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

Law Working Paper N° 782/2024
July 2024

Bruce E. Aronson
New York University

Manabu Matsunaka
Nagoya University

ECGI Working Paper Series in Law

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

Working Paper N° 782/2024

July 2024

Bruce E. Aronson
Manabu Matsunaka

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. Such 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, "in-between" the US and the UK, since it 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 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.

Bruce E. Aronson*
Adjunct Professor of Law
New York University
40 Washington Sq. South
New York, NY 10012, USA
e-mail: ba1525@nyu.edu

Manabu Matsunaka
Professor
Nagoya University
Furocho, Chikusa-ku
Nagoya, 4600024, Japan
e-mail: m-matsunaka@law.nagoya-u.ac.jp

*Corresponding Author

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

Bruce Aronson and Manabu Matsunaka*

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. Such 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, "in-between" the US and the UK, since it separates the rulemaking and enforcement functions and has a takeover panel with substantially limited authority and activities compared to the UK.

* Aronson is Adjunct Professor and Senior Advisor, Japan Center, U.S.-Asia Law Institute, New York University School of Law. He was a member of the board of directors of Eisai Co., Ltd. from 2017-2022. Matsunaka is Professor of Law, Nagoya University. 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.

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 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,

---

[1] John Armour and 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 and 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. 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

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

---

ASIAN 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 43-45 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 manufacuterer 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).

[8] Japanese companies have been described as consisting of a "company community." *See infra* note 153. 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 (3rd 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, the company will enact a shareholder rights plan and then activate it. *See, e.g.*, Armour, Jacobs and Milhaupt, *supra* note 2 at 253. The adoption of such 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.

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 part of "Abenomics" and its successors, while Japanese companies have continued to internationalize in order to maintain growth despite a shrinking market at home.[11] The pro-growth policies of Abenomics 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]

But continuing and accelerating corporate governance reform under Abenomics has set the stage for improvement by altering Japan's overall operating environment. Changes include weaker

---

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, INC., 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 and 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 and 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 217.

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

[12] *Id.*

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] Overall attitudes toward hostile acquisitions are evolving in the direction of letting the market work and a new "market-oriented Japan."[14]

This new environment 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.[15] 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[16] and an ongoing reassessment by the Financial Services Agency ("FSA") of regulations on tender offers and reporting of large shareholdings.[17] Add to the mix the trend for Japanese companies to abolish takeover defenses due to pressure from institutional investors and others,[18] and a 2023 directive of the Tokyo Stock Exchange ("TSE") to listed Japanese companies to improve their capital efficiency and stock price,[19] and rapidly changing conditions have set the stage for new hostile takeover activities and disputes, including with foreign investors.

[13] *See* discussion *infra* in Part III.B.
[14] *See infra* note 139 and accompanying text.
[15] *See* discussion *infra* in Part II.C.
[16] *See infra* notes 98-118 and accompanying text.
[17] *See infra* notes 127-133 and accompanying text.
[18] *See* discussion *supra,* note 9.
[19] *See* discussion *infra* at notes 119-126 and accompanying text.

The above regulatory reforms and litigation mean that the two key features of takeover regulation in Asian countries—mandatory bids and takeover defenses[20]—both seem to be "in play." This rapidly changing market and regulatory activity seeks to address the lingering 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. Such activities also highlight Japan's continuing efforts to achieve its most fundamental goal--a pivot to sustained economic growth. 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.[21] 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.[22] Thus, the main, continuing weakness in the Japanese

[20] Umakanth Varottil & Wai Yee Wan, *Comparative Takeover Regulation: The Background to Connecting Asia to the West*, *in* COMPARATIVE TAKEOVER REGULATION: GLOBAL AND ASIAN PERSPECTIVES 3 (Umakanth Varottil & Wai Yee Wan eds., 2018).

[21] As of late February 2024, the Nikkei 225 index of Japanese stocks (a relatively narrow, but often-cited index, equivalent to the Dow Jones Industrial index in the US) had gained almost 45% over the prior year and reached a new high for the first time since 1989; the rally was driven by foreign investors. *See, e.g.,* Aya Wagatsuma and Yasutaka Tamura, *Record-High Nikkei's Rise Just Getting Started on Foreign Demand*, BLOOMBERG, Feb. 23, 2024.

[22] *See infra* Part IV.B.

system is having the courts as the primary mechanism for the enforcement and interpretation of rules. Accordingly, our main recommendation is that Japan consider a limited takeover panel for enforcement, together with a separate rule-maker.[23]

In reconsidering the analytical framework for hostile takeover regulation and institutional roles, we utilize Australia as a "new" point of reference.[24] 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.[25] 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 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,

[23] *See infra* Part V.A.
[24] See discussion *infra* in Part III.B.
[25] *See* Appendix 1.

particularly the adaptation of an Australian-style, limited takeover panel as the Umpire 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 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 proposes 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,[26] Japan had a very limited regulatory framework to deal with such cases: a securities law provision that dealt to some

[26] 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).

extent with hostile bids[27] and a general corporate law provision that provided that the issuance of shares by a corporation could be enjoined if the primary purpose was to defend the control of incumbent management rather than to raise capital; share issuance could also be enjoined if it was "significantly unfair."[28] By default, it was largely up to the courts to decide actual cases. In the early 2000s another player, although lacking a clear mandate in this area,[29] entered the scene: METI formed a Corporate Value Study Group which drafted a report[30] and issued nonbinding guidelines concerning hostile acquisitions together with the Ministry of Justice (the "2005 Guidelines").[31] As the Livedoor case (discussed below) and the drafting of the above report and

[27] *See generally* Tomotaka Fujita, *The Takeover Regulation in Japan: Peculiar Developments in the Mandatory Offer Rule,* 3 U. TOKYO SOFT L. REV. 24 (2011).

[28] *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, this "primary purpose" test was too narrow to decide the acceptability of specific defensive measures, and in the Livedoor case and subsequent cases courts began to utilize the corporate law provisions on enjoining "significantly unfair" issuance. *See* Companies Act (Law No. 86 of 2005, as amended), Arts. 210 and 247. *See also* 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). This same phrase (in Japanese, ichijirushii fukosei or 著しい不公正) has also been variously translated into English as "significantly unfair," extremely unfair," and "grossly unfair."

[29] 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 Telitaiteki Baisyū 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).

[30] 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 28 at 2195-97.

[31] 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,

the 2005 Guidelines proceeded on a parallel course during 2004, to some extent they influenced each other.[32]

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]."[33] The main issue at the time was who was the Bid Decision-maker: shareholders or the board? It was unclear in the Japanese context whether "corporate value" referred only to the interests of shareholders or also included those of other stakeholders.[34] "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)."[35] Although originally nonbinding, the 2005 Guidelines were made legally effective by the TSE incorporating these guidelines into its listing rules in 2006.[36]

2005), *available at* https://www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/pdf/shishin_hontai.pdf.

[32] *See* Milhaupt *supra* note 28, at 2210.

[33] 2005 Guidelines, *supra* note 31 at 3.

[34] 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 increased corporate value) may have been attractive precisely because it was vague and subject to conflicting interpretations. For the definition of "corporate value" and its transition 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. __(forthcoming 2024) (manuscript at 6-8) (on file with authors)

[35] 2005 Guidelines, *supra* note 31 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 29, at 154 (2007).

[36] *See* Armour, Jacobs and Milhaupt, *supra* note 2, at 255.

