Designing a New Framework to Regulate Hostile Takeovers in a Changing Japan

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We received valuable comments on earlier drafts from Jennifer Hill, Zenichi Shishido, Gen Goto and participants in the inaugural annual conference of the Asian Corporate Law Forum, Singapore, April 23, 2024 and from the participants in a presentation at the Financial Services Agency, Government of Japan, Tokyo, May 13, 2023.. The views expressed herein are solely the personal opinions of the authors.

Abstract

This Article reexamines the existing theoretical framework of hostile takeover regulation, with the goal of providing greater analytical flexibility to aid in the development of an appropriate takeover regime for a changing Japan and other countries. Adoption of a revised takeover regime can contribute to Japan's finally achieving its basic goal for the last decade—a pivot to sustained economic growth. The recent emphasis in Japan on innovation, productivity and capital efficiency, a stock market rally that has drawn the interest of foreign investors, ongoing corporate governance reforms, a new burst of hostile takeover cases since 2021, and significant revisions to M&A best practice guidelines may provide a new opportunity to reach a long-sought "tipping point." Supported by a more welcoming attitude toward hostile takeovers, the old paradigm of "fortress Japan" is in the process of being supplanted by a new "market-oriented Japan." The above changes both create a greater need for effective takeover regulation and a new opportunity for rising institutional players to assume a greater role. Accordingly, there is a new urgency to reconsider both the theory and practice of Japan's approach to the regulation of hostile takeovers, in order to update the current framework in response to changing conditions and to make it a regime that is commensurate with Japan's important position in global business and financial markets. Research to date has generally emphasized the contrasting models of a shareholder-oriented UK system and a board-oriented US regime. But in both cases a single "subordinate lawmaker," the takeover panel in the UK and Delaware courts in the US, makes the rules and enforces them. Under this analysis, Japan has a mixed and incomplete system of regulation with competing subordinate lawmakers. We utilize Australia as a "new" point of reference in the theoretical framework for hostile takeover regulation and institutions, one which is "in-between" the US and the UK since Australia separates the rulemaking and enforcement functions and has a takeover panel with substantially limited authority and activities compared to the UK. We discern three basic roles in a framework for takeover regulation: (1) a "Rule-maker," (2) a "Bid Decision-maker," and (3) an "Umpire" (both adjudicator and propagator of standards of conduct and best practice norms). Applying this revised framework to Japan, we find that, although all relevant institutional players have improved their capabilities, the strength of shareholders has increased substantially more than that of courts and independent directors. Thus, the main weakness in the Japanese system is having the courts as the primary Umpire. Our main recommendation is that Japan consider an Australian-style, limited takeover panel for its Umpire, together with a separate Rule-maker. We hope that our analysis will stimulate further research and discussion on a topic that is of renewed importance in Japan and elsewhere.

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ABSTRACT

This Article reexamines the existing theoretical framework of hostile takeover regulation, with the goal of providing greater analytical flexibility to aid in the development of an appropriate takeover regime for a changing Japan and other countries. Adoption of a revised takeover regime can contribute to Japan's finally achieving its basic goal for the last decade—a pivot to sustained economic growth. The recent emphasis in Japan on innovation, productivity and capital efficiency, a stock market rally that has drawn the interest of foreign investors, ongoing corporate governance reforms, a new burst of hostile takeover cases since 2021, and significant revisions to M&A best practice guidelines may provide a new opportunity to reach a long-sought "tipping point." Supported by a more welcoming attitude toward hostile takeovers, the old paradigm of "fortress Japan" is in the process of being supplanted by a new "market-oriented Japan."

The above changes both create a greater need for effective takeover regulation and a new opportunity for rising institutional players to assume a greater role. Accordingly, there is a new urgency to reconsider both the theory and practice of Japan's approach to the regulation of hostile takeovers, in order to update the current framework in response to changing conditions and to create a takeover regime that is commensurate with Japan's important position in global business and financial markets.

Research to date has generally emphasized the contrasting models of a shareholder-oriented UK system and a board-oriented US regime. But in both cases a single "subordinate lawmaker," the takeover panel in the UK and Delaware courts in the US, makes the rules and enforces them. Under this analysis, Japan has a mixed and incomplete system of regulation with competing

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subordinate lawmakers. We utilize Australia as a "new" point of reference in the theoretical framework for hostile takeover regulation and institutions, one which is "in-between" the US and the UK since Australia separates the rulemaking and enforcement functions and has a takeover panel with substantially limited authority and activities compared to the UK.

We discern three basic roles in a framework for takeover regulation: (1) a "Rule-maker," (2) a "Bid Decision-maker," and (3) an "Umpire" (both adjudicator and propagator of standards of conduct and best practice norms). Applying this revised framework to Japan, we find that, although all relevant institutional players have improved their capabilities, the strength of shareholders has increased substantially more than that of courts and independent directors. Thus, the main weakness in the Japanese system is having the courts as the primary Umpire. Our main recommendation is that Japan consider an Australian-style, limited takeover panel for its Umpire, together with a separate Rule-maker. We hope that our analysis will stimulate further research and discussion on a topic that is of renewed importance in Japan and elsewhere.

OUTLINE

I. INTRODUCTION

Japan has never fit easily into the existing theoretical framework of hostile takeover regulation, which has emphasized the contrasting models of a shareholder-oriented UK system and a board-oriented US regime.[1] According to the best-known comparative analysis that includes Japan, in both cases a single "subordinate lawmaker," the takeover panel in the UK and Delaware courts in the US, makes the rules and enforces them.[2] This historical combination of the roles of rule-making and enforcement by the same institutional player in the UK and the US was difficult to apply directly to Japan (and other countries). As a result, under this analysis Japan has been characterized as a mixed and incomplete system of regulation with competing subordinate lawmakers[3] or as having a "relatively blank institutional slate."[4]

For many years this did not seem to matter. Japan had a reputation for having an inhospitable environment for hostile takeovers, particularly with respect to foreign bidders, ever since a decision by the Supreme Court of Japan in 2007 upheld the takeover defenses[5] of Bulldog Sauce,

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[1] John Armour & David A. Skeel Jr, *Who Writes the Rules for Hostile Takeovers, and Why? – The Peculiar Divergence of US and UK Takeover Regulation*, 95 GEO. L.J. 1727 (2007).

[2] John Armour, Jack B. Jacobs & Curtis J. Milhaupt, *The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework*, 52 HARV. INT'L L.J. 221 (2011).

[3] *Id*. at 257.

[4] Curtis J. Milhaupt, *Takeover Law and Managerial Incentives in the United States and Japan, in* ENTERPRISE LAW: CONTRACTS, MARKETS AND LAWS IN THE US AND JAPAN 177, 182 (Zenichi Shishido ed., 2014)

[5] Although takeover defenses in Japan often involve a form of shareholder rights plan, we do not utilize the widely used phrase "poison pill" in this Article. Defensive measures in Japan differ substantially from poison pills in the US. Those differences are summarized as: (1) shareholder approval is not required in the US, but is generally expected in Japan, (2) the US form is a legal instrument, while its Japanese counterpart is a nonlegal "warning," and (3) the theoretical justification in the US is based on fiduciary duties, while the Japanese emphasize the protection of "corporate value." *See generally* Curtis J. Milhaupt & Zenichi Shishido, *The Enduring Relevance of the Poison Pill: A U.S.-Japan Comparative Analysis*, 28 STAN. J. L. BUS. & FIN. 336, 338 (2023). Another important difference is that while in the US poison pills are generally triggered automatically when the acquirer obtains a fixed percentage of the company's shares (usually 20%), in Japan separate corporate actions are required to create a defense and then activate it. *Id.* at 346. In addition, the traditional form of defense by Japanese companies was to issue new shares to a friendly shareholder or third party (a "white knight") rather than to offer all shareholders (other than the hostile bidder) new shares at a discount as in a shareholder rights plan.
For a broader objection to the use of such terms in Japan, *see* Dan W. Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware*, *in* COMPARATIVE TAKEOVER REGULATION: GLOBAL AND ASIAN

a well-known Japanese condiment maker, against the hostile bid of an American hedge fund.[6] The perception of an inhospitable environment went beyond the legal doctrine of the case, as shareholders, media and public opinion all seemed united against hostile takeovers.

It also seemed unlikely that this environment, which helped sustain an image of a "fortress Japan," would readily change. It was supported by a widespread mistrust in Japan of hostile bidders, who were characterized as "corporate raiders" interested only in their own short-term financial gain and not in the interests of the company, general shareholders, employees or society.[7] In fact, the true "owners" of companies were often thought of as being the employees rather than shareholders.[8] In addition, Japanese companies, fearful even of the limited and unsuccessful attempts at hostile takeovers during 2004-2007, widely adopted pre-bid general takeover defenses despite their questionable legal effect.[9] Some foreign hedge funds refused to

PERSPECTIVES 241, 258 (Umakanth Varottil & Wai Yee Wan eds., 2018) (objecting broadly to any use of the phrase "Japanese poison pill" or "Japanese mandatory bid rule" on the grounds that such terms are closely linked to the UK/US regimes and are misleading when used in conjunction with a very different Japanese system).

[6] *See infra* notes 46-48 and accompanying text.

[7] Although the negative image of corporate raiders was based on aggressive Japanese investors in the 1980s and 1990s, a famous case involving a foreign investor arose in 1989. T. Boone Pickens, a Texas oilman and "corporate raider," accumulated a 26% stake in Koito Manufacuring Co., Ltd., an automobile parts manufacturer in the Toyota group. His efforts to obtain seats on the board, increase dividends, etc., were all soundly rejected by management and shareholders, who characterized him as a greenmailer rather than as a long-term investor. *See, e.g.*, Karl Schoenberger, *Pickens, Rejected by Koito Directors, Blasts 'Japan Inc.' : Wonders if He Was Denied Seats on Board Because He's a Foreigner*, L.A. TIMES, June 30, 1989. It was later revealed that Pickens' funding of over one billion dollars for his Koito shares was provided by a well-known Japanese corporate raider and property speculator, Kitaro Watanabe. *See* Reuters, *Pickens Tells Who Financed Koito Stake…*, L.A. TIMES, Dec. 6, 1990. After Pickens was revealed to be a "mere puppet entirely financed by a Japanese corporate raider…[he] left Japan in embarrassment." *See* Soichirou Kozuka, *Recent Developments in Takeover Law: Changes in Business Practices Meet Decade-Old Rule*, 21 J. JAPAN. L. 5, 7 (2006). *See also infra* note 59.

[8] Japanese companies have been described as consisting of a "company community" that generally favors employee interests over those of shareholders, despite the lack of any such provision under formal law. *See infra* note 172 (company community); *see also* the sources *infra* note 29 (generally noting institutional and cultural barriers, rather than legal barriers to foreign takeovers of Japanese companies). More generally, it may be difficult to protect employees' interests under existing takeover law, with three patterns of development in differing takeover regimes. *See* REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 209-10 (3d ed., 2017).

[9] The most popular form of takeover defense in Japan is a pre-bid general takeover defense often translated into English as a "pre-warning rights plan." It generally consists of adoption of a set of procedures for hostile bids (involving information, timing, etc.). If a hostile bidder subsequently appears and does not follow said procedures,

invest in Japan at all due to their inability to utilize the implicit threat of "going hostile" as a means to increase their negotiating leverage with Japanese companies.[10] Both hostile takeovers in Japan and their regulation were largely frozen in place for nearly 15 years following the Supreme Court decision in the Bulldog Sauce case in 2007.

But change did eventually occur. Over the last decade, Japan has focused on economic growth and capital markets, as popularized by "Abenomics" and its successors, while Japanese companies have continued to internationalize in order to maintain growth despite a declining population and shrinking market at home.[11] The pro-growth policies associated with Abenomics beginning in 2013 sought to reignite sustained economic growth following two lost decades by both encouraging and pressuring Japanese companies to increase capital investment and efficiency, innovation, productivity, business performance and shareholder returns. As discussed below, the results of this ambitious program were mixed and incomplete.[12]

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the company will enact a shareholder rights plan and then activate it. *See, e.g.*, Armour, Jacobs & Milhaupt, *supra* note 2, at 253. The adoption of such general pre-bid defensive measures boomed during 2005-2008, but then declined. Beginning in 2013-14 a substantial number of Japanese companies decided to not renew their defensive measures. *See generally* 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). Using the RECOF database, the authors put the maximum number of takeover defenses by listed companies at 571 (in 2008), which fell to 387 by 2018. *See id.*, table 1 at 751. Using different criteria (*e.g.,* mentions in annual corporate governance reports), data cited by the Tokyo Stock Exchange shows 132 such companies in 2006, a peak of 461 in 2008 and a current total of 265 (in 2023), representing some 7% of listed companies. *See* Tokyo Stock Exchange, TSE-Listed Companies White Paper on Corporate Governance 2023, at 108, *available at* https://www.jpx.co.jp/english/equities/listing/cg/tvdivq0000008jb0-att/uorii50000003gfb.pdf [hereinafter "Corporate Governance White Paper 2023"].
The legal effect of such a pre-bid plan was uncertain, and, as a result, it has also been described as essentially a press release. *See, e.g.,* Milhaupt, *supra* note 4, at 185-86.

[10] One of the best-known and most aggressive hedge funds, Elliott Management, loudly proclaimed that it would not invest in Japan. However, Elliott changed its views based on more recent corporate governance reforms and successful investments by activist shareholders in Japan who did not seek corporate control. For example, Elliott invested over $2.5 billion in SoftBank Group Corp. *See, e.g.*, Jenny Strasburg & Bradley Hope, *Elliott Management Builds More Than $2.5 Billion Stake in SoftBank*, WALL ST. J., Feb. 6, 2020. And it also was active in the recent private equity buyout of Toshiba Corporation. *See, e.g.,* Leo Lewis & Kana Inagaki, *Activist Fund Elliott Targets Toshiba by Building Stake*, FIN. TIMES, Sept. 30, 2021. With respect to the Toshiba buyout, also *see infra* note 239.

[11] *See* discussion *infra* in Part II.E.

[12] *Id.*

But by 2017, continuing and accelerating corporate governance reform set the stage for improvement by altering Japan's overall operating environment. Changes included weaker lifetime employment and fewer management-friendly, "stable" shareholders, and new soft law codes encouraging stronger roles for institutional investors, shareholder activists and independent directors.[13]

The evolution of attitudes and policies toward hostile takeovers and their regulation provides a good indicator of the extent of changes in Japan's overall operating environment. Hostile takeovers are important economically, in that they can create a more efficient allocation of resources for individual companies and, at the same time, exert general pressure on other companies for more efficient management.[14] Takeovers also have great symbolic importance, as they are the strongest indication that government regulators and the public are willing to "let the market work" even at the expense of creating "losers" (i.e., target companies that are taken over involuntarily).[15] Despite the extensive academic literature on the potential benefits of such a "market for corporate control," there are very few active hostile takeover markets in the world—arguably only the US, UK and (at a distant third) Australia.[16] Accordingly, Japan's embrace of such a takeover market could constitute a major step toward the creation of a new "market-

[13] *See* discussion *infra* in Part III.B. For a discussion of 2017 marking a possible turning point in relations between corporate management and institutional investors, *see infra* notes 234-237 and accompanying text.
[14] For classic works on the market for corporate control, *see, e.g.,* Henry G. Manne, *Mergers and the Market for Corporate Control,* 73 J. POL. ECON. 110 (1965); Daniel R. Fischel*, Efficient Capital Market Theory, the Market for Corporate Control, and the. Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1 (1978). *See also* sources cited *infra* note 171.
[15] Hostile takeovers have been referred to as as "the defining symbol of U.S. style capitalism." *See* Kai Liekefett, *The Comeback of Hostile Takeovers*, Harvard Law School Forum on Corporate Governance, Nov. 8, 2020.
[16] *See infra* note 181.

oriented Japan"[17] which can potentially achieve its most fundamental goal--a pivot to sustained economic growth.

The trend toward a newly emerging environment for hostile takeovers in Japan is evidenced by a burst of domestic hostile M&A cases since 2021, focusing on whether takeover defenses are permissible and if shareholder approval is required.[18] In addition, the government has increased its efforts to spur market efficiency and effective corporate management, including current reforms that are directly relevant to hostile takeovers. These new policies, promulgated partly to encourage foreign investment, include an overhaul of M&A guidelines by Japan's Ministry of Economy, Trade and Industry ("METI") in 2023 to encourage "desirable" acquisitions[19] and an ongoing reassessment by the Financial Services Agency ("FSA") of regulations on tender offers and reporting of large shareholdings.[20] Add to the mix the trend for Japanese companies to abolish takeover defenses due to pressure from institutional investors and others,[21] and a 2023 directive of the Tokyo Stock Exchange ("TSE") to listed Japanese companies to improve their capital efficiency and stock price,[22] and rapidly changing conditions have set the stage for new hostile takeover activities and disputes, including with foreign investors.

The above regulatory reforms and litigation mean that the two key features of takeover regulation in Asian countries—mandatory bids and takeover defenses[23]—both seem to be "in play." This rapidly changing market and regulatory activity seek to address the lingering

[17] *See infra* note 148 and accompanying text.
[18] *See* discussion *infra* in Part II.C.
[19] *See infra* notes 104-126 and accompanying text.
[20] *See infra* notes 127-135 and accompanying text.
[21] *See* discussion *supra* note 9.
[22] *See* discussion *infra* notes 136-142 and accompanying text.
[23] Umakanth Varottil & Wai Yee Wan, *Comparative Takeover Regulation: The Background to Connecting Asia to the West*, *in* COMPARATIVE TAKEOVER REGULATION: GLOBAL AND ASIAN PERSPECTIVES, *supra* note 5, at 3.

weaknesses in Japan's regulatory framework for hostile acquisitions, compared both to other takeover regimes and to the increasing role in global business and capital markets that Japan seeks to play. It is important that Japan not "waste" the current opportunity and momentum provided by the large rally in Japan's stock market in 2023-24, and ensure that institutional shortcomings in takeover regulation do not continue to act as a limitation on attracting global investment.[24] Accordingly, there is a new urgency to reconsider the theory and practice of Japan's regime with respect to the regulation of hostile takeovers.

This growing need for regulatory reform is accompanied by new opportunities, as corporate governance reforms and other changes have also acted to strengthen the capabilities of institutional players who might assume an increased role in a revised regulatory framework. An important task for this Article, therefore, is to assess the new relative strengths of these institutional players. As discussed below, although all relevant institutional players have improved their capabilities, the strength of shareholders has increased substantially more than that of courts and independent directors.[25] Thus, the main, continuing weakness in the Japanese system is having the courts as the primary mechanism for the enforcement and interpretation of rules, as well as for the creation and propoagation of standards of conduct and commercial norms. Accordingly, our main recommendation is that Japan consider a limited takeover panel for enforcement, together with a separate rule-maker.[26]

[24] The Nikkei 225 index of Japanese stocks (a relatively narrow, but often-cited, index equivalent to the Dow Jones Industrial index in the US) gained 28% in 2023 and reached a new high for the first time since 1989. *See*, *e.g.,* Kosuke Iguchi*, Japan Stocks' 28% jump in 2023 Fueled by Reform, Buffett and M&A*, NIKKEI ASIA, Dec. 30, 2023. It added an additional 19% in 2024 (for a 47% gain over two years). *See, e.g.,* Nikkei, *Japan Stocks Finish Turbulent 2024 at Highest-ever Year-end Close*, NIKKEI ASIA, Dec. 30, 2024.
[25] *See infra* Part IV.B.
[26] *See infra* Part V.A.

In reconsidering the analytical framework for hostile takeover regulation and institutional roles, we utilize Australia as a "new" point of reference.[27] The Australian system formally separates the rulemaking and enforcement functions and has a takeover panel with substantially limited authority and activities compared to the UK.[28] Incorporating this model into our analysis, we discern three basic roles in a framework for takeover regulation: (1) a rule-maker, who decides the legal principles/rules for making decisions on bids and takeover defenses ("Rule-maker"), (2) a bid decision-maker, who makes the initial decision for the target company about the merits of a hostile takeover bid ("Bid Decision-maker") and (3) an adjudicator or umpire, who can apply the relevant principles and rules and review this decision from a broader social perspective, and also act to create and spread standards of conduct and new commercial norms relating to best business practices ("Umpire").

With the purpose of helping to advance the discussion of a more suitable regulatory regime for hostile takeovers in Japan, this Article has three goals: (1) make a theoretical contribution to the literature on takeover regulation by using the example of the Australian regulatory regime, a new general point of reference "in-between" the UK and US, to reconsider and revise the theoretical framework for the regulation of takeovers, (2) apply this revised framework to Japan to highlight weaknesses in its system of regulation and assess the relative strengths of rising institutional players who might assume new or greater roles, and (3) evaluate the potential for reform and make policy recommendations for changes in the Japanese takeover regime.

This Article proceeds as follows. Part II discusses the wide range of significant changes in Japan's operating environment which has created both new needs and opportunities. It briefly

[27] See discussion *infra* Part III.B.
[28] *See* Appendix 1.

summarizes the state of Japan's regulatory framework in the 2000s and subsequent changes in Japan's corporate governance environment, analyzes the five new court decisions on hostile takeover cases since 2021, and examines the revision of METI's M&A Guidelines in 2023 and other takeover-related government policies of the TSE and FSA. Finally, it identifies and examines the problem to be addressed by regulatory reform as the need to build on the mixed results of Abenomics to facilitate Japan's pivot to sustained growth. Part III provides the framework for addressing the need for a more robust takeover regime, by analyzing the literature on existing regulatory frameworks for hostile takeovers, adding the Australian model as a new point of reference, and revising the existing framework based on the three basic institutional roles noted above.

Part IV briefly considers the overall goals of a regulatory framework for takeovers, evaluates the increased capabilities of the relevant institutional players and then explores who might play the roles of Rule-maker, Bid Decision-maker, and Umpire in a revised Japanese system. Part V recommends that Japan consider adaptation of an Australian-style, limited takeover panel as the Umpire and other reforms to revise its regulatory framework for takeovers, and discusses the main obstacles to the introduction of such a takeover panel. It also revisits the need for regulatory reform in light of comments received on earlier drafts of this Article. Part VI concludes.

II. THEN AND NOW: DEVELOPMENTS IN JAPAN'S CORPORATE GOVERNANCE AND REGULATION OF TAKEOVERS

Corporate governance reform and changes in Japan's operating environment provide both the need to update Japan's regulatory framework and clues as to what institutional players might assume a larger role. In this Part we consider four areas related to changes in Japanese corporate governance and takeover regime: (1) a brief overview of Japan's initial, if incomplete, regime in the 2000s, (2) overall changes in the corporate governance environment which resulted in the general strengthening of institutional players, (3) emergence of new hostile takeover cases since 2021 and the development of case law, and (4) revision of METI's M&A guidelines in 2023 and other policies by the TSE and FSA, which highlight possible changes in the role of METI and other agencies with respect to takeovers, and also illustrate the evolution of best M&A practices in Japan. We then also consider the main problem that revised takeover regulation

may now help address as a result of these changes: Japan's pivot to sustained economic growth.

A. Then: Takeover Regulation in the 2000s

When hostile takeover cases first became an issue in the early 2000s,[29] the main issue was who was the Bid Decision-maker: shareholders or the board? At the time, Japan had a very limited regulatory framework to deal with such cases: a securities law provision that dealt to some extent with hostile bids[30] and a general corporate law provision that provided that the issuance of shares by a corporation could be enjoined if it was illegal or "significantly unfair." Under the "primary purpose" test adopted by the courts, a share issuance was deemed as "significantly

[29] This Article's treatment of hostile acquisitions begins in the 2000s since it was arguably the first time that the "Livedoor shock" and other cases resulted in serious debate and an attempt to develop a legal framework for dealing with hostile takeover cases. This era was, in fact, preceded by a "surge" in domestic cases in the late 1980s . *See* Kozuka, *supra* note 7, at 6. At the same time, during the 1980s there was widespread concern in the US that Japan's policies effectively prevented foreign investors from purchasing Japanese companies despite growing Japanese investment in the US. However, the main barriers to foreign acquisitions of Japanese companies were thought to be extralegal (i.e., institutional and cultural): the insular nature of Japanese corporate governance exemplified by cross-shareholding, the lack of independent directors, and the importance of protecting "lifetime" employees. *See, e.g.,* Merit E. Janow, *Mergers and Acquisitions in Japan: A New Option for Foreign Companies*, 26 COLUM. J. TRANSNAT'L L. 573 (1988); Michiko Ito Crampe & Nicholas Edward Benes, *Majority Ownership Strategies for Japan,* 1 UCLA PAC. BASIN L.J. 41, 72-75 (1982). *See also* Zenichi Shishido, *Japanese Corporate Governance: The Hidden Problems of Corporate Law and Their Solutions*, 25 DEL. J. CORP. L. 189, 209-217 (2000).
[30] *See generally* Tomotaka Fujita, *The Takeover Regulation in Japan: Peculiar Developments in the Mandatory Offer Rule,* 3 U. TOKYO SOFT L. REV. 24 (2011).

unfair" if the primary purpose was to protect the control of incumbent management rather than to raise capital.[31] By default, it was largely up to the courts to decide actual cases, such as the controversial Livedoor case (discussed below) which was pending in 2004.

At this time another player, although lacking a clear mandate in this area,[32] entered the scene: METI formed a Corporate Value Study Group which drafted a report[33] and issued nonbinding guidelines concerning hostile acquisitions together with the Ministry of Justice (the "2005 Guidelines").[34] As the Livedoor case and the drafting of the above report and the 2005

[31] *See* generally Curtis J. Milhaupt, *In the Shadow of Delaware — the Rise of Hostile Takeovers in Japan*, 105 COLUM. L. REV. 2171, 2192-93 (2005). In earlier cases during the 1980s and 1990s involving corporate raiders, courts tended to finesse this issue by stretching to find that the issuance of shares to thwart greenmailers was primarily for a financial purpose. The circumstances, if any, under which a board could issue shares for the purpose of maintaining control was not directly addressed. *See, e.g.*, Hiroshi Oda, *Case No. 30: Corporate Law – Takeovers – Defensive Measures – Equality of Shareholders*, *in* BUSINESS LAW IN JAPAN: CASES AND COMMENTS 323, 327 (Moritz Bälz et al. eds., 2012). As predicted by one prominent commentator, although in the Livedoor case and subsequent cases courts began to utilize the corporate law provisions on enjoining "significantly unfair" issuance to decide hostile takeover cases, the "primary purpose" test adopted by the courts was too narrow to decide the acceptability of specific defensive measures. *See* Hideki Kanda, *Does Corporate Law Really Matter in Hostile Takeovers: Commenting on Professor Gilson and Chancellor Chandler*, 2004 COLUM. BUS. L. REV. 67, 74 (2004). For the relevant corporate law provision, *see* Kaishahō [Companies Act], Law No. 86 of 2005, arts. 210 & 247. This same phrase (in Japanese, ichijirushii fukosei or 著しい不公正) has been variously translated into English as "significantly unfair," extremely unfair," and "grossly unfair."

[32] There was no clear legal mandate for METI to assume such a role. The "old days" of industrial policy and *ex ante* administrative guidance had already been largely replaced by a more transparent system of legal rules and their *ex post* interpretation. Rather than aiming to revive its former practices, METI apparently sought to expand the range of its influence in this new institutional setting where administrative guidance was no longer effective and rulemaking by the courts had become more powerful. *See* Manabu Matsunaka, *Waga Kuni no Tekitaiteki Baishū to Boueisaku wo Meguru Rūru Keisei [Rule Making on Hostile Takeovers and Defensive Measures in Japan]*, 2 SHIN SEDAI HŌSEISAKUGAKU KENKYŪ 363, 379-82 (2009). One commentator stated that "the development of a takeover law in 2005 was initiated, mainly by the public officials of the METI, as an intentional and selective attempt to transplant the U.S. model." *See* Kenichi Osugi, *What Is Converging? Rules on Hostile Takeovers in Japan and the Convergence Debate*, 9 ASIAN-PAC. L. POL'Y. J. 143, 154 (2007).

[33] Corporate Value Study Group, Corporate Value Report (May 27, 2005), *available at* https://www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/pdf/houkokusyo_hontai_eng.pdf (last visited May 10, 2024) ; Corporate Value Study Group, Corporate Value Report 2006: Toward the Firm Establishment of Fair Rules in the Corporate Community (March 31, 2006), *available at* https://www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/pdf/houkoku06_eng.pdf (last visited May 10, 2024). For a discussion of the report, *see* Milhaupt, *supra* note 31, at 2195-97.

