された改訂コーポレートガバナンス・コードでも次のような原則・補充原則が盛り込まれています。

補充原則の２－３①は、「取締役会は、気候変動などの地球環境問題への配慮、人権の尊重、従業員の健康・労働環境への配慮や公正・適切な処遇、取引先との公正・適正な取引、自然災害等への危機管理など、サステナビリティを巡る課題への対応は、リスクの減少のみならず収益機会にもつながる重要な経営課題であると認識し、中長期的な企業価値の向上の観点から、これらの課題に積極的・能動的に取り組むよう検討を深めるべきである」。これができ上がりつつあるころでしたので、リスクの減少だけでなく収益機会というのは、私たちの報告書でも同じ趣旨で述べさせていただいております。

また、補充原則の３－１③では、「特に、プライム市場上場会社は、気候変動に係るリスク及び収益機会が自社の事業活動や収益等に与える影響について、必要なデータの収集と分析を行い、国際的に確立された開示の枠組みである TCFD またはそれと同等の枠組みに基づく開示の質と量の充実を進めるべきである」とされています。リスクを算定する場合、どうやって評価

するかが難しいわけですが、この点に関しては、今日の日経の朝刊に、三井住友銀行が水害による損失リスクについて数値化することができそうだという記事が載っていました。

２．パーパスと会社支配権争奪

話を戻して、「パーパスと会社支配権争奪」についてです。

ご案内のとおり、敵対的買収は、コーポレートガバナンスの上では伝家の宝刀とも言うべきものですが、近時は、「企業価値にとってマイナスであるものの、株主にとってはプラスの効果がある買収提案」についてどのように対応すべきかは極めて難解な問題だという指摘もあります。これをどう考えるかでありますが、会社法の伝統的な解釈問題として論じるのではなく、政策的な視点から検討すべき性質のものであり、政府主導により政策的な観点からこの問題に真正面から向き合っていくことを期待したいという意見もあります。これでいいかどうかわかりませんが、１つの方法ではあると思います。

パーパスをめぐって会社支配権の争奪が生じた事案として、あまり注目されていないかもしれませんが、アミタホールディングスの事案があるのではないかと考えています。これは、同業他社の山﨑砂利商店がアミタホールディングスの株式を約25％まで買い進めたところで、アミタホールディングスが友好的な株主に対して第三者割当増資を試みたけれども、裁判所によって仮に差し止められたという事件です。

この事件において地裁決定は、両社の代表者は会談したものの、アミタホールディングスは会社自体が廃棄物の100％資源化を目指しているので、埋立てや焼却処分をしない事業方針。言ってみればパーパスということで、アミタはそれをホームページで書いているところですが、これに対して、買い進めてきた山﨑砂利商店は最終処分場や焼却施設を運営しているので、基本的に環境についての事業方針を異にしている。したがって、業務提携することは困難であるとの趣旨の回答がされたということです。

これは普通に主要目的テストの枠組みで理解されたと思いますが、パーパスをめぐる理解として考えたらどうなるかということはまたあり得るかと思います。つまり、法的観点からしますと、これは有利発行の可能性があったので、株主総会の特別決議を得たわけですが、この決議では説明義務が尽くされなかった。何についての説明義務かというと、有利に発行する理由ではなく、むしろ、なぜ不公正発行するのかいう点が議論され、ちょっとねじれた感じがしていると思います。

もっとも、この説明義務との関係で、この人たちに割り当てて、買い進めてきた会社の持株比率を減らしますということを正面から問うたらどうかということもあり、もしも、株主総会決議において主要株主との間でパーパスに関する合意、つまりここでは、うちは全て資源化するのだ、そういう会社に向かっていくのだということから、違う考えの会社をリジェクトしたというのであれば、先ほど少し申しました総会決議の遵守義務との関係で、取締役の新株発行がよいとされた可能性もあるのではないかと思っています。

３．パーパスと買収防衛策

松井秀征先生は、買収防衛策を導入・発動する判断を行う者には、必要性の要件の一要素としてステークホルダーの利益を考慮する余地を認めてよいのではないかということを正面からおっしゃっています。その例として、企業を解体するおそれがあるような場合を挙げておられます。

私もこれは非常に共感を覚えるところでありまして、松井先生のご見解は、対象会社のパーパスが株主によって合意されており、そのパーパスに従って取締役が行動するというのであれば、より一般的に受け入れられやすいだろうと思います。ただ、どんな設計の大規模買付けであっても通用するかについては、まだ少し詰めなければいけないと考えています。

４．パーパスを根拠とした防衛策の限界

冒頭少し申し上げたところですが、オール・オア・ナッシングオファーの

場合については、田中亘先生がおっしゃっているように、対象会社の株主としては幾らもらえるかが重要で、買収者が支配権取得後にどんな事業を行うかには全く関心を持たないはずだと。あるいは、飯田先生も、オール･オア･ナッシングオファーについては、強圧性を根拠とした正当化はできないだろうということで、こういった形になってくると、どう説明するか、なかなか難しいのではないかと思います。

他方で、先ほどの松井秀征先生と同じような考えだと思いますが、オール･オア・ナッシングオファーであっても、従業員や取引先等にとってマイナスの効果がある一方、少なくともその時点の株主にとってはプラスの効果があるのではないか。基本的にどこまで言えているのかわかりませんが、そういった〔スクランブル〕でのコメントもあります。

ただ、このような疑問については、現時点での資本市場の論理や実務からすると、パーパスという切り口から会社支配市場法制を再構築することは難しいかもしれないと思っています。

例えば市場関係者の中には、日本と他の国の上場企業等の資本コストに関する考え方を分析されて、日本の企業はそんなに競争力がない、したがって、多くの日本企業が掲げるステークホルダー共創経営は、実際にやろうと思うと、世界の市場に負けてしまってできないのではないかと述べる方もいます。

１つの例として、ソフトバンクグループの孫正義会長兼社長は、パーパスを自分は大事にしたい、パーパスを株主が理解してくれないのであれば上場を廃止すると言って、実際そういう判断をするのか、あるいは両立する道があるのか、関心が示されているところですが、マーケットから見ると両立は難しいというのが現状かと思います。

Ⅵ．結語

最後の「結語」はオープンクエスチョンになっていまして、自分で解決できておりません。

現在の資本市場には、伝統的な株主の価値を高めるというロジックが基礎

にあります。他方で、資本市場を利用している上場会社であっても、社会的に有用なパーパスについては、経営者は重視しなければならないという要請が高まりつつあります。このパーパスを広く捉えてブレークダウンすると、そこに気候変動リスク等があり、サステナビリティも関係するだろうと思います。こういった場面で「市場の論理」と「社会の要請」が両立しなくなってしまうということがもしあるとすると、私はありそうだと思っているのですが、経営者はどうすべきなのかということについては明らかではないと思われます。

このような視点からは、落合先生が20年以上前に「企業法の目的」としておっしゃっていて、さらには、関係諸科学の検討をも踏まえた総合的学問として再構築していかなければいけないのではないかとおっしゃっていますが、これに対して私たちはまだ答えていないのかなと思っております。そういう意味では、今日のこの報告はまだ途中のものといいますか、これからやらなければいけないことを考えたという形にとどまっています。

龍田先生も、松井秀征先生や松井智予先生とご一緒させていただいた『会社法の選択』を引用してくださいながら、会社法制について「でき上がった制度そのものは、やはり無色透明に輝くものであってほしい」と述べておられます。今日ご出席でしたら、松井秀征先生、松井智予先生のご意見もお伺いしたいと思っています。

散漫になりまして申しわけありません。私の報告は以上でございます。

討　議

神作会長　中東先生、大変貴重なご報告をどうもありがとうございました。

それでは、ただいまの中東先生のご報告に対しまして、どなたからでも結構ですので、ご質問、ご意見をよろしくお願いいたします。冒頭に進め方のところでご説明がございましたように、「手を挙げる」機能を用いてご発言を求めていただければと思います。

松井（秀）委員　中東先生、大変貴重なご報告をありがとうございました。

勉強になりました。大変申し訳ございませんが、この後、校務がございまして途中で退出させていただくものですから、冒頭に発言することをお許しいただければと思います。

お伺いしたいのは、本日、中東先生からご報告いただいた内容と従前から議論されてきたこととの関係です。

敵対的企業買収、あるいはそれに対する防衛策という文脈で、誰のどのような利益を考慮するかというのは、古くから議論されてきたことかと思います。今回、中東先生は、パーパス、特に気候変動の例などを取り上げ、社会的な利益も考えながらというところで報告してくださったと理解しているのですけれども、今回、中東先生が取り上げておられる利益というのは、従前、買収防衛策の局面で多様な利益を考慮できるかという場合の利益と基本的には同じ、あるいは同一の方向性で議論できるものなのか、それとも、かなり質の違うものが出てきているのか、というあたりをお伺いしたいと思います。

従前、買収防衛策の局面で多様な利益を考慮できるかというときには、例えば従業員の利益とか地域の利益ということがかなり言われていたわけですが、今回、中東先生がおっしゃっている例というのは、それと共通するような感じもしますし、それらとは異なる利益のような気もしますので、考慮すべき利益の方向性が変わっているのかどうかを伺いたく存じます。

それとあわせて、もし従前とは異なる性質の利益であるなら、従前とは違っているなりに議論は変わっていくべきものなのか。また、仮に従前と性質が同じだとしても、時代の変化とともに違う形で議論を進めていくべきなのか。また、その場合、法律論、制度論等についてどういった方向で議論すべきなのか。ちょっとまとまらない質問で申しわけありませんが、このあたりについて中東先生のご感触をお伺いできればと思います。

中東報告者　先生からご意見いただけて大変光栄です。

利益の方向性については、基本的には従前と変わらないと考えています。従前の利益で何を尊重するかということについてはいろいろあろうかと思いますが、そのうちのどれかというのはさておき、配慮すべき利益がいきなり

変わったとか広がったとか、そういうものではないと思っています。ただ、パーパスという観点を入れることで何か違いが出てくるのか、少し考えたところです。

実際、敵対的な買収に遭ったときに、これまでですと、今回は従業員のため、今回は地域のため、今回は社会のためというように、その場その場で言いわけ的なことができたかもしれないと思うのですが、今回は、自分の会社ではこういうパーパスでやりますと言っていて、それがある程度マーケットで受け入れられているということが前提になるので、いきなり買収されたときに違うことは言えないという意味では、もう少しステークホルダーの利益を酌み取れるのかなと思います。

２点目にも関係して申し上げますと、その会社が大切にしたい一つ一つの利益は変わらないかもしれません。先ほど述べたように、その場で言ってはいけない。経営者が決めるのではなく、株主があらかじめ決めているものということで違いが出るのかなとは思っております。どれだけお答えになったかわかりませんが。

松井（秀）委員　従前と基本的には性質的に同じだということで、了解をいたしました。

あまり気候変動の話にこだわってはいけないのかもしれませんけれども、パーパスというときには、社会的に何が実現できるか、社会的に何が貢献できるかといった話になっていくわけですが、中東先生も書いてくださっているとおり、これは規制等に非常に馴染みにくいのです。例えば、従業員の利益であれば、一応労働法制のようなものもありますし、地域の利益になるとちょっと微妙なんですが、いずれにしても、ある程度公的規制なり、それに準ずるようなものがあろうかと思います。これに対してパーパスというとぼんやりとしたものになり、先生もおっしゃったように、結局のところ取締役の善管注意義務の問題に行き着いてしまう。そうなったときに、従前の買収防衛策以上に、会社としては非常に対応がしにくい。そういう意味で、少し質的に異なっているものが出てきているのではないかという感じもしたもの

ですから、お伺いをした次第です。

ただ、私自身の研究も 10 年以上とまっているのですけれども、今日中東先生から貴重なご示唆をいただけましたので、私自身、考慮すべき利益やそれに対する制度等の対応の考え方について、また深めていきたいと思うきっかけになりました。中東先生、どうもありがとうございました。

中東報告者　松井先生がおっしゃるように、個別法で具体的にしっかり義務が決まっていれば簡単だと思うのですが、それがないところでどうやっていくのかというのは、非常に悩ましいところだと考えています。ただ、有価証券報告書の記載事項は変わるかもしれないとか、こういった事情がある中で、どういう形で義務に落とし込んでいくことができるかというのを考えていくことだと思っております。私も宿題にしたいと思っております。

松井（智）委員　貴重なご報告をどうもありがとうございました。

中東先生のご論稿の５－１のところですが、太田洋弁護士のお話がありまして、「サステナブルな企業価値の最大化に責任を負うはずの取締役」というところから、そこまでと変わってパーパス経営に話が転換しております。

中東先生のお話は、５のところは全体としては、オール・オア・ナッシングでの買収に際して、株主が企業価値というものに最終的に責任を負わないのではないかという問題に収斂する部分と、それから、経営陣が利益と呼ぶものが非常にいろいろなものを含み得ていて、現在ではいわゆるパーパスと呼ばれるものも含み得るようになっているという話の２つに、敵対的買収の文脈では整理できるのではないかと思います。

この２つを別の話と考えるとすると、５－１のパーパスのところを、先ほど松井秀征先生がどのようなものだったのだろうかと質問なさっておられましたが、気候変動とか、今回のアミタホールディングスの判例を私も読みましたけれども、ああいう経営方針もしくは企業が目指す方向が違うからという理由で買収に反対する。今までは、買収者が言ってくる企業価値の増大をどこまで信用できるのかという問題を挙げていたように思いますが、今回の中東先生の５のところは、防衛する側の企業が企業価値と言っているものが

どこまで信用できるのかという問題を言っているような気がします。

特に問題の局面はあまり変わっておらないというふうに中東先生は整理されておられたのですけれども、パーパスというのは、私の印象としても、松井秀征先生と同じように、裁量の幅がかなり大きくなって、不明確になっているような気がいたします。そういう意味では、株主にどういうことを前もってお話しして、その支配権を維持することについて了解を得なくてはいけないのかが問題であり、事前にかなりしっかりとコミュニケーションをしておかないと、正当化するのはなかなか難しいのではないかという印象を持ちました。

アミタホールディングスも、結局のところ、調査報告書の中身が、細かいところを見ると、買収者を拒絶するために何が必要なのかという視点から材料を集めているような調査報告書であったために、結局、経営方針が違うということが本質的な論点になっていない事例だったと思うのです。そういうものであるということを裁判所が細かく読んで見つけ出したということは、裁判所も、パーパスという言葉をうまく「使って」、経営陣が買収に反対することについては相当懐疑的なのではないかと、個人的な印象としては感じているところです。先ほど最終的な論点にはならなかったという話ではあるのですけれども、事実認定を見ると、そんな感じなのかと個人的には感じております。

そういうわけで、パーパス経営という話の中で私の発言も引用していただいているのですが、買収について、そこをそんなに武器として使うことについては、私としてはあまりいいことではないのかなと感じている次第です。

中東報告者　アミタについては確かにおっしゃるとおりで、経営方針の違いに裁判所の焦点が当たりにくかったというのは、それはそうだと思います。これまでの買収防衛策が認められるかどうかの切り口の違いについては、先生がおまとめくださったように、これまでは買収者に経営を委ねたらどうなるだろうか、これがよいだろうかということを問題にしていたのが、もしパーパス経営という切り口をするならば、対象者の経営陣が示している経営方針

が維持されるかどうかということが問われるという点では、先生おっしゃるとおりだと思います。

その上で、このパーパスなるものが、経営者が裁量を持って決めてしまうのはいけないのではないかというご教示もありました。この点は松井秀征先生のご質問にお答えさせていただいたように、それはやはりよろしくない。かといって、では、どこまでやればこのパーパスが株主によって支持されたと言えるのだろうか。例えば株主総会で支持された場合です。そうすると、取締役としては、会社法上、総会決議を遵守する義務を負うので、そちらで整理することもできるのではないかとは申し上げました。

その先は、実はまだあまり考え切れておらず、パーパスであれ、あるいは会社の企業方針でも、言葉は何でもいいと思うのですが、それを中間項にすることによって、経営方針を根っこから覆そうというものは排除するということを認めていい場合もあるのではないかということを考えております。

松井先生に冒頭ご教示いただいた点については、原稿にするときにもう一度考え直させていただきたいと思っております。

松井（智）委員　特に追加の発言はないですが、アミタホールディングスについてだけ。裁判所は、調査報告書もしくは買収の意図についての被買収者の側の声明というのが、どのタイミングで出たかというのを気にしていて、後出し的に説明をするのではダメだよということは、そこでははっきりわかったのではないかという気はするので、普段からコミュニケーションをしておくことが重要だよというところまでは言えるのかなと感じております。

大崎委員　今の松井先生と中東先生のやりとりに触発されてお伺いしたいのですが、私はパーパスということと経営支配権の争奪を結びつける議論をするのであれば、議決権に差をつける、いわゆる複数議決権株式を幅広く認めるほうが、むしろすっきりするのではないかという気がします。

日本ですと、今、上場会社で複数議決権株式を置いているのはサイバーダインがほぼ唯一の例だと思うのですが、2014年２月にサイバーダインが複数議決権株式を出しながら普通株の上場を承認されたときに、どういう目的

でこれを正当化するかというので、「世界平和のため」と言ったのですね。それが当時は説明としてあまりにも捉えどころがないのではないかと受けとめた人が多くて、私自身もそうだったのです。しかし、パーパス経営という話が出てくると、世界平和のために自社の技術の軍事転用を阻止したいからこういう仕組みをとるのだという説明は、結構説得力を持つような気がするのです。ですから、およそ買収者によって変更されたくないような経営方針なり、会社のパーパスを持つのであれば、それを確固としたものとして維持するために支配権を確保する複数議決権株式を出しておくのが、ある意味で王道なのかなという気がいたしました。

それに関連してお伺いしたいのは、サイバーダインの複数議決権株式の場合、これはもちろん東証がそうしろと言ったからというところはあるのですが、いわゆるブレークスルー条項が設けられておりまして、TOB で買収者が４分の３以上の議決権の取得に至った場合は、普通株に転換されてしまうことが前提となっています。こういう設定は、ある意味ではパーパスということだけでは支配権争奪に決着をつけさせないというような考え方にも思うのですが、その辺、中東先生はどのように思われるか、教えていただければと思います。

中東報告者　壮大な話なので、どうお答えしていいか分からないのですが、複数議決権株式については、今のサイバーダインの例を教えていただいても、まだ少し躊躇があるのが正直なところです。確かにブレークスルーがあればいいのかなというところはありますが、むしろ軍事利用等を認めないという方針なのであれば、外為法で規制してほしいとか、また違った形を考えたほうがいいのかなと。

ただ、トヨタの昔のＡＡ型種類株式もそうですし、いろいろ参考になるところはあって、ここまでが許容範囲というのが、もしかすると拡がるかもしれないというのはあります。それはこれからまた研究させていただきたいと思いますし、複数議決権が得意な先生もここにもいらっしゃいますので、またお教えいただければと思っております。

大崎委員　買収防衛策と複数議決権株式のどちらがより制限的に使われるべきかという点についてはいかがですか。

中東報告者　今のところ、現行法制を前提にすると、複数議決権株式のほうを限定的に使うべきであると思っています。ただ、システムとしては安定性を考えると、今も全部アドホックに毎回、毎回、個別的な配慮で買収防衛策を認めるかどうかを決めていますので、それはあまりよろしくない形であるとは思っております。

後藤委員　中東先生、どうもありがとうございました。非常に盛りだくさんだったので、どこからお伺いすればいいのだろうかと思ったのですが、今の大崎先生とのやりとりの中で、買収防衛策と複数議決権株式のどちらがいいのかということだったのですけれども、中東先生のご報告全体としては、パーパスとか、ESG とか、そういう観点からの買収防衛もあってもよいのではないかということを示唆されているのかなと思いながら聞いていました。そういう観点からすると、正面からこれは譲れないんだということを明示して、複数議決権をつくるというのは１つあるのかなという気もしたのですけれども、それは抑制的にというところが中東先生の悩みを示しておられるのかなとも思いました。

買収防衛策と言ったときも、日本風というのがいいのかわかりませんけれども、完全に撃退目的の買収防衛策、例えば第三者割当増資とかはそれに当たるかと思うのです。他方でアメリカのポイズン・ピルはそうでなくて、20％の手前でとどまって、強圧性のない状態で株主総会をやって、そこで決めましょうという話だと思うのです。そちらから行くと、結局それで株主が勝ってしまったら、パーパスも何も全部ひっくり返せることになる。だからこそ、あちらでは複数議決権が必要だと思われているのかもしれません。

そういう観点からは、中東先生のおっしゃっておられる買収防衛策は、アメリカ型というか、結局最後は株主がそれを決めるのだという前提で言っておられるのか。そうではなくて、株主の多数の意思とは別に買収者を撃退できることを認めるものなのか、どちらなのでしょうかということを、お伺い

したいと思いました。

中東報告者　後藤先生、ありがとうございました。皆さんご専門なので、だんだん答えづらくなっていくような感じがしています。

パーパスについては株主がひっくり返すことができるものという前提で考えています。どういう場合にひっくり返せるかというのはこれから議論しないといけないところだとは思っておりますけれども、いつまでも維持できるものではない、どんな場合でも維持できるものではないと考えてはいます。そこまでしたいのであれば、法律でしっかり書かないといけないということかと思います。

複数議決権株式の場合も、先ほど大崎先生からありましたように、どんな場合でもそれを守り切れるわけではないということなので、後藤先生のおっしゃった、どちらが潔いのかという点について、どちらも潔いのか、どちらも潔くないのかよく分からない感じもいたします。ただ、複数議決権株式の場合にはいろいろな場面で総会決議が入りますので、明確かなと思います。

後藤委員　複数議決権株式は、上場するときにしか導入できないということにしてしまえば、上場時点でやってない以上は、今は使えないわけです。やりたかったら、一度ゴーイング・プライベートした後で、もう一回上場しろということであり、もしお金が必要ないというのであれば、ソフトバンクのお話が紹介されていたかと思いますけれども、要は上場をやめてしまえばいいわけです。

そういう観点からすると、そこまでやらずに取締役会限りで防衛策を導入するというのは、怪しげな面があり、かつ、昔、竹内昭夫先生がおっしゃられたように、結局取締役の裁量を拡大するだけではないかという懸念が、どうしても拭えないという気もします。

もう一つはコメントにすぎないのですが、最初の松井先生とのやりとりとも関係するのかもしれないのですけれども、パーパス経営というときに、最近、本もいろいろ出ていますが、その大半は、結局、気候変動の話をしているように思います。その他では、性別だけではなく人種等を含めたダイバー

シティやソーシャルインクルージョンの話と、児童労働や強制労働などで、３つぐらいある。しかし、それ以外に何かあるのだろうかと考えると、パーパス経営というのは、この３つをくくる言葉としては意味があるのかもしれないのですけれども、その内容はすごく限定的であるのかもしれません。例えば、株主以外のステークホルダーの代表でもある従業員の利益の確保みたいなものは、ちょっと異質な気がします。先ほどの大崎先生の話ともかかわるのかもしれないのですけれども、大規模なインデックス投資家が増えてコモンオーナーシップみたいな状況になってきたときに、幅広く投資しているから、地球全体の気候変動がとまったほうがいいのだという話でパーパス経営が推されているのだとすると、特定の企業の、しかもあまり効率がよくない企業の従業員の保護の問題までをパーパスという言葉でくくってしまうというのは、何か気持ちの悪さが残る。そうすると、パーパス経営は、経営学の話としてはいいのかもしれないのですけれども、法律上の概念としてはあまり使えないのではないかという気がします。

質問にもならず、大変恐縮ですけれども、とりあえずそういうことを感じた次第です。

中東報告者　後藤先生のおっしゃるとおりだと考えていまして、パーパスをいろいろ考えるとき、気候変動が主流のキーワードになっている。先ほど少しご紹介したウェビナーでもそうなのですが、カナダの人々はもともと問題意識が高いのですけれども、一緒にやっていると、悪く言えば、流行に乗っている人たちという面も感じないわけではありません。それで先ほど申しましたように、日本の会社法に落とし込みたいということを山田先生とも一緒に考えました。

そういう意味では､パーパスを言ったから何かなるとは全く思ってなくて、パーパス自体、怪しいのではないか。経営学的な発想のものであって、直ちにそれが法的な効果を導くものではないのではないか。それはおっしゃるとおりで、パーパスを一旦、中間項にしてみて、ではパーパスがどういった状態で、この会社で守るべきもの、あるいは投資家との関係でエンゲージされ

たものになっていれば、それを根拠に対象会社の経営陣は防衛策を発動していいかという発想で考えています。

最終的にパーパスという言葉は、自分の論文の説明の中からなくなっていいものだと思っています。一旦これを素材にして、どういう場合であれば、経営者が言っていることが、会社が守るべきこととして共有されていて、それを理由に対抗措置をとっていいのかという整理を最終的にはしたいと思っております。

松尾（直）委員　非常に詳細なご説明をいただいて、ややついていけないところもあるのですけれども、パーパス経営というのは、もちろん私の専門ではないのですが、最近の経営論のはやり事ですよね。今検索したら、経済産業省の研究会が去年９月に公表した報告書（人材版伊藤レポート）に入っているというのがございました。

私の専門である資本市場法制の観点からしますと、金商法第１条の目的規定に則して物事を考えるわけですが、そこに書いているのは、「資本市場の機能の十全な発揮」による「公正な価格形成等」と「投資者の保護」です。上場会社が対象になっていると思うのですが、上場会社については投資者の保護が一番大事なわけです。そうした議論とか、パーパスというのは分かるのですけれども、最後に引用されている大御所の龍田先生の見解はそのとおりだなと思うわけです。

要は、先ほど来、先生方からご指摘のとおり、企業名を挙げて申しわけないですけれども、最近の東芝の状況などを見ていると、経営者の裁量をいかに抑制していくというか、会社法制においても、主体は法人である会社であって、経営者ではないわけです。経営者は、会社に対して善管注意義務と忠実義務を負う立場であるわけです。それをいかに担保するかというのが引き続きの課題です。

申しわけないですけれども、僕はM&A弁護士ではないので、少し距離を置いて見ると、買収防衛絡みで弁護士の先生方があれこれ書かれていることにあまりとらわれると、バランス的によろしくないと思うわけです。一定

の防衛側の考え方が如実に出ているからです。なので、そこはバランスをとっていくことが大事であると思います。日本企業は、実態としては企業価値の向上が叫ばれるのも、相変わらず利益率が低いようです。終身雇用制で、どうしても経営者の保身が見られないこともない。いわゆるプロ経営者もそうです。抽象論で申しわけないのですが、そういうのを抑制する観点が大事かなと思います。

そうすると、申しわけないですけれども、パーパス論にはやはり疑念もあります。ですから、先生の議論が、非上場会社ならいいのですけれども、上場会社の経営者に都合よく利用されないかなという懸念があるのですけれども、その辺はいかがでしょうか。

中東報告者　松尾直彦先生どうもありがとうございます。私も先生おっしゃるように、都合のよいように利用されるというのは非常に嫌だなと思っております。ですので、パーパスと言ったら、常にそれでいいのだというのではなく、先ほど申しましたように、オール・オア・ナッシングオファーであれば、防衛できないというようなつくりの中で考えるということだと思っています。

先生がおっしゃいますように、私も M&A に関心があるからか、ついつい防衛側に立ったような形でバランスをとろうとしてしまうのですが、バランスのとり方自体が、曖昧の中で決まっていくと駄目だというのは、先生おっしゃるとおりだと思いますので、まさに龍田先生がおっしゃっているように、会社法制の中で、守るべきものがきちんと守られるという形にした上で、個別の経営者の裁量を広く認めないというのが望ましい形だと思っています。

マーケットの話ということですと、松尾先生のご関心と少し違うかと思いますけれども、延長線であるかと思いますのが、昔 ROE 経営と言われて、いつの間にか ROESG になり、そこは本当に両立しているのかという気が個人的にはしています。

松尾（直）委員　ROE と ROESG はご指摘のとおりかと思います。私も専門ではないのですけれども、同じ印象を持っています。

小出委員　今日は大変勉強になりました。ありがとうございました。私は買収防衛策等については、ここにいらっしゃる先生方と違って、全く勉強していませんので、その点については、今日は伺っていて、なるほどと思うだけだったのですが、今、後藤先生、松尾先生の話の流れの中でありましたパーパス経営と最近のESGというところについて、少しお聞きしたい。

先生の報告資料の32ページから33ページあたりのところで、特にTCFDという最近の流れで、開示のところについての新しい動きや最近のコーポレートガバナンス・コードなども含めてお話をされました。ただ、私の理解ですと、TCFDというのは、パーパス経営とはある意味で対極とは言いませんけれども、かなり違った考え方なのではないかと思っております。

というのは、ESG関係の開示を考えるときに、それは弥永先生のほうがお詳しいと思いますけれども、最近はシングル・マテリアリティ、ダブル・マテリアリティといって、環境要素というものが、企業の財務的な要素、すなわち、あくまでも伝統的な財務諸表に与える影響を開示するという考え方と、そうではなくて、企業の環境的なリスクというものが、より広く社会全体に対してどういう影響を与えるのかということについて記述するという考え方を分けて、両方についてその影響の重要性を考えるのがダブル・マテリアリティという考え方だとされています。一方で、あくまでその企業の財務諸表に与える影響の重要性を考えるのがシングル・マテリアリティであると考えていて、TCFDというのは、まさに典型的なシングル・マテリアリティに関する開示を求めているものだと私は理解をしています。つまり、あくまでも企業価値とか企業業績に環境要素がどういう影響を与えるのかということを考えていて、企業のパーパスというよりも、株主にとっての企業価値という伝統的な枠組みの中で考えていると思っております。

このあたりは、コーポレートガバナンス・コードなどもよくよく読んでみますと、原則２－３とか原則３－１、あるいは補充原則に書いてあるところは、先生も波線を引かれているように、「企業価値の向上の観点から」と言っていたり、「自社の事業活動や収益等に与える影響について」と言った上で

こういったTCFDを挙げていたりするということを考えると、少なくともコーポレートガバナンス・コードにおけるこの辺の考え方というのは、実はあまりまだパーパス経営といったところまではいっていなくて、伝統的な企業の価値、株主価値というところに立脚してガバナンスを考えていくべきだと考えているように思われますが、そのあたりについて、もちろん今後こうあるべきだということも含めて、お考えをお聞かせいただければと思います。

中東報告者　小出先生、お教えいただきましてありがとうございました。コーポレートガバナンス・コードについては、先生がおっしゃるとおりだと思いまして、若干無理につなげたところがなきにしもあらずだと思っています。

TCFDについては理解がなかなか難しいかなと正直思っていまして、もともとは財務情報としてということだったと思うのですが、日本で最初に紹介されたとき、非財務情報としてこれを出しましょうという整理だったと思います。他方で、近年、目指されているのはリスクの面だけです。リスクだったら一定の数字に落とし込むことができるのではないかということです。全体の議論が若干収斂してないのかな、あるいは整理されてないのかなという感じはしています。

財務情報であれ、非財務情報であれ、どちらであれ、開示されたら直ちにそれは取締役の義務になるのか、開示していれば、そのとおりにやって、それを支配争奪、支配権維持に使えるかというと、またこれは距離のある話ですので、そこは自分自身ももう少し考えていきたいと思っております。

お答えになったかどうかわかりませんが、問題意識としては先生と同じものを共有しているつもりでございます。

小出委員　大変よくわかりました。先生のおっしゃるとおり、TCFDは非財務情報に関する開示だと思うのですけれども、それは財務情報に影響を与えるものを非財務的な観点から記述するというものと考えているように思われます。でも、先生がおっしゃるとおり、ESGに関する開示には、いろいろな考え方のものがありますので、ある意味でパーパス的といいますか、企業が社会に対してどういう影響を与えていくのかということについての開示

も、最近、試みが進んでいますから、そちらのほうは、ある意味でパーパス経営といったものと親和的な部分もあるのかなというふうには感じました。

宮下委員　ご報告ありがとうございました。大変勉強になりました。

本日のご報告のテーマであるパーパスというのが買収防衛を正当化する観点からプラスになる部分があるのかどうかということに関してですが、買収の対象になっている会社にパーパスがあると言ったとしても、買収の局面では、会社がもともと持っていたパーパスだけが独立して問題になるのではなく、買収者の提案との比較で考えることになるのではないかと思いました。

そういう意味では、買収者のほうも、それをパーパスと呼ぶのが適当かどうかというのは分からないですけれども、自分たちが買収した場合には、この会社にはこういう社会的な存在意義を見出していくのだとか、ESG 的な要素に関しても、買収者としては、このようにして対象会社が価値を提供できるようにしていくのだ、ということは言えるのではないかと思うのです。そうすると、結局、パーパスと言っても、会社がもともと掲げていたものと、買収者が「これが今後のパーパスだ」と言って示すものとの比較になってくるのかなと思います。

そうしたときに、ここがご質問になるのですが、会社が長年もともと掲げていたとか、ずっと以前の経営者からそういったパーパスでやってきたとか、投資家に対して、従来から継続的にそういった説明をしているということが、買収者が掲げる新たなパーパスとか経営方針と比較する際に、何かプラスになる部分があるということでしょうか。そこを比較する際に、もともと掲げてきているとか、伝統的にずっとそういう価値観を持っているということを評価すべきなのだという観点があるとお考えかどうかというところがご質問であります。

中東報告者　宮下先生ありがとうございます。結論的には、現時点では比較するときに優位に立つものではないと考えています。どういうことかと申しますと、先生がおっしゃいましたように、これまでずっとこういうパーパスで来ました、こういう経営方針で来ましたと言っても、最終的には、株主の

意思確認をする場面では、提案との比較になる。株主は放っておいてもそういう行動をとると思うのですね。

買収防衛策を正当化する場合があるよと申し上げたのは、一定の条件が満たされていて、今の経営方針をそのまま維持することを託されている。防衛側の経営方針が託されているというような状況がもしあるのであれば、比較をする機会を奪う。つまり、株主意思確認総会を開けないようなタイミングで公開買付けをかけられた場合に、それがもし強圧的なものであれば、取締役会限りで発動してもよいという点で違いが生じると思っています。

ですので、そういった事情がなく、株主意思確認総会にまで至ることになれば、その時点では、株主に、「あなたはこれまでのパーパスをこのまま維持してほしいですか。あるいは対抗ビッドをかけた買付者の方針に従いたいですか」と聞くことになると思っています。そのときに、どちらなのかというのは、株主が自分で選ぶことなので、どちらにしなさいとは誰も言えない。それはどちらも優位に立つものではないと考えています。

宮下委員　私はM&A弁護士として買収防衛側の立場に立って仕事をする機会も多いので、その点が非常に気になるのですが、中東先生がおっしゃられた、株主なり投資家から一定の経営方針を託されている状況で、それに反するような買収提案であるので、取締役会限りで対抗措置がとれると考えられるのが、具体的にどのような場合かということが、今日のお話の中でポイントになる点かと思いました。

現経営陣は過去の株主総会で取締役として選任されていて、取締役として選任される過程では、当然、「こういう経営方針です」とか、「自分としては会社にこういう社会的な存在意義があると考えている」ということを示し、そのうえで選任されていると思いますので、そのような場合は、会社の現経営陣が掲げるパーパスなり経営方針というものは、株主から託されているとも言えると思うのですけれども、それによって取締役会限りで対抗措置を採ることが正当化されるとすると、非常に広範に対抗措置がとれることになってしまうので、恐らくそれでは足りないということではないかと思います。

そのような状況を超えて、何か、こういうことで株主からパーパスを託されているのだという状況があるということなのかと思うのですけれども、それがどういう場合なのかということについて、もし中東先生のほうで何か想定されているものがおありであればと考えた次第です。

中東報告者　実はそこは一番困っているところです。どういう場合だったらそういう形、つまり、最終的には取締役の義務に落とし込まないといけないというのが現時点の考えですので、株主総会決議がある、あるいは定款でこうしなさいと書いてある。いろいろなバリエーションがあると思いますが、そういった具体的な決議がない場合に、先生がおっしゃったように、経営者で選ばれるときに、こういった方針にするということが、一定のエンゲージメントがされているとか、会社のホームページを見たら、こういう会社ですといっぱい書いてあるとか、それでいいのかという話になると、あるいは、これからですと、法令上の開示などでいいのかという話になると、どれぐらいだったらいいのか、どれぐらいだったらいけないのかということは正直詰め切ってないです。

裏返すと、もしある時点で相当数の株主の支持を得て、会社はこういう方針でやるのだということが決まっているのであれば、そもそも敵対的買収に狙われないと言えなくもないかなとは思います。

加藤委員　ご報告ありがとうございました。今の宮下先生とのやりとりとも関連するのですが、今日のご報告の４までの話と５の話の関係が分かりにくいように思います。

つまり、今日のご報告の４までで、公開買付けの強圧性を解消する手段として、日本法は、買収防衛策に多くの役割を期待しているが、最近では、取締役会限りで、そういった防衛策を、強圧性を回避するという目的でも、なかなか簡単に認めてくれないという中東先生の問題意識が示された気がしました。

ただ、公開買付けの強圧性はパーパスを持ち出すまでもなく、それ自体問題です。パーパスを持ち出すことによって、強圧性を解消させる手段として

の買収防衛策の正当化につながるのかが少し気になります。もしご意見をいただければ幸いです。

中東報告者　加藤先生ありがとうございました。加藤先生にもおっしゃっていただくと、自分が何となくごまかしながらやってきたところが、やはりそうだったんだという感じがするのですが、パーパスで一回、先ほど申しましたように、中間項として考えてみようかなとは思ってはみました。ただ、結局のところ、どういう場合に防衛できるだろうか、防衛策が許されるだろうかということになると、これまでの飯田先生のご意見と同じことになりそうですし、そういう意味で、話は４までで終わっているのではないかと言われれば、そんな感じも持っていたところではあります。

ただ、どの範囲で防衛策を認めるかということのベースにあるいろいろなステークホルダーのことも考えていけるような制度が望ましいと個人的には考えておりますので、４で終わるとそういう話にならないのでということはあります。パーパスという言葉を使うかどうかは別として、どういう場合にバランスがいいのか分からないからみんな困っているわけですが、全体でバランスのよい法制度になればとは思っております。

藤田委員　宮下先生と加藤先生のやりとりでほとんど尽きていると思うのですけれども、買収防衛との関係で、パーパスを議論に入れてきたことの意味に関する質問です。中東先生の説明によると、パーパスに反するような買収があっても、現在の多くの株主が、もうパーパスを変更しましょう、従前言ってきたパーパスとは違う経営をすると買収者が言っているのに対して、これに対して株主がいいと言っているのならそれでいいというのであれば、結局、株主意思に沿って買収者を選択するというフレームワークは全く崩れていないことになるわけですね。だから、わざわざパーパスを持ち出したことの意味が、あまりなくなってくるような気がします。

あえて意義を見いだそうとすると、従来、防衛策を正当化する株主意思は、防衛策を支持するものでなくてはならず、それがあれば防衛策に基づいてなされる個別の措置が正当化されるという形だったのですが、パーパスを持ち

出すことで、防衛策それ自体を支持しているわけではないけれども、パーパスに対する明示的に支持があれば、それを無にするような経営に対しては、一旦は防衛することが許されて、株主意思を確認しなさいということになるという点でしょうか。つまり明示的な防衛策に対する容認がなくても、一定の範囲で、株主意思の確認の機会を得られるようにする防衛が認められる余地がでてくるという限りで若干広がる。せいぜい、こういう違いがあることになる程度かなという印象を持ったのですが、そういうことでいいのでしょうかというのが確認させていただきたい点です。

もちろん、株主意思とは無関係にパーパスに基づき取締役会が防衛策を発動することを認めるとなれば、全然話が変わってきます。そうなると最初のほうで多くの方が質問したように、経営者がパーパスを持ち出して防衛していいんですかという疑問につながることになるのですけれども、もし最終的にはパーパスということが、株主意思の確認に収斂するのであれば、今申し上げた通り、防衛策とはっきり明示的に承認しなくてもいい買収措置をとる可能性がでてきうるという程度の微調整の話に尽きてしまうような気がします。そういう理解でいいかどうか確認させていただければと思います。

中東報告者　基本的には藤田先生がおっしゃってくださったとおりだと思っています。

ただ、パーパスについてどれだけ拘束力があるかは、先ほど少し申し上げましたように、定款でこういう形の経営をしましょうと決めているといった場合があれば、それを尊重する形の防衛策が認められやすくなる。株主総会決議だったらどうだろうか。そういう決議がなくても、一定の形でエンゲージメントされたらどうかということは今申し上げたとおりでして、藤田先生がおっしゃってくださいましたように、その限りでの違いが出るというのが現時点の整理です。

ただ、何度も申し上げていますように、あくまで中間項的に考えたので、これがなくなったときに、どこかで法的な手がかりをつかんでということは考えていますが、現時点で、これで何でもできるようになるとか、そういう

物すごいものではないと思っています。

藤田委員　定款変更した場合という話になっていくと、また全然違っていて、定款で特定のことを行うと規定していて、それを守らないことを宣言した買収者が現れた場合に、これに対して防衛することが許されるかというと、取締役は定款遵守義務があるので、定款の規定を守った業務執行を行うために防衛措置をとることは、裁判所も認めてくれると思います。ただ、防衛策の発動につながるぐらい具体的な内容の定款を書くことは、企業価値を損ねる可能性があるから、それはそれでまた別の問題がありますけども。

その話は置いておくと、結局パーパスがうまく認定できれば、それだけで防衛できるというのを中間項として置くのがいいかどうかというと、これまた濫用される危険があることは、気にはなるのですけれども、株主意思に収斂する限りにおいて、従来の議論の枠組み全体との関係では、あまり大きな飛躍ではないように思われます。

ついでに、株主意思の確認との関係で、今日の報告のあった日本アジアグループ事件との関係で言うと、裁判所は、必ずしも事前の確認を要求しているわけではないのでしょうか。日本アジアグループ事件で、裁判所は会社側は株主意思を確認するための防衛策だと言っているけれども、具体的に株主総会を開く予定も目処もたってないでしょうということを非常に強調しているのです。逆に、防衛策として差別的行使条件付新株予約権を発行します、ただし、その効力は事後的に開く総会の承認に依存しますといったような形をすれば、取締役会決議による新株予約権の発行というのは認めてもらえるのではないでしょうか。

実際、その後そういう裁判例も出てきているようであり、絶対に総会決議が先行しないと買収防衛ができないというのが現在の判例法ではないと思います。そう考えると、別にパーパスということを入れなくても、事後的に総会決議によって買収の是非を株主に問います、そのためのスケジュールもすでに組んでいます、そして新株予約権の効力も株主総会の承認に依存しますというような形にすることで、裁判所は新株予約権の発行は認めてくれると

は思うので、あえてパーパスを持ち出すことの存在意義が、私はあまり感じられなくなっています。この点は中東先生と現在の判例法の理解の前提が違うのですかね。

中東報告者　パーパスのこの報告での存在意義を聞いていただいてありがとうございます。最近の裁判例については藤田先生と同じ理解をしています。別にパーパスを持ち出さなくてもという場合には、取締役会限りで発動した、導入も取締役会でしていたものを認めるという余地があり、それは実際にも幾つも出ていると考えています。

パーパスは皆様から何度も言っていただいたように非常に紛らわしく、私、中間項と申し上げたのですが、それもミスリーディングで、最終的にはこの概念を使わないということをお考えください。中間項として一旦これを置いておいて考えるとして、どういう場合であれば、取締役の裁量の範囲の義務と言えるかというのを考えてみたかったということです。

三井オブザーバー　時間も迫っているところですみません。私の理解が不十分なところがあると思うのですが、買収防衛策とかTOB規制の趣旨を考えると、市場に情報が完全に行き渡っていて、経済合理的な判断が100％保証されているといった完全市場の仮説が成り立っていない状況、例えば、取引コストや摩擦がある、あるいは、強圧性がある、といった完全市場のような形での自浄機能が完全には調整できない場合があるので、そのような市場の失敗を緩和・是正するために、TOB規制をはじめ一定の規制が必要とされ、その規制の内容として、情報が十分に行き渡らせるためのディスクロージャー規制を課すことや、一定の行為規制を行うといった非常にナイーブな考えを持っていたのですけれども、どうももっと複雑な切り口があることが本日のご報告を聞いて感じておりました。買収防衛が大きな問題になるケースですと、例えば、短期に最大の利益を上げる投資家と、長期で利益を上げる投資家とで、投資リターンを考えるタイム･ホライズンが違っているので、どちらが会社のバリューを上げるのですかという闘いになっている場合があったりします。今回、「パーパス」という概念が入ってきた。この概念に

ついて十分理解できておりませんが、例えば、会社の存在意義とか、環境とか、SDGs といった社会的なバリューまで入ってくると、買収局面において、買収を是とするのか非とするのかという判断に、今度は、外部経済・外部不経済まで考慮要素に取り込んでいこうとしているのか。外部性も価格に織り込もうとしているのか。更に、そういった多様な考慮要素を株主総会の多数の意思という手続的なものにも織り込もうとしているのか。

「パーパス」という概念とを買収に関する規制の関係、あるいは、「パーパス」といった多様な概念を持ち込む前の段階で、金商法における TOB 規制の改善の要否とその方向を考え、その上で、その改善の方向の中に「パーパス」をどういった切り口で位置づけておられるのかというところを、私は十分に理解できてないと思うので、教えていただけると大変ありがたいのですが、いかがでしょうか。理解不足の質問で申しわけないです。

中東報告者　三井先生ありがとうございます。マーケットが完全に効率的であれば、長期的な利益は短期的な株価に反映されるという前提だと思いますが、そこのところは前提自体、私は怪しいと思っていますので、ギャップが生じた場合にやはり対応が必要だと思っています。

先生がおっしゃるように、パーパスをここで持ち出すことが、長期的、短期的ということの関係で申し上げると、やや強引なのですが、長期的に考えると、資本市場そのものが続いていかないといけない。そのためには企業が続いていかないといけないというところまで話を進めると、一定の外部性があっても、それを内部化するような形で価格に織り込んでもらわないといけないので、それを前提に、マーケットとしては支配権の所在を考えないといけないということになる。どこまでいけるのかというのはありますが、長期、短期の問題ではありますが、一旦、長期を超えたスパンで、外部性の問題ということが考えられるといいかなと思っています。ただ、先生にご指摘をいただいたほどは詰めておりませんでした。今後検討したいと思っております。

松尾（直）委員　三井先生が入っていると知らずに、おおっと思ったのです。横から申しわけないのですけれども、せっかくなので関連して三井先生にお

伺いしたいのです。

今日の中東先生は、公開買付規制の見直しということをテーマに挙げられていて、これは神作先生もよくご存じのとおり、昔、三井先生が企業開示課長の頃かどうかなんですが、イギリスとかEUのM&A法制の研究会が開催されました。ですから、当時、僕は、三井先生は、イギリス・EU型の思考をお持ちなのかなと勝手に思っていました。私自身はあまり賛成できないのですけれども。

中東先生がテーマに挙げられている公開買付規制の見直しの方向性、総合的観点が必要なのはご指摘のとおりなのですけれども、今、三井先生は、やはりイギリス型とかEU型について、あるべき姿だとお考えなのかということをお伺いしたいのですが。

三井オブザーバー　「商事法務」に書かせていただいた文章が大変拙いものでしたので、若干補足させていただきます。

当時、より実効的な買収防衛策を講じる必要があると主張する方々の中に、ここは大きな誤解なのですが、イギリス型のTOBパネルが柔軟に、ルールベースではなくプリンシプルベースで、臨機応変に買収者に対して、当該買収を良いとか悪いとか言ってくれるらしい、そういう仕組みを日本でも自主規制団体が行えるような仕組みとしてはどうかといった主張があったように記憶しております。そういうご関心があって、イギリスのTOBパネルの実際の実務を正確に把握しようと思ったというのが、もともとの調査団としてイギリスを訪問したときの経緯です。

イギリスに行って、実際にTOBパネルの方や関係者の方々に詳しくお聞ききしてよくわかったのは、一定の議決権比率を取得した場合には必ずTOB規制がかかるといった基本のところ、プリンシプルのところでは、決して柔軟ではなくて、非常にリジッドにそれを守る。従って、TOBパネルが買収防衛的な機能を果たすことはない。むしろ、経営権の交代に対してはニュートラルで、円滑な経営権の移転が行われること自体は是としているとかいうところがある。

柔軟なのは、例えばトータル・リターン・スワップみたいに名義人と経済的な利害関係者が一致していないとか、そういうことに対して、形式ではなく実態ベースで判断しようとか、TOBのアナウンスやスケジュールをマーケットの動きや実態に合わせて柔軟に対応したりしていることが分かりました。とりわけ、根本的な制度の違いとして、日本は、議決権割合が３分の１をクロスするときにTOBを義務づけるのですが、英国では、一定の水準を超える株式を取得すること自体はTOBによらずに相対でも自由にできるが、むしろ、その閾値をクロスすると、その後に、当該取得者に対しTOBを義務づけるという規制体系にいる。この方式は、アメリカを除くと、むしろ世界では広く導入されている。そういう多くの国が導入している制度を日本でも導入するか否かを皆で考えてみようという趣旨でした。換言しますと、日本の制度は歴史もあって、ある意味で偶然の所産で、世界とはかなり違う仕組みが導入されているわけですが､そういう世界でも例外的な制度であるが、確立した現行制度を維持するか、多くの国々で採用されている制度に変更するか、その是非を問いたかったのというのがその趣旨です。その時点でイギリスの制度が直ちに全ての面において優れているとまで言い切るつもりはありませんでした。

イギリスでも、例えば、ローカルな企業を海外の資本が買収するときに、地元が当該買収に大反対し、騒動になったと聞きました。そういった制度の根幹をゼロから議論してみませんかという趣旨です。

今日は、今の日本の制度は結構もう限界に来ているなというのを改めて感じたということと、では、どういう制度に持っていったらいいかということで考えるガイドポストみたいなものがないかなと思って、短期･長期の視点、外部経済・不経済の内部化、こういった要素を価格にうまく反映あるいは経済的な価値に反映し切れているのかどうか。「パーパス」という若干主観的な価値・視点にも見えるが、そういった要素をどう株式市場のルールに取り込んでいくか、マーケットとして機能するためには金銭的なバリューに転換しなければならないのか。それらを前提とすると、どういうルールの構成に

するのがいのかなどというのを考えながら、考えがまとまらないうちに２時間たって、終わる前に少しだけお聞きしようというのが動機でございます。大変まとまらない説明と質問で申しわけございません。

神作会長　時間も超過しておりますけれども、今の三井先生、松尾先生のコメントも含めて、最後に中東先生にまとめをしていただけますでしょうか。

中東報告者　三井先生、松尾先生の高尚なお話の後に私がどうすればいいのかという感じですが、三井先生が言ってくださったことはとても心強かったです。三井先生から見ても、今やはり制度的に限界に来ていて、さりとてそんなにすぐ解が見つからない状態だということをお教えいただきましたので、頑張って研究しようと思います。ありがとうございました。

神作会長　私の不手際で時間を 10 分ほど超過しております。まだまだ議論は尽きないと思いますけれども、時間が来ておりますので、今日の研究会はこれにて終了したいと思います。中東先生、非常に貴重なご報告ありがとうございました。

次回の研究会についてでございますけれども、お手元の議事次第にございますように、９月７日の午前 10 時から、藤田友敬先生からご報告をいただく予定でございます。

なお、開催方法等につきましては、新型コロナウイルス感染症の状況を見極めながら、また改めて事務局からご案内をさせていただきます。

それでは、本日の研究会はこれにて閉会とさせていただきます。

報告者レジュメ

金融商品取引法研究会 2021/07/27

「敵対的買収防衛策の新局面」

名古屋大学　中東正文

1　序論

この数年、敵対的買収による支配争奪戦が増えてきており、わが国の上場企業の支配権市場が新しい時代に突入したことが示唆されている[1]。これに呼応してか、敵対的買収防衛策を導入している企業は、防衛策の継続・更新を試みようとする傾向にある[2]。

近時の支配争奪戦は、事業会社によるものもあれば、アクティビストによるものもあるが、対象会社の経営陣が対抗措置を取ろうとすると、構造的な利益相反を生じさせるという法的構造において共通している。

この課題に向き合うために、公開買付規制や大量保有開示制度を通して金融商品取引法による対処もなされた。その結果、買収防衛策を非継続（廃止）のリリースにおいては、例えば、「金融商品取引法による大規模買付行為に関する規制が浸透し、株主のみなさまが適切なご判断を行うために必要な情報や時間を確保するという本プラン〔買収防衛策〕の目的が一定程度担保されていること」が非継続・廃止の理由として説明されることが多かった[3]。

他方で、公開買付規制の枠組みは、発行会社が買収防衛策を導入することができることを前提としており、新しい時代の支配権市場に対応するためには、規制の見直しに着手すべきであるとの見解が示されている[4]。

また、近時、アクティビストの活動が活発になってきており、敵対的買収に至

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[1] 石綿学「〔十字路〕新時代の公開買付規制を」日本経済新聞 2021 年 2 月 12 日夕刊。

[2] 「[M&A スクランブル]買収防衛策導入状況----日邦産業、取締役会決議で対抗措置発動も不適法となるか」（2021/04/27）MARR Online< https://www.marr.jp/genre/topics/kaisetsu/entry/28775>。

[3] 小田急電鉄株式会社「当社株式の大規模買付行為に関する対応策（買収防衛策）の非継続（廃止）ならびに定款の一部変更について」（2018 年 5 月 18 日）など。

[4] 石綿学「〔十字路〕新時代の公開買付規制を」日本経済新聞 2021 年 2 月 12 日夕刊。石綿弁護士は、現在の公開買付規制について、「一旦公開買付けを開始した買収者による撤回は著しく制限され、発行会社が配当などで買収者に対抗した場合の価格調整も認められていない。公開買付規制は原則として市場外取引を対象としており、市場内取引は対象外だ」という課題を示しておられる。

る事例も増えてきている。このような活動との関係で、買収防衛策のあり方も再検討する必要が生じてきている。

敵対的買収の文脈では、会社のパーパス（存在意義）が争点になる事例も出てきている。支配権争奪においてステークホルダーの利益を対象会社の経営陣が考慮することが許されるかという伝統的な議論にも、新しい視点が持ち込まれつつある。折しも、資本主義のあり方が改めて問われているところでもある。

パーパスと買収防衛策との関係を考察すると、従来の検討枠組みにも合致する方向性を見いだすことができるとも思われる。詳しくは後述するが、買収防衛策（対抗措置）の発動が許されるのは、強圧性の排除を理由とする場合に限られるか否かが問われている[5]。強圧性の排除という観点から買収防衛策の限界を探る場合にも、パーパスの維持という観点から買収防衛策の限界を探る場合にも、いわゆる「オール・オア・ナッシングオファー」[6]の場合には、買収防衛策の発動は許さないという結論で一致しそうである。

本報告は、以上のような問題意識から、事前警告型買収防衛策の導入状況（２）、アクティビストの活動の活発化（３）を概観して、会社支配市場法制の改正の必要性について、これまでの議論を整理する（４）。その上で、パーパス経営と敵対的買収防衛策との接点について序論的な検討を行い（５）、今後の課題を示したい。

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[5] 例えば、飯田秀総「買収防衛策の有事導入の理論的検討----公開買付けの強圧性への対処」商事法務 2244 号 4 頁（2020 年）は、「公開買付けの強圧性の観点から正当化される有事導入の買収防衛策の検討のみ」に限定して議論する（5 頁）。

[6] オール・オア・ナッシングオファーとは、「特別決議の成立に必要な株式の応募があることを公開買付成立の条件とし、もし公開買付けが成立すれば、すみやかに交付金合併等のフォローアップ取引を行い、残存株式を公開買付価格と同額で取得する、という条件の買収」をいう。田中亘「なぜ私は心配のし通しで防衛策を好きになれないのか」金融・商事判例 1290 号 18 頁（2008 年）。

2　事前警告型買収防衛策の導入状況

2－1　買収防衛策の導入状況の変化

以前に公表した Alan Koh 助教授と Dan Puchniak 准教授との共著論文では[7]、買収防衛策の有効期間の満了を迎えた会社のうち、どれだけの会社が自主廃止をしたかに注目した[8]。M&A による上場廃止に伴う場合などを除外している。と

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[7] Alan K. Koh, Masafumi Nakahigashi & Dan W. Puchniak, Land of the Falling "Poison Pill": Understanding Defensive Measures in Japan on Their Own Terms, 41 U. Pa. J. Int'l L. 687 (2020).

[8] 基礎データは、三井住友信託銀行が取りまとめたものによった。藤本周＝茂木美樹＝谷野耕司「敵対的買収防衛策の導入状況」商事法務 1776 号 46 頁（2006 年)、藤本周ほか「敵対的買収防衛策の導入状況----2007 年 6 月総会を踏まえて」商事法務 1809 号 31 頁（2007 年)、藤本周ほか「敵対的買収防衛策の導入状況〔上〕----2008 年 6 月総会を踏まえて」商事法務 1843 号 42 頁（2008 年)、藤本周ほか「敵対的買収防衛策の導入状況〔下〕----2008 年 6 月総会を踏まえて」商事法務 1844 号 11 頁（2008 年)、藤本周ほか「敵対的買収防衛策の導入状況----2009 年 6 月総会を踏まえて」商事法務 1877 号 12 頁（2009 年)、藤本周＝茂木美樹＝谷野耕司「敵対的買収防衛策の導入状況----コーポレート・ガバナンスの諸規則改正を受けて」商事法務 1915 号 38 頁（2010 年)、藤本周＝茂木美樹＝谷野耕司「敵対的買収防衛策の導入状況----2011 年 6 月総会を踏まえて」商事法務 1948 号 13 頁（2011 年)、藤本周＝茂木美樹＝谷野耕司「敵対的買収防衛策の導入状況----2012 年 6 月総会を踏まえて」商事法務 1977 号 24 頁（2012 年)、茂木美樹＝谷野耕司「敵対的買収防衛策の導入状況----2013 年 6 月総会を踏まえて」商事法務 2012 号 49 頁（2013 年)、茂木美樹＝谷野耕司「敵対的買収防衛策の導入状況----2016 年 6 月総会を踏まえて」商事法務 2120 号 12 頁（2016 年)、茂木美樹＝谷野耕司「敵対的買収防衛策の導入状況----2017 年 6 月総会を踏まえて」商事法務 2152 号 31 頁（2017 年)、茂木美樹＝谷野耕司「敵対的買収防衛策の導入状況----2018 年 6 月総会を踏まえて」商事法務 2185 号 18 頁（2018 年)、茂木美樹＝谷野耕司「敵対的買収防衛策の導入状況ともの言う株主の動向----2019 年 6 月総会を踏まえて」商事法務 2212 号 33 頁（2019 年)、茂木美樹＝谷野耕司「敵対的買収防衛策の導入状況ともの言う株主の動向----2020 年 6 月総会を踏まえて」商事法務 2246 年 27 頁（2020 年)。これらの雑誌に掲載されていない時期のデータについては、茂木美樹氏と谷野耕司氏にご提供いただいた。記して感謝を申し上げる。See Koh, Nakahigashi & Puchuniak, supra note *, at 727 n.154.

りわけ廃止率（attrition rate）に注目すると、2013 年（2012 年 8 月～2013 年 7 月）を境に廃止率が上昇していた。機関投資家の議決権行使基準の厳格化によって、株主総会での賛成票が確保できず廃止を余儀なくされた場合が増加している[9]。ところが、2020 年（2019 年 8 月～2020 年 7 月）は、廃止率が前年に比べて減少に転じている[10]。

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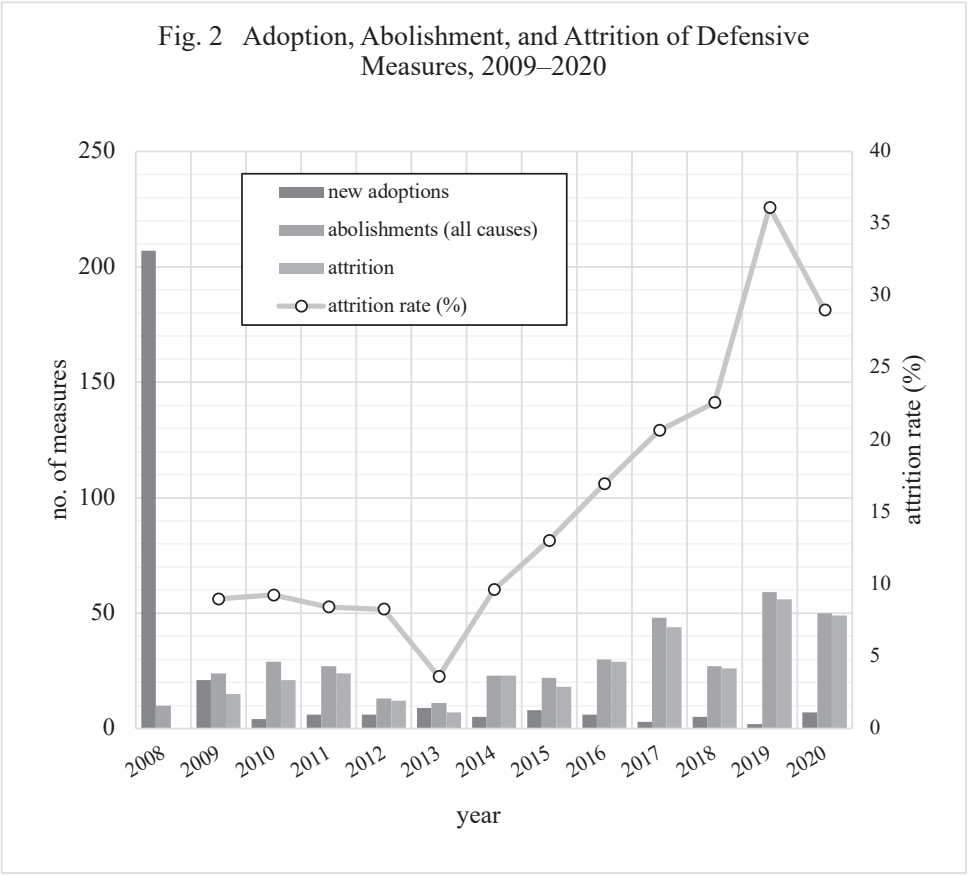
[9] 茂木美樹＝谷野耕司「敵対的買収防衛策の導入状況ともの言う株主の動向----2020 年 6 月総会を踏まえて」商事法務 2246 号 28 頁（2020 年）。

[10] 先の共著論文では、買収防衛策が減少しているにもかかわらず、敵対的買収が 1 件も成功していないことは、「謎（enigma）」であるとして、潜在的な安定株主が存在する可能性のほか、終身雇用制が敵対的買収の何らかの障害になっている可能性を示唆した。とはいえ、敵対的買収を受ける明白かつ現在の危険を日本企業が感じていないのであれば、買収防衛策は不要になるはずであり、導入している会社が数百社あるという事実からすれば、社会的、文化的および法的な観点からの考察では、敵対的買収が成功していない理由を十分に説明することができないとの疑問を残していた。Koh, Nakahigashi & Puchuniak, supra note *, 720-725.

