CORPORATE GOVERNANCE MODELS AND PRACTICES IN JAPAN AND EAST ASIA: PROCEEDINGS OF A PANEL DISCUSSION

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Abstract

Despite general interest in the economic rise of Asia and in the role of law in the development of the region, the literature on comparative corporate governance in Asia is surprisingly undeveloped with respect to in-depth comparisons among Asian countries. In particular, it should be both valuable and feasible to compare and contrast corporate governance systems and practices among countries in East Asia, in light of Japan's historical influence and more recent divergences from that influence.

At a recent conference sponsored by Waseda University, a distinguished group of corporate law scholars from Japan, Korea, Taiwan, and China engaged in a broad-ranging panel discussion centering on the question of the operation and reform of traditional stakeholder-oriented corporate governance systems featuring concentrated ownership and a board of directors involved in day-to-day management against the need to account for greater monitoring of management on behalf of shareholders.

For example, the panelists agreed that the traditional internal corporate auditors (or *kansayaku* in Japanese) have not appeared to operate effectively in monitoring management, and to some extent they should be supplemented or replaced by outside directors. However, the scope and pace of such change varies considerably among countries in East Asia, and skepticism remains about the effectiveness of outside directors.

The panel discussion highlighted both the challenges and significant potential rewards for greater scholarly collaboration in making cross-Asian comparisons in the field of corporate governance.

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INTRODUCTION

The growing importance of Asia has become an increasingly popular topic, even though characterizations of the rise of Asia have shifted significantly over time. The postwar economic development of Japan led, in the 1980s, to the first discussion of a looming Asian challenge to the West.[1] The rise of the "four Asian tigers" circa 1990 led to a new characterization of an East Asian (rather than Japanese) economic "miracle."[2] Rapid growth in China and India in the 2000s has cemented a popular view that we are living in the "Asian century."[3]

There is no doubt that many economies in Asia have been growing rapidly and that intraregional links are increasing.[4] China has replaced the United States as the leading trade partner of both Japan and South Korea.[5] The overall intraregional rise in trade and investment continues despite ongoing territorial and other disputes and sometimes volatile diplomatic relations.[6] Non-

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[1] In the 1980s, the rise of Asia, centered on Japan, was often referred to as leading to a "Pacific century." This term implied a significant U.S. role in the new century, at least for the West Coast that borders the Pacific Ocean. American officials continue to prefer to discuss a "Pacific century," as opposed to other formulations such as an "Asian" or "Chinese" century. *See, e.g.*, Hillary Clinton, *America's Pacific Century*, FOREIGN POLICY (Oct. 11, 2011), http://www.foreignpolicy.com/articles/2011/10/11/americas_pacific_century.

[2] *See, e.g.*, WORLD BANK, *The East Asian Miracle: Economic Growth And Public Policy*, (Sept. 30, 1993), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1993/09/01/000009265_3970716142516/Rendered/PDF/multi_page.pdf.

[3] *See* ASIAN DEVELOPMENT BANK, *Asia 2050: Realizing The Asian Century: Executive Summary* (2011), http://www.adb.org/publications/asia-2050-realizing-asian-century; *See* Kishore Mahbuni, *The Case Against the West: America and Europe in the Asian Century*, FOREIGN AFFAIRS (May/June 2008), http://www.foreignaffairs.com/articles/63402/kishore-mahbubani/the-case-against-the-west; *See* Symposium, *The Asian Century?*, 44 U.C. DAVIS L. REV. 715 (2011).

[4] In 2011, a majority of Asian trade (53%) was intraregional, i.e. Asian countries exporting to other Asian countries (as opposed to 48% intraregional trade in North America). *See* WORLD TRADE ORGANIZATION, *International Trade Statistics*, at 13 (2012), http://www.wto.org/english/res_e/statis_e/its2012_e/its2012_e.pdf.

[5] Japan's exports to China surpassed its exports to the United States for the first time in 2008, and the trend of increasing trade with China has continued through 2011. *See id.* at 236. China became the leading source of Japanese imports beginning in 2002. *See id.* China is also Korea's leading trading partner in terms of both exports and imports. *See id.* at 258.

[6] However, there has been a shift of trade and investment within Asia. During the past year, trade and investment between Japan and China have declined due to territorial disputes and related political tensions. During the first five months of 2013, Japan's investment in China dropped 25.3% from prior levels. *See* JAPAN EXTERNAL TRADE ORGANIZATION, *2013 Jetro Global Trade And Investment Report: Revitalizing Japan Through Global Business*, at 19 (Aug. 8, 2013), http://www.jetro.go.jp/en/reports/white_paper/trade_invest_2013_outline.pdf. However, during the same time

economic ties, such as academic exchange, tourism, and pop culture also continue to deepen.

At the same time, there remains a substantial group of skeptics with regard to the "Asian century." Some question assumptions that the recent high economic growth rates of a number of Asian countries can be sustained for the long term in light of gradually maturing economies and societies.[7] Others refute the notion of a decline in the West, which they view as being implicit in discussions of the rise of Asia.[8]

More fundamentally, however, is an objection to the use of the term "Asia." Even if World Bank estimates that seven economies in Asia will play an increasingly large role in the global economy over the next few decades turn out to be accurate,[9] are these countries sufficiently united in terms of common goals and policy coordination so that it is meaningful to speak of an "Asian dominance" with respect to global business, let alone international politics and security issues?[10]

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period Japan's investment in ASEAN countries rose 604% and reached an all-time high. *See id.* at 19-20.

[7] *See, e.g.*, Anders Aslund, *Are Emerging Economies Entering a Lost Decade?*, BLOOMBERG VIEW (Sep. 10, 2013), http://www.bloombergview.com/articles/2013-09-10/are-emerging-economies-entering-a-lost-decade- . Even proponents of the "Asian century," such as the Asian Development Bank, recognize potential difficulties. The Asian Development Bank, in fact, proposed two possible scenarios for the growth of Asia this century: the "Asian century" and the "middle income trap." The latter refers to a situation in which middle-income countries cannot continue high rates of growth and become high-income countries; instead they are competitively trapped between low-income countries with low costs of manufacturing and high-income countries with strong technology and innovation. *See* ASIAN DEVELOPMENT BANK, *supra* note 3, at 4.

[8] *See, e.g.*, Devin Stewart, *The Asian Century Crumbles*, HUFFINGTON POST (Dec. 23, 2012), http://www.huffingtonpost.com/devin-stewart/the-asian-century-crumble_b_2352088.html (noting that "predictions of American decline go back decades and have been consistently proven wrong").

[9] See ASIAN DEVELOPMENT BANK, *supra* note 3, at 5 (estimating that the combined GDP of China, India, Indonesia, Japan, Korea, Malaysia, and Thailand will constitute 45% of global GDP by 2050, as opposed to 27% of global GDP for all of Asia at present).

[10] *See e.g.*, Clyde Prestowitz, *What if it's not an Asian Century after all?*, FOREIGN POLICY (June 10, 2013), http://prestowitz.foreignpolicy.com/posts/2013/06/10/what_if_its_not_an_asian_century_after_all (arguing that the rising GDP of a number of countries in Asia is "nothing more than an agglomeration of numbers . . . India, China, and Japan are not now and will not in the future be governed by any overarching authority and are very unlikely even to be allies in a loose sense"); Stewart, *supra* note 8 (emphasizing that "'Asia' is a Western concept" and is, in fact, a diverse region where rivalries are intensifying).

Some have provided cultural explanations as a unifying factor in Asia. A number of scholars first cited cultural reasons for Japan's remarkable postwar economic development. *See, e.g.*, EZRA VOGEL, JAPAN AS NUMBER ONE: LESSONS FOR AMERICA (1979). In the 1990s this argument expanded into a discussion of "Asian values." This viewpoint, most closely associated with the former leader of Singapore, Lee Kwan Yew, This debate concerning the significance of "Asia" also poses a clear challenge for the Academy. The field of Asian Studies, while making many valuable contributions to our understanding of Asia, has struggled to escape from its historical roots in "Orientalism" and to define a neutral, useful and consistent framework for "Asia" or "Asian Studies."[11] Within the discipline of law, we encounter similar difficulties in thinking about "Asian law," given that Asia encompasses a wide geographic area with diverse legal systems. Experts in European law, who were formerly plagued by similar issues, are now able to focus primarily on the substantive law and structure of the European Union. There is no such option for Asia.[12]

Given that economic development is the largest factor in the increasing attention paid to Asia, one might expect that corporate law and corporate governance, which are highly significant components of the legal infrastructure that supports such economic growth, would be important subjects of study. This is especially true since many Asian countries face broadly similar issues about reforming corporate governance to incorporate

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emphasized Asian communitarianism in contrast to Western individualism. *See, e.g.*, Fareed Zakaria, *Culture is Destiny: A Conservation with Lee Kwan Yew*, FOREIGN AFFAIRS (March/April 1994), http://www.foreignaffairs.com/articles/49691/fareed-zakaria/a-conversation-with-lee-kuan-yew. Many critics also attacked the "Asian values" argument as an excuse to justify authoritarianism. For a review of this debate, see for example Karen Engle, *Culture And Human Rights: The Asian Values Debate In Context*, 32 N.Y.U. J. INT'L L. & POL. 291 (2000). In any event, the popularity of the "Asian values" argument declined significantly following the Asian financial crisis of 1997-98. *See* Mark R. Thompson, *Whatever Happened to "Asian Values,"* J. OF DEMOCRACY, Oct. 2001, at 154.

[11] Historically, Oriental Studies was a term that embraced the Near East and Far East as opposed to Christian Europe. Although we now speak of the Middle East and Asia, many scholars maintain that these are still Western-originated and influenced concepts. *See, e.g.*, EDWARD SAID, ORIENTALISM (1978); Teemu Ruskola, *Where is Asia? When is Asia? Theorizing Comparative Law and International Law*, 44 U.C. DAVIS L. REV. 879 (2011).

