

**Japan's First Poison Pill Case,  
*Bulldog Sauce v. Steel Partners* :  
A Comparative and Institutional Analysis**

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ABSTRACT

This Article (I) provides an annotated translation of and background for the first Japanese Supreme Court case concerning hostile takeovers as well as laws related to the case; (II) comments on this case in its immediate context; and (III) relates this case to the American literature on hostile takeovers, a market for corporate control, and Japan's corporate governance and legal system. The case applies the principle of shareholder equality to a hostile takeover countermeasure involving what in effect was a greenmail payment to the acquirer. The countermeasures were approved by an overwhelming shareholder vote and compensated the acquirer for its shares by a formula that exceeded its planned purchase price, so in accord with the principle of shareholders' will and the meaning behind the principal of shareholder equality, the Supreme Court found that the countermeasures were acceptable. This Article claims the decision repudiates or should logically end the use of the concept “abusive acquirer”. The term as defined by the Tokyo High Court and others fails to produce a rationally applicable standard for courts

to apply, for boards of directors to think about when facing a hostile bid, or a useful standard considering shareholders' unique position under Japanese law in a takeover contest at present. This Article also claims that the systemic result, while still unclear, may be more pro-takeover than the US managerialist system. The shareholders are nominally given a chance to voice their views on takeover countermeasures at some point in the process in a reasonable period of time; in contrast, the US system generally provides only binding votes on director elections as an indirect means of voting on acquisitions. Whether this result will in fact be more conducive to a market for corporate control than the US depends upon whether Japanese companies continue to be permitted to return to significant cross-shareholdings coupled with ex ante poison pills as a nearly impervious barrier to takeovers. Finally, this Article claims that this result is explained best by an economic analysis including the political system as a whole and incentives peculiar to Japan's legal system's path-dependent evolution to the present. Relative to the US, Japan maintains labor law making firing relatively more difficult than in the US. This creates constituencies for perpetuating corporations' existence over current management control when economic times are bad. The Article discusses several other recent significant corporate governance and takeover events in evaluating the explanatory power of various stakeholder (culturalist, managerialist) versus economic models of behavior. It also analyzes which model of corporate governance the Bulldog case and surrounding laws appear to adopt. The Article concludes with a proposed legal solution to the possible result that ex ante poison pills and a return to cross-shareholding will stunt Japan's nascent corporate control market's growth. Implementing this solution could give Japan's economy and Japanese companies the benefits of a more vibrant and competitive control market than the US.

## I. ANNOTATED TRANSLATION OF THE APPEAL CASE

The Permissive Appeal Case with regard to the Decision Rejecting  
Appeal of a Decision Denying a Petition for a Preliminary Injunction  
against a Decision of a Shareholders' Meeting

*Bulldog Sauce v. Steel Partners*  
(Supreme Court, August 7, 2007)<sup>1</sup>

## 1. Summary

Bulldog Sauce's board of directors submitted a rights plan to prevent a hostile takeover by Steel Partners to a shareholders meeting. The plan was approved by essentially all shareholders present at the shareholders' meeting. The plan provided for a large payment to Steel Partners in exchange for its share of the warrants issued under the plan in lieu of the stock granted to the other warrant-holders. Japan's Supreme Court rejected Steel Partners' appeal of the Tokyo High Court's ruling that rejected Steel Partners' application for a preliminary injunction against Bulldog's 'poison pill'-type rights plan as either in violation of the principle of shareholder equality or being undertaken via a really unfair method. The Tokyo High Court had rejected Steel Partners' appeal of the Tokyo District Court ruling. The High Court labeled Steel Partners an 'abusive acquirer;' the District Court had not done so, and the Supreme Court held that the issue was a non sequitur in the case. The Supreme Court also held that Steel Partners bear the court costs.

Two days later, on August 9, 2007, the Board of Directors implemented the counter-measures.<sup>2</sup> This caused Steel Partners' hostile bid to fail.

## 2. Context

Modern Japan's M&A market has seen low transaction volume overall and even lower volume in hostile transactions. Between 1971 and 1990, Japan had 3 tender offers.<sup>3</sup> In 1991, the Diet passed a mandatory tender offer rule. This rule required that whenever an off-exchange offer would result in the acquisition of more than 33.3% of the targets shares, the offer must be extended to all shareholders.<sup>4</sup> The rule, like the Williams Act, requires that the shares be transferred pro rata from tendering stockholders, transfer of an entire block is impossible if the price is attractive to other shareholders. Thus, it was

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1 *Bulldog Sauce v. Steel Partners*, Hanrei Jihô No. 1983, 56 (2007).

2 K. UCHIDA / P. XU, "US Barbarians at the Japan Gate: Cross Border Hedge Fund Activism" at 1 (Bank of Japan Working Paper Series 2008).

3 C. MILHAUPT / M. WEST, "Institutional Change and M&A in Japan: Diversity Through Deals", in *The Japanese Legal System: Cases, Codes, and Commentary* 702, 703 (C.J. Milhaupt / J.M. Ramseyer / M.D. West, eds., 2006) (citing Mergerstat).

4 *Id.* at 706, citing Securities Exchange Act, Article 27-2(1)(4).

generally difficult to demand a control premium when selling a control block.<sup>5</sup> Japan's no-squeezeout rule further made tender offers means of eliminating minority positions.<sup>6</sup> Under these rules, activist investors were generally unsuccessful at effecting changes in corporate governance via changes of control or the threat of a hostile takeover.<sup>7</sup>

Japan's Diet has since revised its corporate law, securities law, and essentially all related law. The commercial legal landscape has been revised so many times since 1991 that it is difficult to keep track of.<sup>8</sup> Part of this set of reforms is the Company Law,<sup>9</sup> of which 3 provisions are the focus in this case.<sup>10</sup> By 2005, Japan's deal market volume and size were ranked 2nd and 3rd in the world, respectively.<sup>11</sup> This dramatic change has not gone unnoticed; commentary typically cites as reasons for these developments a decrease in cross-shareholdings and the entry of shareholder activist players such as Steel Partners; however, these developments followed directly from legal limitations on cross-shareholding<sup>12</sup> and other reforms since the financial crisis.<sup>13</sup> Partly in order to

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5 *Id.*

6 *Id.*

7 S. JACOBY, "Convergence by Design: The Case of CalPERS in Japan," 55 Am. J. Comp. L. 239 at 3 (2007).

8 The commercial code has been revised, inter alia, comprehensively in 1993, 1994, 3 times in 1997, 1999, 2000, and 2001, all before the enactment of the Company Law which is the topic in this case. MARK WEST, "The Puzzling Divergence of Corporate Law: Evidence and Explanations from Japan and the United States," in Milhaupt / Ramseyer / West, *supra* note 3, at 615, 624-626 (originally published in the University of Pennsylvania Law Review).

9 *Kaisha-hô, Law No. 86/2005.*

10 Article 109, dealing with shareholder equality, was adopted in 2005's Law 86. The other two laws authorize the issuance of warrants (as *shinkabu yoyaku-ken*) under certain conditions, but the history of when warrants became permissible is more complex. Convertible bonds and warrant bonds (bonds with warrants attached) were popular during the bubble era; however, warrants are now regulated in the Company Law. See, e.g., <http://allabout.co.jp/finance/moneyplan/closeup/CU20050302A/index.htm> (Japanese).

11 C. HINES / T. TANIGAWA / A. HUGHES, "Doing Deals in Japan: An Analysis of Recent Trends and Developments for the U.S. Practitioner", at ii (bepress Legal Series no. 1291 2006) (citing Thomson Financial).

12 Article 308(1) of the Company Law restricts share voting in the event of greater than 1/4 (25%) cross-shareholding, and the guidelines for application state that this includes portions owned by subsidiaries. In addition, the definition of parent-subsidiary relationship has been changed such that even a minority stake of 40% may trigger parent-subsidiary status if the parent controls a majority of the voting rights. Company Law Article 2(3) and (4). The tender offer rule also limits the acquisition of blocks over 33% (*supra* note 4) and reporting requirements analogous to the Williams Act.

13 K. SUZUKI, "Future Prospects of Takeovers in Japan Analyzed from the View of Share-ownership Structures and Laws in Comparison with the United States and the European Union", 42 Colum. J. Transnat'l L. 777, 777 (2004) ("It was reported that [cross-shareholding is declining] for several reasons, including a change in accounting standards that required companies to evaluate their cross-held shares on a market price basis or to recognize impairment losses if the corporation determined that the declining share price would not recover.") (citing H. Kanda et al. for research on cross-shareholdings).

provide some level of certainty for this new legal system,<sup>14</sup> the Supreme Court took on this case via a specially permitted appeal.

In Japan, academics have varying opinions concerning hostile takeovers and defenses. One Japanese academic writes that, not only are takeover defenses “one of the most difficult issues in U.S. corporate law,” “evidence is poor” as to whether they are a net economic positive and thus “opinions are quite divided among reasonable people.”<sup>15</sup> “No one can even discern the dominant view.”<sup>16</sup> Japan has pursued hostile takeovers and an M&A market only cautiously, and now that Japan has these, whether their benefits outweigh their drawbacks remains a controversial issue.

In *Livedoor v. NBS*, the Tokyo District Court and High Court enjoined NBS from diluting Livedoor's stake in the company via warrant issuance to more management-friendly parties in order to maintain control.<sup>17</sup> Like Steel Partners in *Bulldog*, *Livedoor* sued under the Company Law to claim that the warrant issuance was via a really unfair method. However, in *NBS*, the countermeasures were implemented by resolution of the board of directors without a shareholder vote. The courts attacked the board's decision for having been made without consulting shareholders and being purposed only to maintain incumbent management control. The courts declared that new warrant issuance must only occur under special circumstances and for the purpose of protecting the common interests of the shareholders. However, the Tokyo High Court said that a board of directors would still be deemed to be acting appropriately if the bidder were an “abusive acquirer,” a status determined on the basis of certain attributes<sup>18</sup> of the bidder or the offer. The *NBS* case refutes the claim that cultural norms unique to Japan would not tolerate hostile takeovers. Milhaupt wrote that it reflected changes in the legal and political landscape allowing takeovers to occur.<sup>19</sup> Another American commentator has written that it was decided despite cultural norms in Japan due to international pressure and may not be predictive of future lower-profile rulings.<sup>20</sup> The *Bulldog* Supreme Court ruling may be read to support the prospect that Japan is opening up to an M&A market, but this remains uncertain.

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14 See H. KANDA, “Symposium: Does Corporate Law Really Matter in Hostile Takeovers?: Commenting on Professor Gilson and Chancellor Chandler,” 2004 Colum. Bus. L. Rev. 67, 68 (Commenting on the fact that Japan has codified corporate law, but lacks court precedent, and thus faces an uncertain legal landscape).

15 *Id.*

16 *Id.* But see *id.* at n. 5 (qualifying this claim by citing L. Bebchuk et al. for the proposition that no longer does anyone claim that defenses ex ante increase shareholder value for shareholders of target firms).

17 1728 Shôji Hômu 41 (2005) (Tokyo High Ct., March 23, 2005).

18 S. ÔSAKI, “The Bulldog Sauce Takeover Defense,” *Nomura Capital Market Review* Vol. 10 No. 3, 2, 11 (2007) (quoted below in the commentary).

19 C. MILHAUPT, “In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan”, 105 Colum. L. Rev. 2171 (2005).

20 S. GIVENS, “Corporate Governance and M&A”, in *Japanese Business Law*, 161 et seq. (G. McAlinn, ed., 2007).

Japan's Ministry of Economy, Trade, and Industry (below, "METI") generally supports the creation of a market for corporate control.<sup>21</sup> In 2005 METI issued a set of guidelines (below, the "METI Guidelines") for hostile takeover defenses which would be acceptable in response to the demand for defensive measures resulting from *NBS* and related cases.<sup>22</sup> These guidelines have been very influential, including in the way countermeasures were adopted in the case below as well as in poison pill-type rights plans adopted before the emergence of a takeover threat.<sup>23</sup> They are officially not legally binding, but since they were generally adopted both by companies and the courts, they are legally relevant. Rights plans now cite uniformly as their purpose the protection and enhancement of corporate value and shareholders' common interests.<sup>24</sup> They also universally involve some shareholder confirmation of the plan, in order to follow the "principle of shareholders' will."<sup>25</sup> Whether managers were generally free to ignore shareholders' wishes in the past<sup>26</sup> or not,<sup>27</sup> METI's view going forward, supported by the courts, is that the three principles governing countermeasures are 1. the protection of corporate value and thus shareholders' common interests; 2. prior disclosure and reflection of shareholders' will; and 3. reasonability and necessity in response to the threat posed.<sup>28</sup> Some commentators argue that the METI guidelines are a betrayal of Japan's prospects for a hostile M&A market; however, the way *NBS* and Fuji Television behaved in *NBS* demonstrated that these guidelines were necessary to rein in abuse of the warrants by incumbent managers against acquirers and to give potential targets a framework in which to interact with bidders. In principle, the METI Guidelines require that corporate governance issues be resolved by and for shareholders.

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21 Conversations with METI officials.

22 "Guidelines Regarding Takeover Defenses for the Purposes of Protection and Enhancement of Corporate Value and Shareholders' Common Interests," May 27, 2005, METI. Reprint in *ZJapanR / J.Japan.L* 21 (2006), 143 et seq.