なお、どのような場合に敵対的買収が成功したと定義するかについて、共著論文では、次のような限定を付している（Koh, Nakahigashi & Puchuniak, supra note *, at 720 n. 129）。ニトリの島忠に対する公開買付けは、この定義のもとでも成功した敵対的買収とみることができる。

> We define a successful hostile takeover as one where 1) the bid is unsolicited and actively opposed by incumbent management; 2) the bid satisfies the mandatory bid rule trigger (i.e. aimed at acquiring at least two-thirds of the company's shares); 3) the bid achieves its objectives; and 4) the bidder replaces incumbent senior management, including the board.

【表】 Koh, Nakahigashi & Puchuniak, 41 U. Pa. J. Int'l L. 743 Fig. 2 (2020) を改訂[11]



[11] 2019 年および 2020 年の数値を、茂木美樹＝谷野耕司「敵対的買収防衛策の導入状況ともの言う株主の動向----2020 年 6 月総会を踏まえて」商事法務 2246 号 27-28 頁（2020 年）、茂木美樹＝谷野耕司「敵対的買収防衛策の導入状況ともの言う株主の動向----2019 年 6 月総会を踏まえて」33-34 頁（2019 年）をもとに追加した。

【表】 Koh, Nakahigashi & Puchuniak, 41 U. Pa. J. Int'l L. 752-753 [Table. 2] (2020)を改訂[12]

Year	2014	2015	2016	2017	2018	2019	2020
Cos. w/ active measures	494	479	453	408	386	329	284
As % of all listed	N.A.	13.4	12.5	11.2**	10.4	8.8	7.5
New measures adopted, previous 12 months	5	8	6	3	5	2	7
Measures introduced (cumulative)	639*	647	653	656	661	663	670
Measures abolished, previous 12 months	23	23	32	48	27	59	50
Measures abolished (cumulative)	145*	168	200	248	275	334	386
Measures expiring, previous 12 months	239†	138	171	213	115	155	169
Attrition, previous 12 months[254]	23†	18	29	44	26	56	49
Attrition rate, previous 12 months (%)	9.62†	13.04	16.96	20.66	22.60	36.13	28.99

[Table 2] Trends in Defensive Measures in Corporate Japan, 2008–2018

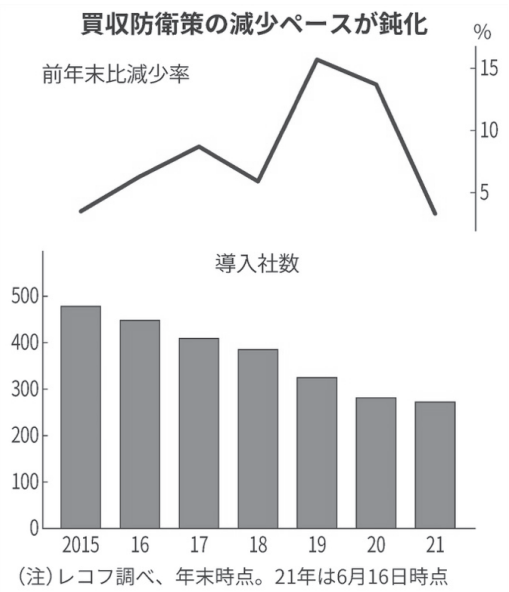
〔2014-2018を抜粋し、2019-2020を追加〕

Source: compiled from Sumitomo Trust Bank reports in Shōji Hōmu, 2006–2018 (excluding 2014).

[12] 2019 年および 2020 年の数値を、茂木美樹＝谷野耕司「敵対的買収防衛策の導入状況ともの言う株主の動向----2020 年 6 月総会を踏まえて」商事法務 2246 号 27-28 頁（2020 年）、茂木美樹＝谷野耕司「敵対的買収防衛策の導入状況ともの言う株主の動向----2019 年 6 月総会を踏まえて」33-34 頁（2019 年）をもとに追加した。

さらに 2021 年の株主総会シーズンでは、この動きが加速した。例えば、レコフの集計をもとに、次のような分析がされている[13]。

> Ｍ＆Ａ（合併・買収）助言のレコフが６月１６日時点のデータを集計した。買収防衛策は可否を株主総会に諮る企業がほとんどで、通年の導入社数は６月でほぼ固まる。２１年は京阪ホールディングスや平和不動産などが廃止を決め、導入社数は２７２社と前年比３・２％減で、前年の減少率（１３・５％）を大きく下回った。ピークの０８年から５割強減ったものの、年間の減少幅は企業統治改革が本格化した１５年以降では最も小さい。



（日本経済新聞 2021 年 6 月 18 日朝刊）

[13] 「買収防衛、減少鈍る、今年９社どまり、『敵対的』に備え」日本経済新聞 2021 年 6 月 18 日朝刊。

２－２　買収防衛策の設計の変化

買収防衛策の設計にも変化が見られる。

注目されるのは、有事における株主意思の確認のための手続の有無であろう。すなわち、2020 年（2019 年 8 月～2020 年 7 月）においても、「買収防衛策の発動時に、株主総会を開催することにより株主意思の確認を行う仕組みのある会社は 89 社（継続した会社 119 社の 74.8%）であり、これらの会社が前回継続した時は 82 社（同 68.9%）であったのと比較して、5.9 ポイント増加している。ブルドックソース事件最高裁決定を踏まえ、また機関投資家の賛同を得るため、買収防衛策の発動時に株主意思を確認する仕組みを持つ会社は確実に増加している」[14]。

なお、導入について、基本的には株主総会での導入が多数であるが、事案の性質から、取締役会で導入を決定する例もある。この点については、特定標的型の買収防衛策の分析との関係でも、考察が必要であろう。従前の事前警告型買収防衛策のように、発動の時点まで敵対的買収者が特定されていないのであれば、導入時に株主総会で決議されていることの意味がどの程度あるのか、他方で、発動時に株主総会の承認が得られることの方が重要ではないかが、特定標的型の買収防衛策の設計については問われるであろう[15]。

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[14] 茂木美樹＝谷野耕司「敵対的買収防衛策の導入状況ともの言う株主の動向----2020 年 6 月総会を踏まえて」商事法務 2246 号 28 頁（2020 年）。2019 年においては、「株主意思の確認を行う仕組みのある会社は 78 社（継続した会社 96 社の 81.3%）であり、これらの会社が前回継続した時は 59 社（同 61.5%）であったのと比較して、大幅に増加している」（茂木美樹＝谷野耕司「敵対的買収防衛策の導入状況ともの言う株主の動向----2019 年 6 月総会を踏まえて」34 頁（2019 年））。2018 年においては、「株主意思の確認を行う仕組みのある会社は 62 社（継続した会社 89 社の 69.7%）であり、これらの会社が前回継続した時は 57 社（同 64.0%）であったのと比較して、若干増加している」（茂木美樹＝谷野耕司「敵対的買収防衛策の導入状況----2018 年 6 月総会を踏まえて」19 頁（2018 年））。

[15] 太田洋弁護士らは、「本件防衛策〔東芝機械の防衛策〕の導入は、取締役会の決議によるものであって、株主総会の承認を得ていないが、……株主意思確認総会の開催前に（公開買付期間を延長せずに）本件公開買付けを終了させるといった例外的な場合でない限り、本件対抗措置の発動には株主意思確認総会

この点にも関係して、富士興産事件が係属中であり、東京地裁令和 3 年 6 月 23 日決定では、取締役会限りで導入及び発動した対抗措置の差止仮処分が認められなかった[16]。この事件では、定時株主総会での株主意思の確認が予定されており、対象会社が株主意思確認総会を終えるまで公開買付期間の延長を要求し、公開買付者が応じている。その後、富士興産の株主意思確認総会では、買収防衛策の導入及び対抗措置の発動が承認されていた（導入及び発動の賛成割合は、それぞれ 66.08%及び 66.18%）[17]。買収者は東京地裁決定に対して即時抗告をしている。

3　アクティビストの活動の活発化

3－1　アクティビストの活動への懸念

における承認が必須であるとされているため、防衛策の導入時にあえて株主総会決議による承認を得ておく必要性がないとの考慮によるものである」とされる（太田洋＝松原大祐＝政安慶一「東芝機械の『特定標的型・株主判断型』買収防衛策について〔上〕----いわゆる有事導入型買収防衛策の法的論点の検討」商事法務 2240 号 12 頁（2020 年））。また、「本件防衛策のような、『特定標的型』かつ『株主判断型』の買収防衛策は、すでに具体化している特定の買収者による買収提案に応じるか否かを株主が判断するための時間と情報を確保するためのものであるため、一般的には、機関投資家を含む株主の理解をより得やすいのではないかと思われる」と説かれている（太田洋＝松原大祐＝政安慶一「東芝機械の『特定標的型・株主判断型』買収防衛策について〔下〕----いわゆる有事導入型買収防衛策の法的論点の検討」商事法務 2241 号 44 頁（2020 年））。

[16] アスリード・キャピタル「東京地方裁判所による新株予約権無償割当差止仮処分命令の申立ての却下決定及び即時抗告申立てに関するお知らせ」（2021 年 6 月 23 日）<https://www.aslead.com/fujikosan/Aslead_Fujikosan_Press_20210623.pdf>。

[17] 富士興産「臨時報告書」（2021 年 6 月 29 日）。これに合わせて、公開買付けの撤回事由に該当する基準の特別配当が承認されている（賛成割合は、99.30%）。

近時、アクティビストの活動が活発になっており、次のような懸念が示されている[18]。

> サン電子、東京ドーム、レオパレス 21、東芝、ヨロズ等への臨時株主総会招集請求や、東芝機械、京阪神ビルディング、日本アジアグループ等に対する敵対的公開買付けなど、強硬な手法による行動が目立ち、日本企業におけるアクティビストに対する警戒感は高まっているといえる。……
>
> ……わが国においては、アクティビストといっても玉石混交であり、対象企業の事業内容を適切に理解し、建設的で企業価値向上に資する提案をするアクティピストばかりではない。……こうしたアクティビストの活動が企業価値向上につながっているかというと疑問がある。
>
> ……日本企業としては、アクティビストの対象にならないことが望ましいが、そのためには、自社のことをよく理解し、アクティビストに狙われにくい会杜になっておくことが最も重要である。

この状況に対応するため、上場会社が買収防衛策を具備する必要性はこれまで以上に高まっている。にもかかわらず、一般的・包括的なすべての株主・投資家を対象とする平時導入型買収防衛策（いわゆる事前警告型買収防衛策）については、機関投資家の議決権行使基準が厳格化していることなどにより、その株式保有比率が相応に高い上場会社では、漫然と導入・更新することは許されない状況である。そのため、平時導入型買収防衛策の導入数は昨年度に引き続き低下し、多くの上場会社では買収防衛策を廃止しているとされる[19]。

３－２　アクティビストによる Bumpitrage

近年、アクティビストによる Bumpitrage に対する関心が高まっている[20]。

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[18] 「(スクランブル) アクティビストは日本企業の企業価値を高めるのか」商事法務 2258 号 66 頁（2021 年)。

[19] 以上について、磯野真宇＝秀永祐介「買収防衛策をめぐる近時の動向----2020 年株主総会を中心に」資料版商事法務 440 号 78 頁（2020 年)。

[20] 富士フイルムＨＤ＝ゼロックス事件を手掛かりにアクティビストの

Bumpitrage は造語であり、おそらくは「bump」が語幹で、M&A 発表直後での株価上昇（bump in stock price） と「arbitrage」からなるものであると推察される[21]。このほか、「衝突（バンプ）とさや取り売買（アービトラージ）の造成語」とするものもある[22]。

太田洋弁護士、野田昌毅弁護士、濵田啓太郎弁護士によれば、アクティビストによる Bumpitrage に対する対応が、実務では喫緊の課題となっている[23]。

> 富士フィルム HD＝ゼロックス事件は、M&A にアクティビストが介入したことで、当事者が当初想定していた取引が不成立に追い込まれた事案である。……今後グローバルに M&A を展開していく日本企業においても、アクティビストによる Bumpitrage はもはや対岸の火事といったレベルの問題ではない。
>
> ……
>
> 本件のようにすでにアクテイビストが対象会社の株主として存在している事案はもちろん、M&A のストラクチャーがアクティビストにとって標的としやすいものである場合（例えば、MBO や上場子会社の完全子会社化等の構造的な利益相反取引）には、取引公表後におけるアクティビストの介入も見込まれ、Bumpitrage の標的となるリスク（条件変更や取引不成立リスク）が高まる。

Bumpitrage について検討するものとして、太田洋＝野田昌毅＝濵田啓太郎「富士フイルムＨＤ＝ゼロックス事件の分析と我が国Ｍ＆Ａ法制・実務への教訓〔上〕〔下〕」金融・商事判例 1614 号 2 頁、1615 号 2 頁（2021 年）。この論文に対するコメント論文として、中東正文「我が国のＭ＆Ａ法制における Bumpitrage への対応」金融・商事判例 1615 号 12 頁（2021 年）。

[21] 中東正文「我が国のＭ＆Ａ法制における Bumpitrage への対応」金融・商事判例 1615 号 15 頁（注 1）（2021 年）。Nanyang Technological University （シンガポール）の Alan K Koh 助教授からお教えいただいた。

[22] オーウェン・ウォーカー（染田屋茂訳）『アクティビスト----取締役会の野蛮な侵入者』44 頁（日経 BP、2021 年）の訳注。同書では、Bumpitrage について、「買収の最終段階にアクティビストが介入して、買収額の増額を要求する手法」であると説明されている（44 頁）。

[23] 太田洋＝野田昌毅＝濵田啓太郎「富士フイルムＨＤ＝ゼロックス事件の分析と我が国Ｍ＆Ａ法制・実務への教訓〔下〕」金融・商事判例 1615 号 3-4 頁（2021 年）。

アクティビストの手法が洗練されてきた様子について、松原大祐弁護士と野澤大和弁護士は、次のように説かれている（強調は中東）[24]。

> 日本において、かつては、経営陣と対立した結果、敵対的買収により経営権取得を試みるアクテイビストがみられたが、かかる手法は、敵対的買収が一般的でなかった当時の日本の状況のもとでは、他の機関投資家からの賛同を得られず、またレピュテーション上もマイナスであり、近時は、このような経営権取得を目的とする手法は稀である。
>
> 近時のアクテイビストは、通常、上場会社の株式の一定割合（数%程度）を保有したうえで、他の株主の賛同を得るためにさまざまな手法を駆使する。
>
> ……
>
> 以上は、最終的に投資先企業の株主総会において他の機関投資家の賛同を得ることを念頭に置いたアクテイビストの手法であるが、これに加えて、近時、アクテイビストによる M&A 取引への介入も散見される。特に、マネジメントバイアウトや親会社による上場子会社の完全子会社化等の経営陣または支配株主と少数株主との間の構造的な利益相反が存在する M&A 取引において、アクテイビストは、TOB 価格や交換比率が少数株主にとって不利に設定されている（プレミアムが十分ではない）等と主張して、TOB 価格の引き上げやストラクチャーの変更等を要求することがある。そして、アクテイビストは TOB 価格の引き上げ等を目的としたバブリックキャンペーンを実施したり、場合によっては対抗 TOB の実施（またはその実施を示唆）したりすることがある。このような構造的な利益相反のある M&A 取引に介入して TOB 価格の引き上げ等を求めることは、近時関心が高まっている少数株主の保護という観点から、投資先企業を攻撃しやすく、また、他の株主からの賛同も得やすいためにアクテイビストが採用する手法の 1 つとなっている。

このような実務家の懸念が顕在化したのが、東芝機械（現・芝浦機械）につい

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[24] 松原大祐＝野澤大和「アクティビストの動向」ビジネス法務 2021 年 2 月号 71-72 頁。

て、また、日本アジアグループについて行われた支配争奪戦であるかもしれない。いずれもシティインデックスイレブンス（以下「シティ」という。）によって敵対的な公開買付け等がなされた。東芝機械事件は、事前警告型買収防衛策を廃止した直後にアクティビストに標的にされた事例であると理解されている[25]。シティによる敵対的公開買付けの予告は、東芝の完全子会社が東芝機械の持分法適用会社を完全子会社化するための公開買付けを契機とするものであった。また、日本アジアグループ事件は、MBO の実施中に敵対的な公開買付けの対象となった事例である。

いずれの事件でも、対象会社は、特定標的型の買収防衛策を導入して、シティの買収を阻止しようとした[26]。東芝機械事件では、買収防衛策が取締役会の決議で導入され、買収防衛策に基づく対抗措置の発動が株主意思確認総会で承認されたため（差別的行使条件付新株予約権の無償割当て）、シティが公開買付けを撤回した。本件は、有事において既に具体化している特定の行為のみを対象として一定の手続の遵守を求める買収防衛策が導入された初めての事例であるとされる[27]。

日本アジアグループ事件では、東芝機械と同様の設計の買収防衛策が取締役会の決議で導入され、これに基づく対抗措置の発動も、株主意思確認総会の決議を経ることなく、取締役会で決定された[28]。シティが発動の適法性を争い、東京地裁に差止めの仮処分の申立てを行った。次のような経過を経て、最終的には、日本アジアグループによって新株予約権の無償割当てが中止されている。その後、シティは、予告していた公開買付けを開始することを決定した。

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[25] 松原大祐＝政安慶一＝白澤秀己「日本における敵対的買収を取り巻く制度②」ビジネス法務 2021 年 5 月号 142 頁。

[26] 太田洋＝松原大祐＝政安慶一「東芝機械の『特定標的型・株主判断型』買収防衛策について〔上〕〔下〕----いわゆる有事導入型買収防衛策の法的論点の検討」商事法務 2240 号 10 頁、2241 号 38 頁（2020 年）。

[27] 太田洋＝松原大祐＝政安慶一「東芝機械の『特定標的型・株主判断型』買収防衛策について〔上〕----いわゆる有事導入型買収防衛策の法的論点の検討」商事法務 2240 号 10 頁（2020 年）。

[28] 一連の経緯については、日本アジアグループのウェブの IR ニュースを参照されたい。また、太田洋「日邦産業事件および日本アジアグループ事件と買収防衛策の今後〔下〕」商事法務 2265 号 19-20 頁（2021 年）も参照。

2021/03/24	シティ、東京地裁に差止め仮処分の申立て
2021/04/02	東京地裁、差止め仮処分を決定
2021/04/05	JAG、保全異議の申立て
2021/04/07	東京地裁、仮処分決定を認可
2021/04/08	JAG、保全抗告の申立て
2021/04/23	東京高裁、保全抗告を棄却
2021/04/26	JAG、新株予約権の無償割当てを中止

4　会社支配市場法制の改正の必要性

4－1　買収防衛策の必要性

東芝機械事件において、敵対的買収者であるシティは公開買付けを撤回しているが、このことのみによっては、買収防衛策の設計や導入・発動の手続が適法であることが裏付けられるものではない。とはいえ、この事案においては、買収防衛策が必要とされ、しかも一定の防衛の効果を生じたと言えるであろう。

また、日本アジアグループ事件においても[29]、裁判所が同じ設計の買収防衛策を、どのような事例においても違法とするものではないと思われる。というのも、保全抗告を棄却した東京高裁令和3年4月23日決定でも、①MBOの開始、②シティによる競合する敵対的公開買付けの開始、③MBOの撤回、④日本アジアグループによる特別配当、重要な子会社株式の譲渡の公表、⑤シティの公開買付けの撤回、⑥買収防衛策の導入、⑦シティによる市場内外における大量買付けの継続、⑧買収防衛策の発動という、一連の支配権を巡る争いが強調されているからである。このような背景が存しない、あるいは重視されない事案であれば、買収防衛策の発動に基づく新株予約権の無償割当ての差止め仮処分が認められなかった可能性もある。

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[29] 東京地裁令和3年4月2日決定〔原審（保全異議）〕資料版商事法務446号166頁、東京地裁令和3年4月7日決定〔保全異議審（保全抗告）〕資料版商事法務446号163頁、東京高裁令和3年4月23日決定〔抗告抗告審（確定）〕資料版商事法務446号154頁。

実際、東京高裁（保全抗告審）は、次のように判示して、強圧性の議論に対しては理解を示して、慎重な検討をしている（強調は中東）。

> 抗告人〔日本アジアグループ〕は、株式の市場内外買付けを通じた買収では、対象会社の株主に対し、望まぬ株式売却を強いる効果（いわゆる強圧性）があるので、抗告人にはこれを排除する目的があったなどと主張する。
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> たしかに、対象会社の株主が買収に応じないでいる間に買収が実現すると、当該株主は、買収に応じた場合と比べて不利益を被ると予想されるために、株主が買収に応じるような圧力を受けるという事態は、理論上想定されるところであり、そのような強圧性のある買収手法に一定の対処をすべきであるという主張自体は、理解できる面がある。したがって、抗告人に、強圧性のある買収手法を排除する目的があったとの主張は、客観的には理解できないではないところである。
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> しかし、強圧性の程度を実証的かつ定量的に把握することは困難である上、買収手法等により強圧性の程度には差があり得ることが指摘されている。そして、前記認定事実によれば、本件において、相手方〔シティ〕は、再公開買付けを実施する予定である旨を公表した際、再公開買付け前の株式の市場内外買付けは抗告人株式の議決権割合の３分の１までしか行わず、その後の買付けは再公開買付けにおいて行うことを明言しており、市場内外買付けによる強圧性については相応の配慮がされているものである。また、再公開買付けは、買付予定数に下限が設定されていないが、他方、買付予定数には上限も設定されず、再公開買付け終了後の議決権割合が３分の２以上となった場合には、全株買付けとその後の公開買付価格と同額によるスクイーズアウト（締出し）が予定されており、強圧性の程度は必ずしも高くないか、又は強圧性の減少のために相応の措置がとられているといえるものである。
>
> したがって、客観的には、抗告人に強圧性のある買収手法を排除する目的があった可能性は否定することができないが、仮にこれがあるとしても、その目的自体弱いものというべきである。

この東京高裁の判示は、一定の場合には、裁判所としても買収防衛策の発動を認める余地があることを示していると理解することができる。そして、発動を認

めるべき場合の一つとして、強圧性が高いにもかかわらず、その減少のための相応の措置がとられていない場合が想定されている。

また、日邦産業事件においては[30]、新株予約権の無償割当てによる対抗措置が発動された事例として、ブルドックソース事件に続くものであるが、株主意思確認総会を経ずに、取締役会限りで発動を決定している[31]。

2021/03/08	日邦産業、新株予約権の無償割当てを決定
2021/03/11	FM、名古屋地裁に差止め仮処分の申立て
2021/03/24	名古屋地裁、差止め仮処分を決定
2021/03/25	日邦産業、保全異議の申立て
2021/04/07	名古屋地裁、仮処分決定を取消
2021/04/09	FM、保全抗告の申立て
2021/04/22	名古屋高裁、保全抗告を棄却
2021/04/25	FM、抗告許可および特別抗告の申立て
2021/05/14	名古屋高裁、不許可決定
2021/05/20	FM、抗告不許可決定について特別抗告

以上のように、一定の場合に、買収防衛策を導入・発動する必要があり、しかも法的に許容され得ることが、近時の裁判例においても示されている。このことは、会社資本市場法制が、制定法だけでは十分に整備されていないことをも意味している。

設計に関する実務では、対抗措置の発動に株主意思確認総会を必要とする傾向があるのに対して、他方で、実際の発動は取締役会の決議のみでも許容する裁判例がある[32]。

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[30] 名古屋地裁令和 3 年 3 月 24 日決定〔原審（保全異議）〕資料版商事法務 446 号 152 頁、名古屋地裁令和 3 年 4 月 7 日決定〔保全異議審（保全抗告）〕資料版商事法務 446 号 144 頁、名古屋高裁令和 3 年 4 月 22 日決定〔保全抗告審（許可抗告（不許可）、特別抗告）〕資料版商事法務 446 号 138 頁。

[31] 太田洋「日邦産業事件および日本アジアグループ事件と買収防衛策の今後〔上〕」商事法務 2264 号 22 頁（2021 年）を参照。

[32] 宮川克也「緊急の買収策に待った：総会経ず発動、司法が差し止め　市場ル

４－２　買収防衛策の目的

近時は、特定の敵対的買収者を念頭に置いた「特定標的型」の買収防衛策が注目されている。最初に用いられた特定標的型の買収防衛策は、東芝機械事件におけるものであろう。その後、日邦産業事件（導入に株主総会決議あり）、日本アジアグループ事件、富士興産事件でも、特定標的型の買収防衛策が発動され、これらの事例では差止仮処分の申立てがなされて、裁判所の見解も示された。

東芝機械事件の買収防衛策を設計した太田洋弁護士らによれば、「本件防衛策の基本的なコンセプトは、……事前警告型買収防衛策と同様、東芝機械の株主が、大規模買付行為等がなされることを受け入れるか否かについて適切な判断を下すために、十分な情報と検討時間を確保すべく、大規模買付者に対して、一定の手続を遵守することを求めるものである」[33]。

さらに、公開買付けの強圧性を排除するという目的もある[34]。前述の日本アジ

ール、見直し論も」日本経済新聞 2021 年 5 月 24 日朝刊参照。日本アジアグループ事件と日邦産業事件の原審決定について、太田洋弁護士は、「両社の防衛策はそれぞれ構造が大きく異なっており、具体的な事案の経緯もまったく違うため、この二件を同列に論じるのは不適切ではあるが、これらはいずれも、取締役会限りでの対抗措置の発動が適法と認められるのではないかと従来実務が想定していた類型につき、発動が不適法と認められたもので、企業法務の現場には大きな衝撃が走った」とされる。太田洋「日邦産業事件および日本アジアグループ事件と買収防衛策の今後〔上〕」商事法務 2264 号 22 頁（2021 年）。

[33] 太田洋＝松原大祐＝政安慶一「東芝機械の『特定標的型・株主判断型』買収防衛策について〔上〕----いわゆる有事導入型買収防衛策の法的論点の検討」商事法務 2240 号 12 頁（2020 年）。また、「本件防衛策は、ブルドックソース事件における買収防衛策のように、買収提案の内容に踏み込んだ実質的な判断を下して、対抗措置の発動により買収を阻止する目的ではなく、買収提案について基本的に株主意思確認総会にその判断を委ねることを前提に、株主の判断に必要な十分な情報と検討時間を確保することを主たる目的とする」とされる。太田洋＝松原大祐＝政安慶一「東芝機械の『特定標的型・株主判断型』買収防衛策について〔下〕----いわゆる有事導入型買収防衛策の法的論点の検討」商事法務 2241 号 38 頁（2020 年）。

[34] 太田洋＝松原大祐＝政安慶一「東芝機械の『特定標的型・株主判断型』買収

アグループ事件に関する東京高裁令和 3 年 4 月 23 日決定（保全抗告審）でも、ニッポン放送事件の東京高裁決定[35]の判断枠組みにおいてであるが、「客観的には、抗告人〔日本アジアグループ〕に強圧性のある買収手法を排除する目的があった可能性は否定することができない」としている。

４－３　会社支配市場法制の不備と買収防衛策の許容

４－３－１　関係法制の再構築の必要性

飯田秀総准教授は、公開買付けの強圧性に注目して、これに対処するための買収防衛策の有事導入について検討され、次のように述べておられる[36]。

> この強圧性の問題については、本来的には、金融商品取引法（……）における公開買付規制において対処するべきであると考えられるが、十分な対応がされているとはいえない（4 頁）
>
> ……
>
> 公開買付けの強圧性に対して買収防衛策による対処は次善の策にすぎな

防衛策について〔上〕〔下〕----いわゆる有事導入型買収防衛策の法的論点の検討」商事法務 2241 号 40 頁（2020 年）。

[35] 東京高裁は、「相手方〔フリージア・マクロス〕は、本件買収防衛策が取締役会決議限りの買収防衛策の発動事案であることを前提に、ニッポン放送事件東京高裁決定（東京高裁平成 17 年 3 月 23 日決定・判例時報 1899 号 56 頁）の判断枠組みにより、本件新株予約権無償割当てが会社法 247 条 2 号の不公正発行に当たる旨主張するので、検討する」としている。この判断枠組みの設定が妥当であったか否かは議論の余地があろう。取締役会決議による発動であっても、ブルドックソース事件の最高裁決定（最決平成 19 年 8 月 7 日民集 61 巻 5 号 2215 頁）の判断枠組みを用いるべきであったとも思われる（太田洋＝松原大祐＝政安慶一「東芝機械の『特定標的型・株主判断型』買収防衛策について〔下〕----いわゆる有事導入型買収防衛策の法的論点の検討」商事法務 2241 号 39-40 頁参照（2020 年）〔最高裁決定は、買収防衛策の発動について株主総会決議による承認が不可欠でしたものではないと解すべきである〕）。

[36] 飯田秀総「買収防衛策の有事導入の理論的検討----公開買付けの強圧性への対処」商事法務 2244 号 4 頁（2020 年）。

い。現行法下では、本稿で述べた限りで買収防衛策による対応は適法と考えるべきであるが、将来的には公開買付規制によって立法的に解決され、本稿で示した解釈論が過渡期的なものとしての役割のみを果たすことが好ましい。（12 頁）

飯田秀総准教授が示唆されているように、買収防衛策が一定の範囲で必要とされており、これが許容されるべきという状況は、法制度としては最善なものとは言えず、関係法制を再構築することが期待される。どのように再構築すべきかは、従前も議論があり、本報告においては、これまでに示されている基本的な方向性の幾つかを取り上げるに留める。活発に議論され出してからほどなく、事前警告型買収防衛策が次第に普及していき、また、敵対的買収の具体的な案件も減ったこともあったか、現在においても当時の議論がそのまま残された状態であると思われる。

以下では、会社支配市場に関する法規制のうち、証券法制（金融商品取引法等）と会社法制を順にみていく。両者の役割分担は比較法的にも所与ではない[37]。これら二つの法制度が交錯する形で、会社支配市場に関する法制度は設計されている[38]。

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[37] 大杉謙一「M&A 取引における株主保護法制の各国比較〔上〕〔下〕----日本法・ドイツ法・アメリカ法を中心に」商事法務 2202 号 6 頁、2203 号 11 頁（2019 年）参照。会社支配市場の法規制には、理念型を大別するとすれば、欧州型の法規制と米国型の法規制が存在する。中東正文「結合企業法制と買収防衛策」森本滋編著『企業結合法の総合的研究』103 頁（商事法務、2009 年）。

[38] 中東正文「結合企業法制と買収防衛策」森本滋編著『企業結合法の総合的研究』105-107 頁（商事法務、2009 年）。参照。また、中東正文「会社支配市場に関わる法規制の再構築」江頭憲治郎＝碓井光明編『法の再構築 I----国家と社会』41 頁（東京大学出版会、2007 年）、中東正文「会社支配市場に関する法の再構築の方向性----英米法諸国を参考にして----」尾崎安央＝川島いづみ編『比較企業法の現在----その理論と課題（石山卓磨先生・上村達男先生還暦記念）』151 頁（成文堂、2011 年）も参照。

４－３－２　証券法制の課題

（１）公開買付規制

＜課題０＞不断のアップデートの必要性

○石綿学「〔十字路〕新時代の公開買付規制を」日本経済新聞 2021 年 2 月 12 日夕刊

公開買付規制は、支配権市場の新時代に対応しているのだろうか。現在の公開買付規制の基本的枠組みがつくられたのは 2006 年。06 年といえば敵対的買収のリスクが強調され、企業がこぞって買収防衛策を導入した年だ。公開買付規制の枠組みも、発行会社が買収防衛策を導入できることを前提としている。また、一旦公開買付けをした買収者による撤回は著しく制限され、発行会社が配当などで買収者に対抗した場合の価格調整も認められていない。公開買付規制は原則として市場外取引を対象としており、市場内取引は対象外だ。

そもそも M&A（合併・買収）とは生き物である。M&A を規律する法制度は、その時々における M&A のニーズと株主その他の関係者の利害、法規制による M&A 阻害効果などを勘案しながら、不断にアップデートすることが求められる。支配権争奪戦が珍しくなくなった今、わが国の公開買付規制の見直しに着手すべきではなかろうか。

＜課題１＞義務的公開買付と全部買付義務が連動していない。

○飯田秀総「公開買付規制・大量保有報告規制の課題」ジュリスト 1512 号 50 頁（2017 年）

日本の公開買付規制は，米国法をベースに導入され，その後，英国の制度を参考にするなどしていわゆる 3 分の 1 ルールが導入された。その結果，部分買付けを容認しつつ強制公開買付制度を規定するという比較法的にも珍しい制度となっている。その一例としては，ヨーロッパ型の義務的公開買付制度は，支配権を取得した後に，公開買付けが義務づけられるという事後

規制型であるのと比較すると，日本法は、3 分の 1 超を取得する際には相対取引を使うことが禁止され，公開買付けによらなければならないという事前規制型であることがあげられる〔注 45：藤田友敬「支配株式の取得と強制公開買付----強制公開買付制度の機能」岩原紳作ほか編『会社・金融・法〔下巻〕』40 頁（商事法務、2013 年)〕。このような特徴は，筆者が知る限り，日本独自のものである。そのため，公開買付規制の設計として諸外国の諸概念・制度を参考にする際には，それを日本法の特徴に合わせる形で導入しなければならないはずである。また，日本でも公開買付けの実例が集積し実例から明らかになる論点も数多い。このような観点からみると立法論的に再検討が必要なものが少なくない。

○藤田友敬「支配株式の取得と強制公開買付----強制公開買付制度の機能」岩原紳作ほか編『会社・金融・法〔下巻〕』（商事法務、2013 年）

買収防衛策の規制と強制公開買付制度は、理論的にも密接に関連する。……ヨーロッパ型の公開買付規制をとる場合、企業価値を損ねるという理由から現経営陣による買収防衛を容認する理由は考えにくい。それは公開買付費用を勘案する場合であっても同じである。その結果、……強圧性について配慮する形で強制公開買付制度の細部が組み立てられた場合、経営者による買収防衛策の発動を制限すべきであるという主張につながりやすい。現に EU 公開買付指令では、同指令に従った公開買付がなされる場合に、対象会社取締役会が買収防衛策を講じる際には、事前に株主総会の承認を得ることを要求し、取締役会の決定による防衛策の発動を禁止している（対象会社取締役会の中立性)。（65-66 頁）

わが国のような部分買付を容認する強制公開買付制度にも、企業価値を下げる買収を抑止する機能はある。しかし、支配株主が存在する場合とは異なり、支配株主が存在しない状態での買収の場合には、たとえ強圧性の問題が存在しなくとも、企業価値を下げる買収が生じる可能性がある。まして強圧性を緩和する機能が含まれていないわが国の強制公開買付制度では、企業価値を下げる買収を十分に抑止できない可能性がある。このような法制のもとでは、買収防衛策を一律に禁止しないことにも理由がないわけではない。（66 頁）

企業価値を下げる買収の抑止を、強制公開買付制度を通じて行うか、買収

防衛策を通じ行うかは、後述のように、企業買収の規制をエンフォースする主体の選択ともかかわってくる(……)。(66 頁)

○浜田道代「差別的行使条件・差別的取得条項付新株予約権無償割当てによる買収防衛策と株主平等原則(2・完)----ブルドックソース事件----」民商法雑誌 139 号 329 頁(2008 年)[39]

イギリスでも、敵対的公開買付けの対象会社の現経営陣は、株主総会の承認を得た上であれば、対抗措置をとることが許される。それに加えて、公開買付けに応じるか否かに関しても、株主の自由な選択が歪められることがないように、次のルールが設けられている。公開買付けの締切日までに買付者の持株の議決権が過半数になる目処がたって公開買付けが成功した場合には、公開買付けの確定宣言をしなければならず、かつ確定宣言をしたときは、締切日から 14 日間は、さらに公開買付けを受け付けなければならない。この手続を定める目的は、公開買付けが成功するのであれば少数株主として会社に残ることを望まない株主に対して、公開買付けの成否に関する結果を見た上で、公開買付けに応じる機会を再度保障することにある。

この、一見複雑であるが運用は容易な手続を、法律で定めておけば、強圧的買収は行いにくくなる。株主は、敵対的公開買付けにつき現経営陣を支持するけれども、買収が成功してしまうのであればもはや少数株主として止まりたくないと考える場合に、そのようにする選択肢が保障される。このような手続は、日本の公開買付規制にも導入することが望ましい。そうすれば、現経営陣を支持する株主が、やむを得ず公開買付けに応じる事態を避けることでてきる。しかも、全部買付義務が課されている限り、この手続によって株主に対し結果を見た上での離脱権を保障しようとも、買収者に追加的な負担を課すことにはならない。

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[39] 田中亘教授は、「延長期間の設定を強制する規制は、英国その他の国で現に制度化されていることからも、より実現が容易であると考えられる。全部買付けの買付者は、初めから全株式の取得を意図して(そのための買収資金も用意して)公開買付けを行っているはずであるから、延長期間を設定し、その期間中に応募をした者の株式を買い取ることを強制したとしても、買付者に対して過度な追加的負担を課すことにはならないはずである」とされる。田中亘『企業買収と防衛策』419 頁(商事法務、2012 年)

○黒沼悦郎「公開買付規制の理論的問題と政策問題」江頭憲治郎編『株式会社法体系』（有斐閣、2013 年）

支配権の移転が生じると想定される議決権割合(30%、3 分の 1 など）を基準値とする義務的公開買付けをわが国へ導入することには、賛成できない。(553 頁）

……全部買付義務では公開買付けに応募しなかった株主の株式は買い付けられないので、公開買付成立後に、短期間の追加応募期間を設けた上で、現行の全部買付義務制度を存続させることに賛成したい。(553-554 頁）

＜課題 2 ＞市場買付けが公開買付規制に服さない[40]。

○太田洋「日邦産業事件および日本アジアグループ事件と買収防衛策の今後〔下〕」商事法務 2265 号 23-24 頁（2021 年）（強調は中東）

本件〔日本アジアグループ事件〕で CI11〔シティ〕らは、第一次 TOB の撤回（3 月 3 日）直後から第二次 TOB の予告公表（3 月 17 日） までの間、市場で日本アジア株式を急速に買い上がっているが、これに対して、機動的に対応策を講じること（言い換えれば、取締役会限りで対応策を講じること）が認められなければ、実質的に、「支配権プレミアムの株主に対する公正な分配」というわが国の強制 TOB 規制の趣旨が害されることになってしまうのではないかとの疑問もある。なぜなら、第二次 TOB の内容は、TOB 価格を特別配当相当額の 300 円引き下げた以外は実質的に第一次 TOB とほとんど同じであり、右を認めると、実質的には、TOB を一定期間中断して、当該期間中に公開買付者に市場買付けを行うことを容認しているのにも等しい状況となるからである。この点は、米国、英国および EU 諸国の法制とは異なって市場買集めについては基本的に強本的に強制 TOB 規制（いわゆる三分の一ルール）を課していないわが国金商法の問題点が顕

[40] 田中亘『企業買収と防衛策』411 頁（商事法務、2012 年）は、「市場内外の買付けを問わず、公開買付けによらなければならないものとするべきである」とする。

在化したものといわざるを得ないであろう。

＜課題３＞撤回制限が厳しい。

○飯田秀総「対象会社による配当と公開買付価格の引下げ」商事法務 2221 号 11 頁（2020 年）（強調は中東）

公開買付期間中に対象会社が配当するリスクを公開買付者が負担する合理性はない。そして、配当については、公開買付けの撤回事由に該当するほどのものでない場合には、買付価格の引下げができれば十分である。もちろん、公開買付けの撤回ができれば、再度、公開買付けを開始すればよいので、制度設計の選択肢としては撤回事由を緩和することも考えられる。しかし、買付価格を引き下げるだけで十分だと考える公開買付者にとっては、公開買付けを一度撤回してから再度公開買付けを開始することは、ゼロからの再出発になるので時間もかかるし、時間がかかることにはさまざまなリスクがあるから、コスト要因となる。しかも、再度の公開買付けに対して、さらに対象会社は配当することも論理的にはあり得るので、撤回を認めるというだけでは不十分である。買付価格の引下げを認めるのが端的に優れた解決策である。

（２）大量保有報告制度

○大崎貞和「株券大量保有開示規制の派生効果と機能不全」宍戸善一編著『「企業法」改革の論理』285-286 頁（日本経済新聞出版社、2011 年）（強調は中東）

たとえば、複数の投資ファンドが、水面下で協調関係にありながら全体としての株式保有を開示せず、最初に行われた開示で突然支配権を獲得する「ウルフパック戦術」が各国で行われており、既存の株券大量保有開示規制が対応できていないとの指摘がある。ここには、２つの異なる問題点が含まれている。

第 1 は、規制における共同保有者概念の妥当性と共同保有者が正しい開

示を行わなかった場合の法的効果をめぐる問題である。「ウルフパック戦術」を取る狼たちが、実際に議決権行使に関して合意しているのであれば、共同保有者として保有状況を開示しなければならないはずである。また、正しい開示を行っていなければ、虚偽記載や報告書の不提出といった違法行為に当たるだろう。他方、狼たちによる経営への介入を脅威と受け止める上場会社の経営者からすれば、開示規制違反があったとしても、彼らの保有する株式の議決権が有効に行使されるのであれば、脅威を排除することはできない。

４－３－３　会社法制の課題

（1）セル・アウト

公開買付けに応募しなかった株主が取り残される可能性があること、したがってまた、公開買付けが強圧的になることを排除するためには、前述のように公開買付規制を改革することが一つの対応策である。あるいは、会社法制の問題として、残存少数株主に退出する権利（セル・アウト権）を与える形によっても、実質的に同様の効果を得ることができよう。

○黒沼悦郎「公開買付規制の理論的問題と政策問題」江頭憲治郎編『株式会社法体系』554 頁（有斐閣、2013 年）

支配会社が被支配会社の議決権の 90%以上を所有する場合、……法制審議会会社法制部会の「会社法制の見直しに関する要綱案」が少数株主のセルアウト権を提案しなかったことは問題である。

（2）エンフォースメント

証券法制が敵対的買収者に遵守されない場合に、違反行為について私法上の効果を与えなければ実効性を確保できない可能性がある。そこで、平成 26 年会社法改正に向けた法制審議会会社法制部会での検討においても、公開買付規制

に違反した場合の私法上の効果が議論され、一定の提言がなされていた[41]。

○神作裕之「金融商品取引法の規定に違反した者による議決権行使の制限」小出篤ほか編『企業法・金融法の新潮流（前田重行先生古稀記念）』28-29 頁（商事法務、2013 年）

「要綱」は、議決権行使の制限をもたらす金商法の規定として、三分の一ルールと全部勧誘・買付義務を対象にすることを提案している。……これらの規制が、実効性を確保することが容易でない類型であることは否定し難いであろう。しかも、これらの公開買付規制は、少数株主に対し部分的または全面的に退出する機会を与えるものであり、少数株主保護の機能を営み得るという意味において、私的利益に深く関係する。それらの規制に違反して取得した株式について、他の株主に議決権行使の差止請求権を付与し、その行使により議決権の喪失という法的効果をもたらことは、公開買付規制のエンフォースメントを強化し、私的利益にも深く関係する規制を遵守させるという観点から、適切な規律であると考える。

○武井一浩ほか「大量保有報告制度の今後の課題」商事法務 1870 号（2009 年）

また、たとえば民事責任の特別規定や諸外国でみられる情報開示訴求・議決権停止など、発行会社や他の投資者が述反行為者に対して直接何らかの法的アクションをとれる制度は、現行法上設けられていない。日本では大量保有報告制度違反について、こうした私法上の効果を伴う制度（以下「私的エンフォースメント」という）の是非についての議論は、諸外国におけるほどの進展をみせていない……。（24 頁）

……

主要資本主義国では、発行会社による実質株主に関する情報開示請求や

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[41] 坂本三郎編著『一問一答 平成 26 年改正会社法〔第 2 版〕』378 頁（商事法務、2015 年）の「Q234　金融商品取引法上の規制に違反した者による議決権行使の差止請求（要綱第 3 部第 1）につき、改正法に規程を設けなかった理由は、何ですか」を参照。

議決権停止の制度等、私的エンフォースメントの必要性が（制度として設けられているところと解釈論に委ねられている国とに分かれているものの）、明確に認識されている。少なくとも大量保有報告を適正に行わなければ、議決権停止や損害賠償請求など私法的効果のリスクが実的にあることを大量保有者側は認識している状況にあるといえる。（26 頁）

○飯田秀総「大量保有報告書規制違反者の議決権行使差止めに関する立法論の検討」商事法務 2001 号 28 頁（2013 年）

大量保有報告書規制に違反したことを理由に議決権行使を差し止めることで回復すべき利益があると評価することはできないし、その必要もない。

○加藤貴仁「大量保有報告制度に関する制度設計上の課題」別冊商事法務 369 号（2012 年）

平成 23 年 12 月に公表された「会社法制の見直しに関する中間試案」では、「株式会社の株主は、他の株主が次に掲げる金融商品取引法上の規制に違反した場合において、その違反する事実が重大であるときは、当該他の株主に対し、 当該株式会社の株主総会における議決権の行使をやめることを請求することができるものとする」との提案がなされている。この提案においては、具体的に、公開買付規制の一部（金融商品取引法……27 条の 2 第 l 項 2 号～6 号、27 条の 13 第 4 項）に違反したことを理由に、違反者の議決権行使の差止めが認められるべきことが主張されている。（121 頁）

本稿の筆者は、この提案自体に異論があるわけではない。この提案との関係で興味深いのは、議決権行使の差止請求の原因となる金商法違反の行為として、当初は、大量保有報告制度に違反した行為も検討事項として挙げられていたことである。（121 頁）

……

仮に、情報開示の強化とそれに伴う「抜け駆け防止」や利益の共有の強制が重視されるべきなのであれば、先に述べた刑事罰と課徴金の間を埋めることが早急に検討されるべきである。この点で、大量保有報告制度に違反した者の議決権行使の差止めを導入することには一定の意義がある。このよ

うな提案の実現は会社法と金商法の法体系の差異を理由に困難であるとするならば、金商法を改正することで迅速な対応がされるべきである。例えば、現行法の枠組みを大きく変えることなく、この問題を解決する方法としては、違反行為者が違反行為期間中に実際に得た利得を考慮して課徴金の額を算定することが考えられる。これに対して、敵対的企業買収や委任状争奪戦に際して。これ以上、被買収企業の経営者の影響力を増加させることを望ましくないものと考えるのであれば、大量保有報告制度における開示義務に違反したことを理由に、違反行為者の議決権行使の差止めは認められるべきではないであろう。（136 頁）

5　パーパス経営と敵対的買収防衛策

5－1　パーパスとコーポレート・ガバナンス

太田洋弁護士は、日本アジアグループ事件の抗告審決定の枠組みを前提とした場合に、取締役会の機能が弱く過ぎないかという問題提起を行っている。すなわち、「本件〔日本アジアグループ事件〕のような場合に対抗措置の発動を取締役会限りで認めないとすれば、買収者としては、議決権割合の 3 分の 1 に達する直前まで株式を買い上がり、然る後にＴＯＢを公表・開始すれば、ほとんどの場合に経営支配権の奪取に成功してしまうのではないかとも思われる。……『経営と所有の分離』という枠組みの中で、会社のサステイナブルな成長および企業価値の中長期的な最大化に一義的な責任を負うはずの取締役会……の権能を、そこまで弱いものと考えてよいのかという点には、疑問も残る」とされる[42]。

このような見解は、近時の「パーパス経営」、「パーパス・ドリブンなガバナンス」といったキーワードとも親和的なものであろう。「資本主義の再構築」[43]に向けた方向性を考えるとき、パーパス（存在意義）、すなわち「自社は環境や人権など様々な社会課題の解決にどう役立つ存在なのか。本業で社会に役立ち、同時

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[42] 太田洋「日邦産業事件および日本アジアグループ事件と買収防衛策の今後〔下〕」商事法務 2265 号 24 頁（2021 年）。

[43] レベッカ・ヘンダーソン『資本主義の再構築（Reimagining Capitalism in a World in Fire）』（高遠裕子訳）（日本経済新聞出版、2020 年）参照。

に長期の成長を実現するという宣言」[44]が肝要になろう。「パーパスを掲げ、それを実現するための企業統治が『サステイナブル・ガバナンス』と位置づけることができる」と説かれている[45]。

昭和年間、平成年間、令和年間、それぞれのコーポレート・ガバナンスの変容については、HR ガバナンス・リーダーズの内ヶ崎茂社長が、次のように整理されている[46]（強調は中東）。

> 昭和の時代、日本企業を規律したのが銀行による「デッド（負債）ガバナンス」だった。大量生産、大量消費、大量廃棄の社会で、企業は銀行から資金を調達して、安価で均一な製品を作り、成長した。これが平成の時代、資本市場が台頭して株主が声を上げるようになり、経営効率を重んじる「エクイティ（株式資本）ガバナンス」になった。企業は株主と対話し、短期の業績を引き上げようとしてきた。
>
> それが令和の今、格差社会が深刻となり、地球環境も非常事態になっている。従業員や市民団体といった、株主を含めた多様なステークホルダー、つまり社会と対話をしながら企業は長期的に価値を上げることが求められるようになった。対話相手を考えれば「ソサエティー・ガバナンス」であり、時間軸で考えれば持続的な「サステナビリティー・ガバナンス」が求められている。

現在の思想として、「ステイクホルダー資本主義」と「株主アクティビズム」という視点から考察する論者は、次のような理解を示している[47]。

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44 渋谷高広「統治改革『パーパス・ドリブン』で」日本経済新聞電子版 2021 年 3 月 31 日 <https://www.nikkei.com/article/DGXZQODL19DNG0Z10C21A3000000>（内ヶ崎茂発言）。

45 渋谷高広「統治改革『パーパス・ドリブン』で」日本経済新聞電子版 2021 年 3 月 31 日（内ヶ崎茂発言）。

46 渋谷高広「統治改革『パーパス・ドリブン』で」日本経済新聞電子版 2021 年 3 月 31 日（内ヶ崎茂発言）。

47 佐成実「ステークホルダー資本主義と株主アクティビズム」商事法務 2262 号 30 頁（2021 年）。なお、両者の概念の整理について、佐成実「ステークホルダー資本主義と株主アクティビズム」商事法務 2262 号 26-27 頁（2021 年）

> およそいかなる高邁な思想であれ、一つの時代の一つの考え方にすぎません。本日のお話の中で「思想」と呼んだ「ステークホルダー資本主義」と「株主アクテイビズム」も、資本主義の発展過程が産み落とした一つの考え方であり、それぞれに対応する時代背景と歴史的役割があります。そうした意味での「時代制約」がある以上、それらは二者択一ではなく、むしろ、「資本主義」のさまざまな側面（「効率性」「倫理」「正義」）を照射する一つの切り口・手掛かりを与えてくれるものである……。

これを会社法制の観点から分析すると、松井智予教授は、「株式会社制度の出発点には、会社に法人格を与え、経営者と別個の権利義務の主体とし、株主の責任を限定し、経営陣や株主が交代しでも永続させるというニーズがある。このような制度は、どの限りで社会的に有用と評価できるのだろうか」[48]と問題提起した上で、次のような見解を示しておられる[49]（強調は中東）。このような考え方は、伝統的な会社法制の理解にも沿ったものであろう[50]。

> 比較的平凡な結論に落ち着く。すなわち、①会社法自身は企業活動を促進することを通じて社会が幸せになる基盤をつくるが、特定の分配を強制して企業利益をファイナンスの視点から最大化する規範ではなく、逆に他の制定法、ソフトロー、社会構造が利益分配にどんな規律を課するかもコントロールできない。ただ、②全体として価値を増加させる事業活動であっても、その過程で許されない分配上の問題を招く場合、法令違反のほかリスク管理不十分として経営陣が責任を追及される余地があるという形で、ステイクホルダーへの利益分配には配慮している。その他、事業を通じた価値創出自体を目的としない----租税回避が法人格の主たる目的となっている----会社は、会社制度を利用することが許されない場合があり得る、ということである。

を参照。

48 松井智予「会社制度と格差の是正」法律時報 93 巻 5 号 30 頁（2021 年）

49 松井智予「会社制度と格差の是正」法律時報 93 巻 5 号 34 頁（2021 年）

50 落合誠一「企業法の目的----株主利益最大化原則の検討」『岩波講座 現代の法 7----企業と法』25 頁（岩波書店、1998 年）ほか参照。

取締役の義務という観点からも、基本的には、松井智予教授の見解が妥当であろう。気候変動の文脈において、「気候変動に関する日本の取締役の義務（Directors' Duties Regarding Climate Change in Japan）」と題する報告書において、次のような分析をしたことがある[51]（強調は中東）。

> Even though directors have broad discretionary decision-making authority to design their board committees, arguably directors could be held liable under the Companies Act and the Regulation for Enforcement of the Companies Act for failure to establish a climate risk management system with sufficient capabilities to perform their responsibilities to oversee and manage climate-related financial risks and opportunities. Depending on the size and kinds of business lines, the system adopted needs to be capable of performing the required proper controls in light of the likelihood and magnitude of climate risks to the company. If directors of a large stock company fail to establish a proper internal control system that appropriately addresses climate-related risks, they could be found personally liable for breach of their duty of care.
>
> .....
>
> Finally, the Corporate Governance Code, which is non-binding, also offers strong normative guidance for directors to effectively manage material climate-related financial risks and opportunities. The impact of soft law such as the Corporate Governance Code has the potential to be instrumental in shifting climate governance, as the principles adopted by companies form part of their fundamental rules of operation.

この報告書を基礎とするウェビナーが開催されたときにも[52]、山田泰弘教授と

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[51] Yoshihiro Yamada, Janis Sarra & Masafumi Nakahigashi, Directors' Duties Regarding Climate Change in Japan at 1-2 (Commonwealth Climate and Law Initiative; February 2021)<https://law-ccli-2019.sites.olt.ubc.ca/files/2021/02/Directors-Duties-Regarding-Climate-Change-in-Japan.pdf>.

[52] Directors' Duties Regarding Climate Change in Japan; Report Launch w/Dr. Janis Sarra, Co-hosted by Canada Climate Law Initiative, Centre for Business

本報告者は、法令、定款又は株主総会決議で明確にされていない義務は、リスク管理に関する義務として理解せざるを得ないという理解を示した。ただ、Janis Sarra 教授は、より積極的に取締役を義務付けるべきであるとの姿勢を示していた。

その後、「気候関連財務情報開示タスクフォース（TCFD: Task Force on Climate-related Financial Disclosures）」の影響が世界的に広がりを見せ、わが国でも、2021 年 6 月 11 日に施行された「改訂コーポレートガバナンス・コード」でも、次のような原則・補充原則が盛り込まれた（強調は中東）。

> 【原則 2-3.　社会・環境問題をはじめとするサステナビリティを巡る課題】
> 上場会社は、社会・環境問題をはじめとするサステナビリティを巡る課題について、適切な対応を行うべきである。

補充原則

2-3① 取締役会は、気候変動などの地球環境問題への配慮、人権の尊重、従業員の健康・労働環境への配慮や公正・適切な処遇、取引先との公正・適正な取引、自然災害等への危機管理など、サステナビティを巡る課題への対応は、リスクの減少のみならず収益機会にもつながる重要な経営課題であると認識し、中長期的な企業価値の向上の観点から、これらの課題に積極的・能動的に取り組むよう検討を深めるべきである。

> 【原則 3-1.　情報開示の充実】
> 上場会社は、法令に基づく開示を適切に行うことに加え、会社の意思決定の透明性・公正性を確保し、実効的なコーポレートガバナンスを実現するとの観点から、(本コードの各原則において開示を求めている事項のほか、)以下の事項について開示し、主体的な情報発信を行うべきであ

Law, Commonwealth Climate and Law Initiative, Applied Social System Institute of Asia, Client Earth and Japan Climate Leaders' Partnership (February 23, 2021)< https://allard.ubc.ca/about-us/events-calendar/directors-duties-regarding-climate-change-japan-report-launch-w-dr-janis-sarra>.