[34] Ministry of Economy, Trade and Industry [METI] and Ministry of Justice, Guidelines Regarding Takeover Defense for the Purpose of Protection and Enhancement of Corporate Value and Shareholders' Common Interest (May 27, 2005), *available at* https://www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/pdf/shishin_hontai.pdf [hereinafter 2005 Guidelines].

Guidelines proceeded on a parallel course during 2004, to some extent they influenced each other.[35]

The 2005 Guidelines set out three basic principles: (1) "protecting and enhancing corporate value and shareholders' common interests," (2) "prior disclosure and shareholders' will," and (3) "ensuring (the) necessity and reasonableness [of defensive measures]."[36] It was unclear in the Japanese context whether "corporate value" referred only to the interests of shareholders or also included those of other stakeholders.[37] "Shareholders' will" might also sound like shareholders are the Bid Decision-maker. However, the 2005 Guidelines clearly state that adopting defensive measures through a shareholder resolution is not generally required--companies can also fulfill the principle of shareholders' will by adopting defensive measures through board resolution so long as there is "a mechanism that allows the shareholders to terminate the defensive measure (and their failure to do so indicates passive approval)."[38] Although originally nonbinding, the essential part of the 2005 Guidelines was made legally effective by the TSE substantially incorporating it into its listing rules in 2006.[39]

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[35] *See* Milhaupt *supra* note 31, at 2210.
[36] 2005 Guidelines, *supra* note 34, at 3.
[37] For examples of differing uses of the concept of corporate value, *see, e.g.*, Bruce Aronson, *The Olympus Scandal and Corporate Governance Reform: Can Japan Find a Middle Ground between the Board Monitoring Model and Management Model?* 30 UCLA PAC. BASIN L.J. 93, n. 118 (2012). The concept of "corporate value" (and permitting a defensive measure if it contributed to the prevention of harm to corporate value) may have been attractive precisely because it was vague and subject to conflicting interpretations. For the definition of "corporate value" and its changing use in METI's guidelines, *see* Manabu Matsunaka, *The Concept of Corporate Value: Corporate Governance, Shareholder Interests, and Stakeholder Interests in Japan*, 57 J. JAPAN. L. 83, 87-90 (2024).
[38] 2005 Guidelines, *supra* note 34, at 6. Both the 2005 Guidelines and the early court cases focused on whether defensive measures followed the shareholders' will rather than on whether the board acted appropriately; this might have been a practical necessity due to the lack of independent directors on corporate boards at that time. *See* Osugi, *supra* note 32, at 154.
[39] The TSE introduced a new set of listing rules to require disclosures and to preclude defensive measures that impair the interests of general shareholders. *See* Tokyo Stock Exchange, Listing Regulations, Rule 440, *available at* https://www.jpx.co.jp/english/rules-participants/rules/regulations/tvdivq0000001vyt-att/listing_regs_20240401.pdf. For enforcement measures by TSE, *see id.* Rule 508, para. 1, item 2, Rule 601, para. 1, item 12 & Tokyo Stock Exchange, Enforcement Rules for Securities Listing Regulations, Rule 601, para. 12,

The Bid Decision-maker also remained unclear from Japanese case law. Neither the Corporate Value Study Group nor the 2005 Guidelines suggested any standard concerning when defensive measures should be enjoined, and judges interpreted existing corporate law.[40] Courts tended to closely scrutinize the reasonableness and rationality of defensive measures in cases where the board acted without shareholder approval by, for example, issuing new shares or rights to a friendly third party to thwart a hostile bidder.[41] This situation occurred in the Livedoor case, where the Tokyo High Court enjoined the target company's defensive measure of issuing a large number of share options to a friendly shareholder, as it would have effectively allowed the target board to determine who controlled the company. The high court thus established the principle that corporate law in Japan allocates the power to appoint directors to shareholders, and a board does not have the authority to alter the shareholding structure.[42]

In an opinion generally reminiscent of the Unocal analysis by Delaware courts,[43] the high court decided that when the primary purpose of the issuance was to maintain control rather than to raise capital, a defensive measure would be deemed an unfair issuance (Companies Act §§210 and 247) with only four limited exceptions where the bidder had an "abusive motive," such as

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available at https://www.jpx.co.jp/english/rules-participants/rules/regulations/tvdivq0000001vyt-att/listing_regs_ER_20250101.pdf. *See also* Armour, Jacobs & Milhaupt, *supra* note 2, at 255.

[40] *See* Osugi, *supra* note 32, at 153. The specific legal doctrine utilized was arguably not important. *See* Kanda, *supra* note 31, at 73. The more significant question was the establishment of some standard to distinguish between acceptable and unacceptable conduct with respect to defensive measures; courts in Japan have struggled with this issue. The 2005 Guidelines provided that in enacting a pre-bid defensive measure either an appropriate board resolution or shareholder resolution could be deemed as reasonably reflecting the will of the shareholders; the guidelines were silent with respect to who should activate such a defensive measure at the time of an actual bid. *See* 2005 Guidelines, *supra* note 34, at 8-10.

[41] *See, e.g.,* Oda, *supra* note 31.

[42] Tōkyō Kōtō Saibansho [Tokyo High Ct.] Mar. 23, 2005, Hei 17 (ra) no. 429, 1899 HANREI JIHŌ [HANJI] 56 (Livedoor case). For factual background and discussion of the Livedoor case, *see* Milhaupt *supra* note 31, at 2178-80.

[43] One commentator refers to the standard of review for takeover defense measures under Japan's early court decisions as "a kind of Unocal rule with Japanese characteristics." *See* Milhaupt, *supra* note 31, at 2171-72.

when the bidder was a greenmailer.[44] This court decision left room for a target's board to adopt weaker defensive measures that did not have the effect of determining who was the winner between competing bids or of effectively terminating a bid.[45]

On the other hand, Japanese courts readily upheld defensive measures approved by shareholders, as evidenced by the most famous case of this period, the Bulldog Sauce case.[46] In that case the Supreme Court upheld defensive measures by Bulldog Sauce against an aggressive American hedge fund, Steel Partners, in which warrants were issued to all shareholders but only the bidder could not convert the warrants to shares (but could redeem them for cash). This measure was approved by a special resolution at a shareholders' meeting with 83.4% of all shareholders voting in favor.[47] The court stated that when shareholders approve a defensive measure courts defer to the shareholders judgment unless the process is seriously flawed, such as when the shareholders' decision is based on inadequate or misleading information.[48]

There was significant fallout from the Bulldog Sauce case. Although the actual results of the case were unsurprising given the strong shareholder approval for the defensive measure, and its

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[44] In *dicta*, the court indicated the following four exceptions: (1) greenmail, (2) sale of core assets (3) sale of assets to pay debt of the acquirer, and (4) sale of non-core assets to pay a large one-time dividend. *See* the Livedoor case, *supra* note 42, at 63; Milhaupt, *supra note* 31, at 2193-94. These criteria were not clarified in subsequent cases. *See* Puchniak & Nakahigashi, *supra* note 5, at 269. In fact, the judge in the case was strongly criticized for utilizing far-reaching *dicta*. *See infra* note 248.

[45] About four months after the Livedoor case, the Tokyo District Court affirmed a defensive measure by a target firm's board that utilized a share split due to its weaker effect. The only result was that the bid would be delayed a few months while the share split formally took effect. At that time, if a target firm split its shares during a bid the settlement of the bid would be delayed due to the necessity of delivering the share certificates before settlement of the bid. *See* Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] July 29, 2005, Hei 18 (yo) no. 20080, 1909 HANJI 87 (Nihon Gijutsu Kaihatsu case).

[46] Saikō Saibansho [Sup. Ct.] Aug. 7, 2007, Hei 19 (kyo) no. 30, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2215 (Bulldog Sauce case).

[47] The Supreme Court stated that "whether an acquisition by a particular shareholder damages the corporate value of a target corporation and thereby damages the interest of the corporation as well as the common interest of shareholders should be judged by the shareholders to whom the interest of the corporation belongs." *Id.* at 2224.

[48] *Id.*

precedential value may have been limited,[49] foreign investors took it as a clear statement that hostile acquisitions (particularly by foreign investors) would not be permitted in Japan.[50] No new hostile takeover cases appeared for over a decade. The Supreme Court's approval of a defensive measure that essentially included a large payment of greenmail to the bidder alarmed METI, and a supplemental report by its study group noted that shareholder approval did not mean that any form of defensive measure would be acceptable.[51] The supplemental report also warned firms against abusively broadening the meaning of "corporate value" to justify rejection of a hostile bid.[52] Japanese companies rushed to adopt pre-bid general defensive measures, despite their doubtful legal effect.[53] The TSE became actively involved in regulation and enforcement of these new defensive measures through its listing rules, requiring prior consultation, registration and disclosure of such defensive measures.[54]

[49] *See, e.g.*, Armour, Jacobs & Milhaupt, *supra* note 2, at 256; (noting that the case would likely have been decided the same way in the US given the strong shareholder approval); Nels Hansen, *Japan's First Poison Pill Case: Bulldog Sauce v. Steel Partners: A Comparative and Institutional Analysis*, 26 J. JAPAN. L. 139, 154 (2008) (stating that "Bulldog should be read as ratification of the principle of corporate democracy, not as perpetuation of a supposed anti-foreigner sentiment in the legal community").

[50] *See, e.g.*, Armour, Jacobs & Milhaupt, *supra* note 2, at 257; *Japanese Companies Start to Question 'Poison Pill' Strategy*, N.Y. TIMES, May 8, 2008 ("'Foreign money has been leaving Japan because of the extreme defensive measures taken by domestic companies, which have created the impression that we are in a closed market"); Shu-Ching Jean Chen, *Japan High Court Keeps Bull-Dog Sauce From Steel Partners' Jaws*, FORBES, Aug. 8, 2007 (stating that the Supreme Court ruling "reflects the prevailing distaste in corporate Japan for foreign invaders like Steel Partners that threaten the long-cherished coziness of its management ranks").

[51] Corporate Value Study Group, Takeover Defense Measures in Light of Recent Environmental Changes (June 30, 2008), *available at* https://www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/pdf/080630TakeoverDefenseMeasures.pdf.

[52] *Id.* at n. 2 ("…… 'corporate value' appearing in the 'Guidelines' and in this report is conceptually assumed to be 'the discounted present value of future cash flow of the company'. This concept should not be arbitrarily stretched in the interpretation of the 'Guidelines' or this report"). *See also* Matsunaka, *supra* note 37, at 89.

[53] This trend actually began in 2006 following the overall acceptance of the use of this kind of defensive measure in METI's 2005 Guidelines and incorporation into TSE listing rules, but the trend accelerated following the Bulldog Sauce case. As noted *supra* note 9, the legal effect of such a pre-bid plan was uncertain, and, as a result, it has also been described as essentially a press release. *See also* Armour, Jacobs & Milhaupt, *supra* note 2, at 254; Puchniak & Nakahigashi, *supra* note 5, at 270.

[54] *See* TOKYO STOCK EXCHANGE, GUIDEBOOK FOR THE TIMELY DISCLOSURE OF CORPORATE INFORMATION 122 (2023), *available at* https://www.jpx.co.jp/english/equities/listing/disclosure/guidebook/dh3otn0000000xbv-att/Guidebook.pdf.

The fear, noted in the 2005 Guidelines, that corporate management might abuse the use of newly "authorized" defensive measures arguably came to pass.[55] At that time, however, there was likely no institutional player (shareholders, independent directors or courts) with the capacity to effectively check corporate management.[56] The development of a more balanced system needed to await changes in corporate governance and Japan's operating environment that would increase the capabilities of these institutional players.

B. Changes in Japan's Overall Corporate Governance Environment

The overall corporate governance environment in Japan[57] has changed significantly since the Bulldog Sauce case in 2007. Although it is beyond the scope of this Article to discuss these changes in detail, a brief survey of the numerous and overlapping changes that potentially affect hostile takeovers is warranted. This survey also acts to highlight institutional players who could potentially play a larger role in takeover regulation.

Attitudes. The most fundamental change, although difficult to measure, might be a change in attitudes toward corporate governance, economic growth, capital markets, the role of corporate management and, especially, the function of hostile bids.[58] As discussed in Part II.E *infra*, the

[55] *See* 2005 Guidelines, *supra* note 31 at 2.
[56] *See, e.g.,* Ronald J. Gilson, *The Poison Pill in Japan: The Missing Infrastructure*, 2004 COLUM. BUS. L. REV. 21 (2004) (noting that in the US, shareholders, independent directors and courts all performed the function of limiting the impact of poison pills so that they were not used simply to block takeovers and entrench management, *id.* at 33, but that in Japan this important role would likely be left up to the courts "by default," *id.* at 41). *See also* Ronald J. Gilson & Curtis J. Milhaupt, *Choice as Regulatory Reform: The Case of Japanese Corporate Governance,* 53 AM. J. COMP. L. 343 (2005).
[57] For a general introduction to Japanese corporate governance, *see, e.g.,* Souichirou Kozuka & Luke Nottage, *Japan*, *in* PRINCIPLES OF CONTEMPORARY CORPORATE GOVERNANCE 383 (Jean Jacques du Plessis et al. eds., 5th ed. 2024); Bruce Aronson, *Japan*, *in* CORPORATE GOVERNANCE IN ASIA: A COMPARATIVE PERSPECTIVE 267 (Bruce Aronson & Joongi Kim eds., 2019).
[58] *See, e.g.*, Leo Lewis, *Japan Inc. Braced for Fresh Hostile Bids*, FIN. TIMES, May 13, 2021; Makiko Yamazaki & Ritsuko Shimizu, *Japanese Banks Less Reluctant to Finance Hostile Takeovers, Lobby chief Says*, REUTERS, April 1, 2024; Nels Hansen, Naoya Shiota & Jun Usami, *In Japan, Resistance to Hostile Takeovers Fades*, M&A Explorer (White & Case LLP), Oct. 12, 2021.

logic of Abenomics and corporate governance reform require both improved corporate performance and, ultimately, acceptance of market discipline to achieve that goal. Whereas early would-be hostile acquirers were dismissed as "corporate raiders,"[59] recent activists have generally been received more favorably by the public, media, institutional investors, government and even Japanese businesses themselves.[60]

Employment/Labor Market. The Japanese labor market has evolved, as the role of "lifetime employment" continues to diminish due to more part-time employment, lateral hiring, use of outside contractors and early retirement.[61] Hostile acquisitions were not traditionally accepted in Japan because companies were primarily managers of (and job providers for) people, not managers of assets who could be readily replaced for poor performance.[62] This distinction has gradually eroded; in addition, the availability of good, experienced managers in a lateral labor

[59] There are many examples. In the late 1980s, T. Boone Pickens efforts to advertise in Japanese media in support of an attempted takeover of Koito (*see supra* note 7) were reportedly rejected by major Japanese newspapers. *See, e.g.*, Fred Hiatt, *Pickens Launches New Attack on Japan's Economic Structure*, WASH. POST, May 11, 1990 (reporting that Pickens "filed an official complaint with Japan's Fair Trade Commission accusing Toyota Motor Corp. and Japan's newspapers of conspiring to prevent him from appealing to Japanese readers with an opinion advertisement"). During the 2000s, the first major shareholder activist in Japan, Yoshiaki Murakami, was both admired and strongly criticized, but was still often referred to as a "corporate raider." Both he and fellow iconoclast, Takafumi Horie, were prosecuted in connection with the Livedoor case. *See, e.g.,* Martin Fackler, *Japan Holds a Corporate Raider over Stock Trade*, N.Y. TIMES, June 5, 2006.

[60] By way of contrast with past treatment, in characterizing the recent unsolicited offer by an aggressive acquirer, Nidec, for Takisawa Machine Tool (*see infra* notes 118-120 and accompanying text), the headline in the domestic edition of Japan's leading business daily read "Getting Attention Due to Nidec's Acquisition Proposal: 20 Machine Tool Makers with Low PBR [price-to-book ratio]." *See Nidekku Baishu Teian de Chūmoku: Tei PBR Kōsaku Kikai 20 Sha*, NIHON KEIZAI SHIMBUN, Aug. 2, 2023, https://www.nikkei.com/article/DGXZQOUC256V20V20C23A7000000/. With respect to government attitudes, *see infra* note 148 (METI apparently embracing the benefits of a form of a market for corporate control in Japan).

[61] For an analysis of whether "lifetime employment" actually existed as a system in Japan, *see* Leon Wolff, *The Death of Lifelong Employment in Japan?, in* CORPORATE GOVERNANCE IN THE 21ST CENTURY 53 (Luke Nottage, Leon Wolff & Kent Anderson eds., 2008) (arguing that "lifetime employment" in Japan is a trope/myth). For recent developments, *see, e.g.,* Motokazu Matsui, *Japan's Midcareer Hires Jump to 37% of All New Jobs: Survey*, NIKKEI ASIA, April 20, 2023; Waka Konohana, *Kishida's Stimulus Package Needs Rethinking, not Reskilling*, JAPAN TIMES, Nov. 29, 2023; Yui Nakamura, *Older Japanese Workers Seek New Jobs as Lifetime Employment Wanes*, NIKKEI ASIA, June 20, 2023; Takayuki Inoue, *Japan Inc. Entrusts Key Management Tasks to Outside Experts*, NIKKEI ASIA, Oct. 15, 2023.

[62] *See, e.g.,* Janow, *supra* note 29.

market is an important factor in support of hostile acquisitions.[63] The traditional management argument that hostile bids must be rejected to protect workers may no longer be considered persuasive.[64]

<u>Improved Corporate Governance and Disclosure</u>. Japan's two soft law codes, the stewardship code of 2014 ("Stewardship Code")[65] and corporate governance code of 2015 ("Corporate Governance Code"),[66] and their triennial revisions have had a substantial positive impact on Japanese corporate governance. Although not legally binding, the "comply or explain" approach has resulted in strong compliance by Japanese listed companies, leading to greater disclosure and transparency and a variety of other effects such as a large increase in the number of independent directors and changes in proxy voting policies by institutional investors.[67]

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[63] Although the supply of experienced managers may be gradually expanding due to the overall increase in lateral hiring (*see supra* note 61), concerns remain that the relative lack of new positions and protections (generous executive compensation and golden parachutes) for senior executives may continue to act as an incentive for them to oppose takeovers. *See, e.g.*, Kenneth J. Lebrun & Paul Lee, *The Evolving Market for Corporate Control in Japan*, 26 THE M&A LAWYER 14, 19-20 (2022).

[64] The fact that this has not been a point of discussion in recent policy formulations, such as METI's 2023 M&A guidelines (*see infra* note 104) suggests that this argument is no longer thought to be persuasive. For one recent example, see the Nidec case (*see infra* notes 118-120 and accompanying text), in which the target company briefly raised the question of post-acquisition treatment of its employees, but this consideration had no effect on the acquisition. *See* Yuji Ohira, *Nidec to Buy Japan's Takisawa, will Launch Tender Bid Thursday*, NIKKEI ASIA, Sept. 13, 2023. In fact, METI'S current guidelines specifically caution against management using employee retention "as an excuse to defend themselves." *See infra* note 110.

[65] The Council of Experts on the Stewardship Code, Principles for Responsible Institutional Investors ≪Japan's Stewardship Code≫: To Promote Sustainable Growth of Companies through Investment and Dialogue (Feb 26, 2014, as amended), *available at* https://www.fsa.go.jp/en/refer/councils/stewardship/20200324/01.pdf.

[66] Tokyo Stock Exchange, Japan's Corporate Governance Code: Seeking Sustainable Corporate Growth and Increased Corporate Value over the Mid- to Long-Term (June 1, 2015, as amended), *available at* https://www.jpx.co.jp/english/news/1020/b5b4pj0000046kxj-att/b5b4pj0000046l07.pdf.

[67] For compliance results, *see* Corporate Governance White Paper 2023, *supra* note 9, at 198-219 (providing comprehensive data on the numbers and percentages of "comply" and "explain" for each Supplementary Principle). For the increase in independent directors, *see infra* note 80. For changes in proxy voting policies by institutional directors, *see infra* notes 70, 74-75 and accompanying text.

Share Ownership. There is a continuing trend of gradually weakening cross-shareholding,[68] as stable shareholders that are friendly to Japanese corporate management have gradually been replaced by foreign shareholders and Japanese institutional investors such as trust banks (acting on behalf of individual beneficiaries).[69] These "new" institutional investors are less friendly to management and have made it more difficult for Japanese companies to enact or maintain anti-takeover defenses.[70] Policies of the FSA and the Corporate Governance Code on disclosure and justification of cross-shareholdings, together with recent changes in proxy voting guidelines of

[68] The initial unwinding of cross-shareholding following the bursting of Japan's economic bubble in the early 1990s (especially by commercial banks) is often cited as an important cause of the earlier group of hostile takeover cases in Japan during the 2000s. *See, e.g.,* Milhaupt, *supra* note 31, at 2184-86. The Corporate Governance Code now calls for re-evaluation of cross-shareholdings and the provision of reasons justifying them, thereby increasing the general pressure to unwind. For data, *see* Corporate Governance White Paper 2023, *supra* note 9, at 156-59. Cross-shareholdings fell below 10% of market capitalization for the first time in 2017 (but *see infra* note 72-69), and the trend has continued. Almost 70% of companies listed on the TSE's Prime Market reportedly have plans to sell cross-shareholdings in 2024, compared with 40% who sold such holdings in 2023, due to continuing pressure from the TSE (*see infra* notes 127-135 and accompanying text) and institutional investors. *See* Tokio Murakami, *Nearly 1,100 Tokyo Prime-listed Companies to Cut Cross-held Shares*, Nikkei Asia, May 18, 2023.

[69] Foreign shareholders have gradually increased their ownership of the shares of Japanese public companies from 10.55 in 1995 to 31.8% in 2023, while Japanese trust banks have similarly increased their share from 10.3% in 1995 to 22.1% in 2023. *See* Tokyo Stock Exchange, 2023 Shareownership Survey, at 4, *available at* https://www.jpx.co.jp/english/markets/statistics-equities/examination/dh3otn00000098wp-att/e-bunpu2023.pdf. This means that for the market as a whole, domestic and foreign institutional investors own a majority of listed companies' shares. There is wide variation, however, among individual companies.

[70] Both proxy advisers' policies and institutional investors' proxy voting guidelines state that institutional investors will generally vote against takeover defenses and, in particular, will do so if such measures lack shareholder approval. For proxy advisers, *see, e.g.,* ISS, Japan: Proxy Voting Guidelines 15 (Jan. 2024), *available at* https://www.issgovernance.com/file/policy/active/asiapacific/Japan-Voting-Guidelines.pdf. In order to consider voting for a proposed anti-takeover defense, the proposal in question must first satisfy nine preconditions, including (1) independent directors comprise a majority of the board (2) the bid evaluation committee is composed entirely of independent directors (or statutory auditors), (3) shareholder approval, (4) the trigger threshold is 20% of shares or more and (5) proxy materials are posted on the TSE's website at least four weeks prior to the shareholders' meeting. *Id.*

For proxy voting guidelines of domestic institutional investors, *see, e.g.,* Sumitomo Mitsui Trust Asset Management Co., Ltd., Our Principles for Exercising Voting Rights (for Domestic Stocks) as a Responsible Institutional Investor (effective January 2024) at 21, *available* for downloading at https://www.sumitrust-am.com/responsible-investment/proxy-voting. Board approval of defensive measures without shareholder consent will also cause opposition to the election of the directors. *Id.* at 13.

proxy advisers and institutional investors, have contributed to this continuing decline,[71] although it remains an issue.[72] Shareholding structure varies widely across listed firms.

Institutional Investors. Japanese institutional investors were historically thought to side with management. However, following the enactment of the Stewardship Code and its revision to require disclosure of individual voting results (in 2017), the situation has dramatically changed.[73] Proxy voting advisers have strengthened their policies and institutional investors have rewritten their proxy voting guidelines, adding tough new requirements for the election of corporate directors.[74] In addition, it is now often the case that new investment committees (which contain

[71] The FSA's ordinance on disclosure was strengthened three times (2010, 2019 and 2023) with respect to cross-shareholdings, Principle 1.4 of the Corporate Governance Code was established in 2015 and strengthened in 2018, the two major proxy advisers enacted new policies on cross-shareholding in 2021 and 2022, while various institutional investors amended their own proxy voting guidelines beginning in 2022. For a table summarizing these policy changes, see Corporate Governance White Paper 2023, *supra* note 9, at 156. Required disclosure now includes a company's policies on cross-shareholding, individual listing of the top 60 issues held, board confirmation of the appropriateness of current cross-shareholdings, and an outline of business transactions with each cross-listed issue. The new proxy voting guidelines and policies noted above adopt quantitative criteria for cross-shareholding. If cross-shareholdings of a listed company exceed a fixed percentage of net assets (usually 20%) the institutional investor will oppose the election of executive directors. *Id.* For results concerning the gradual reduction of cross-shareholdings by major companies from 2013-2022, *see id.* at 159.

[72] *See, e.g.,* Ken Hokugo, How Many Shares are Actually Held by "Allegiant Shareholders"?, BDTI: DISCUSSION F. (Nov. 17, 2018), *https://blog.bdti.or.jp/en/2018/11/17/allegiantkh/*; Leo Lewis, *Leading Critic of Japan Inc Puts Funds on Alert*, FIN. TIMES, June 10, 2018 (Mr. Hokugo, Director of Corporate Governance and Hedge Fund Investments at the Pension Fund Association of Japan, uses a broader definition of "allegiant shareholder" to characterize management-friendly "stable shareholders," and has consistently claimed that cross-shareholding remains more widespread in Japan than official statistics would indicate).

[73] In particular, domestic institutional investors have changed their voting policies since 2017, aligning with those of foreign institutional investors. For example, in 2017, the rate of negative votes against defensive measures by domestic institutional investors increased to 72.5% from 51.6% in 2016, while foreign institutional investors' opposition rate has always exceeded that of domestic institutional investors since 2012. Kin'yūchō [Financial Service Agency], Suchuwādoshippu Cōdo wo Meguru Joukyou to Rontentō nitsuite (Shiryō 3) [On the Issues and Circumstances Concerning the Stewardship Code (Material No.3 for the Meeting of The Council of Experts on the Stewardship Code)], 15 (Oct. 2, 2021), *available at* https://www.fsa.go.jp/singi/stewardship/siryou/20191002/03.pdf. Furthermore, the trend of negative voting against proposals by boards, which had been steadily rising since 2003, strengthened further after 2017. *See* Yasuhiko Kubota *et al.*, Zadankai: *Kabunushi Soukai no Hensen to Kongo no Tenbou (Ge) [Roundtable Discussion on the Transition and Future Prospects of Shareholder Meetings (Part 3)]*, 2272 JUNKAN SHŌJI HŌMU [SHŌJI] 13, 20 fig. 3 & 20-22 (2021).

[74] For proxy advisers, *see, e.g.*, ISS, Japan, *supra* note 70. ISS lists seven instances in which it recommends opposing the election of directors (applicable to all listed companies), including: (1) poor capital efficiency (defined as less than 5% average return on equity for the past five fiscal years), (2) a large percentage of cross-

outside members) review proxy voting guidelines and results,[75] which acts as an additional incentive for institutional investors to vote in accordance with their guidelines. Engagement (informal dialogue) between institutional investors and portfolio companies, a basic premise of the Stewardship Code, is another tool which can act to produce pressure against management policies.[76]

Shareholder Activism. 'Modern" shareholder activism of the 2010s—in which activists publicly engage target companies for the benefit of all shareholders--has also reached Japan.[77] There are a significant number of activist campaigns, with Japan having the second largest number

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shareholdings (20% or more of net assets). (3) an insufficient number of outside directors (less than one-third of the board or less than two outside directors) and (4) no female directors. *Id.* at 5.
For proxy voting guidelines of domestic institutional investors, *see, e.g.,* Sumitomo Mitsui Trust Asset Management Co., Ltd., *supra* note 70. The proxy voting guidelines contain a total of 16 instances in which the election of directors will be opposed. These include the four instances cited by ISS above, although with somewhat different criteria (*i.e.*, there are three financial criteria based on operating losses, return on equity and share price for a three-year period; the cross-shareholding criterion is holdings within the top 10 percentile among TOPIX stocks). *Id.* at 9-14. Significantly, one of the additional instances for opposing the election of directors (as noted in *supra* note 70) is the adoption of an anti-takeover defense without shareholder consent. *Id.* at 13.