Modern Asian studies continue to face significant academic challenges. With respect to the particularly diverse area of Southeast Asia, see for example Victor King, *Southeast Asia: Personal Reflections on a Region*, *in* SOUTHEAST ASIAN STUDIES: DEBATES AND NEW DIRECTIONS 23 (Cynthia Chou & Vincent Houben eds., 2006) (referring to a crisis in area studies that focus on Southeast Asia).

In addition, area studies generally, including Asian studies, have often been accused of having a separate taint as a project funded by the American government during the Second World War and especially the Cold War to pursue state interests. *See, e.g.*, JOHN W. DOWER, *E. H. Norman, Japan and the Uses of History*, *in* ORIGINS OF THE MODERN JAPANESE STATE: SELECTED WRITINGS OF E. H. NORMAN 3 (John W. Dower ed., 1975).

[12] Regional interaction in Asia to date has been dominated by private sector relationships, both economic and cultural. Formal state-to-state relations have lagged far behind, as have law and legal structures, at least compared with other regions such as the EU. *See, e.g.*, Tom Ginsburg, *Eastphailia And Asian Regionalism*, 44 U.C. DAVIS L. REV. 859 (2011).

some aspects of "Western" or "Anglo-American" systems, such as the use of independent directors to monitor management.[13] Asian countries also face outside pressures for reform from a variety of similar sources, including international institutional investors and the demands of globalizing markets.[14]

In reality, however, the literature on comparative corporate law and corporate governance in Asia is surprisingly undeveloped with respect to in-depth comparisons among Asian countries. There is a substantial comparative law literature with a narrow geographic focus on the legal and corporate governance systems of one country in Asia in comparison with the United States or some other Western country.[15] On the other hand, there is a separate literature that looks broadly at the role of law in economic development, and considers Asian countries on a limited basis in an attempt to prove a more general thesis concerning law and development.[16]

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[13] The Asian Corporate Governance Association, an organization of large international institutional investors based in Hong Kong, has made recommendations for a minimum number of independent directors for all the major economies of Asia. *See* ASIAN CORPORATE GOVERNANCE ASSOCIATION, *Rules And Recommendations On The Number Of Independent Directors In Asia* (July 2010), http://www.acga-asia.org/public/files/Rules%20on%20Number%20of%20Independent%20Directors%20in%20Asia%20(ACGA%202010).pdf.

[14] Foreign institutional investor's share of stock market ownership throughout Asia has become quite substantial and continues to climb. For example, in Japan the share of the equity market held by foreign investors has increased from under 5% in 1990 to 28.0% in 2012. See TOKYO STOCK EXCHANGE, *2012 Shareownership Survey*, at 3, http://www.tse.or.jp/english/market/data/shareownership/b7gje60000003tou-att/e_bunpu2012.pdf. In Korea, foreign investors owned 34.7% of the stock market as of the end of 2012 and nearly half of the leading *chaebol*, Samsung Electronics. See U.S. DEP'T OF STATE, *2013 Investment Climate Statement—Republic Of Korea*, http://www.state.gov/e/eb/rls/othr/ics/2013/204670.htm. In Taiwan, foreigners held 34.02% of shares by market value as of the end of 2012. See TAIWAN STOCK EXCHANGE, *Fact Book 2013*, http://www.twse.com.tw/ch/about/company/download/factbook/2013/4.05.htm. In China, leaving aside shares available to foreign investors in Hong Kong and domestic shares set aside for foreigners (H-shares and B-shares), there a number of restrictions on foreign investment in the domestic stock market. Total foreign ownership comprised only 1.09% of the float in the domestic A-shares market as of March 31, 2012. However, restrictions are gradually being liberalized with the investment quota for Qualified Foreign Institutional Investors being substantially raised in 2012. *See, e.g.*, CHINA SECURITIES REGULATORY COMMISSION, *QFFI Investment Quota To Be Increased By 50 Billion U.S. Dollars* (April 3, 2012), http://www.csrc.gov.cn/pub/csrc_en/OpeningUp/RelatedPolices/QFII/201212/t20121210_217805.htm.

[15] A very informal survey by the author of a number of law journals with "Asia" in their name leaves the impression that the vast majority of articles focus on the system of one country in Asia.

[16] This is the well-known and controversial "law matters" thesis that stresses the importance of the legal protection of investors as a prerequisite for strong economic development. *See, e.g.*, Rafael La Porta et al., *Investor Protection and Corporate Governance*, 58 J. FIN. ECON. 2000, at 3; Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. July 1997, at 1131.

The weakness of the literature on Asian law falls in the potentially most valuable "middle ground," i.e., utilizing country expertise in a broader comparative context in Asia, particularly some portion of the region with relative uniformity in legal systems such as East Asia.[17] The important potential benefits of such "middle ground" comparisons include providing both greater context and understanding of corporate law and corporate governance in each country and suggesting alternative approaches to dealing with common problems. This is no easy task due to the necessity of possessing and integrating in-depth knowledge of a number of Asian legal systems. One obvious approach to address this need is greater collaborative research efforts among scholars to pool resources and understanding.[18]

This Article seeks to make a modest contribution to this important collaborative effort by introducing a recent panel discussion focused on the "middle ground" topic of East Asian corporate governance. Japan has exerted

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Other scholars have, however, proceeded to apply this framework to individual Asian countries in interesting ways. For example, research applying the methodology of these researchers (known as "LLSV") to China suggests that China's 1995 Company Law "mattered" and has moved China's score in the "shareholders rights" index from below that of English-origin average countries (and roughly average for all LLSV countries) to the same level as English-origin countries (and above average for LLSV countries as a whole), and, in addition, may have increased the welfare of minority shareholders of listed companies. *See* Yifeng Shen et al., *Investor Protection and Corporation Cost of Equity*, 7 ECON. REV. 2005, at 93 (in Chinese). I am thankful to our panelist, Professor Shen, for supplying this information and the citation. However, enforcement of rights remains a significant issue in China. *See infra* note 32.

[17] A few scholars have focused extensively on law and development in Northeast Asia, although they rely on English language sources. *See, e.g.*, Tom Ginsburg, *Law and the Liberal Transformation of the Northeast Asian Legal Complex in Korea and Taiwan, in* FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM 43 (Terence C. Halliday et al. eds., 2007); *See, e.g.*, John K. M. Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 U. PA. J. INT'L ECON. L. 219 (2007).

The economic development in East Asia cited in the opening paragraph of this Article has also posed a huge challenge for theories of law and development. Economic success in Japan, South Korea, and Taiwan has clearly followed neither the current orthodoxy of free markets and trade and strong protection of property rights, nor the contrasting "dependency theory" that called for disengagement from allegedly oppressive international markets. For a succinct introduction to this issue, *see* John K.M. Ohnesorge, *Japan and Law & Development in Asia: Introduction*, 23 WIS. INT'L. L.J. 225 (2005). This issue of a larger governmental role during the rapid developmental stage of these economies is currently represented in even starker form by the rapid economic rise of a new power in East Asia: China.

[18] Such collaboration has most frequently appeared in edited book volumes in which a number of participants each report on their own jurisdiction with respect to some issue and commentators and/or the volume editors provide an analysis that covers the entire area. *See, e.g.*, TRANSFORMING CORPORATE GOVERNANCE IN EAST ASIA (Curtis Milhaupt et al. eds., 2008); THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH (Dan Puchniak et al. eds., 2012).

strong historical influence on other countries in East Asia in terms of law, administrative structure, and economic model – direct influence on Korea and Taiwan through occupation, and more indirect and lesser influence on China. Such influence includes important features of corporate governance systems, including a historical preference for the use of internal corporate auditors or supervisors (*kansayaku* in Japanese)[19] rather than outside directors to monitor management.

At the same time, in recent decades there has been considerable divergence from Japan's historical influence. As a result, it should be both valuable and feasible for corporate law scholars from East Asia to compare and contrast corporate governance systems and practices among their countries. This is true both with respect to basic areas such as the goals of corporate governance and its reform and to specific issues such as the functioning of the board of directors and the role of independent directors.

The panel discussion ranged broadly over six areas: the importance of Japan's historical influence, the purpose of corporate governance reform and the relationship between corporate governance and business performance, the importance of concentrated ownership structures in East Asia, monitoring of management and the respective roles of *kansayaku* and outside directors, non-structural reforms to strengthen the environment for monitoring, and future issues such as the possibilities for a "mixed" model of East Asian corporate governance and for harmonization of corporate law and corporate governance in East Asia.

The Japanese system of corporate governance historically exerted a strong influence on Korea and Taiwan, with China perhaps being influenced more by

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[19] The role of such internal corporate auditors or supervisors is most closely linked with Japan due to its historical influence in East Asia and to the vigorous ongoing debate over whether *kansayaku* in Japan provide a satisfactory alternative to the corporate governance role played by outside directors in the U.S. and U.K. systems. The system of *kansayaku* in Japan and other supervisory boards in Asia are all loosely based on the two-tier board system in Germany and elsewhere in Europe. However, under Asian systems the supervisors do not select the board of directors (which are also elected directly by shareholders); rather the supervisory board acts parallel to, and "audits" or supervises the performance of, the board of directors. With respect to the authority and effectiveness of *kansayaku* in Japan, see for example Bruce Aronson, *The Olympus Scandal and Corporate Governance Reform: Can Japan Find a Middle Ground between the Board Monitoring Model and Management Model?* 30 U.C.L.A. PAC. BASIN L.J. 93, 141-43 (2012).