る。

補充原則

3-1③ 上場会社は、経営戦略の開示に当たって、自社のサステナビリティについての取組みを適切に開示すべきである。また、人的資本や知的財産への投資等についても、自社の経営戦略・経営課題との整合性を意識しつつ分かりやすく具体的に情報を開示・提供すべきである。

特に、プライム市場上場会社は、気候変動に係るリスク及び収益機会が自社の事業活動や収益等に与える影響について、必要なデータの収集と分析を行い、国際的に確立された開示の枠組みである TCFD またはそれと同等の枠組みに基づく開示の質と量の充実を進めるべきである。

５－２　パーパスと会社支配権争奪

敵対的買収は、抵抗する対象会社の経営陣から会社支配権を奪うことを可能とするものであり、コーポレート・ガバナンスに実効性を持たせるための伝家の宝刀とも言うべきものである[53]。

とはいえ、近時は、次のような指摘もなされている[54]。

> 「企業価値にとってマイナスであるものの、株主にとってはプラスの効果がある買収提案」についてどのように対応すべきかは、きわめて難解な問題である。……
>
> ……会社法の伝統的な解釈問題として論じるというよりも、わが国において各ステイクホルダーにそれぞれどのような配慮をし、その調和を図っていくかといった政策的な視点から検討すべき性質のものとも思われる。……

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[53] 例えば、中東正文『企業結合・企業統治・企業金融』58-63 頁（信山社、1999 年）。

[54] 「〔スクランブル〕『会社はだれのものか』再論」商事法務 2265 号 58 頁（2021 年）。

……政府主導により政策的な観点からこの問題に正面から向き合っていくことを期待したい。

パーパスを巡って会社支配権の争奪が生じた事案として、アミタホールディングス事件を取り上げることができるであろう[55]。これは、同業他社の山崎砂利商店がアミタホールディングス（以下「アミタＨＤ」という。）の株式を約 25% まで買い進めたところ、アミタＨＤが友好的な株主に対して第三者割当増資を試みたが（約 25%→約 22%）、裁判所によって仮に差し止められた事件である。

アミタＨＤ事件において、京都地裁平成 30 年 3 月 28 日決定は[56]、「両社の代表者は、同年 7 月 7 日、会談したものの、債務者〔アミタホールデイングス〕代表者は、債務者は廃棄物の 100%資源化を目指し、埋立てや焼却処分をしない事業方針であるため、最終処分場や焼却施設を運営する債権者〔山崎砂利商店〕とは基本的に事業方針を異にしており、業務提携することは困難であるとの趣旨の回答をした」と認定している。ただ、当事者の争いが別の点に集中したためか、この点を京都地裁は重視することなく、不公正発行にあたるとして第三者割当増資の差止仮処分を認めた。

法的な観点からは、株主総会決議を経た新株発行の差止めが認められた初めての公表裁判例であるとされている[57]。株主総会の特別決議によって承認されたのは、有利発行規制との関係であるが、決議に際しての説明義務（会社法 199 条

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55 中東正文「我が国のＭ＆Ａ法制における Bumpitrage への対応」金融・商事判例 1615 号 13-15 頁（2021 年）。

56 京都地決平成 30 年 3 月 28 日金融・商事判例 1514 号 51 頁。本件の判例評釈として、例えば、三浦治「第三者割当てによる新株発行が著しく不公正な方法によるものとされた事例」金融・商事判例 1565 号 2 頁（2019 年）、福島洋尚「株主総会の特別決議を経た新株の不公正発行」『平成 30 年度重要判例解説』ジュリスト 1531 号 93 頁（2019 年）、三原秀哲「株主総会決議に基づく新株発行（第三者割当て）の差止め」ジュリスト 1541 号 107 頁（2020 年）、鳥山恭一「総会決議にもとづく新株発行の株主による差止め」法律のひろば 72 巻 3 号 61 頁（2019 年）、小菅成一「株主総会決議を得た新株発行が不公正な方法によるものとされた事例」喜悦大学研究論集 62 巻 1 号 51 頁（2019 年）。

57 小菅・前掲注（判批）55 頁、鳥山・前掲注（判批）61 頁、三浦・前掲注（判批）4 頁。

3項、会社法施行規則73条1項2号参照）が不公正発行との関係でも重視されている。もっとも、この説明義務に関して、もしも株主総会決議において主要株主（株主総会決議で賛成票を投じた株主）との間で、パーパスに関する合意があったと評価するのであれば、アミタホールデイングスの取締役が遵守すべき決議（会社法335条参照）であると判断する余地もあったとも思われる[58]。

５－３　パーパスと買収防衛策

パーパスは株主以外のステークホルダーの利益にも関わることが多い。むしろ株主の利益の最大化をパーパスとするのならば、買収防衛策に関わる問題は比較的単純に整理することができそうである。

ステークホルダーの利益の扱いについて、松井秀征教授は、「敵対的買収の結果、特定のステイクホルダーの利益が損なわれる可能性が高く、しかしその影響が株主利益に及ぶかどうか分からない場合、買収防衛策を導入、発動する判断を行う者には、必要性の要件の一要素としてステイクホルダーの利益を考慮する余地を認めてよいのではないか」とされ、その例として、企業を解体するおそれがある場合を掲げておられる[59]。

松井秀征教授の見解は、対象会社のパーパスが株主によって合意されており、このパーパスに従って取締役が行動する場合であれば、より一般的に受け入れられやすいであろう。

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[58] 中東正文「我が国のM＆A法制における Bumpitrage への対応」金融・商事判例1615号14頁（2021年）。なお、松中学教授は、「従来の主要目的ルールは近時多く問題となっている支配株主ではない大株主と経営陣が対立する中で行われる新株発行に対処できていない」として、主要目的ルールに代わるべき不公正発行の判断枠組みを提案されている（松中学「主要目的ルール廃止論」久保大作＝久保田安彦編『企業金融・資本市場の法規制（吉本本健一先生古稀記念）』225頁（商事法務・2020年））。この判断枠組みとの関係については、中東正文「我が国のM＆A法制における Bumpitrage への対応」金融・商事判例1615号13-15頁、16頁（注18）（2021年）を参照されたい。

[59] 松井秀征「敵対的企業買収と防衛策」江頭憲治郎編『株式会社法大系』606頁（有斐閣、2013 年）。この判断は、取締役によって行われるべきであるとされる（同607頁）。

５－４　パーパスを根拠とした防衛策の限界

パーパスを買収防衛策の導入及び発動を正当化する要素として考えることができるとしても、どのような設計の大規模買付行為であっても通用するかについては疑問があると思われる。

例えば、田中亘教授は、オール・オア・ナッシングオファーであれば、「買収者が支配権取得後にどんな事業を行うかは、株主は全く関心を持たないはずである」と分析されている[60]。また、飯田秀総准教授も、オール・オア・ナッシングオファーに相当する公開買付けに対する買収防衛策の導入・発動については、強圧性を根拠とした正当化はできないと述べておられる[61]。

他方で、オール・オア・ナッシングオファーであっても、「従業員や取引先等にとってマイナスの効果がある一方、少なくともその時点の株主にとってはプラスの効果があることになり、対象会社の役員がどのようにこの買収提案に対応すべきかといった問題が発生する」として、買収防衛策を一律に認めなくてよいのか、疑問を呈するものもある[62]。

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[60] 田中亘「なぜ私は心配のし通しで防衛策を好きになれないのか」金融・商事判例 1290 号 18 頁（2008 年）。同論文 18 頁によれば、オール・オア・ナッシングオファーとは、「特別決議の成立に必要な株式の応募があることを公開買付成立の条件とし、もし公開買付けが成立すれば、すみやかに交付金合併等のフォローアップ取引を行い、残存株式を公開買付価格と同額で取得する、という条件の買収」を言う。また、田中亘「ブルドックソース事件の法的検討〔下〕」商事法務 1810 号 17 頁（2007 年）は、「買収者に対して買収後の事業計画なり経営方針を問うことは、既存株主の利益の観点からはまったく意味がない。このような公開買付けによる支配権取得に対してまで、株主総会の決議によって干渉することの合理性は、筆者には見出すことができない」とする。なお、オール・オア・ナッシングオファーについて、同様の見方を提示するものとして、寺本健人「敵対的買収に対して許容される防衛策」立命館法政論集 12 号 88 頁（2014 年）。

[61] 飯田秀総「買収防衛策の有事導入の理論的検討----公開買付けの強圧性への対処」商事法務 2244 号 11-12 頁（2020 年）。

[62] 「〔スクランブル〕『会社はだれのものか』再論」商事法務 2265 号 58 頁（2021 年）は、「もし当該買収提案が、その時点における全株主がその買収価

このような疑問に関して、現時点での資本市場の論理や実務からすると、パーパスという切り口から会社支配市場法制を再構築することは、難しいようにも思われる。

例えば、市場関係者からは、「地球規模の共通する社会課題解決に挑む中で、資本へのアクセスの難易度、資本コストの差は企業の競争力に大きく影響するはずである。その結果、多くの日本企業が掲げるステークホルダー共創経営は実現が難しくなる可能性がある」とされる[63]。

実例としても、ソフトバンクグループの孫正義会長兼社長を巡って、「果たして孫氏は広く株主に価値を問う上場を取るのか、それともパーパスのために株主からの理解に見切りをつけるのか。あるいは両立する道を示すのか」という点について関心が示されている[64]。

格で売却することが担保されていない（すなわち、公開買付けであれば、上限が設定されている）ようなものであれば、買収後も株主が一部残ることになる以上、株主利益という観点からも企業価値を毀損するわけにはいかないという結論が導かれそうである。しかしながら、近時は、その時点における全株主がその買収価格で売却することが担保されている（すなわち、公開買付けであれば、上限が設定されていない）非友好的な買収提案も見受けられる。そのような買収が実行されれば、企業価値を毀損し、従業員や取引先等にとってマイナスの効果がある一方、少なくともその時点の株主にとってはプラスの効果があることになり、対象会社の役員がどのようにこの買収提案に対応すべきかといった問題が発生する」とする。

63 三瓶裕貴「資本コスト経営とは何か」商事法務 2267 号 9 頁（2021 年）。

64 杉本貴司「御社の「志」は何ですか----問われるパーパス定義（経営の視点）」日本経済新聞 2021 年 7 月 5 日朝刊。

> 普段から志を語ることの多いソフトバンクグループの孫正義会長兼社長はどうか。6 月の株主総会で同社は投資で起業家を支える「情報革命の資本家になる」と訴えた。新しい言葉でパーパスを定義したわけだ。
>
> 気がかりなのは度々話題となる非上場化だ。孫氏は「ノーコメント」を貫く。常々自らの経営手法は市場の理解を得られがたいと言い、一方の市場関係者の間でも「孫正義ディスカウント」なる言葉まで存在する。果たして孫氏は広く株主に価値を問う上場を取るのか、それともパーパスのために株主からの理解に見切りをつけるのか。あるいは両立する道を示すのか。

6　結語

現在の資本市場には、伝統的な株主の価値を高めるという論理が基礎にある。同時に、資本市場を利用する上場会社であっても、社会的に有用なパーパスについては、経営者は重視しなければならないという要請が高まりつつある。とはいえ、このような要請に応えることについて、経営者を義務付ける法令上の根拠は乏しい。「市場の論理」と「社会の要請」とが両立しない場面で、経営者はどうすべきなのか、今なお明らかではない。

このような観点からは、落合誠一教授が 20 年以上前に「企業法の目的」として提示された課題が、今なお解決されておらず、宿題として残されていることを意味しているであろう[65]。

> 一見したところ株式会社法に特殊・固有と思われた株主利益最大化原則及び経営者の注意義務の問題は、実は会社関係者それぞれごとの契約法、当該関係法規制の現実的な有効性の問題と密接不可分であり、これらの実証的・ 総合的な検討があったうえではじめて十全の解明が可能となる。すなわち会社法の問題解明においても、関心領域を狭く限定した研究への沈潜のみでは明らかに不十分であり、契約法のみならず広く労働法等も含めた関係法規制への十分な目配りが必要とされるのである。このことは、これからの企業法のあり方についても十分示唆的である。これからの企業法は、個別的課題のさらなる探求とともに広く他の法分野、さらには関係諸科学の検討をも踏まえた総合的学問として構築されるべきものと言わねばならないのである。

本報告は、この課題について、近時の敵対的買収に関する動向を踏まえて、会社支配市場法制に関して現状を整理するように試みた。もっとも、会社法制や証

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[65] 落合誠一「企業法の目的----株主利益最大化原則の検討」『岩波講座 現代の法 7----企業と法』26 頁（岩波書店、1998 年）。

券法制を検討しただけでは、望ましい解を得ることができる課題でもない。落合教授が言われる「総合的学問として構築されるべき」「これからの企業法」を検討するための一つの試みを行ったものに過ぎない[66]。

〔付記〕

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本報告で言及した案件の一部に、報告者も関係しているが、報告は公表事実のみに基づいている。もとより本報告は、個別の案件を具体的に検討することを主眼とはしていない。

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[66] 龍田節教授も、次のように述べておられる。龍田節「会社法は何色？」江頭憲治郎＝森本滋編『拾遺会社法----会社法コンメンタールしおり・付録集」354-355 頁（商事法務、2021 年）。

> イギリス会社法の……規定は、株主の利益を犠牲にして、従業員その他の利益とバランスをとれというのではなく、株主の利益を増進させるために従業員たちの利益を図るよう、取締役に求めている（Gower & Davies, Principles of Modern Company Law 509〔8th ed., 2008〕）。そういう明文規定がない日本法でも、同様の解釈をするはずであろう。取締役が企業の社会的責任に即して行動する義務を負う旨を明定すべきかが問われたとき，そのような定めは有害無益だとして斥けられた（竹内昭夫「企業の社会的責任に関する商法の一般規定の是非」会社法の理論 I〔有斐閣、1984〕107 頁）。理由の 1 つは、その種の規定を置くと、経営者の裁量権を不当に拡大するために使われるおそれがあることであった（竹内・前掲 127 頁）。
>
> ……
>
> 現在進行中の会社法制見直しについては、会社を取り巻く幅広い利害関係者からの一層の信頼を確保する観点から検討を行うとされている（法制審議会会社法制部会第 1 回会議〔2010.4.28〕議事録 4 頁）。ステークホルダーの色つけの仕方は、人によって同じでないかもしれないが、それぞれの制度が誰の要望により、どういう利益を増進させるものか，その色合いをしっかり見きわめた上で、制度作りをしてもらいたい。そして、できあがった制度そのものは、やはり無色透明に輝くものであってほしい。色即是空、空即是色（お釈迦様に叱られそう。お許しください）。

資料

資料 1

Alan K. Koh, Masafumi Nakahigashi & Dan W. Puchniak, Land of the Falling “Poison Pill”: Understanding Defensive Measures in Japan on Their Own Terms, 41 U. Pa. J. Int’l L. 687 (2020).
https://scholarship.law.upenn.edu/jil/vol41/iss3/3/

資料 2

Yoshihiro Yamada, Janis Sarra & Masafumi Nakahigashi, Directors’ Duties Regarding Climate Change in Japan (Commonwealth Climate and Law Initiative; February 2021)
https://law-ccli-2019.sites.olt.ubc.ca/files/2021/02/Directors-Duties-Regarding-Climate-Change-in-Japan.pdf

資料 3

[Webinar] Directors’ Duties Regarding Climate Change in Japan; Report Launch w/Dr. Janis Sarra, Co-hosted by Canada Climate Law Initiative, Centre for Business Law, Commonwealth Climate and Law Initiative, Applied Social System Institute of Asia, Client Earth and Japan Climate Leaders' Partnership (February 23, 2021)
https://allard.ubc.ca/about-us/events-calendar/directors-duties-regarding-climate-change-japan-report-launch-w-dr-janis-sarra

資料 4

東京証券取引所「コーポレートガバナンス・コード（2021 年 6 月版）」
https://www.jpx.co.jp/news/1020/nlsgeu000005ln9r-att/nlsgeu000005lne9.pdf

資　料

【配布資料】

資料１　LAND OF THE FALLING “POISON PILL” UNDERSTANDING DEFENSIVE MEASURES IN JAPAN ON THEIR OWN TERMS

資料２　Directors’ Duties Regarding Climate Change in Japan

資料３　Directors’ Duties Regarding Climate Change in Japan
-Report Launch (W/Dr. Janis Sarra)

資料４　コーポレートガバナンス・コード

LAND OF THE FALLING "POISON PILL" UNDERSTANDING DEFENSIVE MEASURES IN JAPAN ON THEIR OWN TERMS

ALAN K. KOH, MASAFUMI NAKAHIGASHI & DAN W. PUCHNIAK*

altered the trajectory of American corporate governance. When a hostile takeover wave seemed imminent in Japan in the mid-2000s, Japanese boards appeared to embrace this American invention with equal enthusiasm. Japan's experience should have been a ringing endorsement for the utility of American corporate governance solutions in foreign jurisdictions—but it was not to be. Japan's unique interpretation of the "poison pill" that was so eagerly adopted by Japanese companies in the mid-to-late 2000s has turned out to be nothing like their potent American namesakes—and, in fact, the opposite of what would be expected by leading U.S. academics who have built a cottage industry publishing on the U.S. poison pill.

Based on hand collected empirical data, we provide the first in-depth analysis of why Japan's "poison pill" (defensive measures) is heading towards extinction—a watershed reversal that is unexplained in the Japanese literature and has almost entirely escaped the English language literature. By drawing on our hand-collected data, case studies, and Japanese jurisprudence, we illuminate the unique and untold story of how one of the most discussed mechanisms of corporate governance in the U.S. has worked almost entirely differently when transplanted to Japanese soil—the importance of which is heightened as Japan is by far the largest economy in which the poison pill has been tested outside of the United States. Additionally, our analysis sheds light on the unexpected importance of Japan's recently implemented corporate governance code and stewardship code—two Western legal transplants that have garnered considerable attention in the English language literature, but which have yet to be evaluated in light of their impact on defensive measures in Japan.

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All Japanese names are given in the Japanese family name-personal name order except when citing a Japanese author of a source in a western language. All references to articles unless stated otherwise are to provisions of the Kaisha-hō (会社法) [Companies Act], Law No. 86 of July 26, 2005, as amended. All translations, unless otherwise indicated, are by the authors. All remaining errors remain ours alone.

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INTRODUCTION

The advent of the "shareholder rights' plan", more popularly known as the "poison pill"[1], fundamentally altered the trajectory of American corporate governance. Intended to defend vulnerable boards from corporate raiders, the poison pill was embraced by U.S. managers in the 1980s as a lifeline in a sea of hostile takeovers.[2] When pundits predicted an imminent wave of hostile takeovers in Japan in the mid-2000s,[3] Japanese boards appeared to embrace the American invention of the poison pill with equal enthusiasm.[4]

Japan's experience should have been a ringing endorsement for the utility of American corporate governance solutions in foreign jurisdictions and served as evidence supporting the view that corporate governance around the world is destined to converge on the American model.[5] That is, but for two "inconvenient truths" that foreign observers and corporate law scholars have overlooked. These inconvenient truths not only make what occurred in Japan entirely different from what occurred in the United States, but also offer novel insights into how defensive measures have evolved in an unpredictable way in the world's third largest economy.

The first inconvenient truth, which two of the authors previously explored, is that Japan's "poison pill" is fundamentally different from the U.S.-style poison pill.[6] The second inconvenient truth—which this Article exposes—is that the "poison pills" that were the darling of Japanese companies in the mid-2000s have, since their brief moment in the sun, gone into sustained decline in the most

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1 *See* Frank Allen & Steve Swartz, *Lenox Rebuffs Brown-Forman, Adopts Defense*, WALL STREET J., June. 16, 1983, at 2 (providing the first known use of the term "poison pill").

2 *See infra* Part 1.

3 *See* Dan W. Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware*, 15 BERKELEY BUS. L.J. 4, 13-15 (2018) (mentioning several predictions around a possible wave of hostile takeovers in Japan in the mid-2000s and explaining how some idiosyncratic Japanese factors could account for the unfulfilled predictions).

4 *See infra* Section 4.1.

5 *Compare* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439-40, 468 (2001) (declaring that convergence toward a standard, shareholder-centric model—that has always been dominant in the United States—had occurred) *with* Dan W. Puchniak, *The Japanization of American Corporate Governance? Evidence of the Never-Ending History for Corporate Law*, 9 ASIAN-PAC. L. & POL'Y J. 7, 9-10 (2007) (rejecting the convergence debate as irrelevant because corporate governance systems always evolve).

6 *See generally* Puchniak & Nakahigashi, *supra* note 3.

striking reversal of its kind outside of the U.S. and appear to be heading towards extinction.

This Article reveals empirical evidence showing that two trends have fundamentally reshaped the so-called "poison pill" in Japan. First, after an initial boom from 2005–2008, during which hundreds of Japanese companies adopted "pills" each year, new adoptions of the "pill" fell precipitously. In 2008, which was the last year of the boom, listed companies in Japan adopted 207 "pills". The next year, in 2009, merely 21 "pills" were adopted. In 2010, a paltry 4 "pills" were adopted, and every year since then the number of companies adopting "pills" has remained in the single digits.[7] The obvious puzzle is: what happened in 2008 to cause listed companies in Japan to virtually cease adopting new "pills", and what has sustained this "new normal" over the past decade?

Second, in 2013–2014, the rate at which companies in Japan that had previously adopted a "pill" and then later decided to remove it spiked. Interestingly, almost all these removals took place because management decided not to seek shareholder approval to renew an existing "pill" (which is normally required every three-years according to the terms of Japanese "pills").[8] In 2013, merely 3.61% of listed companies did not renew their "pills", compared with 22.60% in 2018. Our hand collected data reveals that the non-renewal rate increased significantly around 2013–2014 and has been rising ever since.[9] The obvious puzzle is: why did the rate of non-renewals spike around 2013–2014, and why has it continued to rise ever since?

The combined effect of the collapse of new "pill" adoptions after 2008, with the spike in non-renewals after 2013, is that the total number of listed companies with "pills" in Japan has been rapidly falling. Based on our hand collected data, in 2016–2017, for every firm that adopted a new "pill", sixteen failed to renew existing ones.[10] This has placed the "pill" in Japan on a trajectory towards extinction—transforming Japan into the "land of the falling 'poison pill'".

This Article seeks to solve these puzzles by providing what is, to our knowledge, the first in-depth analysis in the comparative corporate governance literature of Japan's surprising reversal on the

[7] *See infra* Table 2, Fig. 2.

[8] *See* discussion *infra* Section 4.1; *infra* notes 179-181; Table 3, Fig. 2.

[9] *See infra* Table 2, Fig. 2.

[10] *See infra* Section 4.1.

"poison pill" by drawing on Japanese sources that were before now unexplored in the English-language literature. The reasons behind the watershed reversal in the adoption of the so-called "poison pill" by Japanese companies, to our knowledge, have also not been explored in either English or Japanese. This gap in the comparative corporate governance literature is glaring as it is the largest reversal of its kind outside of the U.S. and involves a mechanism that has produced a small cottage industry of academic musings in the leading U.S. literature.[11]

Specifically, we offer three explanations for the decline of Japan's "poison pill" supported by empirical data, case studies, Japanese jurisprudence, and an in-depth review of Japanese academic literature and financial industry reports. First, the fact that the prophesied tsunami of hostile bids in the mid-2000s failed to produce even a single successful hostile takeover, combined with a dearth in hostile acquirers following the 2008 Global Financial Crisis, reduced the threat of hostile takeovers that was an impetus for Japanese managers to adopt the "pill" in the pre-2008 boom years.[12]

Second, the so-called "poison pill" in Japan is a far cry from the potent poison that many thought it would be when the government approved its use in 2005—which, at that time, appeared to have been created "in the shadow of Delaware".[13] Over the past decade it has become increasingly clear that the so-called "pill" in Japan lacks the active ingredient of its American namesake: providing the board—*without* shareholder approval—a veto right over a hostile bid.[14] Empirical evidence demonstrates that almost all so-called Japanese "pills" require some form of shareholder approval, which makes

[11] For a sampling of frequently-cited articles focusing on or devoting substantial attention to the poison pill, see generally Jeffrey N. Gordon, *Corporations, Markets, and Courts*, 91 COLUM. L. REV. 1931, 1936-48 (1991); Jeffrey N. Gordon, *Just Say Never – Poison Pills, Deadhand Pills, and Shareholder-Adopted Bylaws: An Essay for Warren Buffett*, 19 CARDOZO L. REV. 511 (1997); Ronald J. Gilson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. LAW. 247 (1989); Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 STAN. L. REV. 1325, 1350-1352 (2013); Ronald J. Gilson, *Unocal Fifteen Years Later (and What We Can Do About It)*, 26 DEL. J. CORP. L. 491 (2001); Julian Velasco, *The Enduring Illegitimacy of the Poison Pill*, 27 J. CORP. L. 381 (2002).

[12] *See infra* Section 4.2.

[13] *See* Curtis J. Milhaupt, *In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan*, 105 COLUM. L. REV. 2171, 2196-96 n.82 (2005) (describing the process by which Delaware takeover jurisprudence was adopted).

[14] *See infra* Section 2.2.

sense considering they have been designed in the shadow of ambiguous Japanese (not Delaware) jurisprudence. This scant and ambiguous jurisprudence has not established that boards—without shareholder approval—can adopt, maintain or even trigger a "pill" in Japan.[15] We query whether a "pill" that requires shareholder approval should even be called a "pill"—a point discussed in detail below. Here, the crucial point is that, as it has become increasingly clear that Japanese "pills" fail to provide the board with an unambiguous veto—without shareholder approval—over a hostile bid, the incentive for management to adopt them has significantly diminished.

Third, more recent changes to Japan's corporate governance environment have provided the impetus for increased institutional investor resistance to the introduction of new "pills" and, more importantly, for approving the renewal of expiring ones. In 2015, Japan adopted a "comply or explain" Corporate Governance Code with an idiosyncratic provision: the requirement that companies comply with having no "poison pill" or explain why they have one[16]—a particularly challenging task in the only major developed economy that has yet to experience a successful hostile takeover. Then, in 2017, Japan amended its Stewardship Code to, among other things, require institutional investors to disclose their votes on individual agenda items.[17] Again, in an economy with no successful hostile takeovers, for an institutional investor to disclose their support for renewal of existing "poison pills" would call for an explanation. The timing appears to be significant: shortly before Japan's revised Stewardship Code went into effect, the ratio of removals/adoptions of the so-called "poison pill" increased markedly, making this the most devastating blow yet to the "pill" in Japan and corresponding to institutional investors voluntarily disclosing their votes to prepare for the inauguration of the Stewardship Code. This timely fall in the "poison pill" is highly interesting, as it suggests that Japan's Stewardship Code amendment may have prevented institutional investors from continuing to act in support of management. This is a tangible

[15] *See infra* Section 2.3.

[16] *See infra* notes 201-202; Japan's Corporate Governance Code [Final Proposal] Seeking Sustainable Corporate Growth and Increased Corporate Value over the Mid-to Long-Term, The Council of Experts Concerning the Corporate Governance Code (Mar. 5, 2015), https://www.fsa.go.jp/en/refer/councils/corporategovernance/20150306-1/01.pdf [https://perma.cc/M2VL-DYZN].

[17] *See infra* note 206.

impact on corporate governance not previously foreseen or contemplated by the growing international stewardship literature.[18]

This Article proceeds as follows: Part 1 begins by providing the comparative legal context by explaining the Anglo-American approach to takeover regulation, including the U.S.-style poison pill and United Kingdom ("U.K.") regulations on defensive measures; Part 2 describes the legal design of the so-called Japanese "poison pill", which is fundamentally different from its U.S. counterpart and belies a direct comparison in the Anglo-American context; Part 3 illuminates the broader Japanese corporate governance environment for hostile takeovers to provide a clear context for evaluating the "pill" in Japan on its own terms; Part 4 sets out what is, to the authors' knowledge, the first analysis explaining what has been driving Japanese firms to dismantle their so-called "pills". The Article concludes by highlighting possible future research questions raised by the ostensible transplant of the American poison pill into Japanese soil.

1. ANGLO-AMERICAN MEDICINE FOR AN ANGLO-AMERICAN DISEASE: A BRIEF HISTORY

Conceived in 1982 by the enterprising New York attorney Martin Lipton, the U.S.-style "poison pill" is a legal mechanism that a corporate board can adopt in response to an unsolicited takeover bid. Its purpose, as originally conceptualized by Lipton, was to buy the board more time to plan a course of action that would "maximize shareholder value."[19]

Modern poison pills are diverse in form, but most are based on corporate "rights" that are triggered when an acquirer reaches a certain ownership threshold (typically from 10 to 20%) in the target

[18] *See infra* note 213.

[19] Martin Lipton, *Pills, Polls, and Professors Redux*, 69 U. CHI. L. REV. 1037, 1043-44 (2002).

> In September 1982, I published a memorandum describing the 'Warrant Dividend Plan.' The 'warrant' of the Warrant Dividend Plan was a security that could be issued by the board of directors of a target company (before or after it was faced with an unsolicited bid) that would have the effect of increasing the time available to the board to react to an unsolicited bid and allowing the board to maintain control over the process of responding to the bid. Beginning at the end of 1982, in various forms it was used successfully by targets of hostile bids to gain time and maximize shareholder value.

company; once triggered, the target company's shareholders, other than the acquirer, may purchase additional shares on favorable terms, with the effect of diluting the acquirer's holdings.[20] What made the poison pill attractive was that it could be implemented by the board on its own initiative, and without shareholder consent.[21] This revolutionary legal device soon obtained the imprimatur of the Delaware Supreme Court in a line of cases decided in the 1980s,[22] and made it possible for the board to "just say no" to any hostile bid by deciding to adopt a poison pill.[23]

Notwithstanding a decades-long normative debate about whether a board should have the right to "just say no" to a takeover bid,[24] the creation and adoption of the poison pill fundamentally shifted the balance of corporate governance power from

[20] Paul Davies, Klaus Hopt & Wolf-Georg Ringe, *Control Transactions*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 205, 216 (Reinier Kraakman et al. eds., 3d ed., Oxford University Press 2017); *see also* STEPHEN M. BAINBRIDGE, CORPORATE LAW 418-23 (3rd ed., Foundation Press 2015) (providing a concise introduction to the modern poison pill comprising "flip-in", "flip-over', and "redemption" elements).

[21] Marcel Kahan & Edward B. Rock, *How I Learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law*, 69 U. CHI. L. REV. 871, 909 (2002) ("At least in the first instance, poison pills are adopted unilaterally by the board of directors. Indeed, the fact that the pill did not require shareholder approval was one of its main attractions.").

[22] *Smith v. Van Gorkom*, 488 A2.d 858 (Del. 1985) (requiring directors to rely on an informed view of the corporation's intrinsic value when making takeover-related decisions); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985) (accepting utility of takeover defenses and directors' discretion to deploy them subject to an enhanced business judgment rule); *Revlon, Inc. v. MacAndrews & Forbes Holdings*, 506 A.2d 173 (Del. 1986) (directors not required to maximize short-term value of companies, save where the company was to be sold for cash); *Moran v. Household International, Inc.*, 500 A.2d 1346 (Del. 1985) (permitting boards to adopt the poison pill, and recognizing the board's power to 'just say no' until they were replaced by the shareholders; judicial review of the board's use of the poison pill subject to the *Unocal* enhanced business judgment rule); *Paramount Communications, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1990).

[23] *See* Gordon, *Corporations, Markets, and Courts*, *supra* note 11, at 1941, 1944-47; Marcel Kahan, *Paramount or Paradox: The Delaware Supreme Court's Takeover Jurisprudence*, 19 J. CORP. L. 583, 604 (1994) ("Thus, in a curious way, the logic of *Time* and *Unocal* validates the use of the poison pill for a 'just say no' defense . . . .").

[24] The debate over the proper role of the board in hostile takeovers can be traced back at least as far as Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981) and Ronald J. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819 (1981). For a typical exchange between the two camps, see generally Lucian Arye Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, 69 U. CHI. L. REV. 973 (2002); Lipton, *supra* note 19.

shareholders to boards[25]—with independent directors concomitantly becoming the linchpin in the exercise of this new found board power.[26] The magnitude of this shift is illuminated by the defeatist tone struck by one of America's leading pro-shareholder corporate governance commentators in the 1980s:

> The takeover wars are over. Management won. Although hostile tender offers remain technically possible, the legal and financial barriers in their path are far higher today than they were a few short years ago. As a result, it will be difficult for hostile bidders to prevail in takeover battles, even if shareholders support the insurgents' efforts . . . . This remarkable transformation in the market for corporate control resulted from the emergence of the "poison pill" as an effective antitakeover device . . .[27]

In 1995, 60% of S&P 1500 companies adopted the poison pill,[28] and between 1996–2000 every hostile acquirer in the U.S. encountered a target armed with one.[29] Hostile acquisitions fell

[25] Lucian Arye Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers*, 99 COLUM. L. REV. 1168, 1189 (1999) ("Poison pills have altered fundamentally the allocation of power between managers and shareholders."); Frank Partnoy & Steven Davidoff Solomon, *Frank and Steven's Excellent Corporate-Raiding Adventure*, ATLANTIC (May 2017), https://www.theatlantic.com/magazine/archive/2017/05/frank-and-stevens-excellent-corporate-raiding-adventure/521436/ [https://perma.cc/V937-BXYJ] ("Eventually, companies developed defenses, most notably the "poison pill," which dilutes the stake (and voting rights) of anyone who acquires a substantial amount of stock without first obtaining the board's approval. By the 1990s, power had been returned to management.").

[26] Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1526 (2007) ("The price of the power to "just say no" to a hostile bidder was a board that consisted of a majority of independent directors and a process that would call on those directors to exercise (at least the appearance of) independent judgment.")

[27] Joseph A. Grundfest, *Just Vote No: A Minimalist Strategy for Dealing with Barbarians Inside the Gates*, 45 STAN. L. REV. 857, 858 (1993). Grundfest would also say: "With the demise of the hostile takeover, shareholders can no longer expect much help from the capital markets in disciplining or removing inefficient managers . . . . As a result, corporate America is now governed by directors who are largely impervious to capital market or electoral challenges." *Id.* at 862, 864. In a similar, critical vein, see Jonathan R. Macey, *The Legality and Utility of the Shareholder Rights Bylaw*, 26 HOFSTRA L. REV. 835, 837 (1998).

[28] John C Coates IV, *Explaining Variation in Takeover Defenses: Blame the Lawyers*, 89 CAL. L. REV. 1301, 1307 (2001).

[29] Lucian Arye Bebchuk, John C. Coates IV, & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN.

precipitously over the 1980s,[30] and remained low until through the 1990s,[31] a phenomenon attributed at least in part to the poison pill.[32] The M&A market also shifted decisively in the U.S. toward negotiated, "friendly" acquisitions[33] as the line between "hostile" and "friendly" takeovers blurred.[34]

L. REV. 887, 926-27 (2002) (including pills adopted before the takeover attempt (i.e. the "pre-bid" variety), or "morning after" poison pills adopted as an immediate response to hostile bids).

[30] Kahan & Rock, *supra* note 21, at 879 n.33 (2002) ("Hostile acquisitions fell from almost $127 billion in 1988 to about $45.5 billion in 1989, to a little more than $11 billion in 1990.").

[31] Joseph H. Flom, *Mergers & Acquisitions: The Decade in Review*, 54 U. MIAMI L. REV. 753, 761-62 (2000) (reporting that hostile acquisitions made up a minuscule proportion of total M&A activity, but with a rebound in 1999).

[32] Gordon, *Corporations, Markets, and Courts*, *supra* note 11, at 1931-32; *see also* Robert W. Hamilton, *Corporate Governance in America 1950–2000: Major Changes but Uncertain Benefits*, 25 J. CORP. L. 349, 358 (2000) ("Takeover bids are no longer a major device for eliminating under-performing management because management has devised effective defensive tactics that make purchase-type takeovers impractical. The principal defensive weapon today is a "poison pill" . . . .").

[33] Hamilton, *supra* note 32, at 358 ("Thus, in the United States today, takeover bids are usually negotiated acquisitions rather than truly external bids. A surprise unsolicited bid may be used to get the target's attention and to open discussions, but negotiation then usually follows in order to defuse the poison pill and other defenses.").

[34] Kahan & Rock, *supra* note 21, at 880-81; Paul Davies, *Control Shifts via Share Acquisition Contracts with Shareholders (Takeovers)*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 561-62 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., OUP 2018) (" 'Just say no' may be an accurate description of the formal power held by target directors under the plan, but 'just say no' did not become an accurate description of how target directors behaved." . . . The combined effect of [two developments in U.S. corporate governance] was to change "just say no" into "just say yes, if it is a good price.").

Before long, shareholder-friendly academics,[35] proxy advisory firms,[36] and activist shareholders[37] responded by pushing for

[35] *See, e.g.*, Gilson, *Unocal Fifteen Years Later*, *supra* note 11, at 512 (2001).

> However realistic the threat of a tidal wave of junk bond financed, two-tier, bust-up takeovers, assisted by unthoughtful shareholders, may have appeared to the Delaware courts in 1985, we know now that it was a chimera. Between bidder and target now stand large sophisticated shareholders with carefully considered views of corporate governance. Shareholder initiated bylaws provide an imperfect, but realistic, way to turn back the clock.

See also Bebchuk, *supra* note 24, at 1035.

> The proposed approach—precluding incumbents who lose one election from maintaining pills—would take away from pills the special antitakeover power that they have in the presence of a staggered board. Given that about half of public companies now have staggered boards, a development with profound effects on the market for corporate control, this approach would not address an issue that is merely theoretical. Rather, it would substantially reduce boards' ability to block offers and would restore the safety valve of an effective shareholder vote in firms with staggered boards.

S*ee also* Edward B. Rock & Marcel Kahan, *Anti-Activist Poison Pills* (ECGI Working Paper No 364/2017, August 2017) 45, http://ssrn.com/abstract_id=2928883 accessed Jan. 14, 2019 [https://perma.cc/R4FK-LMZP].

> With the caveat that purely economic exposure should generally not count towards the threshold, we would regard non-discriminatory pills with a 20% threshold as presumptively valid. Such pills seem overall reasonably designed to prevent creeping control, and often serve to maintain a balanced election process, without significantly impeding an activist. On the other hand, even if economic exposure does not count, we would regard anti-activist pills with a threshold of less than 10% and pills with a "wolf-pack" trigger to be presumptively invalid. Such pills are not a reasonable response to any cognizable threat and impose excessive restrictions on the ability of an activist to conduct a credible contest and communicate with other shareholders.

[36] Francis J. Aquila, *Adopting a Poison Pill in Response to Shareholder Activism*, PRACTICAL LAW 24-25 (Apr. 2016), https://www.sullcrom.com/files/upload/Apr16_InTheBoardroom.pdf [https://perma.cc/SHN3-MXGM] ("However, institutional investors and proxy advisory firms are generally wary of corporate defenses such as poison pills because these defenses are generally perceived to be merely intended to achieve board entrenchment. The perceived abuses of the earliest poison pills also taint the image of the poison pill. As a result of the substantial pressure from institutional investors and proxy advisory firms, most U.S. companies have eliminated or watered down their poison pills. As of December 2015, only 19 of the companies in the S&P 500 maintained any poison pill at all."); ISS (Institutional Shareholder Services), *United States Proxy Voting Guidelines: Benchmark Policy Recommendations* 26 (Jan. 4, 2018), https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf [https://perma.cc/Z4BN-D7QD] (recommending a case-by-case approach to management proposals on ratification of poison pills, and specifying

limitations on or removal of poison pills and other impediments to takeovers such as staggered boards.[38] These efforts resulted in the number of companies with a traditional anti-takeover poison pill declining by over half over the 2000s;[39] by 2017, only 65 companies

that rights plans should have attributes including a "term of no more than three years" and no "dead-hand, slow-hand, no-hand, or similar feature that limits the ability of a future board to redeem the pill"). An earlier draft of ISS' policy for 2018 would have gone further by recommending voting against or withholding the vote from all board nominees if the adopts a poison pill with a term of more than 12 months: ISS, *2018 Americas Proxy Voting Guidelines Updates Benchmark Policy Changes for U.S., Canada, and Brazil*, at 6 (Nov. 16, 2017), https://www.issgovernance.com/file/policy/active/updates/Americas-Policy-Updates.pdf [https://perma.cc/6ZLN-FN99].

[37] Jessica Hall, *Hostile Takeovers Hit Record as Market Swoons*, REUTERS (Sept. 29, 2008), https://www.reuters.com/article/us-mergers-hostiles/hostile-takeovers-hit-record-as-market-swoons-idUSTRE48S2P120080929 [https://perma.cc/E2LW-MSJM] ("Hostile takeovers have more than doubled to a record level in the United States so far this year, boosted by falling stock prices and weakened corporate defenses . . . . In addition to the weakness in the U.S. stock market, with the Dow Jones industrials down over 16% this year, hostile bidders gained an advantage in recent years after many companies lowered their takeover defenses in the name of good corporate governance . . . .'The activist movement and the response by many companies to create more shareholder-friendly features—such as the declassifications of boards, reductions in the numbers of poison pills—makes hostile bids more likely to be successful,' Selig said.") (describing instances of backlash from institutional investors).

[38] Lucian Arye Bebchuk et al., *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 890 (2002) (arguing that a staggered board "offers a more powerful antitakeover defense than has previously been recognized"). A concerted effort led by Professor Lucian Bebchuk (Harvard Law School) has led to a substantial decrease in staggered boards among the largest U.S. listed companies. Steven Davidoff Solomon, *The Case Against Staggered Boards*, N.Y. TIMES: DEALBOOK (Mar. 20, 2012, 12:43 PM), https://dealbook.nytimes.com/2012/03/20/the-case-against-staggered-boards/ [https://perma.cc/SFF5-LD64] (noting that the Shareholder Rights Project led by Bebchuk has succeeded in prompting one-third of S&P 500 companies with a staggered board to declassify, and that by 2012 only 126 S&P 500 companies had staggered boards compared to 302 in 2002); 'Declassifications' (Shareholder Rights Project 2017), http://www.srp.law.harvard.edu/declassifications.shtml [https://perma.cc/9SUM-RGGY] (reporting 102 declassifications attributable to the Shareholder Rights Project from the 2012 to 2015 proxy seasons).

[39] Matteo Tonello, *Poison Pills in 2011*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Apr. 3, 2011), https://corpgov.law.harvard.edu/2011/04/03/poison-pills-in-2011 [https://perma.cc/GT48-MSNT] (observing that the number of corporations with poison pills fell from more than 2,200 in 2001 to fewer than 900 in 2011). In recent years, pills that could be triggered at the much lower ownership threshold of 5% ostensibly to protect net operating losses (NOLs)—"NOL poison pills"—have gained popularity. *See* Christine Hurt, *The Hostile Poison Pill*, 50 U.C. DAVIS L. REV. 137, 191 (2016) (arguing that "the most effective and probable use of the NOL

in the S&P 1500, or about 4%, maintained a poison pill, down from 54% in 2005.[40]

Although, at first blush, these dramatic statistics suggest the death of the poison pill and the power of U.S. boards to "just say no", a more in-depth analysis suggests that the poison pill is still surprisingly important and the shift in corporate governance power back to U.S. shareholders is far from incomplete—or, arguably, has hardly occurred at all. Boards still exercise their power to "just say no" by adopting a poison pill not ex ante, but in response to concrete takeover threats from time to time.[41] In addition, all listed companies in the United States, even those without an active pill in place, received the effect of the "shadow pill"—as boards can easily adopt a poison pill at a moment's notice if the threat of a takeover arises. Thus, in effect, every listed company in the United States always has a (shadow) poison pill in place.[42] Suffice it to say that the

poison pill is to thwart activist shareholders, with the existence of the deferred tax asset providing pre-textual cover for the board"). The only poison pill ever triggered is of the NOL pill variety; *see Versata Enterprises, Inc. v. Selectica*, Inc., 5 A.3d 586 (Del. 2010).

[40] Kosmas Papadopoulos et al., *U.S. Board Study: Board Accountability Practices Review*, INSTITUTIONAL SHAREHOLDER SERVICES 13 (Apr. 17, 2018), https://www.issgovernance.com/file/publications/board-accountability-practices-review-2018.pdf [https://perma.cc/YWS2-FJ56].

[41] *Netflix Adopts Poison Pill*, N.Y. TIMES: DEALBOOK (Nov. 5, 2012), https://dealbook.nytimes.com/2012/11/05/netflix-adopts-poison-pill/[https://perma.cc/UX2T-QTRZ] ("With Carl C. Icahn knocking on its front door, Netflix has put up the traditional first line of defense against a corporate takeover."). Steven Davidoff Solomon, *Hostile Takeovers Abound, but Success Is No Guarantee*, N.Y. TIMES: DEALBOOK (May 27, 2016), https://www.nytimes.com/2016/05/28/business/dealbook/hostile-takeovers-abound-but-success-is-no-guarantee.html [https://perma.cc/393X-H5CR] ("Bayer has made a $62 billion bid for Monsanto. It, too, has missed the deadline for nominations for Monsanto's board. And Monsanto has yet to adopt a poison pill, although this can be done in a matter of hours. Because Bayer would have to obtain antitrust approval before buying a substantial number of Monsanto shares, Monsanto does not have to rush. . . . The Andersons has not yet adopted a poison pill, a fact it has trumpeted. But it really does not need to take this defensive maneuver.").

[42] John C Coates IV, *Takeover Defenses in the Shadow of the Pill: A Critique of the Scientific Evidence*, 79 TEX. L. REV. 271, 286-91 (2000) (based on a study of 92 bids from 1996 to 2000). *See also* Francis J. Aquila & Melissa Sawyer, *Poison Pills Find New Life as "Raider-Like" Activism is on the Rise*, BUS. L. TODAY (Sept. 2014), https://www.americanbar.org/content/dam/aba/publications/blt/2014/09/keeping-current-sawyer-201409.authcheckdam.pdf [https://perma.cc/Q4L6-3VL7] ("Instead of maintaining 10-year poison pills as was typical in the 1980s and 1990s, the standard practice now is to keep a poison pill 'on the shelf' and take it out on an as-needed basis. If a company has fully briefed its board on the poison pill's

poison pill has made its mark on corporate governance in the United States, not only when it burst onto the scene in the 1980s, but even today as a central device for board power lurking in the shadows of the U.S. corporate governance environment.

In the U.K., the legal prohibition on boards adopting defensive measures without shareholder approval has prevented the pill from having any impact in the world's second largest market for corporate control.[43] In this context, it appeared—at least when viewed through an American lens—to be an epochal comparative corporate governance moment when the Japanese government released its *Takeover Guidelines* in 2005, which ostensibly made the poison pill legally available in Japan.[44] The idea that one of the most important legal mechanisms in modern American corporate governance had been transplanted into the world's third largest economy,[45] and the third largest stock market,[46] captured the attention of leading corporate governance academics and pundits in the U.S..[47] In the two years following the government officially

effects and prepared all the paperwork in advance, adopting a 'shelf' poison pill can be a *fait accompli* in very little time.").

43 For a leading account comparing the divergence in takeover regulation between the United States and the United Kingdom, see John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why?—The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO L.J. 1727 (2007).

44 Ministry of Economy, Trade and Industry & Ministry of Justice, *Guidelines Regarding Takeover Defense for the Purposes of Protection and Enhancement of Corporate Value and Shareholders' Common Interests* (May 27, 2005), http://www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/pdf/shishin_hontai.pdf [https://perma.cc/4QMX-BS8Y] [hereinafter *Takeover Guidelines*].

45 As of October 2018, in nominal terms, after the United States and the People's Republic of China. International Monetary Fund, *World Economic Outlook (October 2018)—GDP, current prices*, IMF DATAMAPPER (2018), https://www.imf.org/external/datamapper/NGDPD@WEO/OEMDC/ADVEC/WEOWORLD/JPN [https://perma.cc/6MSH-8YW4] (last visited Jan. 14, 2019).

46 As of May 2019, and after the New York Stock Exchange and NASDAQ. *See* M. Szmigiera, *Largest Stock Exchange Operators, Listed by Market Cap of Listed Companies 2019*, STATISTA, https://www.statista.com/statistics/270126/largest-stock-exchange-operators-by-marketcapitalization-of-listed-companies [https://perma.cc/5DXH-SREE] (last visited Feb. 2, 2020).

47 Ronald J. Gilson, *The Poison Pill in Japan: The Missing Infrastructure*, 2004 COLUM. BUS. L. REV. 21, 25 (2004) (arguing that "the poison pill has the potential to be greatly more pernicious in Japan than it has been in the United States, both because of the absence of ameliorating institutions in Japan, and because . . . the forces for change . . . outside the market for corporate control are significantly less strong than in the U.S."), 44 (noting that Japan serves as a useful "second data point" on how poison pills affect the mark for corporate control); Milhaupt, *supra* note 13, at 2216 (observing that Japan's endorsement of the poison pill and

sanctioning the Japanese "poison pill," hundreds of listed companies in Japan adopted it.[48] The obvious question became: would the "poison pill" have the same watershed impact on Japanese corporate governance as it had in the United States in the 1980s? To answer this, we first need to be absolutely clear on one thing: what exactly *is* Japan's so-called "poison pill" as a matter of law?

2. MEDICINE FOR PERCEIVED JAPANESE CORPORATE ILLS: THE STRUCTURE AND LEGAL NATURE OF JAPAN'S SO-CALLED "PILL"

One of comparative corporate law's greatest and most intractable challenges is terminological. Proper use of legal terminology ensures analytical rigor and highlights seemingly minor, but otherwise decisive, differences between legal mechanisms in how they operate in their respective contexts. A preliminary note on terminology thus is in order. In this Article, we consistently use the term "defensive measures" (as a direct translation of *bōeisaku*) when referring to *Japanese* anti-takeover defenses in general. As we discuss below, it is misleading to speak of Japanese defensive measures as "poison pills"; we therefore firmly part ways with a number of commentators on this point.[49] Hence, "poison pill" without qualification is used exclusively to describe the U.S.-model anti-takeover defense, whereas in the Japanese context, any references to "poison pill" or "pill" will be qualified with "so-called" or inverted commas.

Delaware takeover law as "a remarkable example of the transplantation of foreign institutions, and potentially as a watershed moment in the evolution of corporate law and governance in the world's [then-]second largest economy").

48 Fujishima Yūzō, *Baishū Bōeisaku wo meguru Kinji no Dōkō* (買収防衛策を巡る近時の動向) [*Recent Trends in Defensive Measures*] DAIWA INSTITUTE OF RESEARCH: CONSULTING REPORT (Feb. 20, 2009) 2 tbl 1, https://www.dir.co.jp/report/research/capital-mkt/esg/09022001cg.pdf [https://perma.cc/S2VB-LBQZ].

49 *E.g.*, Gilson, *supra* note 47, at 24-25 (referring to Japanese anti-takeover defenses as "the poison pill"); Zenichi Shishido, *Introduction: The Incentive Bargain of the Firm and Enterprise Law: A Nexus of Contracts, Markets, and Laws*, *in* ENTERPRISE LAW: CONTRACTS, MARKETS, AND LAWS IN THE US AND JAPAN 33 (Zenichi Shishido ed., 2014) ("[S]everal mechanisms have been invented to reduce shareholder ability to disrupt management . . . [including] Japanese-style 'poison pills' in Japan."); Toshiaki Yamanaka, *Corporate Boards in Europe and Japan: Convergence and Divergence in Transition*, 19 EUR. BUS. ORG. L. REV. 503, 516 (2018) ("[M]ore than three hundred public firms have introduced the 'Japanese version' of the poison pill since 2005.").

In the discussion that follows, we draw on the two-category classification adopted in Japanese legal discourse: ex-post measures and ex-ante measures.[50] After introducing each category in turn (in 2.1 and 2.2, respectively), we contextualize Japan's defensive measures and associated legal norms by critically comparing them with the U.S. and the U.K. (2.3). The comparative exercise exposes fundamental differences between Japan and the U.S. and U.K. and the importance of properly understanding Japan's defensive measures on their own terms.

2.1. Ex-Post Measures

Ex-post measures are adopted only after a corporation has been specifically targeted by a corporate raider. The two classic defensive measures available to the corporation are: (1) share or share-option[51] placement,[52] which is the issuance of shares or share options to a specific party who is friendly to incumbent management; or (2) option allotment, by which share options are issued to all existing shareholders in a target corporation but with the options exercisable by all shareholders except the raider.[53] The latter—option allotment—may be considered to be a rough equivalent to a pill implemented after a hostile takeover attempt has commenced. In Japan, neither variant has escaped judicial scrutiny entirely intact.

Share or share-option placements, which can be used by management to alter the shareholding structure of a company, may be challenged in court by aggrieved shareholders. Under Japan's corporate law legislation, a shareholder who is likely to suffer prejudice from a share or share-option placement may apply for an injunction restraining the placement on two grounds: (1) unlawfulness or (2) an "extremely unfair" method of placement.[54] Most challenges proceed under the "extremely unfair" limb—out of which the Japanese courts have developed the "primary purpose rule." Briefly stated, if the primary purpose of the placement (i.e., the purpose that takes precedence over other legitimate purposes such as raising capital) is to maintain control of the company, the court may grant an injunction restraining the placement.[55]

It is important to note that Japan's primary purpose rule was developed not as part of directors' duties but rather as an interpretative gloss on a specific corporate law provision governing shareholders' rights.[56] The rule's focus on capital-raising, which is inseparable from the nature of the statutory provision from which the rule developed, is also a limiting factor. As Milhaupt and Pistor astutely observed, "the [primary purpose] rule is not well suited to judging the reasonableness of other types of defensive measures, including the U.S.-style poison pill, that have no corporate finance function."[57] It is thus not entirely clear how the primary purpose rule in its original form applies in the context of defensive measures

50 *See* Puchniak & Nakahigashi, *supra* note 3, at 6, 22-38 (describing Japan's overall regulatory framework on hostile takeovers and distinguishing it from the Anglo-American model).

51 The unofficial Japanese Government translation of *shin-kabu yoyaku-ken* is "share option," but they are also commonly translated as "warrants" in English language-scholarly and business literature.

52 Also often called "share issuances" in the literature, the word "placement" is used here to emphasize the action of "placing" the shares with a specific party or parties as opposed to a general issue ("allotment") to all shareholders.

53 In the early years, the raider's options might, in some circumstances, be redeemable for cash, or exercisable subject to conditions. *See infra* notes 80-82 and accompanying text.

54 For shares, Companies Act, art. 210 provides:

> In the following cases, if shareholders are likely to suffer disadvantage, shareholders may demand that the Stock [Corporation] cease a share issue [of new shares] or disposition of Treasury Shares . . .
>
> (i) in cases where such share issue or disposition of Treasury Shares violates laws and regulations or the articles of incorporation; or
>
> (ii) in cases where such share issue or disposition of Treasury Shares is effected by using a method which is extremely unfair.

Kaisha-hō [Companies Act], Act. No. 86 of 2005, art. 210 (Japan). The text is based on the Japanese Government's unofficial (but widely used) translation at [https://perma.cc/AX7E-KYCP]. The equivalent provision for share options is Companies Act, art. 247.

55 *See generally* Egashira Kenjirō, Kabushiki Kaisha-hō (株式会社法) [The Laws of Stock Corporations (translated title by source author)] 773-75 (7th ed. Yūhikaku 2017); Puchniak & Nakahigashi, *supra* note 3, at 28-33 (describing the history of Japan's primary purpose rule, distinguishing it from U.K. law, and illustrating its function in the case of Livedoor's attempted hostile takeover bid for Nippon Broadcasting System).

56 *See* Yamanaka Toshiaki, *Seitō mokuteki rūru ni yoru torishimariyaku ni taisuru kiritsu: eikoku 2006 kaisha-hō wo fumaete* [*Monitoring Directors with the Proper Purpose Test: Lessons from the UK Companies Act 2006*] 36-37 (Kinyū shōjihō [Fin. & Comm. Law] Working Paper December 2014) [https://perma.cc/K2Y8-SBJ5] (describing how the primary purpose rule operates in practice).

57 Curtis J. Milhaupt & Katharina Pistor, Law and Capitalism: What Corporate Crises Reveal About Legal Systems and Economic Development Around the World 93 (2008).

other than share placements; we discuss this below in the context of the watershed *Livedoor* case.

Second, it is widely recognized that Japanese courts have traditionally been reluctant to find in a given case that an improper purpose took precedence over other seemingly legitimate reasons that would require the company to raise capital.[58] In most cases, all the target board had to do to survive a shareholder challenge was to refer to some need to raise capital—a burden that was easily discharged in practice.[59] Once the court made a finding that the company was in need of capital, the court would also, in principle, respect the discretion of the directors as to the specific means for raising finance.[60] Hence, the prevailing jurisprudence on Japan's primary purpose rule suggested a strong judicial inclination towards upholding the target board's decision to issue shares to a friendly stable-shareholder[61] in the context of an ongoing takeover bid.[62]

In contrast to the relatively well-established jurisprudence on share placements, the question of whether post-bid share option placements would pass scrutiny under the primary purpose rule was answered more recently in the landmark case of *Livedoor* (2005).[63] The facts may be simply stated. Livedoor, an internet company, shocked the nation by launching a hostile takeover bid for Nippon Broadcasting System ("NBS"), a leading broadcaster in Japan. NBS management quickly responded by announcing a plan to issue share options to a friendly stable-shareholder as a defensive measure, which, if exercised, would have dramatically diluted

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[58] EGASHIRA, *supra* note 55, at 773.

[59] *See* Tomotaka Fujita, *Case No. 29: Corporate Law – Takeovers – Issuance of Share Options as Defence Measure – Principal Purpose Rule*, *in* BUSINESS LAW IN JAPAN: CASES AND COMMENTS 317-18 (Moritz Bälz et al. eds., 2012) (discussing how in shareholder suits, target companies will "most likely lose the battle if the purpose is recognized as 'control' " but will "easily prevail if the court rules the purpose is 'finance' or another legitimate purpose"); Puchniak & Nakahigashi, *supra* note 3, at 29 (citing the wide recognition that Japanese courts tend to uphold target boards' decisions as long as those boards refer to "some need to raise capital").

[60] EGASHIRA, *supra* note 55, at 773.

[61] On this concept, see *infra* note 132 and accompanying text.

[62] *Compare* cases cited at EGASHIRA, *supra* note 55, at 773-74 (discussing cases in which injunctions were not granted), *with* those at *id.*, at 774 (discussing cases finding an improper purpose to dilute a particular shareholder, majority of which were decided more recently).

[63] *See* Puchniak & Nakahigashi, *supra* note 3, at 30-33 (describing the events of the *Livedoor* case, the court's reasoning, and the thoughts of various commentators as the events occurred).

Livedoor's stake in NBS. Livedoor applied to the Tokyo District Court for an injunction restraining NBS from completing the placement of the share options. The fact that the options, if exercised, would have more than doubled NBS' share capital made it practically impossible for NBS to argue that the "primary purpose" of the issuance was to raise capital and not to entrench management.[64]

Unsurprisingly, the Tokyo District Court granted the injunction in a decision upheld on appeal to the Tokyo High Court.[65] The Tokyo High Court, however, crafted an exception to the primary purpose rule, laying down four limited circumstances in which a target corporation's board is permitted to conduct a share or share-option placement even where the "primary purpose" was maintaining control in order to protect shareholders' interests (rather than to raise corporate capital). These four circumstances recognized by the Court (albeit in *obiter*) as clearly deleterious to the interests of the target corporation's shareholders are:

> (1) greenmail (i.e. acquiring the target's shares with the intention of forcing the target to buy them back at a higher price);
>
> (2) temporarily taking control of and running the target to advance the acquirer's interests at the target's expense, such as by acquiring the target's core assets at low prices;
>
> (3) pledging as collateral for debts of the acquirer or its associated corporations the target's assets, or repaying such debts using the target's funds; or
>
> (4) temporarily taking control of the management of the target to sell off valuable assets not currently related to the target's business, and distributing the proceeds as

[64] *See* Fujita, *supra* note 59, at 318 n.9 (noting that NBS did not even attempt to make this argument but instead issued a press release announcing that its actions were intended to preserve the nature of the firm as a mass media company).

[65] Tokyo Kōtō Saibansho [Tokyo High Ct.] Mar. 23, 2005, 1173 HANREI TAIMUZU [HANTA] 125. *See* Fujita, *supra* note 59, at 313-15 (summarizing the *Livedoor* case). *See also* KIGYŌ-BAISHŪ WO MEGURU SHOSŌ TO NIPPON-HŌSŌ-JIKEN KANTEI-IKEN (企業買収をめぐる諸相とニッポン放送事件鑑定意見) [VARIOUS ASPECTS ON TAKEOVERS AND EXPERTS' OPINION IN THE NIPPON BROADCASTING SYSTEM CASE] (別冊商事法務編集部 [Editorial Board of Bessatsu Shōji Hōmu] ed., 別冊商事法務289号 [Vol. 289, Bessatsu Shōji Hōmu], Shōji Hōmu 2005).

dividends, or disposing of the target's shares at a price as inflated by the dividends.[66]

The principles laid down by the Tokyo High Court in *Livedoor* were soon incorporated directly into the *Takeover Guidelines* issued jointly by the Ministry of Economy, Trade and Industry and the Ministry of Justice in 2005.[67] Although expressly framed as non-binding in a strict legal sense,[68] the Guidelines' stated aim was nonetheless to serve as a code of conduct for the business community.[69] Hence, notwithstanding its amorphous legal nature, this document is highly instructive, as it states in no uncertain terms that "it is legitimate and reasonable for a joint-stock corporation to adopt defensive measures designed to protect and enhance shareholder interests by preventing certain shareholders from acquiring a controlling stake in the corporation."[70] Despite their initial setback in the courts, defensive measures nonetheless received the imprimatur of Japan's politico-legal establishment.

The second landmark case, *Bull-Dog Sauce* (2007),[71] remains the only case in which the Supreme Court of Japan, the nation's apex court, addresses the question of the legality of defensive measures

[66] *See* CORPORATE VALUE STUDY GROUP, CORPORATE VALUE REPORT 33 n.57 (May 27, 2005), [https://perma.cc/N85Z-EDQQ] (describing the four exceptions as takeover defense measures); Fujita, *supra* note 59, at 315, 319 (describing the four exceptions as means of protecting shareholders from hostile buyers and discussing potential problems these exceptions might cause); Puchniak & Nakahigashi, *supra* note 3, at 33 (describing the four exceptions and asserting the court's intent to use them as a filter "that would allow wealth-enhancing takeovers to proceed without interference from target boards, but still permit target boards to block wealth-reducing hostile takeovers").

[67] *See Takeover Guidelines*, *supra* note 44, at 4 n.1 ("The following can be cited as typical defensive measures to protect and enhance shareholder interests[:] (i) Takeover defense measures to prevent takeovers that would cause an apparent damage to shareholder interests [in any of the four *Livedoor* circumstances].").

[68] *See, e.g.*, *id.* at 3 ("The Guidelines are not legally binding.").

[69] *See id.* at 3 ("The mission of the Guidelines is to change the business community from one without rules concerning takeovers to one governed by fair rules applicable to all. To prepare for the upcoming era of M&A activity, we expect the Guidelines to become the code of conduct for the business community in Japan by being respected and, as the need arises, revised.").

[70] *Id.* at 4.

[71] Supreme Ct. [Saikō Saibansho] August 7, 2007, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2215. *See* Hiroshi Oda, *Case No. 30: Corporate Law – Takeovers – Defensive Measures – Equality of Shareholders*, *in* BUSINESS LAW IN JAPAN: CASES AND COMMENTS 323 (Moritz Bälz et al. eds., 2012) (summarizing the *Bull-Dog Sauce* case).

based on option allotments.[72] This case involved a bid by Steel Partners, a U.S. private equity fund, for all outstanding shares of Bull-Dog Sauce Co. Ltd,[73] the manufacturer of a popular series of Worcestershire-type sauces. In response to the bid, Bull-Dog Sauce's board proposed the defensive measure of allotting three share options per share to all existing shareholders. All shareholders except Steel Partners would be eligible to exercise the options, whereas Steel Partners would be entitled, in the event that the options were exercised, to receive in lieu of shares a cash payment of over $2 billion. In other words, Bull-Dog's defensive measure would have financially compensated Steel Partners for the discriminatory issuance of shares to the other shareholders. Critically, "as the bid was made shortly before Bull-Dog Sauce's annual general meeting, the board decided to put its proposed defensive measure before the shareholders for approval."[74] Astoundingly, the proposed measure was approved by 88.7% of a qualified majority of shareholders; in effect, almost every shareholder (excluding Steel Partners) voted in favor.

Undaunted, Steel Partners applied for an interim injunction restraining the option allotment—"a strange turn of events considering that none of the [other] shareholders appeared to be willing to sell their shares to the hostile acquirer."[75] The Tokyo District Court declined to grant the Steel Partners' application for an injunction in a decision that was upheld on appeal to the Tokyo High Court and further appeal to the Supreme Court of Japan. According to the Supreme Court, target shareholders have the right

[72] *But see* Oda, *supra* note 71, at 329-30 (arguing that the case's significance will be limited because of its unique circumstances); Puchniak & Nakahigashi, *supra* note 3, at 37 (asserting that, in accord with the views of "leading Japanese academics," the case's "unusual circumstances" distinguish it from typical hostile takeover cases).

[73] *See generally* Curtis J. Milhaupt, *Bull-Dog Sauce for the Japanese Soul? Courts, Corporations, and Communities – A Comment on Haley's View of Japanese Law*, 8 WASH. U. GLOBAL STUD. L. REV. 345, 353-56 (2009) [hereinafter Milhaupt, *Bull-Dog Sauce*] (summarizing the *Bull-Dog Sauce* case and arguing (*id.* at 356) that one effect of the case "may be to encourage the (re-)establishment of corporate ties to stable, long-term shareholders").

[74] Puchniak & Nakahigashi, *supra* note 3, at 36. *See also* Oda, *supra* note 71, at 324 (describing the board's view that the bid would harm the company and its decision to resist the bid before the annual shareholders' meeting).

[75] Puchniak & Nakahigashi, *supra* note 3, at 36. *See also* Oda, *supra* note 71, at 324 (describing the bases of the injunction, which are "that the issuing of share options was against the equality of shareholders" and that it was conducted "in a grossly unfair manner").

to decide whether the risk of damage to the corporation justifies the adoption of defensive measures. The Supreme Court further held that, in light of the "fair and adequate measures" taken by the target to compensate the bidder for depriving the bidder of its right to exercise its options, "the target's discriminatory treatment of the bidder as a shareholder was justifiable."[76]

Notwithstanding the buzz generated by the *Bull-Dog Sauce* case and the jurisprudence arising therefrom within Japan[77] and in the international press and scholarly literature,[78] the weight of its legacy today is debatable. First, the facts were highly unusual. Given that nearly all shareholders of the target supported the defensive measure, one might reasonably question why the defensive measure was required at all if the existing shareholders were unwilling to tender their shares to the acquirer in the first place. Whether major shareholders of future targets of hostile takeovers would similarly rally in support of incumbent management is open to serious

[76] Puchniak & Nakahigashi, *supra* note 3, at 36-37. *See also* Oda, *supra* note 71, at 326 (citing the Court's conclusion that the allocation of share options was neither inadequate nor "against the idea of fairness").

[77] The leading commercial law periodical publisher in Japan dedicated a 442-page special issue collecting documents relevant to the case. *See* BURUDOGGU SŌSU NO HŌ-TEKI KENTŌ: BAISHŪ BŌEISAKU NI KANSURU SAIBAN KEIKA TO IGI (ブルドックソース事件の法的検討－買収防衛策に関する裁判経過と意義) [LEGAL ANALYSIS OF THE BULL-DOG SAUCE CASE: THE JUDICIAL PROCEEDINGS ON ANTI-TAKEOVER DEFENSIVE MEASURES AND THEIR SIGNIFICANCE] (別冊商事法務編集部 [Editorial Board of Bessatsu Shōji Hōmu] ed., 別冊商事法務311号 [Vol 311, Bessatsu Shōji Hōmu], Shōji Hōmu 2007).

