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Land of the Falling “Poison” Pill: Understanding Defensive Measures in Japan on Their Own Terms

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Land of the Falling “Poison” Pill

Understanding Defensive Measures in Japan on Their Own Terms

Alan K. Koh, Masafumi Nakahigashi & Dan W. Puchniak*

Embraced by US managers in the 1980s as a lifeline in a sea of hostile takeovers, the poison pill fundamentally altered the trajectory of American corporate governance. When a hostile takeover wave seemed imminent in Japan in the mid-2000s, Japanese boards appeared to embrace this American invention with equal enthusiasm. Japan’s experience should have been a ringing endorsement for the utility of American corporate governance solutions in foreign jurisdictions – but it was not to be. Japan’s unique interpretation of the “poison pill” that was so eagerly adopted by Japanese companies in the mid- to late-2000s has turned out to be nothing like their potent American namesakes – and, in fact, the opposite of what would be expected by leading US academics who have built a cottage

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

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industry publishing on the US poison pill.

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

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INTRODUCTION

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

Japan’s experience should have been a ringing endorsement for the utility of American corporate governance solutions in foreign jurisdictions and served as evidence supporting the view that corporate governance around the world is destined to converge on the American model.⁵ That is, but for two “inconvenient truths” that foreign observers and corporate law scholars have overlooked. These inconvenient truths not only make what occurred in Japan entirely different from what occurred in the United States, but

¹ The first known use of this term was in Frank Allen & Steve Swartz, *Lenox Rebuffs Brown-Forman, Adopts Defense*, WALL ST. J., 2 (Jun. 16, 1983).

² See Part II below.

³ Dan W. Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware*, 15 BERKELEY BUS. L.J. 4, 13–15 (2018) (summarizing various predictions).

⁴ See Part IV.A below.

⁵ *C.f.* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001) (declaring that convergence had occurred) with Dan W. Puchniak, *The Japanization of American Corporate Governance? Evidence of the Never-Ending History for Corporate Law*, 9 ASIAN-PAC. L. & POL’Y J. 7 (2007) (rejecting the convergence debate as irrelevant because corporate governance systems always evolve).

also offer novel insights into how defensive measures have evolved in an unpredictable way in the world's third largest economy.

The first inconvenient truth, which two of the authors previously explored, is that Japan's "poison pill" is fundamentally different from the US-style "poison pill".⁶ The second inconvenient truth – which this Article exposes – is that the "poison pills" that were the darling of Japanese companies in the mid-2000s have, since their brief moment in the sun, gone into sustained decline in the most striking reversal of its kind outside of the US and appear to be heading towards extinction.

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

Second, in 2014–2015, the rate at which companies in Japan which had previously adopted a "pill" and then later decided to "remove" it spiked. Interestingly, almost all these removals took place because management decided not to seek shareholder approval to renew an existing "pill" (which is normally required every three-years according to the terms of Japanese "pills").⁸ In 2013, merely 3.61% of listed companies did not renew their "pills", compared with 22.60% in 2018. Our hand collected data reveals that the non-renewal rate increased significantly around 2013–2014 and has been rising ever since.⁹ The obvious puzzle is: why did the rate of non-renewals spike around 2013–2014 and why has it continued to rise ever since?

The combined effect of the collapse of new "pill" adoptions after 2008, with the spike in non-renewals after 2013, is that the total number of listed companies with "pills" in Japan has been rapidly falling. Based on our hand collected data, in 2016–2017, for every

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

⁷ Table 2; Fig. 2.

⁸ Discussed below at Pt. IV.A; see text accompanying *infra* notes 174–176; Fig. 2; Table 3.

⁹ Table 2; Fig. 2.

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firm that adopted a new “pill”, sixteen failed to renew existing ones.¹⁰ This has placed the “pill” in Japan on a trajectory towards extinction – transforming Japan into the “land of the falling ‘poison pill’”.

This Article seeks to solve these puzzles by providing what is, to our knowledge, the first in-depth analysis in the comparative corporate governance literature of Japan’s surprising reversal on the “poison pill” by drawing on Japanese sources that were before now unexplored in the English-language literature. The reasons behind the watershed reversal in the adoption of the so-called “poison pill” by Japanese companies, to our knowledge, have also not been explored in either English or Japanese. This gap in the comparative corporate governance literature is glaring as it is the largest reversal of its kind outside of the US and involves a mechanism that has produced a small cottage industry of academic musings in the leading US literature.¹¹

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

Second, the so-called “pill” in Japan is a far cry from the potent poison that many thought it would be when the government approved its use in 2005 – which, at that time, appeared to have been created “in the shadow of Delaware”.¹³ Over the past decade it has become increasingly clear that the so-called “pill” in Japan lacks the active ingredient

¹⁰ Discussed below at Part IV.A.

¹¹ A sampling of frequently-cited articles (other those cited later) focusing on or devoting substantial attention to the poison pill would include Jeffrey N. Gordon, *Corporations, Markets, and Courts*, 91 Colum. L. Rev. 1931, 1936–1948 (1991); Jeffrey N. Gordon, “Just Say Never?” *Poison Pills, Deadhand Pills, and Shareholder-Adopted Bylaws: An Essay for Warren Buffett*, 19 Cardozo L. Rev. 511 (1997); Ronald J. Gilson, *Delaware’s Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 Bus. Law. 247 (1989); Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 Stan. L. Rev. 1325, 1350–1352 (2013); Ronald J. Gilson, *Unocal Fifteen Years Later (and What We Can Do About It)*, 26 Del. J. Corp. L. 491 (2001); Julian Velasco, *The Enduring Illegitimacy of the Poison Pill*, 27 J. Corp. L. 381 (2002).

¹² Part IV.B.1.

¹³ See Curtis J. Milhaupt, *In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan*, 105 Colum. L. Rev. 2171, 2196 & 2196.n82 (2005) (describing the process by which Delaware takeover jurisprudence was adopted).

of its American namesake: providing the board – *without* shareholder approval – with a veto right over a hostile bid.¹⁴ Empirical evidence demonstrates that almost all so-called Japanese “pills” require some form of shareholder approval – which makes sense considering they have been designed in the shadow of ambiguous Japanese (not Delaware) jurisprudence. This scant and ambiguous jurisprudence has not established that boards – without shareholder approval – can adopt, maintain or even trigger a “pill” in Japan.¹⁵ We query whether a “pill” that requires shareholder approval should even be called a “pill” – a point discussed in detail below. Here, the crucial point is that as it has become increasingly clear that Japanese “pills” fail to provide the board with an unambiguous veto – without shareholder approval – over a hostile bid, the incentive for management to adopt them has significantly diminished.

Third, more recent changes to Japan’s corporate governance environment have provided the impetus for increased institutional investor resistance to the introduction of new “pills” and, more importantly, for approving the renewal of expiring ones. In 2015, Japan adopted a “comply or explain” Corporate Governance Code with an idiosyncratic provision: the requirement that companies comply with having no poison pill or explaining why they have one – a particularly challenging task in the only major developed economy that has yet to have a successful hostile takeover. Then, in 2017, Japan amended its Stewardship Code, which now requires institutional investors to disclose their votes on individual agenda items, including any support for the renewal of a poison pill – again a particularly challenging task in the only major developed economy that has yet to have a successful hostile takeover. The timing appears to be significant: shortly before Japan’s revised Stewardship Code went into effect, the ratio of removals/adoption of the so-called “poison pill” increased markedly, making this the most devastating blow yet to the “pill” in Japan – and corresponding to institutional investors voluntarily disclosing their votes to prepare for the inauguration of the Stewardship Code. This timely fall in the “poison pill” is highly interesting, as it suggests that Japan’s Stewardship Code amendment may have prevented institutional investors from continuing to act in support of management – a tangible impact on corporate governance not previously foreseen or contemplated by the growing international

¹⁴ Part II.B.

¹⁵ Part II.C.

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stewardship literature.¹⁶

This Article proceeds as follows. Part I begins by providing the comparative legal context by explaining the Anglo-American approach to takeover regulation, including the US-style “poison pill” and UK regulations on defensive measures. Part II describes the legal design of the so-called Japanese “poison pill”, which is fundamentally different from its US counterpart and belies a direct comparison in the Anglo-American context. Part III, illuminates the broader Japanese corporate governance environment for hostile takeovers to provide a clear context for evaluating the “pill” in Japan on its own terms. Part IV sets out, to our knowledge, the first analysis explaining what has been driving Japanese firms to dismantle their so-called “pills”. Part V concludes by highlighting possible future research questions raised by the ostensible transplant of the American poison pill into Japanese soil.

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

Conceived in 1982 by the enterprising New York attorney Martin Lipton, the US-style “poison pill” is a legal mechanism that a corporate board can adopt in response to an unsolicited takeover bid. Its purpose, as originally conceptualized by Lipton, was to buy the board more time to plan a course of action that would “maximize shareholder value”.¹⁷

Modern poison pills are diverse in form, but most are based on corporate “rights” that are triggered when an acquirer reaches a certain ownership threshold (typically from 10 to 20 percent) in the target company; once triggered, the target company’s shareholders other than the acquirer may purchase additional shares on favorable terms, with the effect of diluting the acquirer’s holdings.¹⁸ What made the poison pill attractive was that it

¹⁶ See sources cited at *infra* note 208.

¹⁷ Martin Lipton, *Pills, Polls, and Professors Redux*, (2002) 69 U. CHI. L. REV. 1037, 1043–1044 (2002) (“In September 1982, I published a memorandum describing the “Warrant Dividend Plan”. The “warrant” of the Warrant Dividend Plan was a security that could be issued by the board of directors of a target company (before or after it was faced with an unsolicited bid) that would have the effect of increasing the time available to the board to react to an unsolicited bid and allowing the board to maintain control over the process of responding to the bid. Beginning at the end of 1982, in various forms it was used successfully by targets of hostile bids to gain time and maximize shareholder value.”).

¹⁸ Paul Davies, Klaus Hopt & Wolf-Georg Ringe, *Control Transactions*, in REINIER KRAAKMAN ET AL., THE

could be implemented by the board on its own initiative, and without shareholder consent.¹⁹ This revolutionary legal device soon obtained the imprimatur of the Delaware Supreme Court in a line of cases decided in the 1980s,²⁰ and made it possible for the board to “just say no” to any hostile bid by deciding to adopt a poison pill.²¹

Notwithstanding a decades-long normative debate about whether a board should have the right to “just say no” to a takeover bid,²² the creation and adoption of the poison pill fundamentally shifted the balance of corporate governance power from shareholders to boards²³—with independent directors concomitantly becoming the linchpin in the exercise of this new found board power.²⁴ The magnitude of this shift is illuminated by the

ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 216 (3d. ed., Oxford University Press 2017); see also STEPHEN M. BAINBRIDGE, CORPORATE LAW 418–423 (3rd edn, Foundation Press 2015) (providing a concise introduction to the modern poison pill comprising “flip-in”, “flip-over”, and “redemption” elements).

¹⁹ Marcel Kahan & Edward B. Rock, *How I Learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law*, 69 U. CHI. L. REV. 871, 909 (2002) (“At least in the first instance, poison pills are adopted unilaterally by the board of directors. Indeed, the fact that the pill did not require shareholder approval was one of its main attractions.”).

²⁰ *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) (requiring directors to rely on an informed view of the corporation’s intrinsic value when making takeover-related decisions); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985) (accepting utility of takeover defences and directors’ discretion to deploy them subject to an enhanced business judgment rule); *Revlon, Inc. v. MacAndrews & Forbes Holdings*, 506 A.2d 173 (Del. 1986) (directors not required to maximise short-term value of companies, save where the company was to be sold for cash); *Moran v. Household International, Inc.*, 500 A.2d 1346 (Del. 1985) (permitting boards to adopt the poison pill, and recognizing the board’s power to ‘just say no’ until they were replaced by the shareholders; judicial review of the board’s use of the poison pill subject to the *Unocal* enhanced business judgment rule); *Paramount Communications, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1990).

²¹ Jeffrey N. Gordon, *Corporations, Markets, and Courts*, 91 COLUM. L. REV. 1931, 1941, 1944–1947 (1991); Marcel Kahan, *Paramount or Paradox: The Delaware Supreme Court’s Takeover Jurisprudence*, 19 J. CORP. L. 583, 604 (1994) (“Thus, in a curious way, the logic of *Time* and *Unocal* validates the use of the poison pill for a “just say no” defense ...”).

²² The debate over the proper role of the board in hostile takeovers can be traced back at least as far as Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target’s Management in Responding to a Tender Offer*, 94 HARVARD L. REV. 1161 (1981) and Ronald J. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819 (1981). For a typical exchange between the two camps, compare Lucian Arye Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, 69 U. CHI. L. REV. 973 (2002) and Lipton, *supra* note 17.

²³ Lucian Arye Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers*, 99 COLUM. L. REV. 1168, 1189 (1999) (“Poison pills have altered fundamentally the allocation of power between managers and shareholders.”); Frank Partnoy & Steven Davidoff Solomon, *Frank and Steven’s Excellent Corporate-Raiding Adventure*, THE ATLANTIC (May 2017) <<https://www.theatlantic.com/magazine/archive/2017/05/frank-and-stevens-excellent-corporate-raiding-adventure/521436/>> (“Eventually, companies developed defenses, most notably the “poison pill,” which dilutes the stake (and voting rights) of anyone who acquires a substantial amount of stock without first obtaining the board’s approval. By the 1990s, power had been returned to management.”).

²⁴ Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1526 (2007) (“The price of the power to “just say no” to a hostile bidder was a board that consisted of a majority of independent directors and a process that

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defeatist tone struck by one of America’s leading pro-shareholder corporate governance commentators in the 1980s:²⁵

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

In the 1990s, over 60% of S&P 1500 companies adopted the poison pill,²⁶ and every hostile acquirer in the US encountered a target armed with one.²⁷ Hostile acquisitions fell precipitously over the 1980s,²⁸ and remained low until through the 1990s,²⁹ a phenomenon attributed at least in part to the poison pill.³⁰ The M&A market also shifted decisively in the US toward negotiated, “friendly” acquisitions³¹ as the line between “hostile” and “friendly” takeovers blurred.³²

would call on those directors to exercise (at least the appearance of) independent judgment.”)

²⁵ Joseph A. Grundfest, *Just Vote No: A Minimalist Strategy for Dealing with Barbarians inside the Gates*, 45 STAN. L. REV. 857, 858 (1993). Grundfest would also say: “With the demise of the hostile takeover, shareholders can no longer expect much help from the capital markets in disciplining or removing inefficient managers ... As a result, corporate America is now governed by directors who are largely impervious to capital market or electoral challenges.” *Id.* at 862, 864. In a similar, critical vein, see Jonathan R. Macey, *The Legality and Utility of the Shareholder Rights Bylaw*, 26 HOFSTRA L. REV. 835, 837 (1998).

²⁶ John C Coates IV, *Explaining Variation in Takeover Defenses: Blame the Lawyers*, 89 CAL. L. REV. 1301, 1307 (2001).

²⁷ Lucian Arye Bebchuk, John C. Coates IV, & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 926–927 (2002) (including pills adopted before the takeover attempt (i.e. the “pre-bid” variety), or “morning after” pills adopted as an immediate response to hostile bids).

²⁸ Kahan & Rock, *supra* note 19, at 879 n.33 (2002) (“Hostile acquisitions fell from almost \$127 billion in 1988 to about \$45.5 billion in 1989, to a little more than \$11 billion in 1990.”).

²⁹ Joseph H. Flom, *Mergers & Acquisitions: The Decade in Review*, 54 U. MIAMI L. REV. 753, 761–762 (2000) (reporting that hostile acquisitions made up a minuscule proportion of total M&A activity, but with a rebound in 1999).

³⁰ Gordon, *supra* note 21, at 1931–1932; Robert W. Hamilton, *Corporate Governance in America 1950–2000: Major Changes but Uncertain Benefits*, 25 J. CORP. L. 349, 358 (2000) (“Takeover bids are no longer a major device for eliminating under-performing management because management has devised effective defensive tactics that make purchase-type takeovers impractical. The principal defensive weapon today is a “poison pill” ...”).

³¹ Hamilton, *supra* note 30, at 358 (“Thus, in the United States today, takeover bids are usually negotiated acquisitions rather than truly external bids. A surprise unsolicited bid may be used to get the target’s attention and to open discussions, but negotiation then usually follows in order to defuse the poison pill and other defenses.”).

³² Kahan & Rock, *supra* note 19, at 880–881; Paul Davies, *Control Shifts via Share Acquisition Contracts with Shareholders (Takeovers)*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 561

Before long, shareholder-friendly academics,³³ proxy advisory firms,³⁴ and activist shareholders³⁵ responded by pushing for limitations on or removal of poison pills and

(Jeffrey N. Gordon & Wolf-Georg Ringe eds., OUP 2018) (“Just say no” may be an accurate description of the formal power held by target directors under the plan, but “just say no” did not become an accurate description of how target directors behaved.” ... The combined effect of [two developments in US corporate governance] was to change “just say no” into “just say yes, if it is a good price.”).

³³ See e.g. Ronald J. Gilson, *Unocal Fifteen Years Later (And What We Can Do About It)*, 26 DEL. J. CORP. L. 491, 512 (2001) (“However realistic the threat of a tidal wave of junk bond financed, two-tier, bust-up takeovers, assisted by unthoughtful shareholders, may have appeared to the Delaware courts in 1985, we know now that it was a chimera. Between bidder and target now stand large sophisticated shareholders with carefully considered views of corporate governance. Shareholder initiated bylaws provide an imperfect, but realistic, way to turn back the clock.”); Bebchuk, *supra* note 22, at 1035 (“The proposed approach—precluding incumbents who lose one election from maintaining pills—would take away from pills the special antitakeover power that they have in the presence of a staggered board. Given that about half of public companies now have staggered boards, a development with profound effects on the market for corporate control, this approach would not address an issue that is merely theoretical. Rather, it would substantially reduce boards’ ability to block offers and would restore the safety valve of an effective shareholder vote in firms with staggered boards.”); Edward B. Rock & Marcel Kahan, *Anti-Activist Poison Pills* (ECGI Working Paper No 364/2017, August 2017), 45 at http://ssrn.com/abstract_id=2928883 accessed Jan. 14, 2019 (“With the caveat that purely economic exposure should generally not count towards the threshold, we would regard non-discriminatory pills with a 20% threshold as presumptively valid. Such pills seem overall reasonably designed to prevent creeping control, and often serve to maintain a balanced election process, without significantly impeding an activist. On the other hand, even if economic exposure does not count, we would regard anti-activist pills with a threshold of less than 10% and pills with a “wolf-pack” trigger to be presumptively invalid. Such pills are not a reasonable response to any cognizable threat and impose excessive restrictions on the ability of an activist to conduct a credible contest and communicate with other shareholders.”).

³⁴ Francis J. Aquila, *Adopting a Poison Pill in Response to Shareholder Activism*, PRACTICAL LAW (April 2016) 24–25 at <https://www.sullcrom.com/files/upload/Apr16_InTheBoardroom.pdf> accessed Jan. 14, 2019 (“However, institutional investors and proxy advisory firms are generally wary of corporate defenses such as poison pills because these defenses are generally perceived to be merely intended to achieve board entrenchment. The perceived abuses of the earliest poison pills also taint the image of the poison pill. As a result of the substantial pressure from institutional investors and proxy advisory firms, most US companies have eliminated or watered down their poison pills. As of December 2015, only 19 of the companies in the S&P 500 maintained any poison pill at all.”); ISS (Institutional Shareholder Services), *United States Proxy Voting Guidelines: Benchmark Policy Recommendations* (January 4, 2018), 26 at <<https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf>> (recommending a case-by-case approach to management proposals on ratification of poison pills, and specifying that rights plans should have attributes including a “term of no more than three years” and no “dead-hand, slow-hand, no-hand, or similar feature that limits the ability of a future board to redeem the pill”). An earlier draft of ISS’ policy for 2018 would have gone further by recommending voting against or withholding the vote from all board nominees if the adopts a poison pill with a term of more than 12 months: ISS, *2018 Americas Proxy Voting Guidelines Updates Benchmark Policy Changes for U.S., Canada, and Brazil* (November 16, 2017), 6 at <<https://www.issgovernance.com/file/policy/active/updates/Americas-Policy-Updates.pdf>>.