The Bid decision-maker was also not clear 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.[37] 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.[38] This situation occurred in the Livedoor case, and the Tokyo High Court 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.[39]

In an opinion generally reminiscent of the Unocal analysis by Delaware courts,[40] the high court decided that the scope of the threat that justifies defensive measures by a board (i.e., where the primary purpose of the issuance was to maintain control rather than to raise capital) is narrow; it stated that a defensive measure would be deemed an unfair issuance (Companies Act §§206 and 210) with only four limited exceptions where the bidder had an "abusive motive," such as when the bidder was a greenmailer.[41] In the Livedoor case, if the court had approved the target

[37] *See* Osugi, *supra* note 29, at 153. The specific legal doctrine utilized was arguably not important. *See* Kanda, *supra* note 28, 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 31 at 8-10.

[38] *See, e.g.,* Oda, *supra* note 28.

[39] 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 28, at 2178-80.

[40] *Id.* at 63. 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 28, at 2171-72.

[41] 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 39 at 63; Milhaupt, *id.* at 2193-94. These criteria were not clarified in subsequent cases. *See* Puchniak & Nakahigashi, *supra* note 5, at 269.

company's defensive measure of issuing a large number of share options to a friendly shareholder, it would have effectively allowed the target board to determine who controlled the company. 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.[42]

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.[43] 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.[44] The court stated that when the 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.[45]

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

[42] About four months after the Livedoor case, the Tokyo District 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 share during a bid, the settlement of the bid would be delayed because of the share split, which involved the delivery of share certificates, had to be settled before the bid. See Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] July 29, 2005, Hei 18 (yo) no. 20080, 1909 Hanrei Jihō [Hanji] 87 (Nihon Gijutsu Kaihatsu case).
[43] Saikō Saibansho [Sup. Ct.] Aug. 7, 2007, Hei 19 (kyo) no. 30, 61 Saikō Saibansho Minji Hanreishū [Minshū] 2215 (Bulldog Sauce case).
[44] 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.
[45] Id. at 2224.

precedential value may have been limited,[46] foreign investors took it as a clear statement that hostile acquisitions (particularly by foreign investors) would not be permitted in Japan.[47] 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.[48] The supplemental report also warned firms against abusively broadening the meaning of "corporate value" to justify rejection of a hostile bid.[49] Japanese companies rushed to adopt pre-bid general defensive measures, despite their doubtful legal effect.[50] 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 measures.[51]

---

[46] *See, e.g.*, Armour, Jacobs and 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").

[47] *See, e.g.*, Armour,Jacobs and 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").

[48] 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.

[49] *Id.* at 2, 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 34 (manuscript at 7).

[50] 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 and Milhaupt, *supra* note 2 at 254; Puchniak & Nakahigashi, *supra* note 5 at 270.

[51] *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.[52] At that time, however, there was likely no institutional player (shareholders, independent directors or courts) with the capacity to effectively check corporate management.[53] 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 other institutional players.

B. Changes in Japan's Overall Corporate Governance Environment

The overall corporate governance environment in Japan[54] 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.[55] As discussed in Part II.E *infra*, the

[52] *See* 2005 Guidelines, *supra* note 31 at 2.

[53] *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 and Curtis J. Milhaupt, *Choice as Regulatory Reform: The Case of Japanese Corporate Governance,* 53 AM. J. COMP. L. 343 (2005).

[54] For a general introduction to Japanese corporate governance, *see, e.g.,* Souichirou Kozuka and Luke Nottage, *Japan*, *in* PRINCIPLES OF CONTEMPORARY CORPORATE GOVERNANCE _ (Jean Jacques du Plessis et al., eds., 5th ed. forthoming 2024); Bruce Aronson, *Japan*, *in* CORPORATE GOVERNANCE IN ASIA: A COMPARATIVE PERSPECTIVE 267 (Bruce Aronson and Joongi Kim eds., 2019).

[55] *See, e.g*., Leo Lewis, *Japan Inc. Braced for Fresh Hostile Bids*, FIN. TIMES, May 13, 2021; Makiko Yamazaki and Ritsuko Shimizu, *Japanese Banks Less Reluctant to Finance Hostile Takeovers, Lobby chief Says*, REUTERS, April 1, 2024; Nels Hansen, Naoya Shiota and 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,"[56] recent activists have generally been received more favorably by the public, media, institutional investors, government and even Japanese businesses themselves.[57]

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.[58] 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.[59] This distinction has gradually eroded; in addition, the availability of good, experienced managers in a lateral labor

[56] 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.

[57] 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 112-114 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 Chumoku: Tei PBR Kosaku Kikai 20 Sha*, NIHON KEIZAI SHIMBUN, Aug. 2, 2023. With respect to government attitudes, *see infra* note 139 (METI apparently embracing the benefits of a form of a market for corporate control in Japan).

[58] 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.

[59] *See, e.g.,* Janow, *supra* note 26.

market is an important factor in support of hostile acquisitions.[60] The traditional management argument that hostile bids must be rejected to protect workers may no longer be considered persuasive.[61]

Improved Corporate Governance and Disclosure. Japan's two soft law codes, the stewardship code of 2014 ("Stewardship Code")[62] and corporate governance code of 2015 ("Corporate Governance Code"),[63] 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.[64]

[60] Although the supply of experienced managers may be gradually expanding due to the overall increase in lateral hiring (*see supra* note 58), 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 and Paul Lee, *The Evolving Market for Corporate Control in Japan*, 26 THE M&A LAWYER 14, 19-20 (2022).

[61] 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 98) suggests that this argument is no longer thought to be persuasive. For one recent example, see the Nidec case (*see infra* notes 112-114 and accompanying text), in which the target company briefly raised the question of post-acquisition treatment of its employees, but this consideration had no affect 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 98.

[62] 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.

[63] 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.

[64] 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 77. For changes in proxy voting policies by institutional directors, *see infra* notes 67 and 71-72 and accompanying text.

Share Ownership. There is a continuing trend of gradually weakening cross-shareholding,[65] 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).[66] 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.[67] Policies of the FSA and Corporate Governance Code on disclosure and justification of cross-shareholdings, together with recent changes in proxy voting guidelines of

[65] 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 28 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 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 119-126 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.

[66] Foreign shareholders have gradually increased their ownership of the shares of Japanese public companies from 10.55 in 1995 to 30.1% in 2022, while Japanese trust banks have similarly increased their share from 10.3% in 1995 to 22.6% in 2022. *See* Tokyo Stock Exchange, 2022 Shareownership Survey at 4, available at https://www.jpx.co.jp/english/markets/statistics-equities/examination/p6b22i00000024gs-att/e-bunpu2022.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.

[67] 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 (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 share or more and (5) proxy materials are posted on the TSE's website at least four weeks prior to the shareholders meeting. *Id.* at 15.

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,[68] although it remains an issue.[69] 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.[70] 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.[71] In addition, it is now often the case that new investment committees (which contain

[68] 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.

[69] *See, e.g.,* Ken Hokugo, How Many Shares are Actually Held by "Allegiant Shareholders [1]"? *BDTI, available at* 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).

[70] 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.*, *Kabunushi Soukai no Hensen to Kongo no Tenbou (Ge) [Roundtable Discussion on the Transition and Future Prospects of Shareholder Meetings (Part 3)]*, 2272 SHŌJI HŌMU 13, 20 fig. 3 & 20-22 (2021).

[71] For proxy advisers, *see, e.g.*, ISS, Japan, *supra* note 67. 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-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.

outside members) review proxy voting guidelines and results,[72] 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.[73]

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.[74] There are a significant number of activist campaigns, with Japan having the second largest number

For proxy voting guidelines of domestic institutional investors, *see, e.g.,* Sumitomo Mitsui Trust Asset Management Co., Ltd., *supra* note 67. 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 note 104 *supra*) is the adoption of an anti-takeover defense without shareholder consent. *Id.* at 13.

[72] 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.