[78] *E.g.*, Jennifer G. Hill, *Takeovers, Poison Pills and Protectionism in Comparative Corporate Governance*, *in* I FESTSCHRIFT FÜR KLAUS J. HOPT ZUM 70. GEBURTSTAG AM 24. AUGUST 2010 806, 808 (Stefan Grundmann et al. eds., De Gruyer 2010) ("The fact that the target shareholders had approved the defensive plan was a particularly significant factor in [the *Bull-Dog Sauce*] judgements."); Shu-Ching Jean Chen, *Japan High Court Keeps Bull-Dog Sauce From Steel Partners' Jaws*, FORBES (Aug. 8, 2007), [https://perma.cc/DG9U-YNX3] (discussing the effects of the *Bull-Dog Sauce* decision on Bull-Dog Sauce, Steel Partners, and the Japanese government); Hideki Kanda, *Takeover Defences and the Role of Law: A Japanese Perspective*, *in* PERSPECTIVES IN COMPANY LAW AND FINANCIAL REGULATION 413, 420-22 (Michel Tison et al. eds., 2009) (relating the characteristics of the *Bull-Dog Sauce* case to Japanese statutory law); Milhaupt, *Bull-Dog Sauce*, *supra* note 73, at 353-56 (summarizing the case and discussing its potential effects, particularly as they relate to contemporary hostile-takeover developments); Nathan Rayne & Reiji Murai, *Japan's Bull-Dog OK's Poison Pill for Steel Partners*, REUTERS (June 24, 2007), [https://perma.cc/8FR6-H5TY] (arguing that the *Bull-Dog Sauce* case could set a precedent for the "hundreds of other firms" using poison pill defenses); Alison Tudor, *Steel Partners Presses on with Bull-Dog Bid*, REUTERS (Aug. 8, 2007), [https://perma.cc/Z7RP-YW8S] ("[S]ome financial analysts fear the [*Bull-Dog Sauce*] ruling may erode investor appetite for the Japanese equity market.").

question in light of changes to shareholding structure in Japanese firms since the mid-2000s (a point that we discuss below in Part 3).

A further curiosity lay in Bull-Dog shareholders' overwhelming support[79] for a defensive measure that included a generous payment to the hostile acquirer, which may have been driven by good reasons at the time.[80] However, the Corporate Value Study Group, in a second report released in June 2008, soon expressed its disapproval of defensive measures that would involve cash or financial payoffs to acquirers,[81] and modern defensive measures typically no longer include such a feature.[82] We move to modern defensive measures in the next Section.

[79] Although beyond the scope the present Article, such curiosities may perhaps only make sense in a context where the alchemy of stable-shareholders and corporate cultural norms creates an impenetrable wall against the barbarians at the gate. *See* Puchniak & Nakahigashi, *supra* note 3, at 37-41 (arguing that Japanese culture has formed a barrier to hostile takeovers), 40 (noting that "support for incumbent management by stable shareholders has consistently defeated takeover bids over the last several decades").

[80] *See* Iwakura Masakazu & Sasaki Shigeru, *Burudoggu Sōsu ni yoru Tekitai-teki Baishū ni taisuru Takō Sochi (Ge Sono 2)* (ブルドックソースによる敵対的買収に対する対抗措置（下その2) [*Measures Against Hostile Acquisition by Bull-Dog Sauce (Part 2.2)*], 1825 SHŌJI HŌMU 36, 38 (2008) (observing that the issue of "economic equality" between the acquirer and the other shareholders came up during preliminary injunction proceedings, but that the Supreme Court did not go so far as to make the payment of appropriate compensation to the acquirer an absolute condition for a defensive measure).

[81] *See* CORPORATE VALUE STUDY GROUP, TAKEOVER DEFENSE MEASURES IN LIGHT OF RECENT ENVIRONMENTAL CHANGES 3-4 (June 30, 2008), [https://perma.cc/XE33-6HX6] ("Granting cash or other financial benefits to the acquirers in implementing takeover defense measures invites the actual implementation. As a result, it deprives shareholders of the opportunities of selling their shares to the acquirers after adequate time and information necessary for them to appropriately decide whether to support or oppose the takeovers or the opportunities for negotiation are ensured. Therefore, it could prevent the formation of an efficient capital market. Thus, cash or other financial benefits should not be granted to the acquirers."). Note, however, that the *Takeover Guidelines* based on the 2005 report of the Corporate Value Study Group was not updated.

[82] *See, e.g.*, M&A HŌ TAIKEI [COMPREHENSIVE ANALYSIS OF M&A LAWS IN JAPAN] (Mori Hamada Matsumoto ed., 2015) (describing common hostile takeover measures). As early as 2008, defensive measures that no longer involved direct cash compensation to the acquirer were put in place; Marusan's plan, for example, permitted the acquirer to exercise warrants provided that it divest part of its holdings via securities firms designated by the issuer. *Marusan Shōken ga Shingata no Baishū Bōeisaku, Tekitai-teki Bashū-sha ni mo Jōken-tsuki de Kenri Kōshi wo Nin'yō* (丸三証券が新型の買収防衛策、敵対的買収者にも条件付きで権利行使を容認) [*Marusan Securities Adopts New-Type Defensive Measures, Exercise of Rights by Hostile Acquirers Subject to Conditions Approved*]' REUTERS JAPAN (May 16, 2008), [https://perma.cc/N85Z-EDQQ]. As a recent example, when Kaneka Corporation

2.2. Ex-Ante Measures: PRPs, or the So-Called "Japanese Poison Pill"

The boom in *ex-ante* measures—which are adopted by companies before a specific takeover threat arises—can be traced back to the *Takeover Guidelines* jointly issued by two government ministries after consultation with stakeholders with the goal of "preventing excessive defensive measures, enhancing the reasonableness of takeover defense measures and thereby promoting the establishment of fair rules governing corporate takeovers in the business community."[83] The Guidelines did not only make it clear that potential targets may adopt defensive measures generally;[84] by making express reference to pre-bid *ex-ante* defensive measures,[85] it gave this yet-untested legal tool its blessing. Released in a pivotal year (2005), in which hostile takeover attempts reached a new high in the public consciousness, the *Takeover Guidelines* not only triggered a subsequent shift in jurisprudence but also gained a following among practitioners in Japan.

Since the Guidelines were released, the most popular by consistently overwhelming margins—and the only feasible[86]—type

revised its PRP, it stated that the revised plan made it clear that the acquirer's warrants would not be redeemed for cash. KANEKA CORPORATION, TŌSHA KABUSHIKI NO DAIKIBO KAITSUKE KŌI NI KANSURU TAIŌ SHISHIN (BAISHŪ BŌEISAKU) (当社株式の大規模買付行為に関する対応方針（買収防衛策）の継続について) [ON THE CONTINUATION OF THE POLICY ON RESPONDING TO LARGE-SCALE ACQUISITION OF THIS CORPORATION'S SHARES (ANTI-TAKEOVER DEFENSIVE MEASURE)]' (May 12, 2016), [https://perma.cc/7YNB-LZFX].

83 *Takeover Guidelines*, *supra* note 44, at 1 (Introduction).

84 At the time, only *ex-post* defensive measures had been litigated, most recently in the *Livedoor* case. *See* Puchniak & Nakahigashi, *supra* note 3, at 30-33 (describing the events of the *Livedoor* case, the court's reasoning, and the thoughts of various commentators as the events occurred).

85 *See Takeover Guidelines*, *supra* note 44, at 6 ("In the process of adopting *defensive measures in advance of an unsolicited takeover proposal* . . .") (emphasis added).

86 Defensive measures other than of the PRP variety include the "trust-type" measure. *See* Kanda, *supra* note 78, at 419 ("Under a typical trust based scheme, the firm issues stock warrants to a trust bank with designated shareholders as beneficiaries of the trust. When a hostile bid occurs, the pill is triggered, and the trust bank transfers the warrants to the shareholders. The warrants have a discriminatory feature and the bidder has no right to exercise them, as the terms and conditions of the warrants usually provide that the warrants are not exercisable by the shareholders who own 20% or more of the firm's outstanding stock."). *See also infra* Table 1. Trust-type defensive measures, in contrast to the PRP, were never adopted by more than a mere handful of companies even in the earliest days. *See* Kanda, *supra* note 78, at 418 ("Among 359 firms . . . 10 have trust-type or similar warrant schemes."); Milhaupt, *Bull-Dog Sauce*, *supra* note 73, at 352 tbl. 1 (citing the

of defensive measures is a category of *ex-ante* measures known as *jizen keikoku gata bōeisaku* ["Pre-Warning Rights Plans"] ("PRPs").[87] Strictly legally speaking, a PRP is nothing more than a statement of intention of how the board would act in the event of a hostile bid that takes the form of a press release issued by the target board.[88] In the event of a potential takeover bid that may leave the bidder holding more than a certain percentage (usually 20%) of the issued shares, the acquirer is required to disclose information relevant to their acquisition plans to the target corporation's board for consideration and evaluation.[89] If the acquirer fails to disclose the required information, or the proposed acquisition is deemed to be deleterious to "corporate value" or not in the interests of the shareholders,[90] there would be grounds to trigger the PRP.

Possible variations as to the process by which a PRP is triggered include: (1) a board resolution only; (2) a board resolution upon the

proportion of trust-type defensive measures in July 2006 and July 2007 as being 6.5% and 2.6%, respectively); *infra* Table 1 (showing the consistent and overwhelming dominance of the PRP over alternatives such as the trust-type defensive measure from 2009). *See also* Fujimoto et al. (2007), *infra* note 154, at 34 (pointing to the requirement for a special resolution of the shareholder meeting [i.e., a two-thirds vote] and the need to draft a detailed outline for the issuance of share warrants (発行要項) as reasons that the trust-type measure failed to catch on). *See also Baishū bōeisaku – kiso chishiki: raitsu puran – shintakugin ni yoyakuken – tokubetsu ketsugi nekku ni* (買収防衛策、基礎知識――ライツプラン、信託銀に予約権、特別決議ネックに。) [*Defensive Measures – Basic Knowledge: Rights Plans – Issue of Options to Trust Banks – Special Resolution as Obstacle*], NIKKEI SANGYŌ SHIMBUN 22 (morning edition, June 20, 2006) (citing the requirement of a special resolution and the 30 to 40 million-yen fee payable to trust banks as reasons for the trust-type plan's loss of market share).

87 *Cf.* Hideki Kanda, *Corporate Governance in Japanese Law: Recent Trends and Issues*, 11 HASTINGS BUS. L.J. 69, 73 (2015) (using the alternative nomenclature of "advance warning plan").

88 *See* John Armour et al., *The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework*, 52 HARV. INT'L L.J. 219, 254 (2011) (observing that "[u]nlike the U.S. shareholder rights plan, the pre-warning rights plan is not a legal instrument").

89 Mori Hamada Matsumoto, *supra* note 82, at 797.

90 *See* Mori Hamada Matsumoto, *supra* note 82, at 797-98; Armour et al., *supra* note 88, at 254 (asserting that a company may trigger a PRP if it "determines that the acquisition would damage the 'corporate value of the company or the common interests of the shareholders' "); Kanda, *supra* note 78, at 419 ("[I]f a shareholder attempts to increase its stake to 20% or more of the firm's outstanding stock . . . the shareholder is required to disclose and explain . . . its intent to hold such stock and what the shareholder would do for the firm.").

recommendation of a special committee; or (3) a shareholder vote.[91] If triggered, the board would allot share options that are exercisable by shareholders other than the bidder and its associates.[92] Although the *Takeover Guidelines* expressly contemplates the adoption of a PRP by board resolution,[93] in practice, a shareholder vote is usually necessary when adopting or triggering a PRP.[94] Most modern PRPs automatically expire after a period of one to three years.[95] They may, however, be modified or renewed with shareholder approval or be abolished at any time by a resolution of the board or the shareholder meeting.[96]

Compared with *ex-post* (i.e., post-bid) defensive measures, the modern PRP's prospects of withstanding judicial scrutiny—if and when directly challenged—are open to even greater doubt. The most relevant case on point is *Nireco* (2005).[97] In that case, an early version of the PRP failed to survive judicial scrutiny, as the Tokyo District Court granted an injunction restraining the company from implementing the measure.[98] The decision was sustained upon appeal to the Tokyo High Court.[99] However, in contrast with

[91] *See* Mori Hamada Matsumoto, *supra* note 82, at 797; Armour et al., *supra* note 88, at 254 n.175 (listing three processes for triggering the issuance of warrants: "by simple board resolution," "upon board resolution acting at the recommendation of an independent committee," or "upon vote of the shareholders"); Kanda, *supra* note 78, at 419 & 419 n.16 (reporting that with the majority of PRPs, the decision to trigger the plan rests with a special, independent committee).

[92] Mori Hamada Matsumoto, *supra* note 82, at 798.

[93] *See Takeover Guidelines*, *supra* note 44, at 6 ("[I]t is not appropriate to reject outright the adoption of defensive measures by the board of directors when such measures enhance shareholder interests."). However, the Guidelines were also careful to stress that shareholders should be permitted to dismantle a board-implemented defensive measure. *Id.*

[94] *See Takeover Guidelines*, *supra* note 44, at 5-6 (emphasizing the "principle of shareholders' will" in the adoption of defensive measures). *Cf.* Kanda, *supra* note 78, at 419 (describing how in practice, most proposals for advance-warning-type defense measures obtain shareholder approval).

[95] The overwhelming majority of PRPs have a three-year validity period. *See* MARR, *infra* note 250, at 33 (showing that 349 of 383 PRPs as of Oct. 31, 2018, 366 of 405 as of Dec. 31, 2017, and 395 of 443 as of Dec. 31, 2016 fall into this category).

[96] Mori Hamada Matsumoto, *supra* note 82, at 798.

[97] For a discussion of the *Nireco* case, see Puchniak & Nakahigashi, *supra* note 3, at 35.

[98] Tokyo District Court [Tōkyō Chihō Saibansho] June 1, 2005, 1186 HANREI TAIMUZU [HANTA] 274; Tokyo District Court [Tōkyō Chihō Saibansho] June 9, 2005, 1186 HANREI TAIMUZU [HANTA] 265.

[99] Tokyo High Court [Tōkyō Kōtō Saibansho] June 15, 2005, 1186 HANREI TAIMUZU [HANTA] 254.

modern PRPs, the defensive measure in *Nireco* would have discriminated not only against the acquirer but also against another sub-group of "innocent" shareholders.[100] With *Nireco* offering limited if any jurisprudential value, and no judgment having ever resulted from a modern PRP post-*Nireco*, modern PRPs have yet to undergo trial by fire. Insofar as they continue to be primarily non-legal and contingent in nature, we remain none the wiser as to the actual legal consequences that would flow from a triggered modern PRP. Also, and perhaps most importantly, it should be stressed that the involvement of shareholder approval in either adopting, triggering, or renewing PRPs is noteworthy and—as discussed below—sets it apart from U.S. poison pills, which can clearly be implemented by the board, can be triggered automatically, and require no shareholder approval at any stage at all.

2.3. *Not Poison, Just Untested Medicine: Japanese Defensive Measures in Comparative Perspective*

Not many jurisdictions receive sustained attention from scholars and pundits in the English-language hostile takeovers literature, but three may claim that honor: Japan, the U.K., and the U.S.. It is always tempting to minimize or overlook the substantive differences in the law of anti-takeover defenses between these three, whether because of the myopia that results from viewing one system through the lens of another or to paint an overly generalized picture

[100] *See* Mori Hamada Matsumoto, *supra* note 82, at 796 n.67; Armour et al., *supra* note 88, at 250 n.150 (describing the competing interests and bids of Fuji Television, Livedoor, and NBS). The *Takeover Guidelines* (2005) also give as an example of an unacceptable scheme "a case where stock acquisition rights, etc. with the exercise conditioned on the initiation of a takeover are actually allocated to all shareholders before the start of a takeover, with a specific day prior to the start of the takeover as the record date for allocation (except where resolved or disclosed prior to the commencement of a takeover that stock acquisition rights will be allotted on condition that a takeover is commenced). In such cases, it is likely that all shareholders acquiring stock after the record date, including those who are not the acquiring person, will incur unexpected losses. In addition, the value of the stock owned by shareholders as of the record date may also drop significantly. If the stock acquisition rights are subject to transfer restrictions, it is also possible that the shareholders cannot recover the portion of their investments corresponding to such drop in value. In this way the takeover causes unforeseen losses for shareholders who are not acquiring persons." *Takeover Guidelines*, *supra* note 44, at 2 n.10.

of corporate governance convergence.[101] In this part, we put any such temptation to rest by highlighting key differences between Japan, the U.K., and the U.S., and make the case for understanding the Japanese legal context on its own terms.

Primary purpose rule. Commentators have picked up on apparent similarities[102] between Japan's judicially developed primary purpose rule on the one hand and the "no frustration rule" contained in the Takeover Code[103] and "proper purpose duty" imposed on directors of target corporations as a matter of statutory and common law[104] on the other. Nonetheless, substantial differences exist. First, Japan's primary purpose rule is limited to share/share option placements and share option allotments. By contrast, directors of U.K. companies are bound to exercise all the powers of their office (whether they concern share options or anything else that directors have the power to do) in accordance with the purpose of conferring those powers.[105]

[101] On this theme, albeit in other corporate law contexts, see Dan W. Puchniak, *The Derivative Action in Asia: A Complex Reality*, 9 BERKELEY BUS. L.J. 1, 28 (2012) (asserting the necessity of considering local factors like case law, economic forces and corporate governance institutions when attempting to understand how derivative action functions in Asia's leading economies); Puchniak & Nakahigashi, *supra* note 3, at 42 (concluding that "in order to understand hostile takeovers in any given jurisdiction, it is best to understand that jurisdiction on its own terms); Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329, 356-57 (2001) (outlining three forms of corporate governance, plus two forms of hybrids, but conceding that "[t]he diversity of circumstances suggests that there can be no general prediction of the mode that convergence of national corporate governance institutions may take.").

[102] *See* Armour et al., *supra* note 88, at 250 n.147 ("Doctrinally, this [primary purpose rule] is similar to U.K. common law.").

[103] *See* CITY CODE ON TAKEOVERS AND MERGERS, r. 21.1 (providing that "the board must not, without the approval of the shareholders in general meeting, take any action which may result in any offer or bona fide possible offer being frustrated or in shareholders being denied the opportunity to decide on its merits" or take specific actions such as the issuance of shares or options).

[104] *See* Puchniak & Nakahigashi, *supra* note 3, at 28-29 ("[I]n its application from the 1980s until 2005, Japan's 'primary purpose rule' could not be any more different than the United Kingdom's 'no frustration rule' and 'proper purpose' duty."); *see also* Yamanaka, *supra* note 56.

[105] BRENDA HANNIGAN, COMPANY LAW ¶¶ 9-49 & 9-59 (5th ed., Oxford University Press 2018); R.C. Nolan, *Controlling Fiduciary Power*, 68 CAMBRIDGE L.J. 293, 299 (2009) ("the proper purposes doctrine looks to the particular ends intended to be achieved through certain particular acts and determines whether such ends are contemplated (and therefore authorized) by the power in question.")
For the duty as codified, see Companies Act 2006 (c 46), § 171(b) (Duty to act within powers):

Second, the scope of Japan's primary purpose rule does not overlap precisely with the U.K. proper purpose duty. Although the Tokyo High Court in *Livedoor* enjoined the share option issuance on the facts, the court (and later, the *Takeover Guidelines*) recognized an exception to the primary purpose rule by suggesting that share or share option placements may be conducted even if the primary purpose was specifically to maintain corporate control. The situation for the U.K. is different, as the board's power to issue shares may be legitimately exercised for purposes other than raising capital.[106] However, even setting aside the City Code's non-frustration rule,[107] in no event may the power to issue shares[108]—or perhaps any other power[109]—be used to upset the existing balance of power within the company. It also remains an open question in the U.K. as to whether a decision taken in pursuit of an improper

> A director of a company must—
>
> (a) act in accordance with the company's constitution, and
>
> (b) only exercise powers for the purposes for which they are conferred.

Companies Act 2006 (c 46), § 171(b). It is true that the "proper purpose duty" in the U.K. does take on special prominence in the context of board interference with shareholder control of the company (i.e., change of corporate control). *See* ANDREW GRIFFITHS, CONTRACTING WITH COMPANIES 106 (2005) ("In practice, the 'proper purposes' doctrine has been invoked to prevent the board of a company from using its powers of management to interfere with the 'ownership' powers of the shareholders and thus their ultimate control of the company."); HANNIGAN, *supra* ¶ 9-57 (citing several cases where courts curbed directors' attempts to manipulate the company through improper exercise of their power to allot shares). For the leading case on the English position on the director's duty to act for proper purposes in the context in change of control transactions, see *Eclairs Group Ltd v JKX Oil & Gas plc* [2015] UKSC 71, [2016] 1 BCLC 1; *see also Howard Smith Ltd* v *Ampol Petroleum Ltd* [1974] AC 821 (P.C.) (appeal taken from New South Wales).

[106] *See Howard Smith Ltd* v *Ampol Petroleum Ltd* [1974] AC 821, 835-37 (P.C.) (appeal taken from New South Wales). *See also id.* at 837 (Lord Wilberforce) (stating that it is "too narrow an approach to say that the only valid purpose for which shares may be issued is to raise capital for the Company"); PAUL L. DAVIES & SARAH WORTHINGTON, GOWER'S PRINCIPLES OF MODERN COMPANY LAW 489-90, ¶16-26 (10th ed., 2016) (citing *Howard Smith Ltd v. Ampol Petroleum Ltd*) ("It was argued that the only proper purpose for which a share-issue power could be exercised was to raise new capital when the company needed it. This was rejected as too narrow.").

[107] CITY CODE ON TAKEOVERS AND MERGERS, r. 21.1.

[108] DAVIES & WORTHINGTON, *supra* note 106, ¶ 16-27.

[109] There is doubt as to whether the directors of a U.K. company even have the authority to adopt takeover defenses more generally. In *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28, [2004] 1 WLR 1846, the House of Lords remanded for trial the issue of whether the directors of a U.K. company had the authority to enter into a "poison pill" arrangement by which a change of control in the company or the company's managing director's dismissal would trigger a put option on substantially advantageous terms for a particular major shareholder.

purpose—among other concurrent, legitimate purposes—would be permitted to stand.[110]

PRPs. The Japanese PRP, as an *ex-ante* measure, can be, and is often, adopted by firms even when no specific threat has surfaced.[111] In this regard, it bears some superficial resemblance to the U.S.' "clear-day" poison pill, which refers to "pills that are adopted in a purely preemptive way (and not in response to any particular threat like a hostile tender offer, or the disclosure by an investor that the investor has acquired a significant block of the firm's shares)."[112] Nevertheless, referring to PRPs as "Japanese poison pills" risks obscuring several critical differences.

First, it bears repeating that the modern Japanese PRP is all but completely untested in court. Numerous questions remain unresolved with any reasonable degree of certainty by a body of jurisprudence or binding government regulation.[113] What terms are permissible and what are not in the PRP? Which corporate organ or organs has or have the sole or shared authority to adopt a PRP? What exact corporate formalities and procedures must be followed when implementing or triggering a PRP? What are the respective roles played by the board, independent directors, special committees, and the shareholder body during the initial adoption or renewal process? How about when the PRP is to be triggered? In contrast, a large volume of litigation over U.S. poison pills in the Delaware courts over the last three decades has led to a comparatively much clearer, if sometimes shifting, understanding

[110] *Compare Howard Smith Ltd* v *Ampol Petroleum Ltd* [1974] AC 821 (PC) (appeal taken from New South Wales) 832 ("substantial or primary purpose"), 835 ("substantial purpose") (Lord Wilberforce) *with Eclairs Group Ltd v JKX Oil & Gas plc* [2015] UKSC 71, [2016] 1 BCLC 1 [22] (preferring a "but-for" test by which an act would be invalidated only if the discretionary power to perform that act would not have been exercised but for the improper purpose) (Lord Sumption JSC with whom Lord Hodge JSC agreed), and with [51]-[54] (Lord Mance JSC with whom Lord Neuberger PSC agreed) (declining to take a firm position in the absence of full argument).

[111] *See, e.g.*, Fujimoto et al. (2008), *infra* note 154, at 46 fig. 9 (reporting that only 8.2% of respondents cited share-ownership by activist funds as the reason for adopting a defensive measure).

[112] Emiliano M. Catan, *The Insignificance of Clear-Day Poison Pills* (NYU School of Law Law & Economics Research Paper Series Working Paper No 16-33, Sept 27, 2016), at 3 n.1, https://ssrn.com/abstract=2836223 [https://perma.cc/QUF9-8MM8] (defining the "clear-day" poison pill).

[113] In this regard, the *Takeover Guidelines*, although produced under the sponsorship of two government ministries, cannot be considered binding regulation—not least because it is expressly meant not to be. *See also Takeover Guidelines*, *supra* note 44, at 3.

within the business and legal community about the device's legal function. Crucially, the jurisprudence is clear that a U.S. board can unilaterally put a pill in place and thereby gain the power for practical intents and purposes to "just say no," regardless of how the shareholders might vote.[114]

Second, there is a difference, if not in law, then in the spirit of anti-takeover defensive measures. Shareholder approval[115] plays a major role in PRP practice. For some years now, an overwhelming majority of PRPs are adopted with some form of shareholder vote.[116] Shareholder involvement is also significant when triggering an adopted PRP. As of 2018, less than 30% of all PRPs in force can be unilaterally triggered by the board of directors or a board committee entirely without shareholder approval.[117] The remaining supermajority—over 70%—involves shareholders in the decision-making process in some way. Perhaps surprisingly,[118] about 10% of all PRPs make shareholder approval a necessary condition to

[114] *See supra* note 23.

[115] A shareholder vote can be either a precatory (advisory) resolution of the shareholder meeting, or a resolution of the shareholder meeting within the meaning of the Companies Act. Mori Hamada Matsumoto, *supra* note 82, at 797.

[116] For example, in 2011, only 17 PRPs were adopted solely by authority of the board, whereas 500 received shareholder approval or ratification; in 2018, the respective figures were 7 and 376. Recof M&A MARR, *infra* note 155, at 33; *see also* Fujimoto et al. (2008), *infra* note 154, at 50 & fig 14 (reporting that out of 570 firms with defensive measures in place, only 15 (2.6%) adopted a defensive measure with only a board resolution; another 13 (2.3%) bundled the defensive measure question together with resolutions to appoint directors; all the rest (95.1%) sought a clear shareholder mandate), 51 & fig 15 (reporting that out of 136 firms, 107 (78.7%) put the renewal of an expiring defensive measure to a shareholder vote, another 11 (8.1%) bundled the issue with director election, and only 18 (13.2%) did not seek any shareholder vote); the leading scholar on defensive measures in Japan argues that an efficient PRP is one that may be triggered by the board if and only if authorized *ex ante* by the shareholder meeting. Tanaka Wataru (田中亘), *Tekitai-teki Baishū ni Taisuru Bōeisaku ni tsuite no Oboegaki (ni kan)* (敵対的買収に対する防衛策についての覚書（二・完） [*A Memorandum on Defensive Measures Against Hostile Takeovers (Part 2 of 2)*], 131 Minshōhō Zasshi (民商法雑誌) 800, 828, 833 (2005).

[117] As of 31 October 2018, of the 383 PRPs in place, 110 (28.7%) could be triggered by a decision of the board or a board committee ("*torishimariyaku-kai kettei-gata*" PRPs); the respective figures as of 31 December 2017 were 125 out of 405 PRPs (29.6%); 31 December 2016, 153 out of 443 PRPs (34.5%): Recof M&A MARR, *infra* note 155, at 33.

[118] Writing before PRPs took recognizably modern form, Tanaka considered a shareholder approval requirement at the point of triggering to be unnecessary and possibly inefficient. Tanaka, *supra* note 116, at 824, 826.

trigger.[119] The rest—an absolute majority of all PRPs—adopt a "compromise" model where shareholder approval would be sought where this is deemed necessary.[120]

Given that shareholder participation in both adoption and execution of a PRP is the norm in Japan today, it seems fair to say that shareholders continue to be the lynchpin of the PRP system. As a result of the absence of clear, legally-binding guidance on the legality and operation of PRPs, PRPs do not axiomatically shift the balance of power from one organ to another. Rather, they merely reflect—and at most, mildly reinforce—the pre-existing balance of power between shareholders and the board. By contrast, U.S. law, which has always focused on the board's authority to implement and trigger poison pills,[121] places considerably less emphasis on shareholder involvement than Japan *as a matter of law*.

The analysis above in this Part has shown how Japanese "defensive measures" and the relevant jurisprudence, whether of the post-bid ex-post or the pre-bid ex-ante variety, bear no more than a passing resemblance to their purported counterparts in the U.K. and the U.S.. The primary purpose rule that applies to ex-post defensive measures differs from the U.K. proper purposes duty in scope, and Japan does not have anything resembling the clear no-frustration rule of the U.K.'s City Code. In contrast to the well-tested, and demonstrably lethal, U.S. poison pill, Japanese PRPs remain an unknown variable.

Japan's unique suite of defensive measures is not the only thing that is different from the more familiar Anglo-American world. There is a history of successful hostile takeovers in the U.S..[122] By contrast, whether before or after the tumultuous events of the mid-2000s, not a single hostile takeover attempt succeeded in Japan—but why? The answer to this question, dubbed the "Enigma" of hostile takeovers in Japan,[123] cannot be found by looking only at the law and practice of Japan's legally-untested defensive measures. To

[119] As of 31 October 2018, 39 of 383 PRPs (10.2%) fall into this category ("*kabunushi ishi kakunin-gata*"); as of 31 December 2017, it was 39 of 405 (9.63%); 31 December 2016, 43 of 443 (9.71%). *Id.*

[120] As of 31 October 2018, 234 of 383 PRPs (61.1%) are "*secchū-gata*"; 31 December 2017, 241 of 405 (59.5%); 31 December 2016, 247 of 443 (55.8%). *Id.*

[121] For Delaware jurisprudence, see Part 1 above.

[122] *See, e.g.*, John C. Coates IV, *Measuring the Domain of Mediating Hierarchy: How Contestable Are U.S. Public Corporations?*, 24 J. CORP. L. 837, 855-56 (1999) (tracking hostile bids and their success rates from 1988 to 1998).

[123] Puchniak & Nakahigashi, *supra* note 3.

solve this puzzle, the next Part investigates the broader corporate governance and cultural context surrounding Japan's non-existent hostile takeover market.

3. MEDICINE DOESN'T CURE YOU WHEN YOU AREN'T SICK: JAPANESE CULTURAL NORMS, THE NON-EXISTENT HOSTILE TAKEOVER MARKET, AND THE SO-CALLED "PILL"

It is a truth universally acknowledged in American scholarship that a jurisdiction in possession of a highly dispersed stock market must be in want of hostile takeovers[124]—at least it was, until the scholars met Japan. It is well known that stock ownership in Japan's listed corporations have for a long time been characterized as amongst the most highly dispersed in the world.[125] A further distinctive feature of listed corporations in Japan was the abundance of targets seemingly ripe for takeovers, with bust-up values often exceeding market capitalization.[126] Scholars and pundits alike have long proceeded on the rarely challenged assumption that the United Kingdom and Delaware—the world's two most active hostile takeover markets—served as the model for Japan's regulatory environment and capital markets.[127] This combination of widely dispersed stock ownership, low price-to-book values, and regulation ostensibly based on hostile-takeover-oriented models seemingly distinguish Japan as one of the most hostile takeover-friendly jurisdictions in the world.

Reality, however, is quite another story: hostile M&A in contemporary Japan remains squarely in the realm of theory and fiction.[128] Not a single hostile takeover has ever succeeded in Japan.[129] The persistent failure of would-be hostile acquirers in what

[124] Armour et al., *supra* note 88, at 221-22 ("Internationally, hostile takeovers are a rare phenomenon, occurring with any frequency in only a handful of countries. They are rare because they can only take place in companies with dispersed stock ownership, themselves something of a rarity internationally.")

[125] *See* Puchniak & Nakahigashi, *supra* note 3, at 5 ("only shareholders in the United Kingdom and United States are as dispersed as in Japan").

[126] Puchniak & Nakahigashi, *supra* note 3, at 5-6, 13-14.

[127] Puchniak & Nakahigashi, *supra* note 3, at 6, 22-38.

[128] Puchniak & Nakahigashi, *supra* note 3, at 6, 14.

[129] We define a successful hostile takeover as one where 1) the bid is unsolicited and actively opposed by incumbent management; 2) the bid satisfies the

should have been a "hostile takeovers utopia"[130]—even before the advent of as-yet legally questionable defensive measures—is another example of Japanese exceptionalism. To crack this enigma, two features of Japan's corporate landscape offer valuable clues.

First, the conventional wisdom that dispersed shareholding facilitates hostile takeovers breaks down in Japan. Shareholding in Japanese firms may be dispersed, but not all dispersed shareholders are created equal. Japanese firms are dominated by a subset of dispersed shareholders known in the literature as "stable shareholders."[131] Stable shareholders are sympathetic "insider(s)"

mandatory bid rule trigger (i.e. aimed at acquiring at least two-thirds of the company's shares); 3) the bid achieves its objectives; and 4) the bidder replaces incumbent senior management, including the board. This excludes management-initiated leveraged buyouts (MBOs) and partial offers in which the bidder intended only to secure a less than two-thirds' stake in the company. For a concise explanation of the Japanese mandatory bid rule, see Puchniak & Nakahigashi, *supra* note 3, at 24-25.

There is no consensus among observers identifying any single case as a successful hostile takeover. *Cf.* Dan W. Puchniak, *The Efficiency of Friendliness: Japanese Corporate Governance Succeeds Again Without Hostile Takeovers*, 5 BERKELEY BUS. L.J. 195, 200, 232-50 (describing various hostile attempts and the controversy over whether they may be classified as successful) with *Dōi-nai Baishū, Kabunushi Kyōkan Hirogaru-ka / Tekitai-teki TOB, Sukunai Seikōrei* (同意ない買収、株主共感広がるか 敵対的TOB、少ない成立例) [*Acquisitions Without Consent—Gaining Shareholder Sympathy? The Few Successful Examples of Hostile Tender Offer Bids*], 毎日新聞 [MAINICHI SHIMBUN] (Feb. 7, 2019), https://mainichi.jp/articles/20190207/k00/00m/020/257000c [https://perma.cc/T5UB-Z6YF] (last visited Feb. 11, 2019) (listing only SSP Co., Ltd. and Solid Group Holdings as the only two successful takeovers). However, even these two exceptional examples do not fit our definition. The 2000 bid for SSP Co., Ltd. was not opposed by the board and the few successful examples of unsolicited acquisitions were not by open bid, but rather on-market purchases. Fujinawa Ken'ichi (藤縄憲一), *Tekitai-teki Baishū to Taikō-saku wo meguru Giron ni tsuite* (敵対的買収と対抗策を巡る議論について) [*On the Debate Surrounding Hostile Acquisitions and Their Countermeasures*], RIETI (Feb. 13, 2006), https://www.rieti.go.jp/jp/events/bbl/06021301.html [https://perma.cc/G4L7-9237]. The 2007 successful hostile bid for Solid Group Holdings (now CARCHS Holdings) by Ken Enterprise was not for all outstanding shares, but only up to 66.58% (under the two-thirds mandatory bid triggering threshold) and succeeded because Lehmann Brothers tendered its 48% stake. *See Ken Entāpuraizu no Soriddo Gurūpu HD e no Tekitai-teki TOB Seiritsu* (ケン・エンタープライズのソリッドグループＨＤへの敵対的ＴＯＢ成立) [*Ken Enterprise's Hostile Tender Offer Bid for Solid Group Holdings Succeeds*], REUTERS JAPAN (Dec. 13, 2007), https://jp.reuters.com/article/idJPJAPAN-2934862007121 3 [https://perma.cc/T537-VACQ]. For discussion on the recent Itochu bid for Descente, see Section 4.3 below.

130 Puchniak & Nakahigashi, *supra* note 3, at 8.

131 *See* Paul Sheard, *Interlocking Shareholdings and Corporate Governance*, *in* THE JAPANESE FIRM: SOURCES OF COMPETITIVE STRENGTH 310, 314, 318 (Masahiko Aoki & Ronald Dore eds., 1994).

that generally refrain from taking action detrimental to the incumbent management[132] because of their existing business relationships with the company. As the *Livedoor* and *Bull-Dog Sauce* cases[133] powerfully illustrate, stable shareholders have on multiple occasions given hostile acquirers pause by rallying in support of incumbent management,[134] even when doing so came at a direct financial cost to themselves.[135] Although Japan's cross-shareholding structure has come partly unwound in recent years and foreign investment has increased, leading Japanese scholars have observed that these changes primarily affected large public corporations.[136] By contrast, small- and medium-sized listed corporations that are favored targets for activist shareholders continue to maintain low

132 Ronald J. Gilson, *Reflections in a Distant Mirror: Japanese Corporate Governance Through American Eyes*, 1998 COLUM. BUS. L. REV. 203, 209 n.19 (1998) (defining a "stable shareholder" as one who "agrees not to sell the shares to third parties unsympathetic to incumbent management, particularly hostile takeover bidders or bidders trying to accumulate strategic parcels of shares: agrees, in the event that disposal of the shares is necessary, to consult the firm or at least give notice of its intention to sell"); *see also* Puchniak & Nakahigashi, *supra* note 3, at 17 ("stable-shareholders generally consist of banks, insurance companies, or other non-financial Japanese companies that are 'typically engaged in some sort of business transaction with the issuer corporation.'").

133 *See* Discussion at Section 2.1.

134 *See* Puchniak & Nakahigashi, *supra* note 3, at 18 ("When faced with a hostile takeover bid with a significant premium, stable-shareholders have little incentive to sell their shares given that they are not looking to reap capital gains through their shareholding.").

135 This is especially so in the *Bull-Dog Sauce* case. *See* Gen Goto, *Legally "Strong" Shareholders of Japan*, 3 MICH. J. PRIV. EQUITY & VENTURE CAP. L. 125, 143 (2014) (noting that given the irrational behavior of individual shareholders voting for the management's defensive measure, "it seems logical to conclude that they had strong sympathy for the targeted corporation and antipathy to the hostile bidder").

136 *Id.* at 145-46; *see* Miyajima Hideaki & Nitta Keisuke, *Kabushiki shoyū kōzō no tayōka to sono kiketsu—Kabushiki mochiai no kaishō / "fukkatsu" to kaigai tōshika no yakuwari* (株式所有構造の多様化とその帰結—株式持ち合いの解消・「復活」と海外投資家の役割) [*Diversification of Share-Ownership Structure and its Consequences / Unwinding and "Revival" of Cross-Shareholdings and the Role of Foreign Investors*], *in* NIHON NO KIGYŌ TŌCHI (日本の企業統治) [CORPORATE GOVERNANCE IN JAPAN] 135 (Miyajima Hideaki ed., 2011) (reporting that foreign institutional investors tended to prefer 1) large scale firms with 2) a larger proportion of revenue deriving from overseas sales, 3) high return on assets, and 4) low leverage); *see also* Hideaki Miyajima & Fumiaki Hiroki, *The Unwinding of Cross-Shareholding in Japan: Causes, Effects, and Implications*, *in* CORPORATE GOVERNANCE IN JAPAN: INSTITUTIONAL CHANGE AND ORGANIZATIONAL DIVERSITY 79, 86-88 (Masahiko Aoki, Gregory Jackson & Hideaki Miyajima eds., 2007) (foreign institutional investors began investing in Japanese stocks after their prices fell in the wake of the burst of the asset bubble).

foreign ownership and relatively high cross-shareholding.[137] Beyond stable shareholders, incumbent management also appears to enjoy support from other investors,[138] and even foreign shareholders may be reluctant to challenge the status quo.[139] At least for now, the long-standing antipathy for hostile takeovers shared by management and stable shareholders[140] provides Japanese firms with a powerful defense against hostile takeover attempts. Japan's unique corporate culture[141] means that its dispersed shareholder landscape does not axiomatically render Japanese corporations in general more vulnerable to hostile takeovers.

A second feature is lifetime employee-dominated senior management,[142] which historically also included large corporate boards.[143] The especially potent combination of economic and

[137] Goto (2014), *supra* note 135, at 146 (discussing activist hedge funds); *see also* Tanaka Wataru (田中亘), *Kabushiki hoyū kōzō to kaisha-hō – Bunsan hoyū no jyōjyō gaisha no jirenma wo koete* (株式保有構造と会社法—「分散保有の上場会社のジレンマ」を超えて) [*Shareownership Structure and Corporate Law – Beyond the "Dilemma of Dispersed Listed Corporations"*], 2007 SHŌJI HŌMU 30, 31-32 (2013).

[138] Goto (2014), *supra* note 135, at 142-43; *see also* John Buchanan, Dominic H. Chai & Simon Deakin, *Unexpected Corporate Outcomes from Hedge Fund Activism in Japan*, SOCIO-ECON. REV. 15 (Feb. 12, 2018), https://doi.org/10.1093/ser/mwy007 [https://perma.cc/GF32-86DV] ("Additionally, most Japanese investors tolerate great management autonomy up to the point that managers prove themselves clearly inadequate.").

[139] JOHN BUCHANAN ET AL., HEDGE FUND ACTIVISM IN JAPAN: THE LIMITS OF SHAREHOLDER PRIMACY 213-24 (2012); Maddison Marriage, *Foreign Investors Fear Holding Japan Inc to Account*, FIN. TIMES (Jan. 9, 2016), https://www.ft.com/content/080fd530-a7fe-11e5-9700-2b669a5aeb83.

[140] Curtis J. Milhaupt, *Creative Norm Destruction: The Evolution of Nonlegal Rules in Japanese Corporate Governance*, 149 U. PA. L. REV. 2083, 2100 (2001) (suggesting that in an earlier era when corporate law did not offer the flexibility necessary for the development of defensive measures, "a social norm denigrating hostile takeovers as unethical could operate as a low-cost substitute for an extensive system of formal ground rules for M&A activity and as a complement to the structural obstacle posed by cross-shareholding practices").

[141] Puchniak & Nakahigashi, *supra* note 3, at 41.

[142] On the role of lifetime employment in Japanese corporate governance generally, see Časlav Pejović, *Changes in Long-term Employment and Their Impact on the Japanese Economic Model: Challenges and Dilemmas*, 37 J. JAPAN. L. 51, 66-68 (2014).

[143] Steven N. Kaplan, *Top Executive Rewards and Firm Performance: A Comparison of Japan and the United States*, 102 J. POL. ECON. 510, 517, 520 (1994) (reporting, based on a survey of 119 large Japanese companies from 1980 to 1988, that 21.63 out of the 22.49 directors on average are "insider directors" with either previous or current experience as an executive of the firm); Dan W. Puchniak, *Why Investor Trust (and Not the Law) Matters: Japanese Lifetime Employment's Role as a Non-Legal Mechanism for Credible Investor Trust* (2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2318953&download=yes) [https://perma.cc/SU3U-LBT5]

emotional incentives for lifetime employees of firms in virtually every industry to maintain control over their companies regardless of external pressure has proved to be a formidable barrier to the development of an active market in hostile takeovers.[144] Although not impervious to pressure, Japan's lifetime employee system has remained remarkably resilient despite the changing business environment.[145] While lifetime employment is arguably not the main obstacle to hostile takeovers in Japan, it remains an influential factor that has caused Japan's market for corporate control to evolve in an entirely different direction from the U.S. or U.K.[146]

In any event, as noted above (in Section 2.3), defensive measures do not substantially shift the balance of power between corporate boards and shareholders. They capture and, at best, lightly reinforce the balance of power as it stood at the time the PRP was adopted or last renewed. The term-limited nature of most PRPs prevents their use as a means of effective entrenchment of any state of affairs for too long a period. So long as the interests of shareholders (especially

(unpublished LL.D. dissertation chapter, Kyushu University) 15 ("A system of internal promotion for career employees, which extends to the board of directors, means that career employees dominate the senior management and boards of large Japanese companies."); Miyajima Hideaki (宮島英昭) & Nitta Keisuke (新田敬祐), *Nihon-gata Torishimariyaku-kai no Tagen-teki Shinka: Sono Kettei Yōin to Pafōmansu Kōka* (日本型取締役会の多元的進化：その決定要因とパフォーマンス効果) [*Multi-faceted Evolution of Japanese-Style Corporate Boards: Determinants and Effects on Performance*], *in* KIGYŌ TŌCHI NO TAYŌKA TO TENBŌ (企業統治の多様化と展望) [DIVERSIFICATION AND PROSPECTS OF CORPORATE GOVERNANCE] 40 fig. 2-4 (Kanda Hideki (神田秀樹) & Policy Research Institute, Ministry of Finance, Japan (財務省財務総合政策研究所) eds., Kin'yū Zaisei Jijō Kenkyūkai 2007) (reporting that the average number of directors in companies listed on the First Section of the Tokyo Stock Exchange fell from 18.50 in 1993 to 10.37 in 2004, and for the Second Section from 11.74 to 8.16 over the same period). However, there has been a slight reversal of late, with the average number of directors falling to a low of 8.61 and 6.88 in 2014 for the First and Second Sections respectively before rebounding to 9.29 and 7.73 respectively in 2016. *See* Tokyo Exchange Inc., *TSE-Listed Companies White Paper on Corporate Governance 2017* (Mar. 2017), 75 chart 57, https://www.jpx.co.jp/english/equities/listing/cg/tvdivq0000008jb0-att/b5b4pj000001nj2x.pdf [https://perma.cc/6D6L-82BE].

[144] *See* Puchniak & Nakahigashi, *supra* note 3, at 38-41. For a slightly tongue-in-cheek explanation by a leading Japanese attorney on how dire the fate of a senior executive of a Japanese firm ousted in a hostile takeover would be as compared to their American counterpart, see Fujinawa, *supra* note 129 (discussing differences between Japanese and American senior executives in terms of expected life outcomes).

[145] For an extensive study canvassing a wide range of quantitative and non-quantitative studies, see Sayuri A. Shimoda, *Time to Retire: Is Lifetime Employment in Japan Still Viable?*, 39 FORDHAM INT'L L.J. 753 (2016); *see also* Pejović, *supra* note 142.

[146] *See* Puchniak & Nakahigashi, *supra* note 3, at 41.

stable-shareholders) remain aligned with that of the lifetime employee-dominated management, shareholders will ultimately do the right thing by not giving in to the invading barbarian. In such situations, the legal validity of the company's PRP will be of little consequence.

A clear appreciation of the social, cultural, and legal context not only explains why the expected wave of hostile takeovers never materialized in the mid-2000s, but also arguably how Japanese firms were more than equipped to fend off hostile takeover attempts even in the absence of a "poison pill." This leaves us with one more puzzle: if the conditions were such that hostile takeovers were never going to pose a clear and present danger to Japanese firms, what was the effect of hundreds of Japanese listed companies implementing a heavily watered-down and legally questionable device that they did not really need?

4. Clearing Out the Medicine Cabinet: The Silent Decline of Japan's So-Called "Pill"

We have seen in the two preceding Parts how Japan's so-called "poison pill" is hardly that, and how the corporate governance environment in Japan has created natural walls that have never been successfully breached by barbarians, whether Japanese or American, at the gate. Notwithstanding this, it is well known that hundreds of Japanese firms had adopted defensive measures—overwhelmingly of the PRP variety[147]—in the years immediately following the tumultuous mid-2000s. But that was then; what has become of the Japanese "pill" since?

In this Section, we present domestic data collated from Japanese language sources that have been heretofore unavailable in the English language literature. The data reveals two distinct but sustained trends. First, after an initial boom, new adoptions of defensive measures fell precipitously between 2008–2010, and since 2009–2010 has consistently hovered in the single digits. Second, since at least 2014–2015, Japanese companies have been dismantling their defensive measures at an increasing rate.

Since 2014–2015, one key statistic, which we call "attrition," has spiked, meaning that it is increasingly likely that a defensive

[147] *See infra* Table 1.

measure due to expire[148] would not be renewed. The combination of very few new adoptions and increasing attrition points in one unequivocal direction: down. In just under five years (from January 1, 2014 to October 31, 2018), the number of Japanese firms with PRPs in place fell from 507 to 383, which is almost a quarter (24.46%).[149] Coinciding with a large number of "pills" that expired between mid-2016 and mid-2017, these trends led to the astonishing situation in which 16 times as many "pills" were abolished as they were adopted in Japan.[150]

Thus, virtually unbeknownst to those in the West who had once been captivated by its rise, the once-vaunted "poison pill" is unmistakably in decline—and has been for some time. The next question must surely be: why? We therefore set out in this Section what to our knowledge is the first analysis of the forces that may be driving the removal of the "pill" in Japanese companies. We round off this Section with our view on why the PRP may, despite its falling trajectory, still remain a major feature of corporate governance in Japan.

4.1. Trends in Adoption and Abolishment

There is no official data on defensive measures in Japan; the best publicly available, up-to-date data is collected by private actors.[151] The most precise and granular data available, albeit not for the early years,[152] on defensive measures is from a series of studies by legal consultants at Sumitomo Mitsui Trust Bank, Limited ("SMTB")[153]—one of Japan's largest trust banks. The studies were based on

[148] Most defensive measures have a validity period of one to three years. *See supra* note 95 and accompanying text.

[149] *See infra* Table 1.

[150] *See* Mogi & Tanino (2018), *infra* note 154, at 19 Fig. 1 (48 abolishments versus 3 adoptions).

[151] The Tokyo Stock Exchange also collects and reports some data, but not at the level of granularity offered by SMTB analysts. *See, e.g.*, Tokyo Exchange Inc., *supra* note 143, at 28-32 (presenting data on defensive measures aggregated by listing categories, and divided by several metrics such as turnover, foreign shareholding, and size of the largest shareholder).

[152] In particular, data coverage before 2009 is spotty.

[153] Specifically, the "Stock Transfer Agency Business Advisory Department" (or, in Japanese, 証券代行コンサルティング部). *See Organization Chart*, Sumitomo Mitsui Trust Bank (Oct. 1, 2018), https://www.smtb.jp/tools/english/company/organization.html [https://perma.cc/EQ4M-RMBZ].

SMTB's internal analysis of disclosure documents released by Japanese firms—and are published annually since 2006 (save for 2014) in Japan's leading business law periodical, a publication that is widely read by both practitioners and scholars.[154] Another source available to Japanese practitioners is the proprietary database ("RECOF Database") of M&A data that is maintained by the company publishing the leading specialist M&A practitioner periodical (MARR) in Japan.[155] Although it does not capture the same range of data as the SMTB studies, the RECOF Database is

[154] The studies we drew on to compile Table 2 are: Mogi Miki & Tanino Kōji, *Tekitai-teki Baishū Bōeisaku no Dō'nyū Jōkyō* (敵対的買収防衛策の導入状況) [*The Status on Adoption of Defensive Measures Against Hostile Takeovers*], 2185 SHŌJI HŌMU 18 (2018); Mogi Miki & Tanino Kōji, *Tekitai-teki Baishū Bōeisaku no Dō'nyū Jōkyō* (敵対的買収防衛策の導入状況) [*The Status on Adoption of Defensive Measures Against Hostile Takeovers*], 2152 SHŌJI HŌMU 31 (2017); Mogi Miki & Tanino Kōji, *Tekitai-teki Baishū Bōeisaku no Dō'nyū Jōkyō* (敵対的買収防衛策の導入状況) [*The Status on Adoption of Defensive Measures Against Hostile Takeovers*], 2120 SHŌJI HŌMU 12 (2016); Tanino Kōji, *Tekitai-teki Baishū Bōeisaku no Dō'nyū Jōkyō* (敵対的買収防衛策の導入状況) [*The Status on Adoption of Defensive Measures Against Hostile Takeovers*], 2083 SHŌJI HŌMU 14 (2015); Mogi Miki & Tanino Kōji, *Tekitai-teki Baishū Bōeisaku no Dō'nyū Jōkyō* (敵対的買収防衛策の導入状況) [*The Status on Adoption of Defensive Measures Against Hostile Takeovers*], 2012 SHŌJI HŌMU 49 (2013); Fujimoto Amane, Mogi Miki & Tanino Kōji, *Tekitai-teki Baishū Bōeisaku no Dō'nyū Jōkyō* (敵対的買収防衛策の導入状況) [*The Status on Adoption of Defensive Measures Against Hostile Takeovers*], 1977 SHŌJI HŌMU 24 (2012); Fujimoto Amane, Mogi Miki & Tanino Kōji, *Tekitai-teki Baishū Bōeisaku no Dō'nyū Jōkyō* (敵対的買収防衛策の導入状況) [*The Status on Adoption of Defensive Measures Against Hostile Takeovers*], 1948 SHŌJI HŌMU 13 (2011); Fujimoto Amane, Mogi Miki & Tanino Kōji, *Tekitai-teki Baishū Bōeisaku no Dō'nyū Jōkyō* (敵対的買収防衛策の導入状況) [*The Status on Adoption of Defensive Measures Against Hostile Takeovers*], 1915 SHŌJI HŌMU 38 (2010); Fujimoto Amane et al, *Tekitai-teki Baishū Bōeisaku no Dō'nyū Jōkyō* (敵対的買収防衛策の導入状況) [*The Status on Adoption of Defensive Measures Against Hostile Takeovers*], 1877 SHŌJI HŌMU 12 (2009). For earlier studies, see Fujimoto Amane et al, *Tekitai-teki Baishū Bōeisaku no Dō'nyū Jōkyō (jō)* (敵対的買収防衛策の導入状況〔上〕) [*The Status on Adoption of Defensive Measures Against Hostile Takeovers (Part 1 of 2)*], 1843 SHŌJI HŌMU 42 (2008); Fujimoto Amane et al, *Tekitai-teki Baishū Bōeisaku no Dō'nyū Jōkyō* (敵対的買収防衛策の導入状況) [*The Status on Adoption of Defensive Measures Against Hostile Takeovers*], 1809 SHŌJI HŌMU 31 (2007); Fujimoto Amane et al, *Tekitai-teki Baishū Bōeisaku no Dō'nyū Jōkyō* (敵対的買収防衛策の導入状況) [*The Status on Adoption of Defensive Measures Against Hostile Takeovers*], 1776 SHŌJI HŌMU 46 (2006). We did not include data from studies published before 2009 due to incompleteness and incomparability of the data with subsequent studies. No study was published to the best of our knowledge by the SMTB analysts in 2014, although partial unpublished data was obtained from Mogi Miki and Tanino Kōji, regular authors of the SMTB studies. It should also be noted at the outset that minor discrepancies exist between the SMTB figures (or figures extrapolated therefrom) released in different years, although these discrepancies have no impact on the broader picture and trends.

[155] *RECOF M&A Dētābēsu* (レコフM&Aデータベース) [*RECOF M&A Database*], MARR ONLINE, https://www.marr.jp/recofdb.html [https://perma.cc/AS2Q-VDGM] [hereinafter Recof M&A MARR]

useful for multi-year trends and for information specifically on reasons for abolishment of defensive measures. We present data sourced and processed from the two sources in three separate tables in the Appendix, augmented by references to other sources of data in the description.[156]

Notwithstanding considerable uncertainty then as now as to the legal efficacy of defensive measures, the period from 2005 to 2008 saw a flurry of adoptions of defensive measures by Japanese firms. As Table 1[157] shows, firms with active defensive measures grew by multiples each year, from just 2 at the end of 2004 to 29 in 2005, 175 in 2006, and 409 in 2007. According to data collected by the Daiwa Institute of Research,[158] the number of firms with defensive measures peaked at 574 in August 2008.[159] Since then, as Figure 1[160] and Table 1 show, the trend in the number of firms with active defensive measures—overwhelmingly PRPs[161]—has gone only one way: down.[162] Since 2010, PRPs have been falling by several percentage points each year;[163] as of 31 October, 2018, the number of listed companies with active defensive measures is 387—a figure not seen since 2007.[164]

[156] This is necessitated by the fact that the two predominant datasets cannot be effectively combined because of differences in reference dates and periods. By presenting separately-sourced data in separate tables of overlapping content, we seek to paint an empirical picture of defensive measures in Japanese firms that are as clear and accurate as possible.

[157] This is compiled based on *M&A Kenkyūkai Hōkoku 2009, infra* note 250, at 10 Figure 1-13, 30, and Recof M&A MARR; *see also infra* note 250, at 33.

[158] Daiwa Institute of Research (*Daiwa Sōken*) is the think tank of Daiwa Securities Group, a leading investment banking and financial services conglomerate. *See* Yoriyuki Kusaki, *Message*, DAIWA INSTITUTE OF RESEARCH GROUP, https://www.dir.co.jp/english/corporate/message/president.html [https://perma.cc/XMY9-CJGE] (last visited Jan. 14, 2019).].

[159] Fujishima, *supra* note 48, at 2 tbl. 1.

[160] The data for Figure 1 is sourced from Table 1.

[161] *See* Table 1 (showing that since Dec. 31, 2009, no more than four or five out of the several hundred defensive measures in place in any given year were not PRPs). As such, it is fair to say that for practical intents and purposes, PRPs are—and have been for some time—synonymous with the modern Japanese "poison pill".

[162] *See* Table 1 (showing continuous decline after 31 December 2009 until 31 October 2018); *see also* Table 2 (from 2008 to 31 July 2017).

[163] Except 2009, where the change (net decrease of one PRP) was minuscule.

[164] *See* Table 2 (reporting that as of July 31, 2007 and July 31, 2008, there were respectively 374 and 570 firms with defensive measures in place); *see also* Fujishima, *supra* note 48, at 2 tbl. 1 (reporting that as of November 2007, 409 firms had implemented defensive measures).

Fig. 1 Active PRPs and Other Defensive Measures, 2004–2018

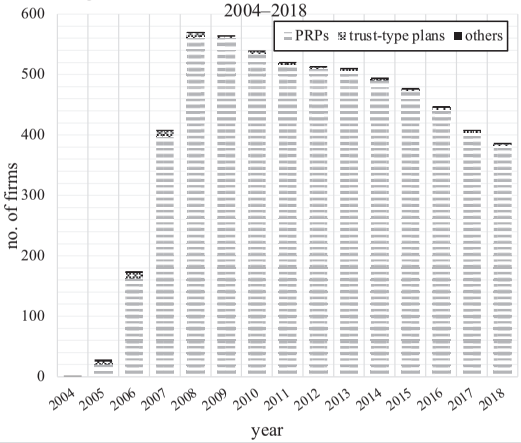


Table 2[165] shows key trends in adoptions and abolishments of defensive measures.[166] For defensive measures in force at a given point in time, the absolute decline in number (also available in Table 1[167]) is also reflected in the corresponding decline as a percentage of all listed companies in Japan.[168] As the net change (whether in raw figures or percentage terms) is a function of both: (1) new adoptions by companies which did not already have defensive measures; and, (2) abolishments by companies that already had them, it is helpful to examine the figures separately.

Figures for new adoptions annually are set out in Table 2 and graphically presented in Figure 2. Up to 2008, a boom in defensive measures resulted in hundreds of new adoptions of defensive measures each year.[169] As Figure 2 dramatically shows, the bust came just as quickly, with the number of defensive measures adopted each year falling precipitously between 2008–2010, and reaching and remaining in the single digits since 2009–2010. Having held steady for almost a decade, this trend is by now old news in Japan; it would not be misleading to call this the "not-so-new" normal.[170] Despite this, there has been scant acknowledgement of the sluggish state of new adoptions in the English language literature.[171]

Details on abolishments specifically are presented in Table 3.[172] Over the course of almost five years (from 1 January 2014 to 31 October 2018), the total, cumulative number of defensive measures abolished more than doubled, rising from 133 to 286, which is an increase of 115%. Table 3 also classifies abolishments by cause. A decade ago, as much as half of defensive measures were

165 Table 2 is based off SMTB analyst data. Note that the SMTB analysts do not reveal their exact source or scope of data beyond "tabulated by Sumitomo-Mitsui Trust Bank from disclosure documents of each company." *See, e.g.*, Mogi & Tanino (2017), *supra* note 154, at 32 fig. 1.

166 The SMTB data does not provide breakdowns for PRPs; all figures comprise all types of defensive measures.

167 Albeit with a reference date of Dec. 31 each year for Table 1, instead of July 31 (for Table 2).

168 Defensive measures' prevalence peaked at around 15% of listed companies in 2008. Igusa Rei (荏草礼依), *Baishū Bōeisaku Dō'nyū Jōkyō: Dō'nyū Shasū wa 10-nen Renzoku Genshō, Pīku-zen no 2007-nen to Dōsuijun no 405-sha ni* (買収防衛策導入状況～導入社数は10年連続減少、ピーク前の2007年と同水準の405社に) [*Anti-Takeover Defensive Measures: 10-Year Continuous Decline in Number of Adopting Companies to 405 Firms, Same Level as in 2007 Pre-Peak*], MARR Online (Apr. 25, 2018), https://www.marr.jp/print/entry/8306 (drawing on data from the RECOF M&A database). Note that the figure for the number of companies adopting defensive measures (569) in the article was as of the end of 2008, which explains the discrepancy with Daiwa Institute of Research's data (574 as of August 2008). Fujishima, *supra* note 48, at 2. Table 2 shows that the percentage of listed companies in Japan with defensive measures in place stagnated until around 2014, whereupon it entered a continuous decline, falling from 13.4% in 2014–2015 to 11.3% by 2016–2017.

169 *See* Table 1 and Figure 1 (showing massive growth in the number of active PRPs from Dec. 31, 2005 through Dec. 31, 2008).

170 It is suggestive that for several years now, the fact that very few firms introduce defensive measures has not received analysis or even comment in the SMTB studies.

171 Neither earlier work by one or more of the present authors, nor the latest high-profile hostile takeover paper featuring Japan did so. *See* Armour et al., *supra* note 88 (picking up on this).

172 *See* infra Table 3.

discontinued because of M&A activity.[173] Since 2013, however, as Table 3 shows, despite occasional spikes in M&A-related abolishments from time to time (in 2012, 2014, and 2016), the most common cause of abolishment by far is non-renewal upon expiration. This may be contrasted with two interesting observations: (1) a defensive measure was abolished on grounds of failure to obtain a favorable shareholder vote only once ever, in 2014; and (2) management only rarely preemptively abolishes a defensive measure before it is due to expire.[174] The dominance of abolishment by non-renewal suggests that while there is no compelling pressure on management to proactively abolish a measure while it is still in force, increasingly the affirmative case for renewing a measure upon expiration—whatever it might be for the firm in question—is not made out.