[75] For example, the stewardship committee of Mitsubishi UFJ Trust Bank conducts *ex ante* review of the guidelines and policies with *ex post* review of voting results. *See*, Mitsubishi UFJ Trust Bank, "Nihonban Suchuwādoshippu Cōdo" no Ukeire [Accepting the "Japanese Stewardship Code"], *available at* https://www.tr.mufg.jp/houjin/jutaku/pdf/stewardship_ja_pdf.pdf, at 6.

[76] The combination of proxy voting and engagement by institutional investors is a form of external pressure (corresponding roughly to the popular Japanese phrase "gaiatsu") which can also be utilized by reformers inside a company to strengthen their arguments for reform. Empirical evidence suggests that Japanese companies react to engagement by pursuing reforms, such as increasing the number of independent directors and abolishing pre-bid defensive measures. *See, e.g.,*Wataru Hidaka, Naoshi Ikeda and Kotaro Inoue, *Does Engagement by Large Asset Managers Enhance Governance of Target Firms?*, 77 PAC.-BASIN FIN. J. 101932 (2023).

[77] Prior to "modern" activism, the term "shareholder activism" generally meant institutional investors (particularly public pension funds) who were willing to use shareholder proposals and negotiation to affect corporate policies, rather than passively voting in support of management. *See, e.g.,* Bernard Black, *Shareholder Activism and Corporate Governance in the United States, in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND LAW 459 (1998). This trend was epitomized by CalPers in the US. In the 2000s in Japan, the Pension Fund Association was virtually the only shareholder that followed this model. *See, e.g.,* Bruce Aronson, *A Japanese CalPERS or a New Model for Institutional Investor Activism? Japan's Pension Fund Association and the Emergence of Shareholder Activism in Japan,* 7 N.Y.U. J.L. BUS. 571 (2011). The relative weakness of this earlier form of "shareholder activism" reinforced the view of commentators that only hostile takeovers and a market for corporate control would provide sufficient pressure on management to ensure good corporate governance. *See, e.g.,* Black, *supra* (referring to the then prevailing form of shareholder activism by large institutional investors as not greatly affecting firm performance and as something which "cannot substitute for a vigorous corporate control market"). *See also* KRAAKMAN ET AL., *supra* note 8, at 239.

following only the US.[78] These activists seek to reform certain aspects of companies' policies/business plans without attempting to take control, and they are increasingly influential. The success and "reasonableness" of these campaigns have arguably changed attitudes in Japan towards "activists" (a word which in the past had a clear negative connotation in Japan, but has a mixed, but generally positive, meaning in the US); it has become increasingly difficult for companies to simply refuse to deal with activists.[79] As activists increasingly receive recognition as advocating for measures that improve company performance on behalf of all shareholders, hostile acquirers will be in a better position to make similar arguments in order to gain control of companies.

Independent Directors. After decades of resistance, implementation of the Corporate Governance Code now means that most substantial (and all the largest) Japanese companies have a meaningful number of independent directors.[80] Larger companies also now have voluntary committees in which independent directors can play a more substantive role.[81] However, the

[78] *See* Insightia, Shareholder Activism in 2020 (Jan. 2021), *available at* https://www.activistinsight.com/research/Insightia_ShareholderActivism2020.pdf. Japan surpassed Australia for the second highest number of campaigns globally (66) in 2020. For global data from 2014-2020, *see id.* at 4. That number was steady in 2021 and increased to 107 in 2022. *See* Insightia, The Shareholder Activism Annual Review 2023 at 32 (Feb. 16, 2023), *available at* https://docs.insightia.com/issues/2023_02_16_Insightia_SAAR2023.pdf.

[79] *See, e.g.*, Mitsuhiro Kamiya, Akira Kumaki & Tatsuya Hasegawa, *Institutional Investors, Activists and Legal Reforms Begin Altering Japanese Corporate Governance*, SKADDEN'S 2022 INSIGHTS (Skadden, Arps, Slate, Meagher & Flom LLP), Jan. 19, 2022, *available at* https://www.skadden.com/insights/publications/2022/01/2022-insights/corporate/institutional-investors-activists-and-legal-reforms. A more welcoming environment also, in turn, increased the willingness of activists to invest in Japan. *See, e.g.,* the example of Elliott Management, *supra* note 10.

[80] The number of independent directors has increased rapidly following the promulgation of the Corporate Governance Code in 2015. For companies listed in the Prime Market (the main segment of the TSE), companies with two or more independent directors (the original provision in the Corporate Governance Code, Principle 4.8, in 2015) increased from 21.4% in 2014 to 99.2% in 2022. *See* Corporate Governance White Paper 2023, *supra* note 9, at 42. Companies with one-third or more independent directors (the current provision of the Corporate Governance Code since 2021) increased from 6.4% in 2014 to 72.8% in 2021, and finally to 92.1% in 2022. *Id.*

[81] Only 2.3% of all listed Japanese companies have adopted the "American-style" corporate governance structure ("Company with Three Committees") under which companies are required to establish audit, nomination and compensation committees, each with a majority of outside directors. *See id.* at 19. 36.9% of listed companies have adopted an alternative "one-committee" structure ("Company with Audit and Supervisory Committee") which

overall role of independent directors varies significantly by firm size, and the median listed firm in Japan is a small or medium-sized company by global standards.[82] These smaller listed firms are significant since they are generally the companies whose efficiency could be improved by hostile takeovers or the threat of them. Accordingly, the actual functioning of independent directors at a range of listed companies is an important issue; many of them are new and their role remains uncertain.

Recent Development. An instructive example for measuring changes in corporate governance and Japan's operating environment is a comparison of the Bulldog Sauce case with the best-known bid for a Japanese company in 2024--Canada's Alimentation Couche-Tard's offer to acquire Japan's Seven & I Holdings, owner of the ubitiquous 7-11 convenience stores.[83] Although there has been no hostile bid to date, the Japanese family that owns Seven & I made a number of claims that would have been familiar to Bulldog Sauce's management, including that ownership by a foreigner would alter the "Japanese" taste of 7-11's rice balls.[84] However, unlike Bulldog Sauce, the weaknesses of Seven & I's management were already well known due to two

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mandates the establishment of an audit committee. *Id.* The majority of listed Japanese companies, 60.7%, retain a traditional "corporate auditor (kansayaku)" system ("Company with Board of Company Auditors") which does not require any committees. *Id.* However, the Corporate Governance Code states that the latter two groups of companies should voluntarily create nomination and compensation committees (Supplemental Principle 4.10.1). In 2015 approximately 10.5% of companies listed in the Prime Market had established nomination and compensation committees, which increased to over 80% in 2022. *See id.* at 62. For a brief introduction to the choice of corporate form in Japan, *see, e.g.,* Bruce Aronson, Souichiro Kozuka, & Luke Nottage, *Corporate Legislation in Japan, in* ROUTLEDGE HANDBOOK OF JAPANESE BUSINESS AND MANAGEMENT 103, 104 (Parissa Haghirian ed., 2016); Jun Saito, *Corporate Structure of Japanese Companies*, JCER: JAPAN. ECON. UPDATE, Dec. 6, 2018, https://www.jcer.or.jp/english/corporate-structure-of-japanese-companies.

[82] *See* Corporate Governance White Paper 2023, *supra* note 9, at 4-5. Independent directors at smaller firms arguably tend to be closer to management and less independent than their counterparts at larger firms. Smaller firms also generally have fewer resources and simpler structures for corporate governance, including board committees, compliance and internal control functions.

[83] *See, e.g.,* Patrick Thomas, Vipal Monga and Miho Inada, *7-Eleven, the Slurpee and a $47 Billion Takeover Battle*, WALL ST. J., Nov. 22, 2024. Couche-Tard's offer was at roughly a 30% premium to Seven & I's market price. *Id.*

[84] *See, e.g.*, Miho Inada & Megumi Fujikawa, *Talk of a 7-Eleven Takeover Has Japan Worried About the Rice Balls*, WALL ST. J., Oct. 28, 2024.

prior activist campaigns against the company, and it seems impossible today for company management to simply ignore shareholder interests—they have proposed a huge management buyout (MBO) which would leave current management in control, but which would also reward shareholders.[85]

C. Changes in Takeover Law (1): New Hostile Takeover Cases since 2021 and Their Impact

Following a hiatus of over a decade, there have been five new hostile takeover court decisions since 2021. In a broad sense the new cases follow the prior cases from 2005-2008, in that courts tend to closely review defensive measures taken by a board without shareholder approval while generally permitting defenses implemented with shareholder approval.

However, these new cases are significant for a number of reasons. First, the very fact of their existence reflects changes in corporate governance and the general operating environment. Second, while the earlier guidelines, subsequent TSE regulations. corporate practice and some of the cases focused on pre-bid general defensive measures, the new cases tend to focus on post-bid defenses. There may now be enough recent examples for corporate lawyers to try to come up with a "playbook" on how to initiate and structure defensive measures following a hostile bid.[86]

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[85] *See, e.g.*, Taro Fuse & Hideki Suzuki, *KKR Considers Joining Seven & I Management Buyout after Apollo*, BLOOMBERG, *reproduced in* JAPAN TIMES, Jan. 16, 2025. The management buyout plan subsequently faltered over issues of control. *See, e.g.,* Hideki Suzuki & Taro Ise, *Seven & I Buyout Talks Stall over Management Control*, BLOOMBERG, reproduced in JAPAN TIMES, Feb. 26, 2025. As of late April, 2025, management has sought to remain in control through a series of measures, including the sale of underperforming businesses, a new (foreign) CEO and a large share buyback, however Seven & I's share price remains 22% below Alimentation Couche-Tard's offer. *See, e.g.,* Mathieu Dion & Reed Stevenson, *Couche-Tard Sees Strong Interest in U.S. stores for Seven & I Deal,* BLOOMBERG, reproduced in JAPAN TIMES, March 26, 2025.

[86] Unlike US practice, such a "playbook" may well be focused more on obtaining shareholder approval (in particular, by structuring a proposed takeover defense to meet the policy guidelines of the two major proxy advisers and thereby increasing the chances of obtaining their favorable recommendation at a general shareholders' meeting) than on court cases and fiduciary duties. However, leading Japanese corporate defense lawyers have also published more general articles on structuring takeover defenses and relevant legal issues. *See, e.g.,* Yo Ōta *et al., Tōshiba Kikai no "Tokutei Hyouteki-gata Kabunushi Handan-gata" Baishū Boueisaku ni tsuite: Iwayuru Yūji Dōnyū-gata Baishū Boueisaku no Hōteki Ronten no Kentou (Jou) (Ge)* [*On the Toshiba Kikai's "Bidder Specific and Shareholder Approved" Defensive Measure: Examinations of Legal Issues Concerning the So-called*

This new alternative of post-bid defensive measures reduces both the necessity and value of pre-bid general measures, and will contribute to the trend of their overall decline among Japanese companies. Third, although courts arguably continued to stick to narrow decisions based on the facts of each case, the new cases and market activity highlighted the need for clearer principles and guidance for market participants. As discussed in the following section, METI reacted by revising its 2005 Guidelines in 2023, with a greater emphasis on promoting "desirable" takeovers, and similar actions were taken by the TSE and FSA.

Defensive measures adopted and activated by the board without shareholder approval were carefully scrutinized and denied in the Nihon Asia Group case.[87] In that case, the Tokyo District Court and Tokyo High Court decided that the will of the shareholders was unknown since there was no shareholder approval and no meeting of shareholders scheduled to obtain such approval. The target firm had established an independent committee which judged the defensive measure to be reasonable. However, the Tokyo High Court ruled that "a committee comprised of members appointed by a board may substitute or complement a judgment by the board, but its decision cannot substitute for verification of the will of shareholders."[88] Although the target firm alleged that the bid by the acquirer had structural coerciveness, the courts judged that this was insufficient to justify the defensive measure, partly because a management buyout bid preceded the hostile takeover and the buyer held a large position in the shares of the company.[89]

Post-bid Defensive Measure (Part One) (Part Two)], 2240 SHŌJI 10, 2241 SHŌJI 38 (2020). For a recent example of a more comprehensive "playbook," *see* HIROKI ITO ET AL. KIGYŌ BOUEI JITSUMU: KIGYŌ KACHI KŌJOU HE NO DŌHYOU [STRATEGY OF CORPORATE DEFENSE: TOWARD IMPROVING CORPORATE VALUE] (2024).

[87] Tōkyō Kōtō Saibansho [Tokyo High Ct.] Apr. 23, 2021, Rei 3 (ra) no. 138, 446 SHIRYŌBAN SHŌJI HŌMU [SHIRYŌ SHŌJI] 154; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Apr. 7, 2021, Rei 3 (mo) no. 40026, 446 SHIRYŌ SHŌJI 163; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Apr. 2, 2021, Rei 3 (yo) no. 20045, 446 SHIRYŌ SHŌJI 166 (Nihon Asia Group case).

[88] *Nihon Asia Group* (Tokyo High Ct.), *supra* note 87, at 157.

[89] *Id.*; *Nihon Asia Group* (Tokyo Dist. Ct.), *supra* note 87, at 164.

The recent cases on post-bid defensive measures with shareholder approval have confirmed that requirements for shareholder approval are easily met. The Nippo Sangyo case[90] and Fuji Kosan case[91] clarified that an ordinary shareholder resolution, i.e. a vote by a simple majority of shareholders, is sufficient as shareholder approval for introducing and activating a defensive measure; a special resolution of two-thirds of shareholder votes (which is generally required for a change of control) is unnecessary. The Fuji Kosan case also clarified that shareholder approval could be obtained after litigation for a preliminary injunction.[92] Accordingly, a target board can activate a defensive measure if it plans to get approval subsequently from the majority of shareholders.

There is debate whether the Nippo Sangyo case actually involved a pre-bid general defensive measure. The board decided to activate its pre-bid defensive measure in response to a takeover bid without any additional shareholder resolution to approve such activation. The Nagoya High Court affirmed the activation of the measure by the board because of the particular facts of the case: shareholder approval to introduce and renew the general pre-bid defensive measure had been given with the knowledge that the eventual hostile bidder (Freesia Macross) had been increasing its ownership position.[93] Thus, it is unclear whether the Nippo Sangyo case can be

[90] Nagoya Kōtō Saibansho [Nagoya High Ct.] Apr. 22, 2021, Rei 3 (ra) no. 138, 446 SHIRYŌ SHŌJI 138 (Nippo Sangyo case).
[91] Tōkyō Kōtō Saibansho [Tokyo High Ct.] Aug. 10, 2021, Rei 3 (ra) no. 1593, 1630 KIN'YŪ SHŌJI HANREI [KINHAN] 16 (Fuji Kosan case).
[92] *Id.* at 22. *See also* Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] June 23, 2021, Rei 3 (yo) no. 20078, 1630 KINHAN 23 (Fuji Kosan case, court of first instance). In the Fuji Kosan case, the board made a decision to activate the defensive measure prior to the shareholders' meeting scheduled to approve such activation. The Tokyo District Court ruled that the decision to activate the defensive measure could be deemed to have been left to the shareholders since the activation was conditioned on approval at the shareholders' meeting scheduled for June 24, 2021. Fuji Kosan (Tokyo Dist. Ct.), *supra*, at 25.
[93] *Nippo Sangyo*, *supra* note 90, at 141-142.

applied to a case where shareholders approve a pre-bid defensive measure without knowledge of a pending bidder.

The Tokyo Kikai case[94] permitted defensive measures with approval by a "majority-of-the-minority" ("MoM") of shareholders. In this case the acquirer purchased a large block of the shares of the target (Tokyo Kikai Seisakusho) in the market. It had acquired about one-third of the target's shares when the defensive measure was introduced, and it ultimately acquired approximately 40%. This large block of shares prevented the target's board from obtaining shareholder approval from a majority of all shareholders. The target's board reacted by utilizing a MoM resolution which required only a majority of disinterested shareholders, thus excluding the acquirer, parties related to it, and shareholders in management. The Tokyo High Court supported the idea and affirmed that the MoM resolution was valid in this case.[95]

However, the power of shareholder approval is not unlimited. Although the use of an MoM resolution in the context of a defensive measure in the Tokyo Kikai case is controversial,[96] the Mistuboshi case made clear that a defensive measure approved by a majority of shareholders may still be deemed unfair if a court determines it is disproportionate to the threat.[97] The Mitsuboshi case was also the first case in Japan of "wolfpack tactics," in which a group of shareholders act in concert in an attempt to acquire the target company, with the group initially purchasing 21.63% of the target's (Mituboshi's) shares.[98]

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[94] Tōkyō Kōtō Saibansho [Tokyo High Ct.] Nov. 9, 2021, Rei 3 (ra) no. 2391, 1641 KINHAN 10 (Tokyo Kikai case).
[95] *Id.* at 25-28.
[96] Although there is MoM voting in the US, there is no case where it was used to approve a takeover defense initiated by the board. *See* Milhaupt & Shishido, *supra* note 5, at 353. In addition, there is a concern that MoM voting may be very friendly to the board (and management) when used in the context of a takeover defense. *Id.* The current METI guidelines discourage the use of MoM voting. *See infra* note 112.
[97] Ōsaka Kōtō Saibansho [Osaka High Ct.] July 21, 2022, Rei 4 (ra) no. 750, 2564 HANJI 34 (Mitsuboshi case).
[98] *See* Ōsaka Chihō Saibansho [Osaka Dist Ct.] July 1, 2022, Rei 4 (yo) no. 30018, 2564 HANJI 46, 52 (Mitsuboshi case, court of first instance).

The Supreme Court affirmed lower court rulings granting an injunction against activation of the target company's defensive measure, as the courts essentially found that the target's board sought to dilute the shareholding of the acquirer group regardless of the progress of the takeover bid.[99] The courts also acknowledged that the shareholders of Mitsuboshi might fear voting against activation of the defensive measure due to the possibility of being deemed by the board to be a person acting in concert with the acquirers.[100]

D. Changes in Takeover Law (2): METI's New M&A Guidelines and Other Administrative Policy Changes

Perhaps the most striking change of attitude with respect to hostile takeovers is by the Japanese government. Following the new hostile takeover cases and the attention they drew to both the state of Japan's nascent takeover market and its incomplete and unpredictable regulatory framework, in 2023 METI, the TSE and the FSA all took important policy actions with a variety of short-term impacts and potential long-term implications. METI, which had traditionally been

[99] Saikō Saibansho [Sup. Ct.] July 28, 2022, Rei 4 (kyo) no. 12, 1667 KINHAN 56 (Mitsuboshi case, the Supreme Court). *See also Mitsuboshi* (Osaka High Ct.), *supra* note 97, at 42; Ōsaka Chihō Saibansho [Osaka Dist Ct.] July 11, 2022, Rei 4 (mo) no. 58021, 2564 HANJI 43, 45 (Mitsuboshi case, court of second Instance); *Mitsuboshi* (Osaka Dist. Ct. First Instance), *supra* note 98, at 55-57.

[100] *Mitsuboshi* (Osaka High Ct.), *supra* note 97, at 41-42. In this case, the Supreme Court affirmed lower court rulings granting an injunction against activation of the target company's defensive measure despite utilization of three steps designed to help ensure its legality: (1) consultation with an independent committee, (2) shareholder approval, and (3) a mechanism for the mitigation of damages of the acquirer group resulting from exercise of the defensive measure. The courts stated that the decision by the target firm that the acquirer group was acting in concert and that the group did not provide sufficient information to the target's board and shareholders was not unreasonable. Nevertheless, an injunction was issued against activation of the defensive measure because it left wide discretion to the company in terms of a broad definition of persons acting in concert with an acquirer and of the actions to be taken by the acquirers that would constitute withdrawal of the takeover (and, accordingly, when the target board would cancel activation of the defensive measure). *See* Wataru Matsumoto, *Looking Back on Shareholder Activism in Japan in 2022*, NO&T JAPAN LEGAL UPDATE (Nagashima, Ohno & Tsunematsu, Tokyo, Japan), Mar. 2023, at 4. This case is thus another indication of courts' skepticism over the ability of an independent committee to make truly independent and reasonable decisions on takeover defenses. On the positive side, the court did not unquestioningly accept shareholder approval as being dispositive, and undertook a review of the actual effect of the defensive measure on shareholders' rights and the fairness of the process utilized in identifying those allegedly acting in concert. *See* Milhaupt & Shishido, *supra* note 5, at 354.

seen as the defender of Japanese companies, proclaimed that it is in favor of letting markets work and wished to accommodate corporate acquisitions, including those by global investors. This, however, has yet to be fully put to the test.

METI 2019 Fair M&A Guidelines

Prior to the recent hostile takeover cases, in 2019 METI revised and updated its M&A guidelines covering transactions in which there are potentially strong conflicts of interest. These new Fair M&A Guidelines ("2019 Fair M&A Guidelines")[101] overhauled an earlier management buyout (MBO) guideline from 2007, both by expanding the guidelines' scope to cover acquisitions of listed companies by controlling shareholders (a relatively recent issue) and by elaborating "measures to ensure fairness" to better deal with conflicts of interest and protect minority shareholders.[102]

The main thrust of the new best practices outlined in these guidelines was to utilize the increasing number of independent directors (following introduction of the Corporate Governance Code in 2015) by having the target company form a special committee of independent directors and other independent members, which committee would have access to its own independent financial and legal experts, and having the board generally defer to the recommendations of this independent committee. Other recommended measures included increased transparency and disclosure to minority shareholders and conducting a "market check" (creating an opportunity for competing bids). It is reported that the 2019 Fair M&A Guidelines have affected M&A practices

[101] Ministry of Economy, Trade and Industry [METI], Fair M&A Guidelines: Enhancing Corporate Value and Securing Shareholders' Interests (June 28, 2019), *available at* https://www.meti.go.jp/english/press/2023/pdf/0831_001b.pdf [hereinafter 2019 Fair M&A Guidelines].
[102] *Id.*

in Japan[103] and these new approaches were carried over to METI's subsequent general M&A guidelines.

METI 2023 Takeover Guidelines

METI's new M&A guidelines, enacted in 2023 ("2023 Guidelines")[104] to replace the original 2005 Guidelines, is both an important signal of the extent to which it has embraced a new role and a potentially important influence on market practices and court decisions relating to hostile takeovers. The 2023 Guidelines are notable with respect to a number of basic premises. First is the stated purpose--which is not only to create fair M&A rules, but to increase "desirable" acquisitions and thereby strengthen both capital markets and corporate management.[105] Thus, the 2023 Guidelines call for the boards of Japanese companies to give "sincere consideration" to a "bona fide offer,"[106] and also to negotiate with bidders to obtain more favorable terms,[107] both of which are aspirational and did not reflect current practice in Japan.

Second, unlike the 2005 Guidelines that emphasized that they were nonbinding,[108] the 2023 Guidelines, although having no direct legal effect, state that they should be "shared among

[103] Although the guidelines are nonbinding and a target company is not required to carry out all of the recommended measures, it was nevertheless anticipated that compliance with the guidelines would be persuasive evidence in court that the agreed-upon transaction price was fair. Analysis of subsequent tender offer documents indicates that actual practices in tender offer bids have generally complied with the 2019 Fair M&A guidelines. *See* Takahiro Oishi, *Publication of the Guidelines for Corporate Takeovers*, NO&T JAPAN LEGAL UPDATE (Nagashima, Ohno & Tsunematsu, Tokyo, Japan), Sept. 2023, at 5.
[104] Ministry of Economy, Trade and Industry [METI], Guidelines for Corporate Takeovers—Enhancing Corporate Value and Securing Shareholders' Interests—(Aug. 31, 2023) *available at* https://www.meti.go.jp/english/press/2023/pdf/0831_001b.pdf [hereinafter 2023 Guildelines].
[105] *See id.* at 6 ("The Guidelines are aimed to present a fair acquisition policy from the perspective of facilitating desirable transactions…")
[106] *Id.* at 19. The broader purpose of this Chapter 3 of the 2023 Guidelines is to establish a "code of conduct" regarding bids, and in particular how the board should respond upon receipt of a bid. *Id.* at 17-29.
[107] *Id*. at 25-27. This is set forth within Chapter 3.2, which is titled "When the board decides on a direction toward reaching agreement of an acquisition." *Id.* at 23.
[108] 2005 Guidelines, *supra* note 34, at 3 ("The Guidelines are not legally binding and should not be read to require that all legitimate takeover measures must conform to the Guidelines.").

participants of the Japanese economy."[109] Third, unlike the 2005 Guidelines which focused only on pre-bid general defensive measures, the 2023 Guidelines have expanded their scope by shifting the focus to post-bid defenses (featured in recent court decisions).

There are other highly significant specific issues. "Corporate value" is further narrowed to more of a quantitative measure which favors shareholders and depends on the stock price.[110] Acceptable circumstances for defensive measures are also narrowed from the standard of "necessity" and "reasonableness" in the 2005 Guidelines to one of "necessity" and

[109] 2023 Guidelines, *supra* note 104, at 5.
[110] *See id.* at 12 (defining corporate value as "the sum of shareholder value (market capitalization, from the market perspective) and net debt value," and stating that the concept of corporate value should "not be used as a tool for management to defend themselves (including management referring to retention of employees as an excuse to defend themselves))." *Id.* This process had already begun when the vague qualitative description of corporate value in the 2005 Guidelines was reconsidered in 2008. *See supra* note 52.

"proportionality" in the 2023 Guidelines.[111] There are, however no clear standards for use of MoM voting[112] or for discerning the intent of shareholders.[113]

Although the general thrust of the 2023 Guidelines was generally welcomed by foreign investors, the continuing lack of clarity on certain issues raised concerns. A typical comment letter, by the investment manager of Norway's sovereign wealth fund, raised the following points: (1) the definition of "corporate value" remains insufficiently clear, (2) acquisition offers should be made directly to independent directors, (3) shareholder approval should be required for all defensive measures, and (4) a takeover panel, or other enforcement mechanism for the guidelines, should be established.[114] This criticism of the draft guidelines during the public consultation period

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[111] *Id.* at 42-43. This difference is reflected in the three basic principles, which are otherwise similar in the 2005 Guidelines and 2023 Guidelines. Principle 3 has been changed from the "Principle of ensuring the necessity and reasonableness" in the 2005 Guidelines to the "Principle of Transparency" in the 2023 guidelines (*compare* Principle 3, 2005 Guidelines, *supra* note 34, at 3 with Principle 3, 2023 Guidelines, *supra* note 104, at 10). Discussion of the term "proportionality" elsewhere in the 2023 Guidelines (at 63-66) may be confusing for non-Japanese readers. Originally it was a concept imported to Japan from Delaware law (where it refers to proportionality between the threat posed by a bid and the defensive measures used to counter such threat). However, under current usage in Japan, particularly when discussing defensive measures with shareholder approval, "proportionality" (in Japanese "sōtōsei" or "相当性") has a very different meaning that is akin to acceptability to the bidder. The main aim is to avoid harm to the bidder—*i.e.,* to secure a chance for the bidder to withdraw its bid before a defensive measure legally takes effect and thereby avoid dilution of its shareholdings. *See id.* at 64-66*. See also* Manabu Matsunaka, *Baishū Boueisaku no Tenkai to Sono Tekihōsei [Developments in Defensive Measures and their Legality]*, 516 HŌGAKU KYŌSITSU 16, 17 & 18-19 (2023) (noting that the Mitsuboshi case was a rare case in which the court reviewed proportionality in terms of a defensive measure being proportional to the threat to the company when such measure is approved by shareholders, and pointing out that courts generally do not consider "proportionality" in that sense but rather in terms of acceptability to the bidder, as reflected in the 2023 Guidelines). While this usage has no resemblance to the use of the term "proportionality" under Delaware law, it makes sense in Japan as one measure to encourage acquisition bids in a country where such bids are rare. *See* KRAAKMAN ET AL., *supra* note 8, at 234 (generally discussing measures in some markets to encourage bids, such as weakening the mandatory bid rule or permitting partial bids).

[112] Although no clear standard for MoM voting was articulated following its permitted use in the decision in the Tokyo Kikai case, the 2023 Guidelines do state that such measure is available only in "very exceptional and limited cases." *See* 2023 Guidelines, *supra* note 104, at 56.

[113] Like court decisions to date, the guidelines state that defensive measures should generally be undertaken in accordance with the "rational intent of shareholders." *Id.* at 10 (Principle 2). Generally this means prior shareholder approval, but in some circumstances the board may seek subsequent shareholder approval, and in very limited circumstances no such approval is necessary. *Id.* at 15-16.