In Japan there is no universally accepted English translation of *kansayaku*, and the professional association of *kansayaku* recently changed its recommended English translation of the term from "Corporate Auditor" to "Audit and Supervisory Board Member." For an explanation of the name change and discussion of the *kansayaku's* role by a leading corporate law academic and corporate law practitioner, see Hiroyuki Kansaku & Kazuhiro Takei, *Background and Goals: New Recommended English Translation of "Kansayaku" and "Kansayaku-kai,"* http://www.kansa.or.jp/en/New_Recommended_English_translation_of_Kansayaku_and_Kansayaku-kai.pdf.

civil law generally.[20] One panelist cited the introduction into Japan and then East Asia of the doctrine of piercing the corporate veil as one example of Japan's influence. At the same time, panelists agreed that there was now a significant trend of divergence from the Japanese model, as U.S. influence has substantially increased throughout East Asia over the last two decades. Nevertheless, a panelist noted that due to institutional similarities Japan remains an important source for providing both context on specific issues and alternative approaches for dealing with current problems.

The question of the purpose of corporate governance reform is not a simple one. Reform in East Asian stakeholder-oriented systems, in which the board often assumes an active role in management, generally tends to focus on increasing "corporate value" to benefit all stakeholders rather than focus on monitoring of management to protect the interests of shareholders (see Table 1).[21] However, panelists also noted that the rise of very large, family-controlled public conglomerates in Korea (*chaebol*) and the continuing significance of government-controlled public companies in China have created a need for "American-style" reform to protect public shareholders of those companies.

In addition, any attempt to increase "corporate value" through improving business performance encounters the long-standing issue of the relationship between "good" corporate governance and business performance. A number of panelists stated that research in their countries essentially agreed with U.S. empirical research that generally finds no correlation between a supermajority of independent directors and improved business performance.[22] However, panelists from Japan and Korea also noted that preliminary research in their countries suggests that moving from no independent directors to one

[20] In his welcoming remarks at the conference, Professor Tatsuo Uemura pointed out that there was, in fact, direct interaction between Japanese academics and Chinese officials responsible for drafting China's first modern corporate law in 1994. However, Japan's overall historical influence on Chinese business law is less than its influence on Korea or Taiwan, and this understanding is reflected by comments from the Chinese panelist, Professor Shen.

[21] "Corporate value" is a vague term, and may be used differently in various contexts. For a discussion of "corporate value" in the Japanese context, *see, e.g.*, Aronson, *supra* note 19 at n. 118 and accompanying text.

[22] *See e.g.*, Sanjai Bhagat & Bernard S. Black, *Non-Correlation Between Board Independence and Long-Term Firm Performance*, 27 J. CORP. L. 231, 263 (2002). However, the authors nevertheless favor boards that include independent directors for the purpose of monitoring self-dealing transactions and firing the CEO when necessary. *Id.* at 234. Miwa and Ramseyer have performed a study on outside directors in Japan and have reached a similar conclusion that adding outside directors does not improve company performance. *See* Yoshiro Miwa & J. Mark Ramseyer, *Who Appoints Them, What Do they Do? Evidence on Outside Directors from Japan*, THE HARVARD JOHN M. OLIN DISCUSSION PAPER NO. 374, Jul. 2002 at 22 (2002), *available at* http://ssrn.com/abstract=326460.

independent director is, in fact, associated with an improvement in business performance.[23]

Concentrated ownership structure is a critical issue for corporate governance in East Asia. In theory, the basic corporate governance problem to be addressed in a system of concentrated ownership – i.e., protection of minority shareholders from overreaching by a controlling shareholder – differs from the fundamental problem in diverse ownership systems - i.e., protecting shareholders generally from self-interested management (see Table 1). In practice, emphasis on creating corporate value for stakeholders through improving business performance may lead to a relative weakness in mechanisms to protect minority shareholders from conflicts of interest and other problems.

At first glance Japan may seem unique in that it is a stakeholder-oriented system featuring public companies with diverse ownership.[24] However, it is generally classified together with Germany and other block ownership systems because its system of cross-shareholding among management-friendly "stable" corporate shareholders provides support for management that is considered to be functionally similar to a system of concentrated ownership.[25] A panelist noted that in Korea, the problems accompanying the emergence of large *chaebol* are the most important corporate governance issue. In Taiwan there is the beginning of a delicate process of transition from family-controlled businesses to more widely-held companies. And concentrated ownership in China, centering on the continuing importance of State-owned Enterprises

[23] For research on Japan in English, *see*, Takuji Saito, *Presence of Outside Directors, Board Effectiveness and Firm Performance: Evidence from Japan* (working paper, Sept. 2009), *available at* http://s3.amazonaws.com/zanran_storage/www.e.okayama-u.ac.jp/ContentPages/47804533.pdf. For an English citation of Saito's subsequent Japanese articles, *see, e.g*, American Chamber of Commerce in Japan, COMMENT LETTER ON INTERIM PROPOSAL CONCERNING REVISION OF THE COMPANY LAW, Jan. 31, 2012 , *available at* http://www.accj.or.jp/images/downloads/public/en/public_comments/17-120131_ACCJ_FINALEnglish.pdf.

For research on Korea, *see* Bernard S. Black et al., *Does Corporate Governance Predict Firms' Market Values? Evidence from Korea*, 22 No. 2 J. L. ECON & ORG. 366 (2006); Bernard S. Black & Woochan Kim, *The Effect of Board Structure on Firm Value: A Multiple Identification Strategies Approach Using Korean Data*, 104 J. FIN. ECON. 203 (2011); Jongmoo Jay Choi et al., *The Value of Outside Directors: Evidence from Corporate Governance Reform in Korea*, 42 No. 4 J. FIN. & QUANTITATIVE. ANALYSIS. 941 (2007).

[24] Wataru Tanaka, *Ownership Structure and Corporate Governance in Japan*, Comment following panel discussion (Jan. 12, 2013) (citing data showing Japan as having the largest percentage of widely held companies among publicly traded firms throughout East Asia and Western Europe). *See also* Stijn Claessens et al., *The Separation of Ownership and Control in East Asian Corporations*, 58 J. FIN. ECON. 81 (2000) and Mara Faccio & Larry H.P. Lang, *The Ultimate Ownership of Western European Corporations*, 65 J. FIN. ECON. 365 (2002) (cited by Tanaka, *supra* note 24.).

[25] *See, e.g.*, Marc Goergen et al., *Recent Developments in German Corporate Governance*, 28 INT'L. REV. L. & ECON. 175 (2008), especially Table 1 at 177.

(SOES), has proven to be the greatest obstacle to the implementation of desired American-style reforms.

Some reformers have anticipated that international institutional investors would play a strong role in spurring reform in East Asia due to the rise in foreign ownership of stock markets throughout the region.[26] The efforts of foreign institutional investors have had some impact in areas such as the use of outside directors.[27] However, our panelists noted that the influence of foreign institutional investors has not generally been great in Japan, and that, in particular, the new, more aggressive form of activism by hedge funds and private equity firms that is a topic of discussion with respect to corporate governance issues in the United States[28] has had mixed results in countries like Korea.

One of the most controversial issues in corporate governance throughout East Asia is the question of a requirement for independent directors to increase monitoring of management on behalf of shareholders. Outside pressure from foreign institutional investors and an internal desire for reform have resulted in a requirement for a minimum number of independent directors throughout East Asia.[29] However, all of the panelists found independent directors to have limited effect in East Asian corporate governance systems to date. In Taiwan, the presence of a controlling shareholder often meant that the primary role of outside directors was to

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[26] *See supra* note 14.

[27] See *infra* note 29 and accompanying text. Also, Manabu Matsunaka, Comment following panel discussion (Jan. 12, 2013) (citing empirical research showing that there is a correlation in Japan between the percentage of shares of a company owned by foreign investors and the number of outside directors on the company's board).

[28] *See, e.g.*, Lucian A. Bebchuk et al., *The Long-Term Effects of Hedge Fund Activism* (working paper, July 9, 2013), *available at* http://ssrn.com/abstract=2291577; Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control.* 155 No. 5 U. PA. L. REV. 1021 (2007); Frank Partnoy & Randall S. Thomas, *Gap Filling, Hedge Funds, and Financial Innovation.* in BROOKINGS-NOMURA PAPERS ON FINANCIAL SERVICES (Yasuyuki Fuchita & Robert E. Litan, eds., 2007).

[29] The minimum for listed companies is one-third of the board in China (independent directors) and one-quarter of the board in Korea (outside directors). For a survey of Asian countries, *see* ASIAN CORPORATE GOVERNANCE ASSOCIATION, *supra note* 13. A minimum of two independent directors are now required in Taiwan. *See* Taiwan Stock Exchange Corporation Rules Governing Review of Securities Listings, Art. 9, para. 9, *available at* http://eng.selaw.com.tw/FLAWDAT01.asp?lsid=FL007326. And even in Japan one independent "officer" (i.e., director or *kansayaku*) became required under rules of the Tokyo Stock Exchange in 2010 and there is expected to be a new comply or explain requirement with respect to having one independent director following the recently proposed amendments to the Companies Act. For information and citations on the current and new requirements, *see* Aronson, *supra* note 19 at note 93 and note 108. A bill to amend the Companies Act that incorporates these proposed amendments was formally submitted to the Japanese Diet (parliament) on November 29, 2013, *available at* http://www.moj.go.jp/hisho/kouhou/hisho06_00228.html (Ministry of Juctice website; in Japanese only).

provide business advice rather than to monitor management. A panelist noted that in Korea outside directors were not highly effective in their formal role, but that informal compromises with management arguably provide a kind of monitoring function. In China, the lack of a friendly environment for outside directors, such as access to information, was thought to hamper their effectiveness.