[73] 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 & Kotaro Inoue, *Does Engagement by Large Asset Managers Enhance Governance of Target Firms?*, 77 PAC.-BASIN FIN. J. 101932 (2023).

[74] 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 NYU J. LAW 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, *id.* (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").

following only the US.[75] 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.[76] 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.[77] Larger companies also now have voluntary committees in which independent directors can play a more substantive role.[78] However, the

[75] *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.

[76] *See, e.g.*, Mitsuhiro Kamiya, Akira Kumaki and Tatsuya Hasegawa, Institutional Investors, Activists and Legal Reforms Begin Altering Japanese Corporate Governance, SKADDEN'S 2022 INSIGHTS (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.

[77] 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.*

[78] 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 mandates the establishment of an audit committee. *Id.* The majority of listed Japanese companies, 60.7%, retain a

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.[79] 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.

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 six 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 cases (and subsequent TSE regulations and corporate practice) 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"

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, and 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, Dec. 6, 2018, *available at* https://www.jcer.or.jp/english/corporate-structure-of-japanese-companies.

[79] *See* Corporate Governance White Paper 2023, *id.* 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.

on how to initiate and structure defensive measures following a hostile bid.[80] This new alternative of post-bid defensive measures reduces the necessity and value of pre-bid general measures, and will contribute to the trend of their overall decline among Japanese companies. Third, as discussed in the following section, the new cases and market activity caused METI to revise 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 by the board without shareholder approval were carefully scrutinized and denied in the Nihon Asia Group case.[81] 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."[82] Although the target firm alleged that the partial bid by the acquirer had structural coerciveness, the courts judged that this was

[80] 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* 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 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).

[81] 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 Shiryōban Shōji Hōmu [Shiryō Shōji] 163; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Apr. 2, 2021, Rei 3 (yo) no. 20045, 446 Shiryōban Shōji Hōmu [Shiryō Shōji] 166 (Nihon Asia Group case).

[82] *Nihon Asia Group* (Tokyo High Ct.), 446 Shiryōban Shōji Hōmu [Shiryō Shōji] at 157.

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.[83]

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[84] and Fuji Kosan case[85] 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.[86] 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

[83] *Id.*; *Nihon Asia Group* (Tokyo Dist. Ct.), 446 Shiryōban Shōji Hōmu [Shiryō Shōji] at 164.
[84] Nagoya Kōtō Saibansho [Nagoya High Ct.] Apr. 22, 2021, Rei 3 (ra) no. 138, 446 Shiryōban shōji hōmu [Shiryō Shōji] 138 (Nippo Sangyo case).
[85] Tōkyō Kōtō Saibansho [Tokyo High Ct.] Aug. 10, 2021, Rei 3 (ra) no. 1593, 1630 Kin'yū Shōji Hanrei [Kinhan] 16 (Fuji Kosan case).
[86] *Id.* at 22. *See also* Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] June 23, 2021, Rei 3 (yo) no. 20078, 1630 Kin'yū Shōji Hanrei [Kinhan] 23. In the Fuji Kosan case, the board made a decision to activate the defensive measure prior to the shareholder 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 shareholder meeting scheduled for June 24, 2021. *Id.* at 25.

increasing its ownership position.[87] Thus, it is unclear whether the Nippo Sangyo case can be applied to a case where shareholders approve a pre-bid defensive measure without knowledge of a pending bidder.

The Tokyo Kikai case[88] 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.[89]

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,[90] 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.[91] The Mitsuboshi case was also the first case in Japan of "wolfpack tactics," in which a group of

[87] *Nippo Sangyo*, supra note 84 at 141-142.
[88] Tōkyō Kōtō Saibansho [Tokyo High Ct.] Nov. 9, 2021, Rei 3 (ra) no. 2391, 1641 Kin'yū Shōji Hanrei [Kinhan] 10 (Tokyo Kikai case).
[89] *Id.* at 25-28.
[90] 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.
[91] Ōsaka Kōtō Saibansho [Osaka High Ct.] July 21, 2022, Rei 4 (ra) no. 750, 2564 Hanrei Jihō [Hanji] 34 (Mitsuboshi case).

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.[92]

The Supreme Court affirmed lower court rulings granting an injunction against activation of the target company's defensive measure,[93] 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. 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.[94]

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

[92] *See* Ōsaka Chihō Saibansho [Osaka Dist Ct.] July 1, 2022, Rei 4 (yo) no. 30018, 2564 Hanrei Jihō [Hanji] 46, 52 (Mitsuboshi case, court of first instance).
[93] Saikō Saibansho [Sup. Ct.] July 28, 2022, Rei 4 (kyo) no. 12, 1667 Kin'yū Shoji Hanrei [Kinhan] 56 (Mitsuboshi).
[93] *Mitsuboshi* (Osaka High Ct.), 2564 Hanrei Jihō [Hanji] at 42; Ōsaka Chihō Saibansho [Osaka Dist Ct.] July 11, 2022, Rei 4 (mo) no. 58021, 2564 Hanrei Jihō [Hanji] 43, 45 (Mitsuboshi case, court of second Instance); *Mitsuboshi* (Osaka Dist. Ct. First Instance), 2564 Hanrei Jihō [Hanji] at 55-57.
[94] *Mitsuboshi* (Osaka High Ct.), *supra* note 85 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 the broad definition of the person 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, Nagashima Ohno & Tsunematsu, Looking Back on Shareholder Activism in Japan in 2022, LEXOLOGY (March 24, 2023). 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.

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 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")[95] 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.[96]

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

[95] 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.
[96] *Id.*

competing bids). It is reported that the 2019 Fair M&A Guidelines have affected M&A practices in Japan[97] 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")[98] to replace the original 2005 Guidelines, is both an important signal of the extent to which it has embraced a new role and also a potentially important influence on both 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.[99] Thus, the 2023 Guidelines call for the boards of Japanese companies to give "sincere consideration" to a "bona fide offer."[100] and also to negotiate with bidders to obtain more favorable terms,[101] both of which are aspirational and did not reflect current practice in Japan.

[97] 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 guidelines. *See* Nagashima Ohno & Tsunematsu, Publication of the Guidelines for Corporate Takeovers, LEXOLOGY (Sept. 25, 2023).

[98] 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.

[99] *See id.* at 6 ("The Guidelines are aimed to present a fair acquisition policy from the perspective of facilitating desirable transactions…")

[100] *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.

[101] *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.

Second, unlike the 2005 Guidelines that emphasized that they were nonbinding,[102] the 2023 Guidelines, although having no direct legal effect, state that they should be "shared among participants of the Japanese economy.[103] 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.[104] Acceptable circumstances for defensive measures are also narrowed from the standard of "necessity" and "reasonableness" in the 2005 Guidelines to one of "necessity" and

[102] 2005 Guidelines, *supra* note 31, 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.").
[103] 2023 Guidelines, *supra* note 98, at 5.
[104] *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 49.

"proportionality" in the 2023 Guidelines.[105] There are, however no clear standards for use of MoM voting[106] or for discerning the intent of shareholders.[107]

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

[105] *Id.* at 42-43. This difference is reflected in the three basic principles which are broadly similar in the 2005 Guidelines and 2023 Guidelines. The biggest difference between them is in Principle 3, which 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 31 at 3 with Principle 3, 2023 Guidelines, *id.* 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 "sotosei" or "相当性") has a very different meaning that is akin to acceptability. 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 can be activated and thereby avoid dilution of the bidder's 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 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 there are generally few such bids. *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).
[106] Although no clear standard for MoM (majority-of-the-minority) 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 98, at 56.
[107] 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.

be established.[108] This criticism of the draft guidelines during the public comment period resulted in strengthening of the final version of the 2023 Guidelines to indicate more clearly the importance of shareholder approval.[109] The final version first made it clear that "corporate value" does not deviate from the standard definition in the finance world[110] and further noted that a target management should not utilize any remaining vagueness in its definition for the purpose of entrenchment.[111]

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.[112] Nidec made an unsolicited public tender offer which was structured so as to comply with the 2023 Guidelines.[113] Terms included a tender offer with no

[108] 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/.