[114] Norges Bank Investment Management, Letter to Japan's Ministry of Economy, Trade and Industry (Aug. 3, 2023), *available at* https://www.nbim.no/en/publications/consultations/2023/draft-guidelines-for-corporate-takeovers/.

resulted in strengthening of the final version of the 2023 Guidelines to indicate more clearly the importance of shareholder approval.[115] The final version first made it clear that "corporate value" does not deviate from the standard definition in the finance world[116] and further noted that a target's management should not utilize any remaining vagueness in its definition for the purpose of entrenchment.[117]

It is thought that the 2023 Guidelines will be influential both on M&A practice and courts. There have not yet been any relevant court decisions following release of the 2023 Guidelines, but these guidelines are said to have been influential in Nidec Corporation's recent takeover of Takisawa Machine Tool Co., Ltd.[118] Nidec made an unsolicited public tender offer which was structured so as to comply with the 2023 Guidelines.[119] Terms included a tender offer with no upper limit (all shareholders could tender shares) and a hefty 100% premium to the recent stock price, and clear efforts to provide sufficient time and information for consideration of the offer

[115] *See* 2023 Guidelines, *supra* note 104, at 15-16. The 2023 Guidelines arguably sought to clarify, in response to comments on the published draft, that shareholders are the Bid Decision-maker (through the revision of Principle 2). Even the limited situations where the board can trigger a defensive measure are justified by a hypothetical (or presumption of) shareholder intent. *But see supra* note 113.

[116] *Id.* at 8 ("'Corporate value' refers to a company's assets, profitability, stability, efficiency, growth potential, and other company attributes that contribute to the interests of shareholders, or the extent to which they do so. Conceptually, corporate value is the sum of the present values of discounted future cash flows generated by a company.") (internal citations omitted). The 2008 Report by the Corporate Value Study Group had already adopted an identical definition. Corporate Value Study Group, *supra* note 51, at 2, n. 2. However, it did not attract investors attention. *See* Matsunaka, *supra* note 37, at 89-90 (discussing how the definition has changed).

[117] 2023 Guidelines, *supra* note 104, at 12 ("The target company management should not make the concept of corporate value unclear by emphasizing qualitative value, which is difficult to measure, nor should the "corporate value" concept be used as a tool for management to defend themselves (including management referring to retention of employees as an excuse to defend themselves)").

[118] *See* Masakazu Iwakura, Hidenori Nakagawa & Masanori Bito, Japanese Update: A Pioneering Unsolicited Takeover in Japan: Nidec's 2023 Acquisition of Takisawa, INTERNATIONAL INSTITUTE FOR THE STUDY OF CROSS-BORDER INVESTMENT AND M&A: FORUM, https://xbma.org/japanese-update-a-pioneering-unsolicited-takeover-in-japan-nidecs-2023-acquisition-of-takisawa/. The three authors are partners at TMI, a major Japanese law firm which represented Nidec in the transaction. *See also* Makiko Yamazaki, *Nidec's Acquisitive CEO Hails New Japan Rules Aimed at Making Takeovers Easier*, YAHOO FINANCE, Jul. 21, 2023.

[119] Iwakura, Nakagawa & Bito, *supra* note 118.

by shareholders. An independent committee of Takisawa ultimately recommended in favor of the offer and 86% of shares were tendered.[120]

Another recent and perhaps even more surprising case, which involved multiple bids, was Dai-Ichi Life Holding Inc.'s acquisition of Benefit One Inc., a corporate services provider and listed subsidiary of Pasona Group Inc.[121] Benefit One had already agreed to be acquired by M3 (a Japanese medical website operator) when the following month Dai-Ichi Life, a generally conservative Japanese life insurer and long-term stable shareholder of Benefit One, jumped in with a higher, unsolicited tender offer.[122] Press coverage alluded to recent regulatory developments as creating a new environment for hostile takeovers.[123] However, Dai-Ichi Life subsequently came to an agreement with Pasona Group and Benefit One, and characterized the transaction as a friendly deal.[124]

Any hopes that the Japanese market was developing its own version of a US-style Revlon duty (with the target company being sold to the highest bidder once the company was put up for sale), were quickly discouraged, however, by the next case in which two US private equity firms battled over control of Japan's Fuji Soft.[125] There is no indication in this case that the target

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[120] *Id.*

[121] *See, e.g.,* Satoshi Tezuka & Jun Watanabe, *Dai-ichi Makes Rare Counterproposal to Acquire Benefit One*, NIKKEI ASIA, Dec. 9, 2023. This article cited a securities company executive as saying that the transaction represented a reversal of "common sense," *i.e.,* that "it is still considered unbecoming to make a counterproposal to an M&A deal that has already been decided…" *Id. See also* Kana Inagaki, *Dai-ichi Life's Unsolicited Bid Marks Milestone for Japan M&A*, FIN. TIMES, Dec. 12, 2023 (referring to the unsolicited offer by a traditional company like Dai-Ichi Life as causing "shock and disbelief…across corporate Japan")

[122] *See* Nao Sano, *Dai-ichi Life Buys Benefit One for $2 Billion After Rare Bid War*, BLOOMBERG, March 12, 2024. Dai-Ichi Life topped M3's offer of 1,600 yen per share with a final offer of 2,173 yen per share. *Id*.

[123] *See* Tezuka & Watanabe, *supra* note 121 (noting the 2023 Guidelines as reflecting METI's "view that Japanese companies are less valuable than their overseas counterparts because they have lagged in M&A activity").

[124] *See* Sano, *supra* note 122. *See* also Reuters, *Dai-ichi's Win Brings Japan's M&A Hopes to Life*, REUTERS, Feb. 9, 2024 (wondering whether "[t]urning unsolicited offers into friendly recommended deals could become the norm in Japan").

[125] *See, e.g.*, Jacky Wong, *Barbarians at the Gate: Private Equity Storms Japan*, WALL ST. J., Oct. 27, 2024.

company will sell to the highest bidder, and there appears to be no clear legal basis or market practice to challenge the approach of the target company's management.[126]

TSE's Request for Listed Companies to Improve Capital Efficiency

Although the TSE's major reform effort of 2022—a market restructuring reform intended to strengthen listing requirements and corporate governance[127]--was generally thought to be unimpressive by investors and analysts, subsequent actions in 2023 caught investors' attention.[128] On March 31, 2023 the TSE sent notifications to listed companies on three actions discussed by its Council of Experts Concerning the Follow-up of Market Restructuring: one on consciousness "of cost of capital and stock price" and two on shareholder engagement and disclosure.[129] As roughly half of Japan's listed companies trade at a stock price that is below book value (and return on equity of less than 8%), a situation that could potentially make such companies candidates for shareholder activism or hostile takeovers, the action concerning cost of

[126] *See id*. More specifically, Bain Capital made a counteroffer to Fuji Soft's going private deal which had been supported by KKR. KKR raised its bid price to 9451 yen, just one yen higher than the price of Bain's bid. Fuji Soft announced its support for KKR's bid. *See* Anton Bridge, *Explainer: What's Behind the Private Equity Battle for Fuji Soft?,* REUTERS, Nov. 26, 2024. Ultimately, after both firms raised their bids a number of times, KKR won the battle. *See, e.g.,* Hideki Suzuki, Takako Taniguchi and Lisa Du, *KKR Wins Control of $4.4 Billion Fuji Soft after Bain Clash*, BLOOMBERG, reproduced in JAPAN TIMES, Feb. 20, 2025.

[127] For an overview of the market restructuring effective April 4, 2022, *see* Tokyo Stock Exchange, Market Restructuring, *available at* https://www.jpx.co.jp/english/equities/improvements/market-structure/01.html. The basic idea behind the reform was to reconstitute the main market segments (*e.g.*, changing the leading First Section of the TSE to the Prime Market), simplify them and utilize tougher listing standards. *Id.* The expectation was that the number of listed companies in the top market segment would be greatly reduced, but this did not occur immediately. Among 2,172 First Section companies (as of August 14, 2020), 1,837 "made the cut" to be listed on the Prime Market (as of July 14, 2022). *See* Corporate Governance White Paper 2023, *supra* note 9, at 2. This number dropped to approximately 1,650 companies on the Prime Market as of May 2024. *See* Murakami, *supra* note 68. For a critical review of the TSE market segment reform, *see, e.g.,* Aya Wagatsuma & Toshiro Hasegawa, *Prime Time: Tokyo Stock Exchange's New Look Goes into Effect,* BLOOMBERG, April 4, 2022.

[128] *See* Jiji, *Tokyo Stock Exchange Urges More Focus on Stock Prices and Capital Efficiency*, JAPAN TIMES, July 24, 2023.

[129] Tokyo Stock Exchange, Action on Cost of Capital-Conscious Management and Other Requests (April 14, 2023), *available at* https://www.jpx.co.jp/english/news/1020/e20230414-01.html.

capital and stock price was particularly significant.[130] It has added to pressure on Japanese companies, and contributed to a recent trend in which troubled listed companies delist and are taken private.[131]

Although the notification was not legally binding, only "requesting" that listed companies give greater consideration to capital efficiency, it also specifies that listed companies should state that they are disclosing the relevant information, and how to access it, in their annual corporate governance report (a mandatory report in which listed companies must disclose whether they "comply or explain" with principles of the Corporate Governance Code).[132] Under the TSE's notification, listed companies should also incorporate such information into their engagement (proactive dialogue) with investors.[133] The TSE subsequently notified listed companies that it would publish a list of companies that had disclosed this information,[134] and did so in January 2024.[135]

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[130] *See* Tokyo Stock Exchange, Action to Implement Management that is Conscious of Cost of Capital and Stock Price, *available at* https://www.jpx.co.jp/english/news/1020/dreu250000004n19-att/dreu250000004n8s.pdf.
[131] *See* Kazuaki Nagata*, As Standards Rise, Tokyo Stock Exchange Delistings Hit Decade High*, REUTERS, *reproduced in* JAPAN TIMES, Jan. 8, 2025. This is an additional factor that will act to encourage the growth of M&A in Japan.
[132] *See* Tokyo Stock Exchange, *supra* note 130, at 5. Accordingly, as with other soft law measures in Japan, this "voluntary request" is backed by mandatory disclosure requirements. The notice requests three steps to be undertaken by each listed company with regard to cost of capital and stock price: (1) analysis of current situation, (2) planning and disclosure, and (3) implementation of initiatives. Although no specific starting date for disclosure is provided, once the process begins companies should "conduct a progress analysis and update disclosures at least once a year." *Id.* at 6.
[133] *Id.* at 6. Among other effects, TSE's notification, together with pressure from institutional investors, has reportedly resulted in acceleration of the continuing trend for Prime-listed companies to unwind cross-shareholdings—as companies with higher cross-shareholdings tend to have worse capital efficiency (*i.e.,* lower price-to-book ratios and return on equity). *See* Murakami, *supra* note 68.
[134] Tokyo Stock Exchange, TSE to Publish a List of Companies That Have Disclosed Information Regarding "Action to Implement Management That Is Conscious of Cost of Capital and Stock Price" (Oct. 26, 2023), *available at* https://www.jpx.co.jp/english/news/1020/o4sio70000000l42-att/o4sio70000000l6o.pdf. As of mid-July 2023, 31% of companies in the Prime Market and 14% of companies in the Standard Market had disclosed the relevant information. *Id.* at 8.
[135] *See* Tokyo Stock Exchange, Tokyo Stock Exchange, Inc. (TSE) Has Published a List of Companies That Have Disclosed Information Regarding "Action to Implement Management That is Conscious of Cost of Capital and Stock Price," Jan. 15, 2024, *available at* https://www.jpx.co.jp/english/news/1020/20240115-01.html. As the

The FSA's Report on Tender Offers and Large Shareholding Reporting

The FSA's Financial System Council undertook a study to offer recommendations for strengthening bid rules and reporting requirements, and issued its report in December 2023.[136] The existing tender offer rules (under Japan's securities laws since 1990) mainly require that acquirers must make a tender offer to all shareholders if they seek to purchase one-third or more of the shares of a listed company through an off-market transaction. However, market purchases of shares are generally exempt, and partial bids are generally allowed.[137] The basic reporting requirements are generally similar to the US.[138]

With unsolicited bids increasingly conducted through market transactions and the growing importance of institutional investors, the FSA working group examined three areas: the tender offer rule, the large share reporting rule and the transparency of beneficial shareholders. The main recommendation was for the current tender offer rule to also apply to market

information is provided in a searchable spreadsheet format, it is easy to ascertain and list up which companies (in a particular industry or with other characteristics) failed to provide the information. *Id.*

[136] The Working Group on Tender Offer Rule and Large Shareholding Reporting Rule, The Financial System Council, Report, Dec. 25, 2023 *available at* https://www.fsa.go.jp/en/refer/councils/singie_kinyu/20240130/01.pdf. Based on this report, an amendment to the Financial Instruments and Exchange Act was promulgated on May 22, 2024. Kin'yū Shōhin Torihiki Hō oyobi Tōshi Hōjin ni kansuru Hōritsu no Ichibu wo Kaisei suru Hōritsu [Act to Amend the Financial Instruments and Exchange Act and Act on Investment Trusts and Investment Corporations], Law No. 32 of 2024, *available at* https://www.shugiin.go.jp/internet/itdb_gian.nsf/html/gian/honbun/houan/g21309056.htm. For a brief explanation of this amendment concerning tender offers in English, see Takahiro Suga, *Japan Legal Update: Recent Developments in Japanese Tender Offer Regulations,* JAPAN LEGAL UPDATE (Anderson Mori & Tomotsune, Tokyo, Japan), May 17, 2024, https://www.amt-law.com/en/insights/others/publication_0028362_en_001/.

[137] A 2006 amendment required that an acquirer intending to purchase two-thirds or more of a company's shares must make a tender offer for all of the shares. *See generally* Fujita, *supra* note 30, at 26-28.

[138] Reporting is required for share ownership exceeding 5% (similar to Rule 13D in the US) and special (less frequent) reporting is permitted for passive institutional investors whose stake is below 10% of the shares and who do not make a material proposal to the company (similar to Rule 13G in the US). The percentage of shares must include shares held by joint holders who have an agreement among them to sell or jointly vote shares. For a summary, *see* Financial System Council Report, *supra* note 136, at 14.

transactions,[139] with other recommendations for the large share reporting rule[140] and the identification of beneficial shareholders.[141]

Most of the fundamental (and interesting) questions were discussed but deferred for future consideration. These include whether partial tender offers should be abolished in favor of a UK-style mandatory bid rule and whether Japan should have a system like the US or UK to identify beneficial shareholders not subject to the large shareholding reporting rule.[142] Many of the immediate recommendations were limited to filling gaps and resolving ambiguities in the current system, so the ultimate impact of this reform effort must await further discussion and action by the FSA.

E. The Problem to be Addressed: The Unfinished Business of Abenomics and the Pivot to Sustained Growth

The developments analyzed in this Part to a large extent represent responses to the greatest issue faced by Japan for quite some time: the attempted pivot from an aging society with a deflationary economy, shrinking markets and economic malaise over two lost decades to a more

[139] Other recommendations relating to tender offers were lowering the current one-third threshold to 30% (to correspond to other countries' systems), obligating bidders to explain their management of conflicts of interests with minority shareholders in the case of partial bids, and considering a new system for handling exceptional treatment under the bid rules in appropriate cases. *Id.* at 2-12.

[140] Recommendations for the large share reporting rule generally involve the possibility of making exceptions for institutional investors who are passive shareholders in order to encourage engagement with portfolio companies. The proposed exceptions involve further clarification of existing general rules relating to (1) permitting less frequent reporting (under a special reporting system) by "passive" institutional investors even if they make material proposals to management that are not related to corporate control, (2) not classifying institutional investors as "joint holders" of shares for reporting purposes despite collective engagement with companies, in the absence of a shareholders' agreement, and (3) exceptional cases where holders of shares through equity derivative transactions seek to engage with management and might be subject to reporting requirements. *Id.* at 14-19.

[141] With respect to the identification of beneficial shareholders, the working group recommended that institutional investors should disclose their shareholdings when queried by companies. *Id.* at 20-21.

[142] *Id.* at 13, 21. With respect to the possibility of a mechanism for imposing injunctions and other orders for violation of the tender offer rules, the report noted that "if a structure that borrows from the U.K.'s Takeover Panel is to be introduced, judgment is best left to such a body." *Id.* at 13.

vibrant country with sustained economic growth. Although emphasis on growth strategies both preceded and followed the Abe administration (which began in December 2012), it had the best-known set of pro-growth policies in "Abenomics."[143] There has been an overall emphasis on "strategic financing for growth-oriented businesses" (including through foreign investment in Japan)[144] and on domestic companies taking greater risks and improving their business performance (including through greater investment in areas linked to innovation and productivity, such as research and development and human capital).[145]

Abenomics also emphasized structural reform, which featured improvements in corporate governance.[146] Better corporate governance implies that Japanese companies will be more accountable to shareholders and will take the necessary risks to achieve profitability and shareholder returns,[147] rather than focus on workplace stability. It has arguably become

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[143] For a graphic overview of the original 2013 growth strategy, *see* New Growth Strategy: The Formulation of "Japan Revitalisation Strategy-Japan is Back-" (June 21, 2013), *available at* https://japan.kantei.go.jp/96_abe/documents/2013/1200485_7321.html (last visited April 26, 2024). For the text, see Japan Revitalization Strategy-JAPAN is BACK (Cabinet Decision on June 14, 2013), *available at* www.kantei.go.jp/jp/singi/keizaisaisei/pdf/en_saikou_jpn_hon.pdf (last visited April 26, 2024). It emphasizes restoring confidence in the future, stating that "This period of long-term economic slowdown has been dubbed 'the lost two decades.' Far graver than the economic losses, however, were the losses of confidence and future hopes among company managers as well as individuals…In this context, the Growth Strategy's role as the third 'arrow' is clear. It should restore the confidence of company managers and of all people, and change expectations into actions." *Id.* at 1.

[144] The first slide of a government presentation on the 2014 revision of the growth strategy states: "Strategic financing for growth-oriented businesses is the key to successful implementation of initiatives for overcoming deflation and achieving sustainable economic growth under Abenomics." *See* Japan Revitalization Strategy (Revised 2014) (Cabinet Decision on June 24, 2014): Major Measures related to Financial and Capital Markets, at 1, *available at* https://www.fsa.go.jp/en/refer/measures/20140624.pdf.

[145] *See, e.g.,* the 2014 revision of the growth strategy, which states: "However hard the government may break through bedrock regulations to pave the way for companies and individuals to act more easily, it will never bring about progress in business restructuring and real productivity improvements beyond mere cost conservation to the Japanese economy, unless corporate managers boldly tackle business realignment and new business exploration in a bid to upgrade their companies' earning power." *See* Japan Revitalization Strategy Revised in 2014: Japan's Challenge for the Future (Cabinet Decision on June 24, 2014), at 2, *available at* https://www.kantei.go.jp/jp/singi/keizaisaisei/pdf/honbunEN.pdf.

[146] *See* Japan Revitalization Strategy-JAPAN is BACK, *supra* note 143, at 37-38 (explaining planned policies, such as increasing outside directors, for "strengthening corporate governance").

[147] The 2014 growth strategy states: "What should be done to increase Japanese companies' earning power, in other words, medium to long-term profitability and productivity…? First, it is important to strengthen the

generally accepted in Japan that sustained economic growth requires strong productivity, that poorly performing Japanese companies with overly conservative management should be pressured rather than supported, and that, ultimately, allowing these weak companies to be bought (even, in theory, by traditionally disfavored foreign investors) may not only improve that company's performance, but will also provide incentives to other corporate managements to improve their performance and avoid a similar fate. The term "market for corporate control" remains relatively unknown in Japan outside academic circles, yet the attitudes and policies described above would certainly suggest growing acceptance of the logic of a generally equivalent concept.[148]

The policies associated with Abenomics, however, initially produced mixed results.[149] Substantial corporate governance reforms provided a positive backdrop for changes in the

mechanism to enhance corporate governance and reform corporate managers' mindset so that they will make proactive business decisions to win in global competition for the purpose of attaining targets including globally-compatible level in return on equity." *See* Japan Revitalization Strategy Revised, *supra* note 145, at 5.

[148] METI's 2023 Guidelines state as follows: "The development of a fair M&A market will ensure that the market functions soundly and that desirable acquisitions (acquisitions that both increase corporate value and secure the interests of shareholders) are actively conducted. This, in turn, will contribute to corporate growth through acquisitions, and also will lead to target companies' opportunities to select superior corporate strategies and to improve external discipline on management. In addition, an active market for desirable M&A transactions will optimize resource allocation, accelerate industry restructuring, and promote healthy economic metabolism of Japan's capital markets where many participating companies currently have low capital efficiency. As a result, the entire economy and society should benefit." *See* 2023 Guidelines, *supra* note 104, at 5-6. *See also supra* notes 14-16 and accompanying text.

[149] In the narrow sense, the three arrows of Abenomics did not achieve their stated goals during the Abe administration. The first arrow, aggressive monetary policy, kept interest rates low but did not achieve sustained inflation (which, however, has increased recently). *See, e.g.,* Tomohiko Nishino, *The Risk of a Normalized Abenomics*, NIPPON.COM: IN DEPTH, Sept. 8, 2022, *available at* https://www.nippon.com/en/in-depth/d00830/. And the second arrow, stimulative fiscal policy, did not achieve strong economic growth. Japan's real growth rate during the decade of Abe's leadership (roughly 2013 to 2022) was approximately the same 0.6% as during the prior "lost decade." *Id.* However, Japan may well have been worse off without these efforts. *See, e.g.,* Yumiko Oshima, Yuko Saito & Momoe Ban, *Japan Economy Changed Course with Abe Policy: U.S. Economists*, NIKKEI ASIA, July 15, 2022 (citing remarks by Adam Posen). And on the positive side, it did result in increased corporate profits, shareholder returns and wages. *See, e.g.,* Toru Fujioka & Paul Jackson, *Legacy of Abenomics to Live Beyond Its Tragically Shot Architect,* BLOOMBERG, July 28, 2022. The third arrow of structural reform (long-term growth policy) was a bundle of policies which resulted in progress in areas such as increasing the role of women in the workforce, but did not fully achieve its stated goals. *See, e.g.,* Fujioka & Jackson, *supra* (citing remarks by David Weinstein). One of the generally successful third-arrow policies was corporate governance reform, as discussed in Part II.B .

operating environment described in Part II.B *supra*. But other efforts, such as cutting corporate taxes in an effort to aid companies in making investments, were generally unsuccessful. Many Japanese companies simply increased their cash cushion rather than their capital investment, resulting in *worse* performance, capital efficiency and returns to shareholders, as evidenced by the nearly half of Japanese companies whose stock price today remains lower than the book value of their assets.[150] This disappointing result led both to further involvement by activist investors and additional governmental measures such as the 2023 Guidelines and the 2023 TSE directive, discussed in Part II.D above, designed to increase the pressure on management at Japanese companies to focus more on improving capital efficiency, business performance and shareholder returns.[151]

Large stock market rallies in 2023 and 2024[152] have created a new opportunity to create a true turning point for sustained growth and development, as global investors increasingly focus on greater opportunities in Japan's markets and its companies, and also on the new investment environment produced by corporate governance reforms. But the question of whether "Japan is back" is the subject of ongoing debate.[153] In order to avoid a "flash-in-the-pan" stock market

Thus, the most popular assessment of Abenomics is a mixed, but generally positive, one: despite its shortcomings, it was a bold (and generally successful) attempt to chart a new course for Japan that would create the conditions for sustained economic growth. *See, e.g.,* Fujioka & Jackson, *supra*; Raymond Woo*, The Legacy of Abenomics Lies between Two Extremes,* JAPAN TIMES, Sept. 27, 2002 (citing Abenomics as a "catalyst in pushing Japan to re-imagine itself in the new global economy").

[150] *See* Tokyo Stock Exchange, *supra* note 130, at 1. In addition to having a price-to-book ratio of less than 1, half of the companies listed in the Prime Market also have return-on-equity (ROE) of under 8 percent. *Id.*

[151] The 2023 Guidelines note that in recent years Japanese companies have been expanding their businesses overseas through acquisitions. *See* 2023 Guidelines, *supra* 104, at 4. Explanatory materials from METI specifically refer to the corresponding lack of domestic restructuring by Japanese companies as part of the background for formulation of the 2023 Guidelines to encourage "desirable" takeovers. *See* Genta Ando, METI, Policies of METI and the Guidelines for Corporate Takeovers 3 (June 2023) (seminar materials on file with the authors).

[152] *See supra* note 24. One reason for the new enthusiasm for Japanese stocks is that the "failures" of Abenomics cited *supra* note 149 (i.e., low growth and too-low inflation) have recently improved. *See, e.g.,* Vivek Shankar, *Investors Are Putting Big Money Into Japan Again. Here's Why.* N.Y. TIMES, June 14, 2023.

[153] *See, e.g.,* Bruce Aronson, *Is Japan (Finally) Back?,* 4 USALI PERSPECTIVES, No. 6, Dec. 3, 2023, *available at* https://usali.org/usali-perspectives-blog/is-japan-finally-back. Those who see a long-term improvement often cite

rally as occurred in 2013[154] upon the announcement of Abenomics and to seize this current opportunity, Japan must continue to encourage accountable and efficient management at Japanese companies. A number of domestic hostile takeovers have occurred over the past few years; investors are waiting to see if foreign buyers will also be successful.

On the positive side, corporate governance reforms and the increased capabilities of institutional players also provide an opportunity to revise Japan's takeover regime to help promote growth and efficiency in both businesses and capital markets. The remainder of this Article provides a framework for utilizing these improved capabilities to help address the unfinished business of Abenomics by (1) updating and revising the theoretical framework on takeover regulation, (2) applying this revised regulatory framework to Japan, and (3) making recommendations on reform of Japan's regulatory framework for takeovers.

III. REVISING COMPARATIVE THEORY ON REGULATING HOSTILE TAKEOVERS

A. The US and UK Models

Despite significant similarities between the UK and the US—including being the two major markets for acquisitions in the world, having broadly similar forms of capitalism with sophisticated capital markets, and sharing common law traditions—they chose diametrically opposed solutions when faced with the new issue of regulation of hostile takeovers.[155] The UK

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the success of corporate governance reforms in attracting foreign investors. *See, e.g.*, Nikkei, *Overseas Investors' Bet on Corporate Governance Reform Drives Stock Market Rally*, NIKKEI ASIA, May 20, 2023. Others see a broader rejuvenation in Japan that goes far beyond the recent stock market rally. *See, e.g.*, Gearoid Ready, *How a Fading Japan Regained Its Superpowers*, BLOOMBERG, April 24, 2024 (citing Japan's rise in "everything from global diplomacy, financial and corporate vitality, military strategy, pop culture and even sports").

[154] There was a sharp rally during the first six months of the Abe administration, *i.e.,* an 80% rise in the Nikkei 225 index from November 2012 through May 2013 in anticipation of economic reforms and growth, but it then receded and was not sustained. *See, e.g.*, Bettina Wassener, *Japanese Stocks Descend Into Bear Market*, N.Y. TIMES, June 12, 2013.

