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## Politics of Japanese Corporate Governance Reform: Politicians do Matter

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# Politics of Japanese Corporate Governance Reform: Politicians do Matter

Manabu Matsunaka<sup>†</sup>

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## PART I: INTRODUCTION

What causes or drives changes in corporate law? By examining reforms in Japan, this paper insists that politicians matter. Specifically, a ruling party's interest in corporate governance is an important factor in changes of corporate law.<sup>1</sup>

Traditional views on economic rulemaking politics in Japan tend to focus on bureaucracy. In addition, there is a widespread belief that managers of large firms and business elites dominate the rulemaking process.

Recently, political scientists have offered more sophisticated perspectives on the question of what drives changes in corporate law.<sup>2</sup> Each of them focuses on political actors instead of political institutions as decisive factors of change in corporate governance. This paper focuses on two arguments: 1) Culpepper's research,<sup>3</sup> which shows that an issue's salience—the extent to which a political issue draws the electorate's attention—determines whether politicians are willing to intervene in corporate governance rulemaking, and 2) Cioffi and Höpner's discussions,<sup>4</sup> which insist that center-left parties play a critical role in pro-shareholder reforms and examine the mechanism of taking initiatives in corporate governance reforms.

In Japan, until the most recent reform in 2014, most changes in corporate governance have been consistent with Culpepper's theory. Before the 1997 reform, patterns of reforms clearly fit the theory: politicians only intervened in the rulemaking of corporate law when an issue's salience rose due to scandals or other exogenous shocks.<sup>5</sup> From the late 1990s, the governing party (the Liberal Democratic Party, or the "LDP") cooperated with business leaders in liberalizing corporate law under the longstanding economic stagnation following the collapse

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1. In this paper, I will not step into whether each seemingly "pro-shareholder" or "shareholder oriented" reform truly promotes the interests of shareholders. A "pro-shareholder" or "shareholder oriented" reform in this paper refers to a reform that aims to enhance the interests of shareholder although managers resist to it. This can be a questionable definition for a corporate law academics, but since most of debates in political science seem to paraphrase such a reform as a pro-shareholder or shareholder oriented one, I follow the trend in this paper.

2. For an overview of research by political scientists and researchers in other related fields, see Peter Gourevitch, *Explaining Corporate Governance Systems: Alternative Approaches*, in *THE TRANSITIONAL POLITICS OF CORPORATE GOVERNANCE REGULATION* 27 (Henk Overbeek, Bastian van Apeldoorn & Andreas Nölke eds., 2007); Ruth V. Aguilera & Gregory Jackson, *Comparative and International Corporate Governance*, 4 *ACAD. OF MGMT. ANNALS* 485 (2010); Michel Goyer, *Corporate Governance*, in *THE OXFORD HANDBOOK OF COMPARATIVE INSTITUTIONAL ANALYSIS* 423, 442 (Glenn Morgan et al. eds., 2010).

3. PEPPER D. CULPEPPER, *QUIET POLITICS AND BUSINESS POWER CORPORATE CONTROL IN EUROPE AND JAPAN* (2011).

4. John W. Cioffi & Martin Höpner, *The Political Paradox of Finance Capitalism: Interests, Preferences, and Center-Left Party Politics in Corporate Governance Reform*, 34 *POL. SOC'Y* 463 (2006); JOHN W. CIOFFI, *PUBLIC LAW AND PRIVATE POWER: CORPORATE GOVERNANCE REFORM IN THE AGE OF FINANCE CAPITALISM* 34 (2010).

5. See *infra* Part V.A.

of the bubble economy. Neither Culpepper or Cioffi and Höpner's theories explicitly discuss a type of politics during this period. While Culpepper's theory is that politicians are disinterested in corporate law issues during a low salience time, Cioffi and Höpner's theory emphasizes initiatives of center parties in pro shareholder reforms. However, the politics during this time also do not contradict these two theories.<sup>6</sup>

The most recent amendment of The Companies Act in Japan offers a good example that cannot be explained by existing theories without modifications: in the 2014 Amendment, conservative ruling party (the LDP) intervened against strong resistance by managers of firms without scandals or other exogenous shocks. Even after the amendment, the LDP continued with further reforms. This phenomenon is clearly against Culpepper's theory. It also does not fit the discussion by Höpner and Cioffi, since the LDP is conservative, not center-left.<sup>7</sup>

The LDP's movement from a simple reaction to high salience to its continued interests in corporate governance is the key to understanding the recent reforms. Further research is necessary to determine why the LDP has become interested in corporate governance. This paper offers a tentative explanation that the LDP raised the priority of shareholder interests because of the LDP's focus on economic growth, as well as other factors that weakened the LDP's ties with strong interest groups.

