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Citation Details

Janis P Sarra & Masafumi Nakahigashi, "Kigyo No Shakai-Teki Sekinin: Challenges for Corporate Social Responsibility in Japan" (2012) 45:3 UBC L Rev 779.

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KIGYO NO SHAKAI-TEKI SEKININ: CHALLENGES FOR CORPORATE SOCIAL RESPONSIBILITY IN JAPAN

JANIS SARRA[†] & MASAFUMI NAKAHIGASHI[‡]

I. INTRODUCTION

Globally, there is increasing discussion about corporate social responsibility (CSR). Many large multinational enterprises, particularly in mining and other resource sectors, have voluntarily adopted CSR programs, having concluded that social, economic, and environmental sustainability measures are good both for the “bottom line” and for the communities in which they operate. Companies in Japan have yet to move in that direction, although there are a few notable exceptions. In part, this lack of adaptation to the growing interest in CSR internationally is due to cultural and social norms in Japan that suggest that many aspects of CSR properly belong to the domain of remedial legislation, such as environmental protection legislation, human rights law, and social safety nets.

There are different normative conceptions of CSR. One, based on a shareholder-primacy model, is that the goal of corporate activity is to maximize profits for shareholders, but that wealth maximization is best accomplished by creating long-term sustainable companies that are socially responsible.¹ For example, Berle argued that all powers granted to corporate

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¹ See generally AA Berle Jr, “For Whom Corporate Managers *Are* Trustees: A Note” (1931) 45:8 Harvard L Rev 1365 at 1365, 1372 (for a discussion of the dangers to corporations that ignore social responsibilities). See also Janis Sarra, “Equity Derivatives and the Challenge for Berle’s Conception of Corporate Accountability” Seattle U L Rev [forthcoming in 2012].

managers were necessarily at all times to be exercised in the best interests of shareholders.² While he acknowledged the powerful impact of corporations on the lives of multiple stakeholders, he was concerned that, absent shareholder primacy, directors and officers would engage in self-interested conduct, rather than act in the best interests of the corporation, and, hence, shareholders were best situated to hold officers accountable for their decisions.³

Another conception of CSR is what Carroll has referred to as the pyramid of CSR, taking into account four kinds of social responsibilities: “economic, legal, ethical, and philanthropic.”⁴ This framework suggests that corporations should be operated to ensure economic sustainability and profits; comply with statutes and other regulations that direct their activities; operate within accepted societal norms, with good corporate citizenship, defined as what is expected morally or ethically; and be philanthropic in their involvement in the community and broader society.⁵ This conception of corporate citizenship recognizes profit objectives but creates a much broader conceptualization of the role of the corporation within society.

The Organisation for Economic Co-operation and Development’s *Guidelines for Multinational Enterprises* also offer some definitional guidance on CSR.⁶ The *OECD Guidelines* contain CSR recommendations addressed by 43 governments to their multinational enterprises and cover a broad range of issues, including contributing to economic sustainability, recognizing and respecting human rights, conducting due diligence in the supply chain, producing fulsome disclosure, assisting in local capacity building, respecting employment and industrial-relations laws and norms, protecting the environment, combatting bribery, respecting consumer interests, advancing

² Berle, *supra* note 1 at 1367.

³ Sarra, *supra* note 1 at 3.

⁴ Archie B Carroll, “The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders” (1991) 34:4 *Business Horizons* 39 at 40.

⁵ *Ibid* at 40–43.

⁶ Organisation for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises* (Paris: OECD 2011) [*OECD Guidelines*].

science and technology, advancing competition, and complying with taxation requirements.⁷

These differing approaches to CSR respect the fundamental structure of corporations but argue for different emphases on issues beyond profit maximization.⁸ As the discussion that follows indicates, there are two types of sustainability: the sustainability of the corporation and the sustainability of society, in which the corporation has a role.

Normative differences in approaches to CSR are also complicated by distinctions between common-law and civil-law jurisdictions and the role that codified laws can play in corporate behaviour. Under common law, corporations' CSR activities often lead statutory law. By setting norms of conduct, corporations and their advocate organizations are able to shape principles and best practices in CSR without the need for legislative intervention, or their practices are used as baseline norms and activities that shape new law. In contrast, in a number of civil-law systems, corporations act with a careful eye to codified law. If that law requires companies to operate in shareholders' best interests, it is harder to make a case for CSR absent legislative change. If challenged, conduct is measured by the courts in terms of compliance with the law, not overall business judgment, although business judgment is respected in some jurisdictions.

The above situation can be seen in Japan within its framework as a civil-law jurisdiction, specifically in the current discussion at Japan's Corporate Law Committee Legislative Council (Corporate Law Committee), which started examining corporate-law reform in April 2010.⁹ The Committee was established to respond to Consultation No. 91, issued by the Minister of

⁷ See *ibid.*

⁸ There are also scholars and community advocates who argue for a more fundamental restructuring of corporations and profits as another form of CSR, which essentially shifts corporations from private actors into the public domain. While offering a very different perspective that is important to consider, such an approach is beyond the scope of discussion in this paper, which is aimed at a deeper understanding of the dynamics and debate in Japan.

⁹ See The Ministry of Justice, Corporate Law Group: Legislative Council (in Japanese), online: <<http://www.moj.go.jp/shingi1/shingi03500005.html>>.

Justice.¹⁰ In the consultation paper, the Minister suggested an approach that would “ensure high credibility to corporations from a wide-range [of] stakeholders, considering corporations’ critical role in social and economic fields”.¹¹ One reason the Minister emphasized the protection of a wide range of stakeholders is that the governing party was the Democratic Party, whose main supporters have been labour unions. Notwithstanding that background, to date the Committee has rejected all proposals favouring employees or labour unions. Instead, the Committee is basing current plans for reform on the shareholder-primacy model.¹²

Considering the discussions to date at the Corporate Law Committee, corporate directors and officers in Japan are predisposed to viewing their role as one that must maximize benefits to their corporation, likely feeling some concern that promoting CSR activities would place them at greater risk of being accused by shareholders of breaching their duty to maximize profit. Even if directors, as corporate citizens, undertake activities that are good for stakeholders and/or society, they face a risk of liability for damages unless they can be confident that they would be able to prove that expenses for CSR activities would bring profit to the corporation. Directors in Japanese corporations are willing to follow the duties expressed in written laws and established judicial interpretations, especially decisions of the Supreme Court of Japan. Although directors could launch CSR initiatives based on what they believe is expected by cultural and social norms, they would take the risk that their activities would be considered a waste of corporate resources and a breach of their duties to maximize profit.

As a result of existing liability chill and the lack of a positive obligation to implement CSR, where Japanese companies can externalize the costs of doing business, such as environmental remediation or the social costs created when a corporation exits a particular region, they will. Such costs are viewed as negative externalities, and if not required to account for the costs in their productive activities, corporations are unlikely to do so. In part, the lack of enthusiasm for CSR in Japan is a function of the civil-law framework under

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

which Japanese corporations operate. Unlike in common-law jurisdictions, the civil law sets out legal obligations; and absent express language requiring CSR, it is difficult for corporate officers to justify the expenditure. Corporations are unlikely to shift from their current purely profit-maximizing goals without express direction by the government through legislative change. The absence of a strong movement towards CSR is also likely due, in part, to long-standing normative beliefs by corporate directors and officers that corporations should not have redistribution of wealth as a goal, but rather, should be operating to maximize returns to their equity investors.

In considering why CSR is a challenge in Japan, it is useful to make first-hand observations about the taxi-cab industry. Japan is one of the easiest places in the world to catch a taxi, even on the street. One does not have to go to cab stands or hotels, as taxis are constantly circulating in traffic, without passengers. In fact, the taxi corporations request that their drivers drive around constantly seeking passengers, which, in turn, increases environmentally harmful emissions. This example illustrates the disconnection between Japanese business practices and environmental protection. Responding to the Kyoto Protocol, adopted by the 3rd Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change in 1997,¹³ the Japan Federation of Hire-Taxi Associations settled on an action plan for global-warming prevention in 1998.¹⁴ However, the proposal focuses mainly on technical efforts, including facilitation of Global Positioning System automatic vehicle monitoring and the development of hybrid vehicles for commercial usage, not on reduction of emissions from vehicles running without passengers. The proposal appears to be aimed at activities that directly increase profit; for example, through reputational benefits and the attraction of more customers who are willing to

¹³ United Nations, *Kyoto Protocol to the United Nations Framework Convention on Climate Change* (1998), online: <<http://unfccc.int>>.

¹⁴ Japan Federation of Hire-Taxi Associations, ハイヤー・タクシー業界の地球温暖化防止に関する自主的行動計画 (*Action Plan for the Prevention of Global Warming in Hire-Taxi Industries*), online: <<http://taxi-japan.or.jp/images/article/ondanka.pdf>>.

pay the additional cost of hybrid vehicles in order to save on energy costs. The government strictly regulates the price of electric power, in contrast with gas prices, which are not under the control of the government; although Japan imposes a very high tax on gasoline to partially offset the externalities involved. The stable price of electric power, at least prior to the unfortunate events surrounding the March 2011 earthquakes, has meant that the move to hybrid vehicles is appealing to the taxi industry. However, gas emissions will continue to dominate the industry for the foreseeable future, and absent prohibitively high fuel prices or government initiative, there is little incentive to consider emissions reduction.

Another example of the narrow focus on profit making is illustrated by some of the scholarly reaction¹⁵ to Toyota Motor Corporation's *Sustainability Report 2009*. The Report reads in part:

Since its founding, Toyota has advocated and strived to realize the philosophy of contributing to society through *monozukuri* (manufacturing) and automobile manufacturing.

At the basis of this philosophy is a way of thinking that emphasizes the principles of Customer First and *Genchi Genbutsu* (on-site, hands on). While the 70-year history of Toyota has been filled with challenges, our suppliers, dealers and employees have worked together to overcome each crisis. There is now felt to be a need to return again to Toyota's origins . . .

The thinking behind the Customer First attitude has been nurtured in Toyota since its founding days. . . . [The former president Shotaro Kamiya] said: 'Users come first, then the dealers and, lastly, the maker.' This refers to the order of priority in receiving benefits from automobile sales.¹⁶

Criticizing the Report, Hiroshi Okumura, former professor at Chuo University, has argued that "the profit of the Toyota Motor Corporation comes first, then the dealers and, lastly users",¹⁷ suggesting that this approach must be the common understanding of corporate activities so that Toyota

¹⁵ See e.g. Hiroshi Okumura, 徹底検証トヨタ (*A Thorough Examination: Toyota*), (Tokyo: Nanatsumori Shokan, 2011) at 154–55.

¹⁶ Toyota Motor Corporation, *Sustainability Report 2009* (Toyota City: Toyota, 2009) at 4–5.

¹⁷ Okumura, *supra* note 15 at 154 [translated by author].

can maximize its profits. Thus, even when global companies have sought to shift their focus, in some instances they have come under attack by scholars and other business people in Japan.

The above examples illustrate that one of the biggest challenges to Japanese corporations' promotion of CSR activities has been directors' obligation to consider how every activity of the corporation contributes directly or indirectly to profits. It has been difficult for Japanese corporations to develop CSR activities when they are not based on laws that would be enforced by regulatory bodies and/or the private sector. The externalities caused by business activities in Japan are likely to be internalized only through enforceable laws, not through corporations' own drive for activities that would benefit an enlarged group of corporate stakeholders.

This paper begins to explore some of these issues. Much of the debate in Anglo-America and Continental Europe about corporate governance and norms in Japan takes place outside of Japan, with little access to the kinds of policy discussions and debates that are actually occurring within Japan's corporate world. Through collaboration between a Canadian scholar and a Japanese scholar working with Japanese corporations and policy-makers, this paper provides insight into the current state of Japanese corporate governance and the discussion regarding development of CSR activities and norms. Part II introduces some of the elements of CSR that have been adopted internationally, including a brief comparative reference to Canadian law. Part III then explores why CSR has taken the particular trajectory that it has in Japan. Part IV examines how the history and development of corporate law has influenced or been influenced by various components of CSR, particularly in the political and environmental arenas. Parts V and VI then respectively examine labour law and environmental law in Japan and their relationship to the potential for the growth of CSR.

II. ELEMENTS OF CORPORATE SOCIAL RESPONSIBILITY

There are a number of elements to CSR. For example, the Canadian government has observed that CSR involves a company becoming aware of its relationship to broader external social, environmental, and economic interests, and publicly disclosing the external impacts caused by its business activities—suggesting that a further step would be factoring these external

social, environmental, and economic impacts into the firm's decision-making model.¹⁸

Canadian scholar Aaron Dhir has suggested that there is a connection between CSR disclosure and financial performance.¹⁹ One can surmise from his work that at least some investors are motivated to seek investments in companies that demonstrate a commitment to social responsibility. The costs associated with CSR can be viewed as an investment "with returns paid in several different forms."²⁰ At least in some sectors, financial institutions, shareholders, and investors increasingly consider a company's management of its CSR performance as a key criterion in their financial and investment decision making.²¹ Community engagement can build relationships, allow for dialogue that can resolve problems before they become regulatory or legal problems, and enhances overall economic sustainability.²²

Globally, there have been numerous policy initiatives advocating CSR. For example, the Global Reporting Initiative (GRI) suggests that "sustainability reporting is the practice of measuring, disclosing, and being accountable to internal and external stakeholders for organizational performance towards the goal of sustainable development."²³ CSR may include substantial investment in initiatives that seek to actively contribute to the communities that corporations work in, including investing in environmental initiatives such as carbon-offsetting plans, building schools

¹⁸ See Industry Canada, "Business Case for CSR", online: <<http://www.ic.gc.ca>>.

¹⁹ Aaron A Dhir, "Shadows and Light: Addressing Information Asymmetries through Enhanced Social Disclosure in Canadian Securities Law" (2009) 47:2 Can Bus LJ 435 at 462, 466.

²⁰ *Ibid* at 466 citing David Hess, "Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness" (1999) 25 J Corp L 41 at 81.