[109] *See* 2023 Guidelines, *supra* note 98, 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 107.

[110] *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 the identical definition. Corporate Value Study Group, *supra* note 48, at 2, n. 2. However, it did not attract investors attention. *See* Matsunaka, *supra* note 34 (manuscript at 7-8) (discussing how the definition has changed).

[111] 2023 Guidelines, *supra* note 98, 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)).")

[112] *See* Masakazu Iwakura, Hidenori Nakagawa and 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, available at 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.

[113] Iwakura et al., *id.*

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 by shareholders. An independent committee of Takisawa ultimately recommended in favor of the offer and 86% of shares were tendered.[114]

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.[115] 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.[116] Press coverage alluded to recent regulatory developments as creating a new environment for hostile takeovers.[117] However, Dai-Ichi Life subsequently came to an agreement with Pasona Group and Benefit One, and characterized the transaction as a friendly deal.[118]

The TSE's Request for Listed Companies to Improve Capital Efficiency

[114] *Id.*

[115] *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")

[116] *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*.

[117] *See* Tezuka & Watanabe, *supra* note 115 (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").

[118] *See* Sano, *supra* note 116. *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").

Although the TSE's major reform effort of 2022—a market restructuring reform intended to strengthen listing requirements and corporate governance[119]--was generally thought to be unimpressive by investors and analysts, subsequent actions in 2023 caught investors' attention.[120] 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.[121] 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 capital and stock price was particularly significant.[122]

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

[119] 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) to simplify them and to 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 65. For a critical review of the TSE market segment reform, *see, e.g.,* Aya Wagatsuma and Toshiro Hasegawa, *Prime Time: Tokyo Stock Exchange's New Look Goes into Effect,* BLOOMBERG, April 4, 2022.

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

[121] Tokyo Stock Exchange, Inc., 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.

[122] *See* Tokyo Stock Exchange, Inc., 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.

"comply or explain" with principles of the Corporate Governance Code).[123] Under the TSE's notification, listed companies should also incorporate such information into their engagement (proactive dialogue) with investors.[124] The TSE subsequently notified listed companies that it would publish a list of companies that had disclosed this information,[125] and did so in January 2024.[126]

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.[127] 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

[123] *Id.* 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.

[124] *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 65.

[125] Tokyo Stock Exchange, Inc., 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.

[126] *See* Tokyo Stock Exchange, Inc., 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 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.*

[127] 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.

of shares are generally exempt, and partial bids are generally allowed.[128] The basic reporting requirements are generally similar to the US.[129]

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 transactions,[130] with other recommendations for the large share reporting rule[131] and the identification of beneficial shareholders.[132]

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

[128] 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 24.

[129] 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, s*ee* Financial System Council Report, *supra* note 127, at 14.

[130] 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.

[131] 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 agreements as shareholders, 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.

[132] 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.

beneficial shareholders not subject to the large shareholding reporting rule.[133] 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 vibrant country with sustained economic growth. Since the Abe administration (beginning December 2012) and its signature set of pro-growth policies known as "Abenomics,"[134] there has been an overall emphasis on "strategic financing for growth-oriented businesses" (including through foreign investment in Japan)[135] and on domestic companies taking greater risks and

[133] *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.

[134] 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 (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.

[135] 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.

improving their business performance (including through greater investment in areas linked to innovation and productivity, such as research and development and human capital).[136]

Abenomics also began an ongoing emphasis on structural reform, which featured improvements in corporate governance.[137] 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,[138] rather than focus on workplace stability. It has arguably become 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.[139]

---

[136] *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, June 24, 2014, at 2, *available at* https://www.kantei.go.jp/jp/singi/keizaisaisei/pdf/honbunEN.pdf.

[137] *See* Japan Revitalization Strategy-JAPAN is BACK, *supra* note 134, at 37-38 (explaining planned policies, such as increasing outside directors, for "strengthening corporate governance").

[138] 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 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 136, at 5.

[139] 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

The policies associated with Abenomics, however, initially produced mixed results.[140] Substantial corporate governance reforms provided a positive backdrop for changes in the 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.[141] 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

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 98, at 5-6.

[140] 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 (although it has increased recently*). See, e.g.,* Tomohiko Nishino, *The Risk of a Normalized Abenomics*, NIPPON.COM, 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 and 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 and 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., id.* (citing remarks by David Weinstein). One of the generally successful third-arrow policies was corporate governance reform, as discussed in Part II.B .

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., id.*; 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").

[141] *See* Tokyo Stock Exchange, Inc., *supra* note 116 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.*

Japanese companies to focus more on improving capital efficiency, business performance and shareholder returns.[142]

Large stock market rallies in 2023 and continuing into 2024[143] 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.[144] In order to avoid a "flash-in-the-pan" stock market rally as occurred in 2013[145] 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 business and capital markets. The remainder of this Article provides a

---

[142] The 2023 Guidelines note that in recent years Japanese companies have been expanding their businesses overseas through acquisitions. *See* 2023 Guidelines, *supra* 98, 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).

[143] *See supra* note 21. One reason for the new enthusiasm for Japanese stocks is that the "failures" of Abenomics cited *supra* note 140 (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.

[144] See, e.g., Bruce Aronson, Is Japan (Finally) Back? USALI PERSPECTIVES, Dec. 3, 2023, *available at* https://usali.org/usali-perspectives-blog/is-japan-finally-back. Those who see a long-term improvement often cite 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").

[145] 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.

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.[146] The UK focused on leaving the decision to shareholders, as their mandatory bid rule both prevented coercive bids and obviated any need to take defensive measures.[147] 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.[148]

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. Based on their own tradition of state judges (especially in Delaware) making decisions on corporate law issues, the

[146] Armour and Skeel, *supra* note 1, at 1738.
[147] For the mandatory bid rule, s*ee* 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); *id*. at 1729.
[148] Armour and Skeel, *supra* note 1, at 1745.

specific rules and their enforcement were legal interpretations developed by courts based on directors' broad fiduciary duties under common law.[149]

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.[150] 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.[151] And in terms of results both systems are generally regarded as being successful and roughly equivalent in their function of regulating hostile takeovers.[152]

Neither system is easily created elsewhere. In a self-regulatory system like the UK, the rule-maker must have incentives that are "consistent with social welfare" based on commercial norms without conflicts of interest.[153] 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.[154] 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.[155]

[149] *See, e.g.,* Armour, Jacobs and Milhaupt, *supra* note 2, at 241-43.
[150] Armour and Skeel, *supra* note 1, at 1732.
[151] 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.*
[152] *See, e.g., id.* at 221.
[153] Armour and Skeel, *supra* note 1, at 1785.
[154] *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.
[155] Armour and Skeel, *id.* at 1784-85.

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.[156] The biggest issue was whether the tradition of cross-shareholding in Japan negated its nominally dispersed shareholders,[157] and if the initial decline in this practice following the bursting of Japan's economic bubble in the 1990s[158] 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.[159]

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.[160] 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

[156] *See generally* Armour, Jacobs and Milhaupt, *supra* note 2. The authors cite the rarity of dispersed ownership throughout the world, and state that if these conditions are met hostile bids that go against prevailing business norms can be expected, and that the first cases are controversial and not adequately dealt with by existing regulation. *Id.* at 221.

[157] *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).

[158] *See generally* Hideaki Miyajima and 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).