[155] Armour & Skeel, *supra* note 1, at 1738.

focused on leaving the decision to shareholders, as their mandatory bid rule both prevented coercive bids and obviated any need to take defensive measures.[156] Based on the traditional influence of strong and cohesive institutional investors, the specific rules and their enforcement were left to a self-regulatory body, a takeover panel, that emphasized commercial norms.[157]

By contrast, the US, which never adopted a mandatory bid rule, ultimately left decisions on takeover defensives against coercive bids to corporate boards of directors.[158] Based on their own tradition of state judges (especially in Delaware) making decisions on corporate law issues, the specific rules and their enforcement were legal interpretations developed by courts based on directors' broad fiduciary duties under common law.[159]

Commentators have generally preferred the UK approach because the mode of regulation—the Panel on Takeovers and Mergers in the United Kingdom ("UK Panel")—seems to be speedy, inexpensive and certain compared to the US system and may provide greater accountability by managers to shareholders.[160] But others have pointed out that the UK's mandatory bid rule could potentially have a chilling effect on hostile bids, and thus on the takeover market.[161] And in

[156] For the mandatory bid rule, *see* the UK Code, The Panel on Takeovers and Mergers, The Takeover Code, Rule 9 (The Mandatory Offer and its Terms), *available at* https://code.thetakeoverpanel.org.uk/tp (last visited on March 28, 2024); Armour & Skeel, *supra* note 1, at 1729.
[157] Armour & Skeel, *supra* note 1, at 1745.
[158] In the US, the Williams Act was enacted by Congress in 1968 to establish procedural and disclosure requirements for cash tender offers with the aim of protecting individual shareholders from coercive bids by corporate raiders. *See, e.g.,* Armour, Jacobs & Milhaupt, *supra* note 2, at 241. However, it has not been utilized by the SEC to enforce directors' fiduciary duties in the takeover context, which has been left entirely to private enforcement. *Id.* Accordingly, it is not incorporated into our analysis. By way of contrast, Australia has a system of public enforcement of directors' duties. *See infra* note 191.
[159] *See, e.g.,* Armour, Jacobs & Milhaupt, *supra* note 2, at 241-43.
[160] Armour & Skeel, *supra* note 1, at 1732.
[161] KRAAKMAN ET AL., *supra* note 8, at 234. Accordingly, some jurisdictions have weakened the UK's mandatory bid rule to prevent a chilling effect and adjust to local conditions. *Id.*

terms of results both systems are generally regarded as being successful and roughly equivalent in their function of regulating hostile takeovers.[162]

Neither system is easily created elsewhere. In a self-regulatory system like the UK,[163] the R\ule-maker must have incentives that are "consistent with social welfare" based on commercial norms without conflicts of interest.[164] On the other hand, the US system functions effectively as a court-oriented regime due to important adaptations concerning the expertise and speed of its court decisions.[165] In both cases the mode of regulation depended on what institutions were powerful in these respective jurisdictions at the time—institutional investors in the UK and Delaware courts in the US—and may also represent unintended consequences of legislation designed with other objectives.[166]

Prior academic debate regarding Japan has, to a considerable extent, focused on the preliminary question of whether Japan is a country which satisfies the necessary conditions cited for an active hostile takeover market: dispersed share ownership, inexpensive shares, and takeover rules based on those of the US and the UK.[167] The biggest issue was whether the tradition of cross-

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[162] *See, e.g., id.* at 221.
[163] Originally a self-regulatory system, the UK Panel was given a new legal basis upon enactment of the UK's Companies Act 2006, which incorporated the EU Takeovers Directive of 2004. However, general principles of the EU directive were identical with the UK Code, and commentators generally report that there has been no significant change in the practice of the UK Panel. *See, e.g.,* Armour, Jacobs & Milhaupt, *supra* note 2, at 237. *But see* DAVID KERSHAW, PRINCIPLES OF TAKEOVER REGULATION 125-128 (2016) (noting a shift in the focus of power after 2006 from the panel itself (members) to the panel executive (staff)). For a discussion of the respective roles of the panel members and panel executive in the UK and Australia, with a focus on the tradeoff between quick, informal resolution of disputes and transparency, *see infra* note 209 and accompanying text.
[164] Armour & Skeel, *supra* note 1, at 1785.
[165] *Id*. at 1749. And the US system also provides rules aimed at limiting managerial entrenchment through the interpretation of fiduciary duties. *See* KRAAKMAN ET AL., *supra* note 8, at 218.
[166] Armour & Skeel, *id.* at 1784-85.
[167] *See generally* Armour, Jacobs & Milhaupt, *supra* note 2. The authors cite the rarity of dispersed ownership throughout the world, and state that if the above three conditions are met hostile bids that go against prevailing business norms can be expected; in addition, the initial cases are controversial and not adequately dealt with by existing regulation. *Id.* at 221.

shareholding in Japan negated its nominally dispersed shareholders,[168] and if the initial decline in this practice following the bursting of Japan's economic bubble in the 1990s[169] was sufficient for Japan to satisfy the above conditions. The initial dearth of hostile takeovers after 2007 has also led to criticism of all three of these criteria with respect to Japan.[170]

Underlying this debate about whether Japan met the conditions for an active takeover market is the fundamental question of the importance of a market for corporate control. Law and economics scholars have consistently cited such a market as the most effective method of ensuring good corporate governance, particularly at listed companies.[171] However, while the direct and disciplinary effects of hostile takeovers were well-established in academic theory, this idea was not widely accepted in Japan as a real-world phenomenon. In the 2000s, the emphasis remained on the traditional importance of long-term employees and monitoring by friendly shareholders as keys to Japan's corporate governance and postwar economic success.[172]

However, recent Japanese hostile takeover cases, the new METI guidelines and other changes in Japan's operating environment suggest that the question of a market for corporate control is once

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[168] *See, e.g.*, Zenichi Shishido*, Reform in Japanese Corporate Law and Corporate Governance,* 49 AM. J. COMP. L. 653 (2001) (noting that the possibility of hostile takeovers in Japan have not been realized due to the creation of cross-shareholding networks).
[169] *See generally* Hideaki Miyajima & Fumiaki Kuroki, *The Unwinding of Cross-Shareholding in Japan: Causes, Effects, and Implications, in* CORPORATE GOVERNANCE IN JAPAN: INSTITUTIONAL CHANGE AND ORGANIZATIONAL DIVERSITY 79 (Masahiko Aoki, Gregory Jackson & Hideaki Miyajima eds., 2007).
[170] Puchniak & Nakahigashi, *supra* note 5, at 244 (arguing that satisfaction of these conditions may be necessary, but is not sufficient, for the establishment of a hostile takeover market; in addition,corporate law scholars have been too focused on abstract theory derived from the UK/US experience and have paid insufficient attention to local, idiosyncratic conditions).
[171] *See supra note 14;* KRAAKMAN ET AL., *supra* note 8, at 239; Black, *supra* note 77.
[172] *See* 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, *supra* note 4, at 1, 14 (citing the "company community"—a coalition between employees and management in Japanese companies—and a coalition between cross-holding shareholders and management as acting "as an alliance against genuine shareholders"). *See also* Dan W. Puchniak, *The Efficiency of Friendliness: Japanese Corporate Governance Succeeds Again without Hostile Takeovers*, 5 BERKELEY BUS. L.J. 195 (2008) (preferring Japan's "unique" corporate governance system, which "has fostered orchestrated and friendly (but not hostile) M&A as a significant force for restructuring," over a system based on hostile takeovers).

again open to debate. More importantly, the regulatory framework for hostile takeovers should be updated in response to changing conditions.[173] Accordingly, we shift the focus of discussion to a reconsideration of regulatory frameworks and how they might apply to Japan.

Japan, which lacked both powerful institutional investors and a tradition of courts making important corporate law decisions,[174] did not fit easily into either the UK or US model when hostile takeovers first appeared in the 2000s.[175] As noted in the Introduction, Japan is thought to have a mixed and incomplete system of regulation with competing "subordinate lawmakers, including the judiciary, unelected representatives of two agencies who steered a process of best-practice formation among market actors, and the TSE, a hybrid between a regulatory agency and a market actor."[176] The result is both ambiguous rules and uneven enforcement.

This situation is not unique to Japan, as in Asia civil law countries have generally borrowed both from the US and the UK, particularly looking to the US in terms of board-imposed takeover defenses and *ex post* decisions by courts (based on fiduciary duties), while at the same time utilizing a restricted version of UK-style mandatory bid rules.[177] Japan's substantial reliance on

[173] KRAAKMAN ET AL., *supra* note 8, at 242 (noting that the main issues in takeover regulation are agency costs and shareholder coordination problems, and that every takeover regime must "ensure they update their approach as and when real-life changes occur").
[174] *See* Armour, Jacobs & Milhaupt, *supra* note 2, at 259; Gilson*, supra* note 56.
[175] An alternative method of analyzing the UK and US systems is to characterize the UK as having strong regulation of both management and shareholders, the US having weak regulation of both, and Japan lacking balance due to its weak regulation of management and strong regulation of shareholders. *See* Zenichi Shishido, *A Response to John Armour, Jack B. Jacobs and Curtis J. Milhaupt,* OPINIO JURIS, Oct. 2, 2011, *available at* https://opiniojuris.org/2011/02/10/hilj_shishido-response-to-armour-jacobs-milhaupt/. We note, however, that there is considerable debate and some doubt about whether Japan actually has strong regulation of shareholders (i.e., tender bid rules that are close to the UK's mandatory bid rule, which leave no room for coercive offers or need for takeover defenses). *See generally* Financial System Council Report, *supra* note 136.
[176] *See* Armour, Jacobs & Milhaupt, *supra* note 2, at 257.
[177] *See generally* Varittol & Wan, *supra* note 23. The authors regard this partial reliance by civil law jurisdictions in Asia on a US-style mode of court-based regulation, with an unclear role for the board, to be "counterintuitive." *Id.* at 31. By way of contrast, common law (i.e., English law) jurisdictions in Asia have followed the UK rule of board neutrality. *Id.* at 21.

the courts for enforcement despite a general affinity for informal dispute resolution is attributed to the lack of agreement on the principle of shareholder primacy, *i.e.*, there is no institutional player representing all interested constituencies who can make decisions in a hostile bid case.[178] Under this view, a panel-type system of dispute resolution is therefore not feasible in Japan, and the court system represents a second-best choice.[179]

It is highly unlikely that a dominant subordinate lawmaker will soon emerge in Japan. The UK and US systems may therefore provide little direct guidance on how Japan might strengthen and "complete" its framework for takeover regulation. Accordingly, we reconsider the overall analytical framework for the necessary institutional roles in a takeover regulatory regime, with an eye toward analyzing and making recommendations for reworking the framework in Japan.

B. Adding the Australian Model as an "In-between" Point of Reference

We select Australia as a "new" point of reference for hostile takeover regulation and institutions.[180] Australia arguably has the only active hostile takeover market following the US and the UK.[181] In Australia there is no dominant subordinate lawmaker, as different institutional

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[178] *See* Shishido, *supra* note 175. Armour et al. explain Japan's emphasis on Delaware law over UK-style informality by citing early government reports and the timing of the Livedoor case. *See* Armour, Jacobs & Milhaupt, *supra* note 2, at 264.

[179] Shishido, *supra* note 175.

[180] Of course, the Australian regime is not entirely new in comparative research on takeover regulation, even ignoring the numerous comparisons with the UK and other English law systems. *See, e.g.,* Umakanth Varottil & Wai Yee Wan, *Concluding Observations and the Future of Comparative Takeover Regulation*, *in* COMPARATIVE TAKEOVER REGULATION: GLOBAL AND ASIAN PERSPECTIVES, *supra* note 5, at 474 (listing Australia as the third 'frontrunner" in M&A, following the US and UK); Robin Hui Huang & Juan Chen, *Takeover Regulation in China: Striking a Balance between Takeover Contestability and Shareholder Protection*, *in* COMPARATIVE TAKEOVER REGULATION: GLOBAL AND ASIAN PERSPECTIVES, *supra* note 5, at 211 (comparing China's takeover regulation with regimes in the US, UK and Australia). For an early discussion relating specifically to the Australian takeovers panel as a possible example for takeover regulation in Japan, *see* Geread Dooley, *Streamlining the Market for Corporate Control: A Takeovers Panel for Japan?*, *in* CORPORATE GOVERNANCE IN THE 21ST CENTURY, *supra* note 61, at 155.

[181] Although the data are somewhat dated, one comparison found that the percentage of hostile bids among completed M&A transactions was 21% in the US (during 1980-94), just over 20% in the UK (1988-98), and 7.5% in Australia (1992-2001). *See* Alan Dignam & Michael Galanis, *Australia Inside-Out: The Corporate Governance*

players act as the Rule-maker (the legislature) and Umpire (the takeovers panel) in hostile takeover bids. Finally, although a number of Commonwealth countries adapted a takeover panel based on the UK model, Australia's limited version, despite its own path-dependent history,[182] may be closest to Japan's needs. The Australian takeovers panel ("Australian Panel") now has an active history of over two decades and, like the UK original, has been judged to be a clear success.[183] The numerous differences between the UK Panel and the more limited Australian Panel are summarized in Appendix 1.

In Australia the Rule-maker is the legislature. General principles for takeover bids are set forth in the purpose section (Section 602) of the chapter on takeover bids in Australia's corporate law, and include (1) market efficiency, information and competition, (2) disclosure of the bidder's identity and reasonable time and information to consider the bid, (3) shareholder equality and (4) appropriate procedures for mandatory squeeze-outs.[184] More detailed rules appear in the

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System of the Australian Listed Market, 28 MELB. U. L. REV. 623 (2004) (SSRN: https://ssrn.com/abstract=1839416SSRN, at 14).

[182] Despite its tradition of emphasizing equal opportunity for shareholders over market efficiency, in the 1990s Australia was troubled by frequent tactical litigation in takeover cases. *See, e.g.,* Jennifer Hill*, The Architecture of Corporate Governance in Australia - Corporate Governance - National Report: Australia*, *in* COMPARATIVE CORPORATE GOVERNANCE: A FUNCTIONAL AND INTERNATIONAL ANALYSIS 106 (Andreas M. Fleckner & Klaus J. Hopt eds., 2013) (SSRN: https://ssrn.com/abstract=1657810, at 43). An initial takeover panel proved ineffective. *See infra* note 193. New calls to "take the legalism out of takeovers" and achieve a more balanced system led to amendments to the Corporations Act in 2000 which created the current takeovers panel and substantially shifted the balance of power from corporate boards to shareholders. *See* Emma Armson, *Evolution of Australian Takeover Legislation*, 39 MONASH U. L. REV. 654, n. 399 (2013) (citing G F K Santow and George Williams, *Taking the Legalism out of Takeovers,* 71 Australian Law Journal 749 (1997) as an influential article that helped spur the change to the current takeover panel); Jennifer Hill, *Subverting Shareholder Rights: Lessons from News Corp.'s Migration to Delaware*, 63 VAND. L. REV. 1, 25-26 (2010).

[183] *See generally* Emma Armson, *Assessing the Performance of Takeover Panels: A Comparative Study*, *in* COMPARATIVE TAKEOVER REGULATION: GLOBAL AND ASIAN PERSPECTIVES, *supra* note 5, at 134 and other sources cited *infra* in note 211. For the leading guide to the role and practice of the Australian Panel, *see* RODD LEVY, TAKEOVERS LAW AND STRATEGY (6th ed., 2023). For the leading treatise on Australian corporate law, *see* ROBERT P. AUSTIN & IAN M. RAMSAY, FORD, AUSTIN AND RAMSAY'S PRINCIPLES OF CORPORATIONS LAW (17th ed., 2017).

[184] *Corporations Act 2001* (Cth) s 602. This section generally incorporates Australia's well-known Eggleston principles on takeover law from 1969 for the purpose of maintaining an efficient, competitive and informed market. *See, e.g.,* Takeovers Panel, Guidance Note 1: Unacceptable Circumstances, *available at* https://takeovers.gov.au/guidance-notes/gn1 (last visited March 26, 2024).

Corporations Act and in regulatory guidance by the corporate and securities law regulator (the Australian Securities & Investments Commission or "ASIC").[185]

Like the UK, in Australia the Bid Decision-maker is the shareholders. Australia has its own form of a UK-style mandatory bid rule,[186] and shareholders decide bids through acceptance. The board of directors must maintain neutrality and cannot adopt takeover defenses without shareholder approval.[187] The main role of the board in a hostile takeover bid is to make a recommendation to shareholders,[188] but it also becomes involved in important practical areas such as the extent of due diligence and the availablility to the acquirer of deal protection (exclusivity) provisions.[189]

Of particular interest is the Umpire, the Australian Panel. Although a number of Commonwealth countries in Asia adapted a takeover panel based on the UK model, (e.g., Hong Kong and

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[185] According to its website, ASIC is "Australia's integrated corporate, markets, financial services and consumer credit regulator…" *See* https://asic.gov.au/. With respect to hostile takeovers, ASIC has limited rule-making authority under the Corporations Act (sections 655A, 669 and 673) to modify the rules. It has produced an extensive (156-page) regulatory guide on the subject. *See* Australian Securities & Investments Commission, Regulatory Guide 9: Takeover Bids, *available at* https://download.asic.gov.au/media/ydql4opa/rg9-published-27-march-2024.pdf.

[186] Acquisition of a company's shares above 20% is generally forbidden, with a key exception for a general offer to shareholders. *See* Armson, *supra* note 183, at 135-36. This essentially precludes private control transactions and mandates an even split of the control premium between majority and minority shareholders. One commentator has noted that "[t]his rule is particularly strict by international standards." *See* Hill, *supra* note 182, at 25.

[187] Although there are no code provisions as in the UK, such policy was adopted by the Australian Panel. Australia's "no frustration rule," set forth in Guidance Note 12, limits the board's activities, but permits the board to propose takeover defenses to the shareholders. *See* Takeovers Panel, Guidance Note 12: Frustrating Action, 15.2, *available at* https://takeovers.gov.au/guidance-notes/gn12. *See also* Armson, *supra* note 183, at 136.

[188] *See Corporations Act 2001* (Cth) s 638. Although the board may propose defensive measures to shareholders in theory (*see* Guidance Note 12, *supra* note 187), it is uncommon in practice. Comment on a prior draft from Tim Bowley. Rather, the board's decision on its recommendation with regard to a hostile bid is sufficiently respected and influential that a bidder may often negotiate with the board in an effort to obtain a positive recommendation. Thus, the board would have sufficient bargaining power even without any shareholder-approved defensive measure. *Id.*

[189] *Id*.

Singapore),[190] only Australia created a panel with relatively limited authority and activities--less authority, independence, budget, staff, and cases than the UK Panel. This is partly a result of divided authority—public enforcement of takeover regulation is entrusted to ASIC, while the Australian Panel handles dispute resolution.[191] Such a public/private "hybrid" model of enforcement stands in contrast to the UK, where the takeover panel assumes both roles. And although it does not enforce corporate law, the Australian Panel nevertheless plays an important role in creating standards of conduct and commercial norms in the Australian takeover market through its decisions and guidance.

The limited nature of the Australian Panel is also possible due to the rules provided by the Rule-maker, *i.e.*, the Australian Panel represents a flexible, commercial norm-based system that was superimposed on a pre-existing rules-based system. Accordingly, it has the discretion, particularly in the absence of an appropriate rule, to apply the general purpose provision of corporate law, together with other policy considerations, to achieve a fair result. [192] It should also be noted that although the scope of activities (jurisdiction) of the Australian Panel is limited

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[190] *See* Armson, *supra* note 183, at 135. For a more detailed discussion, *see* Emma Armson, *Adaptations of the United Kingdom Takeover Panel in Hong Kong and Singapore: Convergence or Divergence?* 15 ASIAN J. COMP. L. 281 (2020).

[191] The unusual system in Australia in which there is public enforcement of takeover rules and directors' fiduciary duties by ASIC, previously caught the attention of comparative law scholars. *See, e.g.,* Renee M. Jones & Michelle Welsh, *Toward a Public Enforcement Model for Directors' Duty of Oversight*, 45 VAND. J. TRANSNAT'L L. 343 (2012); Jenifer Varzaly, *The Enforcement of Directors' Duties in Australia: An Empirical Analysis*, 16 EUR. BUS. ORG. L. REV. 281 (2015). It should be noted that this division of authority is somewhat less clear in practice, in that ASIC generally chooses to take its enforcement actions to the Australian Panel rather than to the Australian court system. Comment on a prior draft from Tim Bowley.

[192] The sources in addition to Section 602 include other sections of Chapter 6 (which implement the purposes of Section 602) and the public interest. *See* Takeovers Panel, Guidance Note 1, *supra* note 184. This can result in broad findings of unacceptable circumstances, such as circumstances "at odds with basic principles and policies underlying takeovers regulation in Australia and Chapter 6." *See* Consolidated Minerals Ltd 03R [2007] ATP 28 (see para [23]), cited *id.*, and *available at* https://takeovers.gov.au/reasons-decisions/2007-atp-28.

compared to the UK panel, the successful Australian panel, established in 2000, replaced an earlier panel whose powers were much more limited and which was largely inactive.[193]

The main role of the Australian Panel is, upon application by interested parties (including the bidder, the target, shareholders or a rival bidder) or by ASIC during the tender offer period, to make a declaration of unacceptable circumstances when a takeover does not comply with the purposes under Australia's Corporations Act.[194] It, accordingly, does not act on its own initiative. As noted above, enforcement of securities (and corporate) laws is undertaken separately by ASIC, and a declaration of unacceptable circumstances by the Australian Panel does not require a violation of law.[195] The Australian Panel can also, upon application by parties, make an interim or permanent order relating to unacceptable circumstances, which is an effective means to enforce its decisions.

Applications to the Australia Panel are decided by three members in a "sitting panel."[196] Members, who are specialists in mergers and acquisitions, are appointed by the Federal

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[193] For a comparison of the former panel and current Australian Panel *see generally* Ian Ramsay, *The Takeovers Panel: A Review*, *in* THE TAKEOVERS PANEL AND TAKEOVERS REGULATION IN AUSTRALIA 1 (Ian Ramsay ed., 2011). The first tentative effort in Australia, spurred by the example of the UK Panel, was a Corporations and Securities Panel established in 1991. This panel served a very limited function: it was only open to application by the government in cases where a takeover bid was felt to violate the underlying principles of corporate law even though it complied with all specific requirements. There were only four cases in its decade of operation. *Id.* at 1.

[194] *Corporations Act 2001* (Cth) ss 657A & 657C. The Australian Panel is the exclusive remedy for private parties in cases relating to bid disputes during the tender offer period. The government retains the option to go to court at any time. Deficiencies in takeover bids typically relate to time allowed to respond to the bid, information provided with respect to the bid, and equality of treatment among shareholders. In addition to applications for a declaration or related order, the panel also accepts applications for review of a panel decision and review of an administrative order. For a summary of the panel procedures, *see Panel Process*, AUSTRALIAN GOVERNMENT TAKEOVER PANEL, https://takeovers.gov.au/panel-process (last visited March 26, 2024).

[195] *See* Takeovers Panel, Guidance Note 1, *supra* note 184.

[196] Sitting Panel members are chosen by the president of the Australian Panel from a current total of 52 part-time members. *See* Australian Government Takeovers Panel, Annual Report 2024, at 9, *available at* https://takeovers.gov.au/sites/takeovers.gov.au/files/2024-10/TP-AR-23-24.pdf [hereinafter Australian Annual Report 2024]. A typical panel would consist of an investment banker, a lawyer and someone with corporate experience. *Id.* at 4. *See also* Australian Government Takeovers Panel, Annual Report 2022-23, at 4, *available at* https://takeovers.gov.au/sites/takeovers.gov.au/files/2023-10/TP-AR-22-23.pdf [hereinafter Australian Annual

Government for three-year terms based on their commercial, legal and other relevant expertise.[197] Proceedings are confidential. Upon acceptance of an application, the Australian Panel issues a "brief" to the parties to clarify the issues and the necessary information. In terms of hearing procedures, the Australian Panel typically relies only on written submissions from the parties. Panel decisions are first sent to the parties, who have an opportunity to make additional submissions or provide an undertaking that may resolve the dispute privately. There is an internal panel review process for decisions on unacceptable circumstances matters.[198] The Australian Panel holds a post-matter review with the parties to obtain feedback to aid the panel's processes and guidance.

Parties (other than the government) cannot go to court in relation to a takeover bid until the end of the takeover bid period. Judicial review of Australian Panel decisions is generally limited to basic questions such as its jurisdiction and due process. Court review is uncommon and courts have generally deferred to the Australian Panel's decisions.[199]

Report 2023]. A discussion of all of the Australian Panel's procedures discussed herein can also be found at Levy, *supra* note 183, at 500-507.

[197] For the overall current distribution of panel members, *see* Australian Annual Report 2024, *supra* note 196, at 12. For brief biographies of current panel members, *see id.* at 14-17. For a list of current panel members, *see Panel Members*, AUSTRALIAN GOVERNMENT TAKEOVER PANEL, https://takeovers.gov.au/about/panel-members (last visited Jan. 27, 2025).

[198] The Review Panel is comprised of another three members of the Australian Panel and have powers similar to the original panel. The President of the Australian Panel must consent to an application for review if the decision is not to make a declaration of unacceptable circumstances, interim order or final order. *See* Armson, *supra* note 183, at 140.

[199] *Id.* The most significant court decision was a High Court ruling upholding the constitutionality of the Australian Panel in 2008. *See generally* Emma Armson, *Attorney-General (Commonwealth) v Alinta Limited: Will the Takeovers Panel Survive Constitutional Challenge?* 29 SYD. L. REV. 495 (2007). The Australian Panel's website has a list of all court decisions (approximately 40 decisions with hyperlinks to the texts) related to the Australian Panel since 1991. *See Court Decisions*, AUSTRALIAN GOVERNMENT TAKEOVER PANEL, https://takeovers.gov.au/resources/court-decisions (last visited March 26, 2024). In only three cases have decisions of the Australian Panel been set aside. *See* Armson, *supra* note 183, at 142.

As noted above, the Australian Panel is reactive and cannot initiate cases on its own. It is also circumspect in a number of areas of its operation--it has never exercised its rule-making power to make supplementary or clarifying rules based on corporate law, and it rarely utilizes its power to convene a conference and summon witnesses instead of relying solely on written submissions.[200] Other powers that have generally not been exercised in recent years include the ability to refer matters to ASIC, the power to decide matters referred to the panel by courts and the power to review decisions by ASIC concerning hostile bids.[201]

However, as noted above, the Australian Panel plays an important role in "fleshing out" the general principles of takeover regulation under corporate law by a variety of means. These include the publication of guidance notes (although not as proactive, numerous or extensive as those of the UK Panel,)[202] publication of the facts and reasoning of all decisions in a style similar to court decisions (with greater transparency than the UK panel),[203] and the creation and propagation of standards of conduct and commercial norms through its decisions and guidance.[204]

[200] It has never exercised its power to issue clarifying rules. *See* Australian Annual Report 2024, *supra* note 196, at 8. Typically, there are no conferences or witnesses summoned during a fiscal year, but there was one of each in 2022-23. *See* Australian Annual Report 2023, *supra* note 196*,* at 20.
[201] In the latest year the panel referred one matter to ASIC. *See* Australian Annual Report 2024, *supra* note 196*,* at 23. The latter two powers noted in the text were not exercised during 2022-23; their utilization depends on applications from parties, of which there were none. *Id.* at 8.
[202] There are currently 23 Guidance Notes. *See Guidance Notes*, AUSTRALIAN GOVERNMENT TAKEOVER PANEL, https://takeovers.gov.au/guidance-notes (last visited March 26, 2024). As noted in Appendix 1, the Australian panel is reactive*, i.e.,* it only publishes guidance on newly emerging issues that it encounters when making panel decisions, while the UK panel more broadly issues guidance on acceptable or best practices.
[203] All panel decisions are published and indexed, and are *available at* https://takeovers.gov.au/reasons-decisions?field_release_year_value=1 (last visited March 26, 2024), and set forth the facts, application, discussion and decision of the case. *See id.* For two indexes of all panel decisions up to 2019 organized by topic and legislation, *see Index of Reasons*, AUSTRALIAN GOVERNMENT TAKEOVER PANEL , https://takeovers.gov.au/resources/index-reasons (last visited March 26, 2024).
[204] A prominent commentator has noted that the Australian Panel's "decisions and guidance to the market have established new standards of conduct and and introduced significant changes to the way takeovers and takeover defences are conducted." *See* Levy, *supra* note 183, at 490. In fact, the Australian Panel has on occasion been cautioned against overreaching in the breadth and depth of its decisions and guidance. *See, e.g.,* John Keeves &

The Australian Panel's scope and role are also relatively limited in other ways compared to the UK panel. It has a smaller number of cases, but greater transparency[205] and includes a range of outcomes.[206] It is not fully independent, but is a division of the Treasury Department. It's small professional staff of seven[207] provides substantive expertise and procedural experience to support (part-time) members, but the members make all decisions.[208] Importantly, unlike the UK where professional staff often resolve matters through informal phone consultation, in Australia all matters handled by the panel involve proceedings, the results of which are published on its

Damian Reichel, *AusNet Services Limited in the Takeovers Panel: "Hard" Exclusivity and Deal Protection Lore Reform*, JOHNSON WINTER SLATTERY (Dec. 2021) (concluding that "…a body like the Panel, exercising executive power, and not being subject to close judicial oversight, needs to tread carefully so as not to exceed its jurisdiction and undercut the rule of law that is so important to the proper functioning of Australia's capital markets"), *available at* https://jws.com.au/insights/articles/2021-articles/ausnet-services-limited-in-the-takeovers-panel.

[205] There was an average of 27.2 applications per year to the Australia Panel from 2000-2024. *See* Australian Annual Report 2024, *supra* note 196, at 6. A below-average 25 applications were made during 2023-24. *Id.* For a list of the applications, *see id.* at 37-9. It is difficult to make direct comparisons with the UK Panel, since in the UK the vast majority of cases are resolved informally by the professional staff and do not lead to panel decisions. It was reported that 60 offers "regulated by the panel" were resolved in the UK in 2022-2023. *See* The [UK] Takeover Panel, 2023-2024 Report at 17 (2024), *available at* https://www.thetakeoverpanel.org.uk/wp-content/uploads/2024/09/AR2024.F.pdf. By contrast, there is no system of informal consultation in Australia, and all matters are resolved through a decision by members of a panel. Accordingly, Australia may well have a larger number of panel decisions than the UK, while the UK panel is involved in a larger number of matters.