²¹ See e.g. Goldcorp, *Human Rights and CSR Policy*, online: <<http://www.goldcorp.com/About-Us/Governance/Human-Rights-CSR-Policy/default.aspx>>.

²² See e.g. Teck Resources, *2011 Annual Report*, online: <<http://www.teck.com/DocumentViewer.aspx?elementId=201920>>.

²³ Global Reporting Initiative, *Sustainability Reporting Guidelines 3.1*, online: <<https://www.globalreporting.org/resource/library/G3.1-Guidelines-Incl-Technical-Protocol.pdf>> at 3.

and setting up educational programs in the overseas communities in which the corporation operates, and offering microfinancing programs in the host community to provide families and the most disadvantaged groups with access to credit that would allow them to plan for the future rather than focusing on day-to-day survival.²⁴ These objectives are important and timely. One question, however, is how to encourage directors and officers to undertake such activities in a meaningful way, absent enforceable directives. In Japan, there is considerable commitment to lifetime employment, as discussed in Part V below, but the initiatives are generally focused on domestic workers and are due to long-standing norms, rather than due to a broader conceptualization of the corporation as a socially responsible global citizen.

There are now also voluntary international standards set out in the 2010 *ISO 26000: Guidance on Social Responsibility (ISO 26000)*.²⁵ *ISO 26000* links the operation of corporations in a socially responsible manner to the objective of sustainable development, observing that

an organization's performance in relation to the society in which it operates and to its impact on the environment has become a critical part of measuring its overall performance and its ability to continue operating effectively. This is, in part, a reflection of the growing recognition of the need for ensuring healthy ecosystems, social equity and good organizational governance.²⁶

ISO 26000 provides guidance to corporations on definitions, trends, and characteristics of social responsibility; principles and practices relating to social responsibility; integrating, implementing, and promoting socially responsible behaviour throughout the organization; identifying and engaging with stakeholders; and communicating commitments, performance, and

²⁴ See Heledd Jenkins & Louise Obara, "Corporate Social Responsibility in the Mining Industry: The Risk of Corporate Dependency" (2006), online: Corporate Responsibility Research Conference <<http://www.crrconference.org>>.

²⁵ International Organization for Standardization, *ISO 26000: Guidance on Social Responsibility* (Geneva: ISO, 2010) [*ISO 26000*].

²⁶ *Ibid* at v.

other information related to social responsibility.²⁷ *ISO 26000* suggests that a corporation's performance on social responsibility can influence competitive advantage, reputation, employee commitment, and the ability to attract and retain workers, members, customers, clients, users, and investors.²⁸ *ISO 26000* is intended to encourage companies to go beyond legal compliance and, at the same time, to "take into consideration societal, environmental, legal, cultural, political and organizational diversity, as well as differences in economic conditions, while being consistent with international norms of behaviour."²⁹

To date, *ISO 26000* has not been intended to be used for certification purposes. It addresses seven core subjects of social responsibility: human rights, labour practices, the environment, fair operating practices, consumer issues, organizational governance, and community involvement and development;³⁰ factors that it views as highly interdependent. *ISO 26000* has received growing attention in the business community, including among Japanese corporations, as discussed below.

In Canada, there is no statutory requirement for CSR; however, the government has recently stated that "Industry Canada promotes CSR principles and practices to Canadian businesses because it makes companies more innovative, productive, and competitive."³¹ While these statements are strong normative indication of the government's commitment, it has chosen not to regulate or legislate CSR requirements in corporate or securities law, except for transparency requirements under securities law. There is no requirement to internalize the costs of current externalities, such as environmental harm, unless they fall under the ambit of environmental-protection legislation or companion remedial statutes. Industry Canada is making its pitch for CSR based on the market and reputational benefits that may accrue to companies implementing CSR.

²⁷ *Ibid* at 1.

²⁸ *Ibid* at vi.

²⁹ *Ibid* at 1.

³⁰ *Ibid* at 19.

³¹ Industry Canada, *supra* note 18.

A. THE ROLE OF THE JUDICIARY IN ADVANCING CORPORATE SOCIAL RESPONSIBILITY

The approach to CSR by the Canadian government received a boost in recent years from two Supreme Court of Canada judgments that affirmed that directors and officers hold a fiduciary obligation to manage in the best interests of the corporation as a whole, and not to act solely to maximize shareholder value.³² In *Peoples Department Stores (Trustee of) v Wise*, the Supreme Court held that in exercising their fiduciary obligation, corporate officers may take into consideration the interests of multiple stakeholders, such as employees, suppliers, creditors, consumers, government and the environment.³³ In *BCE Inc v 1976 Debentureholders*, the Supreme Court emphasized “the need to treat affected stakeholders in a fair manner, commensurate with the corporation’s duties as a responsible corporate citizen.”³⁴ Yet the judgments do not require directors and officers to take account of these interests and do not direct any kind of consultation regarding what those interests might be, although arguably, the judgments will have some effect on the previously narrowly framed shareholder-wealth-maximization norm. There are no reported judgments subsequent to these pronouncements that appear to have addressed whether there is any normative shift in the behaviour of corporate decision makers.

The potential role of the judiciary in advancing CSR norms differs considerably between Canada and Japan. Canadian courts have a tradition of equity, embodied in oppression-remedy provisions in corporate-law statutes, as well as a long tradition of remedies awarded under the common law for inequitable conduct. In contrast, it is difficult to expect Japanese courts to make creative or expansive interpretation of written laws, including tort law, given the civil-law nature of the jurisdiction. For example, the most general provision on tort under Japan’s *Civil Code*, Article 709, reads, “[a] person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages

³² *Peoples Department Stores v Wise*, 2004 SCC 68 at para 42, [2004] 3 SCR 461.

³³ *Ibid* at para 42.

³⁴ *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at para 82, [2008] 3 SCR 560.

resulting in consequence.³⁵ It could be interpreted to expand the scope of application to activities of business corporations, but the cases are rare in Japanese courts and judgments are almost non-existent. The exceptions would be mass tort cases on pollution and harms due to medical side effects, for which Japanese courts have awarded remedies.³⁶

However, it should be emphasized that, notwithstanding the inelasticity of Japanese law, once corporations see the possibility of change in case law or statutory law, they are willing to respond in a timely manner to bring their company into compliance with any new standards of corporate activity or labour laws, or to stay ahead of any discussion of further regulation. Corporations could commit to implementing CSR beyond current legal requirements if they conclude that change will be required in the near future and it is better to voluntarily change than have standards statutorily or judicially imposed. In Japan, *ISO 26000* standards were expected to be captured in Japanese Industrial Standards (JIS) by March of 2012; this inclusion is driving further interest in the *ISO 26000* standards.³⁷ Uncertainty of change in legal obligations or an expectation of new standards may help to promote CSR activities, even in advance of actual legal responsibilities.

³⁵ Minpō (Civ C), art 709, translated by Japanese Law Translation, online: <<http://www.japaneselawtranslation.go.jp>>.

³⁶ See e.g. Tsu District Court (Yokkaichi branch) decision of 24 July 1972 (in Japanese), 672 Horitsu-Jiho 30 (regarding air pollution); Tsu District Court (Yokkaichi branch) decision of 25 June 1982 (in Japanese), 1048 Horitsu-Jiho 25 (regarding air pollution); Tokyo District Court Decision of 18 May 1984 (in Japanese), 1118 Horitsu-Jiho 28 (regarding side effects by immunization).

³⁷ These standards, entitled JIS Z 2600, were published in the Official Gazette (*Kanpo*) on 21 March 2012. JIS Z 26000 has the same contents as *ISO 26000*. See Japanese Standards Association, *ISO 26000 Corporate Social Responsibility* (in Japanese), online: <<http://www.jsa.or.jp/stdz/sr/sr.asp>>; *Japanese Standards Association, Newsletter, Standards Development: Achievement in FY 2011*, online: <http://www.jsa.or.jp/eng/news/2012_1.asp>.

B. STATUTORY STANDARDS IN CORPORATE LAW

There are few examples of legislated CSR. The UK's *Companies Act 2006* requires directors to advance the company's success for the benefit of its members as a whole, and in doing so, directors are to have regard to the impact of the company's operations on the community.³⁸ The Act specifies that directors must act in good faith, having regard for the likely consequences of any decision in the long term, the interests of the company's employees, the need to foster the company's business relationships with customers and others, and the impact of the company's operations on the community and the environment.

CSR for multinational enterprises may involve meeting the highest international standards for environmental protection or human rights, even if the host jurisdiction in which the company operates has considerably lower legislative standards. Japanese corporations can adopt the highest international standards if the standards are helpful or essential to maintaining or developing their business relationships. Despite the long-standing norm in Japan that corporations are unlikely to act absent

³⁸ See *Companies Act 2006* (UK), C-46, s 172 (Duty to promote the success of the company):

(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

(a) the likely consequences of any decision in the long term,

(b) the interests of the company's employees,

(c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment,

(e) the desirability of the company maintaining a reputation for high standards of business conduct, and

(f) the need to act fairly as between members of the company.

(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.

regulatory or statutory directive, the *ISO 26000* guidelines are attracting interest in the Japanese business world. According to the *Nikkei* newspaper in 2011, Japan's corporations have started to strengthen initiatives for CSR as their international business strategy.³⁹ Since the number of jurisdictions that have adopted *ISO 26000* is increasing, Japanese businesses are discovering it is important to meet the standards, especially on human rights and labour customs.

Japanese corporations may become more interested in CSR as a mechanism for disclosure, which in turn could promote substantive corporate activities. Key intermediaries could be "comparability indicators", allowing corporate activity discussed in annual reports required by securities regulation to be compared with international standards, especially ISO certification or voluntary standards, as well as evaluated by trustworthy rating organizations.⁴⁰ Once the comparison is facilitated between corporations, they can easily evaluate the reputation for CSR on a comparative basis. Considering the experience with the *ISO 9000 Quality Management Practices* and *ISO 14000 Environmental Management* series in Japan, corporations tend to choose those companies that have the certification as their counterparties in order to put themselves in a *keiretsu* (corporate group) with a good reputation. In that sense, standards that both enable comparisons and are trustworthy are critical to facilitating CSR activities in Japan.

C. TRANSPARENCY OF CORPORATE SOCIAL RESPONSIBILITY THROUGH SECURITIES DISCLOSURE REQUIREMENTS

As noted above, there is little regulation of CSR, other than transparency requirements. Even where jurisdictions have endorsed best-practice

³⁹ "Enterprises strengthen CSR activities" (in Japanese), *Nikkei* Newspaper (24 August 2011) (on file with author Nakahigashi).

⁴⁰ See Yasuhiko Kubota, 企業の社会的責任 (*Corporate Social Responsibility*) (2007) 51 *Shojihou kenkyu* at 10, 14-15.

standards, they require only that corporations comply or explain,⁴¹ as opposed to any substantive compliance. Hence, one issue is whether transparency requirements themselves have a normative influence on implementation of CSR.

Transparency of CSR activities may create some normative pressure for corporations to adopt them. There are reputational considerations, and, as Dhir noted above, there is arguably a growing number of investors that have either expressed a preference for CSR or have concluded that CSR may be an indicium of more effective corporate-governance structures generally.⁴² Canadian securities laws have relatively recently imposed several disclosure requirements on publicly traded companies that identify some CSR-type initiatives or lack thereof.

The requirements for the Annual Information Form (AIF) under Canadian National Instrument 51-102, *Continuous Disclosure Obligations*, expanded the scope of disclosure effective in 2008, based on regulators' conclusions that increased transparency will continue to make Canadian listed corporations competitive in international markets.⁴³ They require that the company report, for each reportable segment of the business, the financial and operational effects of environmental-protection requirements on the capital expenditures, earnings, and competitive position of the company in the current financial year and the expected effect in future years.⁴⁴ They require disclosure of any social or environmental policies the company has implemented that are fundamental to its operations, such as policies regarding its relationship with the environment, its relationship with the communities in which it does business, and human rights. The company

⁴¹ An example is Canadian securities law. See e.g. *NP 58-201: Corporate Governance Guidelines*, online: TMX <<http://www.tmx.com>>.

⁴² Dhir, *supra* note 19 at 462.

⁴³ Canadian Securities Administrators, *National Instrument 51-102: Continuous Disclosure Obligations*, online: Ontario Securities Commission <<http://www.osc.gov.on.ca/en/13342.htm>>.

⁴⁴ Canadian Securities Administrators, *Form 51-102F: Annual Information Form*, s 5(k) (effective 17 March 2008, rescinded 1 January 2011), online: Ontario Securities Commission <<http://www.osc.gov.on.ca>>.

must describe the policies and the steps that it has taken to implement them. The company must also disclose risk factors relating to its business, such as cash flow and liquidity problems (if any), experience of management, the general risks inherent in the business carried on by the company, environmental and health risks, reliance on key personnel, regulatory constraints, economic or political conditions, financial history, and any other matter that would be likely to influence an investor's decision to purchase securities of the company. If there is a risk that security holders may become liable to make an additional contribution beyond the price of the security, the company must also disclose that risk.⁴⁵ The instructions for the AIF suggest that the company is to disclose the risks in order of seriousness, from the most serious to the least serious, and that a risk factor must not be deemphasized by including excessive caveats or conditions.⁴⁶ The measures are aimed at investor protection, by allowing investors to make informed decisions regarding the risk-management strategies of directors and officers, rather than at any CSR initiative.

Also in Canada, the Management Discussion and Analysis (MD&A) of each publicly traded corporation is to discuss both positive and negative developments and any material changes since the last reporting period, as well as future financial and operating plans and any risks to solvency.⁴⁷ Management is to disclose any factors that have affected the value of projects, such as changes in commodity prices or land use, or political or environmental issues.⁴⁸ While there are no express standards imposed, securities regulators' guidelines as to what might be material changes serve as a type of normative reference as to best or better practices.