³⁵ Jessica Hall, *Hostile takeovers hit record as market swoons*, REUTERS (September 29, 2008) at <https://www.reuters.com/article/us-mergers-hostiles/hostile-takeovers-hit-record-as-market-swoons-idUSTRE48S2P120080929>, accessed Sep. 25, 2018 (“Hostile takeovers have more than doubled to a record level in the United States so far this year, boosted by falling stock prices and weakened corporate defenses. ... In addition to the weakness in the U.S. stock market, with the Dow Jones industrials down over 16 percent this year, hostile bidders gained an advantage in recent years after many companies lowered their takeover defenses in the name of good corporate governance. ... “The activist movement and the response by many companies to create more shareholder-friendly features — such as the declassifications of boards, reductions in the numbers of poison pills — makes hostile bids more likely to be successful,” Selig said.”);

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other impediments to takeovers such as staggered boards.³⁶ These efforts resulted in the number of companies with a traditional anti-takeover poison pill declining by over half over the 2000s;³⁷ by 2017, only 65 companies in the S&P 1500, or about 4 per cent, maintained a poison pill, down from 54 percent in 2005.³⁸

Although, at first blush, these dramatic statistics suggest the death of the poison pill and the power of US boards to “just say no”, a more in-depth analysis suggests that the poison pill is still surprisingly important and the shift in corporate governance power back to US shareholders is far from incomplete – or, arguably, has hardly occurred at all. Boards still exercise their power to “just say no” by adopting a poison pill not ex ante, but in response to concrete takeover threats from time to time.³⁹ In addition, all listed

(describing instances of backlash from institutional investors).

³⁶ Lucian Arye Bebchuk et al., *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 890 (2002) (arguing that a staggered board “offers a more powerful antitakeover defense than has previously been recognized”). A concerted effort led by Professor Lucian Bebchuk (Harvard Law School) has led to a substantial decrease in staggered boards among the largest US listed companies: Steven Davidoff Solomon, *The Case Against Staggered Boards*, N.Y. TIMES: DEALBOOK (March 20, 2012, 12:43p.m.) at <https://dealbook.nytimes.com/2012/03/20/the-case-against-staggered-boards/> (noting that the Shareholder Rights Project led by Bebchuk has succeeded in prompting one-third of S&P 500 companies with a staggered board to declassify, and that by 2012 only 126 S&P 500 companies had staggered boards compared to 302 in 2002); ‘Declassifications’ (Shareholder Rights Project 2017) at <http://www.srp.law.harvard.edu/declassifications.shtml> (reporting 102 declassifications attributable to the Shareholder Rights Project from the 2012 to 2015 proxy seasons).

³⁷ Matteo Tonello, *Poison Pills in 2011*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (April 3, 2011) at <https://corpgov.law.harvard.edu/2011/04/03/poison-pills-in-2011/>, accessed Jan. 14, 2019 (observing that the number of corporations with poison pills fell from more than 2,200 in 2001 to fewer than 900 in 2011).

In recent years, pills that could be triggered at the much lower ownership threshold of 5 percent ostensibly to protect net operating losses (NOLs) – “NOL poison pills” – have gained popularity. See Christine Hurt, *The Hostile Poison Pill*, 50 U.C. DAVIS L. REV. 137, 191 (2016) (arguing that “the most effective and probable use of the NOL poison pill is to thwart activist shareholders, with the existence of the deferred tax asset providing pre-textual cover for the board”). The only poison pill ever triggered is of the NOL pill variety; see *Versata Enterprises, Inc. v. Selectica, Inc.*, 5 A.3d 586 (Del. 2010).

³⁸ Kosmas Papadopoulos et al., *U.S. Board Study: Board Accountability Practices Review* (Institutional Shareholder Services, April 17, 2018) 13, at <<https://www.issgovernance.com/file/publications/board-accountability-practices-review-2018.pdf>>.

³⁹ *Netflix Adopts Poison Pill*, N.Y. TIMES (November 5, 2012) at <https://dealbook.nytimes.com/2012/11/05/netflix-adopts-poison-pill/>, accessed Sep. 25, 2018 (“With Carl C. Icahn knocking on its front door, Netflix has put up the traditional first line of defense against a corporate takeover.”). Steven Davidoff Solomon, *Hostile Takeovers Abound, but Success Is No Guarantee*, N.Y. TIMES (May 27, 2016) at <https://www.nytimes.com/2016/05/28/business/dealbook/hostile-takeovers-abound-but-success-is-no-guarantee.html>, accessed Sep. 25, 2018 (“Bayer has made a \$62 billion bid for Monsanto. It, too, has missed the deadline for nominations for Monsanto’s board. And Monsanto has yet to adopt a poison pill, although this can be done in a matter of hours. Because Bayer would have to obtain antitrust approval before buying a substantial number of Monsanto shares, Monsanto does not have to rush. ... The Andersons has not yet adopted a poison pill, a fact it has trumpeted. But it really does not need to take this defensive maneuver.”).

companies in the United States, even those without an active pill in place, received the effect of the “shadow pill” – as boards can easily adopt a poison pill at a moment’s notice if the threat of a takeover arises. Thus, in effect, every listed company in the United States always has a (shadow) poison pill in place.⁴⁰ Suffice it to say that the poison pill has made its mark on corporate governance in the United States, not only – when it burst onto the scene in the 1980s, but even today as a central device for board power lurking in the shadows of the US corporate governance environment.

In the UK, the legal prohibition on boards adopting defensive measures without shareholder approval has prevented the pill from having any impact in the world’s second largest market for corporate control.⁴¹ In this context, it appeared – at least when viewed through an American lens – to be an epochal comparative corporate governance moment when the Japanese government released its *Takeover Guidelines* in 2005, which ostensibly made the poison pill legally available in Japan.⁴² The idea that one of the most important legal mechanisms in modern American corporate governance had been transplanted into the world’s third largest economy⁴³ and fourth largest stock market⁴⁴ captured the attention of leading American corporate governance academics and

⁴⁰ John C Coates IV, *Takeover Defenses in the Shadow of the Pill: A Critique of the Scientific Evidence*, 79 TEX. L. REV. 271, 286–291 (2000) (based on a study of 92 bids from 1996 to 2000). See also Francis J. Aquila & Melissa Sawyer, *Poison Pills Find New Life as “Raider-Like” Activism is on the Rise*, BUSINESS LAW TODAY (September 2014) at <https://www.americanbar.org/content/dam/aba/publications/blt/2014/09/keeping-current-sawyer-201409.authcheckdam.pdf>, accessed Jan. 14, 2019 (“Instead of maintaining 10-year poison pills as was typical in the 1980s and 1990s, the standard practice now is to keep a poison pill “on the shelf” and take it out on an as-needed basis. If a company has fully briefed its board on the poison pill’s effects and prepared all the paperwork in advance, adopting a “shelf” poison pill can be a *fait accompli* in very little time.”).

⁴¹ For a leading account comparing the divergence in takeover regulation between the United States and the United Kingdom, see John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why?—The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO L.J. 1727 (2007).

⁴² Ministry of Economy, Trade and Industry & Ministry of Justice, *Guidelines Regarding Takeover Defense for the Purposes of Protection and Enhancement of Corporate Value and Shareholders’ Common Interests* (May 27, 2005), available at http://www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/pdf/shishin_hontai.pdf, accessed Jul. 29, 2018 [hereinafter *Takeover Guidelines*].

⁴³ As of October 2018, in nominal terms, after the United States and the People’s Republic of China. International Monetary Fund, *World Economic Outlook (October 2018) – GDP, current prices*, IMF DATAMAPPER (2018) at <https://www.imf.org/external/datamapper/NGDPD@WEO/OEMDC/ADVEC/WEOWORLD/JPN>, accessed Jan. 14, 2019.

⁴⁴ As of April 2017, and after the New York Stock Exchange, NASDAQ, and the London Stock Exchange: statista, *Largest world exchanges by equity capitalization 2017*, THE STATISTICS PORTAL (2017) at <https://www.statista.com/statistics/264661/domestic-market-capitalization-worldwide-top-10/>, accessed Sep. 13, 2018.

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pundits.⁴⁵ In the two years following the government officially sanctioning the Japanese “poison pill”, hundreds of listed companies in Japan adopted it.⁴⁶ The obvious question became: would the “poison pill” have the same watershed impact on Japanese corporate governance as it had in the United States in the 1980s? To answer this, we first need to be absolutely clear on one thing: what exactly *is* Japan’s so-called “poison pill” as a matter of law?

II. MEDICINE FOR PERCEIVED JAPANESE CORPORATE ILLS: THE STRUCTURE AND LEGAL NATURE OF JAPAN’S SO-CALLED “PILL”

One of comparative corporate law’s greatest and most intractable challenges is terminological. Proper use of legal terminology ensures analytical rigor and highlights seemingly minor, but otherwise decisive, differences between legal mechanisms in how they operate in their respective contexts. A preliminary note on terminology thus is in order. In this Article, we consistently use the term “defensive measures” (as a direct translation of *bōeisaku*) when referring to *Japanese* anti-takeover defenses in general. As we discuss below, it is misleading to speak of Japanese defensive measures as “poison pills”; we therefore firmly part ways with a number of commentators on this point.⁴⁷ Hence, “poison pill” without qualification is used exclusively to describe the US-model anti-takeover defense, whereas in the Japanese context any references to “poison pill” or

⁴⁵ Ronald J. Gilson, *The Poison Pill in Japan: The Missing Infrastructure*, 2004 COLUM. BUS. L. REV. 21, 25 (2004) (arguing that “the poison pill has the potential to be greatly more pernicious in Japan than it has been in the United States, both because of the absence of ameliorating institutions in Japan, and because ... the forces for change ... outside the market for corporate control are significantly less strong than in the U.S.”), 44 (noting that Japan serves as a useful “second data point” on how poison pills affect the mark for corporate control); Milhaupt, *supra* note 13, at 2216 (observing that Japan’s endorsement of the poison pill and Delaware takeover law as “a remarkable example of the transplantation of foreign institutions, and potentially as a watershed moment in the evolution of corporate law and governance in the world’s [then-]second largest economy”).

⁴⁶ Fujishima Yūzō, *Baishū Bōeisaku wo meguru Kinji no Dōkō* (買収防衛策を巡る近時の動向) [*Recent Trends in Defensive Measures*] (Daiwa Institute of Research, Consulting Report, February 20, 2009) 2 tbl 1, at <https://www.dir.co.jp/report/research/capital-mkt/esg/09022001cg.pdf>, accessed Jan. 14, 2019.

⁴⁷ e.g. Gilson, *supra* note 45; Zenichi Shishido, *Introduction: The Incentive Bargain of the Firm and Enterprise Law: A Nexus of Contracts, Markets, and Laws*, in ENTERPRISE LAW: CONTRACTS, MARKETS, AND LAWS IN THE US AND JAPAN (Zenichi Shishido ed., Elgar 2014); Toshiaki Yamanaka, *Corporate Boards in Europe and Japan: Convergence and Divergence in Transition*, 19 EUR. BUS. ORG. L. REV. 503, 516 (2018) (“‘Japanese version’ of the poison pill”).

“pill” will be qualified with “so-called” or inverted commas.

In the discussion that follows, we draw on the two-category classification adopted in Japanese legal discourse: ex-post measures and ex-ante measures.⁴⁸ After introducing each in turn (in II.A and II.B, respectively), we contextualize Japan’s defensive measures and associated legal norms by critically comparing them with the US and the UK (II.C). The comparative exercise exposes fundamental differences between Japan and the US and UK, and the importance of properly understanding Japan’s defensive measures on their own terms.

A. *Ex-Post Measures*

Ex post measures are adopted only after a corporation has been specifically targeted by a corporate raider. The two classic defensive measures available to the corporation are: (1) share or share option⁴⁹ placement,⁵⁰ which is the issue of shares or share options to a specific party who is friendly to incumbent management; or (2) option allotment, by which share options are issued to all existing shareholders in a target corporation, but with the options exercisable by all shareholders except the raider.⁵¹ The latter – option allotment – may be considered a rough equivalent to a pill implemented after a hostile takeover attempt has commenced. In Japan, neither variant has escaped judicial scrutiny entirely intact.

Share or share option placements, which can be used by management to alter the shareholding structure of the company, may be challenged in court by aggrieved shareholders. Under Japan’s corporate law legislation, a shareholder who is likely to suffer prejudice from a share or share option placement may apply for an injunction restraining the placement on two grounds: (1) unlawfulness; or, (2) an “extremely unfair”

⁴⁸ For the overall regulatory framework on hostile takeovers and detailed exposition on critical cases and materials, see Puchniak & Nakahigashi, *supra* note 3, at 6, 22–38.

⁴⁹ The unofficial Japanese Government translation of *shin-kabu yoyaku-ken* is “share option”, but they are also commonly translated as “warrants” in English language scholarly and business literature.

⁵⁰ Also often called “share issuances” in the literature, the word “placement” is used here to emphasize the action of “placing” the shares with a specific party or parties as opposed to a general issue (“allotment”) to all shareholders.

⁵¹ In the early years, the raider’s options might, in some circumstances, be redeemable for cash, or exercisable subject to conditions. See *infra* notes 78–80 and accompanying text.

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method of placement.⁵² Most challenges proceed under the “extremely unfair” limb – out of which the Japanese courts have developed the “primary purpose rule”. Briefly stated, if the “primary purpose” of the placement (*i.e.*, the purpose that takes precedence over other legitimate purposes such as raising capital) is to maintain control of the company, the court may grant an injunction restraining the placement.⁵³

It is important to note that Japan’s primary purpose rule was developed not as part of directors’ duties, but rather as an interpretative gloss on a specific corporate law provision governing shareholders’ rights.⁵⁴ The rule’s focus on capital-raising, which is inseparable from the nature of the statutory provision from which the rule developed, is also a limiting factor. As Milhaupt and Pistor astutely observed, “the [primary purpose] rule is not well suited to judging the reasonableness of other types of defensive measures, including the U.S.-style poison pill, that have no corporate finance function”.⁵⁵ It is thus not entirely clear how the primary purpose rule in its original form applies in the context of defensive measures other than share placements; we discuss this below in the context of the watershed *Livedoor* case.

Second, it is widely recognized that Japanese courts have traditionally been reluctant to find in a given case that an improper purpose took precedence over other seemingly legitimate reasons that would require the company to raise capital.⁵⁶ In most cases, all

⁵² For shares, Companies Act, § 210 provides:

In the following cases, if shareholders are likely to suffer disadvantage, shareholders may demand that the Stock [Corporation] cease a share issue [of new shares] or disposition of Treasury Shares ... :

- (i) In cases where such share issue or disposition of Treasury Shares violates the applicable laws and regulations or articles of incorporation; or
- (ii) In cases where such share issue or disposition of Treasury Shares is effected by using a method which is extremely unfair.

The text is based on the Japanese Government’s unofficial (but widely-used) translation at <<http://www.japaneselawtranslation.go.jp/law/detail/?id=2455>>, and lightly edited for clarity.

The equivalent provision for share options is Companies Act, § 247.

⁵³ See generally EGASHIRA KENJIRŌ, *KABUSHIKI KAISHA-HŌ* (株式会社法) [THE LAWS OF STOCK CORPORATIONS (translated title by source author)] 773–775 (7th ed. Yūhikaku 2017); Puchniak & Nakahigashi, *supra* note 3, at 28–33.

⁵⁴ Yamanaka Toshiaki, *Seitō mokuteki rūru ni yoru torishimariyaku ni taisuru kiritsu: eikoku 2006 kaisha-hō wo fumaete* (正当目的ルールによる取締役に対する規律——英国 2006 年会社法を踏まえて) [*Monitoring Directors with the Proper Purpose Test: Lessons from the UK Companies Act 2006*] (Kinyū shōjihō [Fin. & Comm. Law] Working Paper 2014–9), 36–37, available at http://www.securities.j-u-tokyo.ac.jp/workingpaper/pdf/2014-9_Yamanaka.pdf (last visited 25 September 2018).

⁵⁵ CURTIS J. MILHAUPT & KATHARINA PISTOR, *LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD* 93 (University of Chicago Press 2008).

⁵⁶ EGASHIRA, *supra* note 53, at 773.

the target board had to do to survive a shareholder challenge was to refer to some need to raise capital – a burden that was easily discharged in practice.⁵⁷ Once the court made a finding that the company was in need of capital, the court would also in principle respect the discretion of the directors as to the specific means for raising finance.⁵⁸ Hence, the prevailing jurisprudence on Japan’s “primary purpose rule” suggested a strong judicial inclination towards upholding the target board’s decision to issue shares to a friendly stable-shareholder⁵⁹ in the context of an ongoing takeover bid.⁶⁰

In contrast to the relatively well-established jurisprudence on share placements, the question of whether post-bid share option placements would pass scrutiny under the primary purpose rule was answered more recently in the landmark case of *Livedoor* (2005).⁶¹ The facts may be simply stated. Livedoor, an internet company, shocked the nation by launching a hostile takeover bid for Nippon Broadcasting System (“NBS”), a leading broadcaster in Japan. NBS management quickly responded by announcing a plan to issue share options to a friendly stable-shareholder as a defensive measure, which if exercised would have dramatically diluted Livedoor’s stake in NBS. Livedoor applied to the Tokyo District Court for an injunction restraining NBS from completing the placement of the share options. The fact that the options, if exercised, would have more than doubled NBS’ share capital made it practically impossible for NBS to argue that the “primary purpose” of the issuance was to raise capital and not to entrench management.⁶²

Unsurprisingly, the Tokyo District Court granted the injunction in a decision upheld on appeal to the Tokyo High Court.⁶³ The Tokyo High Court, however, crafted an

⁵⁷ Tomotaka Fujita, *Case No. 29: Corporate Law – Takeovers – Issuance of Share Options as Defence Measure – Principal Purpose Rule*, in *BUSINESS LAW IN JAPAN: CASES AND COMMENTS* 317–318 (Moritz Bälz et al. eds., Kluwer Law International 2012); Puchniak & Nakahigashi, *supra* note 3, at 29.

⁵⁸ EGASHIRA, *supra* note 53, at 773.

⁵⁹ On this concept, see *infra* note 128 and accompanying text.

⁶⁰ Compare cases cited at EGASHIRA, *supra* note 53, at 773–774 (cases in which injunctions were not granted) with those (*id.*) at 774 (cases finding an improper purpose to dilute a particular shareholder, majority of which were decided more recently).

⁶¹ For details, see Puchniak & Nakahigashi, *supra* note 3, at 30–33.

⁶² Indeed, NBS did not even attempt to make this argument. Fujita, *supra* note 57, at 318.n9 (noting that NBS issued a press release announcing that its actions were intended to preserve the nature of the firm as a mass media company).

⁶³ Tokyo High Ct. [Tokyo Kōtō Saibansho] Mar. 23, 2005, 1173 HANREI TAIMUZU [HANTA] 125. See Fujita, *supra* note 57, at 313. See also KIGYŌ-BAISHŪ WO MEGURU SHOSŌ TO NIPPON-HŌSŌ-JIKEN KANTEI-IKEN (企業買収をめぐる諸相とニッポン放送事件鑑定意見) [VARIOUS ASPECTS ON TAKEOVERS AND EXPERTS’ OPINION IN THE NIPPON BROADCASTING SYSTEM CASE] (別冊商事法務編集部 [Editorial Board of Bessatsu Shōji Hōmu] ed., 別冊商事法務 289号 [Vol. 289, Bessatsu Shōji Hōmu], Shōji Hōmu 2005).

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exception to the primary purpose rule, laying down four limited circumstances in which a target corporation’s board is permitted to conduct a share or share option placement even where the “primary purpose” was maintaining control in order to protect shareholders’ interests (rather than to raise corporate capital). These four circumstances recognized by the Court (albeit in *obiter*) as clearly deleterious to the interests of the target corporation’s shareholders are:

- (1) greenmail (i.e. acquiring the target’s shares with the intention of forcing the target to buy them back at a higher price);
- (2) temporarily taking control of and running the target to advance the acquirer’s interests at the target’s expense, such as by acquiring the target’s core assets at low prices;
- (3) pledging as collateral for debts of the acquirer or its associated corporations the target’s assets, or repaying such debts using the target’s funds; or
- (4) temporarily taking control of the management of the target to sell off valuable assets not currently related to the target’s business, and distributing the proceeds as dividends, or disposing of the target’s shares at a price as inflated by the dividends.⁶⁴

The principles laid down by the Tokyo High Court in *Livedoor* were soon incorporated directly into the *Takeover Guidelines* issued jointly by the Ministry of Economy, Trade and Industry and the Ministry of Justice in 2005.⁶⁵ Although expressly framed as non-binding in a strict legal sense,⁶⁶ the Guidelines’ stated aim was nonetheless to serve as a code of conduct for the business community.⁶⁷ Hence, notwithstanding its amorphous legal nature, this document is highly instructive as it states in no uncertain terms that “it is legitimate and reasonable for a joint-stock corporation to

⁶⁴ Puchniak & Nakahigashi, *supra* note 3, at 33; Fujita, *supra* note 57, at 315, 319; Corporate Value Study Group, *Corporate Value Report* (May 25, 2005), 33 n.57, at http://www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/pdf/houkokusyo_hontai_eng.pdf, accessed Jan. 14, 2019.