[206] For the issues and decisions during 2023-24, *see* Australian Annual Report 2024, *supra* note 196, at 20-21.

[207] The staff consists of five Treasury Department employees, plus two support staff and two temporary secondees from a law firm. *See id.* at 11.

[208] *See* Armson, *supra* note 183, at 141.

website.[209] Finally, the Australian Panel's annual budget is correspondingly small (about 2.7 million Australian dollars) and is obtained from the Treasury Department.[210]

Like its UK counterpart, the Australian Panel has been judged an overall success in providing an effective forum for dispute resolution in accordance with the criteria of speed, flexibility and certainty in decision-making.[211] It has successfully harnessed the expertise of M&A professionals in Australia to fulfill its mission.[212] The strong reputation of the Australian Panel is evidenced by the Australian government's consultation on a proposal (announced initially in

[209] *See* Table 1 and *supra* note 205. The UK Code clearly contemplates an important role for the Panel Executive, as Section 5 of the Introduction ("The Executive") states that "The day-to-day work of takeover supervision and regulation is carried out by the Executive," and Section 6 of the Introduction ("Interpreting the Code") begins with "This section sets out the rules according to which the Executive issues guidance and rulings on the interpretation, application or effect of the Code." In the UK it is standard practice for individual "case officers" from the panel executive (staff) to provide informal, real-time advice on the UK code to quickly resolve matters. In many cases, the relevant parties "must" consult the panel executive in advance under the Introduction to the UK code. *See* Section 6(b), Introduction, UK Code; Kershaw*, supra* note 163, at 127. In the UK, this active role of the panel executive "is viewed as one of the primary advantages of regulating takeovers through the Takeover Panel." *Id*. However, the price of such informality is that there are few panel proceedings or published decisions, and thus little transparency.
By way of contrast, there is no correspondingly strong role for the panel executive in Australia. Under Australian corporate law, "the panel cannot act without an application." *See* Levy, *supra* note 183, at 492; *Corporations Act 2001* (Cth) s 657C(1). Matters are decided through panel proceedings with the public disclosure of results and a high level of transparency. This differing approach to the tradeoff between quick, discreet resolution (by the panel executive in the UK) and transparency (by members' panel proceedings in Australia) strikes us as one of the most significant differences between the two systems noted in Table 1, and is a major reason why the Australian Panel may serve as a better model for Japan than the UK Panel. We are grateful to Tim Bowley for information comparing and contrasting actual practices of the UK Panel and Australian Panel based on his practice experience.
[210] *See* Australian Annual Report 2024, *supra* note 196, at 25. Most of the budget is used for personnel expenses (over half for employee salaries and one-quarter for retainers and sitting fees of members). *Id.* at 26.
[211] In terms of speed, the long-term average (from 2000-2024) between application and decision is 24.9 calendar days, and the long-term average period between decision and publication is 44.1 days. *Id.* at 6. For an overall evaluation, *see generally* Armson, *supra* note 183; Ramsay, *supra* note 193. Professor Ramsay notes that, unlike its predecessor during the 1990s, the current panel "is regarded as having made a very important contribution to the effective regulation of takeovers in Australia." Ramsay, *supra* note 193, at 1. The reasons given for the panel's success include "the independence of the Panel; the government strengthening the role of the Panel in takeovers disputes; the influence of the Panel on market practice; the timeliness of the decision-making process of the Panel; and its approach to resolving takeovers disputes." *Id.* at 24. *See also* THE TAKEOVER PANEL AFTER TEN YEARS (Jennifer Hill & R P Austin eds., 2011) (noting, in the book's abstract, that "[s]uggestions are made for improvements but on the whole, the Panel's work is strongly supported.")
[212] Panel members are generally comprised of "specialists in mergers and acquisitions – investment bankers, lawyers, company directors and other professionals." *See* Australian Annual Report, *supra* note 196, at 1, and other references in *supra* notes 196 & 197.

2021) to significantly expand the scope of the panel's jurisdiction to replace courts' jurisdiction in the area of mergers ("schemes of arrangement").[213] Due to the relatively limited scope of its authority and activities, together with its greater transparency and substantial contribution to the establishment and propagation of standards of conduct and commercial norms, we view the Australian Panel as providing a better model for Japan than the UK original.

C. Revising the Comparative Framework for Takeover Regulation

As discussed above, the UK and US regimes have a dominant subordinate lawmaker. Prior analysis characterizes the dominant subordinate lawmaker primarily as the Rule-maker (which also acts to enforce the rules).[214] We see no particular reason why the two roles of making rules and enforcing them must be assumed by the same institutional player simply because that was historically true in both the UK and the US.

The Australian regulatory regime provides a real-world example in which the Rule-maker (the legislature) essentially devises general principles and rules which are applied by a separate takeover panel. In light of this additional point of reference, as noted in the Introduction, we discern three basic roles that are necessary in a framework for hostile takeover regulation: (1) a Rule-maker, (2) a Bid Decision-maker, and (3) an Umpire (adjudicator and also creator and propagator of standards of conduct and commercial norms relating to takeover practices).

[213] *See* Department of the Treasury, Government of Australia, Corporate Control Transactions in Australia: Consultation on Options to Improve Schemes of Arrangement, Takeover Bids, and the Role of the Takeover Panel (April 2022), *available at* https://treasury.gov.au/sites/default/files/2022-04/c2022-263877.pdf. To date, the proposal has not been enacted.

[214] *See* Armour & Skeel, *supra* note 1, at 1732 (noting that the choice of rulemaker "can be just as important an influence on the substance of takeover law as [the popular theory of] regulatory competition"); KRAAKMAN ET AL., *supra* note 8, at 210-11 (also noting that in the case of specific takeover rules, as in the EU, the rule-maker is "likely to create a specialized agency" for enforcement. *Id*. at 211.).

As a result of dividing the role of a dominant subordinate lawmaker into two (i.e., Rule-maker and Umpire; see Appendix 2), we de-emphasize the role of the Rule-maker compared to prior analyses. We presume that a number of institutional players could presumably fulfill this role. There can be no complete division between Rule-maker and Umpire, since enforcement decisions and propagation of commercial norms always involve some degree of interpretation and quasi-"rule-making"/guidance, and, similarly, the distinction between *ex ante* "rules" and *ex post* "standards of conduct" can pose difficulties.[215] Nevertheless, we think that the degree of separation matters and that it is significant to conceptually and functionally separate the roles of Rule-maker and Umpire under our framework.

Rule-maker. The rules can consist either of general principles from corporate law or more specific rules that apply to takeover transactions. It has been assumed, or at least implied, that general principles would be made and interpreted by courts (the US system), while specific rules would be created and enforced by a self-regulatory body such as a takeover panel (the UK system). However, these are not the only possibilities, as evidenced by the Australian regime which has general principles and rules created by the legislature and applied by a specialized takeover panel.[216] At a minimum, the Rule-maker must devise general principles so that hostile bids are made (and defended) in a manner that balances efficiency and fairness to shareholders. Hostile takeover cases are necessarily fact-specific and occur in a rapidly changing environment, and even a relatively comprehensive set of principles and rules, like the UK Code, cannot be applied mechanically (or easily) to varied fact patterns.[217] Uniformity and predictability of

[215] For a discussion of this distinction, *see, e.g.,* KRAAKMAN ET AL., *supra* note 8, at 32-33.
[216] This combination is unusual among takeover regimes. *Id.* at 211.
[217] The UK Code and other codes also emphasize enforcement of the "spirit" of the takeover principles and rules embodied in the code. On its website, the UK Panel states the following:

results remains as an issue in all takeover regimes regardless of who is the Rule-maker and whether the principles/rules are general or specific.

Bid Decision-maker. The Bid Decision-maker seems at first blush more like a binary choice between leaving the decision to shareholders (i.e., employing a mandatory bid rule and requiring the board to remain neutral) or leaving the decision, in the first instance, to the board to defend against coercive bids in the absence of a mandatory bid rule. However, the reality is more nuanced. Countries utilizing UK-style systems may weaken the mandatory bid rule to encourage bids and respond to local conditions.[218] On the other hand, the US regime works largely because of its well-established system of independent directors and important adaptations to its judicial system. As a result, defensive measures often lead to a deal on terms that are more favorable to shareholders than the original bid.[219] In other countries, including Japan, there is no established practice of such negotiation or instrumental use of defensive measures. The result in Japan is generally that in the past defensive measures were utilized to defeat all hostile bids (”just say no”) and entrench management.[220]

In addition, as noted in the example of Australia, even in a UK-style system in which shareholders are the Bid Decision-maker, the board may remain involved in important practical

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"The Takeover Code is based upon six General Principles. The General Principles are expressed in broad general terms and the Code does not define the precise extent of, or the limitations on, their application. They are applied in accordance with their spirit in order to achieve their underlying purpose.
In addition to the General Principles, the Code contains a series of Rules. Although most of the Rules are expressed in less general terms than the General Principles, they are also to be interpreted to achieve their underlying purpose. Therefore, their spirit must be observed as well as their letter." *The Takeover Code,* THE TAKEOVER PANEL, https://www.thetakeoverpanel.org.uk/the-code (last visited March 30, 2024).

[218] *See* KRAAKMAN ET AL., *supra* note 8, at 234; Varottil & Wan, *supra* note 23, at 25-28.

[219] *See, e.g., See* Armour, Jacobs & Milhaupt, *supra* note 2, at 246.

[220] *See* discussion *infra* in Part IV.B, especially notes 240-248 and accompanying text, concerning past practice and recent developments.

issues. These issues, including the scope of due diligence and the availability of bid exclusivity, may provide the board with a "seat at the table" in hostile takeovers.[221]

Umpire. In our view the most important institutional role is that of the Umpire. The Umpire plays two important roles. The first role is simply to make decisions on pending cases, *i.e.* apply the principles/rules created by the Rule-maker to the case at hand and derive a result (holding of the case). Trust in a regulatory system ultimately depends on some conflict-free player with expertise rendering a final decision on whether a takeover bid (and any defenses against it) are fair. However, as noted above, the US regime has substantially modified the court system generally utilized in takeover cases, as Delaware courts have greater expertise and experience, and can act more speedily, than courts in other jurisdictions, including Japan.[222]

The second, critical role is to establish standards of conduct and act to create and spread commercial norms related to takeover practice. This provides guidance to market actors that will work both to improve market practices and to reduce the overall necessity of obtaining formal rulings from the Umpire. This role is little discussed in the comparative literature because, as noted above, in the two leading systems in the US and the UK a single subordinate lawmaker acts as both the Rule-maker and the Umpire; delineation of the distinction between "making" and "interpreting" principles/rules through enforcement and propagation of commercial norms accordingly becomes moot. The methods of norm creation differ greatly between the UK and the US—with the UK Panel utilizing a variety of soft law and informal measures (guidance

[221] *See supra* note 189 and accompanying text.
[222] *See* Armour & Skeel*, supra note* 1, at 1784-85.

notes, informal consultation, etc.), while courts in Delaware provide extensive dicta in court decisions that go far beyond the holding of the case.[223]

The example of Australia highlights a third possible role—proactive enforcement of corporate law on hostile takeovers. Australia's system of having ASIC as a separate public enforcer (and leaving the Australian Panel to focus exclusively on dispute resolution) draws attention to the fact that, in the absence of such a public enforcement agency, the Umpire in the UK is also responsible for the enforcement of takeover laws,[224] while the US essentially relies exclusively on private enforcement.[225]

Anticipating arguments concerning Japan, courts in other jurisdictions may not be prepared to effectively assume the role of Umpire under our framework. Courts that lack the expertise, experience and procedural adaptations (speed, etc.) of courts in Delaware may be ill-equipped to make decisions in complex and fast-moving hostile takeover cases. And courts accustomed to focusing solely on application of the law to the facts to reach a decision in the case may be even less equipped for a "Delaware-style" role of utilizing extensive dicta in the process of creating standards of conduct and commercial norms.[226] We see significant shortcomings in both of these

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[223] One long-standing debate is the distinction between rules and standards. *See, e.g.,* KRAAKMAN ET AL., *supra* note 8, at 32-33. We focus more on the Umpire's practical role of providing guidance on acceptable forms of conduct in takeover cases; *i.e.,* more on the role of "preacher" (*see* Rock, *infra* note 226) than "policeman" (*see, e.g.,* Gilson, *supra* note 56).

[224] Accordingly, in theory "enforcer of law" could be a fourth institutional player in a hostile takeover regime. However, we do not include this role within our analytical framework since we are unaware of any such public enforcement role outside of the Australian system. The enforcement function of the UK panel has been cited as being weak, and significantly less than other countries like the US and Australia. *See* Varzaly, *supra* note 191, at 284.

[225] Presumably, the SEC or state authorities could provide a public enforcement option for corporate law on hostile takeovers in the US, but there is little evidence of such a public function to date. *See generally* Jones & Welsh, *supra* note 191. The authors further argue that, due to the inadequacies of reliance on private litigation (shareholder derivative suits) to enforce fiduciary duties in the US, a public enforcement function should be established within the American system. *Id.*

[226] With respect to the role of dicta in Delaware court decisions influencing corporate behavior, *see, e.g.* Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?,* 44 UCLA L. REV. 1009 (1997). Under this view,

roles in the case of courts in Japan, and in particular with respect to the key role of the creation and propagation of standards of conduct and commercial norms. Accordingly, the role of Umpire is our main focus for possible reforms.

IV. APPLYING THE REVISED FRAMEWORK TO JAPAN

A. Overall Goals

In applying our revised framework on takeover regulation to Japan, it is useful to bear in mind the basic goals of a regulatory system for hostile takeovers. Such regimes are well known for attempting to balance two contradictory goals: market efficiency (which generally means promoting hostile bids, both to improve performance of the target companies and to provide a deterrent effect against inefficient management at other companies) and investor protection (including fair and equal treatment of shareholders, which may also potentially have the effect of discouraging hostile bids by regulating the acquirer's ability to structure such bids).[227] There is

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fiduciary duties are not rules, but standards based on process and good faith. And, more specifically, "Delaware courts fill out the concept of "good faith" through fact-intensive, normatively saturated descriptions of manager, director, and lawyer conduct, and of process," that can be analogized to "corporate law sermons." *Id.* at 1015-16. As noted below (*see infra* notes 246), this is a tall order for courts in jurisdictions like Japan. One commentator described the role by stating: "Thus it will be up to the courts [in Japan] to write, through the accretion of judicial decisions, a poison pill "code" that will give transaction planners for both bidders and targets guidance concerning the operational rules of a Japanese market for corporate control." *See* Gilson, *supra* note 56, at 42. The Delaware Court of Chancery also has the added advantage of flexibility due to its powers as a court of equity. *See, e.g.,* William B. Chandler II., *Hostile M&A and the Poison Pill in Japan: A Judicial Perspective*, 2004 COLUM. BUS. L. REV. 45 (2004). And "[as] a court of equity, the Court of Chancery evaluates each case on its merits and bases its decision on precedent, guided by principles of fairness, rather than inflexible application of statutes." *Id.* at 46.
We also note that sitting judges in Delaware actively engage in publishing articles, participating in conferences and other activities to help "spread the word" concerning appropriate behavior in takeover cases. This is far less true in a country like Japan, in terms of both quantity and quality (depth of analysis) of such activities by sitting judges. Much of the activity in Japan consists of formal explanations/commentaries similar to those produced by the government for new legislation; there is no actual discussion of underlying thoughts or philosophies on relevant legal and policy issues. *See also infra* note 248 (noting that Japanese judges who attempt to play a more active role by, for example, adding significant dicta to an important court decision, may be subject to pointed criticism).
[227] *See* KRAAKMAN ET AL., *supra* note 8, at 236-237.

no known system which pursues only one of these objectives and ignores the other,[228] although the balance between these two goals can vary widely.

We also note the important criteria that are generally cited with respect to the Umpire, who makes the final determination in applying the rules, but also applies to the entire regulatory regime. While the UK Panel cites speed, flexibility and certainty, one could certainly add fairness and transparency.[229] And behind these criteria are important issues that are no longer discussed much in the US or UK, but that are quite significant for a newly designed system in a country like Japan: absence of conflicts, independence, ease of use and, in particular, expertise/experience. No system satisfies all of these criteria completely, as there are tradeoffs and competing priorities. And underlying all of this discussion is the basic necessity of having a system that is trusted by all relevant parties--including investors, companies and the public.

Finally, we are cognizant of an important issue which always accompanies hostile takeovers: potential conflicts of interest. We are particularly interested in the conflicts that may directly affect the three major institutional roles in takeover regulation discussed herein.[230] Such problems are present in every system. They may, however, be a greater concern in Japan, which has not yet fully developed a reliable means of dealing with these issues. There is a clear acknowledgement of the necessity of doing so, as evidenced by METI's recent guidelines.

[228] *Id.*
[229] *See generally* Armson *supra* note 183, at 152-156.
[230] Dealing with potential conflicts of interest and thereby providing credibility is an important consideration for all institutional players. For the Rule-maker, it is necessary to devise fair and neutral rules despite potentially conflicting institutional interests (*i.e.,* in the case of METI in Japan, a history of protecting Japanese industries). For the Bid Decision-maker, it is necessary to have a decision-maker with knowledge of the target company, but this leads to potential personal conflicts (such as members of the target board). For the Umpire, personal conflicts are not permitted, but institutional interests and potential conflicts may remain due to the expertise and experience that are required.

B. Evaluating the New Relative Strengths of Institutional Players—Shareholders vs. Independent Directors and Courts

At the time of the first hostile takeover cases in the 2000s Japan was caught off guard, and there were no institutional players that were fully prepared to assume a significant role in a regulatory regime for takeovers.[231] To help answer the question of which institutional players may now be best suited to play expanded roles in a revised regulatory framework, we must consider the relative extent to which each player has increased its institutional capabilities, power and overall influence in conjunction with ongoing corporate governance reforms and changes in Japan's operating environment. We provide an overview of the most significant changes in institutional capabilities and evaluate the possible candidates for each of the three basic regulatory roles in order of their importance: Umpire, Bid-Decision-maker and Rule-maker.

Although arguably all the players have strengthened their capabilities to some degree since the 2000s, in our view shareholders have developed to a far greater extent than their potential competitors such as independent directors and courts. In fact, the increasing importance of institutional investors and shareholder activists is perhaps the biggest change in Japanese corporate governance in recent years.[232] This increased shareholder capability might still be less than the UK at the relevant time;[233] but the main point with respect to the role of Umpire is that

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[231] *See* Armour, Jacobs & Milhaupt, *supra* note 2, at 259. Due to the lack of other capable institutional players in Japan at that time, courts assumed the role of primary Umpire "by default." *See* Gilson, *supra* note 56, at 41.

[232] We note that although Japanese shareholders always had strong theoretical rights, their actual capabilities and influence over management was small. *See* Gen Goto*, Legally "Strong" Shareholders of Japan*, 3 MICH. J. PRIVATE EQUITY & VENTURE CAPITAL L. 125 (2014).

[233] The relevant time frame is when hostile takeovers first became important—the 1950s in the UK, the 1980s in the US, and the 2000s in Japan. In both the US and the UK the strongest institutional player at those respective times came to (and still does) dominate takeover regulation. *See, e.g.,* Armour, Jacobs & Milhaupt, *supra* note 2, at 265. The power of institutional investors in the UK subsequently weakened in the 1990s due to the internationalization of shareholdings, but the takeover regime has not substantially changed. *Id.* at 238. In Japan, it is possible that the recent increased strength of shareholders (institutional investors and shareholder activists) may have occurred too late for them to truly dominate takeover regulation in Japan.

courts in Japan have not substantially increased their capabilities and remain inadequate to fulfill such a role.

Although there are a number of factors underlying this trend of the increasing capabilities of shareholders, including the ongoing decline in cross-shareholding, an important catalyst noted above was the 2017 revision of the Stewardship Code that called for the disclosure of individual proxy votes by institutional investors.[234] Since that time Japanese corporate management has been unable to rely on the support of domestic trusts managed by Japan's trust banks, which now number among their largest shareholders.[235]

The results of this trend are reflected in the sudden and continuing drop in voting support (beginning in 2017) for the election of CEOs and other directors in Japanese companies that violate a significant provision of the strengthened proxy voting guidelines of domestic institutional investors.[236] In 2017 pre-bid general takeover defenses was the main issue, while in the last two years the new requirement for having at least one female board member has gathered the most attention (and negative votes).[237]

[234] *See* Stewardship Code, *supra* note 65.
[235] *See, e.g.,* 2023 Shareownership Survey, *supra* note 69, at 4.
[236] Such guidelines are unrelated to legal requirements, and are designed to achieve good corporate governance at Japanese companies. For examples of policies of proxy advisers and proxy voting guidelines of institutional investors that result in their opposing the election of CEOs and other directors, *see supra* note 74. For a specific example, *see infra* note 244 concerning the case of Eisai Co., Ltd. METI's 2023 Guidelines also refer to 2017 as a turning point in institutional investors voting aginst pre-bid general takeover defenses. *See* 2023 Guidelines, *supra* note 104, at 4.
[237] *See, e.g.,* Nikkei, *Under Pressure, Canon and Toray to Add Women to Boardrooms*, NIKKEI ASIA, May 20, 2023. For examples of policies of proxy advisers and proxy voting guidelines of institutional investors that require at least one female director, *see supra* note 74. The percentage of listed companies in the Prime Market with no female board members has declined from 62% in 2017 to 18.7% in 2022. *See* Corporate Governance White Paper 2023, *supra* note 9, at 116. There is also a new emphasis on increasing the number of female executives, which as of 2021 was only 12.6%. *Id.*

Similarly, the influence of shareholder activists has increased dramatically in recent years.[238] The biggest issue with regards to shareholder activism in Japan is whether activists can obtain the support of traditional institutional investors (both domestic and foreign) in campaigns against poorly performing Japanese companies by arguing that they are pursuing the interests of all shareholders. This tactic, which originated in the U.S., has now become common in Japan, as exemplified by the recent Toshiba case and other well-known activist campaigns.[239]

On the other hand, independent directors and courts have made much less progress. The number of independent directors has increased substantially due to the Corporate Governance Code,[240] but the number of companies that have chosen "American-style" committee structures that emphasize the role of independent directors remains miniscule.[241] Despite the now widely accepted practice of target companies establishing independent committees when facing a hostile bid (as provided in METI guidelines), the courts, institutional investors and academic commentators remain skeptical of the true independence and functioning of such committees and of independent directors generally.[242] It is still difficult to cite a single court case of a board

[238] *See supra* notes 77-79 and accompanying text.
[239] In a significant, long-running corporate governance scandal, Toshiba Corporation, an icon of the Japanese establishment, made bad investments, caused significant accounting scandals, was forced to sell a majority of its shares to foreign investors to raise capital, and ultimately was taken private in a sale to a consortium of private equity investors. *See, e.g.,* Bruce Aronson, *Lessons from the Toshiba Scandal: A Corporate Governance Perspective*, 54 J. JAPAN. L. 91 (2023).
[240] *See supra* note 80.
[241] *See supra* note 81.
[242] Although METI's 2023 Guidelines call for independent directors to "play an important role in addressing any conflict of interest issues at the management level and improving transaction terms" (2023 Guidelines, *supra* note 104, at 14), such practice has not become established in Japan. *See* the recent court decisions discussed *supra* in Part II.C (in which recommendations of independent committees of the target companies were given no deference), especially the Nihon Asia case, *supra* note 87. *See also* Tomotaka Fujita, *Jizen Keikoku-gata Boueisaku no Kyoyōsei: Kinji no Saibanrei no Teiki Suru Mondai* [*Acceptability of Pre-bid Defensive Measures: Issues Raised by Recent Cases*], 79 KIN'YŪ SHŌHIN TORIHIKIHŌ KENKYŪKAI KENKYŪ KIROKU 1, 15-18 (2021) (analyzing recent cases and suggesting that the introduction and activation of defensive tactics by a board without shareholders' approval would be considered illegal in future cases), *available at* https://www.jsri.or.jp/publish/record/pdf/079.pdf. METI's 2019 guidelines also place high expectations on special independent committees to secure fairness in interested transactions, such as freeze-out transactions by controlling shareholders and MBOs. *See* 2019 Fair M&A

negotiating with a bidder to obtain better bid terms for shareholders rather than aligning with management to reject all hostile bids.[243] Lack of trust in independent directors means that it would not be possible for a Japanese company to adopt an "American-style" poison pill in Japan.[244]

Guidelines, *supra* note 101, at 21-22. However, skepticism generally remains concerning the overall role of nominally independent directors, including the nomination process itself and their true independence.

[243] As noted *supra* note 107 and accompanying text, the 2023 Guidelines specifically call for company boards to "negotiate diligently with the acquiring party with the aim of improving the transaction terms" once the board "decides on a direction toward reaching agreement of an acquisition…" 2023 Guidelines, *supra* note 104, at 25. No court case contains such a fact pattern, however recent market transactions (following the 2023 Guidelines) involving multiple bids may be beginning to reflect such a practice. *See* the Nidec and Benefit One cases supra notes 118-124 and accompanying text.

[244] The case of Eisai (Eisai Co., Ltd.) is instructive. It is a leader in corporate governance among Japanese companies, as it is among the 1% of listed companies that has a majority of independent directors on its board and an independent director as chairman of the board. An overview of Eisai's corporate governance structure and current topics appears on its website *at* https://www.eisai.com/company/governance/cgsystem/index.html. Eisai adopted an "American-style" pre-bid general defense policy that was not submitted for shareholder approval and relied solely on a committee composed only of the company's independent directors to decide whether to activate defensive measures against any hostile bid. For its original policy in effect in 2017, *see* Eisai Co., Ltd., Policy for Protection of Company's Corporate Value
and Common Interests of Shareholders, *available at*
https://www.eisai.com/company/governance/cgregulations/pdf/ecgpolicy.pdf.
Shareholder approval of such a policy is not legally required, but failure to obtain shareholder approval violated proxy adviser policies and the proxy voting guidelines of Japanese institutional investors, as amended around 2017 (*see supra* note 70). Accordingly, beginning in 2017 votes opposing election of the CEO and other board members substantially increased. The percentage of affirmative votes for the election of the CEO as a director declined from 86.39% in 2016 to 75.46% in 2017. *See, e.g.,* Daiken Tsunoda, *Shagai Torishimariyaku to Kikan Toshika to no Taiwa—Eisai ni okeru Torikumi [Engagement between Outside Directors and Institutional Investors—Eisai's Initiative*] 2220 SHŌJI 12, 15 (2020).
Eisai responded by, in part, initiating a new program of engagement between its independent directors and institutional investors. *Id.* It also modified the terms of its defensive measure to meet the policy guidelines of ISS and the proxy voting guidelines of domestic institutional investors (*e.g.*, raising the trigger from 15% of shares to the more "standard" 20% of shares), but this had no effect on voting. The percentage of affirmative votes for the election of directors continued to decline, while at the same time new court decisions presented concrete examples of a potentially more attractive alternative—giving up the controversial pre-bid defensive measure and resorting in the future, if necessary, to more focused post-bid measures based on shareholder approval. As a result, Eisai halted renewal of its policy in 2022. *See* Eisai Co., Ltd., Discontinuance (abolition) of the Policy for Protection of the Company's Corporate Value and Common Interests of Shareholders, *available at* https://www.eisai.com/news/2022/news202229.html. Following this action, votes in favor of election of the CEO immediately rebounded from a low level of 67.27% in 2021 to 96.27% in 2022. Notices for shareholder voting results for 2021 (109th Ordinary General Meeting of shareholders) and 2022 (110th Ordinary Meeting of General Shareholders) can be downloaded at https://www.eisai.com/ir/stock/meeting/index.html (last visited April 2, 2024).