Moreover, in October 2010, the Canadian Securities Administrators published Staff Notice 51-333, *Environmental Reporting Guidance*, to provide guidance on continuous-disclosure requirements relating to

⁴⁵ *Ibid.*, s 5.2.

⁴⁶ *Ibid.*, s 5.2(i).

⁴⁷ The objective of the MD&A is to provide a descriptive analysis of the information contained purely in accounting form in the financial statements.

⁴⁸ Canadian Securities Administrators, *Form 51-102F1: Management's Discussion & Analysis*, s 1.4, online: Ontario Securities Commission <<http://www.osc.gov.on.ca>>.

environmental matters.⁴⁹ The MD&A is to include a discussion of potential material environmental liabilities and whether or not the liability has been accrued in the financial statements or has been disclosed in the notes to the statements.⁵⁰ If an asset retirement obligation (ARO) is material to the company, the company is to provide supplemental disclosure in its MD&A, indicating the associated asset to be reclaimed or restored and information about applicable environmental-remediation costs, provided such information is reasonably available.⁵¹ The CSA Notice also states that, in most cases, ARO are critical accounting estimates and should be analyzed in the MD&A.⁵² For mining companies, there is enhanced disclosure in this respect.⁵³ National Instrument 43-101, *Standards of Disclosure for Mineral Projects*, sets out disclosure standards specific to mineral projects.⁵⁴ A company's technical report must include a general discussion of the extent to which the estimate of mineral resources and mineral reserves may be materially affected by any known environmental, socio-economic, political, or other relevant issues.⁵⁵

The requirement for disclosure could be a first step in getting companies to think about what social and environmental risks there may be to their activities, as well as the appropriate responses. It is unclear whether the requirement to disclose social and environmental risks will be generalized to other aspects of CSR activities. However, arguably, social and environmental

⁴⁹ Canadian Securities Administrators, *CSA Staff Notice 51-333 Environmental Reporting Guidance* (27 October 2010), online: Ontario Securities Commission <<http://www.osc.gov.on.ca>>.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ Canadian Securities Administrators, *National Instrument 43-101: Standards of Disclosure for Mineral Projects*, online: Ontario Securities Commission <<http://www.osc.gov.on.ca>>.

⁵⁴ Canadian Securities Administrators, *National Instrument 43-101: Standards of Disclosure for Mineral Projects*, online: Ontario Securities Commission <<http://www.osc.gov.on.ca>>.

⁵⁵ *Ibid.*

risks comprise a fairly broad category of conduct that should be addressed in a meaningful way. Investor response to these risks, and in particular, the failure to address any such material risks, may generate some pressure to adopt CSR initiatives. However, in Canada, the only shareholders with sufficient clout to cause such a governance shift would be institutional shareholders, who may or may not have such an interest, depending on the source of their capital, the short- versus long-term time horizon for their investment, and any prudential obligations they may have in terms of investment decisions.

This shift in Canadian disclosure requirements aligns with changes to U.S. securities regulation. A U.S. Securities and Exchange Commission (SEC) Interpretation issued in 2010 expressly includes disclosure of social and environmental policies, as well as risk factors such as environmental and health risks and political considerations.⁵⁶ The required standard of disclosure of social or environmental policies is that the policies are fundamental to operations, expanding the threshold for the inclusion of information. The requirement is summarized by SEC Chair Schapiro as follows:

It is neither surprising nor especially remarkable for us to conclude that of course a company must consider whether potential legislation—whether that legislation concerns climate change or new licensing requirements—is likely to occur. If so, then under our traditional framework the company must then evaluate the impact it would have on the company's liquidity, capital resources, or results of operations, and disclose to shareholders when that potential impact will be material. Similarly, a company must disclose the significant risks that it faces, whether those risks are due to increased competition or severe weather. These principles of materiality form the bedrock of our disclosure framework.⁵⁷

⁵⁶ U.S. Securities and Exchange Commission, *Commission Guidance Regarding Disclosure Related to Climate Change: Release Nos. 33-9106; 34-61469; FR-82*, online: SEC <<http://www.sec.gov/rules/interp/2010/33-9106.pdf>>.

⁵⁷ Mary Schapiro, *Statement Before the Open Commission Meeting on Disclosure Related to Business or Legislative Events on the Issue of Climate Change* (Speech by SEC Chairman, delivered at Washington, DC, 27 January 2010), online: SEC <<http://www.sec.gov/news/speech/2010/spch012710mls-climate.htm>> [emphasis removed].

Another element of CSR is that socially responsible policies can be seen as a mechanism to retain and attract employees. Professor Kellye Testy has observed that, in the United States, young adults in the 18–25 age group report that focus on the public good is one of the motivating factors in their consideration of employment opportunities.⁵⁸ There have not yet been any studies on why this preference is turning up, and there is a live question as to whether CSR considerations would be sufficient for younger employees to forego particular income opportunities. One hypothesis might be that young adults understand that CSR policies should include appropriate conditions of employment, particularly given the increasing uncertainty about medium- to long-term economic security. Otherwise, they might prefer to take a better salary and then donate a part of their income to more specific socially responsible activities undertaken by NGO or environmental organizations that they support, possibly with a commensurate tax reduction.

III. CONVENTIONAL CORPORATE SOCIAL RESPONSIBILITY ACTIVITIES IN JAPAN

A. INTRODUCTORY FEATURES OF CORPORATE SOCIAL RESPONSIBILITY ACTIVITIES

In the past, CSR activities in Japan were often interpreted as costs that came with social obligations of corporations. In recent years, awareness has been spreading that promoting CSR can be compatible with corporate profitability.⁵⁹ This part discusses recent CSR activities as a basis on which to analyze the current challenges for CSR by Japan's corporations. The following part will then offer an historical perspective for the particular trajectory of CSR in the Japanese context.

⁵⁸ Kellye Testy, "Never Waste a Crisis: Corporate Social Responsibility in a "Down" Economy", UBC Lecture for National Centre for Business Law, 7 February 2010) (written remarks not available, cited with permission).

⁵⁹ For the change of recognition by corporations, see Ministry of Economy, Trade and Industry (METI) (Japan), *White Paper on International Economy and Trade 2004: Towards a "New Value Creation Economy"* at 102, online: <<http://www.meti.go.jp/english/report/data/gIT04maine.html>> [METI, *White Paper on International Economy and Trade*].

1. CORPORATE SOCIAL RESPONSIBILITY REPORTS

In Japan, disclosure of CSR initiatives has grown for corporations listed on the First Section of the Tokyo Stock Exchange (TSE), even though such disclosure is not required by law. The drivers for such change are the need for Japanese corporations to compete globally, disclosure listing requirements for companies that are cross-listed on North American or European exchanges,⁶⁰ and the realization that corporations operating internationally will be assessed for the transparency of their social and environmental risks, and their activities to respond to those risks. There exist several online databases for the reports, with rankings.⁶¹

Professor Katsuhiko Kokubo has found that there is a big difference between CSR-type reports by Japanese corporations and those in Europe and North America.⁶² He observes:

What a corporation should tell readers, i.e., the readers or stakeholders in the corporation, is its attitude or mission for CSR activities to stakeholders. . . . Looking at the reports by Anglo-American corporations that are famous for their CSR activities, they describe the mission and the sufficient strategies to realize them, and show the strategies in each field of activity and the consistency in their policies.⁶³

In his analysis, Kokubo states that the reports in Japan tend to describe whatever sounds good to them and not whatever sounds unfeasible, such as corporate opportunism. He suggests that they pretend to be interested in CSR activities beyond their own benefits, but they lack established guidelines for the form and content of the reports. Rather, the reports look

⁶⁰ See e.g. London Stock Exchange, *Corporate Governance: A Practical Guide*, online: <<http://www.londonstockexchange.com/companies-and-advisors/listing/guide-corporate-governance.pdf>>.

⁶¹ See e.g. Nippon Foundation, CANPAN CSR +, online: <http://canpan.info/csr_list_search_en.do>.

⁶² Katsuhiko Kokubo, “報告書を読ませるために必要なこと” (Things Needed in Order to Encourage People to Read CSR Reports) (2011) 578 *Gekkan-Kansayaku* 132.

⁶³ *Ibid* at 132.

eager to express to stakeholders that their business activities are useful and worthwhile to those stakeholders, society, and the environment.

According to scores given by CANPAN CSR Plus⁶⁴ on CSR activities, mainly based on the CSR reports, the highly scored Japanese corporations are categorized in industries such as manufacturing, electric power, and construction. A common feature of these businesses is that their products are well known to customers/consumers nationally and internationally under their brand names (e.g., Hitachi, Sekisui Chemical, Tokyo Gas, Panasonic, Richoh, Olympus, Fujitsu, Kyushu Electric Power, Sapporo, Sekisui House, Sony, NEC, Mazda, Toshiba, Canon, Nikon, Kansai Electric, and Osaka Gas). The implication that their corporate brand and names are important to their business and the profits generated, so they can justify CSR-type activities.

2. SURVEY AND PROJECT BY NIKKEI

A survey in 2010 undertaken by the *Nikkei* newspaper, Japan's version of *The Wall Street Journal* or the *Financial Times*, shows the same tendency regarding environmental activities.⁶⁵ In the survey, manufacturers that supply their products to consumers are highly rated. The first-rated corporation is Panasonic, which was also highest rated in the previous year's survey. The other top 10 corporations in manufacturing industries are Mitsubishi Electric, Toshiba, Sharp, Toyota Motor Corporation, NEC, Ricoh, Denso, Toyoda Gosei, and Fujifilm. Among them, the businesses of Denso and Toyoda Gosei do not sell their products directly to end-users. However, these two corporations are in the Toyota group and are supplying their products (i.e., car parts) to Toyota Motor Corporation. The results would indicate that these corporations are interested in environmentally oriented management mainly to increase profits. Customers have been very sensitive to price and so-called "eco-car tax reduction" or "green tax" and "eco-points",

⁶⁴ CANPAN CSR + is a website designated to help companies and citizens communicate about CSR by providing a database about corporations' efforts to improve CSR. See *supra* note 61. The score in the text is as of 19 February 2011.

⁶⁵ Nikkei, *Report on Survey of Environment Oriented Management Index* (2010), highlights given in *Nikkei* (30 January 2011) 1; *Nikkei Sangyo* (31 January 2011, 1 February 2011) 1.

which are equivalent to money by the government,⁶⁶ and in turn increase the demand for cars and other green products used by consumers.⁶⁷ Interestingly, the eco-point system is within the jurisdiction of the Minister of Economy, Trade, and Industry (METI), the Ministry of the Environment (MOE), and the Ministry of Internal Affairs and Communications (MIC).⁶⁸ This collaboration would suggest that the system is also considered an important strategy to promote industry, especially research and development (R&D) activities.

Komatsu, whose main businesses are manufacturing and sale of construction and mining equipment, utilities, forest machines, and industrial machinery, has viewed a forthcoming regulation on particulate matter and nitrogen oxide as an important business opportunity.⁶⁹ According to the *Nikkei Sangyo* newspaper, Komatsu is brushing up strength in *monozukuri*, the Japanese way of manufacturing, especially the promotion of core manufacturing technology.⁷⁰ It has concluded that the R&D activities promoting ecological products will make Japan's corporations competitive in a global market.

In 2010, Nikkei started the Global Social Responsibilities Study Meeting (GSR) under the following initiatives:

GSR is a new concept developed in Japan that goes beyond conventional notions of corporate responsibility, such as legal compliance and risk management. It is a way of thinking that focuses on "aggressive CSR" [,] proactive behaviors

⁶⁶ "What to Look for in Eco-friendly Cars" (in Japanese), *Nikkei* Newspaper (25 June 2012) (on file with author Nakahigashi).

⁶⁷ "Toyota Prius Sales Top Two Million Units" (in Japanese), *Nikkei* Newspaper (9 October 2010) (on file with author Nakahigashi).

⁶⁸ *Ibid.*

⁶⁹ "Self-manufacturing: Ecological Products Enriched" (in Japanese), *Nikkei Sangyo* Newspaper (1 February 2011) (on file with author Nakahigashi).

⁷⁰ For details on Japanese manufacturing (*monozukuri*), see Ministry of Economy, Trade and Industry, Ministry of Health, Labour and Welfare & Ministry of Education, Culture, Sports, Science and Technology (Japan), *Summary of the White Paper on Manufacturing Industries (Monozukuri) 2010*, online: <http://www.meti.go.jp/english/report/data/Monodzukuri2010_02.pdf>.

aimed at bringing about a better society. Under this concept, companies collaborate globally with governments and civil society in working within their business processes to resolve global issues, such by reducing carbon dioxide emissions and developing renewable energy to combat global warming, taking steps to reduce poverty, and acting to address water issues.

Corporations are in a position to play a major role in resolving global issues and problems relating to the governance of the global community, and the number of companies in Japan addressing such issues from a business perspective is gradually increasing.

At the same time, bodies like the United Nations and its affiliated organizations, NGOs, and NPOs have been initiating collaborative activities with global companies around the world at a tremendous rate, based on a recognition that cooperation with the business world is indispensable. In this sense, GSR is set to become an essential element of corporate management in the global age.

At the GSR Study Meetings, case studies are presented not just of GSR and philanthropic activities carried out from a corporate perspective but also of companies working to resolve global issues through their main business activities. These case studies pave the way for discussion and investigation of norms of conduct for global companies.⁷¹

Interestingly, the first sentence illustrates that conventional notions of CSR in Japan have been limited to legal compliance and risk management. In other words, Japan's corporations have been recognizing CSR as a matter of risk management, not as one of corporate citizenship.

B. WHITE PAPER ON INTERNATIONAL ECONOMY AND TRADE 2004

In 2004, when the Japanese stock market was recovering from the burst of its bubble economy, METI published its *White Paper on International Economy and Trade 2004*. It appears to be the only volume mentioning CSR, although METI publishes the white paper every year. The heading for CSR activities was "The value creation capacity of companies and 'Corporate Social

⁷¹ Nikkei GSR Project, *What Is GSR?* online: Nikkei <<http://www.nikkei.co.jp/gsr/global/index.html>> [emphasis added].