The next part summarizes political scientists' prior discussions. Part III briefly introduces the process of the 2014 Amendments of The Companies Act in Japan, focusing mainly on whether to mandate public firms to appoint at least one outside director to their boards. Part IV shows that politicians played a critical role in the 2014 Amendment. Part V discusses how politicians become interested in corporate governance reforms. The last part provides brief conclusions.

## PART II: RECENT DISCUSSIONS BY POLITICAL SCIENTISTS

Traditionally, political scientists debated whether political institutions or political actors are more important to changes of laws and policies. However, it is usually difficult to attribute relatively short-term changes in corporate law to a change in political institution, since political institutions do not change so frequently.<sup>8</sup> Therefore, recent studies have focused more on political actors than on political institutions.

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6. See *infra* Part V.B.

7. However, their arguments offer rich insights concerning in what circumstances politicians get interested in corporate governance reforms. See *infra* Parts II.B, V.E.

8. See Goyer, *supra* note 2, at 442. In contrast to a short-term change, diversities of corporate governance and related laws among different countries might be explained by the differences in political institutions. See, e.g., MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE (2003).

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## A. Coalition Theory

One discussion political scientists have centered around is Gourevitch and Shinn's coalition theory.<sup>9</sup> In their model: (1) political factors produce economic policies, including laws on corporate governance, (2) the economic policies affect shareholder structures, and (3) the shareholder structures give feedback to political factors<sup>10</sup> This paper focuses on the first step, where changes in political factors lead to changes in economic policies, including corporate law.

In Gourevitch and Shinn's argument, a political factor is defined as a set of coalitions between interest groups (managers, shareholders, and workers).<sup>11</sup> A coalition between interest groups is determined by each interest group's preference.<sup>12</sup> In turn, the type of political institution (majoritarian or consensus model) affects which coalition wins.<sup>13</sup> For example, if managers and workers have similar preferences (e.g., both want to exclude shareholders from having a large impact on the management of firms), they will form a coalition against shareholders. If the country in this example adopts consensus-based political institutions, the manager-worker coalition wins, leading to the protection of managers' autonomy from shareholders.<sup>14</sup> When a preference of an interest group changes, a coalition also changes. In the previous example, if the preferences of workers move close enough to those of shareholders, workers will deviate from managers and form a coalition with shareholders to confront the managers.<sup>15</sup>

Gourevitch and Shinn offer six types of coalitions.<sup>16</sup> For this paper, "corporatist compromise" coalition and "transparency" coalition are the two most important coalitions. Under the "corporatist compromise," insiders of firms, namely managers and workers, form a coalition against shareholders and the manager-worker coalition wins.<sup>17</sup> This leads to weak minority shareholder protections, which lead to concentrated shareholdings.<sup>18</sup> In contrast, "transparency" coalition produces strong shareholder protections.<sup>19</sup> Here, workers form a coalition with shareholders instead of managers, demanding transparency and protections of shareholder rights. A key for "transparency" coalition is a shift from the preference of workers towards that of shareholders. Gourevitch and Shinn argue that

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9. PETER A. GOUREVITCH & JAMES SHINN, *POLITICAL POWER AND CORPORATE CONTROL: THE NEW GLOBAL POLITICS OF CORPORATE GOVERNANCE* (2005).

10. *Id.* at 16 fig.2.1, 58 fig.4.1.

11. *Id.* at 22-26.

12. *Id.* at 22-25, 59-67.

13. *Id.* at 67-68.

14. This is "corporatist compromise", where minority shareholder protection is weak and shareholdings are concentrated. *Id.* at 64-65. The book recognizes that shareholdings in Japan during post-war period has been dispersed rather than concentrated, nevertheless puts post-war period Japan in this coalition. *See id.* at 167-77.

15. *See id.* at 65-66.

16. *Id.* at 23 tbl.2.3, 60 tbl.4.1.

17. *Id.* at 64-65.

18. *Id.* at 65.

19. *Id.*

workers indirectly become shareholders through having interests in pension funds.<sup>20</sup> Of course, indirect shareholdings through pension funds do not automatically lead to policies reflecting workers' preferences as shareholders. Their preferences will be reflected in policies only if pension funds themselves and institutional investors managing the investments of pension funds pursue interests as shareholders.<sup>21</sup> In sum, the theory suggests that the changes in workers' preferences lead to shareholder-oriented reform.