⁶⁵ *Takeover Guidelines*, *supra* note 42, at 4.n1.

⁶⁶ *Id.* at 3.

⁶⁷ *Id.* at 3 (“The mission of the Guidelines is to change the business community from one without rules concerning takeovers to one governed by fair rules applicable to all. To prepare for the upcoming era of M&A activity, we expect the Guidelines to become the code of conduct for the business community in Japan by being respected and, as the need arises, revised.”).

adopt defensive measures designed to protect and enhance shareholder interests by preventing certain shareholders from acquiring a controlling stake in the corporation”.⁶⁸ Despite their initial setback in the courts, defensive measures nonetheless received the imprimatur of Japan’s politico-legal establishment.

The second landmark case, *Bull-Dog Sauce* (2007),⁶⁹ remains the only case in which the Supreme Court of Japan, the nation’s apex court, addressed the question of the legality of defensive measures based on option allotments.⁷⁰ This case involved a bid by Steel Partners, a US private equity fund, for all outstanding shares of Bull-Dog Sauce Co. Ltd,⁷¹ the manufacturer of a popular series of Worcestershire-type sauces. In response to the bid, Bull-Dog Sauce’s board proposed the defensive measure of allotting three share options per share to all existing shareholders. All shareholders except Steel Partners would be eligible to exercise the options, whereas Steel Partners would be entitled, in the event that the options were exercised, to receive in lieu of shares a cash payment of over ¥ 2 billion. In other words, Bull-Dog’s defensive measure would have financially compensated Steel Partners for the discriminatory issuance of shares to the other shareholders. Critically, as the bid was made shortly before Bull-Dog Sauce’s annual general shareholders’ meeting, the board decided to put the proposed defensive measure before the shareholders for their approval.⁷² Astoundingly, the proposed measure was approved by 88.7 percent of a qualified majority of shareholders; in effect, almost every shareholder (excluding Steel Partners) voted in favor.

Undaunted, Steel Partners applied for an interim injunction restraining the option allotment—a strange turn of events considering that none of the other shareholders appeared to be willing to sell their shares to the hostile bidder.⁷³ The Tokyo District Court declined to grant the Steel Partners’ application for an injunction in a decision that was upheld on appeal to the Tokyo High Court and further appeal to the Supreme Court of

⁶⁸ *Id.* at 4.

⁶⁹ Supreme Ct. [Saikō Saibansho] August 7, 2007, 61 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2215. See Hiroshi Oda, *Case No. 30: Corporate Law – Takeovers – Defensive Measures – Equality of Shareholders*, in *BUSINESS LAW IN JAPAN: CASES AND COMMENTS* 323 (Moritz Bälz et al. eds. 2012).

⁷⁰ Commentators have expressed doubt about the case’s precedential value given its unique circumstances. See Oda, *supra* note 69, at 329–30; Puchniak & Nakahigashi, *supra* note 3, at 37.

⁷¹ See generally Curtis J. Milhaupt, *Bull-Dog Sauce for the Japanese Soul? Courts, Corporations, and Communities—A Comment on Haley’s View of Japanese Law*, 8 WASH. U. GLOBAL STUD. L. REV. 345, 353–356 (2009) [hereinafter Milhaupt, *Bull-Dog Sauce*].

⁷² See Oda, *supra* note 69, at 324; Puchniak & Nakahigashi, *supra* note 3, at 36.

⁷³ See Oda, *supra* note 69; Puchniak & Nakahigashi, *supra* note 3.

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Japan. According to the Supreme Court, target shareholders have the right to decide whether the risk of damage to the corporation justify the adoption of defensive measures. The Supreme Court further held that in light of the “fair and adequate measures” taken by the target to compensate the bidder for depriving the bidder of its right to exercise its options, the target’s discriminatory treatment of the bidder in their capacity as a shareholder was justified.⁷⁴

Notwithstanding the buzz generated by the *Bull-Dog Sauce* case and the jurisprudence arising therefrom within Japan⁷⁵ and in the international press and scholarly literature,⁷⁶ the weight of its legacy today is debatable. First, the facts were highly unusual. Given that nearly all shareholders of the target supported the defensive measure, one might reasonably question why the defensive measure was even required at all if the existing shareholders were unwilling to tender their shares to the acquirer in the first place. Whether major shareholders of future targets of hostile takeovers would similarly rally in support of incumbent management is open to serious question in light of changes to shareholding structure in Japanese firms since the mid-2000s (a point which we discuss below in Part III).

A further curiosity lay in Bull-Dog shareholders’ overwhelming support⁷⁷ for a

⁷⁴ See Oda, *supra* note 69, at 326; Puchniak & Nakahigashi, *supra* note 3, at 36–37.

⁷⁵ The leading commercial law periodical publisher in Japan dedicated a 442-page special issue collecting documents relevant to the case. See BURUDOGGU SŌSU NO HŌ-TEKI KENTŌ: BAISHŪ BŌEISAKU NIKANSURU SAIBAN KEIKA TO IGI (ブルドックソース事件の法的検討—買収防衛策に関する裁判経過と意義) [LEGAL ANALYSIS OF THE BULL-DOG SAUCE CASE: THE JUDICIAL PROCEEDINGS ON ANTI-TAKEOVER DEFENSIVE MEASURES AND THEIR SIGNIFICANCE] (別冊商事法務編集部 [Editorial Board of Bessatsu Shōji Hōmu] ed., 別冊商事法務 311号 [Vol 311, Bessatsu Shōji Hōmu], Shōji Hōmu 2007).

⁷⁶ Milhaupt, *Bull-Dog Sauce*, *supra* note 71; Hideki Kanda, *Takeover Defences and the Role of Law: A Japanese Perspective*, in PERSPECTIVES IN COMPANY LAW AND FINANCIAL REGULATION (Michel Tison et al eds., Cambridge University Press 2009) [hereinafter Kanda, *Takeover Defences*]; Jennifer G. Hill, *Takeovers, Poison Pills and Protectionism in Comparative Corporate Governance*, in I FESTSCHRIFT FÜR KLAUS J. HOPT ZUM 70. GEBURTSTAG AM 24. AUGUST 2010 at 808 (Stefan Grundmann et al eds., De Gruyter 2010); Nathan Rayne & Reiji Murai, *Japan's Bull-Dog OK's poison pill for Steel Partners*, REUTERS (June 24, 2007), at <https://www.reuters.com/article/bulldog-steelpartners-idUST20535420070624>, accessed Oct. 31, 2018; Alison Tudor, *Steel Partners presses on with Bull-Dog bid*, REUTERS (August 8, 2007), at <https://www.reuters.com/article/us-steel-partners-bulldog/steel-partners-presses-on-with-bull-dog-bid-idUST26371820070808>, accessed Oct. 31, 2018; Shu-Ching Jean Chen, *Japan High Court Keeps Bull-Dog Sauce From Steel Partners' Jaws*, FORBES, (August 8, 2007), at https://www.forbes.com/2007/08/08/bulldog-steel-partners-markets-equity-cx_jc_0808markets03.html, accessed Oct. 31, 2018.

⁷⁷ Although beyond the scope the present Article, such curiosities may perhaps only make sense in a context where the alchemy of stable-shareholders and corporate cultural norms creates an impenetrable wall against the barbarians at the gate. See Puchniak & Nakahigashi, *supra* note 3, at 37–41.

defensive measure that included a generous payment to the hostile acquirer, which may have been driven by good reasons at the time.⁷⁸ However, the Corporate Value Study Group, in a second report released in June 2008, soon expressed its disapproval of defensive measures that would involve cash or financial payoffs to acquirers,⁷⁹ and modern defensive measures typically no longer include such a feature.⁸⁰ We move to modern defensive measures in the next Subpart.

⁷⁸ Iwakura Masakazu & Sasaki Shigeru, *Burudoggu Sōsu ni yoru Tekitai-teki Baishū ni taisuru Takō Sochi (Ge Sono 2)* (ブルドックソースによる敵対的買収に対する対抗措置 (下その 2) [*Measures Against Hostile Acquisition by Bull-Dog Sauce (Part 2.2)*], 1825 SHŌJI HŌMU 36, 38 (2008) (observing that the issue of “economic equality” between the acquirer and the other shareholders came up during preliminary injunction proceedings, but that the Supreme Court did not so far as to make the payment of appropriate compensation to the acquirer an absolute condition for a defensive measure).

⁷⁹ Corporate Value Study Group, *Takeover Defense Measures in Light of Recent Environmental Changes* (June 30, 2008), 3–4, available at <https://web.archive.org/web/20080912190956/http://www.meti.go.jp/english/report/data/080630TakeoverDefenseMeasures.pdf>, accessed Jan. 14, 2019 (“Granting cash or other financial benefits to the acquirers in implementing takeover defense measures invites the actual implementation. As a result, it deprives shareholders of the opportunities of selling their shares to the acquirers after adequate time and information necessary for them to appropriately decide whether to support or oppose the takeovers or the opportunities for negotiation are ensured. Therefore it could prevent the formation of an efficient capital market. Thus, cash or other financial benefits should not be granted to the acquirers.”). Note, however, that the *Takeover Guidelines* based on the 2005 report of the Corporate Value Study Group (*supra* note 64) was not updated.

⁸⁰ M&A HŌ TAIKEI (M&A 法大系) [COMPREHENSIVE ANALYSIS OF M&A LAWS IN JAPAN (translated title in original)] 798 (森・濱田松本法律事務所 (Mori Hamada Matsumoto ed., Yūhikaku 2015). As early as 2008, defensive measures that no longer involved direct cash compensation to the acquirer were put in place; Marusan’s plan, for example, permitted the acquirer to exercise warrants provided that it divests part of its holdings via securities firms designated by the issuer. *Marusan Shōken ga Shingata no Baishū Bōeisaku, Tekitai-teki Bashū-sha ni mo Jōken-tsuki de Kenri Kōshi wo Nin’yō* (丸三証券が新型の買収防衛策、敵対的買収者にも条件付きで権利行使を容認) [*Marusan Securities Adopts New-Type Defensive Measures, Exercise of Rights by Hostile Acquirers Subject to Conditions Approved*]’ (REUTERS JAPAN, May 16, 2008), at <https://jp.reuters.com/article/idJPJAPAN-31813920080515>. As a recent example, when Kaneka Corporation revised its PRP, it stated that the revised plan made it clear that the acquirer’s warrants would not be redeemed for cash: *Kaneka Corporation, Tōsha Kabushiki no Daikibo Kaitsuke Kōi ni kansuru Taiō Shishin (Baishū Bōeisaku)* (当社株式の大規模買付行為に関する対応方針 (買収防衛策) の継続について) [*On the Continuation of the Policy on Responding to Large-Scale Acquisition of this Corporation’s Shares (Anti-Takeover Defensive Measure)*]’ (May 12, 2016) <http://www.kaneka.co.jp/wp-kaneka/wp-content/uploads/2017/06/0512%E5%BD%93%E7%A4%BE%E6%A0%AA%E5%BC%8F%E3%81%AE%E5%A4%A7%E8%A6%8F%E6%A8%A1%E8%B2%B7%E4%BB%98%E8%A1%8C%E7%82%BA%E3%81%AB%E9%96%A2%E3%81%99%E3%82%8B%E5%AF%BE%E5%BF%9C%E6%96%B9%E9%87%9D%EF%BC%88%E8%B2%B7%E5%8F%8E%E9%98%B2%E8%A1%9B%E7%AD%96%EF%BC%89%E3%81%AE%E7%B6%99%E7%B6%9A%E3%81%AB%E3%81%A4%E3%81%84%E3%81%A6.pdf>.

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B. *Ex-Ante Measures: PRPs, or the So-Called “Japanese Poison Pill”*

The boom in *ex ante* measures – which are adopted by companies before a specific takeover threat arises – can be traced back to the *Takeover Guidelines* jointly issued by two government ministries after consultation with stakeholders, and with the goal of “preventing excessive defensive measures, enhancing the reasonableness of takeover defense measures and thereby promoting the establishment of fair rules governing corporate takeovers in the business community”.⁸¹ The Guidelines did not only make it clear that potential targets may adopt defensive measures generally;⁸² by making express reference to pre-bid *ex-ante* defensive measures,⁸³ it gave this yet-untested legal tool its blessing. Released in a pivotal year (2005) in which hostile takeover attempts reached a new high in the public consciousness, the *Takeover Guidelines* not only triggered a subsequent shift in jurisprudence, but also gained a following among practitioners in Japan.

Since the Guidelines were released, the most popular and by consistently overwhelming margins – and the only feasible⁸⁴ – type of defensive measures is a category of *ex ante* measures known as *jizen keikoku gata bōeisaku* [“Pre-Warning Rights

⁸¹ *Takeover Guidelines*, *supra* note 42, at 1 (Introduction).

⁸² At the time, only the ex-post variety had been litigated (most recently in *Livedoor*).

⁸³ See *Takeover Guidelines*, *supra* note 42, at 6 (“In the process of adopting *defensive measures in advance of an unsolicited takeover proposal* ...”) (emphasis added in italics).

⁸⁴ Defensive measures other than of the PRP variety include the ‘trust-type’ measure. See Kanda, *Takeover Defences*, *supra* note 76, at 419 (“Under a typical trust based scheme, the firm issues stock warrants to a trust bank with designated shareholders as beneficiaries of the trust. When a hostile bid occurs, the pill is triggered, and the trust bank transfers the warrants to the shareholders. The warrants have a discriminatory feature and the bidder has no right to exercise them, as the terms and conditions of the warrants usually provide that the warrants are not exercisable by the shareholders who own 20% or more of the firm’s outstanding stock.”). See also note 153 below. Trust-type defensive measures, in contrast to the PRP, were never adopted by more than a mere handful of companies even in the earliest days. Kanda, *Takeover Defences*, *supra* note 76, at 418; Milhaupt, *Bull-Dog Sauce*, *supra* note 71, at 352 tbl. 1; Table 1 (showing the consistent and overwhelming dominance of the PRP over alternatives such as the trust-type defensive measure from 2009). See also Fujimoto et al (2007), *infra* note 150, at 34 (pointing to the requirement for a special resolution of the shareholder meeting [*i.e.* a two-thirds vote] and the need to draft a detailed outline for the issuance of share warrants (発行要項) as reasons why the trust-type measure failed to catch on). See also *Baishū bōeisaku – kiso chishiki: raitsu puran – shintakugin ni yoyakuken – tokubetsu ketsugi nekkuni* (買収防衛策、基礎知識 — ライツプラン、信託銀に予約権、特別決議ネックに。) [*Defensive Measures—Basic Knowledge: Rights Plans – Issue of Options to Trust Banks – Special Resolution as Obstacle*], NIKKEI SANGYŌ SHIMBUN 22 (morning edition, Jun. 20, 2006) (citing the requirement of a special resolution and the 30 to 40 million yen fee payable to trust banks as reasons for the trust-type plan’s loss of market share).

Plans”] (“PRPs”).⁸⁵ Strictly legally speaking, a PRP is nothing more than a statement of intention of how the board would act in the event of a hostile bid that takes the form of a press release issued by the target board.⁸⁶ In the event of a potential takeover bid that may leave the bidder holding more than a certain percentage (usually 20 percent) of the issued shares, the acquirer is required to disclose information relevant to their acquisition plans to the target corporation’s board for consideration and evaluation.⁸⁷ If the acquirer fails to disclose the required information, or the proposed acquisition is deemed to be deleterious to “corporate value” or not in the interests of the shareholders,⁸⁸ there would be grounds to trigger the PRP.

There is variation as to the process by which a PRP is triggered, which can be: (1) a board resolution only; (2) a board resolution upon the recommendation of a special committee; or (3) a shareholder vote.⁸⁹ If triggered, the board would allot share options that are exercisable by shareholders other than the bidder and its associates.⁹⁰ Although the *Takeover Guidelines* expressly contemplates the adoption of a PRP by board resolution,⁹¹ in practice a shareholder vote is usually necessary when adopting or triggering a PRP.⁹² Most modern PRPs contain sunset provisions, and expire after a period of one to three years.⁹³ They may, however, be modified or renewed with shareholder approval or be abolished at any time by a resolution of the board or the

⁸⁵ Cf. Hideki Kanda, *Corporate Governance in Japanese Law: Recent Trends and Issues*, 11 HASTINGS BUS. L.J. 69, 73 (2015) (using the alternative nomenclature of “advance warning plan”).

⁸⁶ John Armour et al., *The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework*, 52 HARV. INT’L L.J. 219, 254 (2011) (making the perceptive observation that “[u]nlike the U.S. shareholder rights plan, the pre-warning rights plan is not a legal instrument”).

⁸⁷ M&A LAWS, *supra* note 80, at 797.

⁸⁸ M&A LAWS, *supra* note 80, at 797–798; Armour et al., *supra* note 86, at 254; Kanda, *Takeover Defences*, *supra* note 76, at 419.

⁸⁹ M&A LAWS, *supra* note 80, at 797; Armour et al., *supra* note 86, at 254 n.175; Kanda, *Takeover Defences*, *supra* note 76, at 419 & 419.n16 (reporting that the majority of PRPs the decision to trigger the plan rests with a special, independent committee).

⁹⁰ M&A LAWS, *supra* note 80, at 798.

⁹¹ *Takeover Guidelines*, *supra* note 42, at 6 (“it is not appropriate to reject outright the adoption of defensive measures by the board of directors when such measures enhance shareholder interests”). However, the Guidelines were also careful to stress that shareholders should be permitted to dismantle a board-implemented defensive measure. *Id.*

⁹² Kanda, *Takeover Defences*, *supra* note 76, at 419. *See also Takeover Guidelines*, *supra* note 42, at 5–6 (emphasizing the “principle of shareholders’ will” in the adoption of defensive measures.)

⁹³ The overwhelming majority of PRPs have a three-year validity period. *See MARR*, *infra* note 245, at 33, (showing that 349 of 383 PRPs as of 31 October 2018, 366 of 405 as of 31 December 2017, and 395 of 443 as of 31 December 2016 fall into this category).

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shareholder meeting.⁹⁴

Compared with ex-post (i.e., post-bid) defensive measures, the modern PRP’s prospects of withstanding judicial scrutiny – if and when directly challenged – is open to even greater doubt. The most relevant case on point is *Nireco* (2005).⁹⁵ In that case, an early version of the PRP failed to survive judicial scrutiny, as the Tokyo District Court granted an injunction restraining the company from implementing the measure.⁹⁶ The decision was sustained upon appeal to the Tokyo High Court.⁹⁷ However, in contrast with modern PRPs, the defensive measure in *Nireco* would have discriminated not only against the acquirer, but also against another sub-group of ‘innocent’ shareholders.⁹⁸ With *Nireco* offering limited if any jurisprudential value, and no judgment having ever resulted from a modern PRP post-*Nireco*, modern PRPs have yet to undergo trial by fire. Insofar as they continue to be primarily non-legal and contingent in nature, we remain none the wiser as to the actual legal consequences that would flow from a triggered modern PRP. Also, and perhaps most importantly, it should be stressed that the involvement of shareholder approval in either adopting, triggering or renewing PRPs is noteworthy – and as discussed below – sets it apart from US poison-pills which can clearly be implemented by the board, triggered automatically, and require no shareholder approval at any stage at all.

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

⁹⁴ M&A LAWS, *supra* note 80, at 798.

⁹⁵ For a discussion of the *Nireco* case, see Puchniak & Nakahigashi, *supra* note 3, at 35.

⁹⁶ Tokyo District Court [Tōkyō Chihō Saibansho] June 1, 2005, 1186 HANREI TAIMUZU [HANTA] 274; Tokyo District Court [Tōkyō Chihō Saibansho] June 9, 2005, 1186 HANREI TAIMUZU [HANTA] 265.

⁹⁷ Tokyo High Court [Tōkyō Kōtō Saibansho] June 15, 2005, 1186 HANREI TAIMUZU [HANTA] 254.