Responsibility' (CSR).⁷² The paper raises the issue of why "the value creation capacity of companies and CSR could be compatible".⁷³

In a general statement, the white paper introduces statistics that indicate recognition by the management of Japan's corporations of CSR's relationship to profits that exceeds the global average among other jurisdictions:

. . . CSR in the past was often interpreted as costs that came with social obligations of companies. In recent years, the awareness has been spreading that promoting CSR can be compatible with corporate profitability. For example, as Figure 2.1.20⁷⁴ shows, many corporate managers believe that performing CSR is not simply a part of public relations activities but that it has a high priority in corporate management and is vital to corporate profitability. Managers who believe that CSR is essential for corporate profitability account for as much as 79 percent of the total in Japan, and 68 percent globally.⁷⁵

The white paper proposes three answers to the above question, the last one being most relevant for the purposes of this paper.⁷⁶ It reads:

⁷² METI, *White Paper on International Economy and Trade*, *supra* note 59 at 102.

⁷³ *Ibid* at 103.

⁷⁴ "Figure 2.1.20 Awareness of the importance of CSR by managers (Japan/other countries)" in *ibid* at 104 citing Yotaro Kobayashi et al "The 15th Corporate White Paper on 'Market Evolution' and 'CSR Management': Toward Building Integrity and Creating Stakeholder Value", online: Japan Association of Corporate Executives <<http://www.doyukai.or.jp/en/policyproposals/2002/030326.html>>; PricewaterhouseCoopers, "5th Annual Global CEO Survey: Uncertain Times, Abundant Opportunities", online: <http://www.thesmithfamily.com.au/webdata/resources/files/PwC_Global_CEO_Survey.pdf>.

⁷⁵ METI, *White Paper on International Economy and Trade*, *supra* note 59 at 103–04.

⁷⁶ *Ibid* at 103–05; The *White Paper* suggests:

The first reason is that there is an overlap between CSR and investment in intellectual assets designed to increase company value. . . . For example, the promotion of human capital and the building of a good network with customers as investment in intellectual assets are regarded from the viewpoint of CSR as companies' social responsibility for employees and customers.

For the second reason, when intellectual assets are understood in terms of building processes to increase company value, these same processes contribute to CSR as well. For example, good corporate governance, as discussed earlier, not only leads to favorable corporate profitability but also is conducive to environmental management and compliance that are part of CSR[:]

The promotion of CSR leads to building the distinct character of a company as a source of competitiveness. As companies need to become distinct in the wake of the changes in the environment of competition, companies' efforts to address CSR issues on the strength of their uniqueness leads to continued support from stakeholders through the sharing of values with stakeholders such as customers, shareholders and employees.⁷⁷

Even considering that the statement is a view of METI, the basic idea of CSR in Japan has been deemed to be profit maximization through risk management.

Following publication of the white paper of 2004, in 2008 the world economy underwent a significant downturn, and Japanese corporations faced numerous management obstacles, including the strong yen and higher crude-oil prices. During that period, directors and officers of Japanese corporations could not realize two types of sustainability at the same time. Interestingly, the METI did not express the same active message regarding CSR in its white papers of 2005 or later. There may have been concern that if the METI prioritized the sustainability of society, it would harm the sustainability of corporations, which would be sued by shareholders for damages or would be taken over by other persons who would prioritize the sustainability of the corporation. In this economic situation, directors have been willing to maintain only the sustainability of their corporation, a trend unlikely to change unless there are written and clear statutory or regulatory provisions directing them or encouraging them to pursue the sustainability of society. For legislators and regulators in Japan, in this situation it may be difficult to obligate the private sector to promote CSR activities that impose burdens on corporations. As noted above, directors will not place burdens on their corporations without clear benefits or legal indications in a downward economic situation.

C. SUMMARY

In summary, conventional CSR activities by Japan's corporations can be deemed to be based on their business plan, and not initiated for social-

ibid at 104.

⁷⁷ *Ibid.*

welfare purposes apart from their economic benefits. Certainly, this way of thinking by Japan's corporations does not necessarily mean that people in Japan are not interested in non-profit activities, ecology, and other social and environmental sustainability issues. There exist many non-profit organizations and other bodies that are committed to improving both local and global society. However, people might not expect to contribute to socially important goals through business corporations incorporated in Japan. Rather, Japanese citizens, especially employees of business corporations, have been eager to directly receive more beneficial and protective treatment from their corporations, essentially expecting business corporations to be successful in respect of the profitability and sustainability of their business.

IV. JAPAN'S CORPORATE LAW ON CORPORATE SOCIAL RESPONSIBILITY

A. INTRODUCTION

Article 1 of Japan's *Companies Act*, enacted in 2005, specifies that the "formation, organization, operation and management of companies shall be governed by the provisions of this Act, except as otherwise provided by other acts."⁷⁸ Corporate law, a part of the former *Commercial Code* and now the *Companies Act*,⁷⁹ has been considered the statutory framework for the formation and activities of business corporations, and not as law that directly regulates their conduct.⁸⁰ Such regulations are expected to be found in the fields of labour law, environment law, and other remedial legislation.

⁷⁸ *Companies Act* (会社法) (第一編第二編第三編第四編), Act No 86, art 1, translated by Japanese Law Translation, online: <<http://www.japaneselawtranslation.go.jp>>.

⁷⁹ Until the enactment of *Companies Act* of 2005, corporate law was encoded in the *Commercial Code*.

⁸⁰ The *Companies Act* does not specify the purpose of business corporations, but it does provide that shareholders shall have "[t]he right to receive dividends of surplus" and "[t]he right to receive distribution of residual assets", even if the articles of incorporation provide otherwise. See *Companies Act*, *supra* note 78, art 105(1)-(2).

This separation of the scope and purpose of corporate and remedial laws is related to both Japan's traditional bureaucratic government and the fact that there exists no specific definition of CSR in Japan. In such a situation, managers of Japan's corporations can undertake CSR activities in the limited scope either of what they think beneficial to their corporation directly or indirectly, or because specific laws require the corporation to obey. Once the specific statutes, ordinances, or other legal regulations require specific conduct by corporations, management has to follow the regulations, as it is their fiduciary duty to ensure the corporation complies with corporate law.

When Japan's business people discuss CSR, the major concerns relate to employment, consumer welfare, and the environment. In terms of consumers, product safety has been considered by the relevant government agencies,⁸¹ and a large number of lawsuits brought by victims have facilitated the government's response.⁸² The civil actions have also resulted in monitoring and arguably have influenced the activities of corporations where they bear the costs of monetary damages, loss of sales due to negative reputational effects, et cetera. In that sense, it can be said that the law and society have had some success in making business corporations conscious of this kind of CSR. Unless specific regulations exist, managers are expected to enhance corporate value (i.e., shareholder value) using their business judgment. The next parts of this paper focus on two specific aspects of CSR: employee protection and environmental protection. The former has been an objective traditionally and the latter is a rather new target that has come under corporate governance in the past two decades.

⁸¹ See e.g. Consumer Affairs Agency, *Jurisdiction of Consumer Affairs Agency*, online: <<http://www.caa.go.jp/en/index.html>>; Ministry of Health, Labour, and Welfare, *Household Product Safety Measures*, online: <<http://www.mhlw.go.jp/english>>.

⁸² See also Part VI, below.

B. HISTORY OF CORPORATE LAW IN THE CONTEXT OF CORPORATE SOCIAL RESPONSIBILITY

1. SOCIAL PROBLEMS REGARDING ENVIRONMENTAL POLLUTION IN THE 1950S AND 1960S

After World War II ended in 1945, Japan was under occupation by the General Headquarters/Supreme Commander of the Allied Powers (GHQ/SCAP) until 1952. Initially, the GHQ/SCAP tried to diminish the powers of *zaibatsu*, which was the dominant form of corporate group in Japan at the time and was considered to have facilitated the war by funding and supplying products. In the middle of the dissolution of *zaibatsu*, the GHQ/SCAP changed its stance to one of restrengthening Japan's industries; this shift was due to the Korean War beginning in 1950 and the need for production allies. It was a restart of development of Japan's economy.

Predictably, Japan began to face social and health problems associated with pollution because of the emergent development of heavy industries.⁸³ Many lawsuits were filed in court against major corporations and the government for tort damages, and citizens' movements for CSR in the field began to be widely recognized and well organized.⁸⁴ They succeeded in making legislators establish the *Environmental Pollution Prevention Act* in 1967, which was consolidated into the *Basic Environment Law* in 1993.⁸⁵

Because of the litigation and consequent legislation, corporations causing pollution were required to internalize environmental risk and damage within their risk-management practices. However, it was very probable that the corporations considered the externalities to the extent of their legal liabilities and negative impact to their businesses, such as loss of reputational capital and costs to respond to lawsuits and environmental-protection movements. There is still no evidence to show that corporations have any duty to prevent

⁸³ See e.g. Cases listed at *supra* note 36 at Tsu District Court (Yokkaichi branch).

⁸⁴ See generally, Ministry of the Environment (Japan), *White Paper on Pollution in Japan 1969* (in Japanese), online: <<http://www.env.go.jp/policy/hakusyo/hakusyo.php3?kid=144>>.

⁸⁵ See Ministry of the Environment (Japan), "The Basic Environmental Law—Outline", online: <<http://www.env.go.jp/en/laws/policy/basic/leaflet2.html>>.

pollution in excess of the expected loss; typically under the Learned Hand formula (i.e., the estimated amount of damages corporations will be liable for from possible tort litigation multiplied by the estimated possibility of losing)⁸⁶ will be lower than the certain cost to avoid pollution.

2. CONTRIBUTION TO POLITICAL PARTIES AND *ULTRA VIRES*

One of the biggest tensions regarding CSR in Japan has involved contributions to political parties. The Liberal Democratic Party (LDP) dominated Japan's politics for 38 years, since 1955, its governance referred to as the "55-year system".⁸⁷ Many large corporations were willing to make contributions to LDP, given its stability as a political force. Shareholders in Yawata Iron & Steel, now Nippon Steel after its merger with Fuji Iron & Steel, commenced a derivative action against the directors for damages on the ground that political contributions were *ultra vires* private corporations.⁸⁸ In 1970, the Supreme Court of Japan gave a judgment for defendants. The Court concluded that political contributions by private corporations are expected because they are bodies existing in society; therefore, their political contributions are within the scope of corporate legal power and are not *ultra vires*.⁸⁹ Second, the Supreme Court held that such contributions do not constitute a breach of directors' duties if they are within reasonable limits, considering factors such as corporate scale, financial condition, and amount of the contribution.⁹⁰

⁸⁶ See *United States v Carroll Towing Co.*, 159 F 2d 169 (2d Cir 1947).

⁸⁷ See Ellis S Krauss & Robert J Pekkanen, "The Rise and Fall of Japan's Liberal Democratic Party" (2010) 69:1 *The Journal of Asian Studies* 5 at 6.

⁸⁸ Plaintiff shareholders also argued that political contributions were unconstitutional since they would disturb freedom of expression of shareholders and people in general. See *Supreme Court Decision of 24 June 1970*, 24:6 *Minshu* 625 (in most cases, the names of plaintiffs and defendants are not published; therefore, typically the court's name and date of judgment are used to specify the case).

⁸⁹ *Ibid* at 628–30.

⁹⁰ *Ibid*.

In 1948, prior to the judgment, the *Political Funds Control Act* had been established (which has been amended many times subsequently).⁹¹ In Japan, political contributions by business corporations to political parties are not flatly banned, but there are limitations imposed on the amount.⁹² The Act is premised on the assumption that corporations' political contributions are harmonized to Japan's system of governance, and that too many contributions might be harmful to the Japanese norms regarding protection of society because they would influence public policy in favour of the rich or privileged.

3. CORPORATE LAW REFORM DISCUSSION FOR THE AMENDMENT IN 1981

In 1974, the Japanese *Commercial Code*,⁹³ which provided the corporate-law regime until the establishment of the *Companies Act* of 2005, was amended to regulate misrepresentations in the financial statements of publicly listed corporations, also called "creative accounting" in Japan.⁹⁴ The most famous case in respect of misrepresentation was *Sanyo Special Steel Co Ltd*.⁹⁵ The

⁹¹ *Political Funds Control Act*, Act No 194 of 1948 (in Japanese), online: e-Gov <<http://law.e-gov.go.jp/htmldata/S23/S23HO194.html>> (subsequent major changes were by Act No 64 of 1975, Act No 4 of 1994 and Act No of 135 of 2007).

⁹² *Ibid*, art 21-3.

⁹³ *Commercial Code*, Law No 48/1899, art 266-3, etc. before the amendment. In addition, in 1974, *Act on Special Provisions on the Commercial Code Concerning Audits, etc. of Stock Companies* (商法及び株式会社の監査等に関する商法の特例に関する法律), Law No 22/1974, was newly enacted.

⁹⁴ See e.g. Kazuyuki Suda, "Creative Accounting and Accounting Scandals in Japan" in Michael Jones, ed, *Creative Accounting: Fraud and International Accounting Standards* (West Sussex: John Wiley & Sons, 2011) ch 14.

⁹⁵ The expression of "window dressing" is often used in the United States as well as in Japan, although it is not clearly defined legal terminology. See e.g. Jean Eaglesham & Justin Baer, "SEC to Target Bank 'Window Dressing'", *Financial Times* (18 September 2010) 4; Michael Rapoport, "Regulators to Target 'Window Dressing'", *The Wall Street Journal* (16 September 2010) A1. For the proposal mentioned by the SEC, see Securities and Exchange Commission, "17 CFR Parts 229 and 249 Short-Term Borrowings Disclosure:

main focus of the amendments was accounting and enhancing the audit system. At the same time, during discussion of the amendments, both houses of the Diet declared supplementary resolutions, which required consideration of CSR in further legislation.⁹⁶ The resolutions illustrate the Diet's concern about the problems of pollution and employee protection in corporate activities, as well as the social welfare and benefits of stakeholders generally. Generally, supplementary resolutions are very abstract and are not deemed to be a part of the law in Japan; rather, they indicate points to be discussed in a future Diet session.