### *B. Center-left Parties Initiating Pro-Shareholder Reforms*

The second theory, offered by Cioffi and Höpner,<sup>22</sup> criticizes the discussion by Gourevitch and Shinn that workers' interests as shareholders are not as strong in countries such as Germany, where the social welfare system and public pension system are well established.<sup>23</sup> In addition, they argue that shareholder is not a strong interest group because in a country with a sophisticated equity market, shareholders suffer from collective action problems, while in a country with a poor equity market, there are few investors pursuing pure shareholder interests.<sup>24</sup> Instead of focusing on interest groups, Cioffi and Höpner's theory focuses on center-left political parties. They argue that a consistent pattern in the recent pro-shareholder reforms is a center-left government, supported by financial institutions, taking an initiative in the reforms.<sup>25</sup> By contrast, conservatives have resisted those reforms because of their close ties to managers of large firms.<sup>26</sup>

A center-left party pursuing interests of shareholders might be rather paradoxical in terms of traditional ideological distributions. Cioffi and Höpner argue that the following factors account for the paradox: exogenous economic factors, push factors for center-left parties to pursue the reforms, and pull factors for conservatives from endorsing the reforms.<sup>27</sup> Although several economic factors created a favorable environment for pro-shareholder reform,<sup>28</sup> they emphasize the

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20. *Id.* at 208-10. *See also id.* at 213-23.

21. *Id.* at 273-75.

22. Cioffi & Höpner, *supra* note 4 offered the center-left party theory based on comparative case studies of the U.S., Italy, France and Germany. CIOFFI, *supra* note 4 further develops the theory by examining Germany and the U.S. cases in depth.

23. CIOFFI, *supra* note 4, at 33.

24. *Id.* at 32-33.

25. *Id.* at 235; Cioffi & Höpner, *supra* note 4, at 485. However, Schnyder points out that there is a problem in sample selection of their research. In his comparative research on Netherlands, Sweden and Switzerland, a shareholder-oriented reform by a center-left party took place in the former two countries, but not in Switzerland. Gerhard Schnyder, *Revisiting the Party Paradox of Finance Capitalism: Social Democratic Preferences and Corporate Governance Reforms in Switzerland, Sweden and Netherlands*, 44 COMP. POL. STUD. 184, 198-204 (2011).

26. Cioffi & Höpner, *supra* note 4, at 485-87.

27. *Id.* at 485.

28. *Id.* at 485-86 (pointing out (1) the internationalization of financial markets, services, and investments, (2) an intensified international competition leading to pressures for further restructuring by firms, (3) economic stagnations, which led to fiscal crises and unemployment problem, (4) growth of individual and institutional shareholdings, and (5) successive corporate finance scandals).

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role of political actors who drove reforms as a response to the economic pressures.<sup>29</sup> Faced with longstanding economic stagnation, center-left parties needed policies for promoting economic growth in order to gain support from electorates. While governments in advanced economies have suffered from fiscal limitations and traditional industrial policies have been ineffective, financial markets—especially equity markets—have advanced. In this situation, center-left governments initiated shareholder-oriented reforms to achieve higher returns on equity and further innovation.

Paying close attention to economic growth and initiating shareholder-oriented reform enabled center-left parties to keep existing supporters, as well as acquire support from electorates who did not support left ideologies.<sup>30</sup> At an interest group level, these led to a coalition between labor unions and financial institutions.<sup>31</sup> In contrast to center-left parties, conservative (center-right) parties did not endorse pro-shareholder reforms because of their longstanding strong ties with managers.<sup>32</sup>

### C. *Quiet Politics*

Culpepper starts by questioning an implicit premise of the former discussions: do electorates, and hence politicians, care about corporate law at all?<sup>33</sup> He asserts that prior research has unconsciously handled all policy issues as high salience issues, or those that electorates are interested in, but corporate law issues are technical and complicated, and therefore do not always attract interests of most of the electorate.<sup>34</sup> Lawmaking in a low salience field requires a different mechanism than in a high salience field.<sup>35</sup> By using the concept of salience, Culpepper focuses on an extent of the electorate's attention as a major explanatory

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29. The following explanations in this paragraph are based on CIOFFI, *supra* note 4, at 24-27, 36-37; Cioffi & Höpner, *supra* note 4, at 487-89.