[159] Puchniak & Nakahigashi, *supra* note 5, at 244 (arguing that satisfaction of these three conditions may be necessary, but is not sufficient, for the establishment of a hostile takeover market, and that 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).

[160] *See, e.g.,* KRAAKMAN ET AL., *supra* note 8, at 239; Black, supra note 74.

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.[161]

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 again open to debate. More importantly, the regulatory framework for hostile takeovers should be updated in response to changing conditions.[162] 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,[163] did not fit easily into either the UK or US model when hostile takeovers first appeared in the 2000s.[164] 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-

[161] *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 1, 14 (Zenichi Shishido ed., 2014) (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).

[162] 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." *Id.*

[163] *See* Armour, Jacobs and Milhaupt, *supra* note 2, at 259; Gilson*, supra* note 53.

[164] 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 at 3 (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). S*ee generally* Financial System Council Report, *supra* note 127.

practice formation among market actors, and the TSE, a hybrid between a regulatory agency and a market actor."[165] 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.[166] Japan's substantial reliance on the courts for enforcement despite a general affinity for *ex ante* 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.[167] 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.[168]

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

[165] *See* Armour, Jacobs and Milhaupt, *supra* note 2, at 257.
[166] *See generally* Varittol & Wan, *supra* note 20. 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.
[167] *See* Shishido, *supra* note 164. 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 and Milhaupt, *supra* note 2, at 264.
[168] Shishido, *id.*

We select Australia as a "new" point of reference for hostile takeover regulation and institutions.[169] Australia arguably has the only active hostile takeover market following the US and the UK.[170] In Australia there is no dominant subordinate lawmaker, as different institutional 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,[171] 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

[169] 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 and Wai Yee Wan, *Concluding Observations and the Future of Comparative Takeover Regulation*, *in* COMPARATIVE TAKEOVER REGULATION: GLOBAL AND ASIAN PERSPECTIVES 474 (Umakanth Varottil & Wai Yee Wan eds., 2018) (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 211 (Umakanth Varottil & Wai Yee Wan eds., 2018) (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 155 (Luke Nottage, Leon Wolff & Kent Anderson, eds., 2008).

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

[171] 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 and Klaus J. Hopt, eds., 2013) (SSRN: https://ssrn.com/abstract=1657810, at 43). An initial takeover panel proved ineffective. *See infra* note 179. New calls to "take the legalism out of takeovers" and achieve a more balanced system led to amendments to the Corporation Law 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).

success.[172] The numerous differences between the UK takeover 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.[173] The Australian Panel mainly applies this general purpose provision of corporate law, together with other policy considerations, instead of a more detailed takeover code.[174]

Like the UK, in Australia the Bid Decision-maker is the shareholders. Australia has its own form of a UK-style mandatory bid rule,[175] and shareholders decide bids through voting. The board of directors must maintain neutrality and cannot adopt takeover defenses without

[172] *See generally* Emma 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), and other sources cited *infra* in note 195.

[173] Section 602 CORPORATIONS ACT 2001 (Cth). 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).

[174] The sources in addition to Section 602 include other sections of Chapter 6 (which implement the purposes of Section 602) and the public interest. *Id.* 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.

[175] 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 172 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 171, at 25.

shareholder approval.[176] The role of the board in a hostile takeover bid is to make a recommendation to shareholders.[177]

Of particular interest is 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 Singapore),[178] only Australia created a panel with relatively limited authority and activities--less authority, independence, budget, staff, and cases than the UK takeover panel. It should be noted that although the powers of the Australian Panel are limited compared to the UK panel, it is also true that the successful Australian panel, established in 2000, replaced an earlier panel whose powers were much more limited and which was largely inactive.[179]

The main role of the Australian Panel is, upon application by interested parties (including the bidder, the target, shareholders or a rival bidder) during the tender offer period, to make a declaration of unacceptable circumstances when a takeover does not comply with the purposes under Australia's Corporate Law.[180] It, accordingly, does not act on its own initiative. Enforcement of securities (and corporate) laws is undertaken separately by an independent

[176] Although there are no code provisions as in the UK, such policy was adopted by the Australian Panel. *See* Armson, *id.* at 136.
[177] *See* Section 638, CORPORATIONS ACT 2001.
[178] *See* Armson, *supra* note 172 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).
[179] 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 on by 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.
[180] Section 657A, CORPORATIONS ACT 2001. 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* https://takeovers.gov.au/panel-process (last visited March 26, 2024).

government commission, the Australian Securities & Investments Commission ("ASIC") and not by the Australian Panel. 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 as necessary.

Applications to the Australia Panel are decided by three members in a "sitting panel."[181] Members, who are specialists in mergers and acquisitions, are appointed by the Federal Government for three-year terms based on their commercial, legal and other relevant expertise.[182] In terms of hearing procedures, the Australian Panel typically relies only on written submissions from the parties. There is an internal panel review process for unacceptable circumstances matters.[183]

Parties (other than the government) cannot go to court in relation to a takeover bid until the end of the takeover bid period. Applications for judicial review of Australian Panel decisions can be made to the High Court during the takeover bid, and subsequently in the Federal Court. However courts have generally deferred to the Australian Panel's decisions.[184]

[181] 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 2022-23, *available at* https://takeovers.gov.au/sites/takeovers.gov.au/files/2023-10/TP-AR-22-23.pdf. A typical panel would consist of an investment banker, a lawyer and someone with corporate experience. *Id.* at 4.

[182] Panel members are generally comprised of "specialists in mergers and acquisitions – investment bankers, lawyers, company directors and other professionals." *Id.* at 1. For the overall current distribution, *see id.* at 12. For brief biographies of current panel members, *see id.* at 14-17. For a list of current panel members, *see* https://takeovers.gov.au/about/panel-members (last visited March 26, 2024).

[183] 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 172, at 140.

[184] *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 TAKEOVERS PANEL, *available at*

The Australian Panel has no direct policy-making input and, as noted above, cannot initiate cases on its own. It is also circumspect in 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, rather than rely on written submissions.[185] Other powers that have generally not been exercised in recent years include the ability to refer matters to the ASIC, the power to decide matters referred to the panel by courts and the power to review decisions by the ASIC concerning hostile bids.[186]

However, the Australian Panel has an important, indirect role in policy-making through the establishment and propagation of commercial norms by a variety of means. These include the publication of guidance notes (although not as numerous or extensive as those of the UK takeover panel,)[187] and publication of the facts and reasoning of all decisions in a style similar to court decisions (with greater transparency than the UK panel).[188]

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 172 at 142.

[185] It has never exercised its power to issue clarifying rules. See AUSTRALIAN ANNUAL REPORT 2023, *supra* note 181, at 8. Typically, there are no conferences or witnesses summoned during a fiscal year, but there was one of each in 2022-23. *See id.* at 20.

[186] In the latest year the panel referred one matter to ASIC. *See id*. at 25. 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.

[187] There are currently 23 Guidance Notes. *See Guidance Notes*, AUSTRALIAN GOVERNMENT TAKEOVERS PANEL, *available at* https://takeovers.gov.au/guidance-notes (last visited March 26, 2024).

[188] 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.* The long-term average period between decision and publication is 34.4 days. *See* AUSTRALIAN ANNUAL REPORT 2023, *supra* note 181, at 6. For two indexes of all panel decisions up to 2019 organized by topic and legislation, *see* https://takeovers.gov.au/resources/index-reasons (last visited March 26, 2024).