Acting in correspondence with growing awareness of the issues, the Office of Directors of the Ministry of Justice's Civil Affairs Bureau started to discuss further amendments to the *Commercial Code*, which were subsequently enacted in 1981. As the first step for discussion of corporate-law reform, in 1975 the Office distributed "Points of Discussion" to the affiliated organizations,⁹⁷ soliciting their opinions.⁹⁸ In terms of CSR, it suggested two directions for amendments. The first was to add a general provision on CSR, which would require corporations and their directors to consider

Proposed Rule" (28 September 2010), online: SEC <<http://www.sec.gov/rules/proposed/2010/33-9143fr.pdf>>.

⁹⁶ See Supplementary Resolution by the Committee on Judicial Affairs, the House of Representatives on 3 July 1973, online: National Diet of Japan <<http://kokkai.ndl.go.jp>>; Supplementary Resolution by the Committee on Judicial Affairs, the House of Councillors on 21 February 1971, online: National Diet of Japan <<http://kokkai.ndl.go.jp>>.

⁹⁷ Organizations affiliated to (or interested in) the future amendment of the *Commercial Code*, e.g., economic federations, stock exchanges, universities, Japan Corporate Auditors Association, bar associations (national, i.e., Japan Federation of Bar Associations, and domestic bar associations in prefectures), Japan Federation of Certified Public Tax Accountants' Associations, and Japanese Institute of Certified Public Accountants.

⁹⁸ Ministry of Justice, Civil Affairs Bureau, Office of the Director, "会社法改正に関する問題点" (Discussion Points on the Corporate-Law Amendment) (1975) 704 Shōji-hōmu 6. For the purpose and background of the hearing, see Makoto Yazawa et al, "企業の社会的責任の論点" (Discussion Points on Corporate Social Responsibility) (1975) 705 Shōji-hōmu at 2-7. See also Kubota, *supra* note 40.

stakeholders. The second was to add specific provisions to be obeyed by corporations in specific laws besides the *Commercial Code*.

Regarding the first potential option, there were strong objections by corporate-law scholars as well as business associations.⁹⁹ The reasons presented were, first, that corporate law should consist of rules to balance the conflicting interests of shareholders and creditors, and that corporations should pursue the maximization of corporate value. Second, social welfare and stakeholders' protection should be realized by other legal regimes, such as labour law, human rights law, and environmental law. Third, the view was that once corporations could be expected to pursue public purposes—as with the *Stock Act* of 1937 in Germany under Nazism, whose related provision was deleted by German legislators in 1965¹⁰⁰—dictators might restrict private business activities by corporations. Finally, if management was required to consider public policy while running corporations, it would allow them to conduct the corporation's activities with very wide discretion. The view was that anything besides transactions with conflicts of interest would not

⁹⁹ For opinions submitted to the Ministry of Justice (MOJ), see MOJ, ed, “会社法改正問題に関する意見” (Opinions and Issues on the Corporate Law Amendment) (1976) 728 *Shōji-hōmu* 37; Takeo Suzuki, “歴史はくり返す” (History Is Repeated) (1975) 578 *Jurist* 10; Akio Takeuchi, “企業の社会的に責任に関する商法の一般規定の是非” (The Appropriateness of General Provisions in the Commercial Code on Corporate Social Responsibility) (1976) 722 *Shōji-hōmu* 33. Professors Takeuchi and Suzuki were prominent commentators who were opposed to the introduction of general provisions on CSR. For commentary by supporters, see Jiro Matsuda, “会社の社会的責任について” (Corporate Social Responsibility) (1975) 713 *Shōji-hōmu* 22 (Mr. Matsuda was a former judge of the Supreme Court of Japan). Also, for useful articles on the outline and history of discussion on CSR by strongly supportive scholars, see e.g. Toshikazu Suenaga, “企業の社会的責任” (Corporate Social Responsibility), in Shigeru Morimoto, Kawahama Noboru & Maeda Masahiro, eds, *企業の健全性確保と取締役の責任* (*Corporate Soundness and Liabilities of Directors*) (Tokyo: Yuhikaku, 1997) 140; Kazuhiko Nakamura, “企業の社会的責任論からコーポレート・ガバナンス論へ” (From Corporate Social Responsibility to Corporate Governance Theory) (2002) 22 *Daito Bunka University Hōgaku-kenkyūjo-hō* 7.

¹⁰⁰ *Aktiengesetz* [AktG] [Stock Corporation Act], 30 January 1937, *RGBL I S* 107, art 70 s 1.

constitute a breach of directors' duties under such an approach, and there were concerns about the incentive effects this approach would have.¹⁰¹

In contrast, the second direction, which was to add specific provisions to existing laws, was basically supported, although some objections existed.¹⁰² In practice, this option would bring no direct, material changes to the situation. Probably due to the limited and indirect effects, most advocates for corporate-law reform did not become interested in this idea, regardless of whether they supported strong regulation of corporate activities or opposed additional regulation.¹⁰³ Provisions deemed to advance public policies in Japan have traditionally been recognized as belonging to public law, including labour and environmental law, which is considered the proper domain to regulate relationships between the state and private actors. Until remedial protection is set as a legal obligation of corporations, directors do not have to obey under their fiduciary duty to the corporation. Ultimately, no provisions on CSR were introduced to the *Commercial Code* with the 1981 amendments. This choice can also be explained in part by the ambiguous scope of CSR in Japan, as discussed further below.

4. TREND OF HOSTILE TAKEOVERS IN 1970S AND 1980S

In the 1970s and 1980s, Japan's corporations faced a considerable increase in hostile-takeover attempts by raiders who purchased a bulk of shares in target corporations. These developments included a number of takeover attempts by foreign entities. The most famous case was when Thomas Boone Pickens Jr. bought a large number of shares in Koito Manufacturing, which

¹⁰¹ See Takeuchi, *supra* note 98 at 40.

¹⁰² See *supra* note 97.

¹⁰³ See chapters by various authors in Masafumi Nakahigashi & Hideyuki Matsui, eds, *会社法の選択 (Selections of Corporate Law)* (Tokyo: Shōji-hōmu, 2010). This book analyzes the transformation of corporate law in Japan from the perspective of the actors involved in the reform. These actors include government, scholars, investors, managers, employees, consumers, and local societies, who all try to realize their interests/benefits through legislation. As described later, the Legislative Council under the Ministry of Justice has been a traditional place where the actors present their opinions and discuss them with each other to achieve the best results.

belonged to Toyota Group.¹⁰⁴ In fact, it was not really a hostile takeover but was considered “greenmail”. During these takeover activities, management tried to seek defensive measures, including tightening of cross-shareholding. At the same time, they looked forward to more flexible interpretations of exemptions for stock repurchases, which before 2001 were prohibited (with limited exemptions) under *Commercial Code* article 210.¹⁰⁵ Furthermore, they started to expect amendments to the *Code* that would enable corporations to buy back their shares, although they had to wait for such amendments until 2001. Effective in 2001, corporations could buy back their shares by following the related provisions and regulations of the *Commercial Code* or *Companies Act*.¹⁰⁶ The major regulations address these procedures, such as shareholder meetings, permitting tag-along rights for all shareholders, and takeover bids. Depending heavily on which scheme is chosen, they create relatively complicated requirements.¹⁰⁷ Other regulations address substantive issues, such as limitations on the amount of money that can flow out from corporations, which is a creditor-protection mechanism.¹⁰⁸

Some corporate-law scholars proposed new interpretations of the exemptions to let corporations defend themselves against a buy-up of a large number of their shares.¹⁰⁹ Professor Akira Morita appears to have been the strongest proponent for such a flexible interpretation.¹¹⁰ Interestingly, his main work is on CSR, as he is the well-known author of *Social Responsibility*

¹⁰⁴ See “Volatile and overblown manner of Mr. Pickens” (in Japanese), *Nikkei* Newspaper (21 May 2008, evening edition).

¹⁰⁵ *Commercial Code*, *supra* note 92, art 210; *Companies Act*, *supra* note 77, arts 155–65.

¹⁰⁶ *Ibid.*

¹⁰⁷ See *ibid.*, art 461, s1.

¹⁰⁸ *Ibid.*

¹⁰⁹ See e.g. Akira Morita, “緊急避難としての自己株式取得グリーンメーラー対策” (Stock Buyback as an Emergency Evacuation: Measures against Greenmailers) (1990) 20:3–4 *Kobe Gakuin Hougaku* 61 (495) [Morita, “Stock Buyback as an Emergency Evacuation”]; Akira Morita, “自己株式取得禁止の緩和論について” (A Discussion on Deregulating the Bans on Stock Buyback) (1991) 43:4 *Doshisha Hōgaku* 1 (567).

¹¹⁰ See *ibid.*

of *Modern Corporations*.¹¹¹ He proposed an ambitious interpretation, suggesting that a target corporation that buys up its shares is covered by the exemption permitting a corporation to exercise its rights under *Commercial Code* article 210, item 3, if it is done to protect stakeholders, especially its employees.¹¹² In spite of his efforts, Morita's interpretation was not generally accepted in practice or by corporate-law scholars. One reason was that directors repurchasing the stocks illegally would be liable for breach of their fiduciary obligations,¹¹³ because stock buyback means payback to shareholders, and, from the viewpoint of protection of creditors under the limited-liability regime, strict limitations should be set on that kind of outflow of cash or assets.

Above all, the critical responses to the position in favour of using stock repurchases were that it would give broad discretion to the target management, allowing their possible entrenchment, and that it would facilitate greenmailers' requests to buy back their shares, in contrast to the original idea. No responsive step was taken by Japan's government or the Diet.

5. M&A SCHEMES MADE MORE FLEXIBLE BY CORPORATE-LAW REFORM IN 1990S AND 2000S

Since the late 1990s, Japan has been in a tough period of recovery as a result of the bursting of an economic bubble. The government's basic strategy was to facilitate competition. Therefore, corporate law was expected to encourage merger and acquisition (M&A) activity by enabling corporations to use schemes that are new to Japan, and by introducing a less burdensome procedure that allowed shareholders' meetings to be skipped for small-scale amalgamations. The first break from the traditional framework was the introduction of share exchanges and share transfers in the 1999

¹¹¹ Akira Morita, 現代企業の社会的責任 (*Social Responsibility of Modern Corporations*) (Tokyo: Shoji-houmu, 1978).

¹¹² Morita, "Stock Buyback as an Emergency Evacuation", *supra* note 108 at 93–94. (See also *ibid* at 80–88 for related articles).

¹¹³ Under what was then Article 266 of the *Commercial Code*.

amendments.¹¹⁴ This change enabled corporations to have a 100% shareholding relationship, through resolutions at shareholders' meetings of the party corporations, without the consent of every shareholder.¹¹⁵ The change included the establishment of holding companies.¹¹⁶

In 2000, schemes for corporate divestures with universal succession of assets and liabilities were introduced in Japan.¹¹⁷ In the process of enabling a divesture with universal succession, protection of creditors, especially employees, was to be seriously discussed, as the effect of universal succession could be to change a debtor corporation without the individual consent of creditors. Employees, especially, could be harmed by a corporate divesture, because their working conditions could be drastically changed. However, substantial protections were not provided for employees, other than as contractual counterparties in the *Commercial Code*. Instead, the Diet responded to this concern by establishing new legislation, the 2000 *Act on the Succession to Labour Contracts upon Company Split*,¹¹⁸ declared in force at the same time as the amendment to the *Commercial Code*. The current

¹¹⁴ See Masafumi Nakahigashi, 企業結合・企業統治・企業金融 (*Business Combination, Corporate Governance, and Corporate Finance*) at 171–228 (Tokyo: Shinzansha, 1999) (as the leading article that advocated introduction of share exchange transactions into corporate law), originally published as Masafumi Nakahigashi, “アメリカ法上の三角合併と株式交換” (Triangular Mergers and Share Transfer in the United States) (1994) 28:1 *Chukyo-hōgaku* 1.

¹¹⁵ These share transfers originate in Japan, where a party corporation can establish its 100% holding corporation at the same time as the effective date of the transaction. See *Companies Act*, *supra* note 77, art 2 item 31, art 783, art 795.

¹¹⁶ This change refers both to corporations (i.e., a corporation to be a wholly owning parent and an corporation to be a wholly owned subsidiary through a share-for-share exchange, which is an M & A method unique to Japan), as well as the *Model Business Corporation Act*. See Committee on Corporate Laws, *Model Business Corporation Act* (Chicago: American Bar Association, 2008).

¹¹⁷ See Masafumi Nakahigashi, “組織再編” (Corporate Reorganizations) Nakahigashi & Matsui, *supra* note 102 at 257.

¹¹⁸ Act on the Succession to Labor Contracts upon Company Split, Act No 103 of 2000, translated by Japanese Law Translation, online: <<http://www.japaneselawtranslation.go.jp>>.

Article 1 reads: “The purpose of this Act is to promote the protection of workers by prescribing special provisions, etc. to the *Companies Act* (Act No. 86 of 2005) concerning succession, etc. to labour contracts in cases where a company is split.” The point to be emphasized is not only that the Act was not built into the *Commercial Code*, but also that it is under the jurisdiction of the Ministry of Health, Labour and Welfare (MHLW), not the Ministry of Justice, which means that the Act was established outside of the traditional scope of corporate law.