30. Although promoting economic growth is not included in traditional ideologies of center-left parties, limiting the power of managers of large firms fits into their traditional policies, which was supportable for existing supporters. CIOFFI, *supra* note 4, at 36.

31. *Id.*

32. Cioffi & Höpner, *supra* note 4, at 486-87 shows this tendency of conservatives by comparative studies of the four countries.

33. CULPEPPER, *supra* note 3, at 3.

34. *Id.* at 3-5.

35. *Id.* at 5. Culpepper's arguments are mostly on law makings on takeovers, but it can be applied to other issues of corporate governance. Indeed, in chapter six, he examines his theory by case studies on law makings on management compensation in France and the U.S. See Manabu Matsunaka, *Book Review: Quiet Politics and Business Power: Corporate Control in Europe and Japan*, by Pepper D. Culpepper, 16 SOC. SCI. JAPAN J. 320, 321 (2013).

variable.<sup>36</sup> A high salience issue, such as a tax or pension issue, is of great concern to the electorate, while a low salience issue, such as most of patent or civil procedure issues, is mostly neglected by electorate.<sup>37</sup>

Since the electorate and public are not interested in low salience issues, the media also pays little attention to them, and politicians have less incentive to use their resources on them. This makes room for an interest group with strong stakes in the issue and abilities to solve collective action problems to exert strong influence on lawmaking.<sup>38</sup> In the case of corporate law, those interest groups are often business elites (managers), institutional investors, and insider block holders.<sup>39</sup> Managers in particular tend to dominate lawmaking on low salience issues because they have political resources which shareholders lack.<sup>40</sup>

Another factor in Culpepper's model is whether rulemaking is done in a formal way or an informal way.<sup>41</sup> A typical example of formal rulemaking is an act created by a parliament.<sup>42</sup> Another type of formal rulemaking includes rules made by a government agency with authorities delegated by a law, such as ordinances in Japan or rules made by the SEC in the United States.<sup>43</sup> In contrast, self-regulations by industrial associations or non-legal guidelines by government committees are examples of informal rulemakings.<sup>44</sup>

It is unclear whether the Japanese basic law rulemaking style is formal or informal. In Japan, the National Diet of Japan, the national legislature, enacts any acts, including basic laws such as the Companies Act, at the final stage of lawmaking.<sup>45</sup> However, principles and basic ideas for an amendment of basic laws are formed at the Legislative Council under the Ministry of Justice.<sup>46</sup> After the staff of the ministry draft each article of a bill based on a report by the Legislative Council, the bill is submitted to the Diets by the Cabinet.<sup>47</sup> Culpepper's

36. Culpepper uses numbers of newspaper articles reporting an issue as a proxy for the level of salience of the issue. The ideal data for salience is data from a broad survey on a relative importance of particular issue among various policy issues, but since it is extremely difficult to obtain such data, he uses the number of newspaper articles as a proxy. See CULPEPPER, *supra* note 3, at 20-21.

37. *See id.* at 5.

38. *Id.* at 5-6.

39. *Id.* at 6.

40. *Id.* at 9-11. These political resources include expertise held through lawyers hired by firms, a representation on a meeting in which basic policies on an amendment is discussed (such as the Legislative Council in Japan), and influences on a framing by media.

41. *See id.* at 11-13, 180-85.

42. *See id.* at 181.

43. Culpepper seems to regard a rulemaking by bureaucrats as a kind of formal rulemakings. *See id.* at 182-83. For an example of a rulemaking by the SEC, see *id.* at 156-58.

44. *See id.* at 180.

45. *See* NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 41 (Japan).

46. For the process of deliberation at the Legislative Council and its sections, see Gen Goto, Manabu Matsunaka & Souichirou Kozuka, *Japan's Gradual Reception of Independent Directors: An Empirical and Political-Economic Analysis*, in INDEPENDENT DIRECTORS IN ASIA 135, 160-66 (Dan Puchniak, Harald Baum & Luke Nottage eds., 2017).

47. For an overview of the process of Japanese legislation, see Cabinet Legislation Bureau, *The Law-Making Process*, <http://www.clb.go.jp/english/process.html> (last visited Aug. 5, 2017).



distinction between formal and informal rulemaking becomes unclear when we are to apply his distinction to the process of Japanese basic law rulemaking above. Culpepper generally classifies rulemaking by a government agency with a formal authority as formal.<sup>48</sup> In the chapter discussing rulemakings on hostile takeovers in Japan, he regards the guidelines,<sup>49</sup> deliberated at the Corporate Value Study Group (CVSG)<sup>50</sup> and issued by the Ministry of Economic, Trade and Industries (METI) and the Ministry of Justice (MOJ), as informal.<sup>51</sup> However, since the level of salience is the dominant factor in his model,<sup>52</sup> this lack of clarity will not seriously hamper us from applying his model to the recent reforms in Japan.