The Australian Panel's scope and role are also limited in other ways compared to the UK panel. It has a smaller number of cases,[189] although with a range of outcomes.[190] It is not fully independent, but is a division of the Treasury Department. It's small professional staff of seven[191] only provides administrative support and does not make any decisions; (part-time) members make all decisions.[192] The Australian Panel's annual budget is correspondingly small (about 2.8 million Australian dollars) and is obtained from the Treasury Department.[193]

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.[194] The strong reputation of the Australian Panel is evidenced by the Australian government's consultation on a proposal (announced initially in 2021) to significantly expand the scope of the panel's jurisdiction to generally include mergers ("schemes of arrangement").[195] Due to the relatively limited scope of its authority and activities together

[189] There was an average of 28.3 applications per year to the Australia Panel from 2000-2023. *See* AUSTRALIAN ANNUAL REPORT 2023, *id.* at 6. A below-average 16 applications were made during 2022-23. *Id.* For a list of the applications, *see id.* at 36-7.
[190] For the issues and decisions during 2022-23, *see id.* at 20, 22.
[191] The staff consists of five Treasury Department employees, plus two support staff and one temporary secondee from a law firm. *See id.* at 11.
[192] *See* Armson, *supra* note 172, at 141.
[193] *See* AUSTRALIAN ANNUAL REPORT 2023, *supra* note 181, at 27. 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 28.
[194] In terms of speed, the long-term average (from 2000-2023) between application and decision is 17.4 calendar days. *Id.* at 6. For an overall evaluation, *see generally* Armson, *supra* note 172; Ramsay, *supra* note 179. 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." *Id.* 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.")
[195] *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. The impetus for reform came from the fact that in recent years nearly all large public company control transactions in Australia were carried out through schemes of arrangement rather than through hostile bids. The regulatory scheme for such mergers was over 100 years old, and was both cumbersome and expensive (requiring court approvals for

with its greater transparency and substantial contribution to the establishment and propagation of 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).[196] 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 which are enforced 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,

mergers). *See, e.g.,* Rodd Levy and Robert Nicholson, Making M&A More Efficient, HERBERT SMITH FREEHILLS, April 4, 2022, *available at* https://www.herbertsmithfreehills.com/insights/2022-04/making-ma-more-efficient. The Australian Panel, "which has the overwhelming support of the market as a commercial decision-maker," could not act as a substitute for court approval under the current system since it is only a review body; it could, however, resolve merger disputes in a new regime which did not require such approvals. *Id.* For a plan that builds on the Treasury's proposal to create a new model featuring such an expanded role for the Australian Panel, *see* Rodd Levy and Robert Nicholson, A Simpler Procedure for Acquisition Schemes, HERBERT SMITH FREEHILLS, June 17, 2021, *available at* https://marketing.hsf.com/20/27465/landing-pages/a-simpler-procedure-for-acquisition-schemes.pdf. For a discussion of the Treasury's proposal which favors retaining jurisdiction for the review of mergers with the courts, *see* Michael Gajic, Masi Zaki and Kate Sprat, *Scheming, Away from the Court: Proposed Changes to Corporate Control Transactions in Australia,* NAT'L L. REV. April 26, 2022.
The reforms announced by the Treasury Department in April 2024 focused instead on requiring notification of mergers above a certain threshold to Australia's antitrust regulator, the ACCC (Australian Competition and Consumer Commission), and obtaining prior approval from the ACCC for such mergers. For an overview, *see, e.g.,* Johnson Winter Slattery, Australia's Merger Control Mandatory in 2026, LEXOLOGY, April 11, 2024.

[196] *See* Armour and 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.).

(2) a Bid Decision-maker, and (3) an Umpire (adjudicator and also propagator of commercial norms relating to takeover practices).

As a result of dividing the role of a dominant subordinate lawmaker into two (i.e., Rule-maker and Umpire; see Appendix 2), in relative terms 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; a short statement of general principles applicable to hostile takeovers, as is the case in Australia, seems sufficient. While 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 "rule-making," we think that the degree of separation matters and that it is significant to formally 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 created by the legislature and enforced by a specialized takeover panel.[197] At a minimum, the Rule-maker must only 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 even a relatively comprehensive set of principles and rules, like the UK Code, cannot be applied mechanically (or easily) to varied fact

[197] This combination is unusual among takeover regimes. KRAAKMAN ET AL., *supra* note 8, at 211.

patterns.[198] Uniformity and predictability of results remains as an issue in all takeover regimes (at least as a matter of degree) 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.[199] 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.[200] 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.[201]

[198] 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 takeover panel states the following:
"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." *Available at* https://www.thetakeoverpanel.org.uk/the-code (last visited March 30, 2024).
[199] *See* KRAAKMAN ET AL., *supra* note 8, at 234; Varittol & Wan, supra note 20, at 25-28.
[200] *See, e.g., See* Armour, Jacobs and Milhaupt, *supra* note 2, at 246.
[201] *See* discussion *infra* in Part IV.B, especially notes 218-226 and accompanying text, concerning past practice and recent developments.

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 cses, *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 the Delaware courts have greater expertise and experience, and can act more speedily, than courts in other jurisdictions, including Japan.[202]

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 to both improve market practices and 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 notes, informal consultation, etc.), while courts in Delaware provide extensive dicta in court decisions that go far beyond the holding of the case.[203]

[202] *See supra*, note 146

[203] 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 204) than "policeman" (*see, e.g.,* Gilson *supra* note 203).

Anticipating arguments concerning Japan, courts in other jurisdictions may not be prepared to assume such an expanded role. 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 norm creation.[204] We see significant shortcomings in both of these roles in the case of courts in Japan, and in particular with respect to the key role of norm creation and propagation. 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

[204] 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, 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 (s*ee infra* note 228), 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 203, 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.

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).[205] There is no known system which pursues only one of these objectives and ignores the other,[206] 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 takeover panel cites speed, flexibility and certainty, one could certainly add fairness and transparency.[207] 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.[208] Such

[205] *See* KRAAKMAN ET AL., *supra* note 8, at 236-237.
[206] *Id.*
[207] *See generally* Armson *supra* note 172, at 152-156.
[208] 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

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 2019 Fair M&A Guidelines.

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.[209] 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

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.

[209] *See* sources cited *supra* note 163. 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 53, at 41.

corporate governance in recent years.[210] This increased shareholder capacity might still be less than the UK at the relevant time;[211] but the main point with respect to the role of Umpire is that 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.[212] 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.[213]

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.[214] In 2017 pre-bid general takeover defenses was the main issue, while in

[210] 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).

[211] 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 and 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.

[212] *See* Stewardship Code, *supra* note 62.

[213] *See, e.g.,* 2022 Shareownership Survey, *supra* note 66, at 4.

[214] 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 71. For a specific example, *see infra* note 222 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 98, at 4.

the last two years the requirement for having at least one female board member has gathered the most attention (and negative votes).[215]

Similarly, the influence of shareholder activists has increased dramatically in recent years.[216] 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.[217]

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,[218] but the number of companies that have chosen "American-style" committee structures with a majority of independent directors (or an independent director as chairman of the board) remains miniscule.[219] 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

[215] *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 71. 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.*

[216] *See supra* notes 74-76 and accompanying text.

[217] 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).

[218] *See supra* note 77.

[219] *See supra* note 78.

functioning of such committees and of independent directors generally.[220] It is still difficult to cite a single court case of a board negotiating with a bidder to obtain better bid terms for shareholders rather than aligning with management to reject all hostile bids.[221] 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.[222]

---

[220] 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 98, 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 81. *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* METI's 2019 Fair M&A Guidelines, *supra* note 95, at 21-22. But they onlyconsider such committees as "a starting point" with respect to other procedures such as obtaining fairness opinions. *Id.* at 22. However, skepticism generally remains concerning the overall role of nominally independent directors, including the nomination process itself and their true independence.

[221] As noted *supra* note 101 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…" *Id.* 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 112-118 and accompanying text.