The latest amendment to enable more flexible M&A transactions was brought into force on the establishment of the *Companies Act* of 2005. The *Companies Act* allows the use of cash or other property besides shares in amalgamations, share exchanges, corporate divestitures, etc.¹¹⁹ Squeeze-outs of minority shareholders are now deemed not to be illegal per se, although there are still questions as to what procedure would be appropriate and how much the fair price for minority shareholders should be. The change of basic policy was symbolic in the introduction of a new kind of shares, “class shares subject to class-wide call” (*zenbu-shutoku-jokou-tsuki shurui-kabushiki*).¹²⁰ Beyond their original purpose, these kinds of shares have been frequently used for management buyouts. There have been abusive management buyouts, and courts have been trying to temper such activities, but such efforts seem largely in vain. Currently, the Corporate Law Committee at the Legislative Council is considering amendment of the *Companies Act* to respond to these abusive activities.¹²¹

¹¹⁹ *Companies Act*, supra note 77, art 749.

¹²⁰ *Ibid*, art 108(1) specifies: “A Stock Company may issue two or more classes of shares with different features which have different provisions on the following matters” and its item 7 reads, “such Stock Company shall acquire all of such class shares by resolution of the shareholders meeting”. The original purpose for allowing such kinds of shares was to squeeze out existing shareholders in order to enable insolvent corporations to finance new equity without using legal insolvent-reorganization (rehabilitation) procedures.

¹²¹ See Toru Kitagawa, MBO “における価格決定申立事件再考 [上] [下] ” (Re-considering Cases on Determining Stock Prices in MBOs (Parts 1 & 2) (2010) 1889–1890 *Shōji-hōmu* 4 at 4. See also Minister of Economy, Trade and Industry, 企業価値の向上及び公正な手続確保のための経営者による企業買収 (MBO) に関する指針 (*Guidelines on Increasing Corporate Value and Ensuring Regulatory*

The major disputes centre on the form of appraisal remedies, and the courts are expected to determine fair value of shares by exercising their reasonable discretion.¹²² The effect on stakeholders of bought-out corporations is rarely discussed. However, the establishment of a corporation's reputation has been considered one of the big merits of listing on stock exchanges, and it is considered worth the cost of listing to attract employees with high value. Putting it another way, it could make employees nervous about management buyouts, but these issues are rarely, if ever, discussed.

6. FULL-SCALE HOSTILE-TAKEOVERS BOOM IN MID-2000S

The year 2005 was highly disruptive for corporate managers, as many full-blown hostile takeovers were launched, each deal drastically larger in number and scale than the previous one. Armour et al have observed that Japan's severe economic problems and financial-system distress in the 1990s caused a loosening of the *keiretsu* corporate-group linkages, and cross-shareholding and stable shareholding practices declined substantially through the mid-2000s.¹²³ They suggest that Japanese financial institutions' ownership declined markedly, in large measure due to international capital-adequacy

Compliance in the Context of Management Buyouts (MBOs) (4 September 2007), online: Government of Japan <<http://search.e-gov.go.jp/servlet/PcmFileDownload?seqNo=0000027760>>.

¹²² The disputes occur both in negotiations and before the court. Parties are expected to negotiate disputes arising under the *Companies Act* before they bring any dispute to the court. This type of lawsuit is categorized into cases examined under the *Non-Contentious Cases Procedures Act*. See *Companies Act*, *supra* note 77, art 870(4)(ff). The bill was passed on May 20, 2011 as Act No. 51 of 2011, in force 1 January 2013. For the discussion of the Diet Discussion Committee on Non-Contentious Cases Procedures Act of Legislative Council, see "Division Domestic Relations Trial Act – Legislative Council" (in Japanese), online: Ministry of Justice <http://www.moj.go.jp/shingi1/shingikai_hishoujiken.html>.

¹²³ John Armour, Jack B Jacobs & Curtis J Milhaupt, "A Comparative Analysis of Hostile Takeover Regimes in the US, UK and Japan (With Implications for Emerging Markets)" (12 August 2010) [unpublished, Columbia Law and Economics Working Paper No 377, online: SSRN <<http://ssrn.com/abstract=1657953>>].

requirements and the need to clean up their balance sheets. This trend left an opportunity for foreign ownership of shares by institutional investors, which increased their holdings to 27% of market capitalization in 2008, almost three times the amount held in the mid-1990s.¹²⁴

The hostile takeover that first shocked corporate managers, was a case in which Mr. Takafumi Horie, former CEO of Livedoor, tried to buy out Nippon Broadcasting System, Inc. (NBS) in 2005. In an attempt to defeat Livedoor's bid, the NBS board issued to Fuji warrants whose exercise would drastically dilute Livedoor's stake; the Tokyo High Court affirmed the injunction.¹²⁵ Armour et al observe:

The *Livedoor* court enumerated four examples of abusive motives: (1) greenmail, (2) 'scorched earth' practices involving stripping the target of intellectual property or key customer relationships after the acquisition, (3) liquidation of the target's assets to pay down debt of the acquirer, and (4) selling off assets unrelated to the core business of the target in order to pay a [large] dividend.¹²⁶

The Court in *Livedoor* found insufficient evidence to establish any of these motives and held that the NBS board had issued the warrants with the primary purpose of preserving management's control.¹²⁷

Since 2005, many listed corporations have introduced ex ante defensive measures, especially so-called "advance warning-type defense measures".¹²⁸ Management of target corporations often try to defend them by announcing benefits to stakeholders, especially employees, as well as triggering defensive measures that occurred in *Steel Partners v Bull-Dog Sauce*.¹²⁹ In that case, U.S.

¹²⁴ *Ibid* at 35.

¹²⁵ *Tokyo High Court Decision of 23 March 2005*, 1173 Hanrei Times 125 (Nippon Broadcasting System v Livedoor) [*Livedoor*].

¹²⁶ Armour et al, *supra* note 122 at 38.

¹²⁷ *Ibid*.

¹²⁸ See generally, Amane Fujimoto et al, "敵対的買収防衛策の導入状況" (Present Situation of Defensive Measures against Hostile Takeovers) (2010) 1915 Shōji-hōmu 38.

¹²⁹ See *Supreme Court decision of 7 August 2007*, 61:5 Minshu 2215. See also Wataru Tanaka, "ブルドックソース事件の法的検討 [上] [下]" (Legal Analysis on the Bull-

private-equity fund Steel Partners and its affiliates owned 10.25% of the outstanding shares of Bull-Dog Sauce, and in 2007, an affiliate of Steel Partners launched a tender offer for all of the company's outstanding shares. As a defensive measure, the board of Bull-Dog Sauce made a discriminatory allocation of warrants to shareholders, each warrant exercisable into one common share. Steel Partners was issued the warrants, but was the only shareholder prohibited from exercising them; rather, it could receive only the cash value of the stock into which the warrants could have been exercised. The shareholders approved the defensive measure by special resolution, garnering 83% support. Steel Partners sought a preliminary injunction from the Tokyo District Court to enjoin the warrant issuance, which the Tokyo District Court dismissed, concluding that the discriminatory allocation of warrants was not in conflict with the principle of shareholder equality where the company's stockholders have approved the measure by special resolution and equal economic benefits to shareholders are assured.¹³⁰ The Tokyo High Court affirmed this decision, finding that discriminatory treatment among shareholders based on the attributes of the shareholders does not violate the principle of shareholder equality if the measure is necessary and reasonable to

Dog Case) (2007) 1809–1810 Shōji-hōmu 4 at 15; Mafumi Nakahigashi, “ブルドックソース事件を巡る法的戦略と司法審査” (Legal Strategies and Judicial Examination on the Bull-Dog Case) (2007) 59:11 Kigyo-kaikei 70; Masafumi Nakahigashi, “ブルドックソース事件と株主総会の判断の尊重” (The Bull-Dog Case and Respecting the Decision of the Shareholders Meeting) (2007) 1346 Juristo 17; Shigeru Morimoto, “ブルドックソースvsステール・パートナーズ事件---新株予約権の無償割当てと株主平等の原則・不公正発行” (Bull-Dog vs Steel Partners Case: Allotment Without Contribution of Stock Purchase Rights (SPRs), Shareholder Equality Principle and Unfair Issuance) in Masafumi Nakahigashi, Kenichi Osugi & Gaku Ishiwata, eds, *M&A判例の分析と展開 II (Cases on Mergers and Acquisitions II: Analysis and Future Development)* (Tokyo: Keizai-horei-kenkyukai, 2010) 6; Sadakazu Osaki, “The Bull-Dog Sauce Takeover Defense” (2007) 10:3 Nomura Capital Market Review 2; Linklaters, “Steel Partners v Bull-Dog Sauce: Analysis” (10 August 2007), online: <<http://www.linklaters.com/pdfs/publications/japan/SteelPartnersvsBulldogClient.pdf>> (use Internet Explorer as browser to access).

¹³⁰ *Tokyo District Court Decision of 28 June 2007*, 1805 Shōji-hōmu 43 (Steel Partners Japan Strategic Fund (Offshore), LP v Bull-Dog Sauce Ltd).

prevent damage to corporate value.¹³¹ The Court held that Steel Partners was an abusive bidder (*ran-yo teki baishu sha*), based on its short-term strategy of reselling the shares of the target company at a profit to a third party or to the target company itself, or of selling the assets of the target company at a profit.¹³² The Court held that in the face of an abusive bidder, the reasonableness test would be satisfied if the defensive measure did not cause excessive or unreasonable damage to the bidder. On further appeal, the Supreme Court of Japan affirmed the decision on the basis that the warrant issuance was necessary and reasonable; the Court held that the issuance was not inconsistent with the principle of equality, finding it unnecessary to inquire into the abuse, as it was for the shareholders to determine whether damage would arise on the acquisition of control.¹³³

These tensions are also reflected in policy reports. For example, the Corporate Value Study Group of METI released *Takeover Defense Measures in Light of Recent Environmental Changes* in 2008, offering a clearer understanding of for whom corporate value should be protected:

The premise of takeover defense measures is that they should be ultimately for the protection of the interests of shareholders. Rights plans in the United States, which presuppose that shareholders finally decide to support or oppose takeovers through appointment or dismissal of directors at the general meeting of shareholders, are viewed as a mechanism that makes it possible to draw out from the acquirers and the incumbent management of the target companies better takeover terms and management proposals for shareholders. In other words, rights plans are understood as measures for protecting the interests of shareholders. . . .

The board of directors must not obscure the interests to be protected by takeover defense measures by referring to the interests of stakeholders other than shareholders in cases that does not protect or enhance the shareholder

¹³¹ *Tokyo High Court Decision of 9 July 2007*, 1806 Shōji-hōmu 40 (Steel Partners Japan Strategic Fund (Offshore), LP v Bull-Dog Sauce Ltd).

¹³² *Ibid* at 51.

¹³³ *Supreme Court Decision of 7 August 2007*, 1809 Shōji-hōmu 16 at 18–19 (Steel Partners Japan Strategic Fund (Offshore), LP v Bull-Dog Sauce Co, Ltd).

interests, or must not broadly interpret implementation terms for the purpose of managerial entrenchment.¹³⁴

Constituency clauses in the United States have been understood by Japanese corporate scholars as negative, because they give managers an ability to entrench themselves, with wide discretion and little accountability.¹³⁵ Arguably, the resistance to directors' use of stakeholders' interests as an excuse when exercising defensive measures is because such scholars believe that directors ultimately have to run the business for shareholders.

According to Professor Hiroaki Hara, in the early stages of discussion, especially discussion concerning employees as corporate stakeholders, some scholars supported directors' efforts to defend their corporations from hostile takeovers in order to protect employees' firm-specific investments in Japanese corporations.¹³⁶ Such protection would, in turn, contribute to the competitiveness of Japan's corporations. Hara has observed that the cooperative feature of the relationship between employees and Japan's corporations contributes to shareholders' benefit; the most important resources that create added value are well-trained and well-organized employees.¹³⁷ However, he suggests that these rationales are not supportable, because in theory, the value of firm-specific human assets is to be reflected in

¹³⁴ Corporate Value Study Group, METI, *Takeover Defense Measures in Light of Recent Environmental Changes* (Tokyo: METI, 2008) at 2, 7, online: <<http://www.meti.go.jp/english/report/data/080630TakeoverDefenseMeasures.pdf>>. Members of the Group included several respected scholars, including Professor Hideki Kanda, University of Tokyo, as the chairperson.

¹³⁵ For a discussion between the Panel (Professors Shigeru Morimoto and Masafumi Nakahigashi) and the floor discussants (Professor Minoru Tokumot, etc.) on CSR and employees' protection, see Shigeru Morimoto et al, "企業結合法の総合的研究" (Rethinking the Law of Groups of Companies Overall) (2009) 71 *Shiho* 124 at 168–71 (Records of Symposium at annual meeting of Japan Associate of Private Law (*Nihon Shihogakkai* 日本私法学会) (held on October 12 & 13)).

¹³⁶ Hiroaki Hara, "企業買収と対象会社従業員との関係" (Corporate Relationship of Takeovers and Targeted Corporations' Employees (Part I)) 3 *Kyoto-Gakuen-Hougaku* at 104–06.

¹³⁷ *Ibid.*

stock price, and because in fact, abusive breaches of implicit contract, typically long-life employment, are not observed by empirical studies.¹³⁸

In spite of Professor Hara's analysis, the initial point about the connection of employee protection to shareholder value and overall corporate benefit has merit. But that debate has rarely occurred in Japan's scholarly community or business practices. Many leading scholars have been involved in major hostile-takeover cases, hired to offer their legal opinions, and policy decisions have been taking place in the courtroom, not the public-policy arena. Before it became the subject of a more scholarly or public debate, the hostile-takeover boom ended with the global financial crisis.

C. CURRENT DISCUSSION AT LEGISLATIVE COUNCIL

Currently, the Corporate Law Committee of the Japanese Legislative Council is working on a proposal to the Minister of Justice containing points for corporate-law reform.¹³⁹ The triggering event was the change of political power from the LDP to the Democratic Party of Japan (DPJ) in 2009. The Minister of Justice made a request to the Legislative Council for potential amendments to the *Companies Act*, especially from the viewpoint of ensuring trust from a wide range of stakeholders with interests in the corporation.¹⁴⁰ The suggested main topics are legal regimes on corporate governance and on corporate groups and business combinations. Concerning these topics, a new feature is that "Rengo", the Japanese Trade Union Confederation and an important supporter of the DPJ, has dispatched its representative to the Committee.