23 Around the time the Supreme Court's opinion was issued, roughly 13% of TOPIX 100 companies had "Shareholders' Will"-type rights plans modeled on the METI guidelines. N. HANSEN, "Memorandum on Current (August, 2007) State of Anti-Takeover Measures in TOPIX 100 Companies," internal memorandum written while working at a law firm as a summer associate (used with permission) at 1. All data were gathered from public disclosures of TOPIX 100 companies.

24 See, e.g., rights plan adopted by JFE Holdings on March 1, 2007, available online at <http://www.jfe-holdings.co.jp/en/release/2007/070301-2.html> or reproduced in part *supra* note 23, at 4; see also the rights plan in the instant case, detailed in relevant part in the Supreme Court opinion at 3 or Hanrei Jihô No. 1983, at 58 (2007).

25 *Id.*

26 See GIVENS, *supra* note 20, at 145-148 (giving historical examples of incidents and scholarship in support of the claim that Japan after World War II possessed law much the same as that of Illinois corporate law, but because of cultural differences, it was not really enforced) (2007).

27 S.N. KAPLAN / J.M. RAMSEYER, "Those Japanese Firms with Their Disdain for Shareholders," 74 Wash. U. L.Q. 403 (1996).

28 METI Guidelines, *supra* note 22.

Steel Partners has a reputation as an aggressive player in the market in Japan. The market generally reacts favorably to acquisitions by Steel Partners due to its reputation.<sup>29</sup> However, the lower court ruling referred to Steel Partners as an “abusive acquirer” because of its past success in obtaining greenmail via hostile tender offers.<sup>30</sup> The Tokyo High Court has issued a definition of this term in the past, but given the Supreme Court’s opinion to the contrary that it was not relevant in *Bulldog*, it is unclear when it would apply, if at all.

The laws at issue in the case are the Company Law Article 247 Number 1 and Number 2, Article 109 (1), and Article 278 (2). Article 247 states, “In the following situations, when the shareholder might suffer harm to its interests, shareholders, with respect to the company, may demand that the company cease issuing warrants offered under Article 238 of the Company Law: 1. Where said issuance of warrants violates the laws and regulations or the corporate charter; or 2. Where said issuance of warrants is undertaken via a really unfair method.”<sup>31</sup> (Article 238 authorizes the issuance of warrants to purchase shares provided the company fulfills certain requirements).<sup>32</sup>

Article 109 (1) states, “Joint Stock Companies must treat shareholders equally based on the quantity and contents of the stock they own.”<sup>33</sup>

Article 278 (2) states, “As for the things established by Article 278 (1) Number 1 and Number 2, the distribution of the warrants of Number 1 and the bonds of Number 2 must be based on the number of shares owned by the shareholders other than the joint stock company itself.”<sup>34</sup> (Article 278 (1) requires that Joint Stock Companies establish, when trying to issue warrants, (Number 1) the number, content, and calculation method for the warrants to be distributed to shareholders and (Number 2) in the event that bonds are attached, the type of debt, the calculated amount of each debt, and the calculation method).<sup>35</sup>

The Hanrei Jihô explains how the decision’s influence is thought of as follows (translation):

“This decision is one which judged the rightness of countermeasures adopted concerning an exceptional case where, in order to respond to the public tender offer, emergency countermeasures came to be taken, and moreover, along with these countermeasures, at a regularly scheduled shareholders meeting, an overwhelmingly large number of shareholders’ approvals were gained, and moreover Steel Partners received large sums as compensation. As for the introduction of countermeasures, the necessity of invoking shareholders’ resolutions (ordinary resolution,

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29 UCHIDA, *supra* note 2, at 4.

30 Supreme Court opinion at 5 or Hanrei Jihô 1983, at 60 (2007). *See also* ÔSAKI, *supra* note 18, at 11 for analysis of the High Court’s labeling Steel Partners an “abusive acquirer.”

31 This Article’s translation, Company Law, Article 247 Number 1 and 2.

32 This Article’s translation, Company Law, Article 238.

33 This Article’s translation, Company Law, Article 109(1).

34 This Article’s translation, Company Law, Article 278(2).

35 This Article’s translation, Company Law, Article 278(1) Number 1 and 2.

special resolution), the necessity of granting economic indemnification to the acquirer suffering losses from the countermeasures, its extent, etc., basically, nothing is shown in the way of ordinary guidelines, so with regard to these problems, there is no alternative but to wait for cases to accumulate; however, this case is thought to have a big impact on business practice because it is the first expression of the judgment of the Supreme Court on the sphere of applicability of the principle of shareholder equality, not only the method of inquiry and judgment, but also with regard to the appropriateness of so-called takeover countermeasures.”

*Bulldog* is summarized in Japan as a precedent in which a company’s gratis distribution of warrants designed to reduce a particular shareholder’s relative share of the company in response to a public tender offer by that shareholder was held to violate neither Article 247 Number 1 nor Article 247 Number 2 of the Company Law.<sup>36</sup> This is the first such case, and it is the first hostile takeover case decided by the Supreme Court of Japan.

### 3. Translation<sup>37</sup>

*Reasoning:*

[APPELLANT’S REASONING]

Appellant representative’s reasons, other reasons for appeal:

1. In this case, Appellant [Steel Partners], a shareholder in Appellee [Bulldog], asserts that Company Law (below, the “Law”) Article 247 Number 1 and Number 2<sup>38</sup> apply to require an injunction against Appellee’s granting gratis distribution of warrants in Appellee to Appellee’s other shareholders because this would violate the principle of shareholder equality and was conducted in a really unfair manner.

[FACTS]

2. According to the record, the facts of this case are as follows.

(1) Appellee is a *Kabushiki Kaisha* [Japanese joint stock corporation] mainly selling and manufacturing sauce and other flavorings, and its issued stock trades on the Tokyo Stock Exchange, Division 2.<sup>39</sup> On June 8, 2007 (all below dates refer to 2007 by default),

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36 This Article’s translation, Y. ITOH’s summary of the case on his website (last visited March 27, 2008). <http://www1.doshisha.ac.jp/~yaito/study/caseh19.html>

37 Items in brackets, emphases, and footnotes are all added.

38 For a translation see preceding page.

39 The second division of the TSE is generally more thinly traded and comprises smaller companies than the first division; this may make companies within the division less efficiently priced than in the first division.



Appellee's issuable shares totaled 78,131,000, and Appellee had 19,018,565 shares outstanding.<sup>40</sup>

(2) Appellant is an investment fund aimed at investment in Japanese business enterprises, and on May 18th, together with related legal entities, held about 10.25% of Appellee's issued shares. Also, A (below, "A")<sup>41</sup> is a Delaware Limited Liability Company wholly owned by Appellant set up with the purpose of acquisitions of stock, etc. for Appellant.

(3) A, on May 18th, aiming to acquire all of Appellee's issued stock, announced that it is making a public tender offer for Appellee's stock (below, the "Tender Offer") and delivered to the head of the Kanto Regional Finance Bureau<sup>42</sup> a tender offer commencement report. At first, the Tender Offer's offer period was set as from that date until June 28th with an offer price of 1,584 yen per share, but on June 15th the offer period was extended until August 10th, and the offer price was raised to 1,700 yen per share. Still, the initial offer price represented a premium ranging from 12.82% to about 18.56% above each average market price in the various applicable periods before the tender offer.

(4) On May 25th, Appellee delivered to the head of the Kanto Region Finance Bureau an opinion report which contained a list of questions posed to A, and to that end, on June 1st, A delivered a question reply report (below, the "Reply Report") to that same finance bureau head.

(5) In the Reply Report, it was recorded that 1. Appellant had neither any experience operating a company in Japan nor any current plans to do so, 2. Appellant did not itself intend to operate Appellee at the time, 3. Appellant lacked any vision as to plans which might be able to raise Appellee's business value and how to administer Appellee, 4. currently, Appellant held no business plans or operational plans for the event that Appellant were to acquire control rights over Appellee, and 5. because Appellant did not contemplate operating Appellee's daily business, it was unnecessary to answer questions related to Appellee's manufacturing and sales business, etc. There were no specific entries about returns on invested capital.

For these reasons, on June 7th, Appellee's board of directors determined that the Tender Offer impairs Appellee's business value and hurts Appellee's profits and the common interests of the shareholders, and they decided to oppose the Tender Offer.

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40 This point is significant in that Appellee was authorized to issue additional shares roughly equivalent to the amount distributed via the warrants, yet management apparently chose to amend the corporate charter anyway. This authorizes the future use of warrants as a potential countermeasure, but it also requires a supermajority vote for a special resolution, potentially making the measures more palatable to courts deciding the inevitable lawsuit on the principle of shareholders' will.

41 In the Hanrei Jihô, "A" is identified as Steel Partners Japan Strategic Fund SPVII, labeled "SPVII".

42 *Kantô Zaimu-kyoku*.

Also, Appellee's board of directors, on the same day, as a countermeasure in response to the Tender Offer, decided to submit for discussion to the shareholders' meeting scheduled for June 24th (below, the "Shareholders' Meeting") 1. a proposal for an amendment to the corporate charter regarding a certain gratis distribution of warrants, etc. (below, the "Charter Amendment"), and 2. also, conditioned on the Charter Amendment's passage, a proposal to effect a gratis distribution of warrants (below, the "Proposal"). Within the Charter Amendment, the part about the gratis distribution of warrants in essence stated, "Resolved, that Appellant, for the protection and advancement of the common interests of the shareholders and its business value, among warrant-holders, the exercise and acquisition by certain warrant-holders will receive treatment, determined by the board of directors, the shareholders, and the board of directors as delegated to them by the shareholders, which differs from the other warrant-holders. This shareholders' meeting's resolution is undertaken by extraordinary resolution."

(6) In this Shareholders' Meeting, Appellant went no further than to ask questions about the content of countermeasures in response the Tender Offer, the entire amount of costs necessary for their implementation, whether or not a tax burden would exist in the event that the respective countermeasures are implemented, and how Appellee would respond, etc. in the event of a new public tender offer after the Tender Offer has been withdrawn. Then, the Charter Amendment and the Proposal were passed with the approval of about 88.7% of those shareholders in attendance and about 83.4% of the total voting shares. In addition, the basic idea of the gratis distribution of warrants approved in this Shareholders' Meeting (below, with reference to these warrants, the "Warrants" or a "Warrant," and with reference to this distribution, the "Distribution") is as follows.

A. Under the method of gratis distribution of warrants, registered stockholders, etc. listed on the record date, July 10th, shall receive 3 of the Warrants for each share they own.

B. The Distribution shall go into effect on July 11th.

C. Upon exercise of 1 Warrant, Appellee shall issue 1 share in exchange (the "Share Distribution Number").

D. When Appellee issues shares in exchange for Warrants, the amount payable for the transfer shall be 1 yen per 1 share issued.

E. The Warrants' exercise period shall be from September 1st to the 30th of the same month.

F. Appellant, including related parties such as A (below, the "Appellant and Related Parties"), as disqualified persons, cannot exercise the Warrants (below, the "Exercise Condition").

G. Appellee, as of the date the Board of Directors set (a day before the first day of the exercise period), may acquire the Warrants from shareholders other than Appellant and Related Parties and, as compensation for the receipt of the Warrants, may issue the Share Distribution Number of shares in exchange for each 1 of the Warrants. Appellee,

as of the date the Board of Directors set (a day before the first day of the exercise period), may acquire the Warrants from Appellant and Related Parties and, as compensation for the receipt of the Warrants, may issue 396 yen in for each 1 of the Warrants (below, these stipulations are referred to as the "Acquisition Condition"). Additionally, the above recorded monetary sum corresponds to 1/4 the original price of the Tender Offer.

H. As for the acquisition of the Warrants being exchanged, Appellee's Board of Directors' approval is needed.

(7) Appellee's Board of Directors, on June 24th, received approval of the Proposal, so at the same time they decided the terms of the Distribution, even in the event that the results of confirming with the tax authority and shareholder taxation problems is that going through with acquisition of the disqualified persons Appellant and Related Parties' warrants based on the Acquisition Condition is judged impossible, the board decided that Appellee would exchange 396 yen per warrant (below, this decision is called the "Payment Decision") for all of the Warrants owned by Appellant and Related Parties anyway, without imposing as Appellee whatever various burdens and duties upon Appellant and Related Parties.

*[APPELLATE HISTORY]*

3. (1) Appellant, on the June 13th preceding the Shareholders' Meeting, asserted inter alia that where the requirements of Article 247 of the Law apply and apply by analogy to the Distribution, it violates the principle of shareholder equality and the articles of incorporation (below, the "Regulations, etc."), and that it is via a really unfair method, thus, with respect to the original decision, demanded and applied for preliminary injunctive relief from the Distribution (below, the "Petition for Preliminary Injunction").

(2) In the original decision, on June 28th, the court rejected the Petition for Preliminary Injunction, because even in the event that a gratis distribution of warrants is made to the Shareholders, when that gratis distribution actually change the Shareholders' position, Article 47 of the Law applies by analogy, and after considering the intention of the principle of shareholder equality, as for the Distribution, it does not violate the meaning behind the principle of shareholder equality or the Regulations, etc., nor could one say it was via a really unfair method.

(3) Appellant appealed to the below decision, but on July 9th, because if one thinks that the Distribution to be necessary to prevent injury to Appellee's business value and an appropriate and rational thing and that Appellant and Related Parties are what is called abusive acquirers, this does not violate the principle of shareholder equality and violate the Regulations, etc., nor could one say that it was via a really unfair method, and as such, this appeal was rejected.