If outside directors appeared relatively ineffective at monitoring management under the current systems, the traditional *kansayaku* were generally seen as doing even worse. Although the panelist from Japan noted that *kansayaku* were effective in monitoring compliance, this was not true with regard to monitoring management. Other panelists provided very frank opinions that in Taiwan such *kansyaku* were essentially "worthless" and in Korea their lack of effectiveness led to a new requirement that the largest companies replace them with an audit committee. In every country outside Japan, the lack of effectiveness of *kansayaku* was cited as a reason for the movement toward greater use of outside directors despite a lack of clear evidence of the effectiveness of outside directors to date.[30]

Rather than the specific number of independent directors, information and enforcement are important issues in creating an environment for effective monitoring of management by any potential monitor.[31] Panelists cited the lack of access to information by outside directors as a problem throughout the region. One panelist cited an interesting effort in Taiwan to link outside directors to information technology officers at high tech companies to provide directors access to all the information in the company's computer system.

In addition to sufficient information, enforcement is also a critical factor in both creating incentives for outside directors to oppose management as necessary and for providing such outsiders with a neutral vocabulary (i.e., litigation risk) to question management proposals. In Korea, public

[30] A parallel issue is the lack of data concerning the actual role and functioning of *kansayaku*. In the absence of such data, arguments about *kansayaku* are often general and tend to focus on their legal authority (or lack of it) under the Companies Act rather than on actual practices. For a recent report by the Asian Corporate Governance Association that attempts to utilize a more practical view of their role to achieve a more balanced comparison between the role of outside directors and *kansayaku*, *see* ASIAN CORPORATE GOVERNANCE ASSOCIATION, THE ROLES AND FUNCTIONS OF KANSAYAKU BOARDS COMPARED WITH AUDIT COMMITTEES (2013), *available at* http://www.acga-asia.org/public/files/ACGA_Paper_Kansayaku_Audit_Committees_October_2013_English_Final.pdf.

[31] I have argued in the past that the strongest features of the U.S. corporate governance system are not necessarily independent directors per se, but rather the way the American system provides the monitors of management the practical means and incentives to fulfill their function. These generally include information (both internal information and reporting systems and external public disclosure), enforcement (particularly private enforcement) and complementary monitoring roles for outside professional service providers acting as gatekeepers. *See* Bruce E. Aronson, *What Can We Learn from U.S. Corporate Governance? A Critical Analysis*, 2 U. TOKYO J. L. & POL. 41 (2005), also *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=920865; Aronson, *supra* note 19 at 129-39.

enforcement was thought to be effective, but the question of enforcement against the largest conglomerates remains an issue of concern. A number of panelists cited the need for greater private enforcement. For example there are now private derivative actions in China, but they remain rare against public companies so their impact on the corporate governance system remains weak.[32]

The discussion of future issues centered on two topics. First was the question of whether there was potential for a "mixed" corporate governance system in East Asia that retains the tradition of a board of directors that is actively involved in management but also incorporates a larger element of monitoring. Second was the issue of whether increasing economic ties might result in a need in the future for harmonization of corporate law, securities law, and corporate governance systems.

Panelists noted that all corporate governance systems are "mixed" in a sense, and that there was ongoing experimentation, including the addition of outside directors to traditional management-oriented boards, throughout the region. Although one panelist saw potential for some form of "East Asian model" to emerge, most panelists noted issues in their particular systems, such as the drift in Korea toward more of a shareholder-oriented model to deal with corporate governance problems raised by the largest *chaebol* and the overriding question in China of lessening government control and influence over corporations.

The term "harmonization" covers a range of possible approaches to regularize laws among countries.[33] The panelists generally saw some potential for harmonization in East Asia, but cited different areas as candidates for such

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[32] One of the commentators, who is the head of the Shanghai office of a major Japanese law firm, noted that although discussions of corporate governance in China typically focus on large public companies, in practice investment between Japan and China consisted primarily of joint ventures between private companies. Eriko Hayashi, Comment following panel discussion (Jan. 12, 2013).

More broadly, problems of enforcement in China, particularly with respect to Western-inspired provisions of the Company Law, such as shareholder protection and fiduciary duties, remain significant. Reasons may include (i) the lack of a fair playing field for companies with investors from different backgrounds, (ii) the abstract and ambiguous nature of Chinese law, (iii) inadequacies in the enforcement process, (iv) a judiciary that may be dysfunctional and less experienced in corporate governance and finance matters, (v) the inexperience of all relevant parties in civil enforcement actions, and (vi) most importantly, the prevalence of state intervention in the judicial process and commercial activities. Comment by our panelist, Professor Shen.

[33] One of the commentators, Mitsuo Matsushita, noted that "harmonization" is a broad concept that actually covers four different types of systems: a concentrated regulatory approach (e.g., EU law), a directives or rules approach (e.g., EU directives), a decentralized system (e.g., NAFTA), and a network of international intellectual exchange (e.g., Santiago Principles). He noted that the weakest form of harmonization, i.e. the network approach, might be most appropriate for Asia due to its rapidly increasing informal ties and intellectual exchanges. Mitsuo Matsushita, Comment following panel discussion (Jan. 12, 2013).

harmonization. One panelist cited the potential for harmonization in "soft" law areas such as accounting, information disclosure, and the desire for multinational enterprises to operate similarly in all jurisdictions, as opposed to "hard" corporate law. Another panelist cited the globalization of capital markets as creating potential opportunities, while the panelist from China noted the strong potential impact of Chinese companies "binding" themselves to higher corporate governance standards through cross-listing overseas in Hong Kong.

All of these topics - and more - are covered as the panelists discuss corporate governance models and practices in East Asia.

I. PROCEEDINGS OF THE PANEL, JANUARY 12, 2013

Moderator: Bruce Aronson

Panelists

Joongi KIM, Professor of Law, Yonsei University Law School, Korea (J.D. Georgetown University)

Chien Chung LIN, Associate Professor, Institute of Technology Law, National Chiao Tung University, Taiwan (S.J.D. University of Pennsylvania)

Wei SHEN, Professor of Law, KoGuan Law School Shanghai Jiao Tong University (LLM University of Michigan, LLM Cambridge University, PhD London School of Economics and Political Science)

Souichirou KOZUKA, Professor of Law, Faculty of Law, Gakushuin University, Tokyo (PhD University of Tokyo)

II. HISTORICAL INFLUENCE OF JAPANESE MODEL ON EAST ASIA AND CURRENT TRENDS

PROFESSOR ARONSON: Recently when you read about Japanese influence on other countries in East Asia, it is often in a negative context. Historically, however, various aspects of Japan's system, including, law, administration, and its economic model have had substantial impact - including positive contributions - on other countries in East Asia, particularly Korea and Taiwan. At the same time, in recent decades there has also been significant divergence in these countries from Japan's system. Does this historical influence include Japan's model for corporate governance? Please give your overall impression of the similarities and differences between the theory and practice of corporate governance in Japan and other countries. Is this historical dimension still important for the study and understanding of corporate governance in East Asia?

PROFESSOR KOZUKA: The issue of corporate governance in Japan and East Asia has both historical and contemporary aspects. Historically, Western legal systems influenced East Asia, but I also think that Japan had an intellectual influence on neighboring countries. In addition, today all of the countries in East Asia are simultaneously facing similar pressures from markets and lawyer groups.

I would point to the doctrine of piercing the corporate veil as an example of Japan's intellectual influence. This doctrine was not a part of traditional common law, but was developed in the United States through case law and transplanted to Germany after the First World War. It was then introduced into Japanese law by Japanese academics who studied U.S. and German law and was accepted by the Supreme Court in Japan at the end of the 1960s.[34] I understand that all of the East Asian jurisdictions now have this rule, including a statutory provision in the PRC.[35] This may be a good example of the intellectual influence of Japanese law in the region.

PROFESSOR KIM: Japan's influence on the Korean model of corporate governance remains strong. Traditionally, perhaps up to fifteen years ago, scholars and judges in Korea always looked at Japanese case law and statutes. The recent trend, however, is to study in the United States, and academics and judges feel more comfortable in English and are more likely to look at Western, particularly U.S., law. But even today, scholars are impressed with the very comprehensive nature of Japanese case law regarding corporate governance and corporate law in general.

I would argue that Korea has taken its corporate governance system in its own direction particularly in terms of ownership structure and the enormous market concentration of our largest conglomerates. So although the historical dimension remains important to provide context of how it all began and also to provide potential alternatives, I think we have different concerns now and there is likely to be increasing divergence in the future.

PROFESSOR LIN: In the beginning, Taiwan's company law was basically very similar to the Japanese company act. But in the last two decades there have been two significant changes. On one hand, influence from the United States or European Union is growing in Taiwan. On the other hand, Japan's Companies Act, and the Financial Instruments and Exchange Act, have become much longer, more complicated, and time-consuming to understand. As a result, we feel like we need a more simplified version of the statute or guidelines as a reference to help decide difficult cases when they occur.

That is especially true when we look at those detailed Japanese provisions but still have difficulty in finding a satisfactory answer for our local cases. This leads us to consider the common law approach, especially Delaware law, as a useful alternative. Delaware law uses concepts such as the fiduciary duties of care and loyalty, and those concepts are generally broad enough to help solve difficult questions in foreign jurisdiction like Taiwan.

In this case, I would therefore prefer not to focus on historical influence, but rather to think about what people can learn from Japan's efforts in trying to find the best approach to solve a problem economically. But at the same time, we remain under Japan's historical influence, for example the use of

[34] Saikō Saibansho [Sup. Ct.] Feb. 27, 1969, Shōwa 43 (o) no. 877, 23 no.2 Saikō Saibansho Minji Hanreishū [Minshū].511 (Japan).

[35] PRC Corporate Law, sec.20.

internal corporate auditors (kansayaku) in our company law. We also must face questions brought by that particular organizational design.