⁹⁸ M&A LAWS, *supra* note 80, at 796.n67; Armour et al., *supra* note 86, at 259 n.150; Fujita, *supra* note 57, at 320. The *Takeover Guidelines* (2005) also give as an example of an unacceptable scheme “a case where stock acquisition rights, etc. with the exercise conditioned on the initiation of a takeover are actually allocated to all shareholders before the start of a takeover, with a specific day prior to the start of the takeover as the record date for allocation (except where resolved or disclosed prior to the commencement of a takeover that stock acquisition rights will be allotted on condition that a takeover is commenced). In such cases, it is likely that all shareholders acquiring stock after the record date, including those who are not the acquiring person, will incur unexpected losses. In addition, the value of the stock owned by shareholders as of the record date may also drop significantly. If the stock acquisition rights are subject to transfer restrictions, it is also possible that the shareholders cannot recover the portion of their investments corresponding to such drop in value. In this way the takeover causes unforeseen losses for shareholders who are not acquiring persons”. *Takeover Guidelines*, *supra* note 42, at 2 n.10.

Not many jurisdictions receive sustained attention from scholars and pundits in the English-language hostile takeovers literature, but three may claim that honor: the US, the UK, and Japan. It is always tempting to minimize or overlook the substantive differences in the law of anti-takeover defences between these three, whether because of the myopia that results from viewing one system through the lens of another or to paint an overly generalized picture of corporate governance convergence.⁹⁹ In this Part, we put any such temptation to rest by highlighting key differences between Japan and the other two jurisdictions, and make the case for understanding the Japanese legal context on its own terms.

Primary purpose rule. Commentators have picked up on apparent similarities¹⁰⁰ between Japan’s judicially-developed primary purpose rule on the one hand, and the “no frustration rule” contained in the Takeover Code¹⁰¹ and the “proper purpose duty” imposed on directors of target corporations as a matter of statutory and common law¹⁰² on the other. Nonetheless, substantial differences exist. First, Japan’s primary purpose rule is limited to share/share option placements and share option allotments. By contrast, directors of UK companies are bound to exercise all the powers of their office in accordance with the purpose for conferring those powers.¹⁰³

⁹⁹ On this theme, albeit in other corporate law contexts, see Dan W. Puchniak, *The Derivative Action in Asia: A Complex Reality*, 9 BERKELEY BUS. L. J. 1, 28 (2012); Puchniak & Nakahigashi, *supra* note 3, at 42; Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329, 356–357 (2001).

¹⁰⁰ As most prominently observed by Armour et al., *supra* note 86, at 250.n149.

¹⁰¹ CITY CODE ON TAKEOVERS AND MERGERS, r. 21.1 (providing that “the board must not, without the approval of the shareholders in general meeting, take any action which may result in any offer or bona fide possible offer being frustrated or in shareholders being denied the opportunity to decide on its merits” or take specific actions such as the issuance of shares or options).

¹⁰² Puchniak & Nakahigashi, *supra* note 3, at 28–29; see also Yamanaka, *supra* note 54.

¹⁰³ BRENDA HANNIGAN, COMPANY LAW ¶¶ 9-49 & 9-59 (5th ed., Oxford University Press 2018); see also R.C. Nolan, *Controlling Fiduciary Power*, 68 CAMBRIDGE L.J. 293, 299 (2009) (“the proper purposes doctrine looks to the particular ends intended to be achieved through certain particular acts and determines whether such ends are contemplated (and therefore authorised) by the power in question”).

For the duty as codified, see Companies Act 2006 (c 46), § 171(b) (Duty to act within powers):

A director of a company must—

- (a) act in accordance with the company's constitution, and
- (b) only exercise powers for the purposes for which they are conferred.

It is true that the “proper purpose duty” in the UK does take on special prominence in the context of board interference with shareholder control of the company (i.e., change of corporate control). See Andrew Griffiths, *Contracting with Companies* (Hart 2005) 106; HANNIGAN, *supra* note 103, ¶ 9-57. For leading cases on the English position on the director’s duty to act for proper purposes in the context in change of control transactions, see *Eclairs Group Ltd v JKC Oil & Gas plc* [2015] UKSC 71, [2016] 1 BCLC 1; see also *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 (PC) (appeal taken from New South Wales).

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Second, the scope of Japan’s primary purpose rule does not overlap precisely with the UK proper purpose duty. Although the Tokyo High Court in *Livedoor* enjoined the share option issuance on the facts, the court (and later, the *Takeover Guidelines*) recognized an exception to the primary purpose rule by suggesting that share or share option placements may be conducted even if the primary purpose was specifically to maintain corporate control. The situation for the UK is different, as the board’s power to issue shares may be legitimately exercised for purposes other than raising capital.¹⁰⁴ However, even setting aside the City Code’s non-frustration rule,¹⁰⁵ in no event may the power to issue shares¹⁰⁶ – or perhaps any other power¹⁰⁷ – be used to upset the existing balance of power within the company. It also remains an open question in the UK as to whether a decision taken in pursuit of an improper purpose – among other concurrent, legitimate purposes – would be permitted to stand.¹⁰⁸

PRPs. The Japanese PRP, as an ex-ante measure, can and is often adopted by firms even when no specific threat has surfaced.¹⁰⁹ In this regard, it bears some superficial resemblance to the US “clear-day” poison pill, which refers to “pills that are adopted in a purely preemptive way (and not in response to any particular threat like a hostile tender offer, or the disclosure by an investor that the investor has acquired a significant block of the firm’s shares).”¹¹⁰ Nevertheless, referring to PRPs as “Japanese poison pills” risks

¹⁰⁴ *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 (PC) (appeal taken from New South Wales) 835–837 (Lord Wilberforce); PAUL L. DAVIES & SARAH WORTHINGTON, *GOWER’S PRINCIPLES OF MODERN COMPANY LAW* ¶16-26 (10th ed., Oxford University Press 2016).

¹⁰⁵ CITY CODE ON TAKEOVERS AND MERGERS, r. 21.1.

¹⁰⁶ DAVIES & WORTHINGTON, *supra* note 104, ¶ 16-28.

¹⁰⁷ There is doubt as to whether the directors of a UK company even have the authority to adopt takeover defenses more generally. In *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28, [2004] 1 WLR 1846, the House of Lords remanded for trial the issue of whether the directors of a UK company had the authority to enter into a “poison pill” arrangement by which a change of control in the company or the company’s managing director’s dismissal would trigger a put option on substantially advantageous terms for a particular major shareholder.

¹⁰⁸ Compare *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 (PC) (appeal taken from New South Wales) 832 (“substantial or primary purpose”), 835 (“substantial purpose”) (Lord Wilberforce) with *Eclair Group Ltd v JKC Oil & Gas plc* [2015] UKSC 71, [2016] 1 BCLC 1 [22] (preferring a “but-for” test by which an act would be invalidated only if the discretionary power to perform that act would not have been exercised but for the improper purpose) (Lord Sumption JSC with whom Lord Hodge JSC agreed), and with [51]–[54] (Lord Mance JSC with whom Lord Neuberger PSC agreed) (declining to take a firm position in the absence of full argument).

¹⁰⁹ See eg Fujimoto et al (2008), *infra* note 150, at 46 fig 9 (reporting that only 8.2% of respondents cited shareownership by activist funds as the reason for adopting a defensive measure).

¹¹⁰ Emiliano M. Catan, *The Insignificance of Clear-Day Poison Pills* (NYU School of Law Law & Economics Research Paper Series Working Paper No 16-33, 27 September 2016), at 3 n.1, available at <https://ssrn.com/abstract=2836223> (defining the “clear-day” poison pill).

obscuring several critical differences.

First, it bears repeating that the modern Japanese PRP is all but completely untested in court. Numerous questions remain unresolved with any reasonable degree of certainty by a body of jurisprudence or binding government regulation.¹¹¹ What terms are permissible and what are not in the PRP? Which corporate organ or organs has the sole or shared authority to adopt a PRP? What exact corporate formalities and procedures must be followed when implementing or triggering a PRP? What are the respective roles played by the board, independent directors, special committees, and the shareholder body during the initial adoption or renewal process? How about when the PRP is to be triggered? In contrast, a large volume of litigation over US poison pills in the Delaware courts over the last three decades has led to a comparatively much clearer, if sometimes shifting, understanding within the business and legal community about the device's legal function. Crucially, the jurisprudence is clear that a US board can unilaterally put a pill in place and thereby gain the power for practical intents and purposes to “just say no”, regardless of how the shareholders might vote.¹¹²

Second, there is a difference, if not in law, then in the spirit of anti-takeover defensive measures. Shareholder approval¹¹³ plays a major role in PRP practice. For some years now, an overwhelming majority of PRPs are adopted with some form of shareholder vote.¹¹⁴ Shareholder involvement is also significant when triggering an adopted PRP. As

¹¹¹ In this regard, the *Takeover Guidelines*, although produced under the sponsorship of two government ministries, cannot be considered binding regulation – not least because it is expressly meant not to be. *Takeover Guidelines*, *supra* note 42, at 3.

¹¹² Gordon, *supra* note 21, at 1941, 1944–1947; Kahan, *supra* note 21, at 604 (“Thus, in a curious way, the logic of *Time* and *Unocal* validates the use of the poison pill for a “just say no” defense ...”).

¹¹³ A shareholder vote can be either a precatory (advisory) resolution of the shareholder meeting, or a resolution of the shareholder meeting within the meaning of the Companies Act. M&A LAWS, *supra* note 80, at 797.

¹¹⁴ For example, in 2011, only 17 PRPs were adopted solely by authority of the board, whereas 500 received shareholder approval or ratification; in 2018, the respective figures were 7 and 376. MARR, *infra* note 245, at 33. See also Fujimoto et al (2008), *infra* note 150, at 50 & fig 14 (reporting that out of 570 firms with defensive measures in place, only 15 (2.6%) adopted a defensive measure with only a board resolution; another 13 (2.3%) bundled the defensive measure question together with resolutions to appoint directors; all the rest (95.1%) sought a clear shareholder mandate), 51 & fig 15 (reporting that out of 136 firms, 107 (78.7%) put the renewal of an expiring defensive measure to a shareholder vote, another 11 (8.1%) bundled the issue with director election, and only 18 (13.2%) did not seek any shareholder vote). The leading scholar on defensive measures in Japan argues that an efficient PRP is one that may be triggered by the board if and only if authorized *ex ante* by the shareholder meeting. Tanaka Wataru, *Tekitai-teki Baishū ni Taisuru Bōeisaku ni tsuite no Oboegaki (ni kan)* (敵対的買収に対する防衛策についての覚書 (二・完)) [*A Memorandum on Defensive Measures Against Hostile Takeovers (Part 2 of 2)*], 131 MINSHŌHŌ ZASSHI (民

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of 2018, less than 30% of all PRPs in force can be unilaterally triggered by the board of directors or a board committee entirely without shareholder approval.¹¹⁵ The remaining supermajority – over 70% – involves shareholders in the decision-making process in some way. Perhaps surprisingly,¹¹⁶ about 10% of all PRPs make shareholder approval a necessary condition to trigger.¹¹⁷ The rest – an absolute majority of all PRPs – adopt a “compromise” model where shareholder approval would be sought where this is deemed necessary.¹¹⁸

Given that shareholder participation in both adoption and execution of a PRP is the norm in Japan today, it seems fair to say that shareholders continue to be the lynchpin of the PRP system. As a result of the absence of clear, legally-binding guidance on the legality and operation of PRPs, PRPs do not axiomatically shift the balance of power from one organ to another. Rather, they merely reflect – and at most, mildly reinforce – the pre-existing balance of power between shareholders and the board. By contrast, US law, which has always focused on the board’s authority to implement and trigger poison pills,¹¹⁹ places considerably less emphasis on shareholder involvement than Japan *as a matter of law*.

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

商法雑誌) 800, 828, 833 (2005).

¹¹⁵ As of 31 October 2018, of the 383 PRPs in place, 110 (28.7%) could be triggered by a decision of the board or a board committee (“*torishimariyaku-kai kettei-gata*” PRPs); the respective figures as of 31 December 2017 were 125 out of 405 PRPs (29.6%); 31 December 2016, 153 out of 443 PRPs (34.5%): MARR, *infra* note 245, at 33.

¹¹⁶ Writing before PRPs took recognizably modern form, Tanaka considered that a shareholder approval requirement at the point of triggering to be unnecessary and possibly inefficient. Tanaka, *supra* note 114, at 824, 826.

¹¹⁷ As of 31 October 2018, 39 of 383 PRPs (10.2%) fall into this category (“*kabunushi ishi kakunin-gata*”); as of 31 December 2017, it was 39 of 405 (9.63%); 31 December 2016, 43 of 443 (9.71%). *Id.*

¹¹⁸ As of 31 October 2018, 234 of 383 PRPs (61.1%) are “*secchū-gata*”; 31 December 2017, 241 of 405 (59.5%); 31 December 2016, 247 of 443 (55.8%). *Id.*

¹¹⁹ For Delaware jurisprudence, see Part I above.

Japan's unique suite of defensive measures are not the only thing that is different from the more familiar Anglo-American world. After all, even armed with the full poison pill, hostile takeovers did succeed with some regularity in the US. By contrast, whether before or after the tumultuous events of the mid-2000s, not a single hostile takeover attempt succeeded in Japan – but why? The answer to this question, dubbed the “Enigma” of hostile takeovers in Japan,¹²⁰ cannot be found by looking only at the law and practice of Japan's legally-untested defensive measures. To solve this puzzle, the next Part investigates the broader corporate governance and cultural context surrounding Japan's non-existent hostile takeover market.

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

It is a truth universally acknowledged in American scholarship that a jurisdiction in possession of a highly-dispersed stock market must be in want of hostile takeovers¹²¹ – at least until the scholars met Japan. It is well-known that stock ownership in Japan's listed corporations have for a long time been characterized as amongst the most highly-dispersed in the world.¹²² A further distinctive feature of listed corporations in Japan was the abundance of targets seemingly ripe for takeovers, with bust-up values often exceeding market capitalization.¹²³ Scholars and pundits alike have long proceeded on the rarely-challenged assumption that the United Kingdom and Delaware – the world's two most active hostile takeover markets – served as the model for Japan's regulatory environment and capital markets.¹²⁴ This combination of widely-dispersed stock ownership, low price-to-book values, and regulation ostensibly based on hostile-takeover-oriented models, seemingly distinguish Japan as one of the most hostile

¹²⁰ Puchniak & Nakahigashi, *supra* note 3.

¹²¹ Armour et al., *supra* note 86, at 221–222 (“Internationally, hostile takeovers are a rare phenomenon, occurring with any frequency in only a handful of countries. They are rare because they can only take place in companies with dispersed stock ownership, themselves something of a rarity internationally.”)

¹²² See Puchniak & Nakahigashi, *supra* note 3, at 5 fn 2 (with further references).

¹²³ See Puchniak & Nakahigashi, *supra* note 3, at 5–6, 13–14.

¹²⁴ See Puchniak & Nakahigashi, *supra* note 3, at 6, 22–38.

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takeover-friendly jurisdictions in the world.

Reality, however, is quite another story: hostile M&A in contemporary Japan remains squarely in the realm of theory and fiction.¹²⁵ Not a single hostile takeover has ever succeeded in Japan.¹²⁶ The persistent failure of would-be hostile acquirers in what should have been a “hostile takeovers utopia”¹²⁷ – even before the advent of as-yet legally questionable defensive measures – is but yet another example of Japanese exceptionalism. To crack this enigma, two features of Japan’s corporate landscape offer valuable clues.

First, the conventional wisdom that dispersed shareholding facilitates hostile takeovers breaks down in Japan. Shareholding in Japanese firms may be dispersed, but not all dispersed shareholders are created equal. Japanese firms are dominated by a subset of dispersed shareholders known in the literature as “stable shareholders”. Stable shareholders are sympathetic “insider(s)” that generally refrain from taking action detrimental to the incumbent management¹²⁸ because of their existing business

¹²⁵ See Puchniak & Nakahigashi, *supra* note 3, at 6, 14.

¹²⁶ We define a successful hostile takeover as one where 1) the bid is unsolicited and actively opposed by incumbent management; 2) the bid satisfies the mandatory bid rule trigger (*i.e.* aimed at acquiring at least two-thirds’ of the company’s shares); 3) the bid achieves its objectives; and 4) and the bidder replaces incumbent senior management, including the board. This excludes management-initiated leveraged buyouts (MBOs), and partial offers in which the bidder intended only to secure a less than two-thirds’ stake in the company. For a concise explanation of the Japanese mandatory bid rule, see Puchniak & Nakahigashi, *supra* note 3, at 24–25.

There is no consensus among observers identifying any single case as a successful hostile takeover. *Dōi-nai Baishū, Kabunushi Kyōkan Hirogaru-ka / Tekitai-teki TOB, Sukunau Seikōrei* (同意ない買収、株主共感広がるか 敵対的 TOB、少ない成立例) [*Acquisitions Without Consent—Gaining Shareholder Sympathy? The Few Successful Examples of Hostile Tender Offer Bids*], YAHOO NEWS JAPAN, Feb. 7, 2019 at <https://headlines.yahoo.co.jp/hl?a=20190207-00000081-mai-brf> (last visited Feb. 11, 2019) (listing only SSP Co, Ltd and Solid Group Holdings as the only two successful takeovers). However, even these two exceptional examples do not fit our definition. The 2000 bid for SSP Co, Ltd was not opposed by the board and that the few successful examples of unsolicited acquisitions were not by open bid, but rather on-market purchases. Fujinawa Ken’ichi (藤縄憲一), *Tekitai-teki Baishū to Taikō-saku wo meguru Giron ni tsuite* (敵対的買収と対抗策を巡る議論について) [*On the Debate Surrounding Hostile Acquisitions and Their Countermeasures*], RIETI, Feb. 13, 2006, at <https://www.rieti.go.jp/jp/events/bbl/06021301.html> (last visited Feb. 11, 2019). The 2007 successful hostile bid for Solid Group Holdings (now CARCHS Holdings) by Ken Enterprise was not for all outstanding shares, but only up to 66.58% (under the two-thirds mandatory bid triggering threshold) and succeeded because Lehmann Brothers tendered its 48% stake. See *Ken Entāpurazu no Soriddo Gurūpu HD e no Tekitai-teki TOB Seiritsu* (ケン・エンタープライズのソリッドグループHDへの敵対的TOB成立) [*Ken Enterprise’s Hostile Tender Offer Bid for Solid Group Holdings Succeeds*], REUTERS JAPAN, Dec. 13, 2007, at <https://jp.reuters.com/article/idJPJAPAN-29348620071213> (last visited Feb. 11, 2019). For discussion on the recent Itochu bid for Descente, see Part IV.C below.

¹²⁷ See Puchniak & Nakahigashi, *supra* note 3, at 8.

¹²⁸ Ronald J. Gilson, *Reflections in a Distant Mirror: Japanese Corporate Governance Through American Eyes*, 1998 COLUM. BUS. L. REV. 203, 209 n.19 (1998) (a “stable shareholder” is one who “agrees not to

relationships with the company. As the *Livedoor* and *Bull-Dog Sauce* cases¹²⁹ powerfully illustrate, stable shareholders have on multiple occasions given hostile acquirers pause by rallying in support of incumbent management,¹³⁰ even when doing so came at a direct financial cost to themselves.¹³¹ Although Japan's cross-shareholding structure has come partly unwound in recent years, and foreign investment has increased, leading Japanese scholars have observed that these changes primarily affected large public corporations.¹³² By contrast, small and medium-sized listed corporations that are favored targets for activist shareholders continue to maintain low foreign ownership and relatively high cross-shareholding.¹³³ Beyond stable shareholders, incumbent management also appears to enjoy support from other investors,¹³⁴ and even foreign shareholders may be reluctant to challenge the status quo.¹³⁵ At least for now, the long-standing antipathy for hostile

sell the shares to third parties unsympathetic to incumbent management, particularly hostile takeover bidders or bidders trying to accumulate strategic parcels of shares: agrees, in the event that disposal of the shares is necessary, to consult the firm or at least give notice of its intention to sell"); see also Puchniak & Nakahigashi, *supra* note 3, at 17.

¹²⁹ Discussed above at II.A.

¹³⁰ See Puchniak & Nakahigashi, *supra* note 3, at 17–19.

¹³¹ Especially in the *Bull-Dog Sauce* case. See Gen Goto, *Legally "Strong" Shareholders of Japan*, 3 MICH. J. PRIV. EQUITY & VENTURE CAP. L. 125, 143 (2014) (noting that given the irrational behavior of individual shareholders voting for the management's defensive measure, "it seems logical to conclude that they had strong sympathy for the targeted corporation and antipathy to the hostile bidder").