*[SUPREME COURT'S REASONING]*

4. The reason for this appeal is disagreement with the below decision that the Distribution does not violate the principle of shareholder equality or the Regulations, etc., and that one could not say that it was via a really unfair method.

(1) Regarding the assertion of violation of the principle of shareholder equality

A. Article 109(1) of the Law establishes that Joint Stock Companies (below, "Corporations") must uphold the principle of shareholder equality in the form of equal treatment for shareholders based on the number and content<sup>43</sup> of stock that they own.

We cannot immediately conclude that gratis distribution of warrants violates the principle of shareholder equality, even if their content treats warrant holders discriminatorily, because this is not directly related to the content, etc., of stock. However, Article 278(2) of the Law establishes that the content and number of warrants and the determined method of calculation for the warrants distributed to shareholders, at the point where they receive a distribution based on their status as a shareholder, must be determined by the number of shares owned by the shareholder, etc. The sameness of the contents of the warrants distributed to the shareholders is interpreted as a precondition to the distribution. The meaning behind the principle of shareholder equality as pronounced in Article 109(1) of the Law should apply even in the case of a gratis distribution of warrants.

Then, because the content of the Warrants in the Distribution provides for discriminatory exercise conditions and acquisition conditions like those written above between Appellant and Related Parties and the other shareholders, in the event that shareholders other than Appellant and Related Parties exercise all of their warrants, or, in the event that all of Appellant's warrants are exchanged and purchased by Appellee under the Acquisition Conditions as compensation, Appellant and Related Parties will come to receive a substantial reduction in comparative share of stock and suffer a loss.

B. As for the principle of shareholder equality, in order to protect various individual shareholders' interests, it is usual to impose upon the company a duty to treat shareholders equally based upon the number and content of the stock that they own. However, ordinarily, the various individual shareholders' profits are inconceivable separate from the existence and development of the company. Therefore, in cases where, e.g., there arises danger of injuries to company's existence and development, etc. the business value of the company may be damaged, company profits or joint shareholder profits may be injured, or the like, all brought about by the acquisition of control rights by certain shareholders, in order to prevent these things, to the extent that it does not violate based principles of fairness or lack appropriateness, we cannot immediately

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43 "Content" in the context of stock refers to the possibility that some stock might be preferred or have different benefits, etc.

conclude that this treatment violates the meaning behind this same principle even though this shareholder is treated in a discriminatory way. Also, whether the specified shareholders' acquisition of control rights would or would not cause the company's business value injury, and whether or not corporate profits or the common interests of the shareholders would be damaged, in the end, would best be decided by those who receive the benefit of additions to the profits of the company, the shareholders themselves. Thus, to the extent that the shareholders' meeting procedures were not unfair, that the facts which formed the basis for adjudication did in fact exist, etc., and that there exists no defect in judgment to such an extreme extent as to cause the decision to lose its fairness, their decision should be respected.

C. Within the Shareholders' Meeting, the Proposal was approved by about 83.4% of all voting shares and thus approved, so we can say that essentially all shareholders other than Appellant and Related Parties judged that Appellant's acquisition of control rights would damage the business value, injure Appellee's profits and the common interests of the shareholders. Then, since we cannot say that the procedures at the Shareholders' Meeting were inappropriate, and also because, in the above-mentioned shareholders' judgment, notwithstanding that Appellant and Related Parties' purpose was to buy all the issued shares, as they had no plans to run Appellee's business they failed to make clear how they would manage the company after the acquisition of control rights and also failed to clarify how they expected to achieve a return on investment, therefore, we cannot recognize that this judgment was so defective as to lose its appropriateness.

D. Therefore, we analyze whether or not the Distribution violates the ideal of equity and lacks appropriateness based on the precondition of Appellee's shareholders' decision at the Shareholders' Meeting that Appellant's acquisition of control rights would harm Appellee's business value, Appellee's profits, and the common interests of the shareholders.

Appellant and Related Parties, under the operation of the Exercise Condition and the Acquisition Condition on the Warrants, unable to exercise of said warrants or receive delivery of stock as consideration for the acquisition, will come to lose much of their relative share of the Appellee's stock. However, Appellant and Related Parties also passed up their opportunity to express their opinion during the exchange of opinions at the Shareholders' Meeting, and essentially all shareholders present other than Appellant and Related Parties held that the Distribution would be necessary measures in order to prevent damage to Appellee's business value due to Appellant's acquisition of control rights. Moreover, Appellant and Related Parties may receive payment as compensation in exchange for the execution of the acquisition of the Warrants they own based on the Acquisition Condition; also, even in the event this is not executed, according to the Payment Decision of Appellant's Board of Directors, upon the application of Appellant and Related Parties for exchange of the Warrants they own, at the point where they are able to receive monetary compensation, the above-written compensation is based upon a

price calculated based on that which Appellant and Related Parties themselves set in the Tender Offer, so it can be seen as fitting for the monetary value of the Warrants. In the light of these facts, even considering the aforementioned influence on Appellant and Related Parties, we cannot recognize the Distribution as violating the idea of proportionality or lacking appropriateness. Additionally, while it does not follow that the common interests of the Shareholders will not be harmed and that Appellee's business value will not be injured by the event itself that Appellee acquires the Warrants that Appellant and Related Parties own based on the Acquisition Condition and that Appellee will come to transfer a large sum of money to Appellant and Related Parties, one can say that essentially all those shareholders present at the Shareholder's meeting other than Appellant and Related Parties decided that the aforementioned payment in exchange was an unavoidable measure to prevent damage to Appellee's business value resulting from Appellant's acquisition of control rights and that this decision should be respected, as written above.<sup>44</sup>

E. Therefore, regardless of whether or not one can say that Appellant and Related Parties constitute an 'abusive acquirer' as said in the below decision, based on the reasons explained up to this point, the Distribution is not something which violates the meaning behind the principle of shareholder equality, and one should say that it does not violate the Regulations, etc.<sup>45</sup>

(2) About the assertion that it is via a really unfair method

That one cannot say that the Distribution is via a really unfair method from the viewpoint of the principle of shareholder equality is clear from the explanation up to this point. Also, that Appellee adopted countermeasures like those in this case toward acts attempting to acquire the control rights, even viewed from the points that they were not set up in advance or the purpose of introducing these countermeasures, it is not possible to say that this was via a really unfair method. The reason is as follows.

In other words, in order to respond to the Tender Offer, the changes to Appellee's corporate charter were very hastily undertaken, and the contents of the countermeasures taken in response to the attempt to acquire control rights were fixed before the fact, so it does not follow that the Distribution would have been previously indicated. Certainly, as preparation for the possible case of a purchase aiming toward the acquisition of the corporation's control rights, whether or not one takes countermeasures, and as taken what kind of countermeasures to adopt, at a stage before that kind of situation arises, setting

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44 This sentence appears to acknowledge that the countermeasure at issue constituted greenmail, but that this is fine because the shareholders consented to it.

45 The Supreme Court here does state that the concept of an 'abusive acquirer' is irrelevant to this case, which does contradict what the High Court said in its opinion. The court does not make a statement one way or the other on the concept's application in general, though, just that it is not relevant in their reasoning here.

up in advance allows shareholders, investors, and those attempting to buy the company, etc., related persons a greater opportunity to see them in advance, and we hear that in reality examples of that kind of provision are increasing.<sup>46</sup> However, just because there was no provision before the fact does not mean that it is impermissible to take countermeasures at the time of the beginning of an attempt to acquire control rights. One cannot say that the Distribution was made via a really unfair method because they were not made public beforehand when before countermeasures are fixed, the Tender Offer was made suddenly, acquisition of control rights by Appellant came to be a real possibility, and because of that possibility, the shareholders' meeting decided to act to prevent damage to Appellee's business value, Appellee's profits, and to the common interests of the shareholders, even if it means giving out a whole lot of money because it was necessary to choose these measures in order to respond to an emergency situation, as recorded above, if one considers compensation which appears to correspond to the value of the Warrants distributed to Appellant and Related Parties.<sup>47</sup>

Also, in the event that gratis distribution of warrants were made with discriminatory contents to the shareholders not for the purpose of maintaining the common interests of the shareholders and corporate value, but mainly to maintain the control of the board of the directors and the specially indicated shareholder's control rights, that distribution would in principle be best interpreted as via a really unfair method, but it is clear from the explanation above that the Distribution is not a situation to apply something like that.<sup>48</sup>

(3) Therefore, we cannot say that the Distribution violates the idea behind the principle of shareholder equality, and neither can we say that it was via a really unfair method.

*[RULING]*

5. Because it is as above, the argument is without merit, and we can affirm the below court's decision that it is best to reject the Petition for Preliminary Injunction.

Therefore, all Justices being of the same opinion, it is so ordered.

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46 This suggests ex ante countermeasures will be preferred in Japanese judicial review.

47 This may be read to require a greenmail payment to a hostile acquirer as compensation in situations where countermeasures are adopted without prior public notice.

48 This sentence appears to approve the holding of *NBS* (though not commenting on the dictum concerning abusive acquirers).

## II. COMMENTARY

“If the stockholders are displeased with the action of their elected representatives, the powers of corporate democracy are at their disposal to turn the board out.”<sup>49</sup>

Japan’s rules and regulations on corporate governance remain substantively different from those of Delaware, but Delaware has substantially influenced both the law and the jurisprudence governing these cases. *Bulldog* should be read as ratification of the principle of corporate democracy, not as perpetuation of a supposed anti-foreigner sentiment in the legal community. Also, that the Supreme Court accepted the appeal on the basis of special permission from the Tokyo High Court rather than issues of constitutionality underlying the ruling or the Company Law lead one commentator to argue that the Supreme Court has affirmed the constitutionality of the laws at issue.<sup>50</sup> These laws and related rules are generally pro-shareholder and thus theoretically pro-acquirer, requiring equal treatment and supporting shareholder primacy. The potential systemic result is unclear, but the principles the courts employed should not yield an inefficient result. This Article contends that 1. the Supreme Court interprets METI’s principle of prior disclosure as a recommendation which holds some interpretive weight but is not dispositive here; 2. the Supreme Court rejects the term “abusive acquirer” because the term is logically irrelevant under the legal standard, and if employed by boards in lieu of a shareholder vote, virtually certain to represent a conflict of interest rather than factual threat; and 3. *Bulldog*’s shareholders vote and countermeasures employed here are not sustainable and unlikely to form a persistent fact pattern. Based on *Bulldog* and this interpretation, this Article then makes predictions about the behavior of vulnerable management in Japan and discusses the aftermath of the case.

1. *The Principle of Prior Disclosure*

In *Bulldog*, management did not disclose the takeover countermeasures prior to Steel Partners’ tender offer.<sup>51</sup> This violates the “principle of prior disclosure” articulated in the METI guidelines.<sup>52</sup> However, the guidelines qualify the principle of prior disclosure, stating that management shall disclose takeover defense measures “In order to ensure [their] legal validity and reasonableness” and that management “when adopting takeover defense measures” “should clearly disclose in detail [various specifics of the plan and its goals]...”<sup>53</sup> The plaintiff’s argued that the lack of notice would require enjoining the takeover countermeasures, and this was a significant issue in this case.

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49 *Unocal Corp. v. Mesa Petroleum Co.* (Del. 1985), 493 A.2d 946, 959.

50 ÔSAKI, *supra* note 18, at 12.

51 That it was not set up beforehand is the basis for the argument that the issuance was via a really unfair method. Discussed in the Supreme Court opinion at 9.

52 METI Guidelines, *supra* note 22, at 5.

53 *Id.* at 5, all emphasis added.



However, the court notes throughout the opinion 1. that the fundamental value behind the principle of prior disclosure and other elements of the METI guidelines is the advancement of the common interests of the shareholders,<sup>54</sup> 2. the shareholders are the party best situated to determine their common interests,<sup>55</sup> 3. Steel Partners was given an opportunity to make its case to the shareholders so as to inform them of its plans for the company<sup>56</sup> and therefore 4. this principle's violation is not dispositive here.

## 2. *The Term "Abusive Acquirer"*

The Supreme Court declined to participate in the judicial activism of the High Court in classifying Steel Partners as an "abusive acquirer." All 3 courts reached the same conclusion without this argument as a necessary component.<sup>57</sup> Ozaki argues, though, that the concept of an abusive acquirer remains significant, particularly in the absence of a shareholder resolution, such as a case where the countermeasures are implemented by resolution of the board of directors.<sup>58</sup> However, the Supreme Court mentioned Steel Partners' being characterized as such and then left the issue alone.<sup>59</sup> This led to a diverse range of opinions in the Japanese legal community on 1. whether Steel Partners was in fact an abusive acquirer and 2. the meaning of the classification.<sup>60</sup> The law firm TMI, an interested party in the case, claimed that the Supreme Court's decision left the classification of Steel Partners undisturbed.<sup>61</sup> However, the view of the legal community and judicial circles in Japan is in fact that the Supreme Court determined that it would be strange to call Steel Partners an abusive acquirer.<sup>62</sup> Since it is this view which is

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54 *E.g.*, Supreme Court opinion at 10 (stating that were a distribution plan (not previously disclosed) not for the purpose of protecting corporate value and the common interests of shareholders but instead the power of the existing board of directors or the control rights of a certain shareholder, it would be a different story).

55 Supreme Court opinion at 7 (stating that the shareholders themselves should decide what is best for their collective interests).

56 Supreme Court opinion at 3 (stating that Steel Partners just asked about resulting tax burdens and what the company would do if after the offer failed a new offer were launched at the meeting). Although according to the Supreme Court, it did not really take advantage of this opportunity, that seems not relevant to the logic the Supreme Court employed.