PROFESSOR SHEN: I think Japanese influence in company law was important to China, if you look back at the introduction of commercial law and company law during the late Ching dynasty reform. But that historical dimension is no longer as important for two reasons. One is the foundation of the PRC over sixty years ago. Since then, China was transformed into a Soviet-type legal jurisdiction. The second reason is the strong American influence on modern Chinese legal reform.

However, if you categorize China as a country with a civil law system, together with Japan and Germany, then there are naturally some similarities. We do not have a strong concept of the primacy of shareholder rights in Chinese law. Similar to German law, we have a dual board system, which means that we have a board of directors and a board of supervisors in Chinese company law.

Also if you look at the larger picture, such as legal culture or legal philosophy, perhaps China and Japan share other similarities. For example, we do not focus on formal legal proceedings or the legal system to solve commercial disputes. Instead, we rely on mediation or some other informal mechanisms to solve those issues.

III. PURPOSE OF CORPORATE GOVERNANCE REFORM

A. Shareholder Systems versus Stakeholder Systems

PROFESSOR ARONSON: Table 1 shows a traditional classification of corporate governance systems into shareholder systems and stakeholder systems. In the United States, which is known as a shareholder system, the main focus of corporate governance reform over the past few decades has been to strengthen the monitoring function of the board of directors to aid shareholders in addressing the problem of agency costs. On the other hand, it is my impression that in countries in Asia and elsewhere the main focus on corporate governance reform may still be on providing additional authority or discretion to management to help improve performance on behalf of all stakeholders. If that is true, then the main corporate governance problem for stakeholder systems listed in Table 1, i.e., the protection of minority shareholders, may not be entirely accurate. Please comment on the main purpose of corporate governance reform.

PROFESSOR KIM: This is a very difficult question in Korea. I think there is a basic difference between issues involving our largest conglomerates (or *chaebol*) and other businesses. The issues for *chaebol*, which are the most pressing concerns for us as a whole, involve shareholder-oriented concerns due to the *chaebol*'s dispersed ownership structure. For them, emphasis has been placed on adopting U.S.-type reforms, such as legal enforcement and control of agency costs. But there also has been strong resistance from our largest *chaebol*, as they claim that such an approach is too American and not appropriate for Korea.

I think the stakeholder system fits us better in terms of our nature, social attitudes, and long-term perspective. But because of the *chaebols'* ownership structure, whether by accident or design, we have very difficult and unique concerns that, in my opinion, require us to adopt a more Anglo-American type of reform. And that creates tension within our overall system.

Currently our two largest conglomerates, the Samsung group and the Hyundai Motors group, account for forty percent of our market capitalization, which is very shocking. Their share has increased very recently. And the top ten *chaebol* now control seventy five percent of operating profits and net profits for all of our listed companies.

This gives you a sense of the degree of concentration and how our market has become skewed. So that is both our greatest focus and tension now in terms of corporate governance.

PROFESSOR ARONSON: Perhaps Table 1 should contain a third column for government-dominated systems, since in China a very substantial portion of economic activity is conducted through government-dominated or influenced companies.

People in the West are concerned that in such a system the goals of the corporation might be more political rather than economic, and this may cause problems in our dealing with Chinese investment and other issues related to corporate governance.

If we had a separate column for a government-influenced corporate governance system, what would be the major purpose of corporate governance reform?

PROFESSOR SHEN: I think the question indicates the uniqueness of China in terms of its legal system and economic system, as it is the only country represented on this panel that is an emerging market and socialist legal system.

The major purpose of corporate governance reform in China is to implement the "modern enterprise system," a critically important component in market-oriented reform, by transforming a large number of state-owned enterprises into independently managed companies with a high degree of autonomy. The emphasis has been placed on corporatization and ownership diversification. This move is clear if we look at the Big Four banks' public listings in overseas capital markets. Corporatization and ownership diversification have introduced new forms for exercising corporate control. The main reform in the next stage is to alleviate the negative impact of dominant state ownership.

The second purpose is to bring Chinese companies closer to international standards in corporate governance. So, for example, we are encouraging companies to list overseas.

China's corporate governance reform seems closer to the European model in respecting all stakeholders, including employees and creditors, rather than focusing exclusively on shareholder interests as in key common law jurisdictions. In addition to the Company Law, more protections are offered to employees and creditors in the Labor Law and Bankruptcy Law. An important issue is how to divide corporate governance functions between new institutions representing shareholders and stakeholders such as the shareholders' meeting, board of directors, and board of supervisors and traditional PRC institutions such as the party committee, trade union, and workers' congress.

B. Empirical Research on Correlation between "Good" Corporate Governance and Business Performance

PROFESSOR ARONSON: In some Asian countries improvement in corporate business performance is arguably an important focus of corporate governance reform. But do we have persuasive empirical evidence concerning the relationship between good corporate governance and improved business performance?

As you know, in the United States empirical research generally finds that there is no correlation between a large majority of independent directors and improved business performance. However, many researchers still favor at least some number of independent directors for the different reason of managing conflicts of interest and self-dealing by management.

In some Asian countries, particularly in Japan, this U.S. research is used to support an argument against appointing *any* outside/independent directors. However, the U.S. research focuses primarily on the value of a supermajority of independent directors. What is the general view of the relationship between corporate governance and business performance in your country, both by academics and, more generally, among business people?

PROFESSOR KOZUKA: Japanese businesspeople do not appreciate the idea of having independent directors on the board as an element of enhancing performance of the company. What is interesting is, that seems to be the view not only of businesspeople, but of the general public as well.

For example, recently we hear every day why Sony, Panasonic, and Sharp are losing their positions as global market leaders. But no one argues that it is due to the poor corporate governance of these companies. And in fact, Sony was one of the companies in Japan that has made various attempts to improve corporate governance practices. So this is a good question for researchers.

As regards the research, the situation is very different from the United States, because, as noted, in Japan the question is whether we need to have any outside directors. And in that respect, there is preliminary empirical research using historical data in Japan that found that outside directors have a positive impact on the business performance of Japanese corporations.

PROFESSOR LIN: In Taiwan people try to promote good governance, but they do not see a necessity to link it to performance. The government has a unique strategy about how to implement good corporate governance. They do it at a very slow pace.

About ten years ago in 2002, Taiwan Stock Exchange started to require that any newly listed public company have at least two independent directors. Later in 2006, through authorization of the Securities and Exchange Act, the Financial Supervisory Commission required any company with legal capital exceeding fifty billion Taiwan Dollars (roughly 1.7 billion U.S. dollars) to have at least two independent directors on the board. In 2010, we started asking all public companies to have a compensation committee. And in 2011, the requirement of having at least two independent directors extended to companies with legal capital of ten billion Taiwan Dollars.

In attempting to implement independent directors, Taiwan's approach is a very modest one with a slow pace. But the government gave a clear indication of its direction. Personally, I am in favor of this approach and anticipate seeing more independent directors in the future.

So that brings me back to your question. If that design is not helping good economic performance, what is the reason we have it? Currently the government's argument is more focused on preventing long-term failures than on short-term economic performance. The government wants people to be aware there are some outsiders on the board, and it thinks the existence of outsiders may reduce the likelihood of undesirable practices such as asset tunneling or appropriation of corporate opportunities. Basically I think that design, especially independent directors, is still helping our governance as a whole. But I agree that the link to short-term performance is not clear.

PROFESSOR ARONSON: Some recent empirical research in Japan and Korea suggests that the *first* independent director added to an all-insider board may show a positive correlation with improved business performance. Has that affected the discussion?

PROFESSOR KIM: There has been substantial research on this issue, which has acted to fuel debate. More generally, some fairly influential research has shown a correlation between high share prices, profitability, and productivity, but there is also some work that contradicts such result.

In terms of outside directors, a requirement for outside directors began rather recently, following the Asian Financial Crisis in 1998. Now all listed companies are required to have at least one outside director. In the largest companies, with over roughly two billion dollars in revenue, the majority of the board must be outside directors. In addition, these largest companies must have an audit committee, and two thirds of the audit committee must be composed of outside directors.

Research on the impact of outside directors has clearly shown a positive correlation between increasing the number of outside directors from zero to one. However, such correlation has been less robust for boards having one-quarter or one-half outside directors.

C. Relevance of U.S.-Inspired Reform and Standard for Evaluation of Corporate Governance Reform in East Asia

PROFESSOR ARONSON: Many corporate governance reforms, such as Sarbanes-Oxley, originated in the United States. These reforms are studied and discussed by commentators in Asia, but their actual influence seems to vary and is not entirely clear. In addition, international institutional investors also demand reforms that would place a greater emphasis on maximizing shareholder value.

At the same time, as noted previously, systems in East Asia are not shareholder-oriented systems. Is it fair to expect that those systems will change substantially or dramatically in favor of shareholders? What should be the standard for evaluating the "success" of corporate governance reform in East Asia?

PROFESSOR KOZUKA: Theoretically, the important measure should not be shareholder value but rather corporate value or firm value as a whole. But of course, it is very difficult to gauge firm value as a whole, and shareholder value could be a proxy for measuring firm value. The best measure of firm value is affected by the market situation of each stakeholder.

For example, when there is a strong need for financing from the equity market then it is obvious that companies will try to satisfy the interests of shareholders. If there is a strong need for financing from the debt market, then the interests of creditors will be relevant. If there is a need for employing good employees, then the employment market will be the focus. So I think we should take a closer look at the markets in each area.

PROFESSOR SHEN: China is a hybrid regime which has both European and American concepts. The latest Chinese company law, passed in 2006, expansively adopted the concepts of shareholder rights, and included derivative actions so that minority shareholders can initiate lawsuits against directors. On the other hand, Chinese company law also adopted the concept of corporate social responsibility, which is modeled on European law.

There is strong American influence due to the United States' legal and economic significance. China is also heavily influenced by European countries from time to time since it is still a statute-based law system. Examples of such European influence can be found in the monopoly law, labor law, and other laws.