However, classifying an abolishment as "non-renewal" does not answer the further, and perhaps even more interesting question: why exactly was the decision taken not to renew? Recent data on shareholder resolutions pertaining to defensive measures sheds some light on this. Although it was reported in 2018 that every resolution renewing or amending a defensive measure put to a vote in 128 firms within the June 2017 meeting season was successfully passed, in 32 firms (or 25%) the resolution received less than 70% shareholder approval, with at least two firms receiving less than 55%.[175]

This is consistent with the finding in another study that there has been a general decline in shareholder approval rates for defensive measure resolutions since 2013.[176] The latter study further suggests that a reason why the decline was not even more pronounced lay in the fact that firms receiving low shareholder approval in the past have since turned to outright abolishment.[177] It is thus possible that a substantial percentage of "non-renewal" cases might in fact have turned out to be "failure to obtain shareholder support" cases if

[173] *See* Fujimoto et al. (2008), *supra* note 154, at 51 (reporting that 9 of the 18 defensive measures abolished up to July 31 2008 were attributable to management integration (経営統合), management buyout, acquisition, or other M&A activities broadly defined).

[174] *See* Table 2 (showing 183 of 204 (89.71%) abolishments from 2010–2011 to 2017–2018 were by non-renewal) and Table 3 (showing a total of 7 abolishments before expiry for 2013–2018, versus 137 abolishments by non-renewal).

[175] Igusa, *supra* note 168.

[176] Mogi & Tanino (2017), *supra* note 154, at 33-34, 34 fig 3.

[177] Mogi & Tanino (2017), *supra* note 154, at 34.

management had proceeded to put the issue to a shareholder vote.[178] Non-renewal may at times be a convenient face-saving way out for management who would not want to risk losing a shareholder vote over a defensive measure.

The fact that non-renewal is the primary way by which a defensive measure is abolished has further implications for attempts to analyze the decline of defensive measures in Japan. While there is data on the number of defensive measures (or PRPs specifically) abolished each year (Tables 1, 2, and 3), these figures in and of themselves say little about the level of support for (or opposition against) defensive measures in each reference period.

Recall that defensive measures in recent years usually have a validity period of three years,[179] and consider that a defensive measure, once adopted or renewed, is rarely abolished during its term (Table 3). In 2013–2014, for example, all 23 abolishments were by non-renewal. Hence, regardless of how much support for (or opposition against) a defensive measure there is in a given year, for practical purposes any decision as to whether a defensive measure has outlived its usefulness is likely to be made only when it is about to expire, not before. The exact number of defensive measures abolished in a given reference period would turn not only on the mood towards defensive measures in that year, but would also depend on the number of defensive measures that are due to expire over each 12-month period—which, as Table 2 shows, varies considerably. Hence, to capture a sense of the overall sentiment toward defensive measures, we devise the concept of "attrition rate,"[180] by which we mean the percentage of expiring defensive

[178] A concrete example of a firm deciding not to proceed with a shareholder vote on renewal is Fujifilm Holdings, whose proposed resolution on defensive measures was withdrawn by management just before the shareholder meeting of 2013 on the ground that "it had become difficult to obtain the understanding of a majority of shareholders." *Fuji firumu, baishū bōeisaku gi'an torisage / sōkai chokuzen ni* (富士フイルム、買収防衛策議案取り下げ 総会直前に) [*Fujifilm Withdraws Defensive Measure Proposal Right Before Shareholder Meeting*], NIHON KEIZAI SHIMBUN (electronic ed., June 26, 2013), https://www.nikkei.com/article/DGXNZO56656240W3A620C1DT0000/.

[179] *See supra* note 95 and accompanying text.

[180] Although the SMTB studies from 2009 onwards (excluding 2014) contained attrition and attrition rate figures in whole or in part, nothing was said about the significance or value of this measure, nor was the term "attrition rate" coined or defined as such.

measures that are not renewed.[181] A higher attrition rate in a given year, regardless of the absolute number of defensive measures being abolished, would thus indicate either less demand for or greater pressure against defensive measures.

We are able to obtain or compute attrition rate figures for the years from 2009 to 2018. As Figure 2[182] shows, attrition seems to have progressed in three phases. First, from August 2009 to July 2014, attrition rates held steady between 8-10%, with a one-off fall to just 3.61% for the 2012–2013 period. Since 2013–2014, attrition rates have soared to double-digit figures, more than doubling from 9.62% in 2013–2014 to 20.66% just three years later (2016–2017) and rising further to 22.60% (2017–2018). The confluence of a high attrition rate, a large number of expiring defensive measures, and an exceptionally low number of new adoptions in 2016–2017 led to one astonishing statistic: for every firm that introduced defensive measures, 16[183] abolished[184] them.

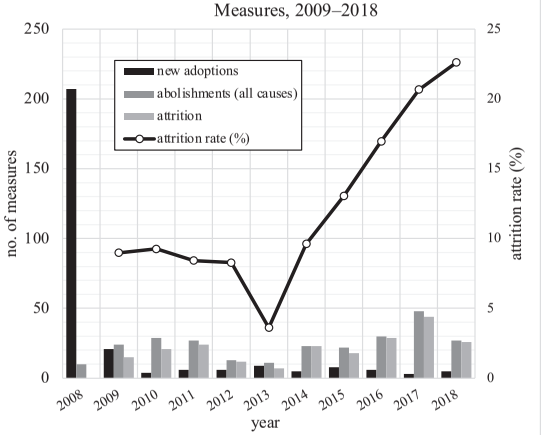
[181] This measure is only made possible by SMTB analyst data, which tracks the number of expiring measures and the number of which that are renewed or not renewed from 2009 onwards.

[182] Data for Figure 2 is from Table 2.

[183] Mogi & Tanino (2018), *supra* note 154, at 19 tbl. 1 (reporting that defensive measures were abolished in 48 firms but introduced in only three in the 12-month period ending July 31, 2017). *Cf.* Mogi & Tanino (2017), *supra* note 154, at 32 tbl. 1 (reporting that defensive measures were abolished in 45 firms). The discrepancy between the 2017 and 2018 studies is resolved in favor of the latter. The respective adoption/abolishment ratio was 1:5 for 2015–2016 and 1:2.875 for 2014–2015.

[184] Following Mogi & Tanino, we do not distinguish between "abandonment" (in which the management pro-actively dismantles the defensive measure), "expiry" (in which a term-limited defensive measure is allowed to expire without renewal), or where the defensive measure has become "defunct" (where the firm has undergone M&A or delisted). *See, e.g.*, Mogi & Tanino (2017), *supra* note 154, at 31.

Fig. 2 Adoption, Abolishment, and Attrition of Defensive Measures, 2009–2018



Although the exceptional adoption/abolishment ratio of 2016–2017 is a one-off event, the attrition rate has continued to rise. For the 2017–2018 period, only 115 defensive measures expired,[185] presenting a substantially smaller pool of defensive measures coming up for a decision as to renewal or abolishment as compared to 213 for the 12 months ending on July 31, 2017 and 171 for the 12 months ending on July 31, 2016 (Table 2). Even though the raw attrition figure fell from 44 in 2016–2017 to just 27 in 2017–2018, the attrition rate has nonetheless increased from 20.66 to 22.60%. Given the trend of rising attrition rates and the fact that a substantially larger number of defensive measures are likely to expire in the near

[185] Igusa, *supra* note 168 (reporting that 104 defensive measures would expire during calendar year 2018).

future—and hence prompt a management decision to let the measure lapse or seek a shareholder mandate to renew—attrition data of the next two to three years will be crucial. The tipping point at which defensive measures go from an institution in decline to just another colorful concluded chapter in the history of corporate governance may very well lay just over the horizon.

In sum, the confluence of two trends—prolonged slump in the number of new adoptions and an increasing attrition rate—represent a sea change in the Japanese hostile takeover landscape so significant that it is surprising that it has thus far escaped entirely any detailed comparative analysis, or even notice in the Western-language literature. Remedying this lapse is the aim of Section 4.2.

4.2. Explaining the Fall in Defensive Measures

The developments described in the preceding Section—which seemingly renders Japanese firms ripe once again for hostile takeovers—cries for an explanation: why is this happening? In this Section, we offer three explanations: (1) Japanese boards no longer consider defensive measures to be necessary to counter the threat of hostile takeovers; (2) the PRP has had a *de minimis* effect on Japanese corporate governance; and (3) corporate governance changes such as the Corporate Governance Code and the new disclosure requirements in Japan's revised Stewardship Code have increased institutional investor resistance against renewal of expiring PRPs. We examine each of these in turn.

1. PRPs ceased to be necessary as hostile takeovers ceased to be a threat ("Necessity Explanation").

Let us assume that PRPs are theoretically, or are at least perceived to be, effective countermeasures to hostile takeovers.[186] An obvious explanation for falling demand for a medicine would be decreased incidence of the disease the medicine is meant to treat; in the PRP's case, that would be hostile takeovers.

[186] For why this perception is, with the benefit of hindsight, difficult to justify today, see Section 2.3 above (explaining why the PRP is of questionable effectiveness as a matter of law) and Section 4.2 below.

The collapse in new demand for defensive measures (i.e. new adoptions) since 2009[187] fits particularly well with the Necessity Explanation. Much of the initial demand for defensive measures, fueled by the turbulent events of the mid-2000s, was quickly exhausted; by 2009, a substantial percentage of Japan's leading firms had PRPs and other defensive measures in place.[188] In the years that followed, the wave of hostile takeovers anticipated in the mid-2000s (and before) never materialized in Japan.[189] Reduced pressure on Japanese firms by investment funds in the wake of the Global Financial Crisis has been linked to the drastic drop in new adoptions in 2008–2009.[190] In recent years, activist investors such as hedge funds have also moved away from acquiring large blocks of shares with a view to eventually gaining corporate control via tender offers. Rather, hedge funds have increasingly favored smaller shareholdings and other forms of engagement with investee firms.[191] By turning away from outright acquisition (hostile or otherwise), this shift in investor behavior also suppressed new demand for anti-takeover defensive measures in firms that were not early adopters. Trends in new adoptions of defensive measures, which fell off a cliff around 2008–2009 to just 21 (from 207 in the previous reference period),[192] and thereafter languished in the single digits,[193] reflect these changes in the perceived necessity of PRPs.

The calculus involved in adopting a defensive measure for the first time is straightforward: if it is necessary and the cost is affordable, do it. It is certainly possible that a defensive measure, which was at the time of initial adoption deemed necessary by management, would later be re-assessed as unnecessary and accordingly abolished. Considerations of necessity, however, do not

[187] *See* Table 2, Figure 2.

[188] *Id.* (noting that by 2009, demand has levelled off with about 24% of companies with premium listings (on the First Sections) having implemented defensive measures).

[189] For reasons why this was so, see Part 3.

[190] *See* Fujimoto et al. (2009), *supra* note 154, at 12 (reporting that only 21 defensive measures were adopted in 2008–2009, a sharp decrease from 207 in 2007–2008).

[191] Ishii Yūsuke, *Kawaru Kabunushi Sōkai* (変わる株主総会) [*The Changing Shareholder Meeting*], *in* KAWARU KABUNUSHI SŌKAI (変わる株主総会) [THE CHANGING SHAREHOLDER MEETING] 23 (Mori Hamada & Matsumoto ed. 2018). For recent work on hedge fund activism in Japan, see Buchanan, Chai & Deakin, *supra* note 138.

[192] *See* Table 2; Figure 2.

[193] *Id.*

necessarily manifest in the same way when a firm's management is deciding if an expiring defensive measure should be renewed,[194] or if an existing defensive measure should be abolished proactively before it expires.

As lived experience (or just common sense) tells us, just because something becomes factually unnecessary does not mean that people would axiomatically cease to do it or actively get rid of it;[195] they may simply hold on to the thing and just do nothing with it. In the face of path dependence and switching costs,[196] loss of necessity is a necessary but insufficient condition for large-scale abandonment of defensive measures. Although, as noted above, there has been no abolishment of defensive measures *en masse* pre-expiry,[197] attrition rates (i.e. percentage of defensive measures not renewed upon expiry) have increased sharply from 2015 onwards.[198] As the Necessity Explanation is, by itself, unable to account for rising attrition, we revisit the attrition trend below (at 4.2.3). In the meantime, recall that the Necessity Explanation is premised on the PRP as a necessary, or at least a somewhat useful, device. But does this premise really hold—and what happens if it does not?

2. *The PRP's effect on Japanese corporate governance is de minimis ("Legal Irrelevance Explanation").*

Initial hopes that the PRP would serve as a potent anti-takeover defense may have justified their initial adoption on grounds of "necessity" in the early years. With the passage of time, however, it becomes increasingly difficult to make the same case for the PRP.

194 Most, although not all, defensive measures are valid for a fixed term; see *supra* note 95 and accompanying text.

195 A simple analogy will suffice: is there not at least one person you know (or yourself) who keeps old medicine around, even when the illness it was meant to treat was cured or never came to pass?

196 *See generally* Ronald J. Gilson, *From Corporate Law to Corporate Governance*, *in* OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 9-14 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018) (discussing path dependence and barriers to changes in corporate governance); Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, *in* CONVERGENCE AND PERSISTENCE AND CORPORATE GOVERNANCE 69-113 (Jeffrey N. Gordon & Mark J. Roe eds., 2004); Reinhard H. Schmidt & Gerald Spindler, *Path Dependence and Complementarity in Corporate Governance*, *in* Gordon & Roe, *id.* at 114-27.

197 At Section 4.1; *see supra* note 174 and accompanying text.

198 Table 2; Figure 2.

We have established[199] that the modern Japanese PRP is nothing like the mature, potent, and binding legal instrument that is the U.S. poison pill; it remains a legally untested construct whose legitimacy appears to hinge on shareholder support. In contrast with the "shadow pill" effect of the U.S. poison pill that protects every listed company in the U.S. regardless of whether a pre-bid "clear-day" poison pill is in place,[200] it is far from clear whether the PRP, when put to the test, will be even worth the paper it is written on. Japan's PRP is, at best, "a shadow of a shadow."

That is not to say that just because the PRP is (or likely to be) of little utility in a real hostile acquisition, it is also *ipso facto* a deleterious feature of corporate governance. As discussed above (at Section 2.3), the PRP does not substantially shift power from the shareholder meeting to the board; it reflects the balance of power existing at the time of adoption or renewal, and (at best) mildly reinforces it for the duration of the PRP. Based on the best information available to us now, PRPs would be most accurately characterized as inconsequential and irrelevant features of Japanese corporate governance.

The Legal Irrelevance Explanation accounts for the sluggish demand for new adoptions over the past nine years. There is generally no compelling reason for a firm to adopt a PRP, given that the board and supportive shareholders are capable of fending off hostile takeovers on their own—and especially if the financial or political cost is substantial. Conversely, there is no urgent need for management to abolish existing PRPs if holding on to them does little harm. Rising attrition rates over the past four or so years, therefore, cannot be attributed entirely to the Legal Irrelevance Explanation. The final, critical question is: how did the cost side of the cost-benefit analysis change significantly in recent years? This brings us to our third and final explanation.

3. *Corporate governance changes sparked increased institutional shareholder resistance to defensive measures ("Investor Resistance Explanation").*

Even as successful hostile takeovers have maintained their absence, Japan's corporate governance environment has nonetheless

199 Section 2.3.

200 *Id.*

undergone substantial changes in recent years. Japan's Corporate Governance Code was first implemented in June 2015 and last amended in June 2018.[201] Principle 1.5 provides that:

> With respect to the adoption or implementation [i.e. triggering] of anti-takeover measures, the board and *kansayaku* [statutory auditors] should carefully examine their necessity and rationale in light of their fiduciary responsibility to shareholders, ensure appropriate procedures, and provide sufficient explanation to shareholders.[202]

Although investor discontent with defensive measures may be nothing new,[203] coupled with growing criticism of defensive measures from not only foreign but also domestic institutional investors,[204] the introduction of the Corporate Governance Code with this interesting feature appears to have prompted a number of firms to proactively abolish defensive measures.[205] In this sense,

[201] TOKYO STOCK EXCHANGE, JAPAN'S CORPORATE GOVERNANCE CODE (June 1, 2018), https://www.jpx.co.jp/english/news/1020/b5b4pj000000jvxr-att/20180601.pdf [https://perma.cc/PEU2-ARSF].

[202] *Id.* at 8. Principle 1.5 was untouched by the 2018 revision.

[203] *See, e.g.*, Fuji firumu, baishū bōeisaku gi'an torisage / sōkai chokuzen ni (富士フイルム、買収防衛策議案取り下げ 総会直前に) [Fujifilm Withdraws Defensive Measure Proposal Right Before Shareholder Meeting], Nihon Keizai Shimbun (electronic ed., June 26, 2013), https://www.nikkei.com/article/DGXNZO56656240W3A620C1DT0000/ [https://perma.cc/AD94-PG87] (reporting that both domestic and foreign institutional investors increasingly object to defensive measures on the grounds that they lead to managerial self-preservation); Kawasaki Kisen nado 19 sha, bōeisaku wo haishi, konnendo, 479 sha wa nao keizoku (川崎汽船など１９社、買収防衛策を廃止、今年度、４７９社はなお継続。) [*19 Firms Including Kawasaki Kisen Abolish Defensive Measures; 479 Firms Continue to Have Them*]; Nihon Keizai Shimbun, 13 (morning ed., June 12, 2015) (noting that strong investor dissatisfaction with defensive measures has been present since before the Corporate Governance Code took effect).

[204] *See "Kawareru kakugo" de kau – bōeisaku haishi, tōshika wa kangei* (「買われる覚悟」を買う――防衛策廃止、投資家は歓迎) [*Buying with the "Readiness to be Bought" – Investors Welcome Abolishment of Defensive Measures*] NIHON KEIZAI SHIMBUN, 18 (morning ed., May 24, 2017) (also reporting that outside [comparable to independent] directors with management expertise have increased, and there have been cases in which such directors advise abolishment of defensive measures).

[205] *See Kawasaki Kisen nado 19 sha, bōeisaku wo haishi, konnendo, 479 sha wa nao keizoku* (川崎汽船など１９社、買収防衛策を廃止、今年度、４７９社はなお継続。) [*19 Firms Including Kawasaki Kisen Abolish Defensive Measures; 479 Firms Continue to Have Them*], NIHON KEIZAI SHIMBUN, 13 (morning ed., June 12, 2015) (citing the example of Nisshinbo Holdings as a firm that had taken into consideration the

changes in the corporate governance environment have made it easier for institutional investors to express—either through or beyond voting at shareholder meetings—their own, possibly long-held objections to defensive measures.

A further development is the 2017 revision of Japan's Stewardship Code, which introduced a new provision exhorting institutional investors to disclose their votes by individual investee company and by individual agenda item.[206] The revision quickly made its impact felt: even before the amended Code formally went into effect, a number of institutional investors proactively disclosed their past voting records.[207] Japanese commentators have attributed the especially pronounced spike in PRP abolishments in 2017

Corporate Governance Code's coming into effect in its decision not to renew its PRP, but also noting that deep-seated wariness of hostile acquisition by other firms in the same industry have kept the number of firms taking proactive steps towards abolition low); *see also Sōkai no shōten (10) baishū bōeisaku – hihan tsuyoku genshō keikō* (総会の焦点（１０）買収防衛策――批判強く減少傾向。) [*Shareholder Meetings Focus (10): Anti-Takeover Defensive Measures – Strong Criticism, Trend of Decline*], NIHON KEIZAI SHIMBUN, 15 (morning ed., June 22, 2015).

[206] Principles for Responsible Institutional Investors, *Japan's Stewardship Code*, (May 29, 2017), 15 at Guidance 5-3, https://www.fsa.go.jp/en/refer/councils/stewardship/20170529/01.pdf [https://perma.cc/C44Z-WWXY] ("Institutional investors should at a minimum aggregate the voting records into each major kind of proposal, and publicly disclose them. Furthermore, to enhance visibility of the consistency of their voting activities with their stewardship policy, institutional investors should disclose voting records for each investee company on an individual agenda item basis."). For the pre-amendment position, see Principles for Responsible Institutional Investors, *Japan's Stewardship Code*, (Feb. 2014), 11 at Guidance 5-3, https://www.fsa.go.jp/en/refer/councils/stewardship/20140407/01.pdf, [https://perma.cc/D2X6-ZRQV] ("Institutional investors should aggregate the voting records into each major kind of proposal, and publicly disclose them. Such a disclosure is important in making more visible the consistency of their voting activities with their stewardship policy."); Gen Goto, *The Logic and Limits of Stewardship Codes: The Case of Japan*, University of Tokyo Business Law Working Paper Series, No 2018-E-01, 45-47 (Oct. 2018), http://www.j.u-tokyo.ac.jp/en/wp-content/uploads/sites/10/2018/10/BLWPS2018E01.pdf [https://perma.cc/PZX8-MSQ5], BERKELEY BUS. L.J. (forthcoming).

[207] *See, e.g.*, Ema Naoyoshi (依馬 直義), *Nihon-ban Suchuwādoshippu Kōdo Kaitei wa Kabunushi Sōkai, Giketsuken Kōshi ni Dō Eikyō Shita ka* (日本版スチュワードシップ・コード改訂は株主総会、議決権行使にどう影響したか) [*How Did the Stewardship Code Revision Affect Shareholder Meetings and Exercise of Voting Rights?*], ASAHI JUDICIARY (Aug. 15, 2017), http://judiciary.asahi.com/fukabori/2017081100001.html [https://perma.cc/UB28-YL2S] (reporting that several institutional investors have already begun disclosing voting decisions by company and by individual resolution even before the amended Stewardship Code was formally promulgated).

(notable both in terms of attrition rate[208] or percentage change[209]) at least in part to the Stewardship Code amendment on disclosure requirements,[210] albeit without clear explanation.

Our Investor Resistance Explanation is as follows. Although institutional investors were previously free, if they so wished, to support management proposals for defensive measures without sanction or consequence,[211] they are now under pressure to disclose—and accordingly, justify publicly—their voting decisions. Given that no general hostile takeover wave ever made its appearance in Japan for a decade, the management of a particular firm would be hard-pressed, absent a concrete and firm-specific hostile takeover threat, to state a compelling reason to maintain a PRP.[212] Without a persuasive, affirmative reason from management, institutional investors would similarly find it difficult to justify voting in favor of renewal of expiring defensive measures.

[208] *See infra* Table 2 (defensive measures attrition reached a high of 20.66%, compared to 16.96% for 2016 and 13.04% for 2015).

[209] *See infra* Table 1 (total number of PRPs in force fell year-on-year by 8.58% in reference year 2017, compared to 6.34% for 2016 and 3.47% for 2015).

[210] Mogi and Tanino (2017) report that of the 43 firms that voluntarily abolished defensive measures in reference year 2017 (i.e. excluding the two abolishments following from M&A activity), 10 firms had very high levels of institutional investor shareholding. They speculate that the difficulty in securing favorable votes from institutional investors was one of the reasons for abolishment in these firms. Mogi & Tanino (2017), *supra* note 154, at 32. They further report that the decrease in favorable votes from domestic institutional investors in shareholder resolutions to approve defensive measures is attributable to the Stewardship Code's new individual disclosure requirement. Mogi & Tanino (2017), *supra* note 154, at 39. *See also* Mogi & Tanino (2018), *supra* note 154, at 23 fig. 7 (reporting substantial declines in the percentage of resolutions on defensive measures for which domestic individual investors voted in favor, and attributing that fall to the revised Stewardship Code).

Although the overwhelming majority of abolishments are not as a result of an attempted renewal failing to garner the necessary shareholder votes in support (*see infra* Table 3, showing that the vast majority of abolishments are management-initiated or based on management-side reasons), as observed above (in the main text after note 177), it is plausible—even likely—that management would simply not table a defensive measure for renewal upon expiry if there was reliable indication that the chances of obtaining shareholder approval were less than extremely high. The change triggered by the Stewardship Code's new disclosure requirement may have thus not only had an effect on the voting percentages on defensive measures that were put to a vote, but also deterred management in firms dominated by institutional investors from even seeking renewal of the defensive measure in the first place.

[211] As discussed in Part 3, antipathy for hostile takeovers was, at least until very recently, widely held by shareholders.

[212] *See supra* Section 4.2.

The effect of the Stewardship Code revision on investor resistance against defensive measures is especially interesting as it hints at an unexpected outcome: a stewardship code—and stewardship as a concept—can matter. The notion that stewardship can have concrete impact on individual firms' corporate governance practices runs counter to the emerging consensus among corporate governance scholars that stewardship codes have been largely ineffectual.[213] For the avoidance of doubt, we stress that the Investor Resistance Explanation is only a tentative one, and that the results of the voting seasons from 2019 onwards should offer crucial evidence either confirming or denying the effect of disclosure requirement changes.

4.3. So, What Are PRPs Good For, Anyway?

If, as we have suggested, the PRP is unnecessary, legally irrelevant, and increasingly under fire from institutional investors, then its demise would seem inevitable. Yet time and again, reports of the demise of many a thing have been greatly exaggerated;[214] any scholar attempting to predict the future of any phenomenon should be appropriately circumspect. Even as the Japanese "pill" seemingly drifts closer towards extinction with each year, prudence demands that we acknowledge that neither is such progress inexorable nor the final destination inevitable. Notwithstanding the PRP's many failings as a legal mechanism, it may continue to play at least some role in Japan's corporate governance landscape for two reasons.

First, PRPs are considerably more palatable than the alternatives. One of these is cross-shareholding. A classic[215] if

[213] Iris H.Y. Chiu, *Reviving Shareholder Stewardship: Critically Examining the Impact of Corporate Transparency Reforms in the UK*, 38 DEL. J. CORP. L. 983, 1022 (2014); Arad Reisberg, *The UK Stewardship Code: On the Road to Nowhere?*, 15 J. CORP. L. STUD. 217 (2015); Brian R. Cheffins, *The Stewardship Code's Achilles' Heel*, 73 MOD. L. REV. 1004, 1024-25 (2010); Paul Davies, *Shareholders in the United Kingdom*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 375 (Jennifer G. Hill & Randall S. Thomas eds., Edward Elgar 2015); *see also* Goto (2018), *supra* note 206, at 50-51 (reporting that adoption of the Stewardship Code by private pension funds in Japan has been underwhelming).

[214] Paraphrasing the famous quip widely attributed to Mark Twain.

[215] *See, e.g.*, Juro Teranishi, *Loan Syndication in War-Time Japan and the Origins of the Main Bank System*, *in* THE JAPANESE MAIN BANK SYSTEM: ITS RELEVANCE FOR

controversial[216] feature of Japanese corporate governance, cross-shareholding is a system where multiple companies agree to hold shares in each other's companies, resulting in a web of mutual or circular shareholdings.[217] By locking down most of the issued shares of participating listed companies, cross-shareholding insulated incumbent management from external pressure and posed a formidable obstacle to hostile takeovers.[218] Throughout the lost decade, cross-shareholdings were gradually unwound in many Japanese firms, although the extent and degree of this unwinding differs between firms.[219] Unlike cross-shareholdings, which are difficult and costly to create and unwind, PRPs can be adopted and removed as and when necessary and with relative ease. PRPs also offer advantages compared to other existing defensive measures. Compared to the sole alternative[220] ex-ante measure, the trust-type plan, PRPs are considerably cheaper to implement and maintain.[221]

Ex-post measures[222] also suffer from their own drawbacks. Share placements to friendly stable shareholders remain a possibility but would require at the time of crisis either the support of a supermajority of shareholders, or substantial financial

DEVELOPING AND TRANSFORMING ECONOMIES 59-61, 63-64, 78-79 (Masahiko Aoki & Hugh Patrick eds., Oxford University Press 1994) (tracing the early history of cross-shareholding).

216 *See* RONALD DORE, STOCK MARKET CAPITALISM: WELFARE CAPITALISM—JAPAN AND GERMANY VERSUS THE ANGLO-SAXONS 92-96 (Oxford University Press 2000) ("The cross-shareholding system has never had an altogether good press in Japan . . . [r]ecently there has been . . . discussion of cross-holdings in the context of the corporate governance debate, and it is surely obvious that unless management stability can be shown to have some relation to shareholder value by improving performance or raising the share price, it is impossible to explain to shareholders the rationale for cross-holdings.").

217 Zenichi Shishido, *Japanese Corporate Governance: The Hidden Problems of Corporate Law and Their Solutions*, 25 DEL. J. CORP. L. 189, 210-21 (2000); Goto (2014), *supra* note 135, at 128 n12.

218 Shishido, *supra* note 217, at 208-11. Shishido, however, also argues that firms stabilized by cross-shareholding are ultimately subject to capital market discipline as cross-shareholders would still sell their shares if corporate performance were to be unacceptable. *Id.* at 211.

219 Goto (2014), *supra* note 135, at 144-46.

220 Class shares were adopted as a takeover defense around 2004, but no firm has adopted it since for this purpose due (at least in part) to resistance from the stock exchange. KANDA HIDEKI, KAISHA-HŌ (会社法) [CORPORATE LAW] 177 (20th ed., Yūhihaku 2018).

221 *See supra* note 86.

222 *See* Section 2.1.

commitment from a supportive stable shareholder.[223] A *Livedoor*-type placement of share options to a particular (friendly) shareholder without shareholder approval is vulnerable to challenge in court;[224] a *Bull-Dog Sauce*-style option allotment discriminating between the bidder and other shareholders would not succeed without both substantial shareholder support and considerable cost to the target company.[225] In this regard, notwithstanding its weaknesses from a purely legal standpoint, the PRP remains the cheapest defense available to a Japanese listed company—provided it can command the necessary shareholder support and would survive judicial scrutiny if challenged (which, as explained above, is uncertain).[226]

This brings us to our second point: if hostile takeovers are ever perceived as a real threat again, we may expect to see a revival in PRPs. Thus, to stop the PRP's decline dead in its tracks—or spark a renaissance—might require no more than a single instance of a hostile takeover repelled by a triggered PRP, or perhaps even something much less drastic. Consider the case of Kawasaki Kisen Kaisha, Ltd. ("Kawasaki Kisen"), a shipping and logistics concern, which announced in May 2015 that its PRP would not be renewed (i.e. abolished) upon expiration in June that year.[227] Within just two months, the Singapore-based hedge fund Effissimo Capital

223 A share placement at a "particularly favorable" (特に有利な金額) price to the placee requires a special resolution (two-thirds) of the shareholders. Companies Act, §§ 199(2), 199(3), 201(1), 309(2)(v). Conversely, a share placement at a fair price may be conducted by the board without a shareholder vote (Companies Act, § 201(1)), but would cost the placee.

224 *See supra* notes 63-65 and accompanying text. For a recent example where a share placement and option allotment by a listed company was enjoined on the ground that the primary purpose of the placement and allotment was to change the composition of the shareholder body, see Osaka Chihō Saibansho [Osaka Dist. Ct.] Decision, Jan. 6, 2017, 1516 Kin'yū Shōji Hanrei (金融商事判例) 51.

225 *See supra* notes 71-80 and accompanying text.

226 For those that have abolished their PRPs or who foresee the loss of shareholder support necessary for maintaining a PRP, "contingency plans" offered by advisory firms may offer some comfort. *See, e.g.*, IR Japan, *Kontinjenshī puran sākutei shi'en* (コンティンジェンシー・プラン策定支援) [*Contingency Plan Formulation Support*], IR JAPAN (2019), https://www.irjapan.net/service/consulting/contingency.html [https://perma.cc/2QV5-5ZCH].

227 Kawasaki Kisen Kaisha, Ltd, *Tōshakabushiki no daikibo kaitsuke kōi ni kansuru taiō hōshin (baishū bōeisaku) no hi-kōshin (haishi) ni tsuite* (当社株式の大規模買付行為に関する対応方針（買収防衛策）の非更新（廃止）について) [*Re the Non-Renewal (Abolishment) of the Company's Policy on Large-Scale Acquisitions of Shares (Defensive Measures)*] (May 21, 2015), https://www.kline.co.jp/ja/news/ir/ir-6173082786920771957/main/0/link/20150521-2.pdf [https://perma.cc/K6M8-UT99].

Management ("Effissimo")[228] had accumulated a substantial stake in the firm;[229] by March 2016, it had become Kawasaki Kisen's largest shareholder by far[230]—and remains so as of November 2018.[231] The fact that Effissimo built its dominant position in Kawasaki Kisen so quickly after the latter abolished its PRP appears a little too convenient to dismiss as mere coincidence.[232] In a further, recent development, Effissimo officially altered its purpose of shareholding from "pure investment" to "to advise management according to the investment and the situation, and to make important proposals, inter alia"[233]—the harbinger of greater activism by Effissimo in the not-so-distant future.[234]

[228] One reason Effissimo receives considerable attention in the Japanese and international media lies in the connection between its founders to activist investor Murakami Yoshiaki of the notorious (and defunct) "Murakami Fund." *See, e.g.*, *Effissimo Capital becomes top shareholder of Japan's Ricoh, Kawasaki Kisen*, BLOOMBERG.COM (Sept. 4, 2015), https://uk.reuters.com/article/effissimo-japan/effissimo-capital-becomes-top-shareholder-of-japans-ricoh-kawasaki-kisen-idUKL4N11A1XA20150904 [https://perma.cc/XXJ4-6JDW].

[229] Effissimo made its first required filing as a major shareholder (greater than 5%) on Sept. 4, 2015. *See* Effissimo Capital Management Pte Ltd, *Tairyō Hoyū Hōkoku-sho* (大量保有報告書) [*Report on Major Shareholding*] 3 (Sept. 4, 2015), http://disclosure.edinet-fsa.go.jp/[https://perma.cc/R9ZS-GTJD] (reporting a 6.18% shareholding).

[230] Kawasaki Kisen Kaisha, Ltd., *Yūkashōken Hōkoku-sho* (有価証券報告書) [*Annual Securities Report*] 36 (June 24, 2016), http://disclosure.edinet-fsa.go.jp/[https://perma.cc/UK7H-498X].

[231] As of Nov. 12, 2018, Effissimo held 38.99% of Kawasaki Kisen Kaisha, Ltd. Kawasaki Kisen Kaisha, Ltd., *Yonhanki Hōkokusho* (四半期報告書) [*Quarterly Report*] 10 (Nov. 12, 2018), http://disclosure.edinet-fsa.go.jp/ [https://perma.cc/462Y-8EH5].

[232] *See, e.g.*, Ōshima Shin'ichi, *Kawasaki Kisen kabu no tairyō shutoku, baishū bōeisaku wo haishi shite inakereba chigau kekka ni?* (川崎汽船株の大量取得、買収防衛策を廃止していなければ違う結果に？) [*Large-Scale Acquisition of Kawasaki Kisen Shares: Would the Result Have Been Different Had Its Defensive Measure Not Been Abolished?*], Listed Company Board Member's Governance Forum (June 28, 2016) (rev'd May 16, 2018), https://govforum.jp/member/news/news-news/news-management/management-management/19667/[https://perma.cc/8SQ9-TGZ4] (suggesting that there is a "high possibility" that the impetus for such a rapid accumulation of Kawasaki Kisen shares lay in the abolishment of its PRP in 2015).

[233] Effissimo Capital Management Pte Ltd, *Henkō Hōkoku-sho No. 86* (変更報告書 No. 86) [Report of Amendment, No. 86] 2 (Nov. 6, 2018), http://disclosure.edinet-fsa.go.jp/ [https://perma.cc/Y4K6-CR98].

[234] *Effissimo ga Kawasaki Kisen kabu no hoyū mokuteki wo henkō* (エフィッシモが川崎汽船株の保有目的を変更) [*Effissimo Amends Its Purpose for Holding Kawasaki Kisen Shares*], IB Consulting (Nov. 6, 2018), https://ib-consulting.jp/newspaper/310/ [https://perma.cc/JYM2-XGBX] (noting that although Effissimo had voted against the resolution appointing the president of Kawasaki Kisen at the June 2016 shareholder meeting, Effissimo has yet to table any shareholder proposals of its own, and suggesting that Effissimo may put forward its own proposal(s) for the next [i.e. 2019] shareholder meeting).

How Effissimo will exercise its newfound power—the accumulation of which may well be attributable to the abolishment of defensive measures—may be crucial. Should Effissimo touch a nerve, it should not surprise if Japanese companies forced to choose between a politically costly and legally unreliable PRP or letting activist shareholders stream through open gates, were to conclude that the former is the lesser of two evils. It is thus only a slight exaggeration to say that the fate of one of the most fascinating aspects of Japanese corporate governance may very well rest in the hands of a few persons based out of a mall on Singapore's main shopping street.[235]

Another recent and closely-watched development is the case of *sōgō shōsha* (general trading company) Itochu Corporation's activities against the sportswear giant Descente Ltd., which had no PRP or other defensive measure in place. A longtime major shareholder of Descente,[236] on January 31, 2019, Itochu commenced an unsolicited tender offer with the target of raising its shareholding by 9.56%, from 30.44 to 40%.[237] The offer price of JPY2, 800 yen a share amounted to a 50% premium over the average price in January 2019.[238] Interestingly, Itochu in its press release expressly declared

[235] As of 2019, Effissimo appears to be based out of The Heeren, a shopping mall on Orchard Road in downtown Singapore.

[236] *See Itochū no Baishū Teian ni Taikō: Desanto ga Wakōru to Teikei* (伊藤忠の買収提案に対抗　デサントがワコールと提携) [*Resisting Itochu's Suggestion of an Acquisition, Descente Enters Alliance with Wacoal*] NIKKEI BUS. (Sept. 3, 2018), https://business.nikkei.com/atcl/report/15/110879/082900855/[https://perma.cc/T3GF-RY3Q] [hereinafter *Descente Enters Alliance with Wacoal*] (summarizing the history between Descente and Itochu, including changes in Itochu's shareholding).

[237] Itochu Corporation, *Kabushiki-gaisha Desanto Kabushiki (Shōken Kōdo: 8114) ni Taisuru Kōkai Kaitsuke no Kaishi ni Kansuru Oshirase* (株式会社デサント株式（証券コード：8114）に対する公開買付けの開始に関するお知らせ) [*Notice on the Commencement of Open Offer for Shares of Descente Ltd Shares (Securities Code: 8114)*], 15 (Jan. 31, 2019), https://www.itochu.co.jp/ja/ir/news/2019/__icsFiles/afieldfile/2019/01/31/ITC190131_j.pdf [https://perma.cc/C84K-K9WB]. Note that Itochu—in collaboration with Descente's second-largest shareholder—controlled over a third of the shares, and thus already had the power to block fundamental changes, which under Japanese law requires a special resolution passed by a two-thirds majority. *See also Descente Enters Alliance with Wacoal*, *supra* note 236, at 10 (reporting that Itochu had disclosed on Aug. 27, 2018 that it had raised its stake to 27.70%, and that there were rumors that Itochu and ANTA (which held just under 7% of Descente) were considering the possibility of a joint acquisition of Descente).

[238] Itochu Corporation, *supra* note 237, at 13.

that it had no plans to acquire an outright majority and convert Descente into a subsidiary,[239] despite media reports that the bid was prompted by a number of factors including: Itochu's dissatisfaction with what it perceived to be an excessive reliance by Descente on its South Korean business, Itochu's interest in expanding operations in the People's Republic of China, as well as Descente's attempt to go private via leveraged management buyout.[240]

Despite resistance from Descente's president and most of the board,[241] as well as the labor union and Descente alumni,[242] Itochu's hostile offer closed successfully on March 15, 2019.[243] Negotiations between Itochu and Descente over restructuring of Descente's board in February 2019 ultimately broke down. On March 25, 2019, Descente announced that President Ishimoto Masatoshi (a third-generation member of Descente's founding family) will step down as of the shareholder meeting scheduled for June 2019, and will be

[239] *Id.* at 2-3. Among Itochu's reasons was that maintaining the independence of the target would facilitate its employees to display their ""excellent planning and development abilities" to the maximum possible extent. *Id.* at 2.

[240] Ōtsuka Takafumi & Nishimura Gōta, *Desanto wo Meguru Baishūgeki, "Saishū Kecchaku" no Butai-ura: Kaichō Saisokkin wo Okurikomi, Zensekinin wo Ou Itochū* (デサントを巡る買収劇、「最終決着」の舞台裏　会長最側近を送り込み、全責任を負う伊藤忠) [*Behind the Scenes of the "Final Settlement": Itochu Takes Full Responsibility by Sending in Chairman's Top Aide*], Tōyō Keizai Online (Mar. 28, 2019), https://toyokeizai.net/articles/-/273502 [https://perma.cc/E8RD-J59K] [hereinafter Ōtsuka & Nishimura]; Shuichiro Sese, *Itochu-Descente feud escalates into full-blown takeover war*, Nikkei Asian Rev. (Feb. 8, 2019), https://asia.nikkei.com/Business/Business-deals/Itochu-Descente-feud-escalates-into-full-blown-takeover-war [https://perma.cc/FGR9-WEXF]; *Desanto e no TOB, "MBO Teian Kikkake" Itochū Senmu* (デサントへのTOB、「MBO提案きっかけ」 伊藤忠専務) [*Itochu Senior Managing Director: Tender Offer for Descente "Sparked by Management Buyout Suggestion"*], Nihon Keizai Shimbun (Jan. 31, 2019), https://www.nikkei.com/article/DGXMZO40716790R30C19A1TJ1000/ [https://perma.cc/E9TL-ULP8].

[241] Descente Ltd, *BS Inbesutomento Kabushiki Kaisha ni yoru Tōsha Kabuken ni Taisuru Kōkai Kaitsuke ni kansuru Iken Hyōmei (Hantai) no Oshirase* (BSインベストメント株式会社による当社株券に対する公開買付けに関する意見表明（反対）のお知らせ) [*Notice on Announcement of Adverse Opinion on the Open Offer for this Corporation's Shares by BS Investment Corporation*] (Feb. 7, 2019), http://www.descente.co.jp/jp/ir/190207_JP.pdf [https://perma.cc/YUY6-H7R9] (recommending against Itochu's offer and noting that Shimizu Motonari, who is an Itochu nominee director, excused himself from the board meeting, and that Nakamura Ichirō, who was formerly of Itochu, "reserved his opinion").

[242] Ōtsuka & Nishimura, *supra* note 240.

[243] *Itochu Wins Bigger Stake in Sportswear-Maker Descente in Rare Hostile Takeover for Japan*, Japan Times (Mar. 15, 2019), https://www.japantimes.co.jp/news/2019/03/15/business/corporate-business/itochu-wins-bigger-stake-sportswear-maker-descente-rare-hostile-takeover-japan/ [https://perma.cc/7JLJ-T9LA].

replaced by Koseki Shūichi, head of Itochu's textiles business and known top aide of Itochu chairman Okafuji Masahiro.[244] Descente's 10-member board of directors will also be downsized to six, with two from Descente, two Itochu nominees, and two outside directors who are reputed business leaders with some connection to Itochu.[245] In successfully replacing most of Descente's board, strengthening its representation on the board, and installing its own senior executive as Descente's next president, Itochu's victorious hostile action[246] opens another chapter in the annals of Japanese corporate governance.

However, it must be stressed that even if there is a one-off successful takeover[247]—or further successful hostile action short of a full hostile takeover similar to the Itochu-Descente saga[248]—that sparks fear into the hearts of Japanese management, the "pill" will

[244] Ōtsuka & Nishimura, *supra* note 240.

[245] *Id.* The incoming CFO, Tsuchihashi Akira, is an executive officer (*shikkō-yakuin*) and the general manager of Itochu's internal audit division. Neither of the two remaining directors from Descente were lifetime employees who joined straight after graduation; one first joined Descente's Korean operation, and the other is a former vice president of Adidas Japan.

[246] Note that as Itochu (at 30.44% shareholding) already wielded a level of effective control even prior to the tender offer and did not seek to acquire an outright majority in Descente, Itochu's actions do not fit our definition of hostile takeover. For the definition, see *supra* note 129. However, with the support of the second-largest shareholder, it is possible that Itochu now—with just 40%—may in practice control a majority of the voting power. *See* Matsuzaki Yūsuke, *"Hatsu" no Tekitai-teki TOB: Hikari to Kage* (「初」の敵対的ＴＯＢ 光と影) [*The "First" Hostile Tender Offer: Light and Darkness*], Nihon Keizai Shimbun (morning ed.) (Mar. 19, 2019), https://www.nikkei.com/article/DGXMZO42592240Y9A310C1DTA000/ [https://perma.cc/6AN7-ZKCN].

[247] For the definition, see *supra* note 129.

[248] Another hostile action in Japan's fast-moving scene to watch is the hostile bid for Kosaido Co., Ltd. by a fund led by the daughter of Murakami Yoshiaki launched on Mar. 22, 2019. This bid is in response to a leveraged management buyout attempt by Kosaido's founding family and management working in conjunction with Bain Capital. *See MBO Mezasu Kōsaidō e Kyū-Murakami Fando-kei "Reno" ga Taikō* (MBO目指す廣済堂へ旧村上ファンド系「レノ」が対抗TOB) [*Ex-Murakami Fund-linked Reno Counters Kosaido's MBO Attempt*], M&A Online (Mar. 22, 2019), https://maonline.jp/articles/counter_tob_kosaido2019 [https://perma.cc/Y3ZV-QH2K]; *Japan Toys with Shareholder Capitalism Just as the West Balks*, Economist (Mar. 28, 2019), https://www.economist.com/business/2019/03/30/japan-toys-with-shareholder-capitalism-just-as-the-west-balks [https://perma.cc/W2QL-JUJF]. As of Apr. 9, 2019, the management buyout attempt has failed; the hostile bid remains pending. *Kōsaidō MBO Shūryō, Nokoru wa "Taikō TOB" no Yukue* (廣済堂TOB終了、残るは「対抗TOB」の行方) [*Kosaido's MBO Attempt Over, What's Left Is the "Counter TOB"*], M&A Online (Apr. 9, 2019), https://maonline.jp/articles/kosaido_tob_mbo201904 [https://perma.cc/4EYZ-7X88].

never take on American form unless Japanese courts introduce the active ingredient into PRPs: the ability for the board to adopt a PRP—without shareholder approval—that provides the board with a clear veto right over a hostile bid. If this were to occur, perhaps PRPs would be redesigned in the shadow of this jurisprudence—but that may take some time and right now seems a long way off. Yet, only time will tell and we are loath to predict the future.

FUTURE RESEARCH QUESTIONS INSPIRED BY JAPAN'S UNIQUE MEDICINE

By stopping the hostile takeover wave in its tracks, poison pills won the takeover wars for management, and changed the trajectory of corporate governance in the U.S. by shifting power from shareholders to management by empowering boards. The advent of hostile takeover attempts and indigenous versions of "poison pills" in Japan, long heralded as a prime candidate for a burgeoning hostile takeovers market, understandably raised expectations that Japan's experience would track that of the U.S. But this was not to be.

As a medicine lacking the active ingredient in the U.S.-pill (i.e., providing the board with a veto right over a hostile bid) the Japanese "poison pill" is something entirely different than what exists in America. We hope this Article has made this clear. Perhaps more importantly, we hope that it provides an accurate understanding of Japanese defensive measures—especially the rise and fall of the PRP—on its own terms. At a minimum, this Article should prevent those who read it from making the comparative corporate law error of simply classifying Japan with the U.S. as countries that have adopted *the* "poison pill."

Beyond this, there are at least three broader issues that we feel this exploration has raised that deserve more attention in future research. First, this Article demonstrates the serious terminological problem in comparative law, which we feel may be getting worse in this era of burgeoning globalization where the *lingua franca* is increasingly English. A common lexicon of English language corporate governance terms, which are mostly derived from the U.S. and U.K. experience, is increasingly used interchangeably by experts in jurisdictions around the world. Although we see this as a positive phenomenon in that it promotes inter-jurisdictional discourse, this Article provides a cautionary tale about how in some

instances (and we have identified other instances elsewhere)[249] it may terribly mislead.

Second, this Article demonstrates how unique interpretations (or the lack thereof) of legal concepts by courts can transform the transplant of a legal idea from one jurisdiction, to something entirely different in another jurisdiction when it is implemented. For a variety of reasons, the Delaware Court of Chancery is a unique animal—both within the U.S. and, especially, when compared to other courts outside the U.S. The importance and uniqueness of Delaware's judicial system in the development of U.S. corporate governance often seems to be forgotten when U.S. corporate law and governance concepts are exported abroad. It is relatively easy to export a general idea—but incredibly difficult to transplant a system like the Delaware courts which has taken generations to develop and is constantly evolving.

Third, it is often forgotten how much the timing of introducing a corporate governance mechanism may impact its development. In this case, just when Japan's poison pill was gaining some momentum, the Global Financial Crisis hit. If not for this, who knows whether some hostile takeovers would have succeeded in Japan and the courts may have been forced to handle more cases and develop a jurisprudence similar to that of Delaware? This is one more reason why functional convergence of corporate governance seems to be an academic pipe dream; whereas formal convergence—at least at the high level of abstraction of simply transplanting common labels—is already here. However, convergence of labels that misdescribe their contents not only provides scant intellectual leverage, but as we have seen in this case, can be terribly misleading.

[249] Puchniak, *supra* note 101 (characterizing claims about how the derivative action would function based on legal origin or about the superiority of the common law as misleading); Dan W. Puchniak & Kon Sik Kim, *Varieties of Independent Directors in Asia: A Taxonomy*, *in* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH (Dan W. Puchniak et al. eds., 2017) (treating independent directors in Asia as equivalent in function to those in the U.S. is misleading, as is considering the rise of independent directors in Asia as evidence of convergence towards the Anglo-American model of corporate governance).

APPENDIX

[Table 1] *PRPs and other Defensive Measures in Japan, 2004–2018*

Source: RECOF Database[250]

Year		2004	2005	2006	2007	2008
Active defense measures, no. of firms	Total	2	29	175	409	571
	PRPs (% total)	0 (0)	20 (68.97)	163 (93.14)	398 (97.31)	562 (98.42)
	Trust-type	0	5	9	9	7
	Others	2	4	3	2	2
Change in PRPs, YoY (% change)		N.A. N.A.	20 N.A.	143 (815)	235 (244.17)	164 (141.21)

Year		2009	2010	2011	2012	2013
Active defense measures, no. of	Total	565	540	521	514	511
	PRPs (% total)	561 (99.29)	536 (99.26)	517 (99.23)	510 (99.22)	507 (99.22)
	Trust-type	2	2	2	2	2
	Others	2	2	2	2	2
Change in PRPs, YoY (% change)		-1 (-.00178)	-25 (-4.46)	-19 (-3.54)	-7 (-1.35)	-3 (-0.588)

Year		2014	2015	2016	2017	2018
Active defense measures, no. of	Total	495	478	448	409	387
	PRPs (% total)	490 (98.99)	473 (98.95)	443 (98.88)	405 (99.02)	383 (98.97)
	Trust-type	2	2	2	2	2
	Others	3	3	3	2	2
Change in PRPs, YoY (% change)		-17 (-3.35)	-17 (-3.47)	-30 (-6.34)	-38 (-8.58)	-22 (-5.43)

Figures for 2004–2008 and 2010–2017 are as of 31 December each year; for 2018, 31 October. Figures for 2009 are extrapolated.

[250] Data for 2004–2008 is from the MARR RECOF Database as reported in *M&A Kenkyūkai Hōkoku 2009* (M&A研究会報告2009) [*Reports of the M&A Study Group, 2009*] (Economic and Social Research Institute, Cabinet Office, Government of Japan) 10 fig. 1-13 (Feb. 2009), [https://perma.cc/8E5J-9S5V] (prepared by Niwa Shōichi, executive officer of RECOF Corporation). Data for 2010–2018 is from MARR RECOF Database, *M&A Tōkei (Hyō to Gurafu)* (M&A統計（表とグラフ）) [*M&A Statistics: Tables and Graphs*] 32 (Dec. 2018).

[Table 2] *Trends in Defensive Measures in Corporate Japan, 2008–2018*[251]

Source: compiled from Sumitomo Trust Bank reports in Shōji Hōmu, 2006–2018 (excluding 2014).[252]

Year	2008	2009	2010	2011	2012	2013
Cos. w/ active measures	570	567	542	521	514	512
As % of all listed	N.A.	N.A.	14.7	14.5	14.5	14.5
New measures adopted, previous 12 months	207	21	4	6	6	9
Measures introduced (cumulative)	588*	609	613	619	625	634
Measures abolished, previous 12 months	10	24	29	27	13	11
Measures abolished (cumulative)	16*	42	71	98	111	122
Measures expiring, previous 12 months	N.A.	167	227	285	145	194
Attrition, previous 12 months[253]	N.A.	15	21	24	12	7
Attrition rate, previous 12 months (%)	N.A.	8.98	9.25	8.42	8.28	3.61

[251] Single asterisks indicate extrapolated figures; double asterisks indicate figures corrected based on studies published in later years; single crosses indicate figures from or computed based on unpublished data. Each 12-month period for each reference year runs from Aug. 1 of the previous year to July 31.

[252] For full citations to the studies, see *supra* note 154. No study was published by SMTB analysts in 2014, but unpublished data on the number of expiring measures and the number subject to attrition for reference year 2014 was sourced from Mogi Miki and Tanino Kōji of SMTB and the attrition rate figure for 2014 calculated accordingly. Although every effort at compiling a consistent dataset has been made, any remaining inconsistencies are an artifact of the original data and reproduced accordingly; they do not, however, have a material impact on the data. Where figures from studies published in different years conflict, the later (or latest) study prevails.

[253] Defined as number of defensive measures discontinued out of those due to expire within a reference year.

Year	2014	2015	2016	2017	2018
Cos. w/ active measures	494	479	453	408	386
As % of all listed	N.A.	13.4	12.5	11.2**	10.4
New measures adopted, previous 12 months	5	8	6	3	5
Measures introduced (cumulative)	639*	647	653	656	661
Measures abolished, previous 12 months	23	23	32	48	27
Measures abolished (cumulative)	145*	168	200	248	275
Measures expiring, previous 12 months	239†	138	171	213	115
Attrition, previous 12 months[254]	23†	18	29	44	26
Attrition rate, previous 12 months (%)	9.62†	13.04	16.96	20.66	22.60

[254] Defined as number of defensive measures discontinued out of those due to expire within a reference year.

[Table 3] *Abolished Defensive Measures: Trends and Reasons, 2006–2018*[255]

Source: RECOF Database.[256]

Year		2011	2012	2013	2014
Cumulative abolishments		105*	122*	133*	157*
Abolishments each calendar year		25	17	11	24
Abolishment initiated by management	Non-renewal	74*	5	7	17
	Before expiry	4*	5	0	0
	Other reasons	3*	0	1	0
Non-management side reasons	Failure to obtain shareholder support	0*	0	0	1
	Delisting/merger	19*	7	3	6
	Injunction/winding up	5*	0	0	0

Year		2015	2016	2017	2018
Cumulative abolishments		180*	216*	259*	286*
Abolishments each calendar year		23	36	43	27
Abolishment initiated by management	Non-renewal	19	29	41	24
	Before expiry	3	1	1	2
	Other reasons	0	1	0	0
Non-management side reasons	Failure to obtain shareholder support	0	0	0	0
	Delisting/merger	1	5	1	1
	Injunction/winding up	0	0	0	0

[255] Asterisks indicate cumulative figures up to that year. Figures for 2011–2017 are as of Dec. 31 of each year; for 2018, as of Oct. 31.

[256] MARR, *supra* note 250, at 33.

COMMONWEALTH
Climate and Law Initiative

Directors' Duties Regarding Climate Change in Japan

February 2021

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Executive Summary

Japan's primary prudential regulator, the Bank of Japan, has acknowledged that climate change poses a systemic risk to the Japanese economy and financial system. There is now overwhelming scientific and financial evidence of the material impacts of climate change on businesses. Since climate change has been recognized by governments, courts, and investors as a material issue affecting the sustainability of almost all companies, corporate directors need to recognize their obligation to address climate-related risks and opportunities.

Directors in Japan have three primary duties, a duty of loyalty, a duty to be in compliance with all laws, regulations, and ordinances, and the company articles, and a duty of care. Directors' duties are set out in the *Companies Act of Japan,* the articles of incorporation, and the Civil Code. The obligation of directors to consider the implications of climate change risk is grounded in the duties each director owes to the corporation they serve. In their oversight of management of climate risks, directors must meet the objective standard of what a reasonably prudent person would do in comparable circumstances.

The *Companies Act of Japan* specifies that the directors of large companies must develop the systems necessary to ensure that execution of their duties complies with laws and regulations to ensure the proper operations of a stock company. The Regulation for Enforcement of the Companies Act requires directors of these companies to develop systems related to management of the risk of loss to the stock company and any of its subsidiaries. In such companies, a director's duty of care will not be effectively performed without a proper internal control system, and directors can be found personally liable if they breach these statutory requirements. These requirements mean that climate governance should be embedded in a board committee responsible for risk management or sustainability. Directors must establish effective proper internal control and risk management systems to support exercise of their duty to supervise business operations. Directors must have sufficient capability to scrutinize climate risks to the company and then interact with management and the board to oversee management of these risks. The committee with responsibility for risk management needs to be able to assess and analyze both the physical risks and transition risks associated with climate change. Where directors lack climate-governance expertise and that expertise is not available among the executives of the company, directors would hire outside professional expertise that can support their climate-related risk management decisions in the best interests of the company.

Even though directors have broad discretionary decision-making authority to design their board committees, arguably directors could be held liable under the *Companies Act* and the Regulation for Enforcement of the Companies Act for failure to establish a climate risk management system with sufficient capabilities to perform their responsibilities to oversee and manage climate-related financial risks and opportunities. Depending on the size and kinds of business lines, the system adopted needs to be capable of performing the required proper controls in light of the likelihood and magnitude of climate risks to the company. If directors of a large stock company fail to establish a proper internal control system that appropriately addresses climate-related risks, they could be found personally liable for breach of their duty of care.

Directors in Japan have a duty of care, to act as a mandatary in the best interest of the company. Directors who neglect their duties are jointly and severally liable to the company for any resulting damages; and where they are grossly negligent or knowingly fail to perform their duties, they are also liable to shareholders or third parties for resulting damages. Since climate change is affecting almost all businesses, failure by corporate directors to recognize their obligation to address climate-related risks and opportunities could result in personal liability for failure to act with due care and in the best interests of the company. This liability for breach of their duties is in addition to their potential personal liability for failure to meet the requirements of any statutes or ordinances.

For duly diligent directors, the Supreme Court of Japan's recognition of a business judgment rule may offer a defence to specific actions to address climate mitigation and adaptation, when hindsight information suggests that the directors should have made a different decision. However, the business judgment rule does not offer a safe haven to directors that fail to act on climate-related risk. Japanese courts have been clear that they will examine not only the process used to reach the business decision, but also undertake a review of the duty of care, from an objective standpoint, to assess whether a director acted unreasonably at the time of the decision. Where directors neglect to undertake reasonable research and analysis of the relevant facts, fail to get expert advice on climate-related risk management, and fail to exercise due care in respect of climate risks, the courts are unlikely to defer to their business judgment because directors will have failed to exercise any judgment at all or failed to engage in a reasonable assessment of the risks.

The Japanese Government has signalled to companies that climate change is a material financial risk that they must address. The Ministry of Environment has advised companies to engage in scenario analysis to assess the resilience of their business in the face of global warming in line with the recommendations of the Financial Stability Board's Taskforce on Climate-related Financial Disclosures. Japan's *Climate Change Adaptation Act* and its *Act on Promotion of Global Warming Countermeasures,* read together, create regulatory expectations that all sectors of Japanese society must make efforts to control climate change through mitigation and adaptation. A company must make efforts to realize the government's climate policy, although these statutes currently impose no legal liabilities on directors for non-compliance.

In contrast, financial services law in Japan, both the *Financial Instruments and Exchange Law* and securities listing regulations published by the securities exchanges, require disclosure of material risks and strategies to address such risks. Climate change is now viewed by investors globally as a material risk.

Finally, the Corporate Governance Code, which is non-binding, also offers strong normative guidance for directors to effectively manage material climate-related financial risks and opportunities. The impact of soft law such as the Corporate Governance Code has the potential to be instrumental in shifting climate governance, as the principles adopted by companies form part of their fundamental rules of operation.

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About the Commonwealth Climate and Law Initiative

The Commonwealth Climate and Law Initiative (CCLI) is a legal research and stakeholder engagement initiative founded by Oxford University Smith School of Enterprise and the Environment, ClientEarth, and Accounting for Sustainability (A4S). The CCLI examines the legal basis for directors and trustees to manage and report on climate change-related risk and climate mitigation and its research is at the forefront of the intersection of climate and biodiversity risks under existing companies and securities laws. Founded to focus on four Commonwealth countries: Australia, Canada, South Africa, and the United Kingdom, the CCLI has expanded its remit to the United States, Hong Kong, India, Singapore, Japan and Malaysia. The CCLI leverages the inter-disciplinary and cross-jurisdictional perspectives provided by its global experts from academia and the legal, accountancy, business, and scientific, communities.

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Abbreviations

°C	degrees Celsius
CEO	chief executive officer
ESG	environmental, social and governance
FIEA	*Financial Instruments and Exchange Act,* Japan
GHG	Greenhouse gas
GPIC	Government Pension Investment Fund, Japan
IASB	International Accounting Standards Board
IPCC	Intergovernmental Panel on Climate Change
JPX	Japan Exchange Group
KPI	key performance indicators
METI	Ministry of Economy, Trade and Industry, Japan
MOE	Ministry of Environment, Japan
NGFS	Network for Greening the Financial System
SASB	Sustainability Accounting Standards Board
SSE	Sustainable Stock Exchanges
TCFD	Taskforce on Climate-related Financial Disclosures
TSE	Tokyo Stock Exchange
UK	United Kingdom
UN	United Nations
UN PRI	United Nations Principles for Responsible Investing
US	United States

1. INTRODUCTION

Globally, climate change has been recognized as an existential threat to humanity and a serious threat to economic activity.[1] The Intergovernmental Panel on Climate Change (IPCC), comprised of more than 800 scientists representing 150 governments, has concluded that at 1°C (Celsius) above pre-industrial temperatures, which is what Earth is experiencing currently, 4 per cent of global land area is undergoing transformation of ecosystems with long-lasting impacts.[2] At 2°C warming, there will be irreversible serious consequences for human and ecological systems.[3] There is now broad scientific consensus that global emissions must drop by 50 per cent over the next decade for the world to have any chance of staying below 1.5°C.[4] Even at 1.5°C warming, there will be irreparable damage to assets, operations, and ecosystems. Thus, the goal must be net-zero carbon emissions as soon as reasonably possible. Investors, companies, and governments are grappling with ways to effectively address the risks of climate change and implement strategies to decarbonize economic activity in order to save the planet.