57 The Supreme Court's opinion notes at 5 that the High Court did label Steel Partners an "abusive acquirer," but notes later that this determination was irrelevant, basing its decision on other factors detailed below, mainly that the shareholder's opinion should be respected, that the monetary compensation offered seemed fair, and that the countermeasures were implemented in response to an emergency.

58 ŌSAKI, *supra* note 18, at 16-17.

59 Reuters, August 8, 2007, "The Supreme Court emphasizes the importance the decision of Bulldog's shareholders; anxiety over a renaissance in cross-shareholding." <http://jp.reuters.com/article/businessNews/idJPJAPAN-27274720070808> (Japanese) (last visited April 5, 2008).

60 *Id.*

61 *Id.*

62 *Id.*; *also*, conversations with various Japanese corporate law practitioners.

most likely to be predictive for future cases in a legal and judicial community renowned for its consistency in judgment and thus predictability,<sup>63</sup> the Supreme Court's stance should be viewed as that the concept of "abusive acquirer" is irrelevant. Also, even if the term were relevant in some context, the qualifications are based on facts that directors are not able to determine. Directors have a direct conflict of interest in control contests, and the Supreme Court made clear its view that shareholders, not directors, should make this determination.

In a hostile tender offer context, whether the would-be acquirer is termed an "abusive acquirer" is irrelevant. If the acquirer is termed 'abusive', one of the following is true of the acquirer: it "(1) has no true intention of participating in the company's management, but is rather a green mailer trying to get stakeholders to buy its shares back at a high price; (2) is attempting a scorched-earth business strategy aimed at taking temporary management control in order to rob the company of its intellectual property, know how, corporate secrets, and key customer/vendors; (3) plans to take control of the business in order to divert the company's assets for use as collateral on, or to pay back, its own debts; (4) aims to take temporary control of management to sell off its assets or temporarily pay a high dividend in order to sell the stock at a high price; or otherwise intends to essentially consume the company."<sup>64</sup> Each of these four possibilities is impossible to accurately discern via a questionnaire concerning the acquirers' intention.

(1) Whether an acquirer is a greenmailer with no "true intention" to participate in management calls for a factual determination by the board of directors facing a change of control as to whether the would-be acquirers legitimately believe they would be better than the board of directors at managing the company. Giving this authority to the board of directors facially violates the principle of shareholders' will. It also puts a party with interests directly in conflict with shareholders in charge of judging the business expertise of the group trying to oust them. The Supreme Court expressed that the place of shareholders in decision making should be respected and elevated; they did not leave room for anyone to overrule the shareholders' considered judgment, and they did also write that management would be considered to have engaged in a "really unfair method" if it were to engage in countermeasures for the purpose of maintaining their control or that of a specific shareholder. Therefore, the Supreme Court did not intend to give this kind of discretion to the board of directors.

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63 *E.g.*, in the context of traffic accidents, the judiciary fashioned such a uniform system of calculating damages that one can learn with some reliability how much one ought to settle for by reading a comic book. Ramseyer and Nakazato show how this predictability is partly responsible for the high settlement rate in Japanese courts rather than any cultural preference for harmony over litigation and conflict. J.M. RAMSEYER / M. NAKAZATO, "The Rational Litigant: Settlement Amounts and Verdict Rates in Japan", 18 J. Leg. Stud. 263 (1989).

64 *Id.* at 11 summarizing *Livedoor v. NBS*.

Moreover, it is unreasonable to expect an acquirer with true intention to engage in management to disclose their business plans. If they were to disclose their business plans, then management could simply adopt their plan, giving the entire value of the acquirer's research and business expertise to current management and shareholders. The principle of shareholders' will presupposes that shareholders will face a choice between their managers and new managers who value the company more highly. Therefore, the principle of shareholders' will demands that shareholders and not boards of directors be entitled to make the key determination as to whether the acquirers' have a serious business plan.

(2) Whether the acquirers are trying to loot the company, steal its secrets, or steal its customers is also not a decision boards of directors should be or will be called upon to make in Japan. The government intervention in the J-POWER takeover bid<sup>65</sup> and corporate opportunity law<sup>66</sup> amply demonstrate that these issues are already taken care of, and the only instance in which boards of directors would "have" to intervene is when their conflict of interest gives them a different bias from that of the government. The Supreme Court does not intend to give this power to boards of directors. The Supreme Court has upheld the spirit and letter of the principle of shareholders' will in *Bulldog*.

(3) An acquirer is not able to pass its debts off on a subsidiary, especially not one which has other shareholders, in Japan. Japan's corporate law requires companies to act in the interest of corporate value and through this the common interests of all shareholders. Japan's corporate law is amply hard on majority shareholders who use their control rights to the detriment of minority shareholders. The *NBS* case is the latest and most famous example of this.<sup>67</sup>

(4) Japanese managers are not free to liquidate some of their profitable assets and close up shop. Actions which would "essentially consume the company" are already proscribed through labor law<sup>68</sup> as well as the way in which fiduciary duties to shareholders

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65 Nikkei Shimbun, March 31, 2008.

<http://veritas.nikkei.co.jp/scramble/index.aspx?id=MS3Z3100R%2031032008> (Japanese).

66 See, e.g., the Yamada Yoko scandal. In part, the former executive director in a middle-man supplier of military equipment to Japan's Self Defense Forces allegedly usurped its corporate opportunity by starting a new company transferring all of the sales business to it. His motives were that he, the manager, had a conflict with the owner. The surrounding scandal as a whole was covered in the Japanese press, and his having usurped the company's "right to sales representation" (*hanbai dairi-ken*) is briefly discussed in, e.g., the Chûnichi Shimbun's coverage, available online at <http://www.chunichi.co.jp/article/feature/ntok0011/list/200712/CK2007123002076240.html> (last visited April 13, 2008) (Japanese).

67 In the *NBS* case, *supra* note 17, courts enjoined a warrant issue because it was in the interests of directors and the majority shareholder, not for the protection of corporate value or the common interests of all shareholders.

68 See, e.g., *Tôyô Oxygen Gas Company v. Shimazaki*, 30 Rôminshû 1002 (1979) (Tokyo High Ct., Oct. 29, 1979) (holding that the Tokyo District Court was wrong and it is alright to

are described in *NBS* and *Bulldog*. The directors must make decisions to improve corporate value and, through this, the common interests of the shareholders. Paying out a temporary dividend to the extent that it would consume the company or cause layoffs would subject the new management to wrongful termination lawsuits and allegations of breach of fiduciary duty; paying out a temporary dividend that frees up underutilized capital and prevents empire-building, however, would likely not face serious legal scrutiny.

Moreover, in each of the four above scenarios, if factual and not merely the product of management's conflict of interest with the shareholders, the following should also be true:

1. the shareholders would be willing to approve any reasonable countermeasures for legitimate reasons, as continuing management control might at least not destroy the business value of the company at shareholder expense for the discriminatory benefit of the acquirer; and
2. the board of directors could call for such a vote consistent with the METI Guidelines and would do so, confident that shareholders would prefer not to be robbed.

The recent jurisprudence of Japan's courts other than the Tokyo High Court as well as the METI Guidelines and all shareholders' rights plans places the principle of shareholder's will in an unassailable position. "Abusive acquirer" is a pejorative term for acquirers who refuse to, e.g., sufficiently answer a questionnaire explaining to the shareholders why they wish to purchase shares.<sup>69</sup> Its use makes foreign investors wary of Japan's supposed protectionism. Logically, it seems to function only to popularize a

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dismiss a division when 1. the company has proven economic necessity; 2. ample alternative employment opportunities appear and the company helps its employees find new jobs; 3. a general call for voluntary retirement which would ordinarily be necessary to ensure division employees a chance to transfer within the company is not necessary because there was a labor shortage and concern about losing what employees they had in other divisions; etc.); *Shioda v. Kôchi Broadcasting Company*, 268 Rôdô Hanrei 17 (1977) (Supreme Ct., Jan. 31, 1977) (holding that an employee could not be fired for sleeping through part of the morning radio broadcast twice, resulting in the company's broadcast's not starting at its scheduled time, and then filing a false report about his conduct the second time) (both translated by K. Sugeno and reprinted with permission in Milhaupt / Ramseyer / West, *supra* note 3, at 545-552). These cases and others illustrate that Japan's managers' actions are significantly restrained by labor law in that they may not fire employees without proving economic necessity, exhausting alternatives, and/or really extreme and repeat malfeasance.

69 The only reported decisions the author is aware of which have affirmed the validity of countermeasures to a hostile takeover in the new legal environment were those in which the acquirer did not apparently in good faith answer the questions the target's board of directors put to it in order to allow the shareholders to make an informed judgment about the value of the offer and the future of the company. *Yumeshin v. JEC*, 1739 Shôji Hômu 100 (2005) (Tokyo Dist. Ct., July 29, 2005) (summarized by HINES ET AL, *supra* note 11, at 21) and *Bulldog*.

given court or ruling with protectionist elements within Japan. To the extent Japan's courts are concerned with their reputation as the or one of the most fair tribunals in the world,<sup>70</sup> they should follow the Supreme Court's example and avoid using the concept. To the extent Japan's boards of directors want court approval of their countermeasures, they should submit them to shareholder vote or risk an injunction on grounds of violating the principle of shareholders' will. Japan's boards of directors are already doing this.<sup>71</sup> While there is nominally some freedom to act unilaterally in response to such an 'abusive acquirer' in many rights plans,<sup>72</sup> the definition of abusive acquirer is so subjective, and non sequitur with respect to the Japanese directors' role, as to be irresponsible to use as a justification for a takeover countermeasure.

If it were possible to objectively determine whether an acquirer is an abusive acquirer, however, it might be argued that where it is targeted by countermeasures, compensation would not be necessary. However, even then, the court's reasoning in *Bulldog* holds that the basic concept of shareholder equality applies to takeover countermeasures in general. Also in *Bulldog*, the Supreme Court noted that the countermeasures involved giving a large sum of money to prevent the hostile acquirer from acquiring control in an emergency situation, i.e., greenmail. Whether or not this greenmail was sufficient appeared to be a significant consideration in the court's reasoning, though this too may be unclear.<sup>73</sup> It would appear from the court's ratification of the requirement that the shareholders pay compensation in light of the principle of shareholder equality that shareholder approval for greenmail is necessary but not sufficient. If being a greenmailer were in fact one among several equal justifications for the board of directors to act without shareholder approval, then boards of directors acting without shareholder approval would appear to be privileged over those acting with shareholder approval. The court stated, though, that the shareholders are the best final decision-maker on countermeasures and whether or not shareholder interests are facing threat. Given *Bulldog* as precedent, even if it were possible to discern what an abusive acquirer is objectively, it would appear illogical to maintain the concept of an "abusive acquirer" in the law.

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70 See J. HALEY, "The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust," in *Law in Japan: A Turning Point*, at 99 et seq. (D. Foote, ed., 2008), also printed in Milhaupt / Ramseyer/ West, *supra* note 3, at 109-117.

71 HANSEN, *supra* note 23 at 1.

72 The vast majority of these rights plans provide for issuance notwithstanding compliance with the plan's timeline and/or shareholder approval in certain circumstances, essentially those in which the acquirer is an "abusive acquirer" as defined by the Tokyo High Court. *Id.* at 2-3. However, as argued above, if the acquirer were an abusive acquirer, shareholders would approve the board action anyway out of self-interest, so one might predict that either this provision will not be invoked or its invocation should be overturned by courts who see through it as a method for management to violate the principle of shareholders' will by invoking rights plans just to maintain their control of the company. The *NBS* case is one example of courts doing just that.

73 Hanrei Jihō 1983, at 58 (2007).

In addition, the concepts' existence preserves at least the appearance that Japanese boards can arbitrarily overrule shareholders' will.<sup>74</sup> This is the opposite of the intention and meaning of this entire body of law.

### 3. *Bulldog – an Unstable Fact Pattern Unlikely to Persist*

The Supreme Court correctly predicted that Bulldog's payment to Steel Partners in compensation for its share of the warrants might damage the company.<sup>75</sup> Some shareholders likely could have predicted the same. However, essentially all shareholders approved these countermeasures.<sup>76</sup> Why might shareholders approve the countermeasures anyway? One possibility is the existence of stable cross-shareholding or supplier-shareholding. Another is that Steel Partners' gaining control rights seemed somehow worse to shareholders than the company's giving a substantial fraction of its liquid assets to Steel Partners as greenmail. Finally, the shareholders may simply have misjudged the results of their actions, and the case and related incidents may bring sophistication to Japan's shareholder class through market forces. That the amount paid in fact exceeded, rather than equaled, Steel Partners' proposed acquisition price is one example of how poorly-understood the economics surrounding this event are: while the warrant purchase price nominally compensates for the planned dilution, because Steel Partners' warrants could not be exercised, Steel Partners netted some profit on its warrants beyond what it had planned for other shareholders to receive.