China also has its own considerations due to its economic stage of development and strong government role. Sometimes, when we focus on or stress shareholder rights, we also observe that the board of directors and managers may have some other preferences. For example, because some top positions in large state-owned enterprises are appointed by the government, their success may be judged more by increasing the amount of paid taxes rather than profits.

IV. OWNERSHIP STRUCTURE AND CORPORATE GOVERNANCE

A. Effect of Dispersed Ownership versus Concentrated (Including Family and State) Ownership

PROFESSOR ARONSON: I would like to ask about the relationship between ownership structure and corporate governance. As indicated in Table 1, ownership structure is said to have a significant influence on corporate governance systems. Differences in ownership structure can also be considered a key factor why American-inspired reform might not be appropriate in the East Asian context. How big a role does ownership structure actually play in shaping corporate governance systems? Does it create fundamental differences, or is it more a question of degree with different countries facing basically similar types of corporate governance problems?

PROFESSOR KIM: During our developmental stages we closely followed the keiretsu cross-ownership structure of Japan. In many ways we have been very successful, and our leading conglomerates, like Samsung, are doing phenomenally well. That leads to a strong argument that there is no real cause for concern despite distortions in ownership structure and weaknesses in corporate governance. If nothing is broken, why try to fix it?

However, there is a dark side as well. Unlike Japan, large conglomerates in Korea have an intricate cross-shareholding structure that is dominated by families, not by large financial institutions. And a key problem is that the families have relatively small ownership interests. If they were big block holders as in Europe, our problems would not be as serious. But their small ownership creates potential problems of tunneling, insider trading, and a variety of other abuses. These problems have occurred repeatedly, and each time they seem to become even more serious. So there is an important question of how to correct this.

Although we inherited the basic practice of cross-shareholding from Japan, it has developed in a different way in Korea and now we have our own problems with respect to ownership structure and corporate governance.

PROFESSOR LIN: Ownership structure is always a key point with regard to how a majority shareholder treats a minority shareholder. I think this is the core of corporate law and the approach to regulating this relationship is always a major concern.

In Taiwan, corporations, which generally have been family-controlled, are now about to face a period of transition. Generally speaking, large companies with over fifty years of history since the end of World War II are now in the hands of the second generation and some are about to change hands to the third generation. In Taiwan there has been a pattern of the founder breaking up the company into smaller, independent entities to divide the business among their children. As a result, we no longer have strong, centralized family control in Taiwan. The control is generally stable, but can still be challenged by dissenting shareholders from time to time.

On the other hand, we have a substantial number of mid-size high-tech companies in Taiwan, which comprise roughly fifty percent of market capitalization, that still have concentrated ownership. We do not have a problem of huge, dominant corporate groups that are family controlled, as in Korea. We think that these mid-size companies generally have good corporate governance due to strong competitive pressures from the product market. They need to take into consideration the interests of groups such as creditors and minority shareholders to maintain their reputation in the capital markets. So ownership structure is quite relevant to the current corporate governance system in Taiwan.

PROFESSOR SHEN: I think this question relates to the earlier discussion about the influence of American-style reform. We are trying to reform corporate governance by adopting more American concepts into Chinese company law. However, the concentration of our shareholding and ownership structure makes this very difficult.

For example, because of this concentration of ownership and shareholding, it is difficult to have an effective market for corporate control.

This makes it difficult for American-style takeover rules to mobilize shareholders.

B. Influence of Foreign Institutional Investors on Corporate Governance Reform

PROFESSOR ARONSON: The percentage of stock market ownership held by foreign institutional investors has become substantial in many Asian countries. Institutional investors often promote corporate governance reform, with a particular emphasis on the role of outside/independent directors. However, we also sometimes hear the argument that more independent directors might be simply a matter of formal structure and not actually improve the substance of corporate governance. Have institutional investors had a substantial impact on corporate governance reform? Do they play a positive role in improving corporate governance?

PROFESSOR KOZUKA: Although foreign institutional investors are active in the Japanese market, they have apparently not been very successful in affecting corporate governance. Consider the Olympus case, in which foreign institutional investors requested that the old management be replaced entirely by a new one. Foreign institutional investors were unable to prevail at the shareholders meeting and some of the board members remained on the board, although the wrongdoers were removed.

Another older example was Steel Partners unsuccessful attempt to take over Bulldog Sauce, with the management of Bulldog Sauce successfully defending itself with a variety of anti-takeover measures. It is interesting to note that the Supreme Court decision in favor of the defending management in the Bulldog Sauce case was theoretically based on the approval of shareholders in support of the defensive measures. This means that lawyers' logic is a bit different from businessmen's logic. Lawyers' logic in Japan is very shareholder-oriented, and that logic in fact defeated the institutional investors trying to bring to Japan more of a shareholder primacy model. So it is not easy for foreign institutional investors to have a substantial impact.

PROFESSOR KIM: We have also had a very controversial case where a large foreign investor was challenging the controlling shareholders of one of our leading conglomerates. The investor came very close to actually stabilizing the independence and competence of the board, but was ultimately not successful.

Traditional institutional investors, such as CalPERS, play a more passive, *ex ante* role. Large companies will seek their input if there is a controversial decision to be made and I think that is a positive role. But more aggressive foreign investors have been less successful in *ex post* actions, such as trying to influence management or nominating their own candidates to the board.

We have also had cases where foreign private equity companies have taken Korean companies private. That is a slightly different question, but is seen as the same thing by the general public. The most controversial private equity transaction is the recent case of a foreign private equity fund. It acquired a large Korean bank at a risky time, and was highly successful in turning it around. However, the fund claims that when it wanted to cash out it encountered many regulatory hurdles that greatly delayed the process.

As a result, this fund actually brought the first investor-State arbitration against Korea. There has been a public backlash against the fund as a result, and it has spilled over into the corporate governance area.

V. MONITORING OF MANAGEMENT

A. Board Function as Management Board vs. Monitoring Board

PROFESSOR ARONSON: The role of the board of directors is one fundamental issue in corporate governance. In many East Asian systems the board of directors assumes an active role in the day-to-day management of the corporation, whereas in the United States the primary function of the board has gradually shifted to one of monitoring management. A board active in daily management may find it more difficult to also effectively monitor management. Is this considered a problem, or is a management board considered to be important for other purposes such as achieving good business performance? How important is the monitoring of management in corporate governance?

PROFESSOR LIN: As I mentioned earlier, in Taiwan most companies still have concentrated ownership. All the directors are generally deferential to the controlling shareholder and his management decisions. In that sense they do not have either a significant management or monitoring role, but rather may provide business advice to the controlling shareholder/management. In some companies the CEO will give careful consideration to the board members' opinions, but I am unsure about how much of a real monitoring function directors have in Taiwan.

PROFESSOR KOZUKA: One of the key points here is the purpose of monitoring: whether it is to monitor the performance of management, conflicts of interest and related party transactions, or compliance issues. Having outsiders as independent directors on the board may be effective in monitoring compliance issues, since it is not easy to hide problems from outsiders if the outsiders are on the board.

The effectiveness of having outsiders on the board with regard to monitoring the performance of management is a more complicated question. It is an open question since the effectiveness of independent directors is not easy to measure and it is difficult to find a definite impact on business performance.

B. Role and Effectiveness of Outside/Independent Directors

PROFESSOR ARONSON: There are now requirements for a minimum number of outside or independent directors for listed companies in Korea and China, and it is a controversial topic in Japan. The question arises whether a requirement for independent directors is just a formality intended, for example, to attract investment from foreign institutional investors, or does it play a positive role in terms of improving actual corporate governance practices?

PROFESSOR SHEN: I think it is appropriate that listed companies have a requirement for some portion of independent directors. However, the results of empirical research are consistent with those in the United States and other countries that find no correlation between independent directors and business performance.

The main reason probably is because there is no concrete power delegated to independent directors. For example, independent directors do not have special power to access corporate information outside of attending board meetings. In that regard, I think the experience in China is similar to that of other countries.

PROFESSOR KIM: There have been many studies on outside directors. In general, outside directors often have some connection to insiders. That is unfortunate, although it is very difficult to try to have companies nominate the ideal outside director. Having said that, however, we have had some cases where outside directors acted quite independently. In a recent high profile case involving a controversial acquisition, the outside directors at one of our largest banks voted against the CEO's proposal. And despite that, the shareholders still approved the deal.

Although it is rare that outside directors vote against management, such directors often argue that they are effective even in the absence of any objection on the record. That is because they often work out the issues beforehand and reach a compromise with management, which eliminates the necessity of a formal objection.

Another very interesting development for outside directors and for audit committee members is that we allow them to hire outside experts or staff to personally assist them directly in acquiring information or analysis. This has been deemed to be very helpful for many outside directors. Nevertheless, if determined insiders wish to conceal something they are generally successful and it remains difficult for outside directors to find out.

C. Monitoring Role of Internal Corporate Auditors (kansayaku)

PROFESSOR ARONSON: In addition to outside directors, beginning with Japan, and also in Korea and Taiwan, there are internal corporate auditors, or in Japanese *kansayaku*, who also have a role in monitoring. Is the role of these internal corporate auditors similar to the role of outside directors in monitoring management? Are these internal corporate auditors effective in monitoring?

PROFESSOR LIN: It is very disappointing to say that in Taiwan they are almost completely ineffective. It is probably the ideal job for a professor or anyone to get additional income without doing much of anything and without assuming any risk. With respect to monitoring generally, I note that some independent directors have started to voice their disagreement with management in some recent cases.

PROFESSOR KOZUKA: They are completely ineffective with respect to performance monitoring, since *kansayaku* or statutory auditors do not have the authority to replace management or to set executive compensation. However, I would give them a higher grade than Professor Lin with respect to compliance monitoring. There are cases where *kansayaku* uncovered scandals that had been concealed for years, and overall they have been effective in detecting and preventing illegal actions by the corporation.