Japanese courts, unlike their US counterparts, have not made significant adjustments in their standard practices to aid speed, expertise and certainty in hostile takeover cases.[245] More importantly, they remain reluctant to utilize dicta to provide guidance on, and help spread, best business practices as do courts in Delaware (see Appendix 3). Recent court decisions continue to focus narrowly on issues related to the dispute at hand, and do not attempt to flesh out general fiduciary duties or standards of conduct that would provide guidance for all hostile takeover cases.[246] Many Japanese companies continue to "just say no" to hostile bids and there is no court case involving the equivalent of a Revlon duty to sell to the highest bidder once the company is put up for sale.[247] Although the courts could indicate helpful standards as dicta, like in the

[245] Some efforts were made with respect to expertise. Tokyo District Court's Civil Division Eight and Osaka District Court's Civil Division Four are commercial divisions specializing in handling corporate law and insolvency cases. The judges of commercial divisions in these two district courts accumulate some level of specialized knowledge in corporate law. *See* Masakatsu Tange, T*ōkyō Chisai Shōjibu ni okeru Shinri Tetsuzukitō no Genjō to Kadai* [*Present Situation and Issues in Hearing Procedures in Tokyo District Court's Commercial Division],* 2311 SHŌJI 43, 46-48 (2022). However, these divisions' exclusive jurisdiction only covers Tokyo and Osaka: *i.e.,* if a target firm's main office is located in Nagoya, a case against the firm is handled by Nagoya District Court, which has no commercial division. If cases are appealed, there are no specialized divisions or expertise in High Courts. Judges' training and career systems (*e.g.,* rotation to a different court every three years or so) greatly hinder any specialization of judges. Thus, the level of expertise of commercial divisions in Japan is far below those of the Delaware Chancery Court and the UK Panel. *See , e.g.,* Kenichi Osugi, *M&A Torihiki ni okeru Kabunusi Hogohōsei no Kakkoku Hikaku: Nihonhō, Doitsuhō, Amerikahō wo Chushin ni [Ge] [International Comparison of Laws Protecting Shareholders in M&A Transactions: Focusing on Japanese Law, German Law, and US Law (Part 2)]*, 2203 SHŌJI 11, 18 (2019) ("compared to Delaware courts and the UK Panel, their expertise seems to be rather low".)

[246] *See generally* the recent cases discussed *supra* Part II.C and Appendix 3. Among five recent cases, only the Nagoya High Court left dicta discussing a potential issue. *See* Nippo Sangyo Case, *supra* note 90, at 142 and Appendix 3 (in rejecting the plaintiff bidder's argument that the defensive measure had no restriction on the period during which the target board could demand that the bidder provide additional information, the court stated that if the target's board demanded that the bidder submit unnecessary information, the bidder could seek an injunction, and the court would grant an injunction in such case). For a general introduction to fiduciary duties in Japan, *see, e.g.,* Hideki Kanda & Curtis J. Milhaupt, *Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, 51 AM. J. COMP. L. 887 (2003).

[247] There have been claims that market practice is already substantially changing following the 2023 Guidelines. For example, Masakazu Iwakura, an experienced corporate lawyer, stated that "In short, in Japanese capital market practices, at least in the competitive tender offer situation, the directors of target companies are interpreted to owe an identical duty to the Revlon duty in the United States so long as the target board decides that control of the target is to be changed." *See* Gen Goto *et al., Poison Pill: Still Relevant After All These Years* 21 (Working Paper, March 20, 2024) , *available at* https://ssrn.com/abstract=4766870. However, the recent case of Fuji Soft has significantly cut against any claim of a new market practice in Japan akin to a Revlon duty. *See supra* notes 125 & 126.

original Livedoor decision, they have not done so.[248] In addition, the cases brought to the courts might be skewed, since they do not include any instances where a target board negotiated with a hostile acquirer.

This is not intended as a general criticism of the Japanese court system, which largely functions effectively.[249] Rather it is a recognition that the Japanese court system (and many others) is not well suited to assuming the unusual and challenging role of courts in Delaware--aggressively developing and implementing new doctrine in corporate law (including the creation and propagation of standards and norms relating to desirable best business practices) that has only modest impact on society overall and requires both speed and specialized expertise.[250]

[248] We note that dicta in the Livedoor case's Tokyo High Court decision was strongly criticized right after the decision was published. For the most influential example, *see* Tomotaka Fujita, *Nippon Hōsō Shinkabu Yoyakuken Hakkō Sashitome Jiken no Kentō [Ge] [Examination of the Injunction Case against the Issuance of Options by Nippon Broadcasting (the Livedoor Case) (Part 2)]*, 1746 SHŌJI 4, 4-6 & 9-10 (2005). The dicta in the Livedoor case was not well crafted but strongly influenced the design and practice of defensive measures by firms and lawyers. It is also worth noting that the 2023 Guidelines encountered difficulties in understanding this dicta in a manner consistent with the Guidelines' basic position. *See* 2023 Guidelines, *supra* note 104, at 58-59.
[249] In fact, one comparative law scholar states that Japanese courts, which focus on consistently interpreting and applying rules to the facts without any additional political or ideological considerations, are a better example of the rule of law than the US legal system, in which a "politicized judiciary is foundational." *See* Frank K. Upham, *In Search of a Rule of Law Model? Try Japan*, *in* 3 USALI PERSPECTIVES, No. 17, Feb. 21, 2023, *available at* https://usali.org/usali-perspectives-blog/in-search-of-a-rule-of-law-model-try-japan.
[250] *See, e.g.,* Armour, Jacobs & Milhaupt *supra* note 2, at 253 (expressing surprise that Japan focused on Delaware doctrine in light of the limited role of Japanese courts).
Japanese courts have been reluctant to assume the role of creating norms through the accretion of judgments under abstract standards such as fairness. This is well illustrated by the deliberation process of the 2014 amendment of the Companies Act. In the deliberation at the Legislative Council (Hōsei Shingikai), Council members from the court system continually opposed introducing new provisions that would require courts to rule on substantive fairness. For a proposed provision imposing liability on a parent corporation for engaging in an unfair dealing with its subsidiary, *see* Hōsei Shingikai Kaisyahōsei Bukai [The Division of Corporate Law of the Legislative Council], Dai 7 Kai Gijiroku [The Minutes of the 7th Meeting] 7 (Nov. 24, 2010) (Judge Yasushi Kanokogi opposing the proposal, arguing that it would be difficult for the court to judge fairness). For a proposed provision awarding shareholders a right of injunction against unfair cash-outs, *see id.* at 49 (Judge Yasushi Kanokogi questioning whether it is feasible to introduce such a new provision); Hōsei Shingikai Kaisyahōsei Bukai [The Division of Corporate Law of the Legislative Council], Dai 12 Kai Gijiroku [The Minutes of the 12th Meeting] 12-13 (Aug. 31, 2011) (Judge Yoshihide Asakura arguing that grounds for the injunction should be limited to those which the court can decide in a short time period and should exclude vague grounds); Hōsei Shingikai Kaisyahōsei Bukai [The Division of Corporate Law of the Legislative Council], Dai 14 Kai Gijiroku [The Minutes of the 14th Meeting] 32-33 (Oct. 26, 2011) (Judge Kanokogi arguing that the grounds for the injunction should be limited to procedural ones,

In addition, Japan's court system might be capable of responding more aggressively if the issue were of sufficiently great importance. It is interesting to note the contrast between the establishment of a specialized intellectual property high court in Tokyo to address a specific need that was of general importance to Japanese businesses—the protection of intellectual property rights[251]—and the recent creation of a new courthouse, a "Business Court," to improve court technology and coordination among courts that handle business cases, including acquisitions.[252]

This new "Business Court" does not create a distinct court organization—takeover cases in Tokyo will be decided, as before, by the Commercial Law Division of the Tokyo District Court. Their judges will remain part of the overall judicial administrative system under which judges are typically rotated to new posts every three years. It is therefore highly unlikely that the creation of this "Business Court" will lead to the development of any additional expertise or experience with respect to takeover cases.

Summarizing the above, we do not view the Japanese courts as having developed the capabilities to act as an effective Umpire, and this constitutes the greatest weakness under Japan's current

and requesting that members from the Ministry of Justice clarify that the grounds do not include breach of directors' fiduciary duties).

[251] The Intellectual Property High Court was established as a special branch of the Tokyo High Court in 2005. For background, *see generally* Japan Patent Office, Asia-Pacific Industrial Property Center (Collaborator: Tomokatsu Tsukahara), Intellectual Property High Court of Japan (2013), *available at* https://www.jpo.go.jp/e/news/kokusai/developing/training/textbook/document/index/Intellectual_Property_High_Court_of_Japan_2013.pdf. This court has reportedly been effective. *See id.* For a comparative perspective, *see* David Tilt, *Comparative Perspectives on Specialised Intellectual Property Courts: Understanding Japan's Intellectual Property High Court Through the Lens of the US Federal Circuit*, 16 ASIAN J. COMP. L. 238 (2021).

[252] The "Business Court" is the informal name given to a new courthouse, opened in October 2022, which is formally called the "Intellectual Property High Court and Nakameguro Branch of Tokyo District Court." It is located in suburban Nakameguro apart from existing courthouses in the central government area of Kasumigaseki. This new "Business Court" is simply an amalgamation (in a new location) of the existing Intellectual Property High Court and three specialized divisions of the Tokyo District Court: the Commercial Division, Insolvency Division and Intellectual Property Division. For an announcement of the opening, *see* Masahiro Hiraki, President of the Tokyo District Court, Opening of the Business Court, *available at* https://www.courts.go.jp/tokyo/vc-files/tokyo/2022/202210.statement-president-of-tokyo-dc.pdf. It is hoped, in particular, that up-to-date technology will speed up the handling of intellectual property cases. *See* Yuta Shimazaki, *Japan's First Business Court Aims to Boost International Confidence,* NIKKEI ASIA, Oct. 14, 2022.

regulatory framework. In the 2000s the courts may have been the only truly independent player, as corporate management was generally able to influence both the board of directors and shareholders to produce desired outcomes (i.e., fending off any hostile bids).[253] Today shareholder approval is no longer a given and is a more meaningful check on corporate management; it should be utilized accordingly. In addition, a move away from court decisions toward a takeover panel might also help counteract the general tendency that corporate management tends to do better in courts than in a panel setting.[254]

C. Filling the Three Institutional Roles under a Revised Regulatory Framework

Umpire

There are a number of potential choices to fulfill the role of Umpire in Japan: courts, administrative agency (METI or FSA), stock exchange (TSE), broad takeover panel (UK style), or limited takeover panel (Australian style). The Umpire must have (or develop) expertise and experience in ruling on hostile takeover bids. It must also be in a position to act to create and spread standards of conduct and commercial norms relating to best business practices. In Japan any administrative agency would likely not be seen as sufficiently free of conflicts. This is not a problem for courts, but they lack expertise, are reluctant to provide extensive dicta, and are inconsistent.

[253] At that time there were few even nominally independent directors in Japanese companies. The Bulldog Sauce case, *supra* notes 46-48, is a good example of shareholders approving management's defensive measures that included payment of substantial greenmail and seemed clearly against shareholders' economic interests. Traditional actors in Japan's earlier system of postwar governance, particularly main banks, may have provided monitoring of management (at least on a contingent basis) and arguably some of the benefits of hostile takeovers (*e.g.*, corporate restructurings) on a friendly basis. *See* Puchniak, *supra* note 172. However, their role has diminished and, in any event, they would have their own conflicts of interest as large shareholders and creditors in the case of a hostile bid.
[254] *See, e.g.,* Armour & Skeel, *supra* note 1, at 1782-84 (noting that common law precedents tend to favor managers, and that this was also true in the UK prior to the creation of a takeover panel).

Japan is also arguably predisposed to prefer a non-legal administrative system to resolve issues relating to hostile bids.[255] The recent strengthening of shareholders, although perhaps insufficient to produce a dominant subordinate lawmaker as in the UK, means that Japan need not continue to rely on the courts, which were always a second-best solution.[256] Accordingly, we recommend a new approach of utilizing an Australian-style limited takeover panel as the Umpire.

Bid Decision-maker

The Bid Decision-maker could be shareholders or either independent directors (if they are a majority of the board) or a special independent committee (if independent directors are not a majority of the board). As discussed above, the capabilities of shareholders have strengthened considerably, while those of independent directors and courts have not. Accordingly, in our analysis the Bid Decision-maker would be the shareholders.

One theme of this Article is the continuing ambiguity in Japan over who is the Bid Decision-maker under Japanese takeover regulation. It seems clear that shareholders are generally more important than the board, but the exact requirements for effectuating takeover defenses vary, and the board maintains some role in co-determination of defenses with shareholders. In addition, recent court cases illustrate the limited role of courts in developing standards of conduct based on existing fiduciary duties despite their present position as the primary Umpire in the Japanese system.[257] The intent of the 2023 Guidelines is arguably to establish shareholders as the Bid

[255] *See, e.g.*, Armour, Jacobs & Milhaupt, *supra* note 2, at 264; Shishido, *supra note* 175.
[256] *See* Shishido, *supra note* 175.
[257] See Appendix 3 and discussion in *supra* Part II.C. In the US, Delaware courts clearly established independent directors as the Bid Decision-maker (*see, e.g.,* Gilson, *supra* note 56, at 34), but there has been no parallel development in Japan.

Decision-maker in the Japanese regime through the creation of best practice norms, as an alternative to court-interpreted fiduciary duties.[258]

The 2023 Guidelines essentially embody the view that shareholder approval is required for all defensive measures proposed by management, and this view also represents the overall thrust of recent case law.[259] That sounds more like a UK-style system (with a no frustration rule) rather than a US-style system (in which the board often adopts poison pills). But in that case what should be the role of the board in hostile takeovers in Japan?

The problem in Japan, as noted above, is that in hostile bids the target's board typically proposes defensive measures to shareholders and there is no norm of negotiation with the bidder, despite an aspirational provision in the 2023 Guidelines favoring such negotiation.[260] We would like to see Japan evolve in the direction of an Australian-style system in which the board legally can propose defensive measures to shareholders, but it is uncommon for the board to do so.[261] Rather, the board should focus on its duty to make a recommendation on a hostile bid to shareholders, and the board's recommendation should carry sufficient weight so that a bidder will often negotiate with the board in an effort to gain a favorable recommendation.[262]

It may be a challenge to establish a similar commercial practice in Japan. One method would be to simply make a clearer statement in the 2023 Guidelines (which already encourage negotiations) that it is generally undesirable for a board to propose defensive measures to

[258] *See supra* notes 115 and 113, and accompanying text.
[259] *See* discussion in *supra* Part II.B. and Part II.C.
[260] *See supra* note 107.
[261] *See supra* notes 187-188 and accompanying text.
[262] *Id.* We acknowledge that the mandatory bid and no frustration rules in a UK-style system like the Australian regime may generally aid in the establishment of a norm that the board focuses on making a recommendation to shareholders and typically does not propose defensive measures to shareholders. There are currently no such rules in Japan, and one possibility would be for the FSA to adopt such rules.

shareholders. However, the effect of such a provision on market practice is uncertain. Australian practice is premised on the board's decision being respected by, and influential with, shareholders (including institutional investors) and other stakeholders. In the Japanese context that would require a larger role for independent directors so that a board's recommendation is perceived as being based on the merits and independent from management.

Accordingly, we are in favor of a continuing role for the board, and particularly increasing the role of independent directors in Japan. This may depend partly on the board becoming more involved in negotiating with hostile bidders on behalf of shareholders with respect to the merits of the bid and some practical issues noted above (e.g., the scope of due diligence and availability of bid exclusivity), rather than focusing exclusively or primarily on defensive measures. We therefore recommend that shareholders be the Bid Decision-maker, but that the board retain an active role in negotiations with the bidder since it is difficult for other actors to assume such a role.

Rule-maker

There are also a number of options for the Rule-maker in Japan, including the legislature (Australian style), an administrative agency (METI or FSA), a stock exchange (TSE), courts (US style), or a takeover panel (UK style). The challenge would be to balance market efficiency and investor protection in a way that is perceived as being "fair." In our analysis the Rule-maker in Japan could be either (1) the legislature, through a broad purpose clause (and rules, as appropriate) in corporate law, (2) the FSA and TSE, through a broad purpose clause (and rules, as appropriate) in a soft law code such as the Corporate Governance Code or (3) METI, through its M&A guidelines. In our view, the Rule-maker is relatively unimportant as, at a minimum, only general principles are required.[263] As discussed above, we are skeptical of Japanese courts' ability and willingness to perform that role.

In theory, either a general statement of principles or a more specific takeover code would be acceptable. It is generally difficult to pass legislation, and we suspect it would be no easy task to enact a new corporate law provision setting forth general principles for regulating hostile bids. The other possibilities would be METI's existing 2023 Guidelines or a new provision of the Corporate Governance Code, either of which would be soft law. As a practical matter, it would likely be both easiest and acceptable to use METI's 2023 Guidelines as the basis for the principles for hostile takeovers in Japan,[264] although, as discussed below, we recommend the creation of a broader interagency council. METI's Guidelines lie somewhere in-between a general statement of corporate law principles and a detailed takeover code.[265] Although these guidelines are criticized for remaining ambiguities (perhaps implicitly being compared to a more comprehensive takeover code such as the UK Code), they are sufficient in setting forth principles and norms to apply to hostile takeover bids. Our view is premised on a separate Umpire

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[263] We note that this view is not universally held by legal scholars in Japan. Some believe that the key institutional role is the Rule-maker, and that the key challenge is to develop a set of rules that can be successfully applied by Japanese courts. Comment on an earlier draft from Gen Goto. Our view, as argued in this Article, is that the real problem is that courts in Japan are ill-equipped and essentially unwilling to provide guidance (standards of conduct and commercial norms) to market participants, and that no particular set of rules is likely to resolve this problem.

[264] METI has already been credited with the role of Rule-maker with respect to its Fair M&A Guidelines of 2019 on freeze-outs by controlling shareholders and MBOs. *See* Osugi, *supra* note 24545, at 18 & 22 n.65. Although overall response to the 2023 Guidelines is positive, there is still a critical voice concerning the role of METI. *See* "Kigyō Baishū ni okeru Kōdō Shishin (An)" no Pabulikku Komento Boshū ni Taisuru Omona Goiken no Gaiyō oyobi Goiken ni Taisuru Keizai Sangyō Shō no Kangaekata [Outline of Major Comments Sent through the Public Comment Process on "The Guidelines for Corporate Takeovers (Draft)" and METI's Responses to the Comments] 1-6 (Aug. 31, 2023).

[265] *See* Hidefusa Iida *et al., Zadankai "Kigyō Baishū ni okeru Kōdō Shishin" no Kentō* [*Roundtable Discussion: Examining "The Guidelines for Corporate Takeovers"*], 33 SOFUTO RŌ KENKYŪ 113, 192 (2023) (Tomotaka Fujita, a member of the deliberation committee for the 2023 Guidelines, stating that the 2023 Guidelines consider how the courts will judge cases but do not try to change case law and therefore avoid making an overly detailed interpretation of law), *available at* https://www.ibc.j.u-tokyo.ac.jp/publications/Zadankai_softlaw33.pdf.

applying these principles to specific cases and providing more specific guidance (standards of conduct and commercial norms) for market participants.

Although METI's 2023 Guidelines are substantively acceptable, we recommend the creation of a permanent interagency council or task force to adopt, administer and periodically review the guidelines.[266] Such a council would consist of representatives from, and experts nominated by, all of the relevant agencies: METI, FSA, TSE and the Ministry of Justice.[267] This approach would provide different expertise and perspectives (including investor protection). It would also likely strengthen the credibility and impact of such guidelines on the market, courts and any Japanese takeover panel. Finally, an interagency council might help the relevant agencies and their experts coordinate policies and actions related to the regulation of hostile takeovers.

V. RECOMMENDATIONS: CONSIDERING AN AUSTRALIAN-STYLE, LIMITED TAKEOVER PANEL AND OTHER REFORMS FOR JAPAN

A. Why an Australian-style Panel?

Commentators have expressed some surprise that Japan's initial *ad hoc* response to hostile takeovers seems closer to the US approach than to the UK approach.[268] However, as noted above, at that time there were no institutional players that were fully prepared to assume a significant role in either a UK-style system or a US-style system.[269] As actual cases arose, the

[266] We gladly acknowledge that the creation of a permanent interagency panel was suggested to us by Curtis Milhaupt in a comment on a prior draft.
[267] As noted above, the 2005 Guidelines, while essentially drafted by METI, were formally a joint product of METI and the Ministry of Justice. *See supra* note 34 and accompanying text.
[268] *See, e.g.*, Armour, Jacobs & Milhaupt, *supra* note 2, at 264.
[269] *See supra* notes 174 and 231.

courts assumed a significant role by default (although METI and later the TSE also become involved in the process), which represented a second-best choice for Japan.[270]

Some commentators and institutional investors have always favored a UK-style approach for Japan.[271] This approach may have gained additional salience following recent court cases and the introduction of METI's 2023 Guidelines, which could presumably be applied by a takeover panel rather than simply represent persuasive evidence of best practices in court. However, to date those favoring such a view have generally looked to the UK's panel as the sole model for a takeover panel.[272]

In light of the strengthening role of shareholders, questions about the functioning of independent directors and difficulties of the Japanese court system in fulfilling a Delaware-style role, we also favor a panel approach for the Umpire in Japan. However, we consider a "full" UK-style panel to be highly impractical and a poor fit for Japan. As noted in Appendix 1, the powers of a UK-style panel are broad and very strong, including drafting and enforcement of the UK code, exclusive jurisdiction over all cases and the ability to proactively assert jurisdiction, and a large

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[270] *See* Shishido, *supra* note 175 and *supra* note 231.

[271] In English, *see, e.g.,* Hiroyuki Watanabe, *Designing a New Takeover Regime for Japan: Suggestions from the European Takeover Rules*, 30 J. JAPAN. L. 89 (2010). In Japanese, *see*, *e.g.*, Kenichi Fujinawa, *Kenshō, Nihon no Kigyō Baishū Rūru: Raitsu Purangata Boueisaku no Dōnyū ha Tadashikattaka [Examining Takeover Regulation in Japan: Is it Appropriate to Introduce a "Rights Plan"-Type Defensive Measure?],* 1818 SHŌJI 17, 22-23 (2007) (casting doubt on introducing a pill-type defensive measure based on the U.S. experience); WATARU TANAKA, KIGYŌ BAISHŪ TO BOUEISAKU [TAKEOVERS AND DEFENSIVE MEASURES] Final Chapter (2012). *But see* Wataru Tanaka, *Boueisaku to Baishūhousei no Shōrai: Tōkyō Kikai Seisakusho Jiken no Hōteki Kentō [The Future of Defensive Measures and Takeover Regulation: Examination of Legal Issues in The Tokyo Kikai Case]*, 470 BESSATSU SHŌJI HŌMU 77, 93-94 (2022) (suggesting that UK/EU-type regulation might not be suitable for Japan).

[272] There has been limited discussion about creating a Japanese "panel" to enforce the Financial Instrument Exchange Act's regulations on takeover bids. In general, *see, e.g.,* Naohiko Matsui, *Kōkaikaisha Hōsei to Kin'yū Shōhintorihikihō [Laws on Public Companies and the Financial Instrument Exchange Act]*, 1898 SHŌJI 46, 55 (2010); Masanori Wakita & Ryo Chikasawa, *Kōkaikaitsuke wo Tomonau M&A ni okeru Jizen no Zesei, Kyūsai [Ex Ante Corrective Action and Relief in M&A Involving Takeover Bids]*, 2311 SHŌJI 65, 70-73 (2022) (analyzing the problems of a prior consultation system on bids and discussing alternatives). However, these discussions do not focus on hostile takeovers and defensive measures. Moreover, they tend to focus on the enforcement aspect of the Umpire rather than creating and disseminating norms.

professional staff that informally decides cases with little, if any, transparency. We cannot envision such a powerful panel being readily accepted in Japan, nor can we see how one could be created.

The Australian example provides a critical point of reference by including a limited takeover panel as the Umpire, *i.e.,* an institutional player that would apply general principles/rules formulated by a separate Rule-maker to hostile bids and also act to create and spread standards of conduct and commercial norms. This is the general approach that we advocate for Japan, with our main recommendation being the introduction of an Australian-style takeover panel. However, even a limited Australian panel would present a number of practical challenges for Japan, in terms of both creation and function.

B. Obstacles to Implementation

Our recommendations leave many questions with respect to implementation. We foresee two major obstacles to adaptation of our primary recommendation, *i.e.,* the introduction of an Australian-style takeover panel into the Japanese takeover regime. First is the difficulty of selecting conflict-free "experts" to serve on the takeover panel who would be acceptable to all relevant constituencies. This has not been a significant issue in the UK or Australia, but might well be a problem in the Japanese context.

Representation on METI's and FSA's relevant committees has broadened since the 2000s and now includes numerous institutional investors.[273] Nevertheless, in addition to academics, the main legal experts—who are also the only ones with direct experience in hostile M&A practice--

[273] For the list of committee members of METI's Fair Acquisition Study Group, *see* 2023 Guidelines, *supra note* 104, at 68.

are virtually all big firm corporate lawyers who usually defend target companies against takeovers.[274] There may well be skepticism concerning their qualifications to act as conflict-free experts, although the use of non-Japanese experts is an option in cases involving foreign parties.[275] This problem may be somewhat ameliorated by the fact that, unlike the UK panel, the Australian model provides that all decisions are made by sitting panels drawn from all of the (part-time) panel members in rotation, and not by regular staff.[276] In addition, it may be a challenge to develop a takeover panel practice that focuses on market practices and does not generally rely on law and legal advocates as representatives of the parties.[277]

The second, and perhaps more serious problem is the relationship between the new panel and the court system. In both the UK and Australia courts themselves have made the determination to generally defer to the decisions of their respective takeover panels.[278] However, in Japan courts have generally not given deference to the decisions of independent government agencies and

[274] *Id.* Large corporate law firms might represent a corporate bidder (as plaintiff) against a corporate target, but would generally not represent an activist plaintiff against a company in a hostile bid.
[275] One relevant example is the Japan Commercial Arbitration Association, which is open to both domestic and international cases but mainly receives international applications. Among the 70 cases filed during the period 2019-2023, 88% were international cases. *See* the statistics page of the website of the Japan Commercial Arbitration Association*, available at* https://www.jcaa.or.jp/en/arbitration/statistics.html. Among the 88 arbitrators appointed during this period, 43% were non-Japanese; 51% of these cases were conducted in English. *Id.*
[276] *See, e.g.,* Armson, *supra* note 183, at 140.
[277] This may create an additional obstacle in Japan in that Japanese companies are accustomed to using lawyers in takeover cases and large corporate law firms have built profitable practices with such representation. However, we believe such an obstacle is surmountable—companies would presumably prefer the use of commercial norms to legal rules and lawyers would likely retain a role in representing companies in panel proceedings, as they do in both the UK and Australia (*see* Appendix 1).
[278] In the UK, this principle was established in 1987 in the first court case that challenged a decision of the UK Panel, the Datafin case. *See* Emma Jane Armson, The Australian Takeovers Panel: An Effective Forum for Dispute Resolution? 113 (June 2017) (PhD thesis, University of Melbourne), *available at* https://rest.neptune-prod.its.unimelb.edu.au/server/api/core/bitstreams/c07b5902-e5f1-5000-bb95-55a0b1e418ef/content. This was subsequently confirmed by the Companies Act 2006, which provides that a breach of the UK code is not a breach of statutory duty under corporate law. *See* Kershaw, *supra* note 163, at 115. For Australia, *see supra* note 199.

have instead undertaken substantive review of cases in competition law and other areas.[279] This may partly be a result of Japan's legal system in which appellate courts generally conduct *de novo* review in civil cases.[280] The extent to which Japanese courts would defer to takeover panel decisions is highly uncertain, unlike areas, such as decisions by arbitral tribunals in arbitration cases, where the scope of judicial review is clearly limited by statute.[281] Courts do occasionally recognize that they lack the expertise and time to make appropriate decisions in a specialized area of corporate law,[282] which might potentially encourage judicial deference. But the courts'

[279] For example, the 2013 amendment of the Antimonopoly Act abolished the internal hearing procedure system for appealing administrative orders (Shinpan in Japanese) by the Japan Fair Trade Commission ("JFTC"). As a result, the JFTC's orders became contestable in courts like other administrative orders, although the Tokyo District Court has exclusive jurisdiction. Before the 2013 amendment, a party dissatisfied with a JFTC order had to first undertake an internal hearing procedure and then appeal to the Tokyo High Court. In addition, the 2013 amendment also abolished the substantial evidence rule, which provided that the facts found by the JFTC bind the court if there are substantial findings. For the 2013 amendment, *see* Shuya Hayashi, *The 2013 Amendment to the Antimonopoly Act: Procedural Fairness under Japanese Competition Law*, 39 J. JAPAN. L. 89 (2015). The amendment was based on distrust of the JFTC's internal appeals system. *See* TADASHI SHIRAISHI, DOKUSEN KINSHI HŌ [Antimonopoly Act] 730 (4th ed. 2023).