¹³² Goto, *supra* note 131, at 145–146; see also Miyajima Hideaki & Nitta Keisuke, *Kabushiki shoyū kōzō no tayōka to sono kiketsu - Kabushiki mochiai no kaishō / "fukkatsu" to kaigai tōshika no yakuwari* (株式会社所有構造の多様化とその帰結—株式持ち合いの解消・「復活」と海外投資家の役割) [*Diversification of Share-Ownership Structure and its Consequences / Unwinding and "Revival" of Cross-Shareholdings and the Role of Foreign Investors*], in NIHON NO KIGYŌ TŌCHI (日本の企業統治) [CORPORATE GOVERNANCE IN JAPAN] 135 (Miyajima Hideaki ed., 2011) (reporting that foreign institutional investors tended to prefer 1) large scale firms with 2) a larger proportion of revenue deriving from overseas sales, 3) high return on assets, and 4) low leverage) and Hideaki Miyajima & Fumiaki Hiroki, *The Unwinding of Cross-Shareholding in Japan: Causes, Effects, and Implications*, in CORPORATE GOVERNANCE IN JAPAN: INSTITUTIONAL CHANGE AND ORGANIZATIONAL DIVERSITY 79, 86–88 (Masahiko Aoki, Gregory Jackson & Hideaki Miyajima eds., Oxford University Press 2007) (foreign institutional investors began investing in Japanese stocks after their prices fell in the wake of the burst of the asset bubble).

¹³³ Goto, *supra* note 131, at 146 (discussing activist hedge funds); see also Tanaka Wataru (田中亘), *Kabushiki hoyū kōzō to kaisha-hō - Bunsan hoyū no jyōjyō gaisha no jirenma wo koete* (株式保有構造と会社法—「分散保有の上場会社のジレンマ」を超えて) [*Shareownership Structure and Corporate Law - Beyond the "Dilemma of Dispersed Listed Corporations"*], 2007 SHŌJI HŌMU 30, 31–32 (2013).

¹³⁴ Goto, *supra* note 131, at 142–143; John Buchanan et al., *Unexpected Corporate Outcomes from Hedge Fund Activism in Japan*, SOCIO-ECONOMIC REVIEW (FORTHCOMING) 15 (2018) ("Additionally, most Japanese investors tolerate great management autonomy up to the point that managers prove themselves clearly inadequate.").

¹³⁵ JOHN BUCHANAN ET AL., HEDGE FUND ACTIVISM IN JAPAN: THE LIMITS OF SHAREHOLDER PRIMACY 213–224 (Cambridge University Press 2012); Maddison Marriage, *Foreign Investors Fear Holding Japan*

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takeovers shared by management and stable shareholders¹³⁶ provide Japanese firms with a powerful defense against hostile takeover attempts. Japan’s unique corporate culture¹³⁷ means that its dispersed shareholder landscape does not axiomatically render Japanese corporations in general more vulnerable to hostile takeovers.

A second feature is lifetime employee-dominated senior management,¹³⁸ and which historically also included large corporate boards.¹³⁹ The especially potent combination of economic and emotional incentives for lifetime employees of firms in virtually every industry to maintain control over their companies regardless of external pressure has proved to be a formidable barrier to the development of an active market in hostile takeovers.¹⁴⁰ Although not impervious to pressure, Japan’s lifetime employee system has

Inc to Account, FIN. TIMES (Jan. 9, 2016), <<https://www.ft.com/content/080fd530-a7fe-11e5-9700-2b669a5aeb83>> (last visited 8 October 2018).

¹³⁶ Curtis J. Milhaupt, *Creative Norm Destruction: The Evolution of Nonlegal Rules in Japanese Corporate Governance*, 149 U. PA. L. REV. 2083, 2100 (2001) (suggesting that in an earlier era when corporate law did not offer the flexibility necessary for the development of defensive measures, “a social norm denigrating hostile takeovers as unethical could operate as a low-cost substitute for an extensive system of formal ground rules for M&A activity and as a complement to the structural obstacle posed by cross-shareholding practices”).

¹³⁷ See Puchniak & Nakahigashi, *supra* note 3, at 41.

¹³⁸ On the role of lifetime employment in Japanese corporate governance generally, see Časlav Pejović, *Changes in Long-term Employment and Their Impact on the Japanese Economic Model: Challenges and Dilemmas*, No. 37 J.JAPAN.L. 51, 66–68 (2014).

¹³⁹ Steven N. Kaplan, *Top Executive Rewards and Firm Performance: A Comparison of Japan and the United States*, 102 J. POL. ECON. 510, 517, 520 (1994) (reporting, based on a survey of 119 large Japanese companies from 1980 to 1988, that 21.63 out of the 22.49 directors on average are ‘insider directors’ with either previous or current experience as an executive of the firm); Dan W. Puchniak, *Why Investor Trust (and Not the Law) Matters: Japanese Lifetime Employment's Role as a Non-Legal Mechanism for Credible Investor Trust* (LL.D. dissertation chapter, Kyushu University 2008) 15 (“A system of internal promotion for career employees, which extends to the board of directors, means that career employees dominate the senior management and boards of large Japanese companies.”) DOI:10.2139/ssrn.2318953; Miyajima Hideaki (宮島英昭) & Nitta Keisuke (新田敬祐), *Nihon-gata Torishimariyaku-kai no Tagen-teki Shinka: Sono Kettei Yōin to Pafōmansu Kōka* (日本型取締役会の多元的進化：その決定要因とパフォーマンス効果) [*Multi-faceted Evolution of Japanese-Style Corporate Boards: Determinants and Effects on Performance*], in *KIGYŌ TŌCHI NO TAYŌKA TO TENBŌ* (企業統治の多様化と展望) [DIVERSIFICATION AND PROSPECTS OF CORPORATE GOVERNANCE] 40 fig. 2-4 (Kanda Hideki (神田秀樹) & (財務省財務総合政策研究所) eds, Kin’yū Zaisei Jijō Kenkyūkai 2007) (reporting that the average number of directors in companies listed on the First Section of the Tokyo Stock Exchange fell from 18.50 in 1993 to 10.37 in 2004, and for the Second Section from 11.74 to 8.16 over the same period). However, there has been a slight reversal of late, with the average number of directors falling to a low of 8.61 and 6.88 in 2014 for the First and Second Sections respectively before rebounding to 9.29 and 7.73 respectively in 2016: Tokyo Exchange Inc, *TSE-Listed Companies White Paper on Corporate Governance 2017* (March 2017), 75 chart 57, at <https://www.jpx.co.jp/english/equities/listing/cg/tvdivq0000008jb0-att/b5b4pj000001nj2x.pdf>, accessed Jan. 14, 2019.

¹⁴⁰ See Puchniak & Nakahigashi, *supra* note 3, at 38–41. For slightly tongue-in-cheek explanation by a

remained remarkably resilient despite the changing business environment.¹⁴¹ While lifetime employment is arguably not the main obstacle to hostile takeovers in Japan, it remains an influential factor that has caused Japan's market for corporate control to evolve in an entirely different direction from the US or UK.¹⁴²

In any event, as noted above (in II.C), defensive measures do not substantially shift the balance of power between corporate boards and shareholders. They capture and at best, lightly reinforce the balance of power as it stood at the time the PRP was adopted or last renewed. The term-limited nature of most PRPs prevents its use as a means of effective entrenchment of any state of affairs for too long a period. So long as the interests of shareholders (especially stable-shareholders) remain aligned with that of the lifetime employee-dominated management, shareholders will ultimately do the right thing by not giving in to the invading barbarian. In such situations, the legal validity of the company's PRP will be of little consequence.

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

IV. CLEARING OUT THE MEDICINE CABINET: THE SILENT DECLINE OF JAPAN'S SO-CALLED "PILL"

We have seen in the two preceding Parts how Japan's so-called "poison pill" is hardly

leading Japanese attorney on how dire the fate of a senior executive of a Japanese firm ousted in a hostile takeover would be as compared to their American counterpart, see Fujinawa, *supra* note 126 (discussing differences between Japanese and American senior executives in terms of expected life outcomes).

¹⁴¹ For an extensive study canvassing a wide range of quantitative and non-quantitative studies, see Sayuri A. Shimoda, *Time to Retire: Is Lifetime Employment in Japan Still Viable?*, 39 FORDHAM INT'L L.J. 753 (2016); see also Pejović, *supra* note 138.

¹⁴² See Puchniak & Nakahigashi, *supra* note 3, at 41.

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that, and how the corporate governance environment in Japan has created natural walls that have never been successfully breached by barbarians, whether Japanese or American, at the gate. Notwithstanding this, it is well-known that hundreds of Japanese firms had adopted defensive measures – overwhelmingly of the PRP variety¹⁴³ – in the years immediately following the tumultuous mid-2000s. But that was then; what has become of the Japanese “pill” since?

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

Since 2014–2015, one key statistic, which we call “attrition”, has spiked, meaning that it is increasingly likely that a defensive measure due to expire¹⁴⁴ would not be renewed. The combination of very few new adoptions and increasing attrition points in one unequivocal direction: down. In just under five years (from 1 January 2014 to 31 October 2018), the number of Japanese firms with PRPs in place fell from 507 to 383, or almost a quarter (24.46%).¹⁴⁵ Coinciding with a large number of “pills” that expired between mid-2016 and mid-2017, these trends led to the astonishing situation where *sixteen* times as many “pills” were abolished as they were adopted in Japan.¹⁴⁶

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

¹⁴³ See Table 1.

¹⁴⁴ Most defensive measures have a validity period of one to three years. See *supra* note 93 and accompanying text.

¹⁴⁵ See *infra* Table 1.

¹⁴⁶ Mogi & Tanino (2018), *infra* note 150, at 19 fig. 1 (48 abolishments versus 3 adoptions).

A. Trends in Adoption and Abolishment

There is no official data on defensive measures in Japan; the best publicly available, up-to-date data is collected by private actors.¹⁴⁷ The most precise and granular data available, albeit not for the early years,¹⁴⁸ on defensive measures is from a series of studies by legal consultants at Sumitomo Mitsui Trust Bank (“SMTB”)¹⁴⁹ – one of Japan’s largest trust banks. The studies were based on SMTB’s internal analysis of disclosure documents released by Japanese firms – and are published annually since 2006 (save for 2014) in Japan’s leading business law periodical, a publication that is widely read by both practitioners and scholars.¹⁵⁰ Another source available to Japanese practitioners is the

¹⁴⁷ The Tokyo Stock Exchange also collects and reports some data, but not at the level of granularity offered by SMTB analysts. See e.g. Tokyo Exchange Inc, *supra* note 139, at 28–32 (presenting data on defensive measures aggregated by listing categories, and divided by several metrics such as turnover, foreign shareholding, and size of largest shareholder).

¹⁴⁸ In particular, data coverage prior to 2009 is spotty.

¹⁴⁹ Specifically, the “Stock Transfer Agency Business Advisory Department” (or, in Japanese, 証券代行コンサルティング部). *Organization Chart*, SUMITOMO MITSUI TRUST BANK (October 1, 2018), <https://www.smtb.jp/tools/english/company/organization.html>, accessed Jan. 14, 2019.

¹⁵⁰ The studies we drew on to compile Table 2 are: Mogi Miki & Tanino Kōji, *Tekitai-teki Baishū Bōeisaku no Dō'nyū Jōkyō* (敵対的買収防衛策の導入状況) [*The Status on Adoption of Defensive Measures Against Hostile Takeovers*], 2185 SHŌJI HŌMU 18 (2018); Mogi Miki & Tanino Kōji, *Tekitai-teki Baishū Bōeisaku no Dō'nyū Jōkyō* (敵対的買収防衛策の導入状況) [*The Status on Adoption of Defensive Measures Against Hostile Takeovers*], 2152 SHŌJI HŌMU 31 (2017); Mogi Miki & Tanino Kōji, *Tekitai-teki Baishū Bōeisaku no Dō'nyū Jōkyō* (敵対的買収防衛策の導入状況) [*The Status on Adoption of Defensive Measures Against Hostile Takeovers*], 2120 SHŌJI HŌMU 12 (2016); Tanino Kōji, *Tekitai-teki Baishū Bōeisaku no Dō'nyū Jōkyō* (敵対的買収防衛策の導入状況) [*The Status on Adoption of Defensive Measures Against Hostile Takeovers*], 2083 SHŌJI HŌMU 14 (2015); Mogi Miki & Tanino Kōji, *Tekitai-teki Baishū Bōeisaku no Dō'nyū Jōkyō* (敵対的買収防衛策の導入状況) [*The Status on Adoption of Defensive Measures Against Hostile Takeovers*], 2012 SHŌJI HŌMU 49 (2013); Fujimoto Amane, Mogi Miki & Tanino Kōji, *Tekitai-teki Baishū Bōeisaku no Dō'nyū Jōkyō* (敵対的買収防衛策の導入状況) [*The Status on Adoption of Defensive Measures Against Hostile Takeovers*], 1977 SHŌJI HŌMU 24 (2012); Fujimoto Amane, Mogi Miki & Tanino Kōji, *Tekitai-teki Baishū Bōeisaku no Dō'nyū Jōkyō* (敵対的買収防衛策の導入状況) [*The Status on Adoption of Defensive Measures Against Hostile Takeovers*], 1948 SHŌJI HŌMU 13 (2011); Fujimoto Amane, Mogi Miki & Tanino Kōji, *Tekitai-teki Baishū Bōeisaku no Dō'nyū Jōkyō* (敵対的買収防衛策の導入状況) [*The Status on Adoption of Defensive Measures Against Hostile Takeovers*], 1915 SHŌJI HŌMU 38 (2010); Fujimoto Amane et al, *Tekitai-teki Baishū Bōeisaku no Dō'nyū Jōkyō* (敵対的買収防衛策の導入状況) [*The Status on Adoption of Defensive Measures Against Hostile Takeovers*], 1877 SHŌJI HŌMU 12 (2009). For earlier studies, see Fujimoto Amane et al, *Tekitai-teki Baishū Bōeisaku no Dō'nyū Jōkyō (jō)* (敵対的買収防衛策の導入状況〔上〕) [*The Status on Adoption of Defensive Measures Against Hostile Takeovers (Part 1 of 2)*], 1843 SHŌJI HŌMU 42 (2008); Fujimoto Amane et al, *Tekitai-teki Baishū Bōeisaku*

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proprietary database (“RECOF Database”) of M&A data that is maintained by the company publishing the leading specialist M&A practitioner periodical (MARR) in Japan.¹⁵¹ Although it does not capture the same range of data as the SMTB studies, the RECOF Database is useful for multi-year trends and for information specifically on reasons for abolishment of defensive measures. We present data sourced and processed from the two sources in three separate tables in the Appendix, augmented by references to other sources of data in the description.¹⁵²

Notwithstanding considerable uncertainty then as now as to the legal efficacy of defensive measures, the period from 2005 to 2008 saw a flurry of adoptions of defensive measures by Japanese firms. As Table 1¹⁵³ shows, firms with active defensive measures grew by multiples each year, from just 2 at the end of 2004 to 29 in 2005, 175 in 2006, and 409 in 2007. According to data collected by the Daiwa Institute of Research,¹⁵⁴ the number of firms with defensive measures peaked at 574 in August 2008.¹⁵⁵ Since then, as Figure 1¹⁵⁶ and Table 1 show, the trend in the number of firms with active defensive

no Dō'nyū Jōkyō (敵対的買収防衛策の導入状況) [*The Status on Adoption of Defensive Measures Against Hostile Takeovers*], 1809 SHŌJI HŌMU 31 (2007); Fujimoto Amane et al, *Tekitai-teki Baishū Bōeisaku no Dō'nyū Jōkyō* (敵対的買収防衛策の導入状況) [*The Status on Adoption of Defensive Measures Against Hostile Takeovers*], 1776 SHŌJI HŌMU 46 (2006). We did not include data from studies published before 2009 due to incompleteness and incomparability of the data with subsequent studies. No study was published, to the best of our knowledge by the SMTB analysts in 2014, although partial unpublished data was obtained from Mogi Miki and Tanino Kōji, regular authors of the SMTB studies. It should also be noted at the outset that minor discrepancies exist between the SMTB figures (or figures extrapolated therefrom) released in different years, although these discrepancies have no impact on the broader picture and trends.

¹⁵¹ *RECOF M&A Dētābēsu* (レコフ M&A データベース) [*RECOF M&A Database*], MARR ONLINE, at <https://www.marr.jp/recofdb.html>, accessed Jan. 14, 2019.

¹⁵² This is necessitated by the fact that the two predominant datasets cannot be effectively combined because of differences in reference dates and periods. By presenting separately-sourced data in separate tables of overlapping content, we seek to paint an empirical picture of defensive measures in Japanese firms that is as clear and accurate as possible.

¹⁵³ This is compiled based on *M&A Kenkyūkai Hōkoku 2009*, *infra* note 245, at 10 fig 1-13 and MARR, *infra* note 245, at 33.

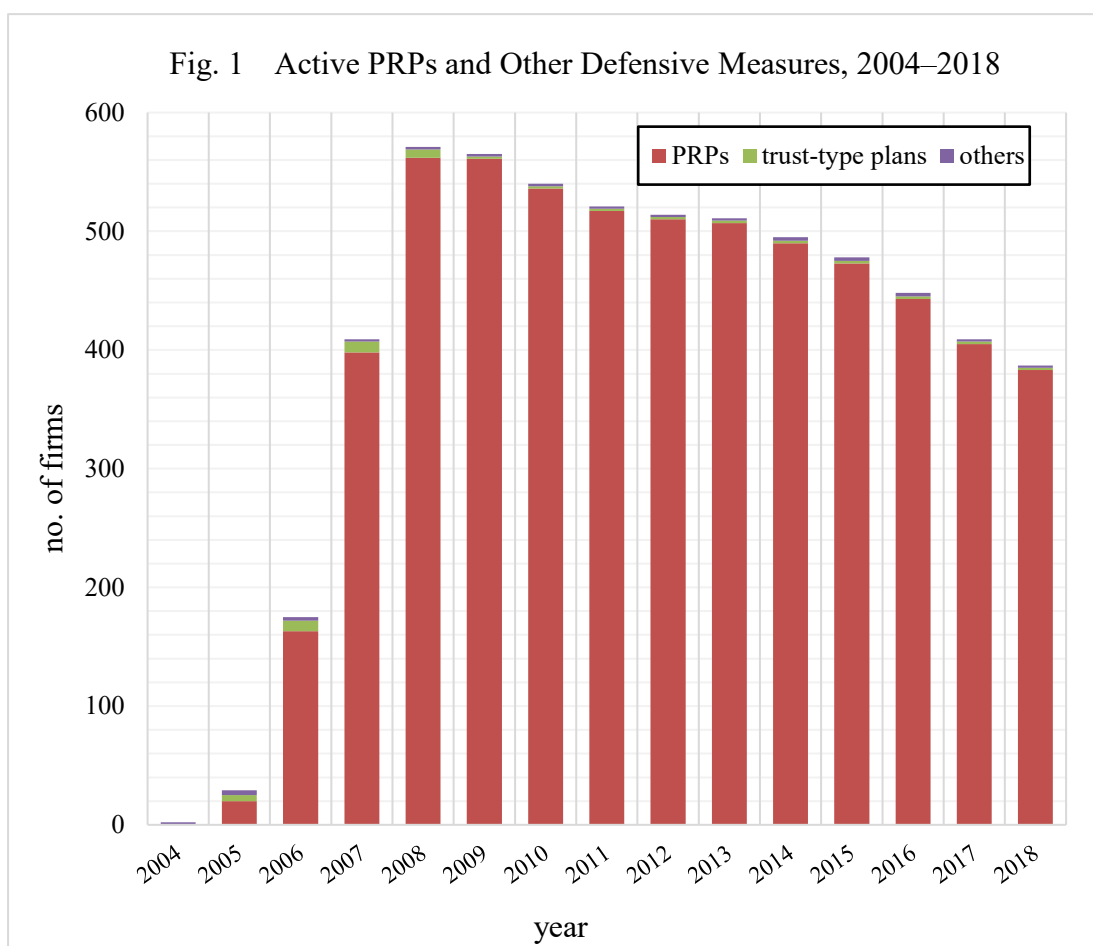
¹⁵⁴ Daiwa Institute of Research (*Daiwa Sōken*) is the think tank of Daiwa Securities Group, a leading investment banking and financial services conglomerate. See Yoriyuki Kusaki, *Message*, DAIWA INSTITUTE OF RESEARCH GROUP, at <https://www.dir.co.jp/english/corporate/message.html>, accessed Jan. 14, 2019.