PROFESSOR KIM: We have the same position in Korea. And I would agree with Professor Lin that the traditional internal corporate auditor is in a very comfortable position; they are usually people who are about to retire. There is not much expectation that they will perform effectively.

However, I note two related positive developments. First, larger companies are now required to have compliance officers, and that has strengthened the compliance function. Second, the largest companies, with over approximately two billion dollars in revenue, are also required to have audit committees in place of the internal corporate auditor.

D. Selection of Top Management

PROFESSOR ARONSON: Who selects and who supervises the top management in East Asian corporate governance systems? Are practices in this area considered a problem?

PROFESSOR SHEN: I do not think it is considered a problem in the Chinese context, because the shareholders select board members and then board members select managers in accordance with the company law. In that regard the board is playing a monitoring role in terms of management contracts. The board can enforce management contract terms, and because of that the managers must perform well.

PROFESSOR LIN: It is an important issue, especially in the last ten years. Generally speaking, if this is not a family company the current CEO will pick his successor internally. He will start an internal competition five or ten years before his retirement, asking his most promising candidates to compete with each other in terms of performance, and the winner of that race will likely become the new CEO.

For family companies, they will divide the big company into several smaller ones and let the children pick their piece of the business. Or, they may remain a big company and allow senior managers to run the company together with the family heirs. The CEO succession is always a major concern now in Taiwan.

VI. "EFFECTIVE" CORPORATE GOVERNANCE (NON-STRUCTURAL ISSUES) – HOW DO WE MAKE ANY MONITOR OF MANAGEMENT MORE EFFECTIVE?

A. Information and Enforcement

PROFESSOR ARONSON: What do we need to do to help monitors be more effective? I have argued in the past that the strength of monitoring in the United States is not necessarily due to the number of independent directors, but rather to the operating environment or "tools" that those directors are provided to help them be effective. In particular, I would point to good access to information and strong enforcement, particularly private enforcement, although private enforcement is controversial even in the United States because of its overall cost.

Is it considered an important issue in East Asia to provide such better environment or "tools" to help monitors of management, whether they are independent directors or even internal corporate auditors or an audit board, to be more effective?

PROFESSOR KIM: Information is critical for an outside director to make a decision, because they are otherwise in the dark and must make decisions based on the information provided to them. Enforcement is one of the hottest topics in Korea right now. There has generally been very rigorous public enforcement.

However, such public enforcement has not extended to the largest conglomerates. They have been treated quite leniently due to a fear that strong public enforcement might harm their business activities, which could cause damage to the economy. For example, the head of one of these conglomerates was given a presidential pardon partially because of his role as a member of the IOC committee in helping Korea win a bid to hold the Winter Olympics.

However, there is now strong sentiment that this system of pardoning and corporate leniency has gone too far. In the past year, the courts have become very strict, and have actually levied some serious sentences on the heads of our largest conglomerates. This is regarded as a pivotal change in Korea.

Private enforcement, unfortunately, still remains much weaker. We have had some shareholder group actions. We also have a limited class action system on the books, but it has not really worked.

PROFESSOR KOZUKA: First, I note that the internal corporate auditor or *kansayaku* has very strong statutory power to investigate and request disclosure of information. That is one of the reasons why I am somewhat more optimistic about their role than other panelists.

The information that is most difficult to obtain is the information concerning the successor to top management, as mentioned in the previous question. In the Japanese system where top management is recruited from among the employees, it is important to observe their daily activities and job performance. Such information is very difficult for *kansayaku* to obtain, and it is even more difficult for outsiders such as independent directors.

PROFESSOR SHEN: The information disclosure system is very important, but it has unfortunately not played an important role in the monitoring regime due to the current stage of development of China's capital market and the limited number of sophisticated users of information.

Enforcement is a huge topic in China. Public enforcement relates to the regulatory system and the court system, and China has much room for improvement. Private enforcement in the form of derivative actions has been robust following enactment of the 2006 company law. However, almost all of these actions are against limited liability companies rather than listed companies, which means that private enforcement through derivative actions has not been that useful in the capital markets.

PROFESSOR LIN: Access to internal information is always the key to effective internal monitoring, regardless of whether the monitors are internal corporate auditors or independent directors. If they do not have a sufficient amount of accurate, current information, they will be unable to monitor the company. So information flow is always the key to internal governance.

In Taiwan we sometimes put the internal auditors, who are removed from day-to-day management, directly under the chairman or the CEO. The role of these auditors is to make sure that every division reports the correct numbers, and nothing is hidden from top management.

Now we are talking about providing independent directors with similar access to the IT officer. Since today nearly everything inside a company is directly controlled by the IT system, the IT officer is probably the most powerful person next to the CEO in terms of how much information he can control. If independent directors can share the same access or authority as the top IT officer, that will be a very helpful improvement for access to internal information. We started this discussion because my university is located in Hsinchu, which is Taiwan's Silicon Valley. High-tech companies seem more willing to embrace this kind of idea.

B. Gatekeepers

PROFESSOR ARONSON: In the United States the term "gatekeeper" became very popular around the time of the passage of Sarbanes-Oxley. As you know, "gatekeeper" refers to accounting firms or other professional service providers that work with clients in the securities markets and are in a position to act as additional monitors to detect and prevent fraud.

One central feature of Sarbanes-Oxley was to take away the self-regulation of the auditing profession and create a new regulatory body under the SEC, the PCAOB, to regulate auditors of public companies. I note that outside audit firms were investigated in Japan's Olympus case, but nothing really happened to them. Is this new emphasis on the role of gatekeepers in the United States something that fits in better with the U.S. system and is not particularly relevant to East Asia? Or is this a new issue that professional service providers and others may be reluctant to embrace, but that nevertheless could make a significant contribution to improving corporate governance in Asia?

PROFESSOR KOZUKA: One of the differences between the United States and other jurisdictions may be that in the U.S. professional service providers are making big money so they have deep pockets. That is less true in other countries.

The concept of gatekeepers is known in Japan and I think in other countries as well, but you are correct in saying that it has not attracted much public attention. When the Olympus scandal occurred, the general public did not focus much on the role of the accounting firm. It focused more on the primary actors who carried out the window-dressing of accounts.

I am not sure whether it is a problem of law or systems, or whether it is a problem of perceptions or what some people may call culture. Anyway, it is true that the concept of gatekeeper has not attracted much attention in Japan.

PROFESSOR KIM: Following the Asian Financial Crisis two major accounting firms collapsed for the first time in Korean history. This was largely because of their poor accounting of some major conglomerates. Fifteen of our top thirty conglomerates collapsed as well.

It was a big shock to the system--that an accounting firm could collapse and also face liability. As a result, I argued that this installed discipline in the system. When I met with accountants they told me they were worried about liability. But I told them that the greater your potential accountability and liability, the higher your fees. They appreciated that.

That was in the late 1990s. After that, the focus on accounting firms unfortunately declined. However, our regulatory agencies have been strong and accounting firms are doing relatively well in meeting international accounting standards. I would say that the accounting profession is doing better than other gatekeepers such as credit agencies, analysts, and even lawyers.

However, as noted, they have not received enough attention recently. This raises the concern that without the incentive of potential sanctions, it is very difficult for them to resist the demands of company insiders.

VII. FUTURE ISSUES

A. Mixed Corporate Governance Systems

PROFESSOR ARONSON: We have talked today about shareholder systems in the United States and stakeholder systems in Asia. We have mentioned that in Asian stakeholder systems the board is typically actively involved in day-to-day management. At the same time, there is pressure from institutional investors and corporate governance reformers to strengthen monitoring on behalf of shareholders.

Is there any potential to develop a mixed model that retains the tradition and some of the strengths of the management board but at the same time incorporates a larger element of transparency, accountability, and monitoring? There are already some leading companies that are experimenting with mixed models, such as adding some independent directors to a management board system.

Is there a new mixed model of corporate governance emerging? How do we go about spreading the best practices being developed by leading companies more broadly? This is a broad question that is presumably being faced by every country in East Asia.

PROFESSOR KOZUKA: Any system is a mixed system in that there are simultaneous influences from the market, from abroad, and also from historical context.

As I noted in my previous remarks, the question is what kind of market our companies are placed in. Are they having a difficult time obtaining financing, or are they rather, as is currently the case in Japan, blessed with abundant capital and seeking business opportunities to deploy those funds? If these conditions coincide in many jurisdictions, then development of a similar mixed system will be observed.

I think in the Asian market, the situations are more or less similar, at least compared with the difference between the United States and Japan or the United States and Europe. And so there is a good chance that an overall form of Asian model will be developed in the region.

PROFESSOR LIN: I would say that in Taiwan we are staying with the shareholder supremacy model for now. Major shareholders and professional managers focus on how to promote shareholder interests as their primary goal, and they follow the shareholder supremacy model. On the other hand, the government remains concerned about externalities such as pollution or labor issues and plays a strong monitoring role. The State and companies have separate roles, and I am not sure whether those different roles can be described as an effort to develop a mixed model. Mixed models can theoretically result in the blurring of responsibilities, so I think the view in Taiwan is to stay with a single model that may be easier to operate.

PROFESSOR KIM: I think that for better or for worse we are drifting toward a more shareholder-oriented model. There is a growing consensus among investors and market watchers, policymakers, and academics that given our circumstances we have little choice.

The most popular phrase in Korea right now is "economic democratization." This concept was strongly advocated by every major presidential candidate in the most recent presidential election. Although it is not entirely clear what that means, one aspect would be reducing the control and influence of insiders and providing shareholders with sufficient rights. We are likely to continue on that path, and feel that there is little choice.