¹³⁸ *Ibid* at 106–07. For the detailed analysis, see Wataru Tanaka, “敵対的買収に対する防衛策についての覚書” (Note on Defensive Measures against Hostile Takeovers (Part II)) (2005) 131:6 *Minshohou-zashi* 800. He suggests that the theory of “breach of trust” dominates anti-takeover statutes in many states in the U.S. (See *ibid* at 809).

¹³⁹ Distributed materials and minutes are available at the MOJ website. See Ministry of Justice, “Corporate Law Committee—Legislative Council” (in Japanese), online: MOJ <<http://www.moj.go.jp/shingi1/shingi03500005.html>> [MOJ, “Corporate Law Committee”] (NB: file location will move into the database for past committees).

¹⁴⁰ The query was made on 24 February 2010: *Query no 91*, online: MOJ <<http://www.moj.go.jp/content/000023763.pdf>>

Rengo is presenting two major proposals to the Committee.¹⁴¹ The first proposal is to introduce a new system that enables employees to propose a candidate to be corporate auditor (*kansayaku*) for a shareholders' meeting.¹⁴² There has been strong opposition to this proposal from the business world, scholars, and legal professionals, and Rengo has not been able to garner any public support. The reason for the opposition is that the potential role of a corporate auditor dispatched by employees is ambiguous, especially in the context of business judgments, potentially creating serious conflicts between shareholders' value and employees' interests. Other reasons are that it could bring unnecessary trouble to decision-making processes, and that most directors in Japan's corporations are former employees in the same corporations and as such are unlikely to harm employees unless there are emergency events. Moreover, according to the Ministry of Health, Labour and Welfare, lifelong or long-term stable employment, which has been deemed one of Japan's traditional employment customs, is being re-evaluated in the 21st century, but is still the main custom in Japanese corporations, despite pressures to revise it in the 1990s.¹⁴³

The second proposal by Rengo is to enable employees to express their opinions when an M&A transaction or issue is going to be discussed at a shareholders' meeting. Their opinions would be distributed to all shareholders with the business report or financial report, etc., in advance of the meeting. Here again, Rengo's views are unsupported. The reasons given against the proposal are that it would delay profitable reorganization, and that employees can express their opinions in other ways.¹⁴⁴

¹⁴¹ For the discussion below, see materials and minutes of the Committee available at MOJ, "Corporate Law Committee", *supra* note 139.

¹⁴² *Kansayaku* is a system unique to Japan. See Japan Corporate Auditors Association, *Corporate Auditor System in Japan*, online: <<http://www.kansa.or.jp/en>>.

¹⁴³ Ministry of Health, Labour and Welfare, 平成21年版 労働経済の分析 (2009 *Analysis of Labor Economy*) at 185. The report suggests that corporations tended to limit number of permanent employees in 1990s, and that nearly 70% of corporations are willing to maintain "long-term stable employment" for as many workers as possible at present and in the future.

¹⁴⁴ See e.g. *Outlines of Opinions Submitted to "Interim Proposal Concerning Revision of Companies Act"*, Material no 19 for the Corporate Law Committee, (22 February 2012);

These proposals were not adopted in a report from the Legislative Council to the Minister of Justice.¹⁴⁵ Besides discussion in the Committee, it will be necessary to watch for future political movement. Since the DPJ lost its majority seat at the House of Councillors, any legislative amendments cannot be enacted without co-operation with the other parties under the current *nejire kokkai* (twisted or deadlocked) Diet. Thus, there are uncertainties with the present government, and there is speculation that the current House of Representatives, which is the lower house, could be dissolved and a general election held. Issues are therefore in flux, and in this political situation, while proposed legislative bills that do not relate to the recent earthquake disaster continue to be on the Diet's table for discussion, they are unlikely to be the subject of active consideration.¹⁴⁶ Any progress is unlikely for an extended period, given that the government's attention is appropriately directed towards dealing with the damage and harms from the terrible earthquake, which seems to have reduced the former conflict between parties.

Minutes of the 8th Meeting of the Committee (22 December 2010) at 14–20, online: MOJ <<http://www.moj.go.jp/content/000068174.pdf>>; *Minutes of the 18th Meeting of the Committee* (21 March 2012) at 46–47, online: MOJ <<http://www.moj.go.jp/content/000097964.pdf>>. See also *Interim Proposal Concerning Revision of Companies Act*, online: Tokyo Stock Exchange <http://www.tse.or.jp/english/news/09/111219_a.html> (an unofficial English translation supplied by the Tokyo Stock Exchange mainly for foreign investors).

¹⁴⁵ On August 1, 2012, the Corporate Law Commission finalized the draft of the Points for the Amendments, and the report is pending approval of the General Meeting of the Legislative Council as of September 2012. See Legislative Council, *Proposal Concerning Revision of Companies Act* (7 September 2012), online: MOJ <<http://www.moj.go.jp/content/000102013.pdf>>.

¹⁴⁶ Two opposing views exist. One is that the LDP and the DPJ would collaborate in response to the matters. It would be possible that all the bills submitted by Cabinet (through MOJ in case of corporate law) would be passed with little discussion at the Diet. Sometimes this kind of procedure is taken due to political expediency.

1. UNCHANGED BASIC STANCE OF CORPORATE LAW

To summarize, the transformation of corporate law in Japan has not advanced a shift towards CSR in the sense of supplying a framework for corporate activities that would internalize possible externalities and create new duties and liabilities for directors and officers. The changes do not explicitly recognize specific stakeholders other than shareholders and creditors in general. In practice, corporations are run on the basis of profits, and corporate law does not expect them to conduct CSR without direct or indirect benefits to the corporation. Their contributions to society would not stand on their citizenship, but on a business basis. Therefore, in order to achieve greater protection of employees, the environment, etc., Japan has to enact laws in a different form.

As a matter of corporate law, CSR has been commonly understood as one of many business strategies in Japan. In terms of risk management, directors address changing circumstances. If they foresee changes to laws, the establishment of comparable standards for CSR, and/or the rise of social movements, then they would prepare for their corporations to easily adjust their business activities to the possible changes. To that extent, corporate law could require corporate directors to promote CSR activities even without any enforceable laws yet in place.

V. LABOUR LAW

Employees have been one of the major stakeholder groups discussed in terms of CSR. Japan has taken the same view as Canada, where “the duty of care provisions are often referred to or reflected in liability provisions in respect of employment, labour, pensions and environment legislation.”¹⁴⁷

Laws on employment are under the jurisdiction of the MHLW,¹⁴⁸ which seems to have little involvement or concern in the ongoing discussion of

¹⁴⁷ Janis P Sarra & Ronald B Davis, *Director and Officer Liability in Corporate Insolvency: A Comprehensive Guide to Rights and Obligations*, 2d ed (Markham, Ont: LexisNexis, 2010) at 44.

¹⁴⁸ The MHLW website is available in English. See Ministry of Health, Labour and Welfare, online: <<http://www.mhlw.go.jp/english>>.

amendment to the Companies Act.¹⁴⁹ The only exception was the enactment of the *Act on the Succession to Labour Contracts upon Company Split* in 2000, when a corporate-divestitures system was introduced into Japanese corporate law.¹⁵⁰

The limited progress towards CSR in theory or practice in Japan may be at least partly due to the fact that lawmakers and scholars of labour law are not necessarily eager to collaborate with those of corporate law to realize CSR-type initiatives. Perhaps they believe that only employment law should address CSR concerns regarding employees; however, the outputs, laws, and regulations of lawmakers and labour scholars are not particularly effective. They have been unsuccessful in enforcing their regulations against corporations with legal sanctions, due largely to strong objections from the business world. Many regulatory rules are in the form of provisions requiring best efforts, essentially corporations following the provisions as far as they can afford to accept them. Such best efforts are not backstopped by enforceable standards. Usually, Japanese corporations do not observe best-effort rules.¹⁵¹

However, there are also counterbalancing norms that have some attributes of CSR. In Japan, many corporations are cash rich and their price-to-book ratio (PBR) is low, meaning that Japanese corporations have reserve cash to keep employees paid when market demand is low, rather than following the Anglo-American practice of massive layoffs of employees when demand drops. This PBR enables them to keep the practice of lifetime employment, one of Japan's long-standing traditions, which continues to exist—albeit with some exceptions, such as part-time workers and dispatched workers from temporary staff-recruitment agencies. Traditionally, Japan's labour law has been considered to be a regime friendly to employees.

¹⁴⁹ See, Ministry of Health, Labour, and Welfare Establishment Act arts 3 and 4 (Act No 97 of 2009) ". Art 3 is on their mission, and Art 4 is on the affairs under the jurisdiction. Japan traditionally has had a vertically segmented administrative system (or overcompartmentalized bureaucracy).

¹⁵⁰ See Hara, *supra* note 135 at 71 (where he finds that the enactment of the Act was the only event that corporate law and labour law were both enthusiastic about).

¹⁵¹ Interview of Professor Hajime Wada, Nagoya University (9 March 2011).

However, it has been deregulated through legislative initiatives such as amendments to the *Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers* of 1985.¹⁵² This *Act* has enabled corporations to use dispatched workers flexibly, which means that such workers are in less stable employment positions.

Also, the number and ratio of non-permanent and part-time employees is increasing. They are vulnerable in periods of business depression, in spite of the fact that labour law attempts to facilitate a change of status from non-permanent to permanent under certain conditions. For such employees' protection, the *Act on Improvement, etc. of Employment Management for Part-Time Workers* was established in 1993. Its Article 8 reads:

With regard to a Part-Time Worker for whom the description of his/her work and the level of responsibilities associated with said work (hereinafter referred to as "Job Description") are equal to those of ordinary workers employed at the referenced place of business (hereinafter referred to as "Part-Time Worker with Equal Job Description") and who has concluded a labor contract without a definite period with a business operator, and whose Job Description and assignment are likely to be changed within the same range as the Job Description and assignment of said ordinary workers, in light of the practices at said place of business and other circumstances, throughout the entire period until the termination of the employment relationship with said business operator (hereinafter referred to as "Part-Time Worker Equivalent to Ordinary Workers"), the business operator shall not engage in discriminatory treatment in terms of the decision of wages, the implementation of education and training, the utilization of welfare facilities and other treatments for workers by reason of being a Part-Time Worker.

The labor contract without a definite period set forth in the preceding paragraph shall include such a labour contract with a definite period that is

¹⁵² *Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers*, Act no 88 of 1985, translated by Japanese Law Translation, online: <<http://www.japaneselawtranslation.go.jp>>.

repeatedly renewed and is therefore reasonably deemed to be a labour contract without a definite period under socially accepted conventions.¹⁵³

The critical problem regarding this provision is that it is not enforced by any penalties, which means the provision is understood as a best-effort rule. If part-time employees want to be deemed permanent employees, for whom labour law offers greater protection, then they have the ability to commence legal action, including lawsuits. However, employees see the possibility that such actions would encourage corporations not to renew their contracts, and thus, they are hesitant to enforce their rights, considering the time, costs, and possible loss of employment.

Rengo expressed its opinion of the *Act* and International Labour Organization (ILO) C 175 of 1994 as follows:¹⁵⁴

Rengo has collaborated with political parties out of power, e.g., Social Democratic Party of Japan, New Komeito (Japanese political party), Democratic Socialist Party at the time, in order for the government and LDP to move to enact the *Act on Improvement, etc. of Employment Management for Part-Time Workers* in 1993 at last.

However, the Act to facilitate improvement of treatment of part-time employees through administrative guidance is far from what Rengo and the collaborated parties required, i.e., “prohibition on discriminative treatment in working conditions with a reason of part-time employees”, and there existed no amendment of the Act until now.

In 1994, at the International Labour Conference of ILO “C175 Part-Time Work Convention” was adopted. Rengo was for the Convention, but Japan’s employers were against and the Japanese government abstained from voting. By the adoption, the big effect was expected on amendment of the Act. However, the government has not been taking active response, for the reasons of employment customs specific to Japan, e.g., seniority wage system.

¹⁵³ *Act on Improvement, etc. of Employment Management for Part-Time Workers*, Act no 76 of 1993, art 8, translated by Cabinet Secretariat, online: <<http://www.cas.go.jp/jp/seisaku/hourei/data/PTW.pdf>>.

¹⁵⁴ Rengo, “連合がめざすパート労働とは” (What Is Part-Time Employment for Rengo?) at 5, online: <<http://www.jtuc-rengo.or.jp/roudou/koyou/hiseikiroudou/part/houshin/index.html>> [translated and abridged by the authors].

Rengo and other unions have been requesting the government to ratify ILO 175, but to date, their efforts have been in vain.¹⁵⁵

In spite of the current legal regime, corporations sometimes are willing to take care of employees beyond what laws with enforcement powers require.¹⁵⁶ If, and only if, corporations see any possible changes in written law and/or case law, do they commence preparing to satisfy the foreseeable standards and/or rules even before the law comes into force. The reason is their recognition of the time and effort required to respond to the changes. With fear of future and possible violation of the law, corporations have incentive beyond what the current law requires. Any action would be undertaken as a result of their own judgment as a part of their risk-management strategy. In terms of corporate law, directors would be personally liable under their duty of care if they did not respond to possible changes in law in a timely and effective manner.

Japanese-based global corporations are very sensitive to so-called “country risk” in developing their business outside Japan. As with many corporations operating internationally, they have concerns about meeting changing legal standards in labour or environmental protection in host countries that differ radically from the standards in their home jurisdiction. When a Japanese corporation enters a country, through a subsidiary or other business entity that is part of the corporate group, it enters understanding the particular corporate law, labour, and other remedial statutes. If the laws were to change considerably, it might create increased risk for the Japanese corporation operating in the host jurisdiction, with implications for the entire corporate group. In this context, the development of CSR norms in a host jurisdiction may be more readily acceptable, but the imposition of strict legal standards may encounter resistance by Japanese corporations.