[222] 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 67). 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 Kikai Toshika to no Taiwa—Eisai ni okeru Torigumi [Engagement between Outside Directors and Institutional Investors—Eisai's Initiative*] 2220 SHOJI HOMU 12, 15 (Jan. 25, 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

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.[223] 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 that would provide guidance for all hostile takeover cases.[224] Many Japanese companies continue to "just say no" to hostile bids and there is no court case involving the

---

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).

[223] With respect to expertise, some efforts were made. 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 Hōmu 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 are 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: Nhonhō, 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 Hōmu 11, 18 (2019) ("compared to Delaware courts and the UK Panel, their expertise seem to be rather low".)

[224] *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 84, 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 and Curtis J. Milhaupt, *Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, 51 AM. J. COMP. L. 887 (2003).

equivalent of a Revlon duty to sell to the highest bidder once the company is put up for sale.[225] Although the courts could indicate helpful standards as dicta, like in the original Livedoor decision, they have not done so.[226] 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.[227] 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 specialized expertise.[228]

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

[225] However, there are claims that market practice is already substantially changing following the 2023 Guidelines.F or 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 o we 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, Ma rch 20, 2024) , *available at* https://ssrn.com/abstract=4766870.

[226] 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 of the Issuance of Options by Nippon Broadcasting (the Livedoor Case) (Part 2)]*, 1746 SHŌJI HŌMU 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 the dicta consistently with the Guidelines' basic position. *See* 2023 Guidelines, *supra* note 988, at 58-59.

[227] 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.

[228] *See, e.g.,* Armour, Jacobs and Milhaupt *supra* note 2, at 253 (expressing surprise that Japan focused on Delaware doctrine in light of the limited role of Japanese courts). *See also supra* note 204.

that was of general importance to Japanese businesses—the protection of intellectual property rights[229]—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.[230]

This new "Business Court" does not create a distinct court organization—takeover cases 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 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).[231] Today

[229] 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).

[230] 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.

[231] At that time there were few even nominally independent directors in Japanese companies. The Bulldog Sauce case, *supra* notes 43-45, is a good example of shareholders approving management's defensive measures that

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 that in a panel setting.[232]

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

Umpire

There are a number of potential choices for the Umpire: 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 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.

Japan is also arguably predisposed to prefer a non-legal administrative system to resolve issues relating to hostile bids.[233] 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.[234] As discussed

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 166. However, their role was 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.

[232] *See, e.g.,* Armour and 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).

[233] *See, e.g*., Armour, Jacobs and Milhaupt, *supra* note 2, at 264; Shishido, *supra note* 164.

[234] *See* Shishido, *id.*

below, we favor 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, but with some role for the board. Either (1) the board must analyze any bid and make a recommendation to shareholders (although it must remain neutral and cannot take defensive measures) or (2) it may propose defensive measures to 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, the 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.[235] The intent of the 2023 Guidelines is arguably to establish shareholders as the Bid Decision-maker in the Japanese regime through the creation of best practice norms, as an alternative to court-interpreted fiduciary duties.[236]

[235] See Appendix 3 and discussion supra in Part II.C. In the US, Delaware courts clearly established independent directors as the Bid Decision-maker (*see, e.g.,* Gilson, *supra* note 54, at 34), but there has been no parallel development in Japan.

[236] *See supra* notes 109 and 107, and accompanying text.

One approach to clarifying the role of the Bid Decision-maker would be for the FSA to strengthen Japan's takeover bid rules under securities laws to bring these rules closer to the UK model. Although this is acceptable, at present we tend to prefer the latter approach of requiring shareholder approval for all defensive measures proposed by management (as essentially embodied in the 2023 Guidelines). This view represents the overall thrust of recent case law, is more readily achievable, and preserves a greater role for independent directors (and may act to encourage their further development in the direction of functioning as a board that is independent from, and monitors, management). The Umpire would still be in a position to deal appropriately with exceptional cases involving management interference or other unfair processes in obtaining shareholder approval.

Rule-maker

There are also a number of options for the Rule-maker, 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 in corporate law, (2) the FSA and TSE, through a broad purpose clause 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 only general principles are required. 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 principles for hostile takeovers in Japan.[237] METI's Guidelines lie somewhere in-between a general statement of corporate law principles and a detailed takeover code.[238] 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 to apply to hostile takeover bids. Our view is premised on a separate Umpire applying these principles to specific cases.

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

A. Why an Australian-Type 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.[239] However, as noted above, at that time there were no institutional players that were fully prepared to assume a

[237] 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 223, 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 Pabuli'ku 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).

[238] 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.

[239] *See, e.g.*, Armour, Jacobs and Milhaupt, *supra* note 2, at 264.

significant role in either a UK-style system or a US-style system.[240] As actual cases arose, the 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.[241]

Some commentators and institutional investors have always favored a UK-style approach for Japan.[242] This approach may have gained additional salience following the recent court cases and the introduction of METI's 2023 Guidelines, which could presumably be enforced by a takeover panel rather than simply represent persuasive evidence of best practices in court. However,to date those favoring such a view have generallylooked to the UK's panel as the sole model for a takeover panel.[243]

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,

[240] *See supra* notes 163 and 209.
[241] *See* Shishido, *supra* note 164; *supra* note 209.
[242] 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 HŌMU 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 the UK/EU type regulation might not be suitable for Japan).
[243] There has been limited discussions 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 Corporation and Financial Instrument Exchange Act]*, 1898 SHŌJI HŌMU 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 HŌMU 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.

exclusive jurisdiction over all cases and the ability to proactively assert jurisdiction, and a large professional staff that decides cases. 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 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 an issue in the UK or Australia, but might well be a problem in the Japanese context.

Representation on METI's and the FSA's relevant committees has broadened since the 2000s and now includes numerous institutional investors.[244] Nevertheless, in addition to academics, the main legal experts—who are also the only ones with direct experience in hostile M&A practice--

[244] For the list of committee members of METI's Fair Acquisition Study Group, *see* 2023 Guidelines, *supra note* 98, at 68.

are virtually all big firm corporate lawyers who defend target companies against takeovers.[245] 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.[246] 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.[247] 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.[248]

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.[249] However, in Japan courts have generally not given deference to the decisions of independent government agencies and have rather undertaken substantive review of cases in competition law and other areas.[250] This

[245] *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.

[246] 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 2019-2013, 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.*

[247] 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 law firms might well retain a role in representing companies in takeover cases.

[248] *See, e.g.,* Armson, *supra* note 172, at 140.

[249] 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 (PhD thesis, June 2017), *available at* https://rest.neptune-prod.its.unimelb.edu.au/server/api/core/bitstreams/c07b5902-e5f1-5000-bb95-55a0b1e418ef/content. For Australia, *see supra* note 184.

[250] 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"), and the JFTC's orders became contestable in courts like other administrative orders, although the Tokyo District Court has

may partly be a result of Japan's legal system in which appellate courts generally conduct *de novo* review in civil cases.[251] 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.[252] But the courts' 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 "voluntary" takeover panel, i.e., a panel without exclusive jurisdiction, which would leave the parties a choice of whether to bring any

---

exclusive jurisdiction. Before the 2013 amendment, a party dissatisfied with a JFTC order had to first undertake a 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 hearing procedure system, in which the hearing panel within the JFTC initially handled appeals. *See* TADASHI SHIRAISHI, DOKUSEN KINSHI HŌ [Antimonopoly Act] 730 (4th ed. 2023).

[251] 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--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.