Stable cross-shareholdings have largely disappeared from Japan's large public companies excepting special cases such as the Nissan-Renault relationship and state-owned enterprises.<sup>77</sup> However, it is said that some suppliers still purchase some fraction of the outstanding stock of their larger customers in exchange for repeat business.<sup>78</sup> In addition, corporate shareholding remains significant in that, at the time the Supreme Court issued its *Bulldog* opinion, over 10% of the companies in the TOPIX 100 had institu-

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74 *Id.*

75 Supreme Court opinion at 8.

76 Supreme Court opinion at 7.

77 HANSEN, *supra* note 23, at 6 (listing those companies on the TOPIX 100 with sufficient group shareholdings to likely defeat any hostile takeover at the time of the Bulldog decision as, "Nissan and Renault have an explicit cross-shareholding arrangement. The Japanese government owns between about 1/3 and 1/2 of NTT. NTT Owns over 60% of NTT DoCoMo. Japanese National Oil Co has a special class of INPEX stock giving a veto right over certain actions when an acquirer hits a 20% purchase trigger ("Golden Shares", discussed below). Deposit Insurance Co. of Japan owns ~50% of Resona. Yahoo! Japan is majority owned by Yahoo Inc and Softbank. Japan Tobacco is majority owned by the Minister of Finance. Softbank is 30% owned by its CEO. Denso is more than 30% owned by Toyota Motor and Toyota Industries. NTT owns a majority of NTT Data.")

78 Conversations with Japanese legal practitioners, including one who has repeatedly advised companies on these acquisitions. *See also* H. KANDA, *supra* note 14, at 70 (Kanda refers in particular to insurance companies' holding stock in other companies to guarantee continued business).

tional or industrial shareholders to the extent that no merger could take place without the consent of some corporate shareholders.<sup>79</sup> Also, if countermeasures can be approved in this form, companies facing trouble might consider increasing cross-shareholdings to prevent takeovers as an alternative to building corporate value.<sup>80</sup> However, corporate shareholding or cross-shareholding alone does little to explain why “essentially all” Bulldog shareholders other than Steel Partners voted to implement the countermeasures. At the time of the tender offer bid, Steel Partners was the largest single shareholder with 10.15% of Bulldog’s shares, so the collective action problem alone makes it exceedingly unlikely that 80% of Bulldog’s shares were held by parties who colluded with management to preserve its power.<sup>81</sup> In fact, Bulldog’s shares were about 33% held by individual shareholders, about 16% by domestic financial institutions (banks, etc.), and 10% by Steel Partners, accounting for about 70% of outstanding shares.<sup>82</sup> The remainder, however, were held by Toppan Publishing, Inc., Rengo Co., Ltd., Nissin Sugar Manufacturing Co., Ltd., and other businesses.<sup>83</sup> This remainder constitutes about 30% of the total shareholdings. It is not possible to effect a merger, etc. without the approval of 2/3 of all shareholders and a quorum of greater than 50% attendance at the shareholders’ meeting (a “Special Resolution”).<sup>84</sup> This makes it difficult to see how Steel Partners could have concluded a merger even had the countermeasures been defeated by shareholder vote. Moreover, if the board and shareholders believe that those 30% will definitely vote in favor of the countermeasures, it may help explain the overwhelming shareholder approval of the board’s proposal. Shareholders gain nothing by voting against it because the friendly shareholders make sure that the proposal will succeed. Shareholders who vote for the proposal might lose Bulldog’s support as a customer, employer, or shareholder. Also, if the company were already captured by incumbent interests and friendly companies, shareholders might gain some value from memorializing this via a shareholder vote and amendment to the corporate charter to avoid future costly legal battles.

Steel Partners’ answer to Bulldog’s questionnaire about plans for the company probably frightened some shareholders about Bulldog’s future under Steel Partners’ management, and Bulldog’s management took advantage of this fear. Steel Partners offered a modest premium over Bulldog’s share price. Bulldog’s management likely

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79 HANSEN, *supra* note 23, at 5.

80 Skadden, Arps, Slate, Meagher & Flom LLP’s partner H. Kamiya’s comments quoted by Reuters, *supra* note 59.

81 “Steel Partners Japan Proposes Tender Offer for Bull-Dog Sauce Co. Ltd.” Business Wire, May 16, 2007.

82 “Bulldog Tender Offer Countermeasures; Management Confident in the Legality of its Position,” Yomiuri Shimbun, <http://www.yomiuri.co.jp/atmoney/mnews/20070625mh05.htm> (Japanese).

83 *Id.*

84 “Additional information for decisionmaking in triangular mergers . . . Proposal to revise Company Law enforcement regulations,” Yomiuri Shimbun, [http://job.yomiuri.co.jp/news/jo\\_ne\\_07031620.cfm](http://job.yomiuri.co.jp/news/jo_ne_07031620.cfm) (Japanese).

suggested to its shareholders on visits to request their support that Steel Partners planned to fire Bulldog's employees.<sup>85</sup> In fear of such a restructuring plan,<sup>86</sup> one individual shareholder noted to applause that "they're walking into a business that's operated for 100 years with their [dirty] shoes on."<sup>87</sup> Also, perhaps individual investors were speculating that Steel Partners was trying to buy Bulldog at a bargain price based on projections for the sauce and seasoning market. Bulldog's stock had risen substantially in the relatively recent past. Also, considering capital gains taxes, Steel Partners was offering a very small premium. Japan's capital gains tax rate was 10% at the time.<sup>88</sup> Even short-term stockholders would face capital gains tax on a significant fraction of the purchase price, because the market price of the stock increased upon the offer and then the offer price was increased beyond the original offer price. In addition, all shareholders would forfeit some of the benefits of compounding interest on their investment once they are taxed on realization. Excluding this benefit and converting all prices for the current number of issued shares, assuming the average Bulldog shareholder purchased their shares at about 170 yen per share,<sup>89</sup> the stable price for most of the past 10 years,<sup>90</sup> the shareholder would face capital gains tax on a gain of 260-290 yen per share, about 150-170% of their original investment, for a total of about 26 to 29 yen per share, based upon the figures given in the Supreme Court opinion. While this does not account for the entire original premium offered, it does account more than 5% of the total share price, a significant fraction of the premium. Therefore, those willing to buy the stock in the first place given transaction costs, capital gains tax rates, and opportunity cost, would have good reason to reject the initial tender offer price, assuming one's outlook for the company had not worsened significantly in the interim. In fact, the existence of a tender offer bid often leads to an acquisition of some kind, hostile or friendly. 'Relationship' investors' rejecting the modest premium because they wished to preserve their relationship both with Bulldog's management and with other companies in which

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85 Yomiuri Shimbun, *supra* note 82.

86 *Id.*, noting in the exchange between shareholders, Steel Partners, and Bulldog Sauce management at the shareholders' meeting that an ordinary shareholder asked Steel Partners whether it was true that they plan to engage in "restructuring," meaning firing, or not. Steel Partners replied that it had not said one word about "restructuring," but instead planned to take the company from 3 factories to 2 factories, and based on ordinary retirement let the workers' numbers decline naturally.

87 *Id.*

88 *E.g.*, explained in English at <http://www.bloomberg.com/apps/news?pid=20601101&sid=ala9AOrHDVDM&refer=japan> (last visited April 14, 2008).

89 All prices based on the price adjusted for the present share issuance, about 70 MM shares. Therefore, the tender offer price would be approximately 430 yen per share (1580 yen multiplied by 19MM shares divided by 70 MM shares), and the revised offer price would be about 460 yen per share.

90 See 10-year chart of Bulldog Sauce, available at <http://quote.yahoo.co.jp/q?s=2804.t&d=c&k=c3&a=v&p=m25,m75,s&t=ay&l=off&z=l&q=c> (Japanese).



they hold minority stakes both because the premium was modest and the bid was unlikely to succeed could be significant in this narrative, too.

Finally, shareholders may have rejected the offer because they concluded it was too low. They might alternatively have concluded that existing management would give them a higher return on their investment. These judgments turned out to be wrong in the short term. While the efficient market hypothesis predicts that shareholders will on average make wealth-maximizing decisions, the corporate control market is relatively new to Japan. Also, this is one transaction out of hundreds or more taking place each year; economics predicts that efficient decisions will be made on average, not necessarily in each case. Non-tendering shareholders lost real value and return, and now they hold a smaller fraction of Japan's capital market. Steel Partners and shareholders which tender to hostile acquirers hold a larger share than they did in the past. Over time, this should result in more shares held by Japanese shareholders who are willing to accept a large premium in exchange for their shares and fewer shares held by shareholders unwilling to accept an efficient premium. This effect should be amplified by the extent to which *Bulldog* preserves or strengthens shareholder activists' incentive to participate in the Japanese market by providing greenmail. Under this view, Japan's institutional investors and individual investors will adapt to the new environment and come to make efficient decisions on average about when to sell and at what price, and shareholder activists will remain active in Japan.

Facially, one might view *Bulldog* as the first time the Japanese Supreme Court denied a foreign hostile acquirer the ability to complete its acquisition based on a discriminatory ex-post countermeasure. However, the "countermeasure" was, as the Supreme Court put it, to pay the acquirer a bunch of greenmail. Therefore, it seems unreasonable for a foreign acquirer to complain about the particular result. Shareholders acting in their own best interest going forward should not ratify such an ineffective countermeasure. The acquirer appears to be free to just try again with even more money after the first failed attempt if they still wish to pursue it after they receive their greenmail.<sup>91</sup> The Supreme Court's opinion suggests that each element of the countermeasure was necessary. Therefore, it may be open season in Japan's market for corporate control of companies lacking poison pill plans. As a result, many companies are now adopting and will continue to adopt rights plans following the METI guidelines.<sup>92</sup> Rights plans following these guidelines, while subject to the principle of shareholders' will, buy time for management to make their case to shareholders.<sup>93</sup>

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91 It is true that they will face, at least under these facts, the still higher standard of an ex ante takeover countermeasure. However, this countermeasure is subject to the same principle of shareholders' will. Surely shareholders will have learned something about hostile tender offers from their immediately preceding experience. However, in this case the company's subsequent financial results and related loss of liquidity may have caused it to lose its former status as an attractive target.

92 See HANSEN, *supra* note 23. See also Supreme Court opinion at 9-10.

93 Usually 60 or 90 business days, which is about 3 or 4 months. See HANSEN, *supra* note 23, at 5.

Under these rights plans, the net result may resemble that in the US: a hostile acquirer must submit its plans to the board, make its case to the shareholders, and follow a timeline similar to that of a proxy fight.<sup>94</sup> Unlike a proxy fight, though, the execution of the countermeasures itself is put to a shareholder vote in a matter of months as long as the acquirer complies with the terms of the plan, or the rights plan itself is ratified annually by shareholder vote. These reforms put Japan's corporate control market in a context familiar to US lawyers, and differences appear to be for the most part in favor of shareholder self-determination. The concept of shareholder equality's including a hostile acquirer may put acquirers in a better position than they are in Delaware, and the Supreme Court's ratification of the acquirer's rights as a shareholder as well as a suitor may give acquirers a chance to make their case to shareholders with a delay of only a few months.

However, these results do not occur in a vacuum: A company looking to fashion counter-measures in the new legal environment may conclude that the best way to avoid hostile takeovers is to maintain greater than 50% friendly shareholdings, in the form of cross-shareholdings, shareholder faith in management, employee ownership, or otherwise. A company with majority friendly shareholders and an ex ante rights plan regularly affirmed by shareholder vote and updated with legal developments may appear invulnerable to a hostile bidder, no matter how superior that bidder's management or valuation might be. This is not what METI wants, the judiciary wants, or in any way promoting shareholder value via an active M&A market. However, it seems an accurate or at least plausible interpretation of the new corporate law. On the other hand, 'friendly' shareholders may change their loyalties when offered a genuinely substantial premium.

#### 4. *Prediction*

Based on this analysis, this Article predicts:

1. Companies suffering from poor valuation and/or weak management will develop and implement ex ante rights plans.

If a company has friendly shareholdings but no rights plan, under Bulldog, it seems likely that in order to fend off any hostile bidder the company would have to implement a rights plan incorporating a substantial greenmail payment. If a company lacks friendly shareholdings, even an ex ante rights plan cannot save it from a hostile bidder indefinitely. This is because the bidder may simply wait for the next time shareholders are called upon to renew the rights plan, and the bidder will be able to purchase the company at that time. However, an ex ante rights plan does give management some modicum of time to stay in control and to try to develop friendly shareholdings or improve the company's financial condition.

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94 HANSEN, *supra* note 23, at 1-2.

2. Companies suffering from poor valuation or weak management will have or seek to develop friendly shareholdings in some form.

Because it is impossible to stay in control even with an ex ante rights plan without friendly shareholdings, a company with weak management or poor valuation will either develop friendly shareholdings or go through a change in control. A company in this situation must therefore 1. please its shareholders to the extent that a hostile bidder would not rationally offer a substantial premium; 2. develop stable cross-shareholdings with similarly situated companies to the extent permissible under the law; or 3. encourage its suppliers, employees, and other friends to purchase as much of its stock as possible. Even these may not be sufficient, depending on the size of the premium the bidder is willing to offer.

### 5. *Aftermath*

Steel Partners acknowledged the failure of its tender offer bid on August 24, 2007; its fraction of outstanding shares fell to 4.44% from 10.52% at the start of the tender offer period.<sup>95</sup> According to Steel Partners, only 1,318,456 shares applied to accept the tender offer.<sup>96</sup> After paying Steel Partners and making its annual report to shareholders, Bulldog stock suffered significantly due to its heavy reported loss in the accounting periods during which the tender offer took place, due largely to its greenmail payment to Steel Partners, underwriting costs, and legal fees associated with developing the plan.<sup>97</sup> While Bulldog's countermeasures succeeded in fending off the initial hostile offer, it appears to have failed in terms of producing shareholder value. Foreign funds have been reasonably active in Japan since this decision. For example, Japan's main energy supply company, J-POWER, was the subject of a serious hostile acquisition attempt by The Children's Investment Fund during 2008.<sup>98</sup> J-POWER is operated largely for the benefit of Japan's regional power companies as a power wholesaler, so TCF's attempt to raise its stake above 10% faced scrutiny from the government and was ultimately rejected,<sup>99</sup> but this is one example of shareholder activist investors' continued involvement in Japan after *Bulldog*. However, ex ante countermeasures should gain prevalence,

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95 AFP BBNews, August 24, 2007, "Bulldog Tender Offer Bid Failed, Steel Partners," <http://www.afpbb.com/article/economy/2271875/2042674> (Japanese).