¹⁵⁵ Fujishima, *supra* note 46, at 2 tbl 1.

¹⁵⁶ The data for Figure 1 is sourced from Table 1.

measures – overwhelmingly PRPs¹⁵⁷ – has gone only one way: down.¹⁵⁸ Since 2010, PRPs have been falling by several percentage points each year;¹⁵⁹ as of 31 October 2018, the number of listed companies with active defensive measures is 387 – a figure not seen since 2007.¹⁶⁰

Table 2¹⁶¹ shows key trends in adoptions and abolishments of defensive measures.¹⁶²



¹⁵⁷ See Table 1 (showing that since 31 December 2009, no more than 4 or 5 out of the several hundred defensive measures in place in any given year were not PRPs). As such, it is fair to say that for practical intents and purposes, PRPs are – and have been for some time – synonymous with the modern Japanese “poison pill”.

¹⁵⁸ Table 1 (showing continuous decline after 31 December 2009 until 31 October 2018); see also Table 2 (from 31 July 2008 to 31 July 2017).

¹⁵⁹ Except 2009, where the change (net decrease of one PRP) was miniscule.

¹⁶⁰ See Table 2 (reporting that as of 31 July 2007 and 31 July 2008, there were respectively 374 and 570 firms with defensive measures in place); Fujishima, *supra* note 46, at 2 tbl 1 (reporting that as of November 2007, 409 firms had implemented defensive measures).

¹⁶¹ Table 2 is based off SMTB analyst data. Note that the SMTB analysts do not reveal their exact source or scope of data beyond “tabulated by Sumitomo-Mitsui Trust Bank from disclosure documents of each company”. See e.g. Mogi & Tanino (2017), *supra* note 150, at 32 fig. 1.

¹⁶² The SMTB data does not provide breakdowns for PRPs; all figures comprise all types of defensive measures.

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For defensive measures in force at a given point in time, the absolute decline in number (also available in Table 1¹⁶³) is also reflected in the corresponding decline as a percentage of all listed companies in Japan.¹⁶⁴ As the net change (whether in raw figures or percentage terms) is a function of both: (1) new adoptions by companies which did not already have defensive measures; and, (2) abolishments by companies that already had them, it is helpful to examine the figures for both separately.

Figures for new adoptions annually are set out in Table 2 and graphically presented in Figure 2. Up to 2008, a boom in defensive measures resulted in hundreds of new adoptions of defensive measures each year.¹⁶⁵ As Figure 2 dramatically shows, the bust came just as quickly, with the number of defensive measures adopted each year falling precipitously between 2008–2010, reaching and remaining in the single digits since 2009–2010. Having held steady for almost a decade, this trend is by now old news in Japan; it would not be misleading to call this the “not-so-new” normal.¹⁶⁶ In spite of this, there has been scant acknowledgement of the sluggish state of new adoptions in the English-language literature.¹⁶⁷

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

¹⁶³ Albeit with a reference date of 31 December each year for Table 1, instead of 31 July (for Table 2).

¹⁶⁴ Defensive measures prevalence peaked at around 15% of listed companies in 2008. Igusa Rei (荇草礼依), *Baishū Bōeisaku Dō'nyū Jōkyō: Dō'nyū Shasū wa 10-nen Renzoku Genshō, Pīku-zen no 2007-nen to Dōsuijun no 405-sha ni* (買収防衛策導入状況 ～導入社数は10年連続減少、ピーク前の2007年と同水準の405社に) [*Anti-Takeover Defensive Measures: 10-Year Continuous Decline in Number of Adopting Companies to 405 Firms, Same Level as in 2007 Pre-Peak*], *MARR Online* (25 April 2018) at <<https://www.marr.jp/print/entry/8306>> (drawing on data from the RECOF M&A database). Note that the figure for number of companies adopting defensive measures (569) in the article was as of end 2008, which explains the discrepancy with Daiwa Institute of Research's data (574 as of August 2008). Cf. Fujishima, *supra* note 46, at 2. Table 2 shows that the percentage of listed companies in Japan with defensive measures in place stagnated until around 2014, whereupon it entered continuous decline, falling from 13.4% in 2014–2015 to 11.3% by 2016–2017.

¹⁶⁵ See Table 1 and Figure 1 (showing massive growth in the number of active PRPs from Dec. 31, 2005 through Dec. 31, 2008).

¹⁶⁶ It is suggestive that for several years now, the fact that very few firms introduce defensive measures has not received analysis or even comment in the SMTB studies.

¹⁶⁷ Neither earlier work by one or more of the present authors, nor the latest high-profile hostile takeover paper featuring Japan (Armour et al., *supra* note 86) has picked up on this.

defensive measures were discontinued because of M&A activity.¹⁶⁸ Since 2013, however, as Table 3 shows, despite occasional spikes in M&A-related abolishments from time to time (in 2012, 2014, and 2016), the most common cause of abolishment by far is non-renewal upon expiration. This may be contrasted with two interesting observations: (1) a defensive measure was abolished on grounds of failure to obtain a favorable shareholder vote only once ever, in 2014; and (2) management only rarely pre-emptively abolishes a defensive measure before it is due to expire.¹⁶⁹ The dominance of abolishment by non-renewal suggests that while there is no compelling pressure on management to proactively abolish a measure while it is still in force, increasingly the affirmative case for renewing a measure upon expiration – whatever it might be for the firm in question – is not made out.

However, classifying an abolishment as “non-renewal” does not answer the further, and perhaps even more interesting question: why exactly was the decision taken not to renew? Recent data on shareholder resolutions pertaining to defensive measures sheds some light on this. It was reported in 2018 that although every resolution renewing or amending a defensive measure put to a vote in 128 firms during the June 2017 meetings season were successfully passed, in 32 firms (or 25%) the resolution received less than 70 percent shareholder approval, with two firms receiving less than 55 percent.¹⁷⁰

This is consistent with the finding in another study that there has been a general decline in shareholder approval rates for defensive measure resolutions since 2013.¹⁷¹ The latter study further suggests that a reason why the decline was not even more pronounced lay in the fact that firms receiving low shareholder approval in the past have since turned to outright abolishment.¹⁷² It is thus possible that a substantial percentage of “non-renewal” cases might in fact have turned out to be “failure to obtain shareholder support” cases if management had proceeded to put the issue to a shareholder vote.¹⁷³

¹⁶⁸ Fujimoto et al (2008), *supra* note 150, at 51 (reporting that 9 of the 18 defensive measures abolished up to 31 July 2008 were attributable to management integration (経営統合), management buyout, acquisition or other M&A activities broadly defined).

¹⁶⁹ See Table 2 (showing 183 of 204 (89.71%) abolishments from 2010–2011 to 2017–2018 were by non-renewal) and Table 3 (showing a total of 7 abolishments before expiry for 2013–2018, versus 137 abolishments by non-renewal).

¹⁷⁰ Igusa, *supra* note 164.

¹⁷¹ Mogi & Tanino (2017), *supra* note 150, at 33–34, 34 fig 3.

¹⁷² Mogi & Tanino (2017), *supra* note 150, at 34.

¹⁷³ A concrete example of a firm deciding not to proceed with a shareholder vote on renewal is Fujifilm

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Non-renewal may at times be a convenient face-saving way out for management who would not want to risk losing a shareholder vote over a defensive measure.

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

Recall that defensive measures in recent years usually have a validity period of three years,¹⁷⁴ and consider that a defensive measure, once adopted or renewed, is rarely abolished during its term (Table 3). In 2013–2014, for example, all 23 abolishments were by non-renewal. Hence, regardless of how much support for (or opposition against) a defensive measure there is in a given year, for practical purposes any decision as to whether a defensive measure has outlived its usefulness is likely to be made only when it is about to expire, and not before. The exact number of defensive measures abolished in a given reference period would turn not only on the mood towards defensive measures in that year, but would also depend on the number of defensive measures that are due to expire over each 12-month period – which, as Table 2 shows, varies considerably. Hence, to capture a sense of the overall sentiment toward defensive measures, we devise the concept of “attrition rate”,¹⁷⁵ by which we mean the percentage of expiring defensive measures that are not renewed.¹⁷⁶ A higher attrition rate in a given year, regardless of the absolute number of defensive measures being abolished, would thus indicate either less demand for or greater pressure against defensive measures.

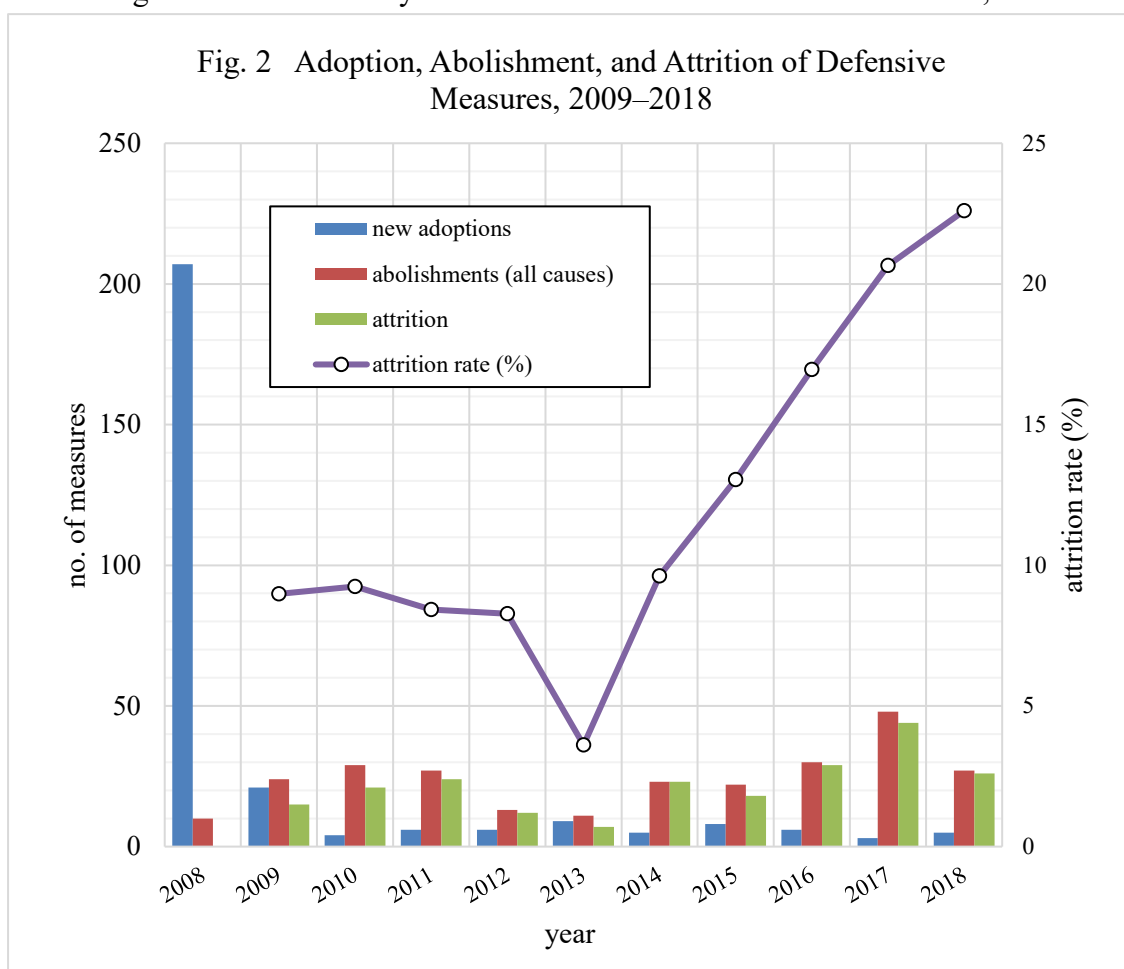
Holdings, whose proposed resolution on defensive measures was withdrawn by management just before the shareholder meeting of 2013 on the ground that “it had become difficult to obtain the understanding of a majority of shareholders”. *Fuji firumu, baishū bōeisaku gi’an torisage / sōkai chokuzen ni* (富士フイルム、買収防衛策議案取り下げ 総会直前に) [*Fujifilm Withdraws Defensive Measure Proposal Right Before Shareholder Meeting*], NIHON KEIZAI SHIMBUN (electronic edition, Jun. 26, 2013), at <https://www.nikkei.com/article/DGXNZO56656240W3A620C1DT0000/>, accessed Jan. 4, 2019.

¹⁷⁴ See *supra* note 93.

¹⁷⁵ Although the SMTB studies from 2009 onwards (excluding 2014) contained attrition and attrition rate figures in whole or part, nothing was said about the significance or value of this measure, nor was the term “attrition rate” coined or defined as such.

¹⁷⁶ This measure is only made possible by SMTB analyst data, which tracks the number of expiring measures and the number of which are renewed or not renewed from 2009 onwards.

We were able to obtain or compute attrition rate figures for the years 2009 to 2018. As Figure 2¹⁷⁷ shows, attrition seems to have progressed in three phases. First, from August 2009 to July 2014, attrition rates held steady between 8 and 10 percent, with a one-off fall to just 3.61 percent for the 2012–2013 period. Since 2013–2014, attrition rates have soared to double-digit figures, more than doubling from 9.62 percent in 2013–2014 to 20.66 percent just three years later (2016–2017) and rising further to 22.60 percent (2017–2018). The confluence of a high attrition rate, a large number of expiring defensive measures, and an exceptionally low number of new adoptions in 2016–2017 led to one astonishing statistic: for every firm that introduced defensive measures, sixteen¹⁷⁸



¹⁷⁷ Data for Figure 2 is from Table 2.

¹⁷⁸ Mogi & Tanino (2018), *supra* note 150, at 19 tbl 1 (reporting that defensive measures were abolished in 48 firms but introduced in only 3 in the 12-month period ending 31 July 2017). *Cf.* Mogi & Tanino (2018), *supra* note 150, at 32 tbl 1 (reporting that defensive measures were abolished in 45 firms). The discrepancy between the 2017 and 2018 studies is resolved in favor of the latter. The respective adoption/abolishment ratio was 1:5 for 2015–2016 and 1:2.875 for 2014–2015.

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abolished¹⁷⁹ them.

Although the exceptional adoption/abolishment ratio of 2016–2017 is a one-off event, the attrition rate has continued to rise. For the 2017–2018 period, only 115 defensive measures expired,¹⁸⁰ presenting a substantially smaller pool of defensive measures coming up for a decision as to renewal or abolishment as compared to 213 for the 12 months ending 31 July 2017 and 171 for the 12 months ending 31 July 2016 (Table 2). Even though the raw attrition figure fell from 44 in 2016–2017 to just 27 in 2017–2018, the attrition rate has nonetheless increased, from 20.66 to 22.60 percent. Given the trend of rising attrition rates and the fact that a substantially larger number of defensive measures are likely to expire in the near future – and hence prompt a management decision to let the measure lapse or seek a shareholder mandate to renew – attrition data from the next two to three years will be crucial. The tipping point at which defensive measures go from an institution in decline, to just another colorful concluded chapter in the history of corporate governance may very well lay just over the horizon.

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

B. *Explaining the Fall in Defensive Measures*

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

¹⁷⁹ Following Mogi & Tanino, we do not distinguish between ‘abandonment’ (in which the management pro-actively dismantles the defensive measure), ‘expiry’ (in which a term-limited defensive measure is allowed to expire without renewal), or where the defensive measure has become ‘defunct’ (where the firm has undergone M&A or delisted). See e.g. Mogi & Tanino (2017), *supra* note 150, at 31.

¹⁸⁰ Igusa, *supra* note 164 (reporting that 104 defensive measures would expire during calendar year 2018).

resistance against renewal of expiring PRPs. We examine each of these in turn.

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

Let us assume that PRPs are theoretically, or were at least perceived to be, effective countermeasures to hostile takeovers.¹⁸¹ An obvious explanation for falling demand for a medicine would be decreased incidence of the disease the medicine is meant to treat; in the PRP’s case, that would be hostile takeovers.

The collapse in new demand for defensive measures (i.e. new adoptions) since 2009¹⁸² fits particularly well with the Necessity Explanation. Much of the initial demand for defensive measures, fueled by the turbulent events of the mid-2000s, was quickly exhausted; by 2009, a substantial percentage of Japan’s leading firms had PRPs and other defensive measures in place.¹⁸³ In the years that followed, the wave of hostile takeovers anticipated in the mid-2000s (and before) never materialized in Japan.¹⁸⁴ Reduced pressure on Japanese firms by investment funds in the wake of the Global Financial Crisis has been linked to the drastic drop in new adoptions in 2008–2009.¹⁸⁵ In recent years, activist investors such as hedge funds have also moved away from acquiring large blocks of shares with a view to eventually gaining corporate control via tender offers. Rather, hedge funds have increasingly favored smaller shareholdings and other forms of engagement with investee firms.¹⁸⁶ By turning away from outright acquisition (hostile or otherwise), this shift in investor behavior also suppressed new demand for anti-takeover defensive measures in firms that were not early adopters. Trends in new adoptions of

¹⁸¹ For why this perception is, with the benefit of hindsight, difficult to justify today, see Part II.C. above (explaining why the PRP is of questionable effectiveness as a matter of law) and Part IV.B.2 below.

¹⁸² Table 2; Figure 2.

¹⁸³ *Id.* (noting that by 2009, demand has levelled off with about 24% of companies with premium listings (on the First Sections) having implemented defensive measures).

¹⁸⁴ For reasons why this was so, see Part III.

¹⁸⁵ See Fujimoto et al (2009), *supra* note 150, at 12 (reporting that only 207 defensive measures were adopted in 2008–2009, a sharp decrease from 21 in 2007–2008).

¹⁸⁶ Ishii Yūsuke, *Kawaru Kabunushi Sōkai* (変わる株主総会) [*The Changing Shareholder Meeting*], in *KAWARU KABUNUSHI SŌKAI* (変わる株主総会) [THE CHANGING SHAREHOLDER MEETING] 23 (Mori Hamada & Matsumoto ed., Nihonkeizaishimbun Shuppansha 2018). For recent work on hedge fund activism in Japan, see John Buchanan, Dominic H. Chai & Simon Deakin, *Unexpected Corporate Outcomes from Hedge Fund Activism in Japan*, *SOCIO-ECONOMIC REVIEW* (forthcoming 2018).

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defensive measures, which fell off a cliff around 2008–2009 to just 21 (from 207 in the previous reference period),¹⁸⁷ and thereafter languished in the single digits,¹⁸⁸ reflect these changes in the perceived necessity of PRPs.

The calculus involved in adopting a defensive measure for the first time is straightforward: if it is necessary and the cost is affordable, do it. It is certainly possible that a defensive measure, which was at the time of initial adoption deemed necessary by management, would later be re-assessed as unnecessary and accordingly abolished. Considerations of necessity, however, do not necessarily manifest in the same way when a firm’s management is deciding if an expiring defensive measure should be renewed,¹⁸⁹ or if an existing defensive measure should be abolished pro-actively before it expires.

As lived experience (or just common sense) tells us, just because something becomes factually unnecessary does not mean that people would axiomatically cease to do it or actively get rid of it;¹⁹⁰ they may simply hold on to the thing and just do nothing with it. In the face of path dependence and switching costs,¹⁹¹ loss of necessity is a necessary but insufficient condition for large-scale abandonment of defensive measures. Although, as noted above, there has been no abolishment of defensive measures *en masse* pre-expiry,¹⁹² attrition rates (i.e. percentage of defensive measures not renewed upon expiry) have increased sharply from 2015 onwards.¹⁹³ As the Necessity Explanation is, by itself, unable to account for rising attrition, we revisit the attrition trend below (at IV.B.3). In the meantime, recall that the Necessity Explanation is premised on the PRP as a necessary, or at least a somewhat useful, device. But does this premise really hold – and what happens if it does not?

¹⁸⁷ Table 2; Figure 2.

¹⁸⁸ *Id.*

¹⁸⁹ Most, although not all, defensive measures are valid for a fixed term; see *supra* note 93 and text thereto.

¹⁹⁰ A simple analogy will suffice: is there not at least one person you know (or yourself) who keeps old medicine around, even when the illness it was meant to treat was cured or never came to pass?