PROFESSOR SHEN: China is on track to be a hybrid regime in terms of its corporate governance system. But the direction and next step of reform depend on various factors. Among them, the most important factor is the pace of de-concentration of state ownership. This also affects the capital market's development. Other factors include reform of the political system, large commercial banks, and so on.

B. Regional Economic Harmonization and Corporate Governance

PROFESSOR ARONSON: I would like to ask the panelists to comment on East Asian and Asian economic harmonization. Despite recent political problems, the long-term trend has been, and likely will continue to be, increasingly strong economic relations among countries in East Asia and in Asia generally.

As a research topic, regional economic integration has become fairly popular. As Professor Uemura mentioned at the beginning of the conference, at Waseda University we have been taking the lead in an ambitious project to strengthen cooperation among capital markets throughout Asia by developing a broad professional corporate bond market.

In the future, will it also be necessary to begin to coordinate and harmonize corporate law, securities law, and corporate governance systems? If so, what is the best way to approach that goal? Would it be through a kind of regional regulation, the spreading of best practices, or some other method?

PROFESSOR SHEN: Prior to discussing legal harmonization, we probably need to focus on regulatory competition. Regulatory competition is frequently discussed in the context of American company law and EU company law. I focus part of my research on private equity and regulatory competition, particularly between mainland China and Hong Kong.

I find that most Chinese companies, especially private companies, are trying to list on overseas stock exchanges, in particular the Hong Kong Stock Exchange. These companies have utilized such foreign listings to substantially improve and upgrade their corporate governance systems. They have also improved their business performance. Empirical research in China has found a strong link between corporate governance and corporate performance for these companies.

There are two schools of thought in comparative corporate law jurisprudence. One emphasizes transplants, and holds that emerging markets can transplant some aspects of legal systems or legal norms from more advanced economies. The other school of thought is more about piggyback systems.

Chinese companies are probably piggybacking on Hong Kong's legal system or Hong Kong company law. This is an interesting topic, but is also different from harmonization. I do not see any trend for Hong Kong and China to harmonize their company law.

The legal regimes in China and Hong Kong may be too different to be harmonized. But one method to improve the corporate governance systems of Chinese companies is to push more Chinese companies to piggyback on the common law company law system of Hong Kong.

PROFESSOR KIM: There are three major areas with the greatest potential for harmonization. The first two are accounting and information disclosure. Another area that may not be a major focus of study, but in which harmonization may actually occur, is multinational companies.

Multinational companies want to minimize transaction costs, and as a result they would like to have very similar operations wherever they are located globally. This can be a powerful force for harmonization. Many of them are not necessarily listed companies. But in terms of accounting and disclosure requirements, I think there is going to be a significant trend toward harmonization. This trend will be encouraged by investors, as harmonization will make it easier for them to compare investments.

It will be substantially more difficult to achieve harmonization in hard-core areas of corporate law. I am recently more pessimistic than in the past about the possibility of any real harmonization or convergence.

PROFESSOR LIN: I share the view of Professor Kim. I think most of our theorists agree on the possibility that you can learn from other countries and try to figure out a best practice for everyone to utilize, and this is a view that I share. And I think the growing global markets, especially the capital markets, will be a very important factor for that harmonization, because companies now raise capital everywhere. So if there is really a need to raise capital from many other places, there is also a need to harmonize the law so that you can simplify procedures to save cost.

But on the other hand, I wish to emphasize the importance of having a very flexible governance structure. If you have very rigid governance rules about how a company should be run, that cannot lead to a practical approach that allows different companies to adapt their governance systems in accordance with their own situation and needs.

Accordingly, I think there is a need for and a trend toward harmonization, but that the model must be flexible enough to allow companies to evaluate their individual needs.

PROFESSOR KOZUKA: My view is close to that of Professor Lin. On one hand, we need a variety of models that will fit into various economic situations before talking about harmonization. On the other hand, there is a strong economic incentive not to have divergent or multiple systems for similar situations. I think that is reflected in the history of the harmonization of law.

Corporate law has very few, if any, precedents of harmonized or uniform law. For example, even in Europe, a complete harmonization of corporate law has not yet been successful. However, harmonization in practice has developed significantly, as in the case of accounting standards or financial regulations.

Accordingly, the trend will be to have a variety of models to respond to various situations, and then to apply like models to like situations.

VIII. QUESTION AND ANSWER

ATTENDEE: Thank you very much for the wonderful discussion. Taking this opportunity of having great professors from neighboring countries, I would like to ask each of you to give your candid view of Japanese corporate governance.

PROFESSOR LIN: I think there are three major forces that drive corporate governance.

The first is product market competition. A company must be run well enough to produce a competitive product. The second is government regulation and policy. The third is internal corporate structure, including the design of shareholder meetings, internal auditors, independent directors and so forth, to help the company operate effectively.

When considering Japanese corporate governance, I think it is necessary to identify the problem that is to be addressed. If the problem is economic performance, it is probably not strongly related to internal governance. But if the problem is asset tunneling or poor management, this may be very relevant to internal governance.

I prefer simple structures for governance so that every relevant person can easily understand his responsibility and accountability. For example, employees could feel responsible or loyal to a variety of people, ranging from a single person such as the CEO, to the board of directors, the shareholders' meeting, and to all constituencies or even the State. But the question of where the ultimate loyalty should lie should be scrutinized by asking whether this particular arrangement or design is easy to understand and follow.

Accordingly, if I could make one change to Japanese corporate governance, it would be to make things simpler. I would simplify the Companies Act and try to clarify what employees should work for and to whom they should owe their loyalty. I think that would result in a good improvement in corporate governance.

PROFESSOR KIM: It is a difficult question since I am an outsider.

On the positive side, I would say that Japan's system is both stable and resilient to shocks. There have been companies with corporate governance problems, but none of the spectacular crashes that occurred in the United States in the cases of Enron, WorldCom, or Lehman Brothers.

Japan was resilient enough to withstand major financial crises. As I mentioned previously, the Asian Financial Crisis was very traumatic for Korea. We needed to change as a result, and some say we changed too drastically. On the other hand, some people also say that due to such drastic change we were better able to withstand the Lehman shock and the most recent crisis.

The stability and resilience of Japan's system may also have a negative aspect, in that it makes the system more difficult to change.

Looking at corporate governance cases involving Olympus or Toyota, there was significant change at those companies but it was not as dramatic as I expected. My general impression is that in the end it seems like the system keeps on moving in the same direction.

PROFESSOR SHEN: I am not very knowledgeable about Japanese law, but I think China and Japan share some similarities in terms of market structure. One feature is the dominant role played by banks in the market. I am interested in the topic of how the banking system will be further reformed in Japan.

During my research project on private equity in China, my observation was that China can likely be categorized as a civil law system together with Japan and Germany. All of these countries have strong banking systems but a weak capital market. As a result, private equity is not as strong in China as in countries, like the United States. and the United Kingdom, that have a stronger capital market but a weaker banking system.

The other question is about how to adopt American legal concepts and norms in Japan. China is also working very hard to modernize its legal system and corporate governance system by adopting more American concepts like shareholder rights, derivative actions, and so on. As I stated previously, these transplanted concepts are not so successful in China. So I am also interested in knowing how Japan will move forward by transplanting and incorporating these concepts into its own system.

CONCLUSION

The panel discussion among four corporate law scholars from the major countries of East Asia highlighted both the challenges and potential rewards of cross-Asian comparisons and greater scholarly collaboration. Although there were differences among the specific corporate governance concerns being discussed in East Asian countries, the basic issue of corporate governance reform was broadly similar - to what extent, in what way, and for what purpose, should countries in East Asia with traditional stakeholder-oriented corporate governance systems featuring concentrated ownership and a board of directors involved in day-to-day management modify their systems to account for greater monitoring of management on behalf of shareholders?

Looking, for example, at the question of the introduction and functioning of outside directors, we can see variations of a theme: the traditional *kansayaku* or supervisors have not appeared to operate effectively, at least in the context of monitoring management, and to some extent they should be supplemented or replaced by outside directors. However, the scope and pace of such change varies considerably among countries in East Asia, and skepticism remains about the effectiveness of outside directors, at least while operating under existing corporate governance frameworks.

The issue of outside directors similarly illustrates the ongoing evolution and experimentation throughout East Asia in dealing with corporate governance reform. Every panelist spoke about systems in flux that were attempting to address certain corporate governance concerns; no one spoke as if they had successfully achieved the desired result and now had a satisfactory system in place for the long term.

Although all of the panelists are sophisticated corporate law scholars involved in comparative work, with some exceptions the main focus of comparison seemingly continues to be between a panelist's own country and the United States (or some other configuration of Western countries) rather than among countries in East Asia. Given the interesting similarities and differences among the countries represented by the panelists in dealing with broadly similar corporate governance concerns, there would seem to be rich potential for intra-Asian comparisons and a clear need for more collaborative research efforts to make such comparisons feasible.

If the panel discussion raised more questions than it answered, this again points to the continuing need for, and vast potential of, additional collaborative efforts.

APPENDIX

Table 1
Simplified Classification of Corporate Governance Systems

Type of system	Shareholder System (U.S./U.K.)	Stakeholder System (Japan/Germany)
Purpose	Maximization of shareholder wealth	Maximization of benefit for stakeholders and society
Ownership Structure	Widely dispersed	Concentrated
Monitoring	1950: Shareholders generally Today: Independent directors/institutional investors + markets	1950: Replace corporate auditors with shareholders generally (Japan); supervisory board (Germany) Today: Banks/financial institutions?
Main Problem	Agency costs – management will act in own self-interest, not in best interests of shareholders	Oppression of minority shareholders – management will act on behalf of controlling shareholder and against interests of minority shareholders
Solution to Main Problem	Reduce agency costs (protect shareholders generally from management) through legal rules and economic incentives	Protect minority shareholders from controlling shareholder through legal rules and economic incentives