96 *Id.*

97 K. WORSLEY, "Steel Partners Loses an Appeal; Bull-Dog Loses About \$15 Million," (August 8, 2007) <http://www.japaneeconomynews.com/index.php?s=callon>. Bulldog revised its profit forecast from 500 million yen to roughly negative one billion yen without any adjustment to sales.

98 Nikkei Shimbun, March 31, 2008. <http://veritas.nikkei.co.jp/scramble/index.aspx?id=MS3Z3100R%2031032008> (Japanese).

99 The committee on customs, foreign exchange and other transactions unanimously rejected the Children's Funds' bid on April 15, 2008. Nikkei Shimbun, <http://www.nikkei.co.jp/news/main/20080415NTE2INK0715042008.html> (Japanese).

because in the event of a hostile bid, the alternative appears to be a choice between greenmail and a change of control under *Bulldog*. Shareholders seem likely to approve ex ante rights plans because they retain control of the final decision with short time delays under both the plans and Supreme Court precedent, though they have not always done so. Steel Partners finished selling off its stake in Bulldog by the end of March, 2008, likely after waiting for the shock to Bulldog's stock price from its poor earnings related to the countermeasures to dissipate.<sup>100</sup>

### III. ANALYSIS: SOME AMERICAN LEGAL ACADEMIC PERSPECTIVES

The Bulldog case raises a host of new issues for Japanese courts, but other than the principle of shareholder equality, none of the basic issues would be new or unfamiliar to Delaware courts or the American legal academy. Since Japan has modeled a large part of its reform on the Delaware legal environment, it seems fitting to analyze Bulldog within the American legal framework. Understanding the history of takeover law in the US, and more particularly, academic views on takeover law should help predict Japan's future, because they strongly influence Japan's courts.<sup>101</sup> This Article briefly discusses various models of corporate governance, evaluates *Bulldog* against these models, and speculates on how Japan's corporate governance system may evolve based on *Bulldog*, other events since the new Company Law was enacted, and Japan's political economy's past and continuing evolution.

#### 1. *The Stakeholder Model*

Lipton and Rosenblum argue that the concept of the corporation as a vehicle for shareholder value ignores that it is a privileged vehicle created by the State to serve broader social needs, organizing the relationships between a variety of constituencies.<sup>102</sup> They argue that "conformity to stockholder wishes and protection of hostile takeovers" are not "the primary goals of corporate governance"; the aim is instead to create "a system that will lead managers and stockholders to work cooperatively towards the corporation's long-term business success."<sup>103</sup> The fear of layoffs is also reflected in shareholder sentiment as expressed at Bulldog's annual meeting.<sup>104</sup> However, in addition to their empirical and efficiency arguments, Easterbrook and Fishel contest stakeholder

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100 <http://www.nikkei.co.jp/news/main/20080418AT1D170C517042008.html> (April 18, 2008) (last visited April 18, 2008) (Japanese).

101 MILHAUPT, *supra* note 19, at 2172 (noting that, in the *NBS* case, both sides briefed the courts on how the case would be decided under *Unocal*, citing a memorandum by J. Coffee on file with the Columbia Law Review).

102 58 U. Chi. L. Rev. 187 (1991).

103 *Id.* at 189.

104 See Yomiuri Shimbun *supra* note, at 82 as discussed *supra* note 86.

(employee, creditor, community, etc.) arguments on the grounds that there is no evidence that inefficient management would more benefit stakeholders than superior, wealth-maximizing management and that a stakeholder system would leave managers accountable to no party at all.<sup>105</sup> Jensen supplements this view by noting that total firm value maximization involves some consideration of stakeholder interests and further claims that total firm valuation should be the management metric, being to total value of the bonds, stock, and warrants issued by the company.<sup>106</sup> Jensen justifies this metric as the best way to introduce accountability, because providing more than one variable for accountability is ineffective. Applying this critique to Jensen's suggested metric, it seems likely that shareholder value as the one variable uncomplicated by other paperholders is most often the best metric as the only metric provided that the firm is financially healthy. While it is possible for people to pursue multiple goals, provided a view the corporation's main problem as agency costs, this view is right because it is difficult to objectively evaluate managers fairly on more than 1 standard. Providing multiple goals allows managers to pursue their own interests using whatever stakeholder interests happen to be aligned with their own as a proxy.

In the case of Japan, because labor laws strongly protect workers from layoffs outside of threat to the very existence of the company,<sup>107</sup> Easterbrook and Fishel's view should be even stronger than in the US. A hostile takeover in Japan is generally limited to using existing labor and capital resources more productively and, optionally, expanding labor resources in a more productive direction than was done in the past. Certain managers and political forces have engaged in substantial fear-mongering regarding foreign control of Japanese companies and M&A in general, but the reason Japanese managers tend not to fire their regular employees is not due to a unique cultural-social bond or unwritten lifetime employment contract but because they are usually not permitted to fire their regular employees. Barring careful process, procedure, circumstances, etc. it would be illegal.<sup>108</sup> Moreover, because one cannot fire Japanese workers outside of extreme circumstances, it seems unlikely that foreign management would be more likely or better able to inflict a wound on another constituency in the nexus of contracts model, such as the community, government, bondholders, etc. On the contrary, hostile takeovers and shareholder activism in general should result in higher productivity and accrue substantial benefits to all stakeholders.

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105 94 Harvard L. Rev. 1161 at 1190-92 (1981).

106 M.C. JENSEN, "Value Maximization, Stakeholder Theory, and the Corporate Objective Function", October 29, 2001 (available at SSRN).

107 See sources cited *supra* note 68.

108 See labor law sources *supra* note 68. Japan's restrictions on restructuring may have lessened since these cases, but restrictions on firing remain far more serious than those in the US, which is the relevant consideration for comparative political economies.

## 2. *The Culturalist Model*

Various arguments have been made that Japanese shareholders oppose hostile takeovers on moral or cultural grounds.<sup>109</sup> Ramseyer has called this view implausible, arguing that shareholders in Japan would likely, if offered a generous premium, tender their shares.<sup>110</sup> The facts of *Bulldog* on their face call into question Ramseyer's view, because shareholders appear to have rejected a premium, though a modest one, in order to prevent a hostile takeover at great cost to themselves and the company.<sup>111</sup> However, in addition to questioning the generosity of the premium as above, there are manifold reasons to reject the Orientalist model.

Japan has very little experience with hostile takeovers. However, the law firms Skadden and Wachtell are today as strong as they are in large part because Joe Flom and Martin Lipton saw through other Wall Street firms disdain for and fear of tender offers and seized the opportunity they presented.<sup>112</sup> The prevailing view in Japan at the dawn of its takeover era strongly resembled sentiments in the US dating back to the beginning of its takeover era, and substantial hostility to hostile takeovers persists even today in the US.<sup>113</sup> Some US commentators even today claim that boards of directors are somehow maximizing shareholder value when acting to prevent shareholders from accepting very high premiums for their shares,<sup>114</sup> contra the evidence<sup>115</sup> and any semblance of an efficient capital market.<sup>116</sup> These arguments would be considered evidence of pan-Asian hostility to Western business practices, the idea of the corporation, and contract

109 See, e.g., J.C. ABEGGLEN, "Can Japanese Companies Be Acquired?", *Mergers & Acquisitions* 16, 18 (Winter 1983); C. MILHAUPT, *supra* note 19, at 2172 (summarizing the culturalist view of the Japanese capital markets and management in the introduction).

110 J.M. RAMSEYER, "Takeovers in Japan: Opportunism, Ideology and Corporate Control", 35 *UCLA L. Rev.* 1 at 7-8 (1987).

111 Supreme Court opinion at 7.

112 *Id.* at 8; see also L. CAPLAN, *Skadden: Power, Money, and the Rise of a Legal Empire* (1994).

113 See P.M. HIRSCH, "From Ambushes to Golden Parachutes: Corporate Takeovers as an Instance of Cultural Framing and Institutional Integration", 91 *Am. J. Soc.* 800 (1986); more recently, see S. BAINBRIDGE, "Director Primacy: The Means and Ends of Corporate Governance," 97 *Nw. U.L. Rev.* 547 (2003); see also K. TURNER, "Settling the Debate: A Response to Professor Bebchuk's Proposed Reform of Hostile Takeover Defenses", 57 *Ala. L. Rev.* 907 (2006).

114 TURNER, *supra* note 113, at 921 ("The director primacy model 'accepts shareholder wealth maximization as the proper corporate decisionmaking norm, but rejects the notion that shareholders are entitled to either direct or indirect decisionmaking control.'" (citing Bainbridge, *supra* note 113)).

115 L. BEBCHUK / A. COHEN, "Firms' Decisions Where to Incorporate", 46 *J. Law & Econ.* 383, 405 ("The overwhelming majority of the event studies that examined the adoption of state antitakeover statutes found either no price reactions or negative price reactions. Researchers have also found evidence that state antitakeover statutes have operated to increase agency costs." (citing several papers and studies)).

116 See EASTERBROOK / FISHEL, *supra* note 105, at 1165-68 (detailing the efficient capital market theory).

law enforcement if the authors were from Asia. Moreover, Japan's companies used to rely primarily on equity markets for finance, more closely resembling contemporaneous US companies than modern Japanese companies in this, so the differences between Japan's capital markets and those of the US are more likely the cumulative result of incremental changes over time based on numerous factors including the economic structure set up after World War II and the political environment since then, the "path-dependent model,"<sup>117</sup> rather than cultural differences persisting since time immemorial or an inexorable march toward the optimal form of corporate governance operating outside of political influences.

An ideal test of the Orientalist model would be a shareholder activist's offering a more substantial premium for a domestic company with over 1/3 supposedly "friendly" shareholding, including employees, suppliers, financiers, etc. If the shareholders were to tender over the objections of management, it would directly contradict the Orientalist view of Japanese shareholders. Since Japanese law permits such a shareholder block to veto any merger, a block of 'friendly' shareholdings of this size, while unable to support the issue of warrants under METI guidelines without additional supporters creating a majority of shareholders, should be able to prevent a true merger.

While slightly different from the above experimental ideal, an excellent example of shareholders acting in their own self-interest against the views of management and others does exist among Japan's largest and highest-profile domestic companies. Tokyo Electron, a company within the TOPIX 100, does not have *ex ante* takeover countermeasures in place. The board, fearing potential hostile takeovers, put a set of countermeasures to a shareholder vote. The board explained that while it did not at present have any evidence of a would-be hostile acquirer, it wished to amend the corporate charter to prepare for such a possibility and announce what countermeasures it would take in the event that a hostile acquirer out to harm corporate value were to emerge. The countermeasures included increasing the number of authorized shares from 300,000,000 to 700,000,000, changing the person in charge of organizing shareholders' meetings from the chairman of the board to the director previously specified by the board of directors, changing the person who presides over shareholders' meetings from the chairman of the board to the director previously specified by the board of directors, changing the person in charge of organizing and presiding over board meetings from the chairman of the board to the director previously specified by the board of directors, changing a provision putting shareholders' meetings in charge of both director compensation and retirement payment to delete retirement payment, and the same for auditors' retirement payment.<sup>118</sup>

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117 See L. BEBCHUK / M. ROE, "A Theory of Path Dependence in Corporate Ownership and Governance", 52 *Stan. L. Rev.* 127 (1999); Y. MIWA / J.M. RAMSEYER, "The Value of Prominent Directors: Corporate Governance and Bank Access in Transitional Japan", 31 *Journal of Legal Studies* 273 (June 2002).

118 Translation of relevant parts of the announcement on Tokyo Electron's home page, [http://www.tel.com/jpn/news/2005/0512\\_002.htm](http://www.tel.com/jpn/news/2005/0512_002.htm) (Japanese) (last visited April 14, 2008).

The shareholders voted down the board's proposal.<sup>119</sup> Western media reported that this constituted rejection of a poison pill plan because foreign investors thought it might impair shareholder value.<sup>120</sup> However, both their countermeasures and those rejected by the shareholders of Yokogawa Electric were not poison pills but rather the authorization to issue many more shares.<sup>121</sup> In between the submission of the proposal and the meeting, the METI Guidelines were issued, and the Tokyo Electron's board published a press release explaining management's position on takeover countermeasures and reiterating the countermeasures proposal and its relationship to the METI Guidelines.<sup>122</sup> Tokyo Electron did have more substantial foreign shareholders than the average in the TOPIX 100,<sup>123</sup> but some Japanese institutional investors joined in rejecting management's relatively modest countermeasures package. This Article contends that an Orientalist explanation is incapable of explaining these incidents, particularly the votes by Japanese institutional investors against takeover countermeasures. Therefore, an Orientalist model of shareholder decision-making fails to account for the decisions Japanese shareholders make and the values behind them. Moreover, were Japanese shareholders predisposed to oppose hostile tender offers, there would be no demand for "poison pill"-type rights plans or other takeover countermeasures for companies not majority foreign-owned.