¹⁹¹ See generally Ronald J. Gilson, *From Corporate Law to Corporate Governance*, in OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 9–14 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., Oxford University Press 2018) (discussing path dependence and barriers to changes in corporate governance); Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, in CONVERGENCE AND PERSISTENCE AND CORPORATE GOVERNANCE 69–113 (Jeffrey N. Gordon & Mark J. Roe eds., Cambridge University Press 2004); Reinhard H. Schmidt & Gerald Spindler, *Path Dependence and Complementarity in Corporate Governance*, in Gordon & Roe, *id.* at 114–127.

¹⁹² At Part IV.A.; see *supra* note 169 and text thereto.

¹⁹³ Table 2; Figure 2.

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

Initial hopes that the PRP would serve as a potent anti-takeover defense may have justified their initial adoption on grounds of "necessity" in the early years. With the passage of time, however, it becomes increasingly difficult to make the same case for the PRP. We have established¹⁹⁴ that the modern Japanese PRP is nothing like the mature, potent, and binding legal instrument that is the US poison pill; it remains a legally untested construct whose legitimacy appears to hinge on shareholder support. In contrast with the "shadow pill" effect of the US poison pill that protects every listed company in the US regardless of whether a pre-bid "clear-sky" poison pill is in place,¹⁹⁵ it is far from clear whether the PRP, when put to the test, will be even worth the paper it is written on. Japan's PRP is, at best, "a shadow of a shadow".

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

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

¹⁹⁴ Part II.C.

¹⁹⁵ *Id.*

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

Even as successful hostile takeovers have maintained their absence, Japan’s corporate governance environment has nonetheless undergone substantial changes in recent years. Japan’s Corporate Governance Code was first implemented in June 2015 and last amended in June 2018.¹⁹⁶ Principle 1.5¹⁹⁷ provides that:

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

Although investor discontent with defensive measures may be nothing new,¹⁹⁸ coupled with growing criticism of defensive measures from not only foreign but also domestic institutional investors,¹⁹⁹ the introduction of the Corporate Governance Code with this interesting feature appears to have prompted a number of firms to pro-actively abolish defensive measures.²⁰⁰ In this sense, changes in the corporate governance environment

¹⁹⁶ TOKYO STOCK EXCHANGE, JAPAN’S CORPORATE GOVERNANCE CODE (Jun. 1, 2018), at <https://www.jpx.co.jp/english/news/1020/b5b4pj000000jvyr-att/20180601.pdf>, accessed Jan. 4, 2019.

¹⁹⁷ *Id.* at 8. Principle 1.5 was untouched by the 2018 revision.

¹⁹⁸ See e.g. *Fuji firumu, baishū bōeisaku gi’an torisage / sōkai chokuzen ni* (富士フイルム、買収防衛策議案取り下げ 総会直前に) [*Fujifilm Withdraws Defensive Measure Proposal Right Before Shareholder Meeting*], NIHON KEIZAI SHIMBUN (electronic edition, Jun. 26, 2013), at <https://www.nikkei.com/article/DGXNZO56656240W3A620C1DT0000/>, accessed Jan. 4, 2019 (reporting that both domestic and foreign institutional investors increasingly object to defensive measures on the grounds that they lead to managerial self-preservation); *Kawasaki Kisen nado 19 sha, bōeisaku wo haishi, konnendo, 479 sha wa nao keizoku* (川崎汽船など19社、買収防衛策を廃止、今年度、479社はなお継続。) [*19 Firms Including Kawasaki Kisen Abolish Defensive Measures; 479 Firms Continue to Have Them*], NIHON KEIZAI SHIMBUN, 13 (morning edition, Jun. 12, 2015) (noting that strong investor dissatisfaction with defensive measures has been present since before the Corporate Governance Code took effect).

¹⁹⁹ “*Kawareru kakugo*” de kau—*bōeisaku haishi, tōshika wa kangei* (「買われる覚悟」を買う—防衛策廃止、投資家は歓迎) [*Buying with the “Readiness to be Bought”—Investors Welcome Abolishment of Defensive Measures*], NIHON KEIZAI SHIMBUN, 18 (morning edition, May 24, 2017) (also reporting that outside [comparable to independent] directors with management expertise have increased, and there have been cases in which such directors advise abolishment of defensive measures).

²⁰⁰ See *Kawasaki Kisen nado 19 sha, bōeisaku wo haishi, konnendo, 479 sha wa nao keizoku* (川崎汽船など19社、買収防衛策を廃止、今年度、479社はなお継続。) [*19 Firms Including Kawasaki Kisen Abolish Defensive Measures; 479 Firms Continue to Have Them*], NIHON KEIZAI SHIMBUN, 13 (morning

have made it easier for institutional investors to express – either through or beyond voting at shareholder meetings – their own, possibly long-held objections to defensive measures.

A further development is the 2017 revision of Japan’s Stewardship Code, which introduced a new provision exhorting institutional investors to disclose their votes by individual investee company and by individual agenda item.²⁰¹ The revision quickly made its impact felt: even before the amended Code formally went into effect, a number of institutional investors proactively disclosed their past voting records.²⁰² Japanese commentators have attributed the especially pronounced spike in PRP abolishments in 2017 (notable both in terms of attrition rate²⁰³ or percentage change²⁰⁴) at least in part to the Stewardship Code amendment on disclosure requirements,²⁰⁵ albeit without clear

edition, Jun. 12, 2015) (citing the example of Nisshinbo Holdings as a firm that had taken into consideration the Corporate Governance Code’s coming into effect in its decision not to renew its PRP, but also noting that deep-seated wariness of hostile acquisition by other firms in the same industry have kept the number of firms taking pro-active steps towards abolition low); see also *Sōkai no shōten (10) baishū bōeisaku—hihan tsuyoku genshō keikō* (総会の焦点 (10) 買収防衛策—批判強く減少傾向。) [*Shareholder Meetings Focus (10): Anti-Takeover Defensive Measures—Strong Criticism, Trend of Decline*], NIHON KEIZAI SHIMBUN, 15 (morning edition, Jun. 22, 2015).

²⁰¹ Principles for Responsible Institutional Investors «Japan’s Stewardship Code» (May 29, 2017), 15 at Guidance 5-3 <<https://www.fsa.go.jp/en/refer/councils/stewardship/20170529/01.pdf>> (“Institutional investors should at a minimum aggregate the voting records into each major kind of proposal, and publicly disclose them. Furthermore, to enhance visibility of the consistency of their voting activities with their stewardship policy, institutional investors should disclose voting records for each investee company on an individual agenda item basis.”). For the pre-amendment position, see Principles for Responsible Institutional Investors «Japan’s Stewardship Code» (26 February 2014), 11 at Guidance 5-3 <<https://www.fsa.go.jp/en/refer/councils/stewardship/20140407/01.pdf>> (“Institutional investors should aggregate the voting records into each major kind of proposal, and publicly disclose them. Such a disclosure is important in making more visible the consistency of their voting activities with their stewardship policy.”); Gen Goto, *The Logic and Limits of Stewardship Codes: The Case of Japan* (University of Tokyo Business Law Working Paper Series, No 2018-E-01, October 2018), 45–47, available at <http://www.j.u-tokyo.ac.jp/en/wp-content/uploads/sites/10/2018/10/BLWPS2018E01.pdf>, BERKELEY BUS. L.J. (forthcoming).

²⁰² See e.g. Ema Naoyoshi (依馬 直義), *Nihon-ban Suchuwādoshippu Kōdo Kaitei wa Kabunushi Sōkai, Giketsuken Kōshi ni Dō Eikyō Shita ka* (日本版スチュワードシップ・コード改訂は株主総会、議決権行使にどう影響したか) [*How Did the Stewardship Code Revision Affect Shareholder Meetings and Exercise of Voting Rights?*], ASAHI JUDICIARY (15 August 2017) <<http://judiciary.asahi.com/fukabori/2017081100001.html>> (reporting that several institutional investors have already begun disclosing voting decisions by company and by individual resolution even before the amended Stewardship Code was formally promulgated).

²⁰³ Table 2 (defensive measures attrition reached high of 20.66%, compared to 16.96% for 2016 and 13.04% for 2015).

²⁰⁴ Table 1 (total number of PRPs in force fell year-on-year by 8.58% in reference year 2017, compared to 6.34% for 2016 and 3.47% for 2015).

²⁰⁵ Mogi and Tanino (2017) report that of the 43 firms that voluntarily abolished defensive measures in reference year 2017 (i.e. excluding the 2 abolishments following from M&A activity), 10 firms had very high levels of institutional investor shareholding. They speculate that the difficulty in securing favourable

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explanation.

Our Investor Resistance Explanation is as follows. Although institutional investors were previously free, if they so wished, to support management proposals for defensive measures without sanction or consequence,²⁰⁶ they are now under pressure to disclose – and accordingly, justify publicly – their voting decisions. Given that no general hostile takeover wave ever made its appearance in Japan for a decade, the management of a particular firm would be hard-pressed, absent a concrete and firm-specific hostile takeover threat, to state a compelling reason to maintain a PRP.²⁰⁷ Without a persuasive, affirmative reason from management, institutional investors would similarly find it difficult to justify voting in favor of renewal of expiring defensive measures.

The effect of the Stewardship Code revision on investor resistance against defensive measures is especially interesting as it hints at an unexpected outcome: a stewardship code – and stewardship as a concept – can matter. The notion that stewardship can have concrete impact on individual firms’ corporate governance practices runs counter to the emerging consensus among corporate governance scholars that stewardship codes have been largely ineffectual.²⁰⁸ For the avoidance of doubt, we stress that the Investor

votes from institutional investors was one of reasons for abolishment in these firms. Mogi & Tanino (2017), *supra* note 150, at 32. They further report that the decrease in favourable votes from domestic institutional investors in shareholder resolutions to approve defensive measures is attributable to the Stewardship Code’s new individual disclosure requirement. Mogi & Tanino (2017), *supra* note 150, at 35. *See also* Mogi & Tanino (2018), *supra* note 150, at 23 & 23 fig. 7 (reporting substantial declines in the percentage of resolutions on defensive measures for which domestic individual investors voted in favour, and attributing that fall to the revised Stewardship Code).

Although the overwhelming majority of abolishments are not as a result of an attempted renewal failing to garner the necessary shareholder votes in support (see Table 3, showing that the vast majority of abolishments are management-initiated or based on management-side reasons), as observed above (in the main text after note 172), it is plausible – even likely – that management would simply not table a defensive measure for renewal upon expiry if there was reliable indication that the chances of obtaining shareholder approval were less than extremely high. The change triggered by the Stewardship Code’s new disclosure requirement may thus not only had an effect on the voting percentages on defensive measures that were put to a vote, but also deterred management in firms dominated by institutional investors from even seeking renewal of the defensive measure in the first place.

²⁰⁶ As discussed in Part III, antipathy for hostile takeovers was, at least until very recently, widely held by shareholders.

²⁰⁷ Parts IV.B.1 and IV.B.2.

²⁰⁸ Iris H.Y. Chiu, *Reviving Shareholder Stewardship: Critically Examining the Impact of Corporate Transparency Reforms in the UK*, 28 DEL. J. CORP. L. 983, 1022 (2014); Arad Reisberg, *The UK Stewardship Code: On the Road to Nowhere?*, 15 J. CORP. L. STUD. 217 (2015); Brian R. Cheffins, *The Stewardship Code’s Achilles’ Heel*, 72 MOD. L. REV. 1004, 1024–1025 (2010); Paul Davies, *Shareholders in the United Kingdom*, in RESEARCH HANDBOOK ON SHAREHOLDER POWER 375 (Jennifer G. Hill & Randall S. Thomas eds., Edward Elgar 2015); *see also* Goto, *supra* note 201, at 50–51 (reporting that adoption of the Stewardship Code by private pension funds in Japan has been underwhelming).

Resistance Explanation is only a tentative one, and that the results of the voting seasons from 2019 onwards should offer crucial evidence either confirming or denying the effect of disclosure requirement changes.

C. *So What Are PRPs Good For, Anyway?*

If, as we have suggested, the PRP is unnecessary, legally irrelevant, and increasingly under fire from institutional investors, then its demise would seem inevitable. Yet time and again, reports of the demise of many a thing have been greatly exaggerated;²⁰⁹ any scholar attempting to predict the future of any phenomenon would do well to be appropriately circumspect. Even as the Japanese “pill” seemingly drifts closer towards extinction with each year, prudence demands that we acknowledge that neither is such progress inexorable, nor the final destination inevitable. Notwithstanding the PRP’s many failings as a legal mechanism, it may continue to play at least some role in Japan’s corporate governance landscape for two reasons.

First, PRPs are considerably more palatable than the alternatives. One of these is cross-shareholding. A classic²¹⁰ if controversial²¹¹ feature of Japanese corporate governance, cross-shareholding is a system where multiple companies agree to hold shares in each other’s companies, resulting in a web of mutual or circular shareholdings.²¹² By locking down most of the issued shares of participating listed companies, cross-shareholding insulated incumbent management from external pressure and posed a formidable obstacle to hostile takeovers.²¹³ Throughout the lost decade, cross-shareholdings were gradually unwound in many Japanese firms, although the extent and degree of this unwinding differs between firms.²¹⁴ Unlike cross-shareholdings,

²⁰⁹ Paraphrasing the famous quip widely attributed to Mark Twain.

²¹⁰ See e.g. Juro Teranishi, *Loan Syndication in War-Time Japan and the Origins of the Main Bank System*, in *THE JAPANESE MAIN BANK SYSTEM: ITS RELEVANCE FOR DEVELOPING AND TRANSFORMING ECONOMIES* 59–61, 63–64, 78–79 (Masahiko Aoki & Hugh Patrick eds., Oxford University Press 1994) (tracing the early history of cross-shareholding).

²¹¹ See RONALD DORE, *STOCK MARKET CAPITALISM: WELFARE CAPITALISM—JAPAN AND GERMANY VERSUS THE ANGLO-SAXONS* 92–96 (Oxford University Press 2000).

²¹² Zenichi Shishido, *The Hidden Problems of Corporate Law and Their Solutions*, 25 *DEL. J. CORP. L.* 189, 210–221 (2000); Goto, *supra* note 131, at 128.n12.

²¹³ Shishido, *supra* note 212, at 208–211. Shishido, however, also argues that firms stabilized by cross-shareholding are ultimately subject to capital market discipline as cross-shareholders would still sell their shares if corporate performance were to be unacceptable. *Id.* at 211.

²¹⁴ Goto, *supra* note 131, at 144–146.

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which are difficult and costly to create and unwind, PRPs can be adopted and removed as and when necessary, and with relative ease. PRPs also offer advantages compared to other existing defensive measures. Compared to the sole alternative²¹⁵ ex-ante measure, the trust-type plan, PRPs are considerably cheaper to implement and maintain.²¹⁶

Ex-post measures²¹⁷ also suffer from their own drawbacks. Share placements to friendly stable shareholders remain a possibility but would require at the time of crisis either the support of a supermajority of shareholders, or substantial financial commitment from a supportive stable shareholder.²¹⁸ A *Livedoor*-type placement of share options to a particular (friendly) shareholder without shareholder approval is vulnerable to challenge in court;²¹⁹ a *Bull-Dog Sauce*-style option allotment discriminating between the bidder and other shareholders would not succeed without both substantial shareholder support and considerable cost to the target company.²²⁰ In this regard, notwithstanding its weaknesses from a purely legal standpoint, the PRP remains the cheapest defense available to a Japanese listed company—provided it can command the necessary shareholder support and would survive judicial scrutiny if challenged (which, as explained above, is uncertain).²²¹

This brings us to our second point: if hostile takeovers are ever perceived as a real threat again, we may expect to see a revival in PRPs. Thus, to stop the PRP’s decline dead in its tracks – or spark a renaissance – might require no more than a single instance of a

²¹⁵ Class shares were adopted as a takeover defense around 2004, but no firm has adopted it since for this purpose due (at least in part) to resistance from the stock exchange. KANDA HIDEKI, KAISHA-HŌ (会社法) [CORPORATE LAW] 177 (20th ed., Yūhikaku 2018).

²¹⁶ See *supra* note 84.

²¹⁷ Part II.A.

²¹⁸ A share placement at a ‘particularly favorable’ (特に有利な金額) price to the placee requires a special resolution (two-thirds) of the shareholders. Companies Act, §§ 199(2), 199(3), 201(1), 309(2)(v). Conversely, a share placement at a fair price may be conducted by the board without a shareholder vote (Companies Act, § 201(1)), but would cost the placee.

²¹⁹ See *supra* notes 61–63 and accompanying text. For a recent example where a share placement and option allotment by a listed company was enjoined on the ground that the primary purpose of the placement and allotment was to change the composition of the shareholder body, see Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Decision, Jan. 6, 2017, 1516 Kin’yū Shōji Hanrei (金融商事判例) 51.

²²⁰ See *supra* notes 69–78 and accompanying text.

²²¹ For those that have abolished their PRPs or who foresee the loss of shareholder support necessary for maintaining a PRP, “contingency plans” offered by advisory firms may offer some comfort. See e.g. IR Japan, *Kontinjenshī puran sakutei shi’en* (コンテンツジェンシー・プラン策定支援) [*Contingency Plan Formulation Support*], IR JAPAN (2019) at <https://www.irjapan.net/service/consulting/contingency.html> (last visited Feb. 3, 2019).

hostile takeover repelled by a triggered PRP, or perhaps even something much less drastic. Consider the case of Kawasaki Kisen Kaisha, Ltd (“Kawasaki Kisen”), a shipping and logistics concern, which announced in May 2015 that its PRP would not be renewed (i.e. abolished) upon expiration in June that year.²²² Within just two months, the Singapore-based hedge fund Effissimo Capital Management (“Effissimo”)²²³ had accumulated a substantial stake in the firm;²²⁴ by March 2016, it had become Kawasaki Kisen’s largest shareholder by far²²⁵ – and remains so as of November 2018.²²⁶ The fact that Effissimo built its dominant position in Kawasaki Kisen so quickly after the latter abolished its PRP appears a little too convenient to dismiss as mere coincidence.²²⁷ In a further, recent

²²² Kawasaki Kisen Kaisha, Ltd, *Tōsha kabushiki no daikibo kaitsuke kōi ni kansuru taiō hōshin (baishū bōeisaku) no hi-kōshin (haishi) ni tsuite* (当社株式の大規模買付行為に関する対応方針 (買収防衛策) の非更新 (廃止) について) [Re the Non-Renewal (Abolishment) of the Company’s Policy on Large-Scale Acquisitions of Shares (Defensive Measures)] (May 21, 2015), at <https://www.kline.co.jp/ja/news/ir/ir-6173082786920771957/main/0/link/20150521-2.pdf>, accessed Jan. 3, 2019.

²²³ One reason Effissimo receives considerable attention in the Japanese and international media lies in the connection between its founders to activist investor Murakami Yoshiaki of the notorious (and defunct) “Murakami Fund”. See e.g. *Effissimo Capital becomes top shareholder of Japan’s Ricoh, Kawasaki Kisen*, BLOOMBERG.COM (Sep. 4, 2015, 06.02PM) <https://uk.reuters.com/article/effissimo-japan/effissimo-capital-becomes-top-shareholder-of-japans-ricoh-kawasaki-kisen-idUKL4N11A1XA20150904>, accessed Jan. 3, 2019.

²²⁴ Effissimo made its first required filing as a major shareholder (greater than 5%) on September 4, 2015. See Effissimo Capital Management Pte Ltd, *Tairyō Hoyū Hōkoku-sho* (大量保有報告書) [Report on Major Shareholding] (Sep. 4, 2015), 3 at <https://disclosure.edinet-fsa.go.jp/E01EW/download?1546521374918&uji.bean=ee.bean.parent.EECommonSearchBean&uji.verb=W0EZA104CXP001003Action&SESSIONKEY=1546521374332&s=S1005UMA>, accessed Jan. 3, 2019 (reporting a 6.18% shareholding).

²²⁵ Kawasaki Kisen Kaisha, Ltd, *Yūcashōken Hōkoku-sho* (有価証券報告書) [Annual Securities Report] (Jun. 24, 2016), 36 at <https://disclosure.edinet-fsa.go.jp/E01EW/download?1546521374918&uji.bean=ee.bean.parent.EECommonSearchBean&uji.verb=W0EZA104CXP001003Action&SESSIONKEY=1546521374332&s=S1005UMA36>, accessed Jan. 3, 2019.