Japan is particularly susceptible to the physical risks of climate change, particularly sea-level rise, inundation into fresh water sources, sustained heat waves, and increased typhoon frequency and intensity. It also faces economic transition risks as global investors increasingly signal that they will shift capital to decarbonized sustainable investments.

Japan has started to respond to these impacts. Prime Minister Yoshihide Suga, in his first general policy speech to both Houses of the Diet in October 2020, committed Japan to working to meet the goal of net-zero greenhouse gas (GHG) emissions by 2050.[5] He stated:

> My administration will devote itself to the greatest possible extent to bring about a green society, while focusing on a virtuous cycle of the economy and the environment as a pillar of our growth strategy. We hereby declare that by 2050 Japan will aim to reduce greenhouse gas emissions to net-zero, that is, to realize a carbon-neutral, decarbonized society. Addressing climate change is no longer a constraint on economic growth. We need to adjust our mindset to a paradigm shift that proactive climate change measures bring transformation of industrial structures as well as our economy and society, leading to dynamic economic growth.[6]

As the world's third largest economy, this announcement aligns Japan with major economies committed to building a sustainable, carbon neutral, and resilient world.[7]

[1] Intergovernmental Panel on Climate Change (IPCC), *Global warming of 1.5°C – An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty,* (October 2018) IPCC <https://www.ipcc.ch/sr15/>.
[2] *Ibid.*
[3] *Ibid.*
[4] *Ibid,* European Union Technical Expert Group, 2020.
[5] The speech in provisional English version is available at Prime Minister of Japan, 'Policy Speech by the Prime Minister to the 203rd Session of the Diet', (28 October 2020), https://japan.kantei.go.jp/99_suga/statement/202010/_00006.html.
[6] *Ibid.* See also Nikkei staff, 'Suga vows to meet Japan's zero-emissions goal by 2050', Nikkei Asia (26 October 2020), https://asia.nikkei.com/Politics/Suga-vows-to-meet-Japan-s-zero-emission-goal-by-2050 .
[7] United Nations Secretary General, 'Statement attributable to the Spokesperson for the Secretary-General – on Japanese Prime Minister Suga's net-zero announcement', (26 October 2020), https://www.un.org/sg/en/content/sg/statement/2020-10-26/statement-attributable-the-spokesperson-for-the-secretary-general-%E2%80%93-japanese-prime-minister-suga%E2%80%99s-net-zero-announcement.

1.1 Context - Climate Change as a Material Financial and Health Risk

Climate change is a systemic risk. The Bank of Japan, as Japan's primary prudential regulator, has acknowledged that climate change poses a systemic risk to the Japanese financial system.[8] It reports that asset prices could fall substantially as climate-related risks materialize, and misevaluation of climate risks can lead to the misallocation of resources.[9] The Bank states that when physical risks and transition risks materialize, the financial system is affected through both direct channels and indirect channels, with interrelated impacts on the real economy and financial system.[10]

The Financial Stability Board's Taskforce on Climate-Related Financial Disclosures (TCFD) was commissioned by the G20 Finance Ministers and Central Bank Governors out of their concern for the disruptive changes due to climate change across economic sectors and industries in the near to medium term, with implications for the global financial system, in terms of avoiding financial dislocations and sudden losses in asset values.[11] The TCFD reported that the two principal types of climate-related risk, physical risks and transition risks are inextricably linked. Within transition risks, there are a number of related sub-risks, as briefly discussed below.

A. Physical Risks

Physical risks resulting from climate change can be event driven (acute) or longer-term shifts (chronic) in climate patterns. Acute physical risks refer to increased severity of extreme weather events, such as cyclones, hurricanes, or floods; and chronic physical risks refer to longer-term shifts in climate patterns, such as sustained higher temperatures that may cause sea level rise or chronic heat waves.[12]

Scientists attribute a recent acceleration in global sea-level rise to global warming, resulting in more severe storms in Japan.[13] The Union of Concerned Scientists has reported that a sea-level rise of 1 metre could place 4.1 million people in Japan at risk of flooding and inundate more than 2,339 square kilometers of land in major cities.[14] It reports that the city of Osaka, population 2.5 million people, has over $200 billion worth of assets threatened by sea-level rise.[15] For example, in July 2018, a devastating downpour in western Japan forced 2 million people to evacuate their homes due to flooding, claiming over 200 lives.[16] In the aftermath of the event, experts agreed that the intensity of the storm was exacerbated by climate change.[17] Continued coastal flooding and storm surges are likely

[8] Bank of Japan, Bank of Japan joins the Network for Greening the Financial System (NGFS)' (28 November 2019), https://www.boj.or.jp/en/announcements/release_2019/rel191128a.htm/. See also Kakuho Furukawa, Hibiki Ichiue and Noriyuki Shiraki, 'How Does Climate Change Interact with the Financial System?', Bank of Japan Working Paper (24 December 2020), https://www.boj.or.jp/en/research/wps_rev/wps_2020/wp20e08.htm/ (hereafter Bank of Japan working paper).
[9] Bank of Japan working paper, *ibid* at 5.
[10] *Ibid* at 9.
[11] TCFD, 'Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures' (June 2017), at iii, https://www.fsb-tcfd.org/publications/final-recommendations-report/; Japanese translation at: https://www.fsb-tcfd.org/wp-content/uploads/2017/06/TCFD_Final_Report_Japanese.pdf.
[12] *Ibid* at 6.
[13] Union of Concerned Scientists, 'Climate Hot Map', https://www.climatehotmap.org/global-warming-locations/osaka-japan.html#end9#end9#end9#end9#end9#end9.
[14] *Ibid*.
[15] R J Nicholls, S Hanson, C Herweijer, N Patmore, S Hallegatte, J Corfee-Morlot, J Château, and R Muir-Wood, 'Ranking port cities with high exposure and vulnerability to climate extremes. Environment working paper no 1', (2008) Paris: Organisation for Economic Co-operation and Development, http://www.oecd.org/officialdocuments/displaydocumentpdf?cote=ENV/WKP%282007%291&doclanguage=en (hereafter Nicholls *et al*).
[16] The Climate Reality Project, 'How the Climate Crisis Impacts Japan', (2020), https://www.climaterealityproject.org/blog/how-climate-crisis-impacts-japan.
[17] *Ibid*.

to put millions of people and valuable assets in Osaka and other cities at risk. Another study documents Japan's high exposure to asset damage due to more frequent, higher winds.[18]

Global warming also has chronic impacts on Japan. Its temperature is rising at a faster rate than the global average. The number of days with a maximum temperature of 30°C to 35°C or above is increasing.[19] In 2018, Japan's temperature record was broken by a heatwave that peaked at a 41°C (106° Fahrenheit), a heat wave that the Japan Meteorological Agency declared a natural disaster, hospitalizing over 30,000 and claiming at least 80 lives.[20] The Japan Government's synthesis report on climate impacts observed that the projected number of cases where heat illness patients will be carried by ambulance will increase nationwide in the period between the present and mid-21st century (2031-2050), projected to at least double in eastern and northern Japan.[21]

Inundation of sea water into freshwater and sustained heat may also place agricultural production of rice, a key staple of Japanese diet, at risk.[22] The Japanese government reported the impacts of climate change on rice yield and quality:

> Cases of white immature grain (high temperature or other damaging condition causes insufficient starch production in the grain, making it look milky white), cracked grain (high temperature causes cracks in the grain) and other degraded quality rice have already been reported throughout Japan. Some cases of reduction in yield have also been reported in specific areas or in extremely warm years.[23]

Another impact of climate change on agriculture in Japan is that high temperatures, solar radiation, and decreased precipitation in the summer are negatively affecting fruit production, including causing sunburn damage.[24] Temperature rise during the summer is also negatively affecting Shiitake mushroom production due to the increased generation of pathogens and decreased generation of the edible parts, requiring further research.[25] The problem of abandoned bamboo forests, primarily in western Japan, means intrusion into mixed-use forests, which will possibly cause adverse effects on local ecosystems and biodiversity, as well as rural landscape management.[26]

With the increase in ocean temperature caused by climate change, spawning and feeding grounds of marine organisms in offshore and coastal areas of Japan, as well as migration routes, are likely to change, causing a direct impact on their distribution.[27] In shallow waters, areas for seaweed cultivation and tidal flats may be reduced or species diversity may decline or disappear due to global warming, causing concerns about the impact on industry.[28]

[18] Nicholls *et al, supra* note 15 at 37.
[19] Japan Government, *Synthesis Report on Observations, Projections and Impact Assessments of Climate Change, 2018 Climate Change in Japan and Its Impacts,* Ministry of the Environment Ministry of Education, Culture, Sports, Science and Technology Ministry of Agriculture, Forestry and Fisheries Ministry of Land, Infrastructure, Transport and Tourism Japan Meteorological Agency at3, https://www.env.go.jp/earth/tekiou/pamph2018_full_Eng.pdf (hereafter Synthesis Report).
[20] Jason Samenow, 'Japan soars to its highest temperature ever recorded: 106 degrees', *The Washington Post*, (23 July 2018), https://www.washingtonpost.com/news/capital-weather-gang/wp/2018/07/23/japan-soars-to-its-highest-temperature-ever-recorded-106-degrees/?noredirect=on.
[21] Synthesis Report, *supra* note 19 at 6.
[22] Kenji Washio, 'The Prediction of Climate Change and Rice Production in Japan' (2013) *Rice Research,* https://www.omicsonline.org/open-access/the-prediction-of-climate-change-and-rice-production-in-japan-jrr.1000e103.php?aid=23457, finding that the reproductive phase of rice is highly sensitive to high temperature, and hotter conditions lead to increasing sterility.
[23] Synthesis Report, *supra* note 19 at 3.
[24] *Ibid* at 3.
[25] *Ibid.*
[26] *Ibid* at 4.
[27] *Ibid.*
[28] *Ibid.*

Physical risks and impacts due to climate change have financial implications for companies, such as direct damage to assets and indirect impacts from supply chain disruption.[29] Direct damage to assets leads to reduction of the value of collateral and write-downs on balance sheets, which can negatively affect annual revenues. It can increase the costs of raising capital, particularly where the company is located in areas such as coastal shorelines where the physical risks are higher. When physical risks materialize, fixed assets such as factories and equipment are damaged, leading to economic loses from irreparable assets or loss of production time, deterioration in the company's creditworthiness and ability to borrow, all of which, in turn, affect both companies' and banks' balance sheets.[30]

Both acute and chronic physical effects can also negatively affect the cost and availability of insurance. Companies' financial performance may also be affected by changes in water availability, sourcing, and quality. Extreme temperature changes can negatively affect organizations' premises, operations, transport needs, and employee safety.[31] When companies have inadequate information about the physical risks, there is risk that they have mispriced assets and misallocated capital.[32] Changing weather patterns also have indirect impacts, such as changes in natural ecosystems and impacts on fisheries, which can cause a wide variety of secondary effects on industrial and economic activities.[33]

In summary, unabated climate change will continue to have a negative impact on short-, medium-, and long-term economic performance.

B. Transition Risks

Japan is also vulnerable to transition risks. In its trade relationships with foreign nations and investments in other countries, businesses in Japan are dealing with different legal regimes and standards for reporting on climate change or meeting scope 1, 2 and 3 emissions reductions targets. Policy uncertainty in some jurisdictions and liability risk for investee companies in countries like the United States (US) are also becoming evident. The time horizons for climate-related risk are not only manifested over the long term; climate change is disrupting businesses today. Thus, oversight and management of climate-related risks must become embedded in governance processes for risk management, strategic planning, and financial reporting in the short, medium, and long term. Within transition risks are numerous types of financial risks, including market risks, legal and policy risks, technology risks, and reputational risks.

i. Market Risks

As institutional investors shift to net-zero carbon emissions investments, there is risk of shifting away from Japan as a market unless investee companies demonstrate that they are effectively managing climate risk. As investors shift their investment priorities, there are direct impacts on supply and demand for different products, services, and commodities, with investors increasingly taking account of climate-related risks and opportunities.[34]

Companies' failures to act to address market pressure to engage in climate mitigation and adaptation strategies are likely to increase the cost of capital or reduce its availability. The chief executive officer (CEO) of the world's biggest institutional asset manager BlackRock, Larry Fink, sent a letter in 2020

[29] TCFD, *supra* note 11 at 6.
[30] Bank of Japan working paper, *supra* note 8 at 10.
[31] TCFD, *supra* note 11 at 6.
[32] *Ibid* at 1.
[33] *Ibid.*
[34] *Ibid* at 6.

addressed to all its investee companies, including a number of Japanese companies, warning that climate change is a financial risk that could shake the stability of economic growth and the financial system, and asking companies for disclosure based on the Sustainability Accounting Standards Board (SASB) standards and the TCFD recommendations, stressing that companies need effective disclosure so that investors can ascertain whether they are properly managing sustainability risks and opportunities.[35]

Also in 2020, Hiro Mizuno, then Executive Managing Director and Chief Investment Officer of Japan's US$1.4 trillion (¥151 trillion assets) Government Pension Investment Fund (GPIF) issued a letter, signed also by two other global asset managers, pointing out that climate change alone has the potential to destroy US$ 69 trillion in global economic wealth by 2100 and calling on companies to develop sustainable long-term strategies to address climate-related risks and to consider the environment, employees, and society in their business strategies.[36] GPIF has stated that it is

> committed to fulfilling our fiduciary duty to secure adequate retirement funds for both current and future beneficiaries. We believe that improving the governance of the companies that we invest in while minimizing negative environmental and social externalities – that is, ESG (environment, social and governance) integration – is vital in ensuring the profitability of the portfolio over the long term.[37]

A study by Choi, Gao, and Jiang recently found that financial institutions around the world have reduced their exposure to stocks of high-emission industries since 2015, and firms in such sectors have experienced lower price-to-earnings and price-to-book ratios, which make equity financing costlier.[38] At the same time, they have increased research and development capital expenditures, suggesting that high-emissions firms are investing in methods to reduce emissions.[39] The authors observe that divestment by financial institutions exerts pressure on companies to adopt climate-friendly policies and decrease their carbon footprint.[40]

ii. Policy and Legal Risks

Policy risks can include government policy actions aimed at constraining company actions that contribute to the adverse effects of climate change and policy aimed at promoting mitigation and adaptation. Examples include implementing carbon-pricing mechanisms to reduce GHG emissions, shifting energy use toward lower-emission sources, adopting energy-efficiency measures, and encouraging greater water efficiency and sustainable land-use practices.[41] For example, a carbon tax introduced to reduce GHG emissions may result in the market value of fossil fuels such as oil and coal dropping substantially, leaving companies with stranded assets that are no longer able to earn an economic return, in turn, negatively affecting the balance sheet.[42]

There are increasing expectations by Japanese regulators that companies will address climate-related financial risks. Japan's Ministry of the Environment (MOE) Climate Change Policy Division has reported

[35] Larry Fink, BlackRock, 'A Fundamental Reshaping of Finance', Letter to CEOs, (January 2020), https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.
[36] Hiro Mizuno *et al*, 'Our Partnership for Sustainable Capital Markets' (March 2020), https://www.gpif.go.jp/en/investment/Our_Partnership_for_Sustainable_Capital_Markets.pdf (hereafter Mizuno *et al*).
[37] Government Pension Investment Fund, 'For All Generations, ESG Report 2019', at 2, https://www.gpif.go.jp/en/investment/GPIF_ESGREPORT_FY2019.pdf.
[38] Darwin Choi, Zhenyu Gao, Wenxi Jiang, 'Global Carbon Divestment and Firms' Actions' (29 May 2020), SSRN 358995, at 9, 13, 14, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3589952.
[39] *Ibid*.
[40] *Ibid* at 3.
[41] TCFD, *supra* note 11 at 5.
[42] Bank of Japan working paper, *supra* note 8 at 10.

that climate-related risks can result from reassessment of the value of a large range of assets with a large volume of GHG emissions during the process of adjustment towards a lower carbon economy.[43] It has issued guidance on disclosure of climate-related risks and opportunities in line with the TCFD, discussed in part 6.3 below. Given that the TCFD framework includes guidance on the robust climate governance processes that necessarily underlie the disclosures, it is an indication of growing regulatory expectations that directors should put in place effective climate governance mechanisms.

Japan's Financial Services Agency reports that '2019 marked a major shift in the way Japan addressed the challenge of the climate emergency.'[44] These policy shifts have encouraged a substantial increase in the number of Japanese firms committed to reporting their approach to climate change using TCFD recommendations, growing from 44 to 223 in 2019.[45] In addition, 23 per cent of Japanese TCFD-supporting companies disclosed the results of their climate-related scenario analysis in 2019.[46]

Another example of regulatory policy likely to impact Japanese companies is Japan's *Climate Change Adaptation Act,* enacted in 2018.[47] It is aimed at promoting climate change adaptation through establishing necessary measures such as formulating plans for adaptation to global warming and providing information on climate change impacts and adaptation in order to contribute to the health and cultural life of the Japanese people, both now and in the future. Article 3 requires the national government to promote the enhancement of scientific knowledge on climate change, its impacts and adaptation, and to use this knowledge to comprehensively establish and promote policies for climate change adaptation.[48] Article 4 directs local governments to endeavor to promote policies for climate change adaptation in accordance with natural, economic, and social factors in their region, providing information on measures and policies to promote climate change adaptation. Governments at all levels are to help promote business activities that contribute to adaptation.[49]

'Climate change impact', as defined in the *Climate Change Adaptation Act,* means impact by climate change that negatively affects human health and the living environment, causes a decline in biodiversity, and impacts daily life, society, economy, and the natural environment.[50] 'Climate change adaptation' means 'reacting to the climate change impact so as to prevent or reduce damage, and to contribute to a stable living environment, sound development of a society and economy, and to preserve the natural environment.'[51]

While the term 'mitigation' and references to GHG are not mentioned in the *Climate Change Adaptation Act,* article 1 makes reference to article 2(1) of the 1998 *Act on Promotion of Global*

[43] The Ministry of the Environment, Government of Japan Climate Change Policy Division, *Practical Guide for Scenario Analysis in line with the TCFD recommendations,* 2nd edition (March 2020), at 1-5, http://www.env.go.jp/policy/policy/tcfd/TCFDguide_2nd_EN.pdf (hereafter Japan MOE); Japanese version available at: TCFD を活用した経営戦略立案のススメ ～気候関連リスク・機会を織り込むシナリオ分析実践ガイド～, 気候関連リスク・機会を織り込むシナリオ分析実践ガイド_0318v2 (env.go.jp).
[44] Satoshi Ikeda, Chief Sustainability Officer, Financial Services Agency, Japan, 'Why Japan is leading the TCFD wave', Commentary, London School of Economics Grantham Research Institute, (March 2020), https://www.lse.ac.uk/granthaminstitute/news/why-japan-is-leading-the-tcfd-wave/.
[45] *Ibid*, citing TCFD 2019 Status Report.
[46] *Ibid*.
[47] *Climate Change Adaptation Act,* Act No 50 of June 13, 2018, 気候変動適応法 平成 30 年 6 月 13 日法律第 50 号, at article 1, English translation, http://www.japaneselawtranslation.go.jp/law/detail/?id=3212&vm=04&re=01. Please note, for translation of Japanese laws generally, see the website of Japanese Law Translation - http://www.japaneselawtranslation.go.jp/?re=01>.
[48] *Ibid*, article 3(1).
[49] *Ibid*, articles 3(1) and (2).
[50] *Ibid*, article 2(1).
[51] *Ibid*, article 2(2).

Warming Countermeasures.[52] That article expressly refers to global warming affecting the planet as a whole, and the increasing concentration of GHG in the atmosphere as a result of human activity. Article 2(2) of the *Act on Promotion of Global Warming Countermeasures* discusses 'global warming countermeasures' to control GHG emissions and to maintain and improve the absorption of GHG, as well as other measures to take in international cooperation for the prevention of global warming. The two statutes read together clearly indicate that adaptation measures include measures to reduce emissions, referred to as 'mitigation' internationally.

The *Climate Change Adaptation Act* specifies that businesses must endeavor to adapt to climate change in accordance with the content of their business activities, and in cooperation with national and local governmental programs for climate change adaptation.[53] The *Act* sets out the obligations of national and local governments, the private sector, and citizens to promote climate change adaptation efforts. One challenge in respect of enforcing the goals of the *Act* is that the direction to businesses is not expressly enforceable; the *Act* does not, by itself, provide a legal basis for directors' duties in respect of climate change.

Another policy signal is that the Bank of Japan has joined the Network for Greening the Financial System (NGFS), a group of central banks and supervisors concerned with the systemic risks of climate change to the financial system.[54] Other member banks, such as in the United Kingdom (UK), the European Union, and Australia, are now requiring stress-testing of domestic and cross-border financial institutions, which indicates where the Japan's central bank may be moving in the near future.

The Japan Government's synthesis report on climate impacts also discusses the opportunities that climate change presents. It uses, as examples, businesses developing information technologies, such as agriculture support services and services to project and assess risks from disasters; technologies to improve the heat-tolerance environment and the comfort of buildings and houses; as well as financial instruments that provide insurance or a hedge against possible damage due to abnormal weather events.[55] All of these government policy reports reveal that there are risks to Japanese directors that fail to read regulatory signals in respect of the need to manage climate-related financial risks and that fail to disclose the effectiveness of measures taken.

Regulation from other jurisdictions will also impact Japanese businesses. For example, automobile emission regulations introduced in Europe effective 2021 have resulted in some Japanese companies expressing concern that they may not be able to achieve emissions reductions targets, which could result in substantial fines and loss of business.[56]

[52] Article 2(1), *Act on Promotion of Global Warming Countermeasures (*Act No. 117 of 1998, 地球温暖化対策の推進に関する法律 平成 10 年法律第 117 号 (japaneselawtranslation.go.jp). English translation can be found at http://www.japaneselawtranslation.go.jp/law/detail/?id=97&vm=&re. Article 1 states: In recognition of the serious impact of global warming on the environment of the entire planet, and the importance of efforts on the part of all humankind to actively and voluntarily address the universal issue of stabilizing greenhouse gas concentrations in the atmosphere at levels where human interference does not pose a danger to climate systems, the purpose of this Law is to promote global warming countermeasures by formulating a plan for attaining targets under the Kyoto Protocol and taking measures to promote the control of greenhouse gas emissions due to social, economic, and other activities, thereby contributing to the health and cultural life of the Japanese people, both now and in the future, as well as contributing to the wellbeing of all humankind.
[53] *Climate Change Adaptation Act*, *supra* note 52, article 5.
[54] Bank of Japan, *supra* note 8.
[55] Synthesis Report, *supra* note 19 at 7.
[56] Nikkei Business Newspaper, Nihon Keizai Simbun morning edition, (8 September 2020) (in Japanese only). The title of the article in English is 'Climate change risk, disclosure 4 times, 264 companies in the previous term（気候変動リスク、開示 4 倍前期 264 社).

Another important risk is litigation or legal risk. Globally, there has been a huge increase in the number of climate-related lawsuits, which include claims by investors in respect of breaches of directors' duties, securities law claims regarding the failure of companies to disclose climate-related risks and financial impacts, and lawsuits commenced by regional and local governments and public interest organizations against companies that are major GHG emitters.[57] As companies and financial institutions experience more financial losses due to climate change, the risk of litigation for directors' failure to act is also likely to increase.

iii. Technology Risks

Technologies are rapidly developing to respond to the risks created by climate change, aimed at shifting businesses and economies to more sustainable and climate-friendly economic activities. Disruptive technologies can pose either risks or opportunities for Japanese companies. As the TCFD observed, to the extent that new technology displaces old systems and disrupts some parts of the existing economic system, winners and losers will emerge from this 'creative destruction' that is inevitable, even though the exact timing is still uncertain.[58]

There is growing interest in investing in new technologies that are energy efficient, use renewable energy sources, and reduce GHG emissions. Innovations in battery storage, energy efficiency, and carbon capture and storage will affect the competitiveness of many companies, their production and distribution costs, and demand for their products and services from end users.[59]

iv. Reputational Risks

The TCFD has also identified climate change as a source of reputational risk tied to changing customer or community perceptions of an organization's contribution to or detraction from the transition to a low-carbon economy.[60] Consumer trends and civil society pressure to develop a serious path to decarbonization can affect the company reputationally, and thus financially, if the directors fail to recognize and act on climate-related risks and opportunities. Also, with a growing number of institutional investors endorsing the United Nations (UN) Sustainable Development Goals, there is a growing social risk to companies in terms of their reputation and 'social licence' to operate.[61]

Having briefly canvassed the context in Japan regarding climate change and its attendant risks, the next part gives an overview of corporate directors' duties in Japan and the various options that companies have in terms of type of company and governance structure.

2. OVERVIEW OF CORPORATE BOARDS IN JAPAN

Directors' duties in Japan are set out in the *Companies Act* and in the companies' articles.[62] Publicly-listed stock companies are also regulated by the *Financial Instruments and Exchange Law*,[63] and

[57] Janis Sarra, *From Ideas to Action, Governance Paths to Net Zero* (2020, Oxford University Press), chapter 7.
[58] TCFD, *supra* note 11 at 6.
[59] *ibid.*
[60] *Ibid.*
[61] Sarra, *From Ideas to Action, Governance Paths to Net Zero, supra* note 57; United Nations Sustainable Development Goals, https://www.un.org/sustainabledevelopment/sustainable-development-goals/.
[62] *Companies Act of Japan*, Act No 86 of July 26, 2005 (会社法 平成 17 年 7 月 26 日法律第 86 号), English translation at http://www.japaneselawtranslation.go.jp/law/detail/?id=2035&vm=04&re=02 (hereafter *Companies Act of Japan*).
[63] *Financial Instruments and Exchange Act* (*FIEA*), https://www.fsa.go.jp/en/policy/fiel/, *The Act for the Amendment of the Securities and Exchange Act, etc (Act No 65 of 2006) and the Act for the Development, etc of Relevant Acts for Enforcement of*

securities listing regulations published by the securities exchanges, as well as the Corporate Governance Code, the latter of which is non-binding guidance.[64] The governance structures of Japanese companies arise from a deep history of cross-shareholdings and cultural norms regarding the relationship between directors and the myriad interests implicated in the corporation's activities.[65] The evolution of corporate law in Japan, particularly in the past decade, has begun to focus on directors' duties, particular in respect of ensuring that proper governance and internal control systems are in place.[66]

A 'stock company' (*kabushiki kaisha*) pursuant to the *Companies Act of Japan* includes all privately-held and publicly-listed companies that are incorporated and have issued shares.[67] A 'public company' is defined as any stock company, the articles of incorporation of which do not require, as a feature of all or part of its shares, the approval of the stock company for the acquisition of such shares by transfer.[68] Stock companies, whether privately-held or public companies, have options, pursuant to Japanese corporate law, to organize their governance structures in a number of ways. Of note, is that 'company' is defined in the *Companies Act* more broadly than stock companies and includes a general partnership company, limited partnership company, or limited liability company.[69] A limited liability company does not issue stock. As of 2018, 93.8 per cent of Japanese corporate entities are *kabushiki kaisha* (stock companies).[70]

2.1 Options for Corporate Governance Structures

The structure of corporate boards in Japan differs from many countries in that most of Japan's largest publicly-listed companies have been overwhelmingly dominated by corporate insiders, with very few outside or independent directors.[71] Nakahigashi and Puchniak observe that even when the *Companies Act of Japan* was amended to allow companies the option of more US-style corporate boards and the Tokyo Stock Exchange Listing Rules were amended in 2010 to require all listed companies to have at least one independent director or statutory auditor (*kansayaku*),[72] the vast majority of corporate boards in publicly-listed Japanese companies remain insider dominated.[73] That situation has started to change with the issuing of the Corporate Governance Code, as discussed in part 4.3 below, although the majority of directors continue to be inside directors.

Effective May 2015, companies in Japan may choose one of three main forms of organizational structure under the *Companies Act of Japan*: a 'Company with *Kansayaku* Board' (audit and supervisory board);

the Act for the Amendment of the Securities and Exchange Act, etc (2006 Act No 66), promulgated on 14 June 2006. Translation of the *Act* is available at http://www.japaneselawtranslation.go.jp/law/detail/?id=3538&vm=04&re=01&new=1.

[64] Tokyo Stock Exchange, 'Japan's Corporate Governance Code Seeking Sustainable Corporate Growth and Increased Corporate Value over the Mid- to Long-Term' (as revised 1 June 2018) at 16, https://www.jpx.co.jp/english/news/1020/b5b4pj000000jvxr-att/20180602_en.pdf (hereafter Corporate Governance Code). For a discussion of early corporate law, prior to the modernization of company law, see Janis Sarra and Masafumi Nakahigashi, 'Balancing Social and Corporate Culture in the Global Economy: The Evolution of Japanese Corporate Culture and Norms' (2002) 24 *Law & Policy* 4 at 299-354.

[65] Sarra and Nakahigashi, *ibid*.

[66] See for example, article 348(4), *Companies Act of Japan*.

[67] *Companies Act of Japan,* article 25.

[68] *Companies Act of Japan,* article 2(v).

[69] *Ibid,* article 2(i).

[70] Katsuyuki Yamaguchi, Kaoru Tatsumi, and Mamiko Komura, 'Corporate governance and directors' duties in Japan: overview' (1 May 2020), Thompson Reuters Practical Law, https://uk.practicallaw.thomsonreuters.com/1-502-0177?transitionType=Default&contextData=(sc.Default)&firstPage=true (hereafter Yamaguchi *et al*). *Kabushiki kaisha* are generally classified according to the transfer restrictions imposed on their shares.

[71] Dan W Puchniak and Masafumi Nakahigashi, 'Case No. 21: Corporate Law – Business Judgment Rule – Derivative Action – Supreme Court, 15 July 2010', in Moritz Bälz et al eds, *Business Law in Japan ---- Cases and Comments* （Kluwer Law International; 2012) at 215-226 (hereafter Puchniak and Nakahigashi).

[72] Tokyo Stock Exchange, Securities Listing Regulations Rule 436-2; Tokyo Stock Exchange, Enforcement Rules for Securities Listing Regulations Rule 436-2. English translation at <http://www.tse.or.jp/english/rules/regulations/>.

[73] Puchniak and Nakahigashi, *supra* note 71 at 10.

a 'Company with Three Committees' – a nomination, audit, and remuneration committee;[74] or a 'Company with Supervisory Committee'.[75] The latter two forms of organizational structure under the *Companies Act* are similar to companies in other countries where committees are established under the board and assigned certain responsibilities with the aim of strengthening oversight and monitoring functions.[76] All three forms of company governance structures have a board of directors. The differences in governance structures are discussed in more detail in Appendix I; however, the key governance and director oversight features are summarized here.

For a Company with a *Kansayaku* Board, the *Companies Act* allocates specific governance functions to the board of directors, the *kansayaku* (auditors), and the *kansayaku* board, the latter of which must have three or more auditors. Thus, under this governance model, listed companies are required to have two boards, a board of directors and a board of *kansayaku*. The *kansayaku* audit the performance of duties by directors and the management and have investigation powers by law. The *kansayaku* board decides audit policy and the execution of each *kansayaku*'s authority. However, the *kansayaku* board's decision may not preclude *kansayaku* from exercising their authority.[77] The *kansayaku* serve an oversight function over the directors and the board of directors. In the exercise of their audit powers, the *kansayaku* can bring a lawsuit against directors seeking an injunction or damages for director misconduct.[78]

No one can be elected as director and *kansayaku* at the same time. In order to ensure independence and high-level information gathering power, not less than half of *kansayaku,* as appointed at the general shareholder meeting, must be outside *kansayaku*, and at least one full-time *kansayaku* must be appointed.

A Company with Three Committees must appoint one or more *shikkoyaku* (executive officers) from directors or non-directors, by a resolution of the board, and delegate business administration and certain kinds of business decisions to the *shikkoyaku*.[79] The board can delegate substantial decision-making authority over the management of the company to the executive officers. The board must appoint one or more 'representative executive officers' from among the executive officers, who have responsibility for carrying out decisions made by the board or the executive officers, and have authority to represent the company. As of May 2020, only 76 of the approximately 3,700 publicly-listed companies on the Tokyo Stock Exchange (TSE) had the three-committee structure.[80]

A Company with Supervisory Committee has only one board, and it is represented by the representative director. If independent directors do not comprise a majority of the board, the Corporate Governance Code recommends, as best practice, establishing an independent advisory committee under the board, in which independent directors approve remuneration and some executive hiring decisions.[81]

All three forms of companies can create a position with the title of *shikkoyaku* or *shikkoyakuin* for persons who are delegated by the board to exercise a specified range of decisions regarding business administration.[82]

[74] Yamaguchi *et al*, *supra* note 70.

[75] Corporate Governance Code, *supra* note 64.

[76] *Ibid*.

[77] Article 390(2), *Companies Act of Japan*.

[78] Articles 385, 386, Companies Act of Japan.

[79] *Ibid*.

[80] *Ibid*.

[81] *Ibid,* Supplementary Principle 4.10.1.

[82] Corporate Governance Code, *supra* note 64 at 16.

The 2019 amendments to the *Companies Act of Japan* now require public companies to have at least one 'outside director'.[83] Outside director, in this context, does not mean 'independent' within the meaning of the TSE rules. Publicly-listed companies that are not large companies defined by *Companies Act* are not required to have at least one outside director, but the number of such listed companies in Japan is small.[84] Article 2(15) of *Companies Act* defines the standard of 'outside' director, but makes no reference to independence. The TSE adds a requirement of 'independent director', but does not make the criteria of independence clear in the Securities Listing Regulations. Publicly-listed companies set their own criteria regarding the independence of directors and must disclose that criteria. However, the TSE may publicly announce or impose a listing agreement violation penalty if a company's criteria does not satisfy TSE requirements of independence in accordance with the TSE 'Guidelines Concerning Listed Company Compliance'.[85] Rule 436-2(1) states that directors are independent if they are unlikely to have conflicts of interest with general investors,[86] giving the TSE authority to impose a listing violation penalty on them for failure to comply.

No matter which of the three types of corporate board structures permitted in Japan have been adopted, all companies have directors and all the directors have duties pursuant to corporate law and, where they are publicly-listed, pursuant to financial services law.

Directors in Japan have three primary duties, a duty of loyalty, a duty to be in compliance with all laws, regulations, and ordinances, and the company articles, and a duty of care to act with the care of a prudent manager,[87] discussed in detail in the next three parts. Japan is a civil law country, and thus the statutes set out the legal basis for the scope of directors' and officers' duties.

3. DIRECTORS' DUTIES OF LOYALTY AND ADHERENCE TO THE LAW

3.1 Duty of Loyalty

The *Companies Act of Japan* sets out the duty of loyalty that directors owe to the company. Articles 355 specifies:

> Duty of Loyalty
> Article 355 Directors shall perform their duties for the Stock Company in a loyal manner in compliance with laws and regulations, the articles of incorporation, and resolutions of shareholders meetings.[88]

In general, the duty of loyalty includes a duty on directors to avoid conflicts of interest and self-dealing transactions. However, article 355 of the *Companies Act of Japan* requires directors to perform their duties for the company in a loyal manner; so article 355's duty sets out not only a duty to avoid conflicts of interest and self-dealing transactions, but also a duty of care in their oversight and management of the company. The duty of loyalty is not distinguished from a duty of care in Japan,[89] and most directors' duties in respect of oversight and management of climate change are likely to arise under the duty of

[83] *Companies Act of Japan*, article 327-2.
[84] *Companies Act of Japan*, Article 2(vi), see Appendix I for a definition of large companies.
[85] TSE, 'Guidelines Concerning Listed Company Compliance', Part III. See Appendix I for more discussion.
[86] Securities Listing Regulations Rule 436-2. https://www.jpx.co.jp/english/rules-participants/rules/regulations/tvdivq0000001vyt-att/securities_listing_regs1-826_20190716.pdf.
[87] Civil Code of Japan, Act No. 89 of April 27, 1896, as amended, article 644, 民法 明治 29 年 4 月 27 日法律第 89 号); *Companies Act of Japan*, article 355.
[88] *Ibid.*
[89] 24-6 Saikosaibannsyo Minjihanreisyu 625, Japanese Supreme Court's decision June 2 of 1970.

care part of article 355, as well as article 330 of the *Companies Act* and article 644 of the Civil Code, as discussed in part 4.

Directors also have a duty to report any information that is likely to harm the company. Article 357(1) specifies that if directors detect any fact likely to cause substantial detriment to the stock company, they shall immediately report such fact to the shareholders, or, for a company with auditors, to the company auditors. Article 357(2) states that for the purpose of application of article 357(1) to a company with a *kansayaku* board, the report is to be made to that board.[90]

3.2 Directors' Duty to Obey Specific Laws, Regulations, and Ordinances, and the Corporate Articles

Note that Article 355 above specifies that in being loyal to the company, directors shall perform their duties in compliance with laws and regulations, the articles of incorporation, and resolutions of shareholders meetings.

The *Companies Act of Japan* specifies that the directors of large companies must develop the systems necessary to ensure that the execution of duties by the directors complies with the laws and regulations and the articles of incorporation, and other systems prescribed by ordinance necessary to ensure the proper operations of a stock company.[91] This statutory obligation is reinforced by Article 100 of the Regulation for Enforcement of the Companies Act, which requires directors to develop systems related to management of the risk of loss to the stock company and any of its subsidiaries.[92] It thus requires the board of directors of a large stock company to establish a proper internal control and risk management system to support directors' duty to supervise business operations.[93] In such companies, a director's duty of care to supervise the business will not be effectively performed without a proper internal control system.

Companies in a corporate group should each act in their own interests. Where transactions enhance the interests of the whole of group, they are permissible; however, directors of a company in a corporate group should not make decisions if they are not in the interests of the entity of which they are directors.

The duty to obey laws and regulations is straightforward. Statutes set out the standards, and if a director violates specific provisions that require a corporation to act, it is a breach of the director's duties, as well as a breach of statutory obligation by the company. Various Japanese laws impose civil, criminal, and administrative penalties or other liabilities both on the corporation and on directors as the decision-makers. A number of environmental laws, such as the *Soil Contamination*

[90] *Companies Act of Japan*, article 357(2).
[91] *Companies Act of Japan*, article 348(4), referencing also 348(3)(iv), specifies that directors of a company without a board of directors must develop a system of internal controls if it is a large company, a decision that cannot be delegated to a single director. The obligation is reinforced by Article 98 of the Regulation for Enforcement of the Companies Act. Article 362(5), referencing (4)(vi) of the *Companies Act of Japan* specifies that board of directors of a company with *Kansayaku* Board must develop the system if it is a large company. The obligation is reinforced by Article 100 of the Regulation for Enforcement of the Companies Act. Article 399-13(2), referencing (1)(i)(c) of the *Companies Act of Japan* specifies that board of directors of a company with supervisory board must develop the system. The obligation is reinforced by Article 110-4 of the Regulation for Enforcement of the Companies Act. Article 416(2), referencing (1)(i)(e) of the *Companies Act of Japan* specifies that board of directors of a company with three committees must develop the system. The obligation is reinforced by Article 112 of the Regulation for Enforcement of the Companies Act.
[92] Regulation for Enforcement of the Companies Act, article 100(ii), Japanese Law Translation 会社法施行規則平成 18 年 2 月 7 日法務省令第 12 号 Ministry of Justice Order No 12 of February 7, 2006, http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&dn=1&x=52&y=13&co=01&ia=03&ja=04&ky=companies+act+enforcement+regulation&page=9.
[93] Large company is a defined term under Article 2(vi) of the *Companies Act of Japan.*

Countermeasures Act[94] and the *Water Pollution Prevention Act*,[95] regulate the actions of the company; and directors who violate environmental and health and safety laws can be subject to both civil and criminal liabilities.[96]

3.3 Application of these Duties to Climate Change

Directors' duty of loyalty to the company means that they are required to act in its best interests. Arguably, best interests includes the long-term sustainability of the company. As noted above, the *Climate Change Adaptation Act* requires that businesses endeavour to adapt to climate change in accordance with the content of their business activities, and to cooperate with governments at all levels, so directors have a duty to endeavour to adapt.

The MOE has advised companies to engage in scenario analysis to assess the resilience of their business in the face of global warming. As the World Economic Forum has observed, as stewards for long-term performance and resilience, the board of directors should determine the most effective way to integrate climate considerations into its structure and committees.[97] It suggests that regardless of board structure, 'the approach to embedding climate considerations should enable sufficient attention and scrutiny to climate as a financial risk and opportunity.'[98] Moreover, it is important to remember that the board of directors as a whole retains legal responsibility for addressing climate-related financial risks, notwithstanding any allocation of risk management or disclosure of climate-related risks to a specific board committee.

Even though directors have a broad business discretion to design board committees, arguably directors could be held liable under articles 423(1), 348(4), 362(5), 399-13(2), and 416(2) of the *Companies Act of Japan* and articles 98, 100, 110-2, and 114 of the Regulation for Enforcement of the Companies Act for failure to establish a climate risk management system with sufficient capabilities to perform their responsibilities to oversee and manage climate-related financial risks and opportunities, including both physical and transition risks. Depending on the size and kinds of business lines, the risk management system adopted needs to be proper and sufficiently capable of performing the above-mentioned responsibilities in light of the likelihood and magnitude of climate risks to the company.

In the future, any strengthening of statutes that would require companies to set targets towards decarbonization or that require companies to disclose governance, strategy, risk management, and metrics in line with an international framework would add those duties to other duties of directors.

4. DIRECTORS' DUTY OF CARE

Japanese directors also have a duty of care in their oversight and management of the company. This obligation is both a positive obligation of exercising due care in the performance of their duties and a defence to personal liability where directors have acted with due care.[99] These duties apply to all stock

[94] *Soil Contamination Countermeasures Act*, Act No 53 of May 29, 2002, as amended.
[95] *Water Pollution Prevention Act*, Law No 138 of 1970, as amended by Law No 75 of 1995, 水質汚濁防止法 昭和 45 年 12 月 25 日法律第 138 号.
[96] Yamaguchi *et al*, *supra* note 70.
[97] World Economic Forum, *How to Set Up Effective Climate Governance on Corporate Boards: Guiding principles and questions*, (19 January 2019), principle 3, https://www.weforum.org/whitepapers/how-to-set-up-effective-climate-governance-on-corporate-boards-guiding-principles-and-questions.
[98] *Ibid* at 13.
[99] *Companies Act of Japan*, examples of where due care are a defence include article 52.2(2)(ii), article 120.4(4), and article 213.2(2)(ii).

companies, regardless of whether they are publicly- or privately-held. The duties are set out in articles 355 and 330 of the *Companies Act of Japan* and article 644 of Japan's Civil Code.

The statutory requirement that directors of a large stock company establish a proper internal control and risk management system means that climate governance should be embedded in a board risk management committee or a sustainability committee. The committee allocated with this responsibility must have directors that have sufficient capability to scrutinize climate risks to the company and then to interact with the management and the board to manage and oversee management of these risks. More specifically, such risk management committee needs to be able to assess and analyze both the physical risks and transition risks of climate change discussed in part 1. Where directors lack the expertise and that expertise is not available among the executives of the company, directors should hire outside professional expertise that can support their climate-related risk management decisions in the best interests of the company.

Directors have a broad business discretion to design internal control and risk management systems. Where they determine that a separate risk management committee is necessary, they can embed oversight of climate risk in that committee. With or without a separate risk management committee, the board of directors as a whole still has the overall responsibility to ensure that the company is identifying and addressing material climate-related financial risks and opportunities. The duty of care in the context of climate change mitigation and adaption can be derived from articles 355 and 330 of the *Companies Act of Japan* and article 644 of the Civil Code duties to act in the company's best interests.

Under corporate law, for example, directors can be found personally liable under their duty of care if they did not respond to changes in law in a timely and effective manner.[100] One example would be a failure to comply with articles 348, 362(5), 399-13(2), and 416(2) of the *Companies Act*, as discussed above. If directors of a large stock company fail to establish a proper internal control system that appropriately addresses climate-related risks, they could be found personally liable for breach of their duty of care.

The financial risks of climate change are so broadly acknowledged by governments, scientists, financial institutions, companies, investors and civil society, that it is no longer a defence for directors to say that they were unaware of the risks. Failure to manage climate-related financial risks is likely to be found to be a failure of directors' duty of care. Some scholars have suggested that Japanese courts will look to outcomes more often than process to assess whether directors have met their duty of care.[101] In this respect, there may be heightened risk of Japanese directors being found in breach of their duty of care if they fail to act on climate change, as compared with other jurisdictions, as discussed in part 4.6 below on the business judgment rule.

Legal opinions in Australia, New Zealand, and Canada have all concluded that the duty of care of corporate directors includes a duty of oversight and effective management of climate-related risks and opportunities.[102] In the Canadian legal opinion, Carol Hansell opines:

[100] Janis Sarra and Masafumi Nakahigashi, 'Kigyo No Shakai-Teki Sekinin: Challenges for Corporate Social Responsibility in Japan' (2012) 45:3 *UBC Law Review* 779 at 828.
[101] J Mark Ramseyer and Masayuki Tamaruya, 'Fiduciary Principles in Japanese Law' (2017) Discussion Paper No. 935 09/2017 Harvard Law School, at 8, 10, citing [No names given], 2063 Hanrei jiho 138 (Sup. Ct. 27 November 2009). The Supreme Court similarly used an ex post analysis of the outcome to declare loans by the Hokkaido Development Bank to a troubled real estate firm to constitute a duty of care violation in [No names given], 1997 Hanrei jiho 143 (Sup. Ct. Jan. 28, 2008); http://www.law.harvard.edu/programs/olin_center/papers/pdf/Ramseyer_935.pdf.
[102] Noel Hutley SC and Sebastian Hartford Davis, 'Climate Change and Directors' Duties, Supplementary memorandum of Opinion' (26 March 2019), Australia Centre for Policy Development; Noel Hutley SC and Sebastian Hartford Davis, 'Climate Change and Directors Duties, Memorandum of Opinion' (7 October 2016), commissioned by the Future Business Council and the Centre for Policy Development, <https:// cpd.org.au/ wp- content/ uploads/ 2016/ 10/ Legal- Opinion- on- Climate-

> Since there can be little doubt that directors are aware of climate change risk, they must inform themselves of the risk that climate change poses to the corporation and how that risk is being managed. If this information is not already included in management reports to the board, the board should direct management to deliver the necessary information to them . . .
>
> As is the case for any disclosure, misrepresentations about climate change risk can expose the corporation, its officers and its directors to both regulatory and civil liability. In respect of potential civil liability, an important factor for directors is that investors need not be aware of a misrepresentation about climate change to seek damages based on it; securities law deems them to have relied on the misrepresentations. Directors should also be aware that their decisions about disclosure are not protected by the business judgment rule.[103]

Similarly, directors in Japanese companies may have such a duty, given some of the similarities between Canada's and Japan's corporate governance systems. Directors' duties in Japan are set out in the *Companies Act of Japan,*[104] the Civil Code of Japan,[105] and the *Financial Instruments and Exchange Act (FIEA)*.[106]

4.1 Duty of Care Owed to the Company

The duties of care and diligence are set out in Japan's *Companies Act* article 330 and the Civil Code article 644. *Companies Act* article 330 specifies that the relationship between a stock company and its officers or accounting auditors shall be governed by the provisions on mandate, including Civil Code article 644. The Civil Code specifies:

> Duty of Care of Mandatary
> Article 644 A mandatary shall assume a duty to administer the mandated business with the care of a good manager in compliance with the main purport of the mandate.

A 'mandatary' in the corporate context is one that has been given a mandate to oversee or manage the affairs of the company. Article 644 thus requires directors to exercise the care that a good manager would exercise. Article 355 of *Companies Act of Japan* also sets out a duty of care in their oversight and management of the company as mentioned Part 3.1. Directors are to act with due care; and proving due care is a defence to liability for a number of directors' actions.[107] Equally, where directors are negligent in the performance of their duties, they can be personally liable for the misconduct. Article 429 of the *Companies Act* provides for directors' monetary liability where they are 'with knowledge or grossly negligent in performing their duties' to the third party, and article 423 sets out directors' liability to the company:

> Liability of Officers to Stock Company for Damages
> Article 423(1) If a director, accounting advisor, company auditor, executive officer or financial auditor (hereinafter in this Section referred to as "Officers, Etc.") neglects their duties, they are liable to such Stock Company for damages arising as a result thereof.[108]

Change- and- Directors- Duties.pdf> ; Chapman Tripp, 'Climate Change Risk— Implications for New Zealand Company Directors and Managed Investment Scheme Providers' (October 2019) Legal Opinion; Carol Hansell, 'Putting Climate Change Risk on the Boardroom Table', https://law-ccli-2019.sites.olt.ubc.ca/files/2020/06/Hansell-Climate-Change-Opinion.pdf.

[103] Hansell, *ibid* at 21.

[104] *Companies Act of Japan*, article 355.

[105] Civil Code, article 640.

[106] *Financial Instruments and Exchange Act*, *supra* note 63.

[107] *Companies Act of Japan,* article 52(2)(i), including for actions in the incorporation of a company, liabilities of directors in case of shortfall in value of property contributed, and liability where shares are acquired in response to demand for purchase

[108] Articles 423 (2), (3), (4), *Companies Act of Japan,* relate to interested transactions and potential director conflicts of interest and are not relevant for this paper.

Directors in Japan have a duty of care, to act as a mandatary in the best interest of the company, its shareholders and stakeholders. Directors who neglect their duties are jointly and severally liable to the company for any resulting damages; and where directors are grossly negligent or knowingly fail to perform their duties, such directors are also liable to third parties or shareholders for the resulting damages.[109] However, if directors can demonstrate that they did not fail to exercise their duty of care in the performance of their duties, they will not be held liable.[110]

4.2 Application of Due Care and Diligence in a Climate Risk Context

Since climate change is affecting almost all businesses and has been recognized by governments, courts, and investors as a material issue affecting the sustainability of the company, corporate directors need to recognize their obligation to address climate-related risks and opportunities. Directors could be found in breach of their duties and found personally liable for failures of the duty to act with due care in the best interests of the company in failing to address climate-related risks and opportunities. This liability for breach of their duties is in addition to their potential personal liability for failure to meet the requirements of any statutes or ordinances.

Examples of breach of the duty of care would be a complete failure to engage in oversight of the management of climate-related financial risks; failure to set up appropriate risk management committees or other governance mechanisms to manage risks pursuant to article 348 of the *Companies Act;* failure to make relevant enquiries to management regarding physical and transition risks to the business due to climate change; or failure to seek outside expertise where the directors do not possess the knowledge or expertise to devise a strategy to address climate risk. Other examples might include failure to robustly assess the assumptions underlying revenue/cost projections for climate-related disruption, and failure to ensure assets and supply chains are resilient to foreseeable physical climate risks.

In Canada and the UK, directors' duty of care is assessed by an objective standard, as has also been suggested by the Supreme Court of Japan.[111] The obligation of directors to consider the implications of climate change risk is grounded in the duties each director owes to the corporation he or she serves. In their oversight of management of climate risks, directors must meet the objective standard of what a reasonably prudent person would do in comparable circumstances.[112] As Hansell as observed:

> Among other things, directors must put aside their own preconceptions about the reality or imminence of climate change risk. They may not demure to management and simply wait for presentations to be made to them. Directors must put climate change on the board agenda. They must require reports and recommendations from management and external sources as necessary, and be satisfied that the corporation is addressing climate change risk appropriately.[113]

This insight arguably also applies in the Japanese corporate context.

[109] Yamaguchi *et al*, *supra* note 70.

[110] *Ibid*, see the discussion below on the business judgment rule.

[111] Please see the discussion in part 4.6 of this report.

[112] See for example, the Supreme Court of Canada judgments in *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68 at para 63 and *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at para 44.

[113] Hansell, *supra* note 102 at 1.

4.3 The Duty of Care for Public Companies is Reinforced by Japan's Corporate Governance Code

Japan's Corporate Governance Code, published by Tokyo Stock Exchange, requires publicly-listed companies to address ESG and other sustainability issues proactively.[114] The Corporate Governance Code specifies that 'Companies should take appropriate measures to address sustainability issues, including social and environmental matters' and that 'given the increasing demand and interest with respect to sustainability issues in recent years, the board should consider addressing these matters positively and proactively'.[115] The Corporate Governance Code states that 'while the quantitative part of financial statements of Japanese companies conform to a standard format and therefore excel with respect to comparability, qualitative and non-financial information, such as financial standing, business strategies, risks and ESG (environmental, social and governance) matters, is often boiler-plate and lacking in detail, therefore less valuable'.[116] The board should actively commit to ensuring that disclosed information, including non-financial information, is as valuable and useful as possible.[117]

The Corporate Governance Code is non-binding on companies, but it does strongly influence governance norms. Since climate-related financial risks and opportunities are part of ESG, the Code supports directors' efforts to effectively manage climate change impacts. The Corporate Governance Code has the potential to be instrumental for certain companies, particularly in light of the fact that many companies are voluntarily adhering to it. The impact of soft-law and its appreciation by the Japan Financial Services Agency is influenced by developments in the UK by financial services regulators, and Japan can draw on the experiences of regulators internationally. For example, New Zealand and the UK have announced that TCFD disclosure will become mandatory for companies subject to their jurisdiction, and the UK is moving towards mandatory disclosure of company efforts to reach net-zero emissions.[118]

Arguably, the principles of the Corporate Governance Code that are adopted by a company should be treated as 'fundamentally important internal rules' of the company such that directors have a duty of care not to ignore these principles. A stock company listed on the TSE may choose to comply with each principle of the Corporate Governance Code or explain the reasons why it is not complying. However, once the company, through its legitimate decision-making process, has chosen to comply with specified principles of the Code, directors, officers, and employees must adhere to the company's decision and have no freedom to choose to comply or not.

Adoption of the Corporate Governance Code is communicated to the TSE in a statement. While it does not create a new contractual obligation, the company has committed to board governance practices that comply with the principles endorsed. Failure to comply with the principles adopted could jeopardize the company's listing. Thus, any failure to meet the commitments the company has made to the listing exchange would be assessed as part of the directors meeting their statutory duty of care to act in the best interests of the company. The obligations owed to the company are to comply with all the adopted principles, unless the board subsequently decides to officially change its decision from compliance to non-compliance by explaining their reasons for the change.

[114] Corporate Governance Code, *supra* note 64.
[115] *Ibid*, Principle 2.3, at 10.
[116] *Ibid* at 13
[117] *Ibid.*
[118] Ministry for the Environment, Government of New Zealand, *Climate Related Financial Disclosures,* (21 September 2020), https://www.mfe.govt.nz/climate-change/climate-change-and-government/mandatory-climate-related-financial-disclosures; HM Treasury, *Chancellor sets out ambition for future of UK Financial Services,* (9 November 2020), https://www.gov.uk/government/news/chancellor-sets-out-ambition-for-future-of-uk-financial-services?utm_source=POLITICO.EU&utm_campaign=f1fb3a3a16-EMAIL_CAMPAIGN_2020_11_09_05_28&utm_medium=email&utm_term=0_10959edeb5-f1fb3a3a16-190626680.

The Corporate Governance Code principles chosen by corporate boards determine the fundamental governance structure of the company together with the company articles. Given the fundamental nature of the governance principles chosen, arguably all the directors of the company owe a duty of care not to simply ignore the principles chosen by the company for compliance. The decision of the board on which principles to adopt is examined through the lens of the business judgment rule. If a non-compliant director is trying to persuade the board to change the company's official decision, that action would also be assessed in terms of whether or not the director has met his or her duty of care.

Principle 2.1 of the Corporate Governance Code states that 'Guided by their position concerning social responsibility, companies should undertake their businesses in order to create value for all stakeholders while increasing corporate value over the mid- to long-term. To this end, companies should draft and maintain business principles that will become the basis for such activities.'[119] The setting of corporate goals and strategic direction is a major aspect of directors' responsibilities.[120] Principle 4.5 of the Code specifies that the fiduciary responsibilities of directors and *kansayaku* require that they 'secure the appropriate cooperation with stakeholders and act in the interest of the company and the common interests of its shareholders.'[121] In order to promote sustainable corporate growth over the mid- to long-term, the directors are to set corporate strategy, and carry out effective oversight of directors and the management from an independent and objective standpoint, regardless of the form of corporate structure.[122]

In the application of these basic principles to climate governance, of note is that the TSE reports that almost all of the principles have been adopted by companies listed on its exchange. Therefore, practically, it would be near-impossible for a non-compliant director to convince the board to switch from compliance to non-compliance of the Code as part of their duties of care and loyalty. As a result, it would be possible to argue that failure to consider climate risks and opportunities over the mid-to-long term in determining strategies for the company's sustainable growth constitutes a breach of duty of care.[123] For instance, directors of a company with very large fossil fuel positions in their business or investment portfolio are arguably obligated to create a mid-to-long term strategy to reallocate business resources from fossil fuels to new opportunities to achieve sustainable growth, embedding that strategy in their mid-term business plan.[124]

In addition to their articles of association, publicly-listed Japanese companies normally have a number of internal rules such as board meeting rules, risk management rules, and rules regarding operation of board committees, all of which directors must comply with. Internal approval processes tend to be formal based on such internal rules.[125] A company can change any internal rule if directors find it is unreasonable or impractical. Equally, a director can be held personally liable for a breach of duty of care when violating an important internal rule.[126]

[119] *Ibid* at 10.
[120] *Ibid*, Principle 4.1.
[121] *Ibid*, Principle 4.5.
[122] *Ibid* Principle 4.
[123] Similar analysis has been undertaken in the UK, Canada and Australia, see Sarah Barker and Ellie Mulholland, *Directors' Liability and Climate Risk: Comparative Paper – Australia, Canada, South Africa, and the United Kingdom* (CCLI 2019), https://ccli.ouce.ox.ac.uk/wp-content/uploads/2019/10/CCLI-Directors%E2%80%99-Liability-and-Climate-Risk-Comparative-Paper-October-2019-vFINAL.pdf (hereafter Barker and Mulholland).
[124] Mid-term business plans (*chuuki keiei keikaku*) for Japanese companies are typically 3-year plans. Corporate Governance Code, *supra* note 64.
[125] The terms Kessai and Ringi refer to a Japan-specific internal procedures to decide some issues in a company, and they are not relevant in the climate context as they do not relate to issues of the binding power of directors' decisions.
[126] In a Tokyo High Court judgment dated May 21 in the 20th year of Heisei, a director who executed a derivative transaction in contravention of the internal risk management rule was held liable for damages in breach of duty of care, *Yakult Honsha co, Ltd. Case,* 1281 Hanrei jiho 274 (Tokyo High Ct, 21 May 2008).

Similarly, the Corporate Governance Code principles adopted should be treated as important internal rules of the company. While there are not yet any Japanese court precedents in which any principles have been applied to a director's duty, since the Corporate Governance Code's early introduction, it has been aimed at making directors' duty of care and duty of loyalty effective in practice by providing an important framework.[127] For example, the notes to principle 4 state:

> the reasonableness of the decision-making process at the time of the decision is generally considered an important factor in determining whether or not the management and directors should owe personal liability for damages. The Code includes principles and practices that are expected to contribute to such a reasonable decision-making process, and promote transparency, fairness, timeliness and decisiveness as well.[128]

The Corporate Governance Code offers an important framework and standards of objective reasonableness that are helpful in determining directors' duty of care and duty of loyalty. It will likely be relied on in any lawsuit seeking a director's personal liability for damages.

The Corporate Governance Code also contains principles for independent directors, notwithstanding that they are not currently the norm, linking their activities to sustainable growth.[129] As noted above, the Corporate Governance Code is non-binding, but it may have created some normative pressure on corporate directors to identify and oversee material ESG risks and opportunities, including climate related-financial risk. If ESG factors are part of the key performance indicators (KPI) of the company's mid- and long-term business plan and are indicators of medium-to-long-term performance-linked compensation, directors would have the obligation to make efforts to promote climate change mitigation and adaptation.[130] Almost all listed stock companies make mid- and long-term business plans and set non-financial factors as KPI. Several companies make ESG factors indicators of directors' performance-linked compensation, and management of climate-related risks and opportunities is therefore part of their mandate.

The United Nations Principles for Responsible Investing organization (UN PRI) has observed that Japan's Corporate Governance Code should result in improved disclosure of key ESG issues, including in cross-shareholdings, and should enhance corporate governance expectations.[131] In 2017, it concluded that Japan lagged in understanding that ESG integration refers to the systematic and explicit inclusion of material ESG factors into portfolio analysis and investment decisions.[132]

4.4 Duty of Care to Other Stakeholders

There is currently no express duty of care to stakeholders set out in Japan's corporate legislation. However, Japan's corporate governance structure has a long history of concern for stakeholders beyond shareholder interests, situating the activities of companies within an elaborate framework of intercompany crossholdings and an understanding of the company as embedded in the community, with strong relationships with employees, customers, and stakeholders that are part of the company's supply chain.[133] Given this extensive history, normatively, directors should be thinking about the social and consumer risks of climate change, as discussed in part 1 above.

[127] Corporate Governance Code, *supra* note 64, preamble.
[128] *Ibid* at 17.
[129] *ibid*, Principle 4.5. See Appendix II.
[130] See the discussion of compensation in Appendix I.
[131] United Nations PRI, 'Fiduciary duty in the 21st century: Japan roadmap' (25 April 2017), https://www.unpri.org/fiduciary-duty/fiduciary-duty-in-the-21st-century-japan-roadmap/262.article.
[132] *Ibid* at 6.
[133] For a discussion, see Sarra and Nakahigashi, *supra* note 64.

Directors have a responsibility to consider mid- and long-term interests of the company. Directors are allowed to consider stakeholders' interests, but in Japan, this consideration should contribute to long-term success of the company and thus ultimately to shareholders' benefit. In most cases, directors, who consider stakeholders' interests important will be protected by the business judgment rule, discussed below in part 4.6.

When shareholders' interests come into conflict with the other stakeholders' interests, directors must make decisions in the best interests of the company because they legally owe duties to company and shareholders. Their climate governance decisions must either arise out of their legal obligations to manage risks to the company or out of shareholder decisions amending the company articles to expressly embed policies such as targets to move to net-zero carbon emissions. As in many countries, leadership by the corporate board will be essential to managing climate-related risks and opportunities and to embedding consideration of stakeholder interests into climate governance.