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119 The announcement on Tokyo Electron's homepage briefly announces what the proposal included and that it was not approved. [http://www.tel.com/jpn/news/2005/0624\\_001.htm](http://www.tel.com/jpn/news/2005/0624_001.htm) (Japanese) (last visited April 14, 2008). Interestingly, this announcement does not appear to be in the English language news disclosure list at this time. <http://www.tel.com/eng/news/2005/index.htm> (as of April 14, 2008).

120 See, e.g., "The Sun Also Rises", *The Economist*, Oct. 6 2005 ("The role of shareholders has been boosted too: at the spate of annual meetings on June 29th shareholders rejected poison-pill proposals at several big firms, including Tokyo Electron, Fanuc and Yokogawa Electric."); available online at <http://www.billemmott.com/article.php?id=26>. (last visited April 14, 2008).

121 See *Nihon Keizai Shimbun*, June 29, 2005; see also confirmation at, e.g., [http://yugo-yamamoto.cocolog-nifty.com/uragami/2005/06/post\\_0166.html](http://yugo-yamamoto.cocolog-nifty.com/uragami/2005/06/post_0166.html) (Japanese) (last visited April 14, 2008).

122 Management's position on hostile tender offers and an attempt to relate its countermeasures to the METI Guidelines were disclosed on June 3, 2005. [http://www.tel.com/jpn/news/2005/0603\\_001.htm](http://www.tel.com/jpn/news/2005/0603_001.htm) (Japanese) (last visited April 14, 2008).

123 Tokyo Electron's annual report for 2005, investor information section, indicates that foreign shareholders held 41.45% and Japanese financial institutions held 37% of the company. Available online in English at <http://www.tel.com/eng/ir/ar2005/ar2005.htm> (last visited April 15, 2008).



### 3. *Efficiency and Shareholder Value*

It seems possible “that some features of ... Japanese corporate governance are as likely to be pale images of the American future as American securities markets are likely to be the foreign future.”<sup>124</sup>

Professors Easterbrook and Fishel cite the Williams Act as the beginning of the end of hostile acquirers' ability to swiftly and effectively “force shareholders to decide quickly whether to sell all or part of their shares at a premium”<sup>125</sup> in the US. They argue that the relevant consideration in maximizing shareholder welfare is not just the eventual sale price of the shares, but also the effect the countermeasure has on the quantity of future tender offers and the way in which this impacts management efficiency.<sup>126</sup> They argue that the most probable reason for takeovers is agency costs resulting from passive dispersed free-riding shareholders, and hostile takeovers reduce agency costs by replacing managers whose agency costs are too high.<sup>127</sup> In addition, they argue, the threat of a hostile takeover provides managers with incentives to perform efficiently for fear of replacement, and these incentives are absent if their only monitor is a body of dispersed shareholders.<sup>128</sup> More takeovers produce more efficiency, and therefore any measure preventing tender offers reduces social welfare.<sup>129</sup> Also, a delayed auction process through a poison pill produces waste, externalized in part to the bidder, and a transfer of wealth between the bidder and the shareholders through a higher price, not economic efficiency.<sup>130</sup>

Given the lack of hostile acquisitions in Japan, Ramseyer and Miwa looked to alternative means of discipline, such as the product market, internal labor market, lenders, and shareholders.<sup>131</sup> Japan's product market is fiercely competitive. Japanese employees regularly put in unpaid overtime and compete with each other over promotions. Banks compete to offer borrowers a competitive interest rate, and bondholders and stockholders purchase issues on the Tokyo Stock Exchange and others.<sup>132</sup> However, as

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124 M. ROE, *Strong Managers Weak Owners: The Political Roots of American Corporate Finance* at 150 (1996).

125 EASTERBROOK / FISHEL, *supra* note 105, at 1162.

126 *Id.* at 1164.

127 *Id.* at 1169.

128 *Id.* at 1169, stating that “the most probable explanation for unfriendly takeovers emphasizes their role in monitoring the performance of corporate managers.”

129 *Id.* at 1174.

130 *Id.* at 1175.

131 RAMSEYER, *supra* note 110, at 5.

132 Ministry of Finance, Policy Research Institute, “Survey about our country's companies' corporate governance”, available at <http://www.mof.go.jp/jouhou/soken/kenkyu/zk063/furoku01.pdf> (conducted in 2002) (last visited, April 18, 2008) (Japanese) at 31 (reporting that 27.7% of surveyed companies cite Main Bank's provision of especially low cost capital as the reason they borrow from them) and 30 (over 20% of surveyed companies obtain financing from their main bank, other

Easterbrook and Fishel argue, more discipline seems better than less, so while Japan's product market, labor market, and corporate debt and equity markets may have a formidable disciplinary effect, to add a disciplinary takeover market should help. However, Roe explains takeovers as the result of political decisions over the course of US history resulting in financial fragmentation. This explains the historical lack of takeover markets in Germany and Japan as a natural result of large blockholders' competing with each other and holding controlling interests in even the large public companies, whether the blockholders are families, financial institutions, or industrial conglomerates.<sup>133</sup>

Easterbrook and Fishel cite data to show that their predictions are better than those based on various views that place hostile takeovers in a negative light.<sup>134</sup> Their view is generally supported by the subsequent literature. Bebchuck argues that those who believe state competition for legal rules leads to a "race to the top" are mistaken, because they generally agree that anti-takeover rules are inefficient, yet many states have adopted anti-takeover rules (under pressure from management and employee interests).<sup>135</sup> Rather, the empirical evidence suggests<sup>136</sup> that anti-takeover rules are adopted under pressure from management and employee interests, whose interests in the control market in the US generally differ from those of shareholders.<sup>137</sup>

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banks, national bond issuance, national stock issuance, and financial institutions other than banks).

133 ROE, *supra* note 124, at 151 (noting that the blockholders can prevent a takeover market's emergence as long as there are blockholders with sufficient net assets).

134 *Id.* at 1186-88.

135 105 Harvard Law Review 1437, 1446 (1992).

136 See BEBCHUK / COHEN, *supra* note 115.

137 See BEBCHUK / ROE *supra* note 117, at 130 ("Those parties who participate in corporate control under an existing structure might have the incentive and power to impede changes that would reduce their private benefits of control even if the change would be efficient. For example, a controlling shareholder might elect not to move her firm to a diffused ownership structure because the move would reduce the controller's private benefits of control. Similarly, the managers of a company with diffused ownership, seeking to maintain their independence, might elect to prevent their firm from moving to a concentrated - ownership structure even if the move would be efficient overall.").

#### 4. Evaluation

Lipton and Rosenblum's ideal of corporate governance for stakeholder interests appears to be in one sense ratified by *Bulldog* and in another sense violated. Bulldog's management did what they did in the name of the common interests of shareholders and overall business value,<sup>138</sup> but they also deprived both shareholders of their profits and the employees, communities, and other stakeholders of some stability from business operations through a massive greenmail payment.<sup>139</sup> Since the decision defers to the considered judgment of management, shareholders, including related businesses and employees, and the government as represented by the court system, though not METI, Lipton and Rosenblum's stakeholder view may appear to some audiences to form the theoretical basis for the result, though not the stated reason, the principle of shareholder equality and the primacy of shareholders' will. However, the fact that Japanese courts requires shareholder approval for countermeasures in all cases does directly conflict with the stakeholder model and the nexus of contracts model advanced by Lipton, Rosenblum, Bainbridge, and others. Despite possessing very labor-friendly law and German-style corporate governance structures, Japan's current legal environment turns culturalist views of its legal system and political economy on their head and in theory rejects any pro-management, director supremacy, or stakeholder model. The language of the METI guidelines, the opinions of the Tokyo District Court, High Court, and Supreme Court seem to follow the Jensen enlightened stakeholder model if any stakeholder model, as they call for decisions to support business value and through it shareholder value. However, the potential for ex ante anti-takeover measures coupled with cross-shareholding, while untested by courts to date, suggests that in practical effect, Japan may have management-friendly rules once companies complete the process of adapting to the new environment. Conversations with METI officials suggest that Japan's large companies hold substantial influence over law-making and policy-making as in many countries, but the principle of shareholder equality's existence in the Company Law is a mystery even to some officials involved in drafting it. This Article suggests that it may result from the difference in political economies resulting from Japan's labor law, destabilizing managerialist control of government institutions in an economic downturn and through, *inter alia*, law, opening the door to takeovers of those companies not utilizing their resources and position effectively.

Easterbrook and Fishel concluded that Delaware's business judgment rule should be limited in the tender offer context<sup>140</sup> due to directors' conflict of interest with shareholders in that context. They argue that managers should respond to tender offers

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138 See, e.g., Supreme Court opinion at 2; Hanrei Jihô 1983, at 58 (2007).

139 Noted by the Supreme Court. Supreme Court opinion at 8-9; Hanrei Jihô 1983, at 61 (2007).

140 In particular, the business judgment should not apply much in where there is a change in control looming, because directors are usually always an interested party to the transaction in that they will be fired if the company is acquired.

generally with passivity.<sup>141</sup> Judged by this standard, *Bulldog* was decided incorrectly. Management responded not with passivity but by mobilizing lawyers and underwriters to protect their control rights. Management's countermeasures could not have actually been taken for the benefit of common shareholder interests, because greenmail harm shareholders. In general, allowing takeover countermeasures ex ante or ex post would at best amount to a transfer of wealth from bidder to shareholder at substantial cost. On the other hand, *Bulldog* requires shareholders and management to choose between greenmail and a change in control to fulfill the principle of Shareholder Equality toward the offeror. As an invitation to pursue greenmail, *Bulldog* may incentivize hostile tender offers while minimizing disruption to the economy in the form of actual changes in control. However, *Bulldog* is likely to encourage companies to adopt ex ante takeover countermeasures and may result in increased cross-shareholdings as a takeover countermeasure. Therefore, depending on the outcome of future court cases or laws concerning cross shareholdings and ex ante takeover countermeasures, Easterbrook and Fishel might argue that the resulting incentive structure creates waste and reduces the benefits of the market for corporate control.

This result is opposed, though, by considerations of comparative political economy. Ramseyer and Miwa have shown that Japanese firms have an efficient number of outside directors due to capital market and product market competition relative to the legal rules and economic conditions of Japan,<sup>142</sup> but due to the newness of Japan's current corporate legal system, uncertainties in its interpretation, and shifting economic pressures from, inter alia, globalization, changing transportation and raw materials costs, and shifting demographics within Japan, the economy may not yet have reached an efficient equilibrium. In terms of the political economy, in Japan unlike the US, employees and unions have incentives relatively more aligned with shareholders than with any managers imposing agency costs through private benefits of control. Companies can generally only fire employees without facing likely successful wrongful termination suits where the company faces severe financial crisis.<sup>143</sup> Employees are also significantly compensated for overall firm performance through semi-annual bonuses, so excessive managerial agency costs are transmitted directly to employees as well as shareholders.<sup>144</sup> The employee class, then, is more likely to support a takeover market in Japan in reaction to excessive managerial agency costs than in the US.

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141 *Supra* note 105, at 1194-1204. In particular, they argue that management should be able to react to a tender offer or potential hostile takeover by, at most, issue a press release advising shareholders on what to do, but otherwise to go about operating the company as usual.

142 J.M. RAMSEYER / Y. MIWA, "Who Appoints Them, What Do They Do? Evidence on Outside Directors from Japan", *Journal of Economics & Management Strategy*, Vol. 14 No. 2 299 (Summer 2005).

143 *See* labor law sources cited *supra* note 68.

144 RAMSEYER *supra* note 110, at 44. The practice of semi-annual bonuses, sometimes tied to performance, remains the norm at Japanese companies.

Using Bebchuck & Roe's framework to analyze whether the *Bulldog* rule is efficient or not, it seems likely that the rule as applied to the instant case is efficient. Shareholders get to choose what the company will do, and their judgment will be respected barring extreme circumstances. This is far more supportive of shareholder value than, generally, the US and other countries with strong defensive measures such as the poison pill, staggered boards, and 'change of control' provisions in employment contracts. Shareholders' getting the final word theoretically eliminates the agency cost of allowing management to act on behalf of shareholders in this situation where they face a significant conflict of interest and therefore are unlikely to act precisely as shareholders would like. The principal of shareholders' will sounds great for takeover advocates. Countermeasures are considered largely inefficient and at best transfers of wealth from buyer to seller, so as a ruling promoting the principle of shareholders' will, *Bulldog* should promote the growth of Japan's economy. Japan's delay periods from anti-takeover countermeasures implemented under the METI Guidelines are much shorter than those facing an American acquirer, which may face a staggered board with a poison pill in place.<sup>145</sup> In the US, above and beyond the costs imposed by state anti-takeover legislation, the judicially-approved poison pill has been described as a "show-stopper" and the result of a political economy with dispersed efficiency gains and concentrated losses.<sup>146</sup> Like the modern public corporation's dispersed shareholders and unified management interests, the political form, including the judiciary, has agency costs of its own in addition to those inherent in the structure of the public corporation.<sup>147</sup> Japan's political structure, in part because it has national incorporation and in part because efficiency gains are partly concentrated in the employee class by virtue of their structural incentives to promote the company's fiscal health, may be better suited to produce an efficient rule. Also, note that it does not matter whether METI is aware of pressure from the employee class for economic growth in terms of maintaining the financial health of Japanese companies as a group in this way: all that matters to support this theory is that the pressure *exceeds* that in the US relative to management pressure. It also does not matter that Japan's labor law has made it more possible than it was in the past to fire people: what does matter is that it is *less* possible than in the US.