²²⁶ As of November 12, 2018, Effissimo held 38.99% of Kawasaki Kisen Kaisha, Ltd. See Kawasaki Kisen Kaisha, Ltd, *Yonhanki Hōkokusho* (四半期報告書) [Quarterly Report] (Nov. 12, 2018), 10, at <https://disclosure.edinet-fsa.go.jp/E01EW/download?1546517097485&uji.bean=ee.bean.parent.EECommonSearchBean&uji.verb=W0EZA104CXP001003Action&SESSIONKEY=1546517097196&s=S100EIFG>, accessed Jan. 3, 2019.

²²⁷ See e.g. Ōshima Shin’ichi, *Kawasaki Kisen kabu no tairyō shutoku, baishū bōeisaku wo haishi shite inakereba chigau kekka ni?* (川崎汽船株の大量取得、買収防衛策を廃止していなければ違う結果に?) [Large-Scale Acquisition of Kawasaki Kisen Shares: Would the Result Have Been Different Had Its Defensive Measure Not Been Abolished?] (Listed Company Board Member’s Governance Forum, Jun. 28, 2016, rev’d May 16, 2018) at <https://govforum.jp/member/news/news-news/news-management/management-management/19667/>, accessed Jan. 3, 2019 (suggesting that there is a “high possibility” that the impetus for such a rapid accumulation of Kawasaki Kisen shares lay in the abolishment of its PRP in 2015).

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development, Effissimo officially altered its purpose of shareholding from “pure investment” to “to advise management according to the investment and the situation, and to make important proposals, inter alia”²²⁸ – the harbinger of greater activism by Effissimo in the not-so-distant future.²²⁹

How Effissimo will exercise its newfound power – the accumulation of which may well be attributable to the abolishment of defensive measures – may be crucial. Should Effissimo touch a nerve, it should not surprise if Japanese companies forced to choose between a politically costly and legally unreliable PRP or letting activist shareholders stream through open gates, were to conclude that the former is the lesser of two evils. It is thus only a slight exaggeration to say that the fate of one of the most fascinating aspects of Japanese corporate governance may very well rest in the hands of a few persons based out of a mall on Singapore’s main shopping street.²³⁰

Another recent and closely-watched development is the case of *sōgō shōsha* (general trading company) Itochu Corporation’s activities against the sportswear giant Descente Ltd, which had no PRP or other defensive measure in place. A longtime major shareholder of Descente,²³¹ on January 31, 2019, Itochu commenced an unsolicited tender offer with the target of raising its shareholding by 9.56 percent, from 30.44 to 40 percent.²³² The

²²⁸ Effissimo Capital Management Pte Ltd, Henkō Hōkoku-sho No. 86 (変更報告書 No. 86) [Report of Amendment, No. 86] (Nov. 6, 2018), 2, available at <https://disclosure.edinet-fsa.go.jp/E01EW/download?1546517097485&uji.bean=ee.bean.parent.EECommonSearchBean&uji.verb=W0EZA104CXP001003Action&SESSIONKEY=1546517097196&s=S100EEQF>, accessed Jan. 3, 2019.

²²⁹ *Effissimo ga Kawasaki Kisen kabu no hoyū mokuteki wo henkō* (エフイッシモが川崎汽船株の保有目的を変更) [*Effissimo Amends Its Purpose for Holding Kawasaki Kisen Shares*] (IB Consulting, Nov. 6, 2018), at <https://ib-consulting.jp/newspaper/310/>, accessed Jan. 3, 2019 (noting that although Effissimo had voted against the resolution appointing the president of Kawasaki Kisen at the June 2016 shareholder meeting, Effissimo has yet to table any shareholder proposals of its own, and suggesting that Effissimo may put forward its own proposal(s) for the next [i.e. 2019] shareholder meeting).

²³⁰ As of January 14, 2019, Effissimo appears to be based out of The Heeren, a shopping mall on Orchard Road in downtown Singapore.

²³¹ *See Itochū no Baishū Teian ni Taikō: Desanto ga Wakōru to Teikei* (伊藤忠の買収提案に対抗 デサントがワコールと提携) [*Resisting Itochu’s Suggestion of an Acquisition, Descente Enters Alliance with Wacoal*], NIKKEI BUS., Sep. 3, 2018 at 9 [hereinafter *Descente Enters Alliance with Wacoal*] (summarizing the history between Descente and Itochu, including changes in Itochu’s shareholding).

²³² Itochu Corporation, *Kabushiki-gaisha Desanto Kabushiki (Shōken Kōdo: 8114) ni Taisuru Kōkai Kaitsuke no Kaishi ni Kansuru Oshirase* (株式会社デサント株式会社 (証券コード: 8114) に対する公開買付けの開始に関するお知らせ) [*Notice on the Commencement of Open Offer for Shares of Descente Ltd Shares (Securities Code: 8114)*], Jan. 31, 2019, at 3, 15, at https://www.itochu.co.jp/ja/ir/news/2019/_icsFiles/afeldfile/2019/01/31/ITC190131_j.pdf (last visited

offer price of JPY2,800 a share amounted to a 50 percent premium over the average price in January 2019.²³³ Interestingly, Itochu in its press release expressly declared that it had no plans to acquire an outright majority and convert Descente into a subsidiary,²³⁴ despite media reports that the bid was prompted by Itochu's dissatisfaction with what it perceived to be an excessive reliance by Descente on its South Korean business, Itochu's interest in expanding operations in the People's Republic of China, as well as Descente's attempt to go private via leveraged management buyout.²³⁵

Despite resistance from Descente's president and most of the board,²³⁶ as well as the labor union and Descente alumni,²³⁷ Itochu's hostile offer closed successfully on March 15, 2019.²³⁸ Negotiations between Itochu and Descente over restructuring of Descente's board in February 2019 ultimately broke down, and on March 25, 2019, Descente

Mar. 29, 2019). Note that Itochu – in collaboration with Descente's second-largest shareholder – controlled over a third of the shares, and thus already had the power to block fundamental changes, which under Japanese law requires a special resolution passed by a two-thirds majority. *See Descente Enters Alliance with Wacoal, supra* note 231, at 10 (reporting that Itochu had disclosed on Aug. 27, 2018 that it had raised its stake to 27.70 percent, and that there were rumors that Itochu and ANTA (which held just under 7 percent of Descente) were considering the possibility of a joint acquisition of Descente).

²³³ Itochu Corporation, *supra* note 232, at 13.

²³⁴ *Id.* at 2–3. Among Itochu's reasons was that maintaining the independence of the target would facilitate its employees to display their 'excellent planning and development abilities' to the maximum possible extent. *Id.* at 2.

²³⁵ Ōtsuka Takafumi & Nishimura Gōta, *Desanto wo Meguru Baishūgeki, "Saishū Kecchaku" no Butai-ura: Kaichō Saisokkin wo Okurikomi, Zensekinin wo Ou Itochū* (デサントを巡る買収劇、「最終決着」の舞台裏 会長最側近を送り込み、全責任を負う伊藤忠) [*Behind the Scenes of the "Final Settlement": Itochu Takes Full Responsibility by Sending in Chairman's Top Aide*], TŌYŌ KEIZAI ONLINE, Mar. 28, 2019, at <https://toyokeizai.net/articles/-/273502> (last visited Mar. 29, 2019); Shuichiro Sese, *Itochu-Descente feud escalates into full-blown takeover war*, NIKKEI ASIAN REV., Feb. 8, 2019, at <https://asia.nikkei.com/Business/Business-deals/Itochu-Descente-feud-escalates-into-full-blown-takeover-war> (last visited Mar. 29, 2019); *Desanto e no TOB, "MBO Teian Kikkake" Itochū Senmu* (デサントへのTOB、「MBO 提案きっかけ」伊藤忠専務) [*Itochu Senior Managing Director: Tender Offer for Descente "Sparked by Management Buyout Suggestion"*], NIHON KEIZAI SHIMBUN, Jan. 31, 2019, at <https://www.nikkei.com/article/DGXMZO40716790R30C19A1TJ1000/> (last visited Mar. 29, 2019).

²³⁶ Descente Ltd, (BS インベストメント株式会社による当社株券に対する公開買付けに関する意見表明 (反対) のお知らせ) [*Notice on Announcement of Adverse Opinion on the Open Offer for this Corporation's Shares by BS Investment Corporation*], Feb. 7, 2019, at http://www.descente.co.jp/jp/ir/190207_JP.pdf (last visited Mar. 29, 2019) (recommending against Itochu's offer and noting that Shimizu Motonari, who is an Itochu nominee director, excused himself from the board meeting, and that Nakamura Ichirō, who was formerly of Itochu, 'reserved his opinion').

²³⁷ Ōtsuka & Nishimura, *supra* note 235.

²³⁸ *Itochu wins bigger stake in sportswear-maker Descente in rare hostile takeover for Japan*, THE JAPAN TIMES, Mar. 15, 2019, at <https://www.japantimes.co.jp/news/2019/03/15/business/corporate-business/itochu-wins-bigger-stake-sportswear-maker-descente-rare-hostile-takeover-japan/> (last visited Mar. 29, 2019).

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announced that President Ishimoto Masatoshi (a third-generation member of Descente’s founding family) will step down as of the shareholder meeting scheduled for June 2019, and will be replaced by Koseki Shūichi, head of Itochu’s textiles business and known top aide of Itochu chairman Okafuji Masahiro.²³⁹ Descente’s 10-member board of directors will also be downsized to six, with two from Descente, two Itochu nominees, and two outside directors who are reputed business leaders with some connection to Itochu.²⁴⁰ In successfully replacing most of Descente’s board, strengthening its representation on the board, and installing its own senior executive as Descente’s next president, Itochu’s victorious hostile action²⁴¹ opens another chapter in the annals of Japanese corporate governance.

However, it must be stressed that even if there is a one-off successful takeover²⁴² – or further successful hostile action short of a full hostile takeover similar to the Itochu–Descente saga²⁴³ – that sparks fear into the hearts of Japanese management, the “pill” will never take on American form unless Japanese courts introduce the active ingredient into PRPs: the ability for the board to adopt a PRP – without shareholder approval – that provides the board with a clear veto right over a hostile bid. If this were to occur, perhaps PRPs would be redesigned in the shadow of this jurisprudence – but that may take some

²³⁹ Ōtsuka & Nishimura, *supra* note 235.

²⁴⁰ *Id.* The incoming CFO, Tsuchihashi Akira, is an executive officer (*shikkō-yakuin*) and the general manager of Itochu’s internal audit division. Neither of the two remaining directors from Descente were lifetime employees who joined straight after graduation; one first joined Descente’s Korean operation, and the other is a former vice president of Adidas Japan. *Id.*

²⁴¹ Note that as Itochu (at 30.44 percent shareholding) already wielded a level of effective control even prior to the tender offer and did not seek to acquire an outright majority in Descente, Itochu’s actions do not fit our definition of hostile takeover. For the definition, see *supra* note 126. However, with the support of the second-largest shareholder, it is possible that Itochu now – with just 40 percent – may in practice control a majority of the voting power. See Matsuzaki Yūsuke, “Hatsu” no Tekitai-teki TOB: Hikari to Kage (「初」の敵対的 T O B 光と影) [*The “First” Hostile Tender Offer: Light and Darkness*], NIHON KEIZAI SHIMBUN (morning ed.), Mar. 19, 2019, at <https://www.nikkei.com/article/DGXMZO42592240Y9A310C1DTA000/> (last visited Mar. 29, 2019).

²⁴² For the definition, see *supra* note 126.

²⁴³ Another hostile action in Japan’s fast-moving scene to watch is the hostile bid for Kosaido Co., Ltd. by a fund led by the daughter of Murakami Yoshiaki launched on March 22, 2019. This bid is in response to a leveraged management buyout attempt by Kosaido’s founding family and management working in conjunction with Bain Capital. See *MBO Mezasu Kōsaidō e Kyū-Murakami Fando-kei “Reno” ga Taikō* (MBO 目指す廣濟堂へ旧村上ファンド系「レノ」が対抗 TOB) [*Ex-Murakami Fund-linked Reno Counters Kosaido’s MBO Attempt*], M&A ONLINE, Mar. 22, 2019, at https://maonline.jp/articles/counter_tob_kosaido2019 (last visited Apr. 2, 2019); *Japan toys with shareholder capitalism just as the West balks*, THE ECONOMIST, Mar. 28, 2019, at <https://www.economist.com/business/2019/03/30/japan-toys-with-shareholder-capitalism-just-as-the-west-balks> (last visited Mar. 29, 2019).

time and right now seems a long way off. Yet, only time will tell and we are loath to predict the future.

FUTURE RESEARCH QUESTIONS INSPIRED BY JAPAN'S UNIQUE MEDICINE

By stopping the hostile takeover wave in its tracks, poison pills won the takeover wars for management, and changed the trajectory of corporate governance in the US by shifting power from shareholders to management by empowering boards. The advent of hostile takeover attempts and indigenous versions of “poison pills” in Japan, long heralded as a prime candidate for a burgeoning hostile takeovers market, understandably raised expectations that Japan’s experience would track that of the US. But this was not to be.

As a medicine lacking the active ingredient in the US-pill (i.e., providing the board with a veto right over a hostile bid) the Japanese “poison pill” is something entirely different than what exists in America. We hope this Article has made this clear. Perhaps more importantly, we hope that it provides an accurate understanding of Japanese defensive measures – especially the rise and fall of the PRP – on its own terms. At a minimum, this Article should prevent those who read it from making the comparative corporate law error of simply classifying Japan with the US as countries that have adopted *the* “poison pill”.

Beyond this, there are at least three broader issues that we feel this exploration has raised that deserve more attention in future research. First, this Article demonstrates the serious terminological problem in comparative law, which we feel may be getting worse in this era of burgeoning globalization where the *lingua franca* is increasingly English. A common lexicon of English language corporate governance terms, which are mostly derived from the US and UK experience, is increasingly used interchangeably by experts in jurisdictions around the world. Although we see this as a positive in that it promotes inter-jurisdictional discourse, this Article provides a cautionary tale about how in some instances (and we have identified other instances elsewhere)²⁴⁴ it may terribly mislead.

²⁴⁴ Puchniak, *supra* note 99 (claims about how the derivative action would function based on legal origin or about the superiority of the common law are misleading); Dan W. Puchniak & Kon Sik Kim, *Varieties of Independent Directors in Asia: A Taxonomy*, in *INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH* (Dan W. Puchniak et al eds., Cambridge University Press

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Second, this Article demonstrates how unique interpretations (or the lack thereof) of legal concepts by courts can transform the transplant of a legal idea from one jurisdiction, to something entirely different in another jurisdiction when it is implemented. For a variety of reasons, the Delaware court is a unique animal – both within the US and, especially, when compared to other courts outside the US. The importance and uniqueness of the Delaware court in the development of US corporate governance often seems to be forgotten when US corporate law and governance concepts are exported abroad. It is relatively easy to export a general idea – but incredibly difficult to transplant a system like the Delaware court which has taken generations to develop and is constantly evolving.

Third, it is often forgotten how much the timing of introducing a corporate governance mechanism may impact its development. In this case, just when Japan’s poison pill was gaining some momentum, the Global Financial Crisis hit. If not for this, who knows whether some hostile takeovers would have succeeded in Japan and the courts may have been forced to handle more cases and develop a jurisprudence similar to that of Delaware. This is one more reason why functional convergence of corporate governance seems to be an academic pipe dream; whereas formal convergence – at least at the high level of abstraction of simply transplanting common labels – is already here. However, convergence of labels that mis-describe their contents not only provides scant intellectual leverage, but as we have seen in this case, can be terribly misleading.

2017) (treating independent directors in Asia as equivalent in function to those in the US is misleading, as is considering the rise of independent directors in Asia as evidence of convergence towards the Anglo-American model of corporate governance).

APPENDIX

[Table 1] *PRPs and other Defensive Measures in Japan, 2004–2018*

Source: RECOF Database²⁴⁵

Year		2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
active defensive measures, no. of firms	total	2	29	175	409	571	565	540	521	514	511	495	478	448	409	387
	PRPs	0	20	163	398	562	561	536	517	510	507	490	473	443	405	383
	(% of total)	(0)	(68.97)	(93.14)	(97.31)	(98.42)	(99.29)	(99.26)	(99.23)	(99.22)	(99.22)	(98.99)	(98.95)	(98.88)	(99.02)	(98.97)
	trust-type	0	5	9	9	7	2	2	2	2	2	2	2	2	2	2
	others	2	4	3	2	2	2	2	2	2	2	2	3	3	3	2
change in PRPs, year-on- year (% change)	N.A. N.A.	20 N.A.	143 (815)	235 (244.17)	164 (141.21)	-1 (-.0017)	-25 (-4.46)	-19 (-3.54)	-7 (-1.35)	-3 (-0.588)	-17 (-3.35)	-17 (-3.47)	-30 (-6.34)	-38 (-8.58)	-22 (-5.43)	

²⁴⁵ Data for 2004–2008 is from the RECOF Database as reported in *M&A Kenkyūkai Hōkoku 2009* (M&A 研究会報告 2009) [*Reports of the M&A Study Group, 2009*] (Economic and Social Research Institute, Cabinet Office, Government of Japan) 10 fig 1-13 (Feb. 2009), available at <http://www.esri.go.jp/jp/prj/mer/houkoku/0902.pdf> (prepared by Niwa Shōichi, executive officer of RECOF Corporation). Data for 2010–2018 is from MARR, *M&A Tōkei (Hyō to Gurafu)* (M&A 統計 (表とグラフ)) [*M&A Statistics: Tables and Graphs*] (December 2018), 32, available at MARR RECOF Database.

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Figures for 2004–2008 and 2010–2017 are as of 31 December each year; for 2018, 31 October. Figures for 2009 are extrapolated.

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

Source: compiled from Sumitomo Trust Bank reports in *Shōji Hōmu*, 2006–2018 (excluding 2014).²⁴⁶

Notes: Single asterisks indicate extrapolated figures; double asterisks indicate figures corrected based on figures from studies published in later years; single crosses indicate figures from or computed based on unpublished data. Each 12-month reference period for each reference year begins runs from 1 August of the previous year to 31 July of the reference year.

Year	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
cos. w/ active measures	570	567	542	521	514	512	494	479	453	408	386
as % of all listed	N.A.	N.A.	14.7	14.5	14.5	14.5	N.A.	13.4	12.5	11.2**	10.4
new measures adopted, previous 12 months	207	21	4	6	6	9	5	8	6	3	5
measures introduced (cumulative)	588*	609	613	619	625	634	639*	647	653	656	661
measures abolished, previous 12 months	10	24	29	27	13	11	23	23	32	48	27

²⁴⁶ For full citations to the studies, see *supra* note 150. No study was published by SMTB analysts in 2014, but unpublished data on the number of expiring measures and the number subject to attrition for reference year 2014 was sourced from Mogi Miki and Tanino Kōji of SMTB and the attrition rate figure for 2014 calculated accordingly. Although every effort at compiling a consistent dataset has been made, any remaining inconsistencies are an artifact of the original data and reproduced accordingly; they do not, however, have a material impact on the data. Where figures from studies published in different years conflict, the later (latest) study prevails.

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Year	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
measures abolished (cumulative)	16*	42	71	98	111	122	145*	168	200	248	275
measures expiring, previous 12 months	N.A.	167	227	285	145	194	239 [†]	138	171	213	115
attrition, ²⁴⁷ previous 12 months	N.A.	15	21	24	12	7	23 [†]	18	29	44	26
attrition rate, previous 12 months (%)	N.A.	8.98	9.25	8.42	8.28	3.61	9.62 [†]	13.04	16.96	20.66	22.60

²⁴⁷ Defined as number of defensive measures discontinued out of those due to expire within a reference year.

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[Table 3] *Abolished Defensive Measures: Trends and Reasons, 2006–2018*

Source: RECOF Database.²⁴⁸ Asterisks indicate cumulative figures up to that year. Figures for 2011–2017 are as of 31 December of each year; for 2018, as of 31 October.

Year		2011	2012	2013	2014	2015	2016	2017	2018
cumulative abolishments		105*	122*	133*	157*	180*	216*	259*	286*
abolishments each calendar year		25	17	11	24	23	36	43	27
abolishment initiated by management	non-renewal	74*	5	7	17	19	29	41	24
	before expiry	4*	5	0	0	3	1	1	2
	other reasons	3*	0	1	0	0	1	0	0
non-management side reasons	failure to obtain shareholder support	0*	0	0	1	0	0	0	0
	delisting/merger	19*	7	3	6	1	5	1	1
	injunction/winding up	5*	0	0	0	0	0	0	0

²⁴⁸ MARR, *supra* note 245, at 33.