The Corporate Governance Code, while stating that companies should 'take appropriate measures to fully secure shareholder rights and develop an environment in which shareholders can exercise their rights appropriately and effectively', also states:

> Companies should fully recognize that their sustainable growth and the creation of mid- to long-term corporate value are brought as a result of the provision of resources and contributions made by a range of stakeholders, including employees, customers, business partners, creditors and local communities. As such, companies should endeavor to appropriately cooperate with these stakeholders. The board and the management should exercise their leadership in establishing a corporate culture where the rights and positions of stakeholders are respected and sound business ethics are ensured.[134]

The Code also states that the 'appropriate actions of companies based on the recognition of their stakeholder responsibilities will benefit the entire economy and society, which will in turn contribute to producing further benefits to companies, thereby creating a virtuous cycle.'[135] Although the Code is not part of the statutory directors' duty of care, it creates best practice norms that support management of climate-related financial risks and opportunities, and, as noted above, may ground an action in respect of the duty of care where the principles have been adopted by the company and a director has failed to comply.

4.5 Institutional Investors' Fiduciary Obligations Have an Impact on Corporate Directors' Duties

Institutional investors also have fiduciary obligations to address climate-related risk, as discussed in Appendix III. The fact that institutional investors are increasingly acknowledging that their fiduciary obligations include investing in companies that are reducing their carbon footprints and are developing innovative technologies for climate mitigation and adaptation means that investee companies are directly affected by these decisions shifting investment portfolios towards climate-mitigating activities. If company directors fail to recognize these strong shifts in capital markets activity, they may be in breach of their duty of care.

4.6 Deference to Business Judgment of Corporate Directors

It is only in the past ten years that the Japanese courts have recognized a 'business judgment rule' that gives deference to the decisions of directors in appropriate circumstances.[136] In the Apamanshop case,

[134] Corporate Governance Code, *supra* note 64, Principle 2.
[135] *Ibid* at 9.
[136] Puchniak and Nakahigashi, *supra* note 72.

the Supreme Court of Japan overturned a High Court judgment finding that directors had breached their duty of care in agreeing to a deal carried out for the purpose of making a partially-owned subsidiary a wholly-owned subsidiary of Apamanshop as a part of the corporate group's restructuring plan.[137]

The Supreme Court of Japan held that 'so long as there are no significantly unreasonable aspects involved in the process and content of such decisions, it should be understood that the directors will not violate their duty of care as directors'.[138] In arriving at its decision, the Supreme Court placed considerable weight on the directors' reasonable deliberations of the relevant facts at the board meeting and on the directors' decision to seek and follow a lawyer's opinion.[139] The Court cited several specific factors, such as the short time period since the partially-owned subsidiary's public offering, the range in the value of its unlisted shares, the essential nature of the affiliated shops, the relationship between the entities, and the corporate group's future business, concluding that the content of the decision was not 'significantly unreasonable'.[140]

The decision was the first time that the business judgment rule was explicitly applied by the Supreme Court of Japan, particularly significant because of several judgments in the period prior that expressly did not defer to business judgment.[141] The framework used by the Supreme Court suggests that directors' managerial decisions should be protected from liability by the business judgment rule when: (1) the decision was based on reasonable research and analysis of the relevant facts; and (2) the decision was not irrational or inappropriate in comparison to what a reasonable manager in the specific business environment would have decided.[142] Thus deference to the directors' business judgment depends on the directors actually turning their minds to an issue. Courts are unlikely to defer to directors where there has been inaction on climate change or failure to exercise oversight of management of climate-related financial risks.

Puchniak and Nakahigashi observe that the willingness of courts in Japan to engage in a detailed examination of the reasonableness of the content of directors' decisions distinguishes the Japanese business judgment rule from the business judgment rule in the US.[143] Unlike the US rule, directors in Japan are unlikely to be released from the duty of care or duty of loyalty under the Japanese business judgment rule solely by their state of mind, *eg,* acting in good faith or in their belief for the best interest of the company. The Supreme Court of Japan's reasoning appears closer to the business judgment rule as defined by Canadian courts.

The Supreme Court of Canada has held that many decisions made in the course of business, although ultimately unsuccessful, are reasonable and defensible at the time they are made; and that provided the decision taken is within a range of reasonableness, courts are unlikely to substitute their opinion for that of the board, even though subsequent events may have cast doubt on the board's determination.[144] However, the Canadian Supreme Court has also held that the courts 'are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was

[137] *Ibid* at 220.
[138] Supreme Court of Japan Decision, Part 4, para 2.
[139] *Ibid,* Part 4, para 3.
[140] Puchniak and Nakahigashi, *supra* note 72 at 8.
[141] *Ibid* at 222, citing M Kitamura, 'Hi-jôjô-kaisha no kabushiki no kaitori to keiei-handan-no-gensoku' [Purchase of Shares in Unlisted Corporations and the Business Judgment Rule], in *Juristo* 1420 (2011) 139; and R Kobayashi, 'Hi-jô-jôkaisha no kaitori kakaku no kettei to torishimariyaku no zenkan-chui-gimu-ihan no umu' [Decision of Purchase Price of Unlisted Companies and the Existence of Directors' Breach of the Duty of Care], in *Hanrei Select* 2010 [II] (2010) 18. For the Kitamura article in Japanese, 非上場会社の株式の買取りと経営判断の原則. For the Kobayashi article in Japanese, 非上場会社の買取価格の決定と取締役の善管注意義務違反の有無.
[142] Puchniak and Nakahigashi, *supra* note 72 at 223.
[143] *Ibid* at 9, 11.
[144] *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at para 39, (2008) 3 SCR 560 at para 64.

brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made'.[145] The specificities of the elements necessary to find a breach of the duty of care in Japan may facilitate a finding by a court that directors breached their duty of care.

Given the scientifically predictable nature and magnitude of climate change risks, arguably directors are required by their duty of care under the *Companies Act of Japan* to be educated by appropriate external experts, to have the skills and information to appropriately assess material risks and opportunities to the company and maintain command of climate-related risks and opportunities. If they do not have climate expertise on the board, directors need to ensure that they have that expertise within the company's management or to hire external expertise.[146]

For duly diligent directors, the Court's recognition of a business judgment rule may offer a defence to specific actions to address climate mitigation and adaptation, when hindsight information suggests that the directors should have made a different decision. However, the business judgment rule does not offer a safe haven to directors that fail to act on climate-related risk. Japanese courts have been clear that they will examine not only the process used to reach the business decision but also undertake an objective review of the duty of care to assess whether a director acted significantly unreasonably from an objective standpoint at the time of the decision-making. This objective assessment by the courts is also reflected in case law in Canada, the UK, and Australia,[147] and if anything, is likely to be an even more stringent test applied by Japanese Courts.

The contours of Japanese courts' deference to business judgment are likely to develop further in the future. However, it seems evident that with respect to climate change, where directors neglect to undertake reasonable research and analysis of the relevant facts, fail to get expert advice on climate-related-risk management, and fail to exercise due care in respect of climate risks, the courts are unlikely to defer to their business judgment, because directors will have failed to exercise any judgment at all or will have failed to engage in a reasonable assessment of the risks.

Litigation is a less-used strategy for holding Japanese corporate directors accountable for breaches of their duties of care, loyalty, and adherence to the law. However, Japanese corporate law does allow for derivative actions by shareholders, which may offer an avenue for future litigation in respect of directors' failure to manage climate-related risks.[148] Shareholders who have continuously held shares for more than six months may demand that the company sue its directors, and if the company does not file the lawsuit within 60 days of the demand, the shareholders may bring a derivative action on behalf of the company.[149] Assuming the lawsuit is well-founded, a derivative action can overcome financial barriers to holding directors accountable as it can be funded from the company's assets.

Shareholder engagement with investee companies is another avenue to hold directors and officers accountable for their management and oversight of climate change risks and the next part turns to shareholder proposals as a growing corporate engagement strategy.

[145] *Ibid*.
[146] See international authorities such as the World Economic Forum, *The Global Risks Report 2020,* (2020), https://www.weforum.org/reports/the-global-risks-report-2020 and TCFD Final Report, *supra* note 11.
[147] See for example, Janis Sarra, *Fiduciary Obligations in Business and Investment: Implications of Climate Change* (CCLI, 2018) janis-cover.pdf (ubc.ca); Sarah Barker, *Directors' Liability and Climate Risk: Australia - Country Paper* (CCLI 2018), https://ccli.ouce.ox.ac.uk/wp-content/uploads/2018/04/CCLI-Australia-Paper-Final.pdf; and Alexia Staker and Alice Garton, *Directors' Liability and Climate Risk: United Kingdom - Country Paper* (CCLI April 2018), https://ccli.ouce.ox.ac.uk/wp-content/uploads/2018/04/CCLI-UK-Paper-Final.pdf.
[148] *Companies Act of Japan,* article 847.
[149] *Ibid*. Shareholders of a parent company may also file a derivative suit against directors of wholly owned subsidiaries if such subsidiary does not file the lawsuit within 60 days of the demand against the subsidiary by the parent company's shareholders.

5. SHAREHOLDER PROPOSALS UNDER THE *COMPANIES ACT*

In Japan, a shareholder can bring a shareholder proposal to the company's management to amend the articles of incorporation. A shareholder proposal that receives a majority of two-thirds or more of the votes of the shareholders present at the meeting is binding on directors.[150] Note that it is the votes exercised by shareholders present and voting at the meeting; it does not include any unexercised votes. To amend the articles of incorporation, a special resolution by shareholders' meeting is necessary, which can be approved by the same majority or the corporate articles can specify a higher threshold of votes required before the corporate articles can be revised.[151] Article 355 of the *Companies Act of Japan* requires directors and officers to obey resolutions of shareholders' meetings that receive the requisite level of shareholder support, similar to corporate legislation in the UK and elsewhere.[152]

Amendments to the *Companies Act* in 2019 included changes to the rules governing shareholder proposals. Only shareholders that hold at least 1 per cent of total votes (usually one unit of 100 shares) or 300 votes can make a shareholder proposal.[153] Pursuant to the amendments, shareholders are now limited in the number of proposals that they can make each year. The amendments will come into effect 1 March 2021, with some amendments, such as providing shareholder meeting materials through the internet, not in effect until 2023.[154]

5.1 The Growing Number of Climate-related Shareholder Proposals

If a resolution is passed at a shareholder meeting amending articles of incorporation by the requisite majority stating that the company must promote climate change mitigation and adaptation, directors and managers would have an obligation to comply in accordance with article 355 of *Companies Act*. Failure to comply could result in personal liability.

In Japan, shareholders that hold the requisite votes can propose agenda items, including amending the corporate articles to require consideration of ESG matters, including climate change. However, to date, institutional investors interested in ESG do not constitute the majority at shareholders' meetings in Japan, so it is difficult for them to have the articles of incorporation amended to state that the company must set targets for decarbonization and climate change mitigation and adaptation. That situation is likely to change as climate change becomes even more urgent.

Shareholder activism is starting to draw attention to the need for climate-related risk management. For example, in June 2020, a shareholder proposal at Mizuho Financial Group, Japan's third largest bank, proposed amending the articles of incorporation to state: 'Noting the company's support for the Paris Agreement and the Task Force on Climate-related Financial Disclosures (TCFD), the company shall disclose in its annual reporting a plan outlining the company's business strategy, including metrics and

[150] *Companies Act of Japan,* article 309 (2).
[151] *Ibid,* article 309 (2)(xi) and Chapter 5, article 466.
[152] See for example, the Barclay's resolution. Resolution 29, setting the goals of Barclays to be net zero by 2050 and commits it to a strategy, with targets, for alignment of its entire financing portfolio to the goals of the Paris Agreement; Barclays PLC Notice of Annual General Meeting 2020, Letter from Group Chairman (2020), at 1, 4, 13, https://home.barclays/content/dam/home-barclays/documents/investor-relations/reports-and-events/AGM2020/NOM-2020.PDF. See also Barclays, 'Update on Barclays' ambition to be a net zero bank by 2050' (30 November 2020), https://home.barclays/society/our-position-on-climate-change/highlights/.
[153] *Companies Act of Japan,* article 303(2). Usually one unit of 100 shares gives one vote to the shareholders, therefore the *Act* indicates number of votes (not number of shares). Listed companies are requested to make one unit by 100 shares by Tokyo Stock Exchange and/or other domestic stock exchanges. 'Standardization of Trading Unit', https://www.jpx.co.jp/english/equities/improvements/unit/.
[154] Yamaguchi *et al, supra* note 70.

targets, to align its investments with the goals of the Paris Agreement'.[155] This resolution garnered 34.5 percent of votes cast, short of the two-thirds required to pass, but was supported by a significant number of global investors and two major proxy advisory services.[156]

Electric power companies, who operate coal-burning power plants, have received shareholder proposals (titled 'bill' with a number assigned) to add a 'forbidden clause' that would amend the corporate articles to prohibit the company from operating coal-burning power plants in order to adapt to climate change. An example is the general shareholder meeting of Chubu Electric Power Co, Inc on 25 June 2020, in which 28 shareholders with an aggregate of 428 votes proposed adding a clause to the company's articles to prohibit operating coal-burning power plants for the purpose of adapting to climate change.[157] The proposal was rejected, although it received 191,056 votes (3.3 percent of total votes) in favour.[158]

Similar proposals submitted to the annual general shareholder meetings of Tokyo Electric Power Company Holdings, Inc and The Kansai Electric Power Co, Inc in 2020 lost the vote, but garnered 550,632 and 225,715 votes in support respectively.[159] Two municipal governments, Osaka City and Kyoto City, which hold 724,965 votes in Kansai Electric Power Co, proposed (Bill No 29) adding a clause to replace atomic-power plants with renewable energy power plants for the purpose of building a sustainable electric supply service.[160] They called on other shareholders to support their proposal, and while it was rejected, it received 1.32 million votes in favour, about 18.7 per cent of total votes.[161] In

[155] Mizuho Financial Group , 'Mizuho Financial Group Convocation Notice of the 18th Ordinary General Meeting of Shareholders', (20200 at 55, https://www.mizuhogroup.com/binaries/content/assets/pdf/mizuhoglobal/investors/financial-information/stock-information/meeting18_1_eng.pdf.
[156] 'Mizuho investors reject Japan's first shareholder climate resolution', *The Japan Times* (25 June 2020), https://www.japantimes.co.jp/news/2020/06/25/business/corporate-business/mizuho-investors-reject-shareholder-climate-resolution/#:~:text=Mizuho%20investors%20reject%20Japan%27s%20first%20shareholder%20climate%20resolution,-Sorry%2C%20but%20your&text=Mizuho%20Financial%20Group%20Inc.,-investors%20rejected%20a&text=The%20resolution%2C%20which%20its%20sponsor,aligned%20with%20the%20Paris%20Agreement.
[157] Chubu Electric Power Co, Inc, *Dai 96 kai Teijikabunushisoukai Syousyu-go-tuchi* [Notice of Calling of 96th general Shareholders Meetings] No 8 bill [in Japanese], https://www.chuden.co.jp/resource/ir/ir_kabunushi/ir_sokai/ir_sokai_96_01.pdf.
[158] Chubu Electric Power Co, Inc, *Rinji Houkokusyo* [Extraordinary Report requested by Financial Instruments and Exchange Act] (2020/06/26) [in Japanese], https://www.chuden.co.jp/ir/ir_siryo/yukashoken/__icsFiles/afieldfile/2020/06/26/96rinzihoukokusho_3_1.pdf.
[159] Tokyo Electric Power Company Holdings, Inc, general shareholder meeting on June 25th of 2020. No 4 bill, 215 shareholders who totally have 1753 votes proposed to add a forbidden clause to operate coal-burning power plants for the purpose of adapting climate change to the articles of incorporation. Tokyo Electric Power Company Holdings, Inc, *Dai 96 kai Teijikabunushisoukai Syousyu-go- tuchi* [Notice of Calling of 96th general Shareholders Meetings] No 4 bill [in Japanese], https://www4.tepco.co.jp/about/ir/stockinfo/pdf/200526_1-j.pdf. This bill proposing a clause forbidding operation of coal-burning power plant was rejected, although 550,632 votes, about 2.12 per cent of the total votes, supported it. Tokyo Electric Power Company Holdings, Inc, *Rinji Houkokusyo*[Extraordinary Report requested by Financial Instruments and Exchange Act] (2020/07/02) [in Japanese] https://www4.tepco.co.jp/about/ir/library/securities_report/pdf/200702-j.pdf. The Kansai Electric Power Co, Inc, The 96th general shareholder meeting on June 25th of 2020, No 8 bill; 28 shareholders who totally have 424 votes suggested to add a forbidden clause to operate coal-burning power plants for the purpose of adapting climate change at the articles of incorporation.
[160] Osaka City, *Kansai Denryoku Kabusikikaisya nitaisteno Kabunushiteian* [The shareholder's proposal to the Kansai Electric Power Co., Inc.](2020.06.30) [in Japanese], https://www.city.osaka.lg.jp/kankyo/page/0000264358.html#r020427. The Office of Adopting Global Warming at the Bureau for Environmental Policy of Kyoto City, *Datsu Genpatu Syakai no Jitsugen he* [Getting out from depending Nuclear Plant] (2020.06.11)[in Japanese], https://www.city.kyoto.lg.jp/kankyo/cmsfiles/contents/0000271/271137/R2koho.pdf; The Kansai Electric Power Co, Inc, *Dai 96 kai Teijikabunushisoukai Syousyu-go-tuchi* [Notice of Calling of 96th general Shareholders Meetings] No 8 and No 29 bills [in Japanese], https://www.kepco.co.jp/ir/stockholder/meeting/96kai/__icsFiles/afieldfile/2020/05/26/96_syosyu.pdf. It received 225,715 votes, about 3.2 per cent of total votes.
[161] The Kansai Electric Power Co, Inc, *Rinji Houkokusyo* [Extraordinary Report requested by Financial Instruments and Exchange Act] (2020/06/26) [in Japanese](2020/06/29),

these examples, the company directors opposed the shareholders' bills (proposals) because they did not want a narrowing of their managerial discretion. The case of the Kansai Electric Power Co differs from the other two cases, as many shareholders agreed with the shareholder proposal to embed ESG in the articles of incorporation. In this case, there were two separate shareholder proposals that received different levels of support.

In electric power companies, local governments are influential shareholders. Osaka City has 7.64 per cent of issued shares of the Kansai Electric Power Company, and is its biggest shareholder. The mayor of Osaka, Ichiro Matsui, submitted the shareholder proposal (No 29 bill) with Kyoto City as co-sponsoring shareholder.[162] Even though the proposal did not succeed at the shareholder meeting, it sent messages to management of the Kansai Electric Power Co and citizens of these municipalities. Osaka City will continue to pursue its efforts to make Kansai Electric Power Company take positive action to replace atomic-power plants with renewable energy power plants, a particularly important safety issue after the Fukusima nuclear accident in 2011.[163]

Climate change is increasingly a financial issue for companies. As noted in part 1, investors have made it clear that climate change is a financial risk that needs to be managed, placing these proposals squarely within the duties of directors to undertake oversight and management in the best interests of the company.

There is growing interest in implementing climate mitigation and adaptation strategies utilizing shareholder proposals, and shareholders are increasingly persuaded that companies should act on climate change mitigation and adaptation. Given the binding nature of successful shareholder proposals, shareholders could eventually require companies to amend their articles of incorporation to require specific actions on climate change risk management, including disclosure of their action plans and measurable targets to decarbonize.

Increasing shareholder engagement has also resulted in direct meetings between institutional investors and corporate boards. The Climate Action 100+ network, which includes 540 investors responsible for over $52 trillion in assets under management, is engaging companies on improving climate change governance, cutting emissions, and strengthening climate-related financial disclosures.[164] It is seeking commitments from corporate boards to Implement a strong governance framework that clearly articulates the board's accountability and oversight of climate change risk; to take action to reduce GHG emissions across the value chain, moving towards net-zero emissions by 2050 or sooner; and to provide enhanced corporate disclosure in line with the TCFD and sector-specific Global Investor Coalition on Climate Change Investor Expectations on Climate Change guidelines.[165] Climate Action 100+'s 'Net-Zero Company Benchmark', developed in 2020 in collaboration with EY and almost 50 signatory investors, investor network experts, and leading climate research and data non-governmental organizations, urges companies to establish assessment indicators that are robust, fair, and applicable to local markets and across sectors.[166]

https://www.kepco.co.jp/ir/stockholder/meeting/96kai/__icsFiles/afieldfile/2020/06/29/report_20200629_1.pdf

[162] The Mayor of Osaka is one of joint representative leaders of the national political party, *Nihon Ishin no Kai* [Japan Innovation Party], which is a nongovernmental party, but on several political issues, it cooperates with national government.

[163] Osaka City, *Kansai Denryoku Kabusikikaisya nitaisiteno Kabunushiteian* [The shareholder's proposal to the Kansai Electric Power Co., Inc.](2020.06.30) [in Japanese], https://www.city.osaka.lg.jp/kankyo/page/0000264358.html#r020427.

[164] Climate Action 100+, https://www.climateaction100.org/about/.

[165] Climate Action 100+, 'The Three Asks', (2020), https://www.climateaction100.org/approach/the-three-asks/.

[166] Climate Action 100+ Net-Zero Company Benchmark, (2020), https://www.climateaction100.org/progress/net-zero-company-benchmark/.

6. DUTY OF DISCLOSURE

It is in the area of disclosure that Japan is moving most rapidly to identify and manage climate-related risks, generally as part of ESG factors that companies and investors are increasingly identifying as important. The 2018 revised Corporate Governance Code calls for companies to disclose non-financial ESG information in a valuable and useful way. The Code also states that listed companies should disclose information on governance in a corporate governance report. What is less clear is the extent to which Japan has recognized that many climate risks are financially material, not just non-financial risks. While the obligations under financial services laws are obligations of the company, the directors are responsible for ensuring the accuracy of the company's financial reporting, and both companies and directors can receive fines or other sanctions for failing to comply with the law.

6.1 Disclosure and Reporting Requirements

The duty to disclose is embedded in the *Financial Instruments and Exchange Act (FIEA),* which, in 2006, replaced the former Securities and Exchange Act, the Law Concerning Foreign Securities Firms, and the Law Concerning the Regulation of Investment Advisory Services Relating to Securities.[167] As of October 2020, there has been no express direction by Japan's securities regulators that companies must disclose the breadth and nature of climate-related financial risks. However, the *FIEA* requires disclosure of material business risks, which means material business risks arising from climate change. To date, it is often reported as 'non-financial information' in annual reports. The Japan Stock Exchange has also strongly endorsed ESG disclosure, including disclosure of climate-related risks, as discussed in part 6.6 below.

There have been a number of recent regulatory and guidance developments aimed at enhancing the disclosure of ESG risks and opportunities, including climate-related risks and opportunities.

6.2 Financial Instruments and Exchange Act Disclosure

The *FIEA* was enacted to enhance fairness and transparency, and to restore confidence in the Japanese capital markets.[168] The 'Fair Disclosure Rule Guidelines' specify that 'material information' refers to the 'undisclosed material information about the operations, business, or assets of the listed company, etc, which has a material influence on investors' investment decisions'.[169] The provisions of Article 27-36 of the *FIEA*, generally referred to as the 'fair disclosure rule', were introduced to ensure fair disclosure of information to investors.[170] The rule is applicable to information of a precise nature that, if it were disclosed, is likely to have a material influence on the value of securities.[171] Where the relevant information falls under the category of material information, the listed company must promptly disclose it.[172]

[167] *Financial Instruments and Exchange Act, supra* note 63.

[168] Financial Services Agency, Japan, 'New Legislative Framework for Investor Protection - Financial Instruments and Exchange Law', https://www.fsa.go.jp/en/policy/fiel/20061010.pdf.

[169] As provided in Article 27-36, paragraph (1) of the *Act*. Planning and Coordination Bureau, Financial Services Agency, 'Points to Note Regarding Article 27-36 of the Financial Instruments and Exchange Act (Fair Disclosure Rule Guidelines)', (April 2018), translation at https://www.fsa.go.jp/en/laws_regulations/disclosure/20180206-2.pdf. It specifies: 'These guidelines are not binding on determinations made by investigative authorities and judicial decisions including the application of penal provisions. In addition, these guidelines do not guarantee that the Financial Services Agency (FSA) will make the same interpretations as those shown in these guidelines in the future.'

[170] *Ibid* at 5.

[171] *Ibid*.

[172] *Ibid* at 6.

Introduction of the fair disclosure rule was aimed at promoting early disclosure of information by issuers and enhancing dialogue between issuers and investors.[173] Listed companies that are subject to application of the rule are expected to actively disclose information in light of the purpose and significance of the rule.

In terms of future-oriented information, the 'Fair Disclosure Rule Guidelines' specify that:

> when specific details of the plan concerning operating profits or net profits that are planned to be disclosed as the contents of the medium-term management plan are pieces of information which, in themselves, can be used for making investment decisions and are likely to have a material influence on the value of securities if they were disclosed and when such details of the plan are to be provided to the investors immediately prior to the disclosure of the medium-term management plan, the provision of such pieces of information may constitute provision of material information.[174]

In January 2019, Japan's Financial Services Agency issued a Cabinet Office Ordinance on Disclosure of Corporate Affairs, which sets out new securities law filing requirements requiring disclosure of business risks. [175] This amendment is critically important as it significantly expands previous mandatory disclosure requirements from disclosing material facts and information to now include requirements to disclose material 'forward-looking risk'. The amendment requires the company to disclose:

- material risks that the management recognizes have the potential to impact the company's financial condition or the cash flow status, together with the explanation of the degree of possibility and time of the occurrence of the risk, and details of the impact the risk will have on operating results if it materializes;
- countermeasures the company is taking against the risk;
- material risks are to be described in an easily understandable way, taking into consideration the materiality of a risk and its degree of relevance to the business policies and strategies;
- the degree of impact that the material risk will have on corporate value, operating results, financial condition, etc;
- with regard to operational and financial issues, companies are required to explain matters that management recognizes as possibly having a material impact on operating results, such as changes to laws and systems that may greatly impact business; and
- in disclosures of the analysis and examination of the cash flow status as well as information on sources of funds and capital liquidity, companies are required to provide a specific, understandable description of the management's awareness of market trends in capital demands, including funding methods and state of affairs and major uses of capital.[176]

[173] *Ibid* at 3.
[174] *Ibid* at 5.
[175] 企業内容等の開示に関する留意事項について （企業内容等開示ガイドライン）, https://www.fsa.go.jp/common/law/kaiji/200501_kaiji.pdf. Amendment in January 2019 to Cabinet Order concerning Corporate Disclosure ("Corporate Disclosure Order"), Filing Form No 2, Chapter 2 "Corporate Information," Section 2.2 (31) disclosure of "business risks, etc. Cabinet Office Order related to disclosure of corporate contents after amendment in accordance with Cabinet Office Order No 3 of 2019 (announced and enforced on January 31, 2019). An English translation is not yet available, but a discussion can be found in Japan Financial Services Agency, Principles Regarding the Disclosure of Narrative Information, (19 March 2020), https://www.fsa.go.jp/en/news/2019/20190606-3/01.pdf; and Financial Services Agency, 'Points to Note Regarding Disclosure of Corporate Affairs (Guideline for the Disclosure of Corporate Affairs)' (April 2020), https://www.fsa.go.jp/common/law/kaiji/200501_kaiji.pdf.
[176] Financial Services Agency, Principles Regarding the Disclosure of Narrative Information, *ibid*.

While there is no express reference to climate change in the Ordinance, these new requirements align closely with the TCFD framework for disclosure of governance and management of financial risks in their obligation to disclose material risks and their management in the short, medium and long term. It sets the stage for more effective climate governance and disclosure, because once climate risk becomes material, directors need to meet these new requirements.

Also of note is that International Financial Reporting Standards (IFRS) are one of four permitted financial reporting frameworks in Japan.[177] For companies that use IFRS for accounting and financial reporting, the IFRS Foundation has recently issued guidance that states that material climate-related financial information should be reported under many of its standards, including IAS 1 Presentation of Financial Statements, IAS 2 Inventories, IAS 12 Income Taxes, IAS 16 Property, Plant and Equipment, IAS 38 Intangible Assets, IAS 36 Impairment of Assets, IAS 37 Provisions, Contingent Liabilities and Contingent Assets, IFRS 7 Financial Instruments: Disclosures, IFRS 9 Financial Instruments, and IFRS 13 Fair Value Measurement. [178] In addition to this specific disclosure, the IFRS states that it is important for companies whose financial position or financial performance is particularly affected by climate-related matters to provide overarching disclosure.[179] Directors of companies using IFRS need to ensure their financial reporting meets these standards.

6.3 Ministry of the Environment Practical Guide for Scenario Analysis in Line with the TCFD Recommendations

In March 2020, the MOE issued updated guidance on scenario analysis in line with the TCFD recommendations, expressly recognizing that climate change can present clear risks and opportunities for business management. [180] Its 'Practical Guide for Scenario Analysis in Line with TCFD Recommendations' offers practical examples from 12 companies and useful materials for scenario analysis.[181]

The Practical Guide also sets out the financial opportunities relating to adoption of effective climate governance, including reduced operating costs through efficiency gains; increased production capacity, resulting in increased revenues; increased value of fixed assets such as highly rated energy-efficient buildings; increased revenue through demand for lower emissions products and services; and increased reliability of supply chain and ability to operate under various conditions.[182] It reports that financial impacts from moving to more efficient renewable energy include reduced exposure to future fossil fuel price increases; reduced exposure to GHG emissions and therefore less sensitivity to changes in the cost of carbon; returns on investment in low-emissions technology; increased capital availability; and reputational benefits resulting in increased demand for goods and services; and a better competitive position to reflect shifting consumer preferences, resulting in increased revenues.[183] As of February 2020, 61 financial companies and 161 other companies in Japan were reporting in alignment with the TCFD recommendations.[184]

[177] The others are Japanese GAAP, Japan's Modified International Standards (JMIS), and US GAAP; IFRS Foundation, 'Japan' (2020), https://www.ifrs.org/use-around-the-world/use-of-ifrs-standards-by-jurisdiction/japan/.
[178] IFRS, 'Effects of climate-related matters on financial statements', (20 November 2020), at 1, https://www.ifrs.org/news-and-events/2020/11/educational-material-on-the-effects-of-climate-related-matters/.
[179] *Ibid*.
[180] Ministry of the Environment, Government of Japan Climate Change Policy Division, *The Practical Guide for Scenario Analysis in line with the TCFD recommendations,* 2nd edition (March 2020), at 6, http://www.env.go.jp/policy/policy/tcfd/TCFDguide_2nd_EN.pdf.
[181] MOEJ, 'Practical Guide for Scenario Analysis in Line with TCFD Recommendations, published in March 2019 (https://www.env.go.jp/en/headline/2396.html) and 2nd Edition (https://www.env.go.jp/en/headline/2439.html) in March 2020.
[182] *Ibid* at 1-13.
[183] *Ibid*.
[184] *Ibid* at 1-8.

6.4 Ministry of Economy, Trade and Industry's (METI's) Guidance for Collaborative Value Creation

The Japan Ministry of Economy, Trade and Industry's (METI's) 'Guidance for Collaborative Value Creation', published in 2017, discusses ESG factors as an important part of a company's sustainability and sustainable growth, highlighting effective governance as core to the entire process of value creation.[185] The Guidance observes that often there have been complaints about a lack of disclosure concerning information on management strategies and their interrelationship with ESG matters, information that is often the basis for long-term investment decisions.[186] It suggests principles for communicating a company's values, business model, strategy, and governance to investors in an integrated manner, linking ESG and strategy.[187]

The Guidance proposes a basic framework for promoting dialogue between companies and investors and for enhancing the quality of information disclosure, serving as a guideline to assist corporate directors to comprehensively communicate key information to investors, including business models, strategies, and governance systems. The Guidance is also designed to be used as a framework for investors to monitor investee companies and conduct engagement activities to fulfill their stewardship responsibilities.

6.5 Japan's TCFD Consortium

As noted in the introduction, the TCFD proposed a comprehensive framework for climate governance, strategy, risk management, and disclosure of targets and metric.[188] As of September 2020, support for the TCFD governance and disclosure framework has grown to over 1,500 organizations globally, representing a market capitalization of over US$12.6 trillion.[189] As of July 2020, there are 290 Japanese supporters of the TCFD recommendations, making up more than 20 per cent of the total number of supporting organizations worldwide.[190] Japan's Financial Services Agency and the Japan Exchange Group have endorsed the TCFD framework.

In 2019, a Japanese 'TCFD Consortium' was launched as a platform for debate on how to make company disclosure based on the TCFD recommendations more effective, and how to make sure that it leads to more appropriate investment decisions from financial institutions.[191] The Financial Services Agency, the METI and MOE supported the establishment of this industry-led TCFD consortium.[192] METI had established the 'Study Group on Implementing the TCFD Recommendations for Mobilizing Green Finance through Proactive Corporate Disclosures' to consider methods of disclosure in accordance with the TCFD recommendations, leading to the development of the TCFD Consortium's guidance for

[185] Ministry of Economy, Trade and Industry (METI) 'Guidance for Integrated Corporate Disclosure and Company-Investor Dialogues for Collaborative Value Creation - ESG integration, non-financial information disclosure and intangible assets into investment' (29 May 2017), https://www.meti.go.jp/english/press/2017/pdf/0529_004b.pdf (hereafter METI Guidance).
[186] METI, 'Kachi kyōsō no tame no sōgōteki kaiji/taiwa gaidansu – ESG/hizaimujōhō to mukei shisan tōshi' (2017); METI, 'Guidance for Integrated Corporate Disclosure and Company-Investor Dialogues for Collaborative Value Creation - ESG integration, non-financial information disclosure and intangible assets into investment', (2017) https://www.meti.go.jp/english/press/2017/pdf/0529_004b.pdf.
[187] *Ibid*.
[188] TCFD Final Report, *supra* note 11.
[189] TCFD, 'TCFD Supporters' (September 2020), https://www.fsb-tcfd.org/tcfd-supporters/.
[190] TCFD Consortium, Japan, 'Guidance on Climate-related Financial Disclosures 2.0', (July 2020) at 3, https://tcfd-consortium.jp/pdf/en/news/20081201/TCFD_Guidance_2_0-e.pdf (hereafter TCFD Consortium, 2.0 report).
[191] TCFD Consortium Japan, 'Guidance for Utilizing Climate-related Information to Promote Green Investment', https://tcfdconsortium.jp/en/news_detail/19100802) and https://tcfd-consortium.jp/en. SASB has also published a TCFD Implementation Guide (https://www.sasb.org/knowledge-hub/tcfd-implementation-guide/) in co-operation with the Climate Disclosure Standards Board, and has translated this guide into Japanese (https://www.sasb.org/knowledge-hub/tcfd-implementation-guide-japanese/).
[192] UN PRI, *Final Report on Fiduciary Obligation in the 21st Century,* at 43, https://www.unpri.org/download?ac=9792.

utilizing climate-related information to promote green investment.[193] In July 2020, the TCFD Consortium released *Guidance on Climate-related Financial Disclosures 2.0*.[194]

The TCFD Consortium reports that the organizations that have become TCFD supporters are also playing a major role in reducing national GHG emissions. Pursuant to the *Act on Promotion of Warming Countermeasures*, companies whose GHG emissions are above a certain level are required to report the emissions through a Mandatory Greenhouse Gas Accounting and Reporting System (SHK system).[195] While only 3 per cent of the approximately 12,000 companies reporting to the SHK system have become TCFD supporters, their emissions account for more than 40 per cent of the emissions by all of the reporting companies, encouraging earlier emissions reductions in these companies.[196]

6.6 The Practical Handbook for ESG Disclosure

The Japan Exchange Group, Inc and Tokyo Stock Exchange, Inc in March 2020 published a 'Practical Handbook for ESG Disclosure', aimed at supporting listed companies in their efforts to improve ESG disclosure, recognizing that many of the global frameworks for sustainability disclosure have not been translated into Japanese.[197] 'Environmental' includes climate change, resource depletion, waste, pollution, and deforestation.[198] It draws on the work of the Sustainable Stock Exchanges (SSE) initiative, 'Model Guidance on Reporting ESG Information to Investors',[199] the METI's 'Guidance for Integrated Corporate Disclosure and Company-Investor Dialogues for Collaborative Value Creation - ESG integration, non-financial information disclosure and intangible assets into investment';[200] recommendations of the TCFD, and the SASB standards.[201]The Practical Handbook for ESG Disclosure proposes four steps:

> Step 1: ESG Issues and ESG Investment
> Understand ESG issues and the current situation around ESG investment.
>
> Step 2: Connecting ESG Issues to Strategy
> Decide on what ESG issues are material to your company's strategy.
>
> Step 3: Oversight and Implementation
> Put in place an internal structure for oversight and implementation of ESG issues and set metrics/targets, to enable steady progress on ESG activities.
>
> Step 4: Information Disclosure and Engagement
> Having linked ESG issues to corporate value, disclose ESG information so it can be used for investment decisions, aiming for mid- to long-term corporate value creation by actively seeking dialogue with investors and other stakeholders.[202]

[193] TCFD Consortium, 2.0 report, *supra* note 190; TCFD Consortium Japan, 'Guidance for Utilizing Climate-related Information to Promote Green Investment', *ibid*. Ministry of Economy, Trade and Industry's Guidance for Climate-related Financial Disclosures, https://www.meti.go.jp/english/press/2018/1225_006.html.
[194] TCFD Consortium, 2.0, *supra,* note 190.
[195] *Ibid* at 3-4.
[196] *Ibid* at 3-4.
[197] Japan Exchange Group, Inc and Tokyo Stock Exchange, Inc published a *Practical Handbook for ESG Disclosure*, (31 March 2020), [English translation 25 May 2020], at 17, https://www.jpx.co.jp/english/corporate/sustainability/esg-investment/handbook/index.html (hereafter Practical Handbook for ESG Disclosure).
[198] *Ibid* at 9.
[199] Sustainable Stock Exchanges (SSE) Initiative, 'Model Guidance on Reporting ESG Information to Investors', https://sseinitiative.org/wp-content/uploads/2017/06/SSE-Model-Guidance-on-Reporting-ESG.pdf (hereafter SSE Model Guidance).
[200] METI Guidance, *supra* note 185.
[201] Practical Handbook for ESG Disclosure, *supra* note 197 at 5.
[202] *Ibid* at 7.

The Handbook recommends that identification and discussion of ESG issues should take place at the board of directors, given its oversight role, and should include outside directors.[203] It notes that the board of directors is responsible for oversight of whether the response to ESG issues is being suitably carried out and leading to corporate value creation; thus, there must be a process for reporting to the board. ESG issues should be included as part of discussions on strategy, risk management, and business planning, and the board should monitor and oversee progress towards targets related to ESG activities.[204] It also recommends that listed companies disclose and provide their ESG information in English so that overseas investors can easily access the information, taking into account what proportion of the company's investors are overseas.[205]

The Handbook recommends setting suitable metrics to measure progress on GHG emissions reductions, emissions intensity, energy usage, intensity and mix, water usage, environmental operations and oversight, and climate risk mitigation, in line with the company's strategy or ESG action plan.[206] Suitable metrics should be set based on where and in what way the chosen material issues will affect the company's business, recommending use of SASB and other metrics already established.[207] In terms of how to set specific targets, the Handbook recommends that each company should use a process suitable for their circumstances, but in general, they should calculate future predictions by looking at past achievements and set targets by looking to targets set by domestic or overseas organizations, 'backcast' as endorsed by the TCFD recommendations.[208]

The Handbook cites the International Accounting Standards Board (IASB) that 'Information is material if omitting, misstating or obscuring it could reasonably be expected to influence the decisions that the primary users of general purpose financial statements make on the basis of those financial statements, which provide financial information about a specific reporting entity.[209]

The Handbook also commends the Guidance issued by the World Federation of Exchanges that there should be a board statement setting out material issues are identified and embedded in its strategy, and how the board reviews progress against targets. Boards should make clear how their selected ESG issues link to value creation/destruction; companies should explain to investors how they identify their material issues; and they should ensure that their reporting is accurate, timely, and follows one of the internationally recognized reporting standards.[210]

6.7 Disclosure by the Japan Government Pension Investment Fund

Japan's Government Pension Investment Fund (GPIF) has provided leadership in disclosure of climate-related financial risk.[211] All of its ¥151 trillion assets under management are now being tracked based

[203] *Ibid* at 33.
[204] *Ibid* at 33.
[205] *Ibid* at 48.
[206] *Ibid* at 45.
[207] *Ibid* at 36. SASB has published standards for 77 industries, SASB Standards, https://www.sasb.org/standards-overview/download-current-standards/.
[208] Practical Handbook for ESG Disclosure, *supra* note 197 at 36.
[209] The Japanese Financial Services Agency (JFSA) writes that 'materiality of narrative information should be judged based on 18 IFRS, whether or not it is material to investors' investment decisions; Handbook at 19, citing Japan Financial Services Agency (2019) 'Principles Regarding the Disclosure of Narrative Information'.
[210] Practical Handbook for ESG Disclosure, *supra* note 197 at 67, citing WFE ESG Guidance and Metrics can be downloaded from the WFE website. https://www.world-exchanges.org/news/articles/world-federation-exchanges-publishes-revisedesg-guidance-metrics, and the Global Reporting Initiative Standards, https://www.globalreporting.org/standards. Japanese: https://www.globalreporting.org/standards/gri-standards-translations/gri-standardsjapanese-translations-download-center/.
[211] Japan Government Pension Investment Fund, 'GPIF Publishes the 'Analysis of Climate Change-Related Risks and Opportunities in the GPIF Portfolio'' (2 October 2020),

on ESG factors. Its assets under management tracking ESG indexes is ¥5.7 trillion, and its investment in green, social and sustainability bonds issued by multilateral development banks is approximately ¥440 billion.[212] It has an A+ rating from the UN PRI. In its FY2019 ESG Report released in August 2020, for the first time, GPIF has quantified the physical and transition risks and opportunities of climate change inherent in its portfolio in terms of the potential change in the value of these securities.[213]

GPIF expanded on the information it disclosed the previous year in line with the TCFD recommendations, now including a comprehensive assessment of climate change-related risks and opportunities across all major asset classes in the fund's portfolio.[214] It used three global climate change data and analytics firms to compile a climate change analysis that utilizes cutting-edge climate change assessment techniques. Given the space limitations in its ESG report, it issued a supplementary report in October 2020 on climate change specifically.[215]

The climate change report measures the carbon footprint and GHG emissions per unit of revenue (value added) for its investee companies, examining scope 1, 2 and 3 carbon emissions, setting out its methodology in great detail.[216] It measures carbon intensity of its portfolios by asset.[217] Compared to the prior fiscal year, GPIF reduced the carbon intensity and the carbon footprint of its portfolios by 15.3 percent.[218] GPIF reports that two main drivers affected its carbon footprint in the past year – changes in the quantity of GHG emissions by investee companies and changes in the types of investment held in investees.[219] It also discloses in detail the challenges due to inadequate reporting by investee companies of their carbon intensity, planning to accelerate its seeking accurate information.[220]

GPIF invested in the S&P/JPX Carbon Efficient Index. It conducted scenario testing under 1.5ºC, 2ºC, and 3ºC scenarios, finding 1.5ºC scenario had the highest positive effect on its equity portfolios.[221] Its fixed income portfolio had the opposite effect under the scenarios tested. It conducted a 'portfolio potential warming' analysis regarding the future potential contributions of investee companies to global warming, and potential fossil fuel exposure, as well as risks and opportunities in its government bonds portfolio.[222] It details the emissions in its sovereign bond investments, explaining its methodology for calculating carbon footprint.[223] It undertakes predictive analysis regarding investments in new technologies and potential value diminution in sectors with high traditional environmental impacts and energy needs. GPIF also introduced a 'transition pathway initiative management quality score' (developed by FTSE), which measures the extent to which investee companies manage GHG emissions and how they respond to risks and opportunities in the transition to a lower carbon economy.[224]

6.8 Conclusion - Director Liability and Disclosure of Material Climate-related Risks

https://www.gpif.go.jp/en/investment/esg/gpif_publishes_the_analysis_of_climatechange-related_risks_and_opportunitiesin_the_gpif_portfolio.html.
[212] *Ibid* at 4.
[213] Government Pension Investment Fund, 'For All Generations, ESG Report 2019', https://www.gpif.go.jp/en/investment/GPIF_ESGREPORT_FY2019.pdf
[214] Japan, 'Analysis of Climate Change-Related Risks and Opportunities in the GPIF Portfolio', Supplementary Guide to GPIF ESG 2019 Report', https://www.gpif.go.jp/en/investment/GPIF_CLIMATE_REPORT_FY2019.pdf.
[215] *Ibid*.
[216] *Ibid* at 11 – 13.
[217] *Ibid* at 15.
[218] *Ibid* at 4.
[219] *Ibid* at 16.
[220] *Ibid* at 20-22.
[221] *Ibid* at 4.
[222] *Ibid* at 5.
[223] *Ibid* at
[224] *Ibid* at 5.

Climate change presents a foreseeable financial risk in the short, medium and long term. Financial disclosure is critically important for companies, investors, and regulators, and for effective functioning of capital markets, and directors and their corporate boards have a responsibility to disclose materials risks. For privately-held stock companies in Japan, that obligation is to shareholders in the form of reporting the financial statements to annual shareholder meetings.

For public companies in Japan, that disclosure requirement is both periodic and continuous pursuant to financial services law. Since it is directors that have the overall responsibility for ensuring the company's financial disclosures are accurate, they may be primarily liable for misleading disclosures made to the market.[225] Both companies and directors may be subject to sanctions under financial services legislation for failure to comply with disclosure requirements. Unlike general director duties under company law, disclosure pursuant to financial services law is not subject to the business judgment rule, as the requirements are clearly set out in law.

As has been observed for other countries:

> Directors and fiduciaries must now approach their governance of climate change in the same way as they would any other financial matter. The only safeguard against liability exposure will be a proactive, dynamic and considered approach to the impact of climate change on strategy, risk management oversight and reporting.
>
> . . .
>
> There are a number of disclosure omissions that are amongst those most likely to present a risk of misleading disclosure in practice, particularly for companies in those sectors highly exposed to physical or economic transition risks associated with climate change within mainstream investment and planning horizons. These include:
>
> - a failure to disclose material economic transition risks or physical risks to a company's financial prospects, especially in the narrative portions of the annual report...
> - the denial or material understatement of risk exposure or material overstatement of strategic preparedness or risk management of relevant climate-related financial risks, as expectations of the content of disclosures increase to mirror the evolving standards of directors to identify, assess and manage climate related financial risks; ...
> - an inconsistency between internal assessments on climate risk and external disclosures, such as where internal reports from management and experts indicate the impact on the business of a proposed regulation to implement the goals of the Paris Agreement would be severe, but disclosures deny that the company is able to assess those impacts; and
> - a high-level boilerplate forward-looking risk statement about the predicted impacts (or lack of impacts) of climate change on the company's operations and assets, including a statement of opinion or belief, that is not supported on reasonable grounds or not accompanied by adequate, specific disclosures on the limitations or uncertainties that materially impact on the achievement of the statement.[226]

Disclosure of management of climate-related risks is likely to generate enhanced corporate governance as institutional investors increasingly insist that their investee companies report their management and metrics relating to decarbonization.

[225] Janis Sarra, *Audit Committees and Effective Climate Governance, A Guide for Boards of Directors* (CCLI December 2020), https://law-ccli-2019.sites.olt.ubc.ca/files/2020/12/CCLI-Guide-for-Audit-Committees-on-Effective-Climate-Governance.pdf.

[226] Barker and Mulholland, *supra* note 123 at 6, 14-16.

Nikkei Business Newspaper has reported that disclosures related to climate change increased four-fold in the past year, companies reporting that the disclosure is in response to investor pressure.[227] Of 2,484 companies for which Takara Printing submitted securities reports for the fiscal year ended March 2020, 264 now disclose climate change and global warming as a risk to their businesses and financial performance, up from 71 companies the year prior. By sector, the largest increase in disclosure was in the banking and chemical sectors.[228]

7. LOOKING AHEAD

Awareness of climate-related financial risk as part of ESG governance is growing in Japan. The Government Pension Investment Fund signed the UN PRI in 2015 and the number of Japanese UN PRI signatories exceeded 80 in January 2020, where institutional investors acknowledge their duty to act in the best long term interests of beneficiaries and affirm their belief that ESG issues can affect the performance of investment portfolios[229] The amount of Japanese assets allocated to ESG investment more than tripled between 2016 and 2018, from US$ 0.5 trillion US$ to 2.1 trillion.[230] A survey by the METI showed that of 97.9 per cent of investors surveyed who were practicing ESG investment aimed at reducing risks, 87.5 per cent adopted ESG to increase returns, and 83.3 per cent reported wanting to contribute to society.[231] A growing number of companies in Japan have recognized the seriousness of climate-related financial risk in their securities law annual reports.[232]

At the same time, the corporate culture in Japan is more one of relationship than litigation, and recent innovations in corporate and financial service law have not really changed that dynamic. Relationship and presenting one's best face may mean that it is difficult for outsiders to assess the dynamics of the board's oversight of climate risk, although all of the above-mentioned advances in corporate disclosure are likely to increase transparency.

[227] Nikkei Business Newspaper, Nihon Keizai Simbun morning edition September 8, 2020 (in Japanese only), English translation of title: 'Climate change risk, disclosure 4 times, 264 companies in the previous term'（気候変動リスク、開示 4 倍　前期 264 社，環境規制言及、投資家の圧力強く。）.

[228] *Ibid*. For example, Mitsubishi Chemical HD disclosed as a risk that 'if carbon taxes and climate change gas emission regulations are introduced in each country where we do business, it will affect our business performance.' Mitsubishi UFJ Financial Group said, 'If it is considered that we are not fulfilling our responsibilities to society due to insufficient efforts and information disclosure, it will lead to damage to corporate value' against the background of increasing investor pressure.

[229] Practical Handbook for ESG Disclosure, *supra* note 197 at 9-10.

[230] *Ibid* at 9.

[231] *Ibid* at 11.

[232] See for example, Ricoh Company, Ltd., Annual Securities Report, (The 120th Business Term) From April 1, 2019 to March 31, 2020, https://www.ricoh.com/-/Media/Ricoh/Sites/com/IR/financial_data/securities_report/pdf/AnnualSecuritiesReport_120th.pdf, which discusses the need to identify medium- to long-term sustainability risks and opportunities as well as material issues faced by the corporate group, including investment decisions on risks and opportunities related to climate change recommended by the TCFD; supervise and advice on sustainability strategies, material issues, and progress against ESG targets for each business division throughout the entire Group 4. Identify sustainability issues to be submitted for discussion at the Board of Directors and report them to the Board of Directors and the Head of the Sustainability Management Division; and reviewing its greenhouse gas reduction goals and stepping up efforts in that regard while sharing information better in keeping with the TCFD recommendations. See also Komatsu Ltd., Annual Securities Report From April 1, 2019 to March 31, 2020 (The 151st Fiscal Year), which observed: Komatsu is investing a significant proportion of its management resources, such as research and development expenditure, to comply with environmental and other related regulations and to respond to climate change issues. If Komatsu is required to incur additional expenses and make additional capital investments due to future revision of environmental regulations or future impacts of climate change, or if its development, production, sales and service operations are adversely affected by such revised regulations, Komatsu may experience an unfavorable impact on its business results, https://home.komatsu/en/ir/library/annual-security-report/sir_info_02/__icsFiles/afieldfile/2020/07/06/151th_q4_houkokusyo_e.pdf

In Japan, over 100 companies, local governments, research institutions, and non- governmental organizations have established the Japan Climate Initiative, a network committed to strengthening communication and exchange of strategies and solutions among all actors that are implementing climate actions in Japan.[233]

In 2017, Japan Exchange Group (JPX) joined the Sustainable Stock Exchanges (SSE) Initiative, and in June 2019, it published a Japanese translation of the SSE Initiative's Model Guidance on Reporting ESG Information to Investors.[234]

Electric companies are now verifying their achievements in each fiscal year by referring to the CO_2 emission factor (CO_2 emissions per kWh of power consumption) that reflects their efforts.[235] As of July 2015, the Federation of Electric Power Companies of Japan, together with J-Power, JAPC and 23 power producers and suppliers, established a new voluntary framework for achieving a low carbon society, formulated the Action Plan for the Electricity Industry for Achieving a Low-Carbon Society, setting a CO_2 reduction target for the entire electricity industry for FY2030 and expanding use of non-fossil energy sources.[236]

Japanese companies are also looking at upside opportunities related to climate change. For example, MS&AD Insurance Group Holdings Co, Ltd and MS&AD InterRisk Research & Consulting, Inc, in collaboration with Jupiter Intelligence, have started providing a service known as 'Climate Change Impact Assessment Service for TCFD', having 'developed a next-generation climate risk analytics system for predicting multi-hazard risks such as floods and windstorms caused by climate change', the first Japanese insurance/financial group able to provide a global climate change impact assessment by simulating various catastrophe indicators and financial impacts for different climate scenarios, time axes, and return periods based on data from the latitude and longitude .[237]

Finally, Japan has embraced what is generally considered to be the next stage of decarbonization, the move to a circular economy, in which there are net-zero emissions or climate positive emissions. METI has released its 'Circular Economy Vision 2020' that urges a shift to new business models with higher circularity; is aimed at acquiring appropriate evaluation from the market and society; and that results in early establishment of a resilient resource circulation system to present Japan's basic policy directions for a circular economy.[238]

As all these developments unfold, corporate directors will be expected to stay current and exercise effective oversight of climate-related financial risks and opportunities.

[233] Japan Climate Initiative (2019), https://japanclimate.org/english/.
[234] SSE Model Guidance, *supra* note 199 at 4.
[235] The Federation of Electric Power Companies of Japan, Efforts for Preventing Global Warming, https://www.fepc.or.jp/english/environment/global_warming/index.html.
[236] *Ibid.*
[237] MS&AD, 'Launching Climate Change Impact Assessment Service for TCFD with Jupiter Intelligence -Global impact assessment of natural catastrophe risk from climate change' (7 July 2020), https://www.ms-ad-hd.com/en/news/irnews/irnews-559384501232751076.html.
[238] METI, 'Circular Economy Vision 2020', (22 May 2020), https://www.meti.go.jp/english/press/2020/0522_003.html; in Japanese: 循環経済ビジョン 2020（概要） https://www.meti.go.jp/press/2020/05/20200522004/20200522004-1.pdf.

APPENDIX I
THREE FORMS OF ORGANIZATION STRUCTURE UNDER THE COMPANIES ACT OF JAPAN

This appendix supplements the discussion in part 2 with additional details on Japanese corporate structures. As noted in part 2, effective May 2015, companies in Japan may choose one of three main forms of organizational structure under the *Companies Act*: a Company with *Kansayaku* Board (audit and supervisory board); a 'Company with Three Committees' – a nomination, audit, and remuneration committee;[239] or a 'Company with Supervisory Committee'.[240] The latter two forms of organizational structure under the *Companies Act* are similar to companies in other countries where committees are established under the board and assigned certain responsibilities with the aim of strengthening oversight and monitoring functions.[241]

For a Company with a *Kansayaku* Board, the *Companies Act* allocates specific governance functions to the board of directors, the *kansayaku* (auditor) and the *kansayaku* board.[242] Thus, under this governance model, listed companies are required to have two boards, a board of directors and a board of *kansayaku.* The *kansayaku* audit the performance of duties by directors and the management and have investigation powers by law.[243] In order to ensure both independence and high-level information gathering power, not less than half of *kansayaku,* as appointed at the general shareholder meeting, must be outside *kansayaku*, and at least one full-time *kansayaku* must also be appointed. Article 335(3) of the *Companies Act* specifies: 'A Company with Board of Company auditors shall have three or more company auditors, and the half or more of them shall be Outside Company Auditors.' Article 390(3) states: 'Board of company auditors shall appoint full-time company auditors from among the company auditors.' The *kansayaku* are allowed to excise their power quite independently, compared with members of committees in a 'company with audit and supervisory committee'.

All stock companies can appoint *shikkoyaku* or *shikkoyakuin,* as discussed in part 2. Company with Three Committees must appoint one or more *shikkoyaku* (executive officers) from directors or non-directors, by a resolution of the board, and delegate business administration and certain kinds of business decisions to the *shikkoyaku*.[244] The board must appoint one or more representative executive officers from among the executive officers, and they are responsible for carrying out the decisions made by the board or the executive officers, and have authority to represent the company. The board can delegate substantial decision-making authority over the management of the company to the executive officers.[245] As of May 2020, only 76 of the approximately 3,700 listed companies on the Tokyo Stock Exchange had the three committees structure.[246]

A Company with Supervisory Committee has one board, but can create positions with the title of *shikkoyakuin* for persons who are delegated by the board to exercise a certain range of discretion regarding business administration.[247] If independent directors do not comprise a majority of the board, the Corporate Governance Code recommends, as best practice to strengthen the independence,

[239] Yamaguchi *et al*, *supra* note 70.
[240] Corporate Governance Code, *supra* note 64.
[241] *Ibid*. The Code's footnote states: 'There are cases where a Company with Kansayaku Board or a Company with Supervisory Committee creates positions with the title of "shikkoyakuin" for persons who are delegated by the board a certain range of discretion regarding business administration. Unlike *shikkoyaku* in companies with three committees (nomination, audit and remuneration), *shikkoyakuin* is not a statutory position', *ibid.*
[242] JPX's provisional English translation looks a bit confusing with comparison to the original Japanese version, which states "A Company with *kansayaku* Board is a system unique to Japan in which certain governance functions are assumed by the board, *kansayaku* and the k*ansayaku* board', Corporate Governance Code, *supra* note 64 at 16-17, Notes to General Principle 4.
[243] *Ibid*.
[244] *Ibid*.
[245] Yamaguchi *et al*, *supra* note 70.
[246] *Ibid*.
[247] Corporate Governance Code, *supra* note 64 at 16.

objectivity and accountability of the board on the matters of nomination and remuneration of the senior management and directors, that the company seek appropriate involvement and advice from the independent directors; for example, by establishing an optional independent advisory committee under the board, in which independent directors approve remuneration and some executive hiring decisions.[248]

As noted in part 2, pursuant to the *Companies Act,* a company is defined as 'any Stock Company (*kabushiki kaisha*), General Partnership Company, Limited Partnership Company or Limited Liability Company' and a foreign company is defined as 'any juridical person incorporated under the law of a foreign country or such other foreign organization that is of the same kind as the Company or is similar to a Company.'[249] A public company means 'any Stock Company the articles of incorporation of which do not require, as a feature of all or part of its shares, the approval of the Stock Company for the acquisition of such shares by transfer'.[250]

The 2019 amendments to the *Companies Act* now require listed companies to have at least one 'outside director'.[251] Article 2 (xv) specifies:

> Outside Director means a director of any Stock Company who is neither an Executive Director (hereinafter referring to a director of a Stock Company listed in any item of Article 363(1), and any other director who has executed operation of such Stock Company) nor an executive officer, nor an employee, including a manager, of such Stock Company or any of its Subsidiaries, and who has neither ever served in the past as an executive director nor executive officer, nor as an employee, including a manager, of such Stock Company or any of its Subsidiaries.

Outside director, in this context, does not mean 'independent' within the meaning of the Tokyo Stock Exchange rules. Listed companies that are not large companies defined by *Companies Act* article 2 (vi) are not required to have at least one outside director, but the number of such listed companies in Japan is small.[252] 'Large Company' means any stock company which satisfies any of the following requirements: (a) that the amount of the stated capital in the balance sheet as of the end of its most recent business year, referring to the balance sheet reported to the annual shareholders' meeting specifically 'referring to the balance sheet under Article 435(1) in cases where the first annual shareholders' meeting after the incorporation of the Stock Company has not yet been held) is 500,000,000 yen or more; or (b) that the total sum of the amounts in the liabilities section of the balance sheet as of the end of its Most Recent Business Year is 20,000,000,000 yen or more'.[253]

Article 2(15) of *Companies Act* defines the standard of 'outside' director, but makes no reference to independence. The TSE adds requirement of 'independent director', but does not make the criteria of independence clear in the Securities Listing Regulations. Listed companies set out their own criteria regarding the independence of directors and must disclose that criteria, but the TSE may publicly announce or impose a listing agreement violation penalty if a company's criteria does not satisfy TSE'S requirements of independence in accordance with the TSE 'Guidelines concerning Listed Company Compliance', part III.[254] For example, III-5-(3)-2 of the TSE's Guidelines sets out a definition of independent director for purposes of exchange listing:

[248] *Ibid,* Supplementary Principle 4.10.1; this advice also applies to a Company with a *Kansayaku* Board.
[249] *Companies Act of Japan,* article 2. For example, Article 593(1) Partners who execute the business shall have the duty to perform their duties with due care of a prudent manager.
[250] *Ibid.*
[251] *Companies Act of Japan,* article 327-2.
[252] *Companies Act of Japan,* Article 2(vi).
[253] *Ibid.*
[254] TSE, 'Guidelines Concerning Listed Company Compliance', III. 'Examination Pertaining to Ensuring Effectiveness (Measures against Violation of Code of Corporate Conduct) 5. In the case of a violation by a listed company of the provisions of Chapter 4, Section 4, Sub-section 1 of the Regulations, a decision on public announcement pursuant to the provisions of Rule 508,

> The status of a person(s) who is reported to the Exchange as being an independent director(s)/auditor(s) by the issuer of a listed domestic stock pursuant to the provisions of Rule 436-2 of the Enforcement Rules when such person falls under any of the following a. to d.;
>
> a. A person for which said company is a major client or a person who executes business for such person, or a major client of said company or a person who executes business for such client;
>
> b. A consultant, accounting professional or legal professional (in the case of a group such as a juridical person or association, including persons belonging to such group) who receives a large amount of money or other asset other than remuneration for directorship/auditorship from said company; or
>
> c. A person who has recently fallen under any of the following (a) or (b);
> c-2. A person who fallen under any of the following (a) or (b) at the time within ten years prior to assuming office;
> (a) A person who executes business for a parent company of said company (including a director who does not execute business or an auditor in cases where said company designates its outside auditor as an independent director); or
> (b) A person who executes business for a fellow subsidiary of said company.
>
> d. A close relative of a person referred to in any of the following (a) to (f) (excluding those of insignificance);
> (a) A person referred to in a. to the preceding c.;
> (b) An accounting advisor of said company (limited to cases where the outside auditor thereof has been designated as an independent auditor. When said accounting advisor is a corporation, any member thereof who is in charge of such advisory affairs is included; the same shall apply hereinafter);
> (c) A person who executes business for a subsidiary of said company (including a director who does not execute business or an accounting advisor in cases where said company designates its outside auditor as an independent auditor);
> (d) A person who executes business for a parent company of said company (including a director who does not execute business or an auditor in cases where said company designates its outside auditor as an independent auditor);
> (e) A person who executes business for a fellow subsidiary of said company; or
> (f) A person who has recently fallen under (b) or (c), or a person who executed business for said company (in cases where an outside auditor is designated as an independent director, meaning a director who does not execute business).[255]

Rule 436-2(1) states that directors are independent if they are unlikely to have conflicts of interest with general investors. Securities Listing Regulations Rule 436-2 specifies:

> Securing Independent Director(s)/Auditor(s): For the protection of general investors, an issuer of listed domestic stocks must secure at least one independent director/auditor (meaning an

Paragraph 1 of the Regulations, as well as a decision on whether or not to impose the listing agreement violation penalty pursuant to the provisions of Rule 509 of the Regulations, shall be made in comprehensive consideration of (i) the matters prescribed in the classifications referred to in the following (1) to (8) and (ii) the details, the background, the cause, and the actual state of affairs relating to said violation, as well as the state of implementation of measures such as a regulatory action taken by the Exchange in response to said violation and any other circumstances'. https://www.jpx.co.jp/english/rules-participants/rules/regulations/tvdivq0000001vyt-att/listed_company_compliance_guidelines_20150501.pdf
[255] *Ibid*.