Finally, under securities regulation in Japan, listed corporations are requested to include information on employment issues in their public

¹⁵⁵ See e.g. *ibid*; Zenroren (National Confederation of Trade Unions), “全労連” (Homepage), online: <<http://www.zenroren.gr.jp/jp/kintou/index.html>>.

¹⁵⁶ Interview of Professor Hajime Wada, Nagoya University (9 March 2011) (the following reasons are also from the interview).

annual reports, pursuant to the *Financial Instruments and Exchange Act*.¹⁵⁷ The reports must include information on affairs of employment.¹⁵⁸ For example, Sony's annual report for financial year 2010 reads, "In our corporation and its consolidated subsidiaries, 23% of employees belong to the unions, and the labour-management relations are good."¹⁵⁹ The purpose of the disclosure is to supply material information to investors, and it can be understood in a context of the specific corporation's risk management.

Hence, elements of CSR are made transparent through securities law, particularly in terms of disclosing employee unrest or satisfaction. However, labour and similar laws that address employees are somewhat segregated from any moves to create a broader CSR approach. Therefore, there is no field of law responsible for requiring corporations to undertake CSR as society expects at present. The future of CSR on labour issues would largely depend on how seriously disclosures requested by securities law would be taken by both society and investors. If contents of disclosure become standards in Japan, there would exist strong commitment by corporations to society and employees.

VI. ENVIRONMENTAL LAW

A number of issues regarding CSR and environmental law in the corporate-law context have been touched on above. In Japan, environmental law is under the jurisdiction of the Ministry of the Environment Government (MOE). In 2001 it was upgraded from an agency (*cho*) to a ministry (*sho*).¹⁶⁰ The government in 1998 also established the Institute for Global

¹⁵⁷ *Financial Instruments and Exchange Act*, Act No 25 of 1948, art 24, translated by Financial Services Agency, online: <<http://www.fsa.go.jp/common/law/fie01.pdf>>.

¹⁵⁸ *Ibid*, art 15, item 1 & Form 3 (Cabinet Office Ordinance concerning Disclosure of Corporate Affairs).

¹⁵⁹ See Sony, *2010 Annual Financial Report* (28 June 2010) at 17, online: Ullet <<http://www.ullet.com/edinet/S00064AG.pdf>>. (The information is much less fruitful than annual reports in the United States. *C.f.* Sony, *Form 20-F for FY 2010*, at 105–106 [under the *Securities Exchange Act* of 1934 in the United States]).

¹⁶⁰ See Ministry of the Environment, online: MOE <<http://www.env.go.jp/en>>.

Environmental Strategies (IGES),¹⁶¹ signalling its interest in being engaged in environmental-protection initiatives.

In Japanese legal scholarship, few scholars specialize in environmental law, and their focus is primarily on individual subtopics, such as torts, administrative law, and international public law, without a comprehensive framework for the intersection of these discreet areas with corporate law. Japanese tort law initially responded to a huge problem of pollution in the period of rapid growth in Japan after World War II. As noted above, a large number of judgments against corporations required them to try to internalize the externalities, with corporations addressing pollution as a matter of risk management. The tort litigation included the government as a defendant. In addition to domestic affairs, corporations became more sensitive to global affairs.

Mr. Eiichiro Adachi, chief researcher of the Japan Research Institute, insists that corporate business and environmental matters are entering a new phase; corporations are now facing actual events that can negatively influence them.¹⁶² These influences include a strengthening of regulations to limit business activities, and rising costs due to the influence of environmental degradation.¹⁶³ He emphasizes the possibility that environmental adaptation will be key to corporate risk management.¹⁶⁴

However, there are considerable challenges to Japan meeting the stream of international environmental conventions. The profitability of corporations is still not back to the time prior to the economic shocks felt after Lehman Brothers' failure. The views of the business world are that the current government is not developing proper policies to facilitate business

¹⁶¹ See Institute for Global Environmental Strategies, online: <<http://www.iges.or.jp/en/index.html>>. The first chair was Mr. Akio Morishima, Professor Emeritus at Nagoya University and former visiting professor at the University of British Columbia. His original specialty was tort, especially public pollution.

¹⁶² Eiichiro Adachi, “環境を意識した経営戦略” (Environmentally Conscious Business Strategies) (2011) 581 *Gekkan-Kansayaku* 4 at 4.

¹⁶³ *Ibid* (for a brief history concerning on international movements and Japan's response, see *ibid* at 4–12).

¹⁶⁴ *Ibid* at 5.

activities, including tax-rate reductions. The private sector in Japan often concludes that it is not able to afford the costs of addressing environmental problems without specific direction by law and/or being able to foresee business gain over the cost.

As noted in the introduction, there are also serious issues surrounding emissions. In 2009, former Prime Minister Yukio Hatoyama's speech at United Nations Summit on Climate Change declared that Japan would have a 25% decrease in emissions compared with its 1990 level by the year 2020.¹⁶⁵ The response of Japanese corporations was that such a target was impossible, yet corporations are required to respond to the targeted amount of reduction. The public-policy debate in this respect continues, but it may now have been delayed by the more pressing issues in the aftermath of the earthquakes.¹⁶⁶

The Japanese government has expressed some interest in biological diversity as another CSR-type initiative—the notion of introducing a new era of living in harmony with nature. The interest and potential commitment to this was born at the Nagoya Biodiversity Summit.¹⁶⁷ Some environmental reports published by listed corporations refer to the problems of creating biological diversity; however, here again, what they can do seems to be limited in the current depressed economy.

In spite of the global financial downturn, it is noteworthy to mention Canadian and U.S. developments in transparency of corporate activity regarding the environment. As noted earlier, Canadian National Instrument 51-102 expands the scope of required disclosure, and the Annual Information Form expressly includes disclosure of environmental policies as risk factors, such as environmental and health risks and political

¹⁶⁵ Yukio Hatoyama, "Statement by Prime Minister Yukio Hatoyama at the United Nations Summit on Climate Change" *Speeches and Statements by Prime Minister* (22 September 2009), online: Prime Minister of Japan and His Cabinet, <http://www.kantei.go.jp/foreign/hatoyama/statement/200909/ehat_0922_e.html>.

¹⁶⁶ See Ministry of the Environment, *supra* note 159.

¹⁶⁷ See Convention on Biological Diversity, "COP—10 Documents" (18–29 October 2010), online: COP 10 <<http://www.cbd.int/cop10/doc/>> (convention occurred in Nagoya, Japan).

considerations. Even in the U.S., where interest in climate-change issues is said to be low,¹⁶⁸ the Securities and Exchange Commission (SEC) has released its interpretation of needed disclosure requirements in its *Commission Guidance Regarding Disclosure Related to Climate Change*.¹⁶⁹

If the Financial Services Agency (FSA) in Japan were to require listed corporations to state this kind of information in their annual reports, just as they currently must on labour relations, companies would have to take a further step in considering environmental issues associated with their productive activities. It would be natural progress to require a statement on climate-change issues in annual reports, which are the most important disclosure documents for investors.¹⁷⁰

The enrichment of required contents of annual reports means that the stated items are important for investment decisions and for evaluating corporate profitability. In other words, environmental affairs could be said to be a matter of risk management in the terminology of corporate law. However, the possibility of new direct regulations and disclosure requirements could lead corporations to prepare themselves for the time when this possibility would be realized. To that extent, corporations are willing to undertake CSR activities beyond what the current law requires, just as discussed above regarding labour law.

VII. CONCLUSION

CSR in Japan is at a nascent stage of development. As an expressed normative goal of corporate law, it has not had much carriage. However, many elements of CSR have been adopted in other aspects of employment and environmental law, with sometimes questionable effectiveness. However, there are two developments that might encourage Japanese directors' initiatives in CSR activities.

¹⁶⁸ Adachi, *supra* note 161 at 10.

¹⁶⁹ SEC, *Commission Guidance Regarding Disclosure Related to Climate Change* (Release Nos 33-9106; 34-61469; FR-82) (2 February 2010), online: <<http://www.sec.gov/rules/interp/2010/33-9106.pdf>>.

¹⁷⁰ Adachi, *supra* note 161 at 10.

First, while directors and officers are generally expected to manage their corporations for maximization of corporate value and shareholders' interest, certain kinds of CSR activities will enhance their business, at least indirectly. When directors plan and implement CSR activities with such consideration, they are protected under the business-judgment rule. Historically, the business-judgment rule in Japan was somewhat different from the one in Anglo-American jurisdictions, since courts in Japan did not generally recognize the broad discretion of directors and they tended to second-guess decisions by later results.¹⁷¹ However, in a recent 2010 case, the Supreme Court of Japan respected directors' decisions based on an interpretation of the business-judgment rule that accorded directors broader discretion and protected directors where there has been reliance on specialists.¹⁷² By its nature, it is usually difficult to evaluate how much the specific CSR activities contribute to the specific corporate profit. Therefore, without specific evidence indicating that the directors disregarded the business-judgment rule, such as in cases of conflict of interest, insufficient information, or irrational decisions, the court indicated that directors would not be personally liable even if the CSR contribution was too much or unnecessary as a result.

Furthermore, once de facto standards, especially international standards for global corporations, are established, directors could be expected to follow the standards under their fiduciary duties to the corporation.¹⁷³ In this sense, it will be interesting to observe how Japan's corporations respond to *ISO 26000*.¹⁷⁴ Although it is still merely guidance, it could promote CSR activities by Japan's corporations for at least the following two reasons. First,

¹⁷¹ See e.g. Kenjiro Egashira, 株式会社法 (*Laws of Stock Corporations*), 3d ed (Tokyo: Yuhikaku, 2009) at 434–35.

¹⁷² *Supreme Court Decision of 17 July 2010*, 1353 Financial and Business Law Precedents 26 (Apamanshop Network Co case).

¹⁷³ Professor Kubota considers movements to making standards inside/outside Japan as a desirable direction. See Kubota, *supra* note 40 at 15.

¹⁷⁴ For additional details on *ISO 26000*, see "ISO 26000 – Social Responsibility", online: ISO <http://www.iso.org/iso/iso_catalogue/management_and_leadership_standards/social_responsibility.htm>.

ISO 26000 can be expected to supply reasonable grounds for directors to be protected by the business-judgment rule. Second, directors might be asked by shareholders, business partners, and other stakeholders to explain why they are not alert to, and active in, CSR activities. It would come to be identified as a risk not to follow *ISO 26000* insofar as directors are running the business as corporate citizens. If *ISO 26000* is eventually upgraded to a certification standard, the attitude of Japan's corporations will drastically change, considering their experience regarding the *ISO 9000* series and *14000* series.¹⁷⁵ Certification requirements under *ISO 26000* would lead corporations to follow the guidelines in order to ensure their activities in the world run smoothly, pursuant to their business judgment.

Second, even if there exists no certain regime at present, corporations are watching carefully for any possible changes to statutes, regulations, case law, administrative guidelines, and generally accepted standards. Once they see the possibility, they start to prepare to respond to the expected changes as an anticipatory measure. They may try to complete the minimum level of activities necessary for compliance. At the same time, they would try to avoid the risk that the completion would be less than what is expected in fact. In this sense, there exist two factors leading corporations to promote CSR activities beyond what the legal regime requests at present. The first factor is concerning time; corporations need to launch CSR activities on their own initiative before the actual change of law or standard comes into force and becomes enforceable. The second factor is uncertainty; corporations cannot avoid uncertainty in the content of the expected changes. These factors would not be avoidable in meeting their risk-management obligations, and they would facilitate CSR activities beyond what the actual legal regime would require in the future as well as at present.

The above analysis offers insights into how to promote CSR activities in Japan. One method is to give corporations incentives that will promote their business development. Another method is to threaten to change laws or

¹⁷⁵ See International Organization for Standardization, "ISO 9000 – Quality Management", online: ISO <http://www.iso.org/iso/home/standards/management-standards/iso_9000.htm>; International Organization for Standardization, "ISO 14000—Environmental Management", online: ISO <<http://www.iso.org/iso/iso14000>>.

standards, such that Japanese corporations respond as part of their risk-management strategy.

These two methods can probably be applied to other jurisdictions. The difference would be that Japan does not have a tradition of equity in its court system or a history of a purposive interpretation of written law; therefore, the political powers that let corporations feel possible change of written law or administrative guidance with enforcement are more critically important in Japan than in the common-law jurisdictions. These powers would be political parties, citizens' movements, pressures from international society, as well as the government and the Diet.

In conclusion, we refer back to the two types of sustainability discussed at the outset of this paper: sustainability of corporations and sustainability of society. They might have been considered not to stand together in Japan previously. That might explain why the *Sustainability Report 2009* of Toyota Motor Corporation cites the phrase "Users come first, then the dealers and, lastly, the maker" to show the order of priority in the company.¹⁷⁶ However, the two kinds of sustainability could be coordinated, as is evident in the following statement by Toyota personnel. In a recent issue of *Nikkei Business* on 21 March 2011, concerning the disaster of east Japan, Mr. Mitsuhiro Suzuki of the Aichi Social Welfare Conference Volunteer Center, who was an employee of Toyota Motor Corporation, suggested that the current disaster might give everyone an opportunity to think about the role of corporations in Japan.¹⁷⁷ He observed:

What can corporations offer for support in such serious disasters? Of course, their immediate concern is financial and other support for their corporate constituencies, including their employees, clients and consumers. At the same time, they are expected to more generally support citizens experiencing hardship. Corporations cannot continue to exist unless citizens take them as being necessary. In order to successfully encourage such sentiments, it is

¹⁷⁶ Toyota Motor Corporation, *supra* note 16.

¹⁷⁷ Interview of Mitsuhiro Suzuki, "被災地支援、義援金より当座の資金を" (Support to Damaged Areas, Present Money rather than Donation) *Nikkei Business* (21 March 2011)16 at 19.

important how the corporate employees conduct themselves in such situations, as important as manufacturing and good sales.¹⁷⁸

¹⁷⁸ See The Center (in Japanese), online: <<http://aichivc.jp>> [translated by author].