Hansmann & Kraakman write that this shareholder value model has emerged as the dominant view, and convergence is inevitable.<sup>148</sup> Blair argues that share price is a flawed metric because it is manipulable, but this is a straw man argument because Hansmann and Kraakman advocate for shareholder value as the measure of management success,

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145 Compare HANSEN, *supra* note 23, at 5, with the source in note 123.

146 See ROE, *supra* note 124, at 160-67.

147 *Id.*

148 H. HANSMANN / R. KRAAKMAN, "The End of History for Corporate Law", *The Georgetown Law Journal*, Vol. 89 439 (2001).

not share price.<sup>149</sup> Japan now conforms to the shareholder value model, at least nominally. The result in the Japanese M&A market may be in some ways more efficient than the US market for corporate control, limited by, *inter alia*, Japan's labor law, director liability, and the extent to which Japan's judiciary is a political creature<sup>150</sup> subservient to management interests. Shareholders should be reassured by METI's strong pro-takeover stance, the desperate pro-shareholder reforms enacted since Japan's economic troubles began, and the potential pro-takeover effect on the political economy of Japan's labor law. The government continues to act to encourage foreign investment.<sup>151</sup> Japan is unlikely to adopt a "Labor-Oriented Model"<sup>152</sup> of corporate governance because labor interests are relatively well-protected already by laws, court decisions, and social welfare programs. The "Manager-Oriented Model"<sup>153</sup> lacks the political traction it has had in the US for structural reasons: incorporation in Japan is national, preventing jurisdiction-shopping and a race to the bottom in anti-takeover laws.<sup>154</sup> If nationalistic shareholders bamboozled by self-interested management are really to blame for the outcome of the shareholder vote in this exceptional case, their share of shareholder votes should decline over time under the influence of capital market competition. As long as Japan's polity experiences anxiety about the economy, globalization, and its shrinking

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149 M.M. BLAIR, *Corporate Value, Corporate Governance, and Corporate Performance*, in *Corporate Governance and Capital Flows in a Global Economy*, 53, 60 (P.K. Cornelius / B. Kogut, eds., 2003).

150 See J. HALEY, "The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust," in *Law in Japan: A Turning Point*, (D. Foote, ed. 2008), at 99 et seq, also printed in Milhaupt / Ramseyer / West, *supra* note 3, at 109-117 for the narrative that Japan is extremely politically independent despite their activist role; see J.M. RAMSEYER / E. RASMUSEN, "Skewed Incentives: Paying for Politics as a Japanese Judge", 83 *Judicature* 190 (2000) for empirical evidence and examples of how Japan's judges were subject to political control by the LDP.

151 See, e.g., the government's plan to alleviate the tax burdens facing foreign investment from countries lacking tax treaties with Japan.  
<http://www.nikkei.co.jp/news/keizai/20080415AT3S1401L14042008.html> (Japanese) (last visited April 14, 2008, dated April 15, 2008 7AM Japan time).

152 See HANSMANN / KRAAKMAN, *supra* note 148, at 444.

153 *Id.*

154 See W. CARY, "Federalism and Corporate Law: Reflections upon Delaware", 83 *Yale Law Journal* 663 (1974); L. BEBCHUK, "Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law", 105 *Harvard Law Review* 1437 (1992) (identifying areas in which state competition is likely to produce undesirable corporate law rules, including generally conflicts of interest between managers and shareholders such as hostile takeovers); L. BEBCHUK / A. FERRELL, "Federalism and Corporate Law: The Race to Protect Managers from Takeovers", 99 *Columbia Law Review* 1168 (1999) (showing how the development of corporate law supports the view that there is a race to the bottom in corporate law where management interests conflict with shareholder interests, in particular, in the takeover context). For purposes of comparing the US and Japan, the work on federal intervention in to corporate law (e.g., M. ROE, "Regulatory Competition in Making Corporate Law in the United States-And its Limits", 21 *Oxford Review Of Economic Policy* 232 (2005)) should not be weighed because this should be a neutral between Japan and the US.

workforce, Japan's political economy should continue to move in favor of shareholder protections, leading to convergence in certain areas. In this case, the forces at issue are likely "the failure of alternative models [and] the competitive pressures of global commerce" rather than a "shift of interest group influence in favor of an emerging shareholder class."<sup>155</sup> Japan's managers are unable to jurisdiction shop to the extent that managers of EU or American companies are, so meaningful reforms to and good enforcement of corporate law should make a substantial difference in the market, and Japan's government is not constrained by the race-to-the-bottom inertia prevalent in the US with regard to anti-takeover statutes in particular.

This Article does not contend, though, that Japan existed under a "relationship-based investing model";<sup>156</sup> this Article claims that such views erroneously attribute to a fictional pan-Asian culture differences in incentives and pricing due to path-dependent differences in capital and debt structure and lender information. Rajan and Zingales' claim that the rate a lender lends to a client it has substantial ties with and information about is a "non-market" rate and thus inefficiently over or under-priced depending on the time point suggests that the laws of economics, product market competition, and capital market competition do not apply in East Asia. The data with respect to Japan contradict this view,<sup>157</sup> and Japan is a non sequitur in the financial crisis of 1997

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155 HANSMANN / KRAAKMAN *supra* note 148, at 443 (listing 3 forces for convergence around the Standard Model). Japan lacks a significant shareholder class; most household assets remain in savings. Koizumi may have managed to convince the general public for a time to, paradoxically, oppose management interests in order to protect Japan's employment opportunities. This Article holds that this paradox is explained by Japan's labor law's impact on the direction of employee interests.

156 R. RAJAN / L. ZINGALES, "Which Capitalism? Lessons from the East Asian Crisis," *Journal of Applied Corporate Finance* Vol. 11 No. 3, 40 (Fall 1998) (purporting that there is an East Asia-wide relationship-based economic model much like Japan's supposed Main Bank and *keiretsu* systems involving below-market interest rates and excessive lending when times are bad compensated by above-market interest rates when times are good, and that this system was implicated in the financial crisis in Thailand, etc., in the late '90's).

157 Ministry of Finance, Policy Research Institute, "Survey about our country's companies' corporate governance", available at <http://www.mof.go.jp/jouhou/soken/kenkyu/zk063/furoku01.pdf> (conducted in 2002) (last visited, April 18, 2008) at 31. This survey writes that, of those companies obtaining finance from their main bank, 27.7% do so because it is cheaper than alternative modes of finance, suggesting that rather than commanding a premium, these banks are able to offer a discount rate, possibly due to superior information, internalizing some of the company's benefits from the capital structure, etc. Companies were able to choose up to two options. The other major reasons cited are because of typical bank line-of-credit type services (can provide funding in response to unexpected capital needs (68.8%) and that they provide daily business placement related ancillary service, transactions, information, etc. (42.6%). Only 11.6% replied that they choose these banks because they feel that the bank will help them when they have operational difficulties. Given the companies had two choices, this number seems too small to justify claiming that there was or is a separate economic system. The number more likely reflects the universal economic principle following from incentives

discussed in their article anyway, possessing a different legal system, enforcement mechanism efficacy, economy type, level of economic development, as well as culture, if relevant, than Thailand, Indonesia, the Philippines, Malaysia, and South Korea, the five countries most impacted by the financial crisis of 1997.<sup>158</sup> In fact, conflating various East Asian countries and their problems, such as Thailand with South Korea, may have contributed to the panic which, along with disorderly workout problems, lead to the unnecessarily large magnitude of that financial crisis.<sup>159</sup>

Allowing management to seek out friendly cross-shareholdings in conjunction with ex ante takeover countermeasures allows management to control a situation in which it has significant conflicts of interests with shareholders.<sup>160</sup> To the extent that this allows them to avoid a meaningful shareholder vote, this would violate the principle of “shareholders’ will” and may prevent the accrual of some benefits of an active market for corporate control. However, there is no guarantee that “friendly” shareholders will continue to be friendly if offered a significant premium above what they paid for the shares.<sup>161</sup> Also, to the extent that such arrangements are truly inefficient, over time those shareholders making rational decisions will come to control the market along with those others which adapt before spending their capital entirely on greenmail. Conversely, to the extent that cross-shareholding does allow institutional investors to reduce agency costs<sup>162</sup> through control blocks, such controlled companies should be immunized against takeovers. However, the companies will not be immunized against the forces of a competitive market place. Also, the principle of shareholders’ will appears to have real traction with the Japanese judiciary, as evidenced by *NBS* and now *Bulldog*. If management finds a superficial way around a shareholder vote, they may face resistance from courts as well as shareholder activists, METI, and some legislators motivated by a polity strongly incentivized to oppose excessive management-imposed agency costs.<sup>163</sup>

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bank officers face concerning non-performing loans: “If you owe the bank \$100, that’s your problem. If you owe the bank \$100MM, that’s the bank’s problem.” Getty.

158 See, e.g., S. RADELET / J. SACHS, “The Onset of the East Asian Financial Crisis”, National Bureau of Economic Research Working Paper No. 6680 (July 1998) at 9 (calling these five countries the “Asian-5”, the countries hardest hit by the crisis).

159 *Id.* at 3 (noting that outside Thailand, the magnitude of the crisis was not supported by the fundamentals).

160 Skadden, Arps, Slate, Meagher & Flom LLP’s partner H. Kamiya’s comments quoted by Reuters, *supra* note 59.

161 RAMSEYER, *supra* note 110, at 1.

162 See ROE, *supra* note 120, at 149-150.

163 This Article suggests that these legislators may be motivated by either a genuine desire for the public good or, more cynically, concentrations of employee constituents whose future is jeopardized by mismanagement or a need to adapt to the global economy.



5. *How to Solve the Perceived Potential for Abusive Pro-management Shareholdings*

If the government wishes to control for the problem abusive pro-management shareholdings coupled with *ex ante* takeover countermeasures, they could further impose legal limitations on cross shareholdings or just voting rights in a takeover setting by adding a provision to the company law that companies not primarily engaged in the investment business may not vote their shares in a special resolution at a shareholders' meeting. If the shares are held just for "friendship" rather than as an anti-takeover device, one would expect that cross-shareholding would not decline as a result excepting the extent to which the value of shares is reduced by their inability to vote. If the shares are held as an anti-takeover device, this provision would help ensure that hostile acquirers will get a fair chance to persuade shareholders that it would be in their best interest to sell. Japanese employment law makes it difficult for true layoffs to take place,<sup>164</sup> and takeovers would thus appear to facilitate reorganization there with minimum disruption to stakeholders unless reorganization involves moving to a different physical location. Putting this piece in place could make Japan's corporate control market one of the most efficient in the world, or at least most protective of shareholder value by allowing countermeasures only to the extent that shareholder value is increased. The principle of shareholders will stands in sharp contrast to Delaware's business judgment rule and state corporate governance law in general, which Blair classifies as closer to "director primacy" than shareholder interests or shareholders' will.<sup>165</sup>

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164 See sources cited *supra* note 64.

165 BLAIR *supra* note 149, at 64.

## ZUSAMMENFASSUNG

*Der Beitrag bietet eine kommentierte Übersetzung und eine Darstellung des Hintergrunds der ersten Entscheidung des japanischen Obersten Gerichtshofs (OGH) zu feindlichen Übernahmen (I.), kommentiert diese in ihrem unmittelbaren Kontext (II.) und setzt sie in Beziehung zur US-amerikanischen Diskussion über feindliche Übernahmen, den Market for Corporate Control, die japanische Corporate Governance und das japanische Recht im allgemeinen (III.). Die Entscheidung wendet den Grundsatz der Gleichbehandlung der Aktionäre auf einen sog. Greenmailing-Fall an. Die Abwehrmaßnahme war dabei von einer überwältigenden Mehrheit der Aktionäre gebilligt worden und entschädigte den Bieter angemessen, wenn nicht sogar übermäßig, für den Ausschluß des Bezugsrechts. Daher erklärte der OGH die Abwehrmaßnahme unter Berücksichtigung des Aktionärswillens und von Sinn und Zweck des Gleichbehandlungsgrundsatzes für rechtmäßig.*

*Der Artikel vertritt folgende Thesen: Erstens erteile die Entscheidung dem von Instanzgerichten entwickelten Konzept des „missbräuchlichen Bieters“ eine Absage oder solle ihm in ihrer Konsequenz jedenfalls für die Zukunft den Boden entziehen; zweitens könne sie, auch wenn Unklarheiten fortbeständen, ein Regime zur Folge haben, das übernahmefreundlicher ist als das managementfreundliche US-amerikanische Modell; und drittens lasse sich dieses Ergebnis am besten durch eine ökonomische Analyse erklären, welche das politische System und die spezifischen Anreizstrukturen des japanischen Rechts und seiner pfadabhängigen Entwicklung einbeziehe. Der Beitrag geht ferner auf verschiedene wichtige Ereignisse auf dem Gebiet des Übernahmerechts und der Corporate Governance aus jüngerer Zeit ein. Dabei wird die Aussagekraft kulturalistischer und managerialistischer Erklärungsmodelle ökonomischen Erklärungsmustern gegenübergestellt. Schließlich wird analysiert, welches Corporate Governance-Modell der Entscheidung und den relevanten Vorschriften zugrunde zu liegen scheint.*

*Der Beitrag schließt mit dem Vorschlag, der Gefahr rechtlich vorzubeugen, dass ex ante Abwehrmaßnahmen und ein Wiederaufleben der wechselseitigen Beteiligungen Japans jungen Market for Corporate Control im Keim ersticken könnten.*

*(Übers. durch die Red.)*