NOTHING NEW IN THE (NORTH) EAST?
INTERPRETING THE RHETORIC AND REALITY OF JAPANESE CORPORATE GOVERNANCE*

As Japan emerges from a lost decade of economic stagnation, attention is also focusing on its corporate governance system. Shareholders are gaining ground vis-à-vis other stakeholders. This is also evident in a plethora of legislative reforms culminating in the consolidated Company Law of 2005, leading some to proclaim the Americanisation of Japanese Law. Part I of this paper outlines two pairs of views. It confirms significant but gradual transformation towards a more market-driven system, involving some modes of change paralleled elsewhere. In assessing change more broadly, Part II urges care in selecting the temporal timeframe and countries to compare, balancing blackletter law and wider socio-economic context, disclosing normative preferences, and focusing on processes as well as outcomes.

Introduction

Japan has recently reappeared on the radar screen of comparative corporate governance debates, including amidst the writings of commentators in Australia. At least three main factors underpin this renewed interest. One is contemporary concern about the perceived excesses of the Anglo-American model of corporate governance, focused on maximising shareholder value, in the wake of widespread corporate collapses in the United States and Australia (Hill 2005b). Japan has regained attention as promising a broader-based stakeholder model, giving weight also to the interests of core employees, creditors (especially the so-called main banks), key suppliers and customers (especially those in keiretsu corporate groups) (Acquaah--Gaisie 2005: 43). Indeed, with the Australia--US Free Trade Agreement recently entering in force, fears of further excessive Americanisation of Australian corporate law (cf von Nessen 1999) have led to calls for Australia to contest convergence by drawing on stakeholder models reportedly more prevalent in our region, notably in Japan (Clarke 2005: 118--29). This possibility is now reinforced by the potential for a full-scale FTA between Australia and Japan, leveraging off the looser Australia--Japan Trade and Economic Framework agreed upon in 2003. The Chief Justice of New South Wales, involved in negotiating the 1976 Australia--Japan Basic Treaty of Friendship and Cooperation, has recently called for FTAs to add provisions on cross-border judicial collaboration and enforcement (Spigelman 2006a; 2006b). Further steps could include a softer business law harmonisation agenda, as emerged under Australia's long-standing FTA with New Zealand, and eventually some supranational institutions or processes as in the European Union.

A second reason for greater interest recently in Japanese corporate governance is that its vast economy -- still many times larger than China's, for example -- seemed from 2005 finally to be pulling itself out of its lost decade (and a half) of economic stagnation. Indeed, the author of Japan: The System that Soured (Katz 1998) now contends that it will stun the world in its economic renaissance, albeit probably not for another decade -- following a tumultuous battle at the political level (Katz 2003: 10). Analysts at the Sydney-based Lowy Institute for International Policy have argued recently that Prime Minister Koizumi will leave already a fundamentally altered polity when he steps down on 20 September 2006 (Cook 2006), and that Japan is also ripe for reassessment in light of inter-related changes to Japan's foreign relations and its economy (Cook and McKay 2006).
Interest more specifically in Japanese corporate governance remains strong, moreover, because of some shocking events in 2006. On 23 January, prosecutors arrested a young idiosyncratic entrepreneur, Takafuli Horie, for engaging in schemes to inflate profits in his Internet and investment firm Livedoor. This generated such panic on the Tokyo Stock Exchange (TSE) that its trading system crashed. In June, Yoshiaki Murakami, an investment fund manager and former bureaucrat, was arrested for insider trading in Nippon Broadcasting Corporation shares knowing that Livedoor was interested in a hostile takeover in order to gain control of its Fuji Television subsidiary. Unlike the hapless Horie, Murakami was able first to appeal to the media, standing by his capitalist principles: What is wrong with making lots of money as long as you don’t break the rules? You all hate me because I made big profits. Unfortunately, he does seem to have breached securities law. By contrast, Horie and others in Livedoor seem to have exploited loopholes in substantive law (such as after-hours trading), rather like Enron, as well as benefiting from lax enforcement. In any event, the TSE is recovering, underpinned by Japan’s broader economic revival. Further, in late July 2006 Oji Paper Co. (Japan’s largest) launched a hostile bid for 6th-largest Hokuetsu – perceived as the first hostile takeover attempt in Japan by a major company of an industry rival. Arguing that this disturbs the order in the industry, 2nd-largest Nippon Paper moved to boost its own shareholding in Hokuetsu, which is also turning to Mitsubishi Corporation in defence. Thus, despite the downfall of Horie and Murakami, the taboo against takeovers appears to have been broken in Japan, as in Germany after Vodafone launched the largest-ever hostile takeover of Mannesmann in 1999 (Baum 2006: 61)