> outside director (meaning an entity falling under an outside director prescribed in Article 2, Item (15) of the Companies Act who is an outside director/auditor prescribed in Article 2, Paragraph 3, Item (5) of the Ordinance for Enforcement of the Companies Act (the Ordinance of the Ministry of Justice No. 12 of 2006)) or outside auditor (meaning an entity falling under an outside auditor prescribed in Article 2, Item (16) of the Companies Act who is an outside director/auditor prescribed in Article 2, Paragraph 3, Item (5) of the Ordinance for Enforcement of the Companies Act) who is unlikely to have conflicts of interest with general investors; hereinafter the same.[256]

The Tokyo Stock Exchange may impose a listing agreement violation penalty on them. However, it is unclear whether the 'independent director' is likely to have conflicts of interest with general investors.

In case of failure to elect outside directors, the resolution of the board of directors risks being found to be void, because the board's structure and decision process would be in violation of the *Companies Act* and thus illegal. In contrast, where there has been a failure to elect independent directors, the resolutions of the board of directors be still valid (not void), because the election of independent directors is not required by *Companies Act* (statutory law), only requested by soft law, *eg,* the Tokyo Stock Exchange. The 2019 amendment comes into force on 1 March 2021.

In companies with a *Kansayaku* board (audit and supervisory board) and companies with a supervisory committee, directors' compensation is fixed by a resolution at a shareholders meeting if such matters are not prescribed in the articles of incorporation. [257] In companies with three committees, the remuneration committee sets directors' compensation in accordance with the regulation on Compensation Policies for Directors. [258] Therefore, making ESG factors indicators of directors' performance-linked compensation means that shareholders have agreed that the company should promote climate change adaptation, and directors have the obligation to make effort to fulfill that obligation.

One example is the electrical components maker OMRON corporation, where compensation to directors is set based on medium-to-long-term performance, including return on investment and meeting sustainability objectives, the latter evaluated by a third-party organization and based on the Dow Jones Sustainability Indices (DJSI).[259] The DJSI are a series of ESG indices that include companies evaluated and selected based on long-term shareholder value perspective, reflecting economic, environmental, and social factors comprehensively. Another example is Kao Corporation, a producer of human health care, skin care, cosmetics, and fabric and home care, where long-term incentive compensation is paid in accordance with several indicators including the World's Most Ethical Companies indicators evaluated by Ethisphere Institute.[260]

[256] Securities Listing Regulations Rule 436-2, https://www.jpx.co.jp/english/rules-participants/rules/regulations/tvdivq0000001vyt-att/securities_listing_regs1-826_20190716.pdf.
[257] *Companies Act of Japan,* article 361.
[258] Compensation Policies for Directors, Regulation for Enforcement of the Companies Act, article 121.
[259] OMRON corporation, Business report for shareholders meeting, at 40-41, https://www.omron.com/global/en/assets/file/ir/shareholder/convocation_notice_for_the_83rd_ordinary_general_meeting_of_shareholders.pdf .
[260] Kao Corporation, Integrated Report 2020 at 79, https://www.kao.com/content/dam/sites/kao/www-kao-com/global/en/investor-relations/pdf/reports-fy2020e-all-008.pdf. See also Kirin Holdings Company, Limited, in which long-term incentive compensation is calculated by financial evaluation and non-financial evaluation, the latter including progress and achievement in four key areas including the environment, https://www.kirinholdings.co.jp/english/ir/governance/conpensation.html.

One reason few companies have medium-to-long-term performance-linked compensation to directors evaluated by ESG indicators is the *Corporation Tax Act of Japan*.[261] Costs of payments of performance-linked compensation to directors evaluated by ESG indicators are excluded from deductible expenses, when calculating the amount of income of the domestic corporation for each business year. Only payments of performance-linked compensation to directors evaluated by the market price of the shares or indicators of company profit, including the amount of sales, are included deductible expenses.[262] If the *Corporation Tax Act* were reformed, many more companies would have performance-linked compensation to directors evaluated by ESG indicators.

Shareholder proposals, if approved by the requisite majority of votes, are binding on the corporate directors and officers. In Japan, a shareholder proposal that receives a majority of two-thirds or more of the votes of the shareholders present at the meeting is binding on directors.[263] Note that it is vote exercised by shareholders present and voting at the meeting; it does not include any unexercised votes. To amend the articles of incorporation, a special resolution by shareholders' meeting is necessary, which can be approved by the same majority, or the corporate articles can specify a higher threshold of votes required before the corporate articles can be revised.[264]

As discussed in part 5, amendments to the *Companies Act of Japan* were promulgated on 11 December 2019, including changes to the rules governing shareholders' meetings, virtual provision of meeting materials, and a restriction on the number of shareholder proposals. Only shareholders that hold at least 1 per cent of total votes (usually one unit of 100 shares) or 300 votes can make a shareholder proposal.[265] Pursuant to the amendments, they are now limited in the number of proposals that they can make each year.

Prior to the 2019 amendments, there had been instances of a single shareholder submitting more than 100 proposals, and the amendment is aimed at making governance more manageable. For example, in 2012, Nomura HD received over 100 proposals from one shareholder, and the other several companies have faced the same issues over the past 10 years.[266] It should not affect the ability to make a shareholder proposal related to managing climate-related risks, although the 1 per cent vote or 300 vote threshold can pose a barrier to shareholders with smaller investments to bring climate-related issues to the attention of the corporate board. The amendments will come into effect 1 March 2021, with some portions, such as providing shareholder meeting materials through the internet, coming into effect by June 2023.[267]

> Shareholders' Right to Propose
> Article 303 (1) Shareholders may demand that the directors include certain matters (limited to the matters on which such shareholders may exercise their votes. The same shall apply in the following paragraph) in the purpose of the shareholders meeting.

[261] *Corporation Tax Act,* Act No 34 of March 31, 1965, 法人税法 昭和 40 年 3 月 31 日法律第 34 号 amended by No 4 of March 31, 2017. English translation of Amendment of Act No. 23 of 2008 prior to the amendment by No 4 of March 31, 2017 is available at http://www.japaneselawtranslation.go.jp/law/detail_main?re=&vm=2&id=53. English translation of this paper is revised referring English translation of Amendment of Act No. 23 of 2008.
[262] *Corporation Tax Act,* article 34(3)(a).
[263] *Companies Act of Japan,* article 309 (2).
[264] *Ibid,* article 309 (2)(xi) and Chapter 5, article 466.
[265] *Ibid,* article 303(2). The shareholders have to have 1 per cent of votes or 300 votes. Usually one unit of 100 shares gives one vote to the shareholders, therefore the *Act* indicates number of votes (not number of shares). Listed companies are requested to make one unit by 100 shares by Tokyo Stock Exchange and/or other domestic stock exchanges. 'Standardization of Trading Unit', https://www.jpx.co.jp/english/equities/improvements/unit/.
[266] See 'Frustrated Shareholder Proposes Nomura 'Hunker Down'', *Wall Street Journal* (1 June 2012), https://www.wsj.com/articles/BL-JRTB-12184.
[267] Yamaguchi *et al, supra* note 70.

(2) Notwithstanding the provisions of the preceding paragraph, at a Company with Board of Directors, only shareholders having consecutively for the preceding six months or more (or, in cases where shorter period is prescribed in the articles of incorporation, such period or more) not less than one hundredth (1/100) (or, in cases where lesser proportion is prescribed in the articles of incorporation, such proportion) of the votes of all shareholders or not less than three hundred (or, in cases where lesser number is prescribed in the articles of incorporation, such number of) votes of all shareholders may demand the directors that the directors include certain matters in the purpose of the shareholders meeting. In such cases, that demand shall be submitted no later than eight weeks (or, in cases where shorter period is prescribed in the articles of incorporation, such period or more) prior to the day of the shareholders meeting.

APPENDIX II
RELEVANT PROVISIONS OF THE CORPORATE GOVERNANCE CODE

This appendix adds some detail to the discussion in part 4.3. Japan's Corporate Governance Code, published by Tokyo Stock Exchange in 2015, requires listed companies to address social, environmental and other sustainability issues positively and proactively.[268] The Corporate Governance Code is non-binding on companies, but it does strongly influence governance norms. Since climate-related financial risks and opportunities are part of the 'environmental' in ESG, the Code supports directors' efforts to effectively manage climate change impacts.

Principle 2.1 of the Code states that 'Guided by their position concerning social responsibility, companies should undertake their businesses in order to create value for all stakeholders while increasing corporate value over the mid- to long-term. To this end, companies should draft and maintain business principles that will become the basis for such activities.'[269] The board should view the establishment of corporate goals (business principles, etc) and the setting of strategic direction as one major aspect of its roles and responsibilities.[270]

Principle 4 of the Corporate Governance Code sets out the responsibilities of the Board:

> 4. Given its fiduciary responsibility and accountability to shareholders, in order to promote sustainable corporate growth and the increase of corporate value over the mid- to long-term and enhance earnings power and capital efficiency, the board should appropriately fulfill its roles and responsibilities, including:
>
> (1) setting the broad direction of corporate strategy;
> (2) establishing an environment where appropriate risk-taking by the senior management is supported; and
> (3) carrying out effective oversight of directors and the management (including *shikkoyaku* and so-called *shikkoyakuin*) from an independent and objective standpoint.
>
> Such roles and responsibilities should be equally and appropriately fulfilled regardless of the form of corporate organization – i.e., Company with *Kansayaku* Board (where a part of these roles and responsibilities are performed by *kansayaku* and the *kansayaku* board), Company with Three Committees (Nomination, Audit and Remuneration), or Company with Supervisory Committee.

Principle 4.5 of the Corporate Governance Code specifies that the fiduciary responsibilities of directors and *kansayaku* requires that they 'secure the appropriate cooperation with stakeholders and act in the interest of the company and the common interests of its shareholders.'[271]

The Corporate Governance Code also contains principles for independent directors, notwithstanding they currently they are not the norm, linking their activities to sustainable growth. It recommends:

> Principle 4.7 Roles and Responsibilities of Independent Directors
> Companies should make effective use of independent directors, taking into consideration the expectations listed below with respect to their roles and responsibilities:

[268] Corporate Governance Code, *supra* note 64.
[269] *Ibid* at 10.
[270] *Ibid*, Principle 4.1.
[271] *ibid*, Principle 4.5.

i) provision of advice on business policies and business improvement based on their knowledge and experience with the aim to promote sustainable corporate growth and increase corporate value over the mid- to long-term;
ii) monitoring of the management through important decision-making at the board including the appointment and dismissal of the senior management;
iii) monitoring of conflicts of interest between the company and the management or controlling shareholders; and
iv) appropriately representing the views of minority shareholders and other stakeholders in the boardroom from a standpoint independent of the management and controlling shareholders.

Principle 4.8 Effective Use of Independent Directors
Independent directors should fulfill their roles and responsibilities with the aim of contributing to sustainable growth of companies and increasing corporate value over the mid- to long-term. Companies should therefore appoint at least two independent directors that sufficiently have such qualities. Irrespective of the above, if a company believes it needs to appoint at least one-third of directors as independent directors based on a broad consideration of factors such as the industry, company size, business characteristics, organizational structure and circumstances surrounding the company, it should appoint a sufficient number of independent directors.

Since its early introduction, the Code has viewed directors as fiduciaries of shareholders and has been aimed at making directors' duty of care and duty of loyalty effective in practice by providing an important framework, as evidenced by the preamble of the 2009 Code. With respect to the Basic Principle 4, the current Corporate Governance Code states "…the reasonableness of the decision-making process at the time of decision is generally considered an important factor in determining whether or not the management and directors should owe personal liabilities for damages. The Code includes principles and practices that are expected to contribute to such a reasonable decision-making process…" The Code expects that it provides standards for a reasonable decision-making process in a lawsuit seeking a director's personal liabilities for damages.

The Corporate Governance Code has influenced the number of independent directors on publicly-listed company boards. Nicholas Benes has observed that the percentage of large Japanese corporations with independent director representation has expanded significantly since the Corporate Governance Code's launch, also reflecting pressure from external investors.[272] He reports that 80 per cent of companies listed on tier 1 level of the Tokyo Stock Exchange (TSE1) now have two or more independent directors on their boards, according to ascertainable criteria for 'independence', almost four times the percentage recorded prior to the Code.[273] Benes reports that for almost 23 per cent of TSE1-listed firms, independent directors make up one-third or more of the board.[274] However, he also points to continuing issues of the competence of boards, suggesting that investors will have to apply some pressure to have meaningful governance reform.[275]

[272] Nick Benes, 'Corporate governance in Japan now' https://ethicalboardroom.com/corporate-governance-in-japan-now/.
[273] *Ibid.*
[274] *Ibid.*
[275] *Ibid.*

APPENDIX III
DUTIES OF INSTITUTIONAL INVESTORS IN RESPECT OF CLIMATE-RELATED RISKS AND OPPORTUNITIES

The United Nations Principles for Responsible Investment (UN PRI) *Final Report on Fiduciary Obligation in the 21st Century* specifies that the fiduciary duties of investors require them to incorporate ESG issues into investment analysis and decision-making processes, consistent with their investment time horizons; to encourage high standards of ESG performance in the companies or other entities in which they invest; to understand and incorporate beneficiaries' and savers' sustainability-related preferences, regardless of whether these preferences are financially material; to support the stability and resilience of the financial system; and to report on how they have implemented these commitments.[276] Commitment to these UN PRI duties regarding responsible investment has grown to over 2,500 signatories, investing US$ 90 trillion.[277]

The Japan Financial Services Agency is the financial regulation oversight agency, 'responsible for ensuring stability of Japan's financial system, protection of depositors, insurance policyholders and securities investors, and smooth finance through such measures as planning and policymaking concerning the financial system, inspection and supervision of private sector financial institutions, and surveillance'.[278] The FSA has specified that fiduciary duties include the duties of prudence and loyalty, requiring institutional investors to avoid conflicts of interest and provide services and advice in the best interests of their beneficiaries.[279] Institutional investors need to consider the intergenerational impact of their investment decisions.[280]

Japan's 'Principles for Responsible Institutional Investors Stewardship Code' was revised effective 24 March 2020, setting out principles for best practice for institutional investors in fulfilling their stewardship responsibilities with regard for their clients, beneficiaries, and investee companies.[281] The amendment to the Stewardship Code emphasizes promoting sustainable growth and consideration of ESG factors when making investment decisions.[282]

The Stewardship Code emphasizes the need to monitor investee companies' governance, strategy, performance, capital structure, business risks, and opportunities, including arising from climate change, and to monitor and assess how the companies address them.[283] The Code specifies that a part of stewardship responsibility is purposeful dialogue with companies based on in-depth knowledge of companies, and consideration of medium- to long-term sustainability, including ESG factors consistent with their investment management strategies.

As of 30 April 2020, approximately 280 institutional investors have endorsed the Stewardship Code; and many institutional investors are now actively monitoring corporate governance.[284] A growing number are publishing their principles of corporate governance. While prior to 2017, engagement with

[276] UN PRI, *Final Report on Fiduciary Obligation in the 21st Century,* https://www.unpri.org/download?ac=9792.
[277] UN PRI, 'ESG incorporation is an investment norm', (2020), https://www.unpri.org/pri/fiduciary-duty-in-the-21st-century-final-report/4998.article.
[278] Japan Financial Services Agency, 'The Role of the FSA' (2020), https://www.fsa.go.jp/en/about/pamphlet_e.pdf.
[279] UN PRI and Baker Mackenzie, 'Recommendations of Task Force on Climate-related Financial Disclosures , review of local relevance JAPAN' at 7, https://www.unpri.org/download?ac=1406.
[280] Mizuno *et al, supra* note 36 at 1.
[281] Council of Experts on Japan's Stewardship Code, Principles for Responsible Institutional Investors ≪Japan's Stewardship Code≫ (24 March 2020), https://www.fsa.go.jp/en/refer/councils/stewardship/20200324/01.pdf.
[282] *Ibid*. It also and establishes a new principle regarding the provision of appropriate services to institutional investors by service providers, such as proxy voting advisors and investment consultants.
[283] *Ibid* at 10.
[284] *Ibid*.

investee companies tended to be conducted primarily by overseas investors (in 2017 around 30 per cent of tier one JPX equities were internationally owned), in the past three years Japanese asset managers have been building their stewardship capacity and commencing engagement with investee companies on climate and other ESG issues.[285]

The UN PRI observes that a growing number of Japanese institutional investors now view consideration of ESG factors when making investment decisions as an important part of fulfilling their fiduciary duty and accountability as investors.[286] They also understand the importance of reporting this process and its results to beneficiaries.[287] The UN PRI report on Japan notes that institutional investors in Japan are increasingly understanding and creating capacity to act upon the stewardship responsibilities within their fiduciary duties.[288] However, it also highlighted an important aspect of Japan's corporate governance:

> Central to engagement with Japanese corporations was an understanding of the culture and history of each corporation and taking the time to build the trust upon which effective engagement depended – an expectation highlighted in Principle 7 of the Stewardship Code.[289]
>
> . . .
>
> Our stakeholders consistently raised cross-shareholding or "allegiance shareholdings" as a critical issue in Japanese corporate governance, which could erode shareholders' ability to engage with corporations on ESG issues. Japanese corporations often view such arrangements as a natural and expected feature of the business environment. However, they result in very different accountability dynamics for Japanese corporations as these shareholdings can account for a significant slice of a corporation's shareholder base, though divided among many small holdings by corporations. Investors have several concerns about cross-shareholdings:
>
> - lack of transparency on the rationale for such holdings;
> - their effect on capital efficiency;
> - conflicts of interest;
> - dangers for "pure" minority shareholders;
> - anti-takeover effects;
> - emerging evidence that the size of cross-shareholding is negatively correlated with corporate performance.[290]

Thus the growing recognition by institutional investors globally that their fiduciary obligation includes considering how their portfolio investing is addressing climate-related financial risk is likely to result in an increasing number of Japanese institutional investors becoming active in oversight of how their investments are reducing their carbon footprint or carbon intensity or both. Many global investors now use ESG factors in financial reporting, as part of the financial statements and the management discussion and analysis (MD&A).

Effective climate governance is likely to increase as institutional investors press investee companies to decarbonize and develop sustainable business strategies.

[285] UN PRI, *supra* note 276 at 9-10.
[286] *Ibid* at 10.
[287] *Ibid* at 10.
[288] *Ibid* at 8.
[289] *Ibid* at 10.
[290] *Ibid* at 12.

資料３

DIRECTORS' DUTIES REGARDING CLIMATE CHANGE IN JAPAN - REPORT LAUNCH (W/ DR. JANIS SARRA)

DATE: Tuesday, February 23, 2021
TIME: 4:00 pm — 5:00 pm
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Japan's primary prudential regulator, the Bank of Japan, has acknowledged that climate change poses a systemic risk to the Japanese economy and financial system. There is now overwhelming scientific and financial evidence of the material impacts of climate change on businesses. Since climate change has been recognized by governments, courts, and investors as a material issue affecting the sustainability of almost all companies, corporate directors need to recognize their obligation to address climate-related risks and opportunities.

Directors in Japan have three primary duties, a duty of loyalty, a duty to be in compliance with all laws, regulations, and ordinances, and the company articles, and a duty of care. Directors' duties are set out in the Companies Act of Japan, the articles of incorporation, and the Civil Code. The obligation of directors to consider the implications of climate change risk is grounded in the duties each director owes to the corporation they serve. In their oversight of management of climate risks, directors must meet the objective standard of what a reasonably prudent person would do in comparable circumstances.

The report will be released in English and Japanese

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コーポレートガバナンス・コード

～会社の持続的な成長と中長期的な企業価値の向上のために～

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株式会社東京証券取引所

コーポレートガバナンス・コードについて

本コードにおいて、「コーポレートガバナンス」とは、会社が、株主をはじめ顧客・従業員・地域社会等の立場を踏まえた上で、透明・公正かつ迅速・果断な意思決定を行うための仕組みを意味する。

本コードは、実効的なコーポレートガバナンスの実現に資する主要な原則を取りまとめたものであり、これらが適切に実践されることは、それぞれの会社において持続的な成長と中長期的な企業価値の向上のための自律的な対応が図られることを通じて、会社、投資家、ひいては経済全体の発展にも寄与することとなるものと考えられる。

基本原則

【株主の権利・平等性の確保】

1．　上場会社は、株主の権利が実質的に確保されるよう適切な対応を行うとともに、株主がその権利を適切に行使することができる環境の整備を行うべきである。

　また、上場会社は、株主の実質的な平等性を確保すべきである。

　少数株主や外国人株主については、株主の権利の実質的な確保、権利行使に係る環境や実質的な平等性の確保に課題や懸念が生じやすい面があることから、十分に配慮を行うべきである。

【株主以外のステークホルダーとの適切な協働】

2．　上場会社は、会社の持続的な成長と中長期的な企業価値の創出は、従業員、顧客、取引先、債権者、地域社会をはじめとする様々なステークホルダーによるリソースの提供や貢献の結果であることを十分に認識し、これらのステークホルダーとの適切な協働に努めるべきである。

　取締役会・経営陣は、これらのステークホルダーの権利・立場や健全な事業活動倫理を尊重する企業文化・風土の醸成に向けてリーダーシップを発揮すべきである。

【適切な情報開示と透明性の確保】

3．　上場会社は、会社の財政状態・経営成績等の財務情報や、経営戦略・経営課題、リスクやガバナンスに係る情報等の非財務情報について、法令に基づく開示を適切に行うとともに、法令に基づく開示以外の情報提供にも主体的に取り組むべきである。

　その際、取締役会は、開示・提供される情報が株主との間で建設的な対話を行う上での基盤となることも踏まえ、そうした情報（とりわけ非財務情報）が、正確で利用者にとって分かりやすく、情報として有用性の高いものとなるようにすべきである。

【取締役会等の責務】

4．　上場会社の取締役会は、株主に対する受託者責任・説明責任を踏まえ、会社の持続的成長と中長期的な企業価値の向上を促し、収益力・資本効率等の改善を図るべく、

　(1)　企業戦略等の大きな方向性を示すこと

　(2)　経営陣幹部による適切なリスクテイクを支える環境整備を行うこと

　(3)　独立した客観的な立場から、経営陣（執行役及びいわゆる執行役員を含む）・取締役に対する実効性の高い監督を行うこと

をはじめとする役割・責務を適切に果たすべきである。

　こうした役割・責務は、監査役会設置会社（その役割・責務の一部は監査役及び監査役会が担うこととなる）、指名委員会等設置会社、監査等委員会設置会社など、いずれの機関設計を採用する場合にも、等しく適切に果たされるべきである。

【株主との対話】

5．　上場会社は、その持続的な成長と中長期的な企業価値の向上に資するため、株主総会の場以外においても、株主との間で建設的な対話を行うべきである。

　経営陣幹部・取締役（社外取締役を含む）は、こうした対話を通じて株主の声に耳を傾け、その関心・懸念に正当な関心を払うとともに、自らの経営方針を株主に分かりやすい形で明確に説明しその理解を得る努力を行い、株主を含むステークホルダーの立場に関するバランスのとれた理解と、そうした理解を踏まえた適切な対応に努めるべきである。

第１章　株主の権利・平等性の確保

【基本原則１】

上場会社は、株主の権利が実質的に確保されるよう適切な対応を行うとともに、株主がその権利を適切に行使することができる環境の整備を行うべきである。
また、上場会社は、株主の実質的な平等性を確保すべきである。
少数株主や外国人株主については、株主の権利の実質的な確保、権利行使に係る環境や実質的な平等性の確保に課題や懸念が生じやすい面があることから、十分に配慮を行うべきである。

考え方

上場会社には、株主を含む多様なステークホルダーが存在しており、こうしたステークホルダーとの適切な協働を欠いては、その持続的な成長を実現することは困難である。その際、資本提供者は重要な要であり、株主はコーポレートガバナンスの規律における主要な起点でもある。上場会社には、株主が有する様々な権利が実質的に確保されるよう、その円滑な行使に配慮することにより、株主との適切な協働を確保し、持続的な成長に向けた取組みに邁進することが求められる。

また、上場会社は、自らの株主を、その有する株式の内容及び数に応じて平等に取り扱う会社法上の義務を負っているところ、この点を実質的にも確保していることについて広く株主から信認を得ることは、資本提供者からの支持の基盤を強化することにも資するものである。

【原則１－１．株主の権利の確保】
上場会社は、株主総会における議決権をはじめとする株主の権利が実質的に確保されるよう、適切な対応を行うべきである。

補充原則

１－１①　取締役会は、株主総会において可決には至ったものの相当数の反対票が投じられた会社提案議案があったと認めるときは、反対の理由や反対票が多くなった原因の分析を行い、株主との対話その他の対応の要否について検討を行うべきである。

１－１②　上場会社は、総会決議事項の一部を取締役会に委任するよう株主総会に提案するに当たっては、自らの取締役会においてコーポレートガバナンスに関する役割・責務を十分に果たし得るような体制が整っているか否かを考慮すべきである。他方で、上場会社において、そうした体制がしっかりと整っていると判断する場合には、上記の提案を行うことが、経営判断の機動性・専門性の確保の観点から望ましい場合があることを考慮に入れるべきである。

１－１③　上場会社は、株主の権利の重要性を踏まえ、その権利行使を事実上妨げることのないよう配慮すべきである。とりわけ、少数株主にも認められている上場会社及びその役員に対する特別な権利（違法行為の差止めや代表訴訟提起に係る権利等）については、その権利行使の確保に課題や懸念が生じやすい面があることから、十分に配慮を行うべきである。

【原則１－２．株主総会における権利行使】
上場会社は、株主総会が株主との建設的な対話の場であることを認識し、株主の視点に立って、株主総会における権利行使に係る適切な環境整備を行うべきである。

補充原則

１－２①　上場会社は、株主総会において株主が適切な判断を行うことに資すると考えられる情報については、必要に応じ適確に提供すべきである。

１－２②　上場会社は、株主が総会議案の十分な検討期間を確保することができるよう、招集通知に記載する情報の正確性を担保しつつその早期発送に努めるべきであり、また、招集通知に記載する情報は、株主総会の招集に係る取締役会決議から招集通知を発送するまでの間に、TDnet や自社のウェブサイトにより電子的に公表すべきである。

１－２③　上場会社は、株主との建設的な対話の充実や、そのための正確な情報提供等の観点を考慮し、株主総会開催日をはじめとする株主総会関連の日程の適切な設定を行うべきである。

１－２④　上場会社は、自社の株主における機関投資家や海外投資家の比率等も踏まえ、議決権の電子行使を可能とするための環境作り（議決権電子行使プラットフォームの利用等）や招集通知の英訳を進めるべきである。
　特に、プライム市場上場会社は、少なくとも機関投資家向けに議決権電子行使プラットフォームを利用可能とすべきである。

１－２⑤　信託銀行等の名義で株式を保有する機関投資家等が、株主総会において、信託銀行等に代わって自ら議決権の行使等を行うことをあらかじめ希望する場合に対応するため、上場会社は、信託銀行等と協議しつつ検討を行うべきである。

【原則１－３．資本政策の基本的な方針】
**　上場会社は、資本政策の動向が株主の利益に重要な影響を与え得ることを踏まえ、資本政策の基本的な方針について説明を行うべきである。**

【原則１－４．政策保有株式】
**　上場会社が政策保有株式として上場株式を保有する場合には、政策保有株式の縮減に関する方針・考え方など、政策保有に関する方針を開示すべきである。また、毎年、取締役会で、個別の政策保有株式について、保有目的が適切か、保有に伴う便益やリスクが資本コストに見合っているか等を具体的に精査し、保有の適否を検証するとともに、そうした検証の内容について開示すべきである。**
**　上場会社は、政策保有株式に係る議決権の行使について、適切な対応を確保するための具体的な基準を策定・開示し、その基準に沿った対応を行うべきである。**

補充原則

１－４①　上場会社は、自社の株式を政策保有株式として保有している会社（政策保有株主）からその株式の売却等の意向が示された場合には、取引の縮減を示唆することなどにより、売却等を妨げるべきではない。

１－４②　上場会社は、政策保有株主との間で、取引の経済合理性を十分に検証しないまま取引を継続するなど、会社や株主共同の利益を害するような取引を行うべきではない。

【原則１－５．いわゆる買収防衛策】
**　買収防衛の効果をもたらすことを企図してとられる方策は、経営陣・取締役会の保身を目的とするものであってはならない。その導入・運用については、取締役会・監査役は、株主に対する受託者責任を全うする観点から、その必要性･合理性をしっかりと検討し、適正な手続を確保するとともに、株主に十分な説明を行うべきである。**

補充原則

１－５①　上場会社は、自社の株式が公開買付けに付された場合には、取締役会としての考え方（対抗提案があればその内容を含む）を明確に説明すべきであり、また、株主が公開買付けに応じて株式を手放す権利を不当に妨げる措置を講じるべきではない。

【原則１－６．株主の利益を害する可能性のある資本政策】
**　支配権の変動や大規模な希釈化をもたらす資本政策（増資、ＭＢＯ等を含む）については、既存株主を不当に害することのないよう、取締役会・監査役は、株主に対する受託者責任を全うする観点から、その必要性･合理性をしっかりと検討し、適正な手続を確保するとともに、株主に十分な説明を行うべきである。**

【原則１－７．関連当事者間の取引】
**　上場会社がその役員や主要株主等との取引（関連当事者間の取引）を行う場合には、そうした取引が会社や株主共同の利益を害することのないよう、また、そうした懸念を惹起することのないよう、取締役会は、あらかじめ、取引の重要性やその性質に応じた適切な手続を定めてその枠組みを開示するとともに、その手続を踏まえた監視（取引の承認を含む）を行うべきである。**

第２章　株主以外のステークホルダーとの適切な協働

【基本原則２】

上場会社は、会社の持続的な成長と中長期的な企業価値の創出は、従業員、顧客、取引先、債権者、地域社会をはじめとする様々なステークホルダーによるリソースの提供や貢献の結果であることを十分に認識し、これらのステークホルダーとの適切な協働に努めるべきである。

取締役会・経営陣は、これらのステークホルダーの権利・立場や健全な事業活動倫理を尊重する企業文化・風土の醸成に向けてリーダーシップを発揮すべきである。

考え方

上場会社には、株主以外にも重要なステークホルダーが数多く存在する。これらのステークホルダーには、従業員をはじめとする社内の関係者や、顧客・取引先・債権者等の社外の関係者、更には、地域社会のように会社の存続・活動の基盤をなす主体が含まれる。上場会社は、自らの持続的な成長と中長期的な企業価値の創出を達成するためには、これらのステークホルダーとの適切な協働が不可欠であることを十分に認識すべきである。

また、「持続可能な開発目標」（ＳＤＧｓ）が国連サミットで採択され、気候関連財務情報開示タスクフォース（ＴＣＦＤ）への賛同機関数が増加するなど、中長期的な企業価値の向上に向け、サステナビリティ（ＥＳＧ要素を含む中長期的な持続可能性）が重要な経営課題であるとの意識が高まっている。こうした中、我が国企業においては、サステナビリティ課題への積極的・能動的な対応を一層進めていくことが重要である。

上場会社が、こうした認識を踏まえて適切な対応を行うことは、社会・経済全体に利益を及ぼすとともに、その結果として、会社自身にも更に利益がもたらされる、という好循環の実現に資するものである。

【原則２－１．中長期的な企業価値向上の基礎となる経営理念の策定】

上場会社は、自らが担う社会的な責任についての考え方を踏まえ、様々なステークホルダーへの価値創造に配慮した経営を行いつつ中長期的な企業価値向上を図るべきであり、こうした活動の基礎となる経営理念を策定すべきである。

【原則２－２．会社の行動準則の策定・実践】

上場会社は、ステークホルダーとの適切な協働やその利益の尊重、健全な事業活動倫理などについて、会社としての価値観を示しその構成員が従うべき行動準則を定め、実践すべきである。取締役会は、行動準則の策定・改訂の責務を担い、これが国内外の事業活動の第一線にまで広く浸透し、遵守されるようにすべきである。

補充原則

２－２①　取締役会は、行動準則が広く実践されているか否かについて、適宜または定期的にレビューを行うべきである。その際には、実質的に行動準則の趣旨・精神を尊重する企業文化・風土が存在するか否かに重点を置くべきであり、形式的な遵守確認に終始すべきではない。

【原則２－３．社会・環境問題をはじめとするサステナビリティを巡る課題】

上場会社は、社会・環境問題をはじめとするサステナビリティを巡る課題について、適切な対応を行うべきである。

補充原則

２－３①　取締役会は、気候変動などの地球環境問題への配慮、人権の尊重、従業員の健康・労働環境への配慮や公正・適切な処遇、取引先との公正・適正な取引、自然災害等への危機管理など、サステナビリティを巡る課題への対応は、リスクの減少のみならず収益機会にもつながる重要な経営課題であると認識し、中長期的な企業価値の向上の観点から、これらの課題に積極的・能動的に取り組むよう検討を深めるべきである。

【原則２－４．女性の活躍促進を含む社内の多様性の確保】

上場会社は、社内に異なる経験・技能・属性を反映した多様な視点や価値観が存在することは、会社の持続的な成長を確保する上での強みとなり得る、との認識に立ち、社内における女性の活躍促進を含む多様性の確保を推進すべきである。

補充原則

２－４①　上場会社は、女性・外国人・中途採用者の管理職への登用等、中核人材の登用等における多様性の確保についての考え方と自主的かつ測定可能な目標を示すとともに、その状況を開示すべきである。
　また、中長期的な企業価値の向上に向けた人材戦略の重要性に鑑み、多様性の確保に向けた人材育成方針と社内環境整備方針をその実施状況と併せて開示すべきである。

【原則２－５．内部通報】
上場会社は、その従業員等が、不利益を被る危険を懸念することなく、違法または不適切な行為・情報開示に関する情報や真摯な疑念を伝えることができるよう、また、伝えられた情報や疑念が客観的に検証され適切に活用されるよう、内部通報に係る適切な体制整備を行うべきである。取締役会は、こうした体制整備を実現する責務を負うとともに、その運用状況を監督すべきである。

補充原則

２－５①　上場会社は、内部通報に係る体制整備の一環として、経営陣から独立した窓口の設置（例えば、社外取締役と監査役による合議体を窓口とする等）を行うべきであり、また、情報提供者の秘匿と不利益取扱の禁止に関する規律を整備すべきである。

【原則２－６．企業年金のアセットオーナーとしての機能発揮】
上場会社は、企業年金の積立金の運用が、従業員の安定的な資産形成に加えて自らの財政状態にも影響を与えることを踏まえ、企業年金が運用（運用機関に対するモニタリングなどのスチュワードシップ活動を含む）の専門性を高めてアセットオーナーとして期待される機能を発揮できるよう、運用に当たる適切な資質を持った人材の計画的な登用・配置などの人事面や運営面における取組みを行うとともに、そうした取組みの内容を開示すべきである。その際、上場会社は、企業年金の受益者と会社との間に生じ得る利益相反が適切に管理されるようにすべきである。

第３章　適切な情報開示と透明性の確保

【基本原則３】

上場会社は、会社の財政状態・経営成績等の財務情報や、経営戦略・経営課題、リスクやガバナンスに係る情報等の非財務情報について、法令に基づく開示を適切に行うとともに、法令に基づく開示以外の情報提供にも主体的に取り組むべきである。
その際、取締役会は、開示・提供される情報が株主との間で建設的な対話を行う上での基盤となることも踏まえ、そうした情報（とりわけ非財務情報）が、正確で利用者にとって分かりやすく、情報として有用性の高いものとなるようにすべきである。

考え方

上場会社には、様々な情報を開示することが求められている。これらの情報が法令に基づき適時適切に開示されることは、投資家保護や資本市場の信頼性確保の観点から不可欠の要請であり、取締役会・監査役・監査役会・外部会計監査人は、この点に関し財務情報に係る内部統制体制の適切な整備をはじめとする重要な責務を負っている。
また、上場会社は、法令に基づく開示以外の情報提供にも主体的に取り組むべきである。
更に、我が国の上場会社による情報開示は、計表等については、様式・作成要領などが詳細に定められており比較可能性に優れている一方で、会社の財政状態、経営戦略、リスク、ガバナンスや社会・環境問題に関する事項（いわゆるＥＳＧ要素）などについて説明等を行ういわゆる非財務情報を巡っては、ひな型的な記述や具体性を欠く記述となっており付加価値に乏しい場合が少なくない、との指摘もある。取締役会は、こうした情報を含め、開示・提供される情報が可能な限り利用者にとって有益な記載となるよう積極的に関与を行う必要がある。
法令に基づく開示であれそれ以外の場合であれ、適切な情報の開示・提供は、上場会社の外側にいて情報の非対称性の下におかれている株主等のステークホルダーと認識を共有し、その理解を得るための有力な手段となり得るものであり、「『責任ある機関投資家』の諸原則《日本版スチュワードシップ・コード》」を踏まえた建設的な対話にも資するものである。

【原則３－１．情報開示の充実】

上場会社は、法令に基づく開示を適切に行うことに加え、会社の意思決定の透明性・公正性を確保し、実効的なコーポレートガバナンスを実現するとの観点から、（本コードの各原則において開示を求めている事項のほか、）以下の事項について開示し、主体的な情報発信を行うべきである。

（ⅰ）会社の目指すところ（経営理念等）や経営戦略、経営計画

（ⅱ）本コードのそれぞれの原則を踏まえた、コーポレートガバナンスに関する基本的な考え方と基本方針

（ⅲ）取締役会が経営陣幹部・取締役の報酬を決定するに当たっての方針と手続

（ⅳ）取締役会が経営陣幹部の選解任と取締役・監査役候補の指名を行うに当たっての方針と手続

（ⅴ）取締役会が上記（ⅳ）を踏まえて経営陣幹部の選解任と取締役・監査役候補の指名を行う際の、個々の選解任・指名についての説明

補充原則

３－１①　上記の情報の開示（法令に基づく開示を含む）に当たって、取締役会は、ひな型的な記述や具体性を欠く記述を避け、利用者にとって付加価値の高い記載となるようにすべきである。

３－１②　上場会社は、自社の株主における海外投資家等の比率も踏まえ、合理的な範囲において、英語での情報の開示・提供を進めるべきである。

特に、プライム市場上場会社は、開示書類のうち必要とされる情報について、英語での開示・提供を行うべきである。

３－１③　上場会社は、経営戦略の開示に当たって、自社のサステナビリティについての取組みを適切に開示すべきである。また、人的資本や知的財産への投資等についても、自社の経営戦略・経営課題との整合性を意識しつつ分かりやすく具体的に情報を開示・提供すべきである。

特に、プライム市場上場会社は、気候変動に係るリスク及び収益機会が自社の事業活動や収益等に与える影響について、必要なデータの収集と分析を行い、国際的に確立された開示の枠組みであるＴＣＦＤまたはそれと同等の枠組みに基づく開示の質と量の充実を進めるべきである。

【原則３－２．外部会計監査人】

外部会計監査人及び上場会社は、外部会計監査人が株主・投資家に対して責務を負っていることを認識し、適正な監査の確保に向けて適切な対応を行うべきである。

補充原則

３－２①　監査役会は、少なくとも下記の対応を行うべきである。

（ⅰ）　外部会計監査人候補を適切に選定し外部会計監査人を適切に評価するための基準の策定

（ⅱ）　外部会計監査人に求められる独立性と専門性を有しているか否かについての確認

３－２②　取締役会及び監査役会は、少なくとも下記の対応を行うべきである。

（ⅰ）　高品質な監査を可能とする十分な監査時間の確保

（ⅱ）　外部会計監査人からＣＥＯ・ＣＦＯ等の経営陣幹部へのアクセス（面談等）の確保

（ⅲ）　外部会計監査人と監査役（監査役会への出席を含む）、内部監査部門や社外取締役との十分な連携の確保

（ⅳ）　外部会計監査人が不正を発見し適切な対応を求めた場合や、不備・問題点を指摘した場合の会社側の対応体制の確立

第４章　取締役会等の責務

【基本原則４】

上場会社の取締役会は、株主に対する受託者責任・説明責任を踏まえ、会社の持続的成長と中長期的な企業価値の向上を促し、収益力・資本効率等の改善を図るべく、
(1) 企業戦略等の大きな方向性を示すこと
(2) 経営陣幹部による適切なリスクテイクを支える環境整備を行うこと
(3) 独立した客観的な立場から、経営陣（執行役及びいわゆる執行役員を含む）・取締役に対する実効性の高い監督を行うこと
をはじめとする役割・責務を適切に果たすべきである。
こうした役割・責務は、監査役会設置会社（その役割・責務の一部は監査役及び監査役会が担うこととなる）、指名委員会等設置会社、監査等委員会設置会社など、いずれの機関設計を採用する場合にも、等しく適切に果たされるべきである。

考え方

上場会社は、通常、会社法が規定する機関設計のうち主要な３種類（監査役会設置会社、指名委員会等設置会社、監査等委員会設置会社）のいずれかを選択することとされている。前者（監査役会設置会社）は、取締役会と監査役・監査役会に統治機能を担わせる我が国独自の制度である。その制度では、監査役は、取締役・経営陣等の職務執行の監査を行うこととされており、法律に基づく調査権限が付与されている。また、独立性と高度な情報収集能力の双方を確保すべく、監査役（株主総会で選任）の半数以上は社外監査役とし、かつ常勤の監査役を置くこととされている。後者の２つは、取締役会に委員会を設置して一定の役割を担わせることにより監督機能の強化を目指すものであるという点において、諸外国にも類例が見られる制度である。上記の３種類の機関設計のいずれを採用する場合でも、重要なことは、創意工夫を施すことによりそれぞれの機関の機能を実質的かつ十分に発揮させることである。

また、本コードを策定する大きな目的の一つは、上場会社による透明・公正かつ迅速・果断な意思決定を促すことにあるが、上場会社の意思決定のうちには、外部環境の変化その他の事情により、結果として会社に損害を生じさせることとなるものが無いとは言い切れない。その場合、経営陣・取締役が損害賠償責任を負うか否かの判断に際しては、一般的に、その意思決定の時点における意思決定過程の合理性が重要な考慮要素の一つとなるものと考えられるが、本コードには、ここでいう意思決定過程の合理性を担保することに寄与すると考えられる内容が含まれており、本コードは、上場会社の透明・公正かつ迅速・果断な意思決定を促す効果を持つこととなるものと期待している。

そして、支配株主は、会社及び株主共同の利益を尊重し、少数株主を不公正に取り扱ってはならないのであって、支配株主を有する上場会社には、少数株主の利益を保護するためのガバナンス体制の整備が求められる。

【原則４－１．取締役会の役割・責務(1)】
取締役会は、会社の目指すところ（経営理念等）を確立し、戦略的な方向付けを行うことを主要な役割・責務の一つと捉え、具体的な経営戦略や経営計画等について建設的な議論を行うべきであり、重要な業務執行の決定を行う場合には、上記の戦略的な方向付けを踏まえるべきである。

補充原則

４－１①　取締役会は、取締役会自身として何を判断・決定し、何を経営陣に委ねるのかに関連して、経営陣に対する委任の範囲を明確に定め、その概要を開示すべきである。

４－１②　取締役会・経営陣幹部は、中期経営計画も株主に対するコミットメントの一つであるとの認識に立ち、その実現に向けて最善の努力を行うべきである。仮に、中期経営計画が目標未達に終わった場合には、その原因や自社が行った対応の内容を十分に分析し、株主に説明を行うとともに、その分析を次期以降の計画に反映させるべきである。

４－１③　取締役会は、会社の目指すところ（経営理念等）や具体的な経営戦略を踏まえ、最高経営責任者（ＣＥＯ）等の後継者計画（プランニング）の策定・運用に主体的に関与するとともに、後継者候補の育成が十分な時間と資源をかけて計画的に行われていくよう、適切に監督を行うべきである。

【原則４－２．取締役会の役割・責務(2)】
取締役会は、経営陣幹部による適切なリスクテイクを支える環境整備を行うことを主要な役割・責務の一つと捉え、経営陣からの健全な企業家精神に基づく提案を歓迎しつつ、説明責任の確保に向けて、そうした提案について独立した客観的な立場において多角的かつ十分な検討を行うとともに、承認した提案が実行される際には、経営陣幹部の迅速・果断な意思決定を支援すべきである。
また、経営陣の報酬については、中長期的な会社の業績や潜在的リスクを反映させ、健全な企業家精神の発揮に資するようなインセンティブ付けを行うべきである。

補充原則

４－２①　取締役会は、経営陣の報酬が持続的な成長に向けた健全なインセンティブとして機能するよう、客観性・透明性ある手続に従い、報酬制度を設計し、具体的な報酬額を決定すべきである。その際、中長期的な業績と連動する報酬の割合や、現金報酬と自社株報酬との割合を適切に設定すべきである。

４－２②　取締役会は、中長期的な企業価値の向上の観点から、自社のサステナビリティを巡る取組みについて基本的な方針を策定すべきである。

また、人的資本・知的財産への投資等の重要性に鑑み、これらをはじめとする経営資源の配分や、事業ポートフォリオに関する戦略の実行が、企業の持続的な成長に資するよう、実効的に監督を行うべきである。

【原則４－３．取締役会の役割・責務(3)】

取締役会は、独立した客観的な立場から、経営陣・取締役に対する実効性の高い監督を行うことを主要な役割・責務の一つと捉え、適切に会社の業績等の評価を行い、その評価を経営陣幹部の人事に適切に反映すべきである。

また、取締役会は、適時かつ正確な情報開示が行われるよう監督を行うとともに、内部統制やリスク管理体制を適切に整備すべきである。

更に、取締役会は、経営陣・支配株主等の関連当事者と会社との間に生じ得る利益相反を適切に管理すべきである。

補充原則

４－３①　取締役会は、経営陣幹部の選任や解任について、会社の業績等の評価を踏まえ、公正かつ透明性の高い手続に従い、適切に実行すべきである。

４－３②　取締役会は、ＣＥＯの選解任は、会社における最も重要な戦略的意思決定であることを踏まえ、客観性・適時性・透明性ある手続に従い、十分な時間と資源をかけて、資質を備えたＣＥＯを選任すべきである。

４－３③　取締役会は、会社の業績等の適切な評価を踏まえ、ＣＥＯがその機能を十分発揮していないと認められる場合に、ＣＥＯを解任するための客観性・適時性・透明性ある手続を確立すべきである。

４－３④　内部統制や先を見越した全社的リスク管理体制の整備は、適切なコンプライアンスの確保とリスクテイクの裏付けとなり得るものであり、取締役会はグループ全体を含めたこれらの体制を適切に構築し、内部監査部門を活用しつつ、その運用状況を監督すべきである。

【原則４－４．監査役及び監査役会の役割・責務】

監査役及び監査役会は、取締役の職務の執行の監査、監査役・外部会計監査人の選解任や監査報酬に係る権限の行使などの役割・責務を果たすに当たって、株主に対する受託者責任を踏まえ、独立した客観的な立場において適切な判断を行うべきである。

また、監査役及び監査役会に期待される重要な役割・責務には、業務監査・会計監査をはじめとするいわば「守りの機能」があるが、こうした機能を含め、その役割・責務を十分に果たすためには、自らの守備範囲を過度に狭く捉えることは適切でなく、能動的・積極的に権限を行使し、取締役会においてあるいは経営陣に対して適切に意見を述べるべきである。

補充原則

４－４①　監査役会は、会社法により、その半数以上を社外監査役とすること及び常勤の監査役を置くことの双方が求められていることを踏まえ、その役割・責務を十分に果たすとの観点から、前者に由来する強固な独立性と、後者が保有する高度な情報収集力とを有機的に組み合わせて実効性を高めるべきである。また、監査役または監査役会は、社外取締役が、その独立性に影響を受けることなく情報収集力の強化を図ることができるよう、社外取締役との連携を確保すべきである。

【原則４－５．取締役・監査役等の受託者責任】

上場会社の取締役・監査役及び経営陣は、それぞれの株主に対する受託者責任を認識し、ステークホルダーとの適切な協働を確保しつつ、会社や株主共同の利益のために行動すべきである。

【原則４－６．経営の監督と執行】

上場会社は、取締役会による独立かつ客観的な経営の監督の実効性を確保すべく、業務の執行には携わらない、業務の執行と一定の距離を置く取締役の活用について検討すべきである。

【原則４－７．独立社外取締役の役割・責務】

上場会社は、独立社外取締役には、特に以下の役割・責務を果たすことが期待されることに留意しつつ、その有効な活用を図るべきである。

（ⅰ）経営の方針や経営改善について、自らの知見に基づき、会社の持続的な成長を促し中長期的な企業価値の向上を図る、との観点からの助言を行うこと

（ⅱ）経営陣幹部の選解任その他の取締役会の重要な意思決定を通じ、経営の監督を行うこと

（ⅲ）会社と経営陣・支配株主等との間の利益相反を監督すること

（ⅳ）経営陣・支配株主から独立した立場で、少数株主をはじめとするステークホルダーの意見を取締役会に適切に反映させること

【原則４－８．独立社外取締役の有効な活用】

独立社外取締役は会社の持続的な成長と中長期的な企業価値の向上に寄与するように役割・責務を果たすべきであり、プライム市場上場会社はそのような資質を十分に備えた独立社外取締役を少なくとも３分の１（その他の市場の上場会社においては２名）以上選任すべきである。

また、上記にかかわらず、業種・規模・事業特性・機関設計・会社をとりまく環境等を総合的に勘案して、過半数の独立社外取締役を選任することが必要と考えるプライム市場上場会社（その他の市場の上場会社においては少なくとも３分の１以上の独立社外取締役を選任することが必要と考える上場会社）は、十分な人数の独立社外取締役を選任すべきである。

補充原則

４－８①　独立社外取締役は、取締役会における議論に積極的に貢献するとの観点から、例えば、独立社外者のみを構成員とする会合を定期的に開催するなど、独立した客観的な立場に基づく情報交換・認識共有を図るべきである。

４－８②　独立社外取締役は、例えば、互選により「筆頭独立社外取締役」を決定することなどにより、経営陣との連絡・調整や監査役または監査役会との連携に係る体制整備を図るべきである。

４－８③　支配株主を有する上場会社は、取締役会において支配株主からの独立性を有する独立社外取締役を少なくとも３分の１以上（プライム市場上場会社においては過半数）選任するか、または支配株主と少数株主との利益が相反する重要な取引・行為について審議・検討を行う、独立社外取締役を含む独立性を有する者で構成された特別委員会を設置すべきである。

【原則４－９．独立社外取締役の独立性判断基準及び資質】

取締役会は、金融商品取引所が定める独立性基準を踏まえ、独立社外取締役となる者の独立性をその実質面において担保することに主眼を置いた独立性判断基準を策定・開示すべきである。また、取締役会は、取締役会における率直・活発で建設的な検討への貢献が期待できる人物を独立社外取締役の候補者として選定するよう努めるべきである。

【原則４－10．任意の仕組みの活用】

上場会社は、会社法が定める会社の機関設計のうち会社の特性に応じて最も適切な形態を採用するに当たり、必要に応じて任意の仕組みを活用することにより、統治機能の更なる充実を図るべきである。

補充原則

４－10①　上場会社が監査役会設置会社または監査等委員会設置会社であって、独立社外取締役が取締役会の過半数に達していない場合には、経営陣幹部・取締役の指名（後継者計画を含む）・報酬などに係る取締役会の機能の独立性・客観性と説明責任を強化するため、取締役会の下に独立社外取締役を主要な構成員とする独立した指名委員会・報酬委員会を設置することにより、指名や報酬などの特に重要な事項に関する検討に当たり、ジェンダー等の多様性やスキルの観点を含め、これらの委員会の適切な関与・助言を得るべきである。

特に、プライム市場上場会社は、各委員会の構成員の過半数を独立社外取締役とすることを基本とし、その委員会構成の独立性に関する考え方・権限・役割等を開示すべきである。

【原則４－11．取締役会・監査役会の実効性確保のための前提条件】

取締役会は、その役割・責務を実効的に果たすための知識・経験・能力を全体としてバランス良く備え、ジェンダーや国際性、職歴、年齢の面を含む多様性と適正規模を両立させる形で構成されるべきである。また、監査役には、適切な経験・能力及び必要な財務・会計・法務に関する知識を有する者が選任されるべきであり、特に、財務・会計に関する十分な知見を有している者が１名以上選任されるべきである。

取締役会は、取締役会全体としての実効性に関する分析・評価を行うことなどにより、その機能の向上を図るべきである。

補充原則

４－11①　取締役会は、経営戦略に照らして自らが備えるべきスキル等を特定した上で、取締役会の全体としての知識・経験・能力のバランス、多様性及び規模に関する考え方を定め、各取締役の知識・経験・能力等を一覧化したいわゆるスキル・マトリックスをはじめ、経営環境や事業特性等に応じた適切な形で取締役の有するスキル等の組み合わせを取締役の選任に関する方針・手続と併せて開示すべきである。その際、独立社外取締役には、他社での経営経験を有する者を含めるべきである。

４－11②　社外取締役・社外監査役をはじめ、取締役・監査役は、その役割・責務を適切に果たすために必要となる時間・労力を取締役・監査役の業務に振り向けるべきである。こうした観点から、例えば、取締役・監査役が他の上場会社の役員を兼任する場合には、その数は合理的な範囲にとどめるべきであり、上場会社は、その兼任状況を毎年開示すべきである。

４－11③　取締役会は、毎年、各取締役の自己評価なども参考にしつつ、取締役会全体の実効性について分析・評価を行い、その結果の概要を開示すべきである。

【原則４－12. 取締役会における審議の活性化】
取締役会は、社外取締役による問題提起を含め自由闊達で建設的な議論・意見交換を尊ぶ気風の醸成に努めるべきである。

補充原則

４－12①　取締役会は、会議運営に関する下記の取扱いを確保しつつ、その審議の活性化を図るべきである。

（ⅰ）　取締役会の資料が、会日に十分に先立って配布されるようにすること

（ⅱ）　取締役会の資料以外にも、必要に応じ、会社から取締役に対して十分な情報が（適切な場合には、要点を把握しやすいように整理・分析された形で）提供されるようにすること

（ⅲ）　年間の取締役会開催スケジュールや予想される審議事項について決定しておくこと

（ⅳ）　審議項目数や開催頻度を適切に設定すること

（ⅴ）　審議時間を十分に確保すること

【原則４－13. 情報入手と支援体制】
取締役・監査役は、その役割・責務を実効的に果たすために、能動的に情報を入手すべきであり、必要に応じ、会社に対して追加の情報提供を求めるべきである。
また、上場会社は、人員面を含む取締役・監査役の支援体制を整えるべきである。
取締役会・監査役会は、各取締役・監査役が求める情報の円滑な提供が確保されているかどうかを確認すべきである。

補充原則

４－13①　社外取締役を含む取締役は、透明・公正かつ迅速・果断な会社の意思決定に資するとの観点から、必要と考える場合には、会社に対して追加の情報提供を求めるべきである。また、社外監査役を含む監査役は、法令に基づく調査権限を行使することを含め、適切に情報入手を行うべきである。

４－13②　取締役・監査役は、必要と考える場合には、会社の費用において外部の専門家の助言を得ることも考慮すべきである。

４－13③　上場会社は、取締役会及び監査役会の機能発揮に向け、内部監査部門がこれらに対しても適切に直接報告を行う仕組みを構築すること等により、内部監査部門と取締役・監査役との連携を確保すべきである。また、上場会社は、例えば、社外取締役・社外監査役の指示を受けて会社の情報を適確に提供できるよう社内との連絡・調整にあたる者の選任など、社外取締役や社外監査役に必要な情報を適確に提供するための工夫を行うべきである。

【原則４－14. 取締役・監査役のトレーニング】
新任者をはじめとする取締役・監査役は、上場会社の重要な統治機関の一翼を担う者として期待される役割・責務を適切に果たすため、その役割・責務に係る理解を深めるとともに、必要な知識の習得や適切な更新等の研鑽に努めるべきである。このため、上場会社は、個々の取締役・監査役に適合したトレーニングの機会の提供・斡旋やその費用の支援を行うべきであり、取締役会は、こうした対応が適切にとられているか否かを確認すべきである。

補充原則

４－14①　社外取締役・社外監査役を含む取締役・監査役は、就任の際には、会社の事業・財務・組織等に関する必要な知識を取得し、取締役・監査役に求められる役割と責務（法的責任を含む）を十分に理解する機会を得るべきであり、就任後においても、必要に応じ、これらを継続的に更新する機会を得るべきである。

４－14②　上場会社は、取締役・監査役に対するトレーニングの方針について開示を行うべきである。

第５章　株主との対話

【基本原則５】

上場会社は、その持続的な成長と中長期的な企業価値の向上に資するため、株主総会の場以外においても、株主との間で建設的な対話を行うべきである。
経営陣幹部・取締役（社外取締役を含む）は、こうした対話を通じて株主の声に耳を傾け、その関心・懸念に正当な関心を払うとともに、自らの経営方針を株主に分かりやすい形で明確に説明しその理解を得る努力を行い、株主を含むステークホルダーの立場に関するバランスのとれた理解と、そうした理解を踏まえた適切な対応に努めるべきである。

考え方

「『責任ある機関投資家』の諸原則《日本版スチュワードシップ・コード》」の策定を受け、機関投資家には、投資先企業やその事業環境等に関する深い理解に基づく建設的な「目的を持った対話」（エンゲージメント）を行うことが求められている。
上場会社にとっても、株主と平素から対話を行い、具体的な経営戦略や経営計画などに対する理解を得るとともに懸念があれば適切に対応を講じることは、経営の正統性の基盤を強化し、持続的な成長に向けた取組みに邁進する上で極めて有益である。また、一般に、上場会社の経営陣・取締役は、従業員・取引先・金融機関とは日常的に接触し、その意見に触れる機会には恵まれているが、これらはいずれも賃金債権、貸付債権等の債権者であり、株主と接する機会は限られている。経営陣幹部・取締役が、株主との対話を通じてその声に耳を傾けることは、資本提供者の目線からの経営分析や意見を吸収し、持続的な成長に向けた健全な企業家精神を喚起する機会を得る、ということも意味する。

【原則５－１．株主との建設的な対話に関する方針】

上場会社は、株主からの対話（面談）の申込みに対しては、会社の持続的な成長と中長期的な企業価値の向上に資するよう、合理的な範囲で前向きに対応すべきである。取締役会は、株主との建設的な対話を促進するための体制整備・取組みに関する方針を検討・承認し、開示すべきである。

補充原則

５－１①　株主との実際の対話（面談）の対応者については、株主の希望と面談の主な関心事項も踏まえた上で、合理的な範囲で、経営陣幹部、社外取締役を含む取締役または監査役が面談に臨むことを基本とすべきである。

５－１②　株主との建設的な対話を促進するための方針には、少なくとも以下の点を記載すべきである。

（ⅰ）　株主との対話全般について、下記（ⅱ）～（ⅴ）に記載する事項を含めその統括を行い、建設的な対話が実現するように目配りを行う経営陣または取締役の指定

（ⅱ）　対話を補助する社内のＩＲ担当、経営企画、総務、財務、経理、法務部門等の有機的な連携のための方策

（ⅲ）　個別面談以外の対話の手段（例えば、投資家説明会やＩＲ活動）の充実に関する取組み

（ⅳ）　対話において把握された株主の意見・懸念の経営陣幹部や取締役会に対する適切かつ効果的なフィードバックのための方策

（ⅴ）　対話に際してのインサイダー情報の管理に関する方策

５－１③　上場会社は、必要に応じ、自らの株主構造の把握に努めるべきであり、株主も、こうした把握作業にできる限り協力することが望ましい。

【原則５－２．経営戦略や経営計画の策定・公表】

経営戦略や経営計画の策定・公表に当たっては、自社の資本コストを的確に把握した上で、収益計画や資本政策の基本的な方針を示すとともに、収益力・資本効率等に関する目標を提示し、その実現のために、事業ポートフォリオの見直しや、設備投資・研究開発投資・人的資本への投資等を含む経営資源の配分等に関し具体的に何を実行するのかについて、株主に分かりやすい言葉・論理で明確に説明を行うべきである。

補充原則

５－２①　上場会社は、経営戦略等の策定・公表に当たっては、取締役会において決定された事業ポートフォリオに関する基本的な方針や事業ポートフォリオの見直しの状況について分かりやすく示すべきである。

金融商品取引法研究会名簿

（令和３年７月27日現在）

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〃	島崎　征夫	金融庁企画市場局市場課長
〃	大津　英嗣	野村ホールディングスグループ法務部長
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〃	森　正孝	ＳＭＢＣ日興証券法務部長
〃	田中　秀樹	みずほ証券法務部長
〃	窪　久子	三菱ＵＦＪモルガン・スタンレー証券法務部長
〃	島村　昌征	日本証券業協会常務執行役政策本部共同本部長
〃	松本　昌男	日本証券業協会自主規制本部長
〃	横田　裕	日本証券業協会自主規制本部自主規制企画部長
〃	塚崎　由寛	日本取引所グループ総務部法務グループ課長
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〃（幹事）	石川　真衣	日本証券経済研究所研究員

（敬称略）

［参考］　既に公表した「金融商品取引法研究会（証券取引法研究会）研究記録」

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報告者　山下友信東京大学教授

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松尾直彦金融庁総務企画局
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―組合型ファンドを中心に―」
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