[252] 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 248. We are not confident this would occur in Japan. For an example of a statutory restriction limiting the scope of review in Japan, *see* its Arbitration Law (Law No. 138 of 2003, as amended). 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 the limited grounds enumerated in the law. *Id.,* Art. 44(1). *See also* Hiroyuki Tezuka, Azusa Saito and Motonori Ezaki, Arbitration Procedures and Practice in Japan: Overview, PRACTICAL LAW (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). However, courts have occasionally respected self-regulation. 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" (Companies Act, art. 199, para. 3) (Ōsaka Chihō Saibansho [Osaka Dist. Ct.] June 22, 1990, Hei 2 (yo) no. 1541 & 1502, 1265 Kin'yū Shōji Hanrei [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 setting the issuing price (Ōsaka Chihō Saibansho [Osaka Dist. Ct.] July 12, 1990, Hei 2 (yo) no. 1717, 1265 Kin'yū Shōji Hanrei [Kinhan] 33).

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, but could later 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.[253] 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 informal panel procedures, subsequent reforms could strengthen its jurisdiction and powers.

Our other recommendations face the obstacles previously noted in the discussion in part IVB above. For the Rule-maker, METI's reputation as a conflict-free provider of rules has substantially improved, however there still may a preference by some relevant parties for a Rule-maker focused more on investor protection, such as the FSA and TSE (and amending the Corporate Governance Code).[254] If METI's 2023 Guidelines are utilized, they should be made binding on the takeover panel and not just treated as persuasive evidence like in courts.

For the Bid Decision-maker, there are fewer obstacles to implementing our recommendation. However, 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).[255] Although a

[253] For the UK, *see, e.g.,* Armour, Jacobs and Milhaupt, *supra* note 2, at 237. For Australia, *see* Ramsay, *supra* note 179, 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.
[254] *See supra* note 237.
[255] *See supra* notes 91-94 and accompanying text.

takeover panel should be able to prevent such abuse, the prospects for realizing our underlying hope that independent directors and independent committees will strengthen their corporate governance role are less clear. And it is uncertain at present how the FSA's ongoing review of tender offer bid rules may impact the role of the Bid Decision-maker.[256]

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 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. 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.[257] 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

[256] The FSA's working group also indicated that the creation of a takeover panel in Japan could mean that provisions for enforcement of tender offer rules should be decided by such a panel rather than through regulation. *See* Financial System Council Report, *supra* note 127, at 13.
[257] The only recent source that covers some of these issues may be Goto et al., *supra* note 225.

practice already informally accepts 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 (although not yet in hostile takeover cases), and (4) Japanese trust and like their court system.[258]

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 the 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.

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 20223 Guidelines will be "automatically" adopted; prior experience in Japan indicates that

[258] This argument is constructed with reference to *id.* and comments from participants in the inaugural annual conference of the Asian Corporate Law Forum, Singapore, April 23, 2024.

adoption of METI's guidelines by market actors and especially by courts will be piecemeal and partial.[259] As discussed above, the 2023 Guidelines are not as detailed as the UK Code, and in 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 norm creation and propagation, as do courts in Delaware,[260] 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 commercial norms.[261]

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, and no particular interest in creating a Revlon duty.[262] Recently, following promulgation of the 2023

[259] 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 43-45; for the 2008 report *see supra* notes 48-49. 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, but they have no enforcement mechanism outside the judicial system.

[260] For Delaware, *see* Rock, *supra* note 204; for Japan *see* summary of recent cases in Appendix 3.

[261] 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 and Bernard Black, *A Self Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911 (1996); Bernard Black, Reiner Kraakman and Anna Tarasova, *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. 1731 (2000).

[262] 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 these 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*

Guidelines, there have been two well-known instances of multiple bids in Japan (and no court decisions), as noted in Part II.C *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.[263]

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

Interest], in Kigyō to Hō wo Meguru Gendaiteki Kadai [Contemporary Issues Regarding Firms and Law] 279 (Maki Saito et al., eds. 2021).

[263] 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-type panel is that all bidders would presumably be interested parties.

Guidelines. However, practice is uneven and there are still Japanese companies that continue to "just say no" to takeover bids;[264] 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 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 32% of the stock market and account for some 60% of stock transactions; they have been 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

[264] In a recent case, Chilled & Frozen Logistics Holdings initially responded to an unsolicited offer by AZ-COM MARUWA Holdings by stating that they needed more time to consider because "we have received multiple expressions of interest in an acquisition from third parties," without giving any information concerning these offers. Chilled & Frozen Logistics Holdings, *Notice Concerning Announcement of Opinion (Reservation) as to Tender Offer for Company's Stock by AZ-COM MARUWA Holdings Inc.* (May 7, 2024), *available at* https://www.cflogi.co.jp/uploads/info20240507-2.pdf. This kind of response by target firms could be regarded as a new form of "just say no."

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 relatively weak and uncertain regulation of board defenses by courts, which generally favored management autonomy over shareholder monitoring.[265] 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

[265] *See* Shishido, supra note 164, at 2. *See also* J Armour and 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).

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.[266]

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 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.

[266] 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 43). The Toshiba case, *supra* note 217, 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).

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;[267] 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 commercial norms. Together with a separate Rule-maker, such as METI, and a Bid Decision-maker that focuses on shareholder voting and requires shareholder approval for all defensive measures, 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 model of takeover regulation focusing 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 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

[267] This was reportedly the case in Australia when it reconstituted and strengthened the power of its takeover panel in 2000. *See* Jennifer Hill, *Subverting Shareholder Rights: Lessons from News Corp.'s Migration to Delaware, supra* note 46, at 26.

do not see any successful real-world example of "US-lite" (including Japan), we consider Australia to be a prime example of a successful "UK-lite."

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 and its "spirit"	Narrow: resolving disputes (court substitute) during takeover bid period
Initiation of activities	Proactive role in enforcing UK Code: can act on its own initiative	Restrictive: only resolves disputes upon applications from parties
Period of Deciding Hostile Bid Cases	Exclusive jurisdiction at all times	Temporary, exclusive jurisdiction for private parties during takeover bid period, then courts
Decisionmakers	Takeover Panel Executive (Professional Staff)	Part-time members (panel of 3)
Formality of Proceedings	Oral hearings; no rules of evidence; legal representatives rarely used	Generally conducted through written submissions only
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
Decisions on exemptions and modifications of takeover rules; Enforcement of law	UK Panel	Government agency (ASIC)
Communication with Public	Generally does not publish decisions and reasons; publishes guidance notes on acceptable practices	Generally publishes decisions and reasons; publishes guidance notes on acceptable practices
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 processes	Limited to subsequent review of 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 (Umakanth Varottil & Wai Yee Wan eds., 2018) 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	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 and 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 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 solely 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? -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 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) affirmed. -Excluding the acquirer from voting on the shareholder	-What are the grounds for allowing MoM resolutions? When can they be used?	-Bidder continued purchasing about forty percent of the target's shares in the market, but did not launch a bid.

	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 defects of a MoM resolution? -Can a target's board activate defensive measures without shareholder approval in a similar situation?	
Mitsuboshi	-Affirmed the need for shareholder approval to activate defensive measure 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.

european corporate governance institute

about ECGI

The European Corporate Governance Institute has been established to improve *corporate governance through fostering independent scientific research and related activities.*

The ECGI will produce and disseminate high quality research while remaining close to the concerns and interests of corporate, financial and public policy makers. It will draw on the expertise of scholars from numerous countries and bring together a critical mass of expertise and interest to bear on this important subject.

The views expressed in this working paper are those of the authors, not those of the ECGI or its members.

www.ecgi.global

ECGI Working Paper Series in Law

https://ecgi.global/content/working-papers

Electronic Access to the Working Paper Series

The full set of ECGI working papers can be accessed through the Institute's Web-site (https://ecgi.global/content/working-papers) or SSRN:

Finance Paper Series	http://www.ssrn.com/link/ECGI-Fin.html
Law Paper Series	http://www.ssrn.com/link/ECGI-Law.html