[280] In civil cases, "[p]roceedings in the second instance are deemed as a continuation of those in the first instance, and the court of second instance may conduct proceedings to arrange issues and evidence, examine evidence, and find facts" with respect to issues on appeal. *See* Supreme Court of Japan, Outline of Civil Procedure in Japan 18 (2022), *available at* https://www.courts.go.jp/english/vc-files/courts-en/Material/Outline_of_Civil_Procedure_in_JAPAN_2022.pdf. Although not a full *de novo* review, in criminal cases as well an appeal (by either party, since prosecutors can also appeal), can be made based on one of four enumerated grounds, including "[a]n error in fact-finding." *See* Supreme Court of Japan, Outline of Criminal Justice in Japan 8 (2023), *available at* https://www.courts.go.jp/english/vc-files/courts-en/Material/Outline_of_Civil_Procedure_in_JAPAN_2022.pdf.

[281] As noted above, in both the UK and Australia courts decided to limit their scope of review in appeals from panel decisions. *See supra* note 278. We are not confident this would occur in Japan. For an example of a statutory restriction limiting the scope of review in Japan, *see* Chūsaihō [Arbitration Law], Law No. 138 of 2003. Parties to an arbitration cannot appeal the award to a court, but (in keeping with international conventions and practice) can request that the award be set aside based only on limited grounds enumerated in the law. *Id.,* art. 44(1). *See also* Hiroyuki Tezuka, Azusa Saito & Motonori Ezaki, *Arbitration Procedures and Practice in Japan: Overview,* PRACTICAL LAW GLOBAL GUIDE 2017: ARBITRATION (2017), *available at* https://www.nishimura.com/sites/default/files/images/51254.pdf. As of 2019, "there has been no arbitral award for which rescission has become determinative as a result of being disputed up to the supreme court)." *See* Japan International Dispute Resolution Center, International Arbitration in Japan 7 (March 2020), *available at* https://idrc.jp/images/home/booklet.pdf (last visited May 17, 2024).

[282] For example, the Osaka District Court enjoined a share issuance because it lacked shareholder authorization, even though the issue price of shares was "particularly favorable to subscribers for the shares" (Kaishahō [Companies Act], Law No. 86 of 2005, art. 199, para. 3) (Ōsaka Chihō Saibansho [Osaka Dist. Ct.] June 22, 1990, Hei 2 (yo) no. 1541 & 1502, 1265 KINHAN 30). However, the court affirmed the next issuance attempt by the same firm, because this time the issuing firm complied with the Japan Securities Dealers Association's self-regulation when

overall track record in this regard is not promising, and there is no obvious means of requiring courts to defer to panel decisions in the absence of explicit statutory limitations.

One possible solution would be to begin initially with a takeover panel that has no exclusive jurisdiction, thus leaving the parties a choice of whether to bring any dispute over hostile bids and defensive measures to either the panel or the courts. If an interested party brought a dispute to the panel, the opposing party would be required to participate in the panel procedure. During the panel's proceeding the parties would be unable to go to court, but following a panel's decision the parties could appeal to the relevant court.

Such an approach would represent a modest reform compared to the present need. However, the initial takeover panels in both the UK and Australia had substantially lesser powers and operated much less effectively than they do today.[283] If, as a first step, Japan were provided some time for a non-exclusive takeover panel to develop both experience and credibility in matters relating to the provision of conflict-free expertise and the appropriateness of panel procedures, subsequent reforms could strengthen its jurisdiction and powers.

Our other recommendations, although likely less difficult to implement, presumably face the obstacles previously noted in the discussion in part IV.B above. For the Rule-maker, it would be necessary to establish an interagency council. However, the creation of such a council should ameliorate any lingering concerns about METI's past role as a perceived defender of Japanese

setting the issuing price (Ōsaka Chihō Saibansho [Osaka Dist. Ct.] July 12, 1990, Hei 2 (yo) no. 1717, 1265 KINHAN 33).

[283] For the UK, *see, e.g.,* Armour, Jacobs & Milhaupt, *supra* note 2, at 237. For Australia, *see* Ramsay, *supra* note 193, at 1. This raises the obvious question of "Why 'import' a system that was not successful and later substantially reorganized?" However, the political feasibility of adapting an Australian-style panel in Japan as opposed to taking a more modest "first step" toward the eventual establishment of such a panel is beyond the scope of this Article.

industry and help establish the council's reputation as a conflict-free provider of rules.[284] Whether or not METI's 2023 Guidelines are utilized as the basis for principles of hostile takeover regulation, any such guidelines should be made binding on the takeover panel and not just treated as persuasive evidence as in courts.

For the Bid Decision-maker, there are fewer obstacles to implementing our recommendation. However, it will not be a simple task to develop a norm that the board relies on the persuasiveness of its recommendation on the takeover bid, and generally does not propose defensive measures for shareholder approval. The current reliance on shareholder voting, but with boards retaining the ability to initiate defensive measures approved by shareholders, could result in management attempting to unduly influence shareholder voting on defensive measures (as in the Mitsuboshi case).[285] A takeover panel should be able to prevent such abuse. However, as noted above, the prospects for realizing our underlying hope that independent directors and independent committees will strengthen their corporate governance role may depend partly on the board expanding its focus beyond defensive measures—*i.e.* becoming more involved in negotiating with hostile bidders on behalf of shareholders with respect to practical issues regarding takeover bids .

C. The Need for Substantive Reform of Takeover Regulation Revisited

In drafting this Article, we assumed that the primary issue was whether an Australian-type limited takeover panel would be a good "fit" for Japan, and in particular whether the practical

[284] *See supra* note 264.
[285] *See supra* notes 97-100 and accompanying text.

difficulties in implementing such a proposal could be readily surmounted; we regarded the need for substantive reform of the Japanese regime for takeover regulation to be self-evident.

However, comments from Japanese colleagues on earlier drafts of this Article raised a number of specific points that contested the underlying need for reform of the current system.[286] We wish to convey and address these points, but we are not aware of any article that incorporates these specific criticisms into an overall view of the regulatory framework for takeovers in Japan.[287] Many of the important changes in Japan (such as court decisions on hostile takeovers and the 2023 Guidelines) are recent developments and academic research that considers their overall impact on Japan's regulatory regime and its future development is still quite limited.

An argument refuting the need for reform would likely proceed as follows: (1) METI's 2023 Guidelines will be (or are being) widely accepted in M&A practice, so that only a few exceptional cases will remain for courts to decide (and therefore courts' institutional weaknesses are not important), (2) recent instances of multiple takeover bids in Japan indicate that market practice may already informally accept a kind of Revlon duty, and eventually a dispute will arise and result in a court decision on such a duty, (3) decisions of independent directors are gradually gaining respect, at least at large, sophisticated companies, and (4) Japanese trust and like their court system.[288]

Add our own observation that recent cases may have allowed Japanese corporate law firms to develop a "playbook" for companies to use in structuring takeover defenses to maximize their

[286] Such comments also include questions and remarks from participants in response to our presentation of a draft of this Article to the inaugural annual conference of the Asian Corporate Law Forum, Singapore, April 23, 2024.
[287] The only recent source that covers some of these issues may be Goto *et al.*, *supra* note 247.
[288] This argument is constructed with reference to *id.*, comments on prior drafts of our Article, and comments from conference participants noted *supra* note 286.

chances of obtaining shareholder approval, and the result may be that the current weaknesses and "incompleteness" in the Japanese takeover regime will gradually be addressed over the next decade simply by the continuation of current trends within the existing framework. Accordingly, the substantial costs, broadly defined, of implementing a proposal for a new takeover panel would likely outweigh the potential benefits, given ongoing developments in the current system and the correspondingly limited need to substantially change it.[289]

We disagree with this argument. With respect to the overall economic and social need for an effective system of takeover regulation, see the discussion in Part II.E *supra* on Japan's attempts to pivot to sustained growth and development. In more direct response to the above argument, we remain skeptical that the current regime will develop gradually into a robust regulatory framework based solely on current trends and roles of existing institutional players.

We question both the extent and the significance of all four trends noted above. It is too early to tell exactly how much influence the 2023 Guidelines will exert on market practice. We expect that there will be some, and possibly substantial, impact. However, we are skeptical that the 2023 Guidelines will be "automatically" adopted; prior experience in Japan indicates that adoption of METI's guidelines by market actors and especially by courts will be piecemeal and partial.[290] As discussed above, the 2023 Guidelines are not as detailed as the UK Code, and in

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[289] We gratefully acknowledge confirmation from our colleague, Zenichi Shishido, in a comment on a prior draft, that this and the preceding paragraph accurately reflects his views (although he remains unpersuaded by our analysis).

[290] As noted *supra* in Part II.A, the relationship between the decision of Japan's Supreme Court in the Bulldog Sauce case and the reports of the METI-led Corporate Value Study Group were complicated, and following this court decision the Corporate Value Study Group issued another report in 2008 that essentially disagreed with important elements of the court's ruling. For the Bulldog Sauce case, *see supra* notes 46-49; for the 2008 report, *see supra* notes 51-52. The main issue was defining the limits of defensive measures approved by shareholders (one area of disagreement in the 2000s was the payment of greenmail). This remains an important issue today which has not been addressed by courts; the 2023 Guidelines may suggest some limits on shareholder approval, albeit ambiguously, and they have no enforcement mechanism outside the judicial system.

any event takeover cases are very fact specific and generally require application of the "spirit" of the principles/rules. Japanese courts have generally not been willing to provide dicta that may be useful in the creation and propagation of standards of conduct and norms, as do courts in Delaware,[291] and this situation is unlikely to change. In terms of our analysis, we are being asked to accept a relatively inactive or weak Umpire in Japan, even though we believe that the role of Umpire is the most important one in creating an effective and trusted regulatory regime for takeovers, including the creation and propagation of standards of conduct and commercial norms.[292]

The arguments are generally similar with respect to market practice (and the possibility of an eventual court decision) regarding multiple bids and the equivalent of a Revlon duty. Historically, there has been only slow and incomplete development of fiduciary duties, particularly with respect to conflicts of interest, and no particular movement toward creating a Revlon duty.[293] Recently, following promulgation of the 2023 Guidelines, there have been two well-known instances of multiple bids in Japan (and no court decisions), as noted in Part II.C

[291] For Delaware, *see* Rock, *supra* note 226; for Japan *see* summary of recent cases in Appendix 3.
[292] Although perhaps unsuitable as an analogy for Japan, the general idea of reasonable rules becoming self-executing through market practices, despite institutional weaknesses, proved to be wishful thinking with respect to Russia in the 1990s. *See* Reiner Kraakman & Bernard Black, *A Self Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911 (1996); Bernard Black, Reiner Kraakman & Anna Tarasova, *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. 1731 (2000).
[293] Japanese judges may have taken conflicts of interest into account, without discussing the issue explicitly, in reaching court decisions while utilizing general duties of care and loyalty. *See, e.g.,* Goto *et al.*, *supra* note 216, at 18-20 (speaker: Iwakura) and 27 (speaker: Goto). *But see id.* at 24 (speaker: Tokutsu). However past decisions have not been clear on this issue and accordingly had no strong effect on market practice. For an examination of prior lower court decisions on conflicts of interest and liability for directors and officers, *see* Manabu Matsunaka, *Torishimariyaku no Ninmuketai Sekinin to Rieki Sōhan [Directors' Liability and Conflicts of Interest]*, *in* KIGYŌ TO HŌ WO MEGURU GENDAITEKI KADAI [Contemporary Issues Regarding Firms and Law] 279 (Maki Saito *et al.*, eds. 2021).

supra. From our perspective it is quite optimistic to assume that market practice and court decisions will quickly move in the direction of the creation of an equivalent to a Revlon duty.[294]

While we strongly hope that the role of independent directors in Japan's corporate governance system will improve and that their decisions will increasingly be respected, the results to date have been very limited. There is no evidence that independent directors are regarded as being truly independent from management, particularly in cases of clear potential conflicts of interest where independence really matters. This trend is, in fact, most evident in the area of hostile takeovers--the decisions of independent directors have not been given any weight by institutional investors or courts. The current proxy guidelines of a number of institutional investors require a majority of independent directors on the board as a condition for voting in favor of pre-bid general takeover defenses, but there is no specific role for independent directors and no deference given to their voting or decisions. Courts have similarly ignored independent directors in takeover cases.

As noted above, current market practice in Japan regarding takeover bids may be evolving in the direction of targets taking *bona fide* unsolicited bids seriously, as provided in the 2023 Guidelines. However, practice is uneven and there are still Japanese companies that continue to attempt to "just say no" to takeover bids despite mounting pressure for the fair treatment of

[294] Under Japanese law it is difficult for a bidder to contest the target board's conduct regarding multiple bids. The court's review is generally limited to the effectiveness of a defensive measure and does not extend to fiduciary duties in competing bids. *See* Manabu Matsunaka, *Tekitaiteki Baishū to Dokuritsu I'inkai [Hostile Takeovers and Independent Committees]*, 339 MARR (Dec. 9, 2022), https://www.marr.jp/genre/viewpoint/aspect/entry/40652 (pointing out that there are situations where it is difficult for bidders to bring cases to court and suggesting that the duties of the board in handling unsolicited offers need to be fleshed out through routes other than case law). One advantage of an Australian-style panel is that all bidders would presumably be interested parties. *See also* the recent Fuji Soft case, *supra* notes 125-126, which clearly ran counter to the possibility of the establishment of a Revlon-type duty in Japanese M&A market practice.

shareholders;[295] instances of a target negotiating with a hostile bidder to improve bid terms and then cede control remain rare. Despite some gradual improvement in the role of independent directors at large companies, we foresee no substantial change in these market practices in the near future.

While we agree that Japanese courts are well respected within Japan, they remain ill-equipped and lack incentives, unlike courts in Delaware, to act as an effective Umpire in a regulatory framework for hostile takeovers. As discussed above, it is difficult for courts to provide expertise and accumulate relevant experience, and they generally do not include dicta that could be useful in the establishment of standards of conduct and commercial norms. This is even more true when cases are appealed from District Courts to High Courts and the Supreme Court. And even if courts in Japan are respected by Japanese, can the same be said concerning parties who are not Japanese?

Accordingly, even if we accept, *arguendo*, that our view of development of the current system is unduly pessimistic and that the argument against the necessity of reform is correct, that would leave Japan with a domestically oriented, insular takeover regime at a time when both its business and financial markets are internationalizing at a rapid pace. Today foreign investors own 30% of the stock market and account for over 60% of stock transactions;[296] they have been

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[295] In a recent case, Chilled & Frozen Logistics Holdings ("C&F") initially responded to an unsolicited offer by AZ-COM MARUWA Holdings by attempting a variation of "just say no"--stating that they needed more time to consider due to vague references to expressions of interest from other parties. However, due to mounting pressure, it eventually became a typical white knight case with an acquisition by a third party that ended happily for shareholders. *See, e.g.,* Kai Ishizaki, *Japan's SG Holdings Sparks Bidding War for Rival Trucking Firm: C&F Logistics Embraces Higher Bid over Earlier Offer from AZ-COM*, NIKKEI ASIA, June 1, 2024.This case reinforces the notion that Japanese practice is evolving. It has become more difficult for a target's management to completely ignore the interests of shareholders (*see* discussion of the 7 & I case, *supra* notes 83-85 and accompanying text), but that there is still no clear norm equivalent to a Revlon duty for the target's management to sell to the highest bidder (*see* discussion of the Fuji Soft case, *supra* notes 125-126 and accompanying text).

[296] For ownership, *see* Tokyo Stock Exchange, 2023 Shareownership Survey, *supra* note 69, at 4 (foreigners owned 31.8% of the stock market in 2023). For weekly trading data, *see* Tokyo Stock Exchange, Trading by type of

driving Japan's recent stock market rally and have played a substantial role in creating the opportunity for Japan to take advantage of favorable conditions and pivot to sustained economic growth. Recent actions by METI, TSE and FSA are premised on the need to continue corporate governance and market reforms in order, in part, to continue to attract overseas investment. A regulatory regime in which a foreign bidder could bring to a takeover panel any complaint about defenses adopted by a Japanese target could make a positive difference in the level and nature of foreign investment in Japanese markets.

VI. CONCLUSION

Japan's regulatory system for hostile takeovers remains incomplete, complicated and uncertain. It is an unwieldy mix of US and UK elements due to the difficulties in prioritizing and clarifying the balance between the conflicting goals of market efficiency and investor protection. The fact that other civil law countries in East Asia have developed broadly similar regimes may add perspective to the challenges and Japan's reaction to them, but does not directly help resolve outstanding issues in Japan's regulatory system for hostile takeovers.

Historically, the Japanese regime had little relevant law[297] and relatively weak and uncertain regulation of board defenses by courts, which generally favored management autonomy over

Investors, *available at* https://www.jpx.co.jp/english/markets/statistics-equities/investor-type/index.html (for the second week of August, 2024, foreigners accounted for 65.3% of trading by volume and 68.5% of trading by value). *Id.*

[297] *See* Kanda, *supra* note 31. Writing in 2004, Professor Kanda noted that "no one [in Japan] can tell what the law is with respect to takeover defenses" (*id.* at 70), and that if defensive measures were challenged in court, "the court would face a very difficult question without clear guidance from explicit Commercial Code provisions. In such an event, it is possible that bright-line rules would be introduced through legislation." *Id.* at 75. No such legislation was ever enacted.

shareholder monitoring.[298] The history of "corporate value" in Japan provides a good illustration of both Japan's problems and recent efforts to begin to strike a better balance. Given important changes in its operating environment, Japan may now be in a position to more effectively redress the balance between market efficiency and investor protection, and to potentially develop a market for corporate control.

There is a new urgency to reform Japan's system. For over a decade Japan has sought to reignite economic growth. There is arguably a new appreciation that sustained economic growth requires investment in innovation and strong productivity, and that, in turn is fostered by the access to capital and discipline of a robust capital market. Ongoing corporate governance reform extends this viewpoint to include corporate management that focuses on performance and is willing to take appropriate risks, recognizes the important of shareholders' interests, and is also subject to monitoring by stakeholders and markets. Attitudes toward hostile acquisitions are evolving in light of the necessity of further corporate governance reforms to attract foreign investors.[299]

Changing circumstances also provide new opportunities for reform of takeover regulation. The roles of institutional investors and activist shareholders, independent directors and courts in Japan have all gradually strengthened, raising the possibility of larger institutional roles by these

[298] *See* Shishido, *supra* note 175, at 2. *See also* Armour & Skeel, *supra* note 1, at 1782-84 (stating that the use of litigation to resolve hostile bids has a structural bias in favor of a company's directors and management, at least under common law precedents, which also held true in the UK prior to the adoption of a takeover panel to privatize such cases).
[299] The extent of evolving attitudes toward hostile acquisitions has yet to be fully tested. There is still no successful case involving a truly foreign acquirer, particularly by a foreign fund that was a financial, rather than a strategic, bidder (for an unsuccessful earlier attempt, *see* the Bulldog Sauce case, *supra* note 46). The Toshiba case, *supra* note 239, indicates an increased sensitivity to national security concerns, so it could depend on the industry and the identity of the acquirer (a state-owned entreprise from China would presumably encounter greater resistance than an acquirer from an allied country).

players. Recent court decisions on hostile takeovers and new policy initiatives by METI, TSE and FSA have indicated a change in traditional attitudes towards hostile acquisitions and provided some new rules, precedents and processes; but they have also highlighted continuing weaknesses and uncertainties in the current regulatory regime.

Although the role of shareholders has strengthened more than those of independent directors and the courts, it may still be insufficient to become a dominant subordinate lawmaker (both Bid Decision-maker and Umpire) as in the US and UK. An Australian-style, limited takeover panel might act to further strengthen the balance in favor of shareholders;[300] it would also be a more appropriate Umpire than courts in a revised regulatory scheme that more clearly emphasized commercial norms over legal fiduciary duties. More importantly, such a panel represents a promising approach to achieve credibility in Japan's regulatory system of takeovers through a conflict-free, expert, independent, and predictable Umpire that could effectively act to create and propagate standards of conduct and commercial norms. Together with a separate Rule-maker, such as an interagency council, and a Bid Decision-maker that focuses on shareholder voting and requires shareholder approval for all defensive measures (while retaining a role for the board and independent directors), we believe it is possible for Japan to transition to a revised regulatory framework for hostile takeovers that is commensurate with its current economic importance and with the role it seeks to play in global business and capital markets.

We do not favor a binary analytical framework for takeover regulation that focuses on the contrasting examples of the US and the UK, since both regimes are path dependent and difficult to replicate elsewhere. Japan and other East Asian countries have mixed systems, although at

[300] This was reportedly the case in Australia when it reconstituted and strengthened the power of its takeover panel in 2000. *See* Hill, *Subverting Shareholder Rights: Lessons from News Corp.'s Migration to Delaware, supra* note 182, at 26.

least in Japan's case we do not view its current system as successful or adequate in light of changing conditions and needs. If, *arguendo*, such a binary UK/US framework were to be utilized, our recommendations essentially call for Japan to reform its regime from one of "US-lite" to "UK-lite," for a number of reasons including evolution in the relative strengths of its institutional players. Although we do not see any successful real-world example of a "US-lite" system (including Japan), we consider Australia to be a prime example of a successful "UK-lite" Regime.

If Japan needs a more speedy, fair and consistent regulatory framework for takeovers to promote investment in its capital markets, together with improvement in corporate performance and governance, the most important step is to provide an expert and experienced Umpire that is trusted by all stakeholders and the public. We hope that our analysis and recommendations, by separating the roles of Rule-maker and Umpire and by introducing the Australian takeover regime and its takeovers panel as a point of reference, will provide greater analytical flexibility and aid in the development of a takeover regime that better fits Japan's circumstances and needs.

Appendix 1: Key Features of UK Takeover Panel and Australian Takeovers Panel

Feature	UK Panel	Australian Panel
Scope of Activities	Broad: drafting, administering, monitoring compliance with and enforcing the UK Code	Narrow: temporary, exclusive jurisdiction for resolving contested hostile bids; non-exclusive jurisdiction for other M&A disputes
Guidance	Proactive: publishes guidance notes on acceptable practices (including new policies)	Reactive: publishes guidance notes only on emerging issues of controversy in its decisions
Initiation of activities	Proactive: exclusive role in enforcing UK Code; can act on its own initiative	Reactive: only resolves disputes upon applications from private parties or ASIC
Enforcement of Law; Decisions on exemptions and modifications of takeover rules	UK Panel	Government agency (ASIC) (which also provides related policy guidance)
Jurisdiction for Deciding Hostile Bid Cases	Exclusive jurisdiction at all times	Exclusive jurisdiction on contested bids only during takeover bid period; non-exclusive jurisdiction on other matters at all times
Decisionmakers	Matters typically resolved by takeover panel executive (professional staff); part-time members for occasional panel proceedings	Part-time members (panel of 3) only; all cases are resolved through panel proceedings
Formality of Proceedings	Matters typically resolved by phone (lawyers discuss with panel executive); oral hearings for occasional formal proceedings; no rules of evidence	No resolution by phone with panel executive; proceedings generally conducted through written submissions only; no rules of evidence
Sanctions for Code Violations	Flexible: private reprimand, public censure, reporting conduct to another person, and triggering "cold shoulder" sanctions	Declarations of unacceptable circumstances and related orders
Transparency; Communication with Public	Generally does not publish decisions and reasons; publishes guidance notes	Publishes decisions and reasons; publishes guidance notes
Internal Review of Panel Decisions	Appeal to hearings committee and then appeal to takeovers appeal panel	Appeal to review panel (new panel of 3 part-time members)

Judicial Review of Panel Decisions	Limited to subsequent review of panel's jurisdiction and processes	Limited to subsequent review of panel's jurisdiction and processes
Panel staff and Source of Budget	27 staff with large budget (11.4 million pounds) from securities transaction tax and offering document fee	5 staff (+2 temporary) and small budget (2.8 million Australian dollars) from government (Treasury Department)

Sources: compiled from Emma Jane Armson, *Assessing the Performance of Takeover Panels: A Comparative Study, in* COMPARATIVE TAKEOVER REGULATION: GLOBAL AND ASIAN PERSPECTIVES 134 (Umakanth Varottil & Wai Yee Wan eds., 2018), DAVID KERSHAW, PRINCIPLES OF TAKEOVER REGULATION (2016), RODD LEVY, TAKEOVERS LAW AND STRATEGY (6th ed., 2023) and 2023 annual reports of the UK and Australian panels.

Appendix 2: Revised Simplified Framework for Regulation of Hostile Takeovers

Country	Bid Decision-Maker	Main "Subordinate Lawmaker" (Rule-maker and Umpire)	Comments
UK	Shareholders	Takeover panel	Strong influence of institutional investors
US	Board of directors (independent directors)	State courts (Delaware)	Tradition of state court decisions in corporate cases (and rise of independent directors)
Australia	Shareholders	Legislature is Rule-maker; takeovers panel is Umpire; separate government agency enforces corporate law	No dominant "subordinate lawmaker"; limited takeover panel
Japan	Mixture of shareholders and board of directors	Mixture of courts, government agencies (METI and FSA) and TSE	No tradition of either strong institutional investors or state court decisions; ad hoc and mixed system

Sources: Compiled from John Armour, Jack B Jacobs & Curtis J Milhaupt, *The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework*, 52 HARV. INT'L L.J. 221 (2011) and Emma Jane Armson, *Assessing the Performance of Takeover Panels: A Comparative Study, in* COMPARATIVE TAKEOVER REGULATION: GLOBAL AND ASIAN PERSPECTIVES 134 (Umakanth Varottil & Wai Yee Wan eds., 2018).

Appendix 3: Table of Recent Court Decisions

Case	Major Points (Holding)	Open Questions	Remarks
Nippo Sangyo	-Defensive measure introduced with shareholder approval and activated by the board was affirmed. -Demand for bidder to provide sufficient information to target and its shareholders is reasonable grounds for defensive measures. -If target board demands too much information from bidder, the court might enjoin activation of defensive measures.	-What happens when a pre-bid measure is introduced with shareholder approval when there is no known bidder? -What information can a target board demand from a bidder?	-Defensive measure introduced and renewed before the bid, but bidder was known to be buying shares. -Bidder was reluctant to provide necessary information to the target and its shareholders.
Nihon Asia Group	-Defensive measure introduced and activated unilaterally by the target board was deemed significantly unfair. -Independent committee cannot substitute its decision for shareholders' decision. -Bidder's position of up to one-third of the target's shares before the bid does not constitute sufficient grounds for target's board to activate measure.	When can a target's board activate defensive measures without shareholder approval? -What is a sufficient level of structural coerciveness that justifies the activation of defensive measures by the board? -What is the standard of conduct for a target board when a counteroffer is made?	-Initially, the bid was launched as a counteroffer to the target's MBO.
Fuji Kosan	-Defensive measure activated with shareholder approval was affirmed. -Shareholder approval can be obtained after the board's decision to activate the measure. -Shareholder approval does not require special resolution (2/3 vote), and ordinary resolution (majority vote) is sufficient.	-When are measures activated with shareholder approval deemed significantly unfair? - What is a sufficient level of structural coerciveness? -What is the the effect of voting by shareholders with business connections to the target?	-The bidder initially refused a request from the target's board to extend the bid period.

Tokyo Kikai	-Defensive measure activated with shareholder approval by MoM (majority of minority) was affirmed. -Excluding the acquirer from voting on the shareholder resolution was not inappropriate under the facts of the case. -The bidder's purchase of a large volume of target's shares in the market was structurally coercive.	-What are the grounds for allowing MoM resolutions? When can they be used? -What are the defects of a MoM resolution? -Can a target's board activate defensive measures without shareholder approval in a similar situation?	-Bidder continued purchasing about forty percent of the target's shares in the market, but did not launch a bid.
Mitsuboshi	-Affirmed the need to activate defensive measure with shareholder approval against bidders' wolf-pack purchase of target's shares. -Activation was enjoined due to a lack of proportionality. -The measure was deemed disproportionate because 1) it did not clarify conditions for the bidder to withdraw and avoid dilution, and 2) it restricted the bidder from exercising shareholder rights (to vote and to sell shares).	-To what extent can measures restrict a bidder's rights after activation? -What is the relationship between necessity to activate measures and proportionality? -How should a target's board cope with a wolf-pack, including setting the scope of persons acting in concert?	-Bidder was a group of an LLP, its partners, and other relevant persons acting in concert. -Bidder agreed to stop buying target's shares, but not to give up right to call shareholder meeting. -Activation of measure approved by 54.46% of the target's shareholders in attendance.

Source: compiled by the authors.

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