Under Culpepper's model, politicians have the greatest influence, and managers have the least influence, in formal rulemaking on a high salience issue.<sup>53</sup> On the other hand, managers have the strongest power in an informal rulemaking on a low salience issue to which politicians are indifferent, and hence exert less influence.<sup>54</sup> An informal rulemaking on a high salience issue and a formal rulemaking on a low salience issue lie between the two extremes.<sup>55</sup> Although Culpepper shows examples of the latter two types of rulemakings,<sup>56</sup> his explanations put greater weight on salience than on the modes (formal or informal) of rulemakings throughout the book.

Furthermore, salience and the mode of a rulemaking are not independent from each other: since politicians are indifferent to a low salience issue, they tend to leave the issue to an informal rulemaking.<sup>57</sup> In addition, Culpepper argues that for formal rulemaking on a low salience issue, bureaucrats play a large role and managers can persuade them using expertise (such as by utilizing experts),<sup>58</sup> which becomes very similar to the mechanism of an informal rulemaking on a low salience issue. Therefore, we can understand that the dominant factor in his model is salience, rather than the mode of rulemaking.

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48. See *supra* note 43 and accompanying text.

49. Ministry of Economy, Trade and Industry & Ministry of Justice, Guidelines Regarding Takeover Defense for the Purposes of Protection and Enhancement of Corporate Value and Shareholders' Common Interests (2005) (Japan), [http://www.meti.go.jp/policy/economy/keiei\\_innovation/keizai-housei/pdf/shishin\\_hontai.pdf](http://www.meti.go.jp/policy/economy/keiei_innovation/keizai-housei/pdf/shishin_hontai.pdf).

50. The CVSG is formed under METI in 2004 to discuss policy and legal issues on hostile takeover defenses. Corporate Value Study Group, Corporate Value Report (2005), [http://www.meti.go.jp/policy/economy/keiei\\_innovation/keizaihousei/pdf/houkokusyo\\_hontai\\_eng.pdf](http://www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/pdf/houkokusyo_hontai_eng.pdf). The CVSG publicized a final report on the same day the two agencies publicized the guidelines. The guidelines explicitly refer to the report as a source of their proposals. Ministry of Economy, Trade and Industry & Ministry of Justice, *supra* note 49, at 2-3.

51. Culpepper, *supra* note 3, at 143.

52. See *id.* at 11-12, 183.

53. *Id.* at 90 fig.7.1.

54. *Id.*

55. *Id.*

56. *Id.* at 182-84.

57. *Id.* at 11-12.

58. *Id.* at 183.

## PART III: 2014 AMENDMENTS OF COMPANIES ACT

In 2014, the Companies Act experienced a substantial amendment for the first time since it was separated from the Commercial Code by a 2005 reform.<sup>59</sup> The 2014 Amendment involved broad topics other than the issue of outside director discussed below.<sup>60</sup> For example, regarding corporate governance, the Amendment created a new type of governance system mainly for large public firms (a company with audit and supervisory committees)<sup>61</sup> and introduced a double-derivative suit in a very limited manner.<sup>62</sup> The reform also covered issues on M&A, such as limiting the power of a board to issue shares leading to a transfer of corporate control,<sup>63</sup> and creating a new method for squeeze-outs.<sup>64</sup> The most fiercely debated topic was whether to mandate listed firms to appoint at least one outside director.<sup>65</sup> This part will present a summary of the amendment process focusing on the outside director issue. A detailed timeline of the amendment process and related events are shown in Table 1.

**Table 1: The Procedure of the 2014 Companies Act Amendment regarding Outside Directors**

Date	The Legislative Council and the MOJ	Activities of Politicians	Other events
2009.7		DPJ “Toward the Legislation of Public Corporation Law”	
2009.9.16		Hatoyama Cabinet (DPJ) was inaugurated.	
2010.2.24	Consultation to the Legislative Council No. 91		
2010.4.28	The first meeting of the		

59. Act for Partial Amendment of the Companies Act (act no. 90 of 2014) (Japan). Before the 2005 Amendment, Japanese corporate law was organized by the part two of the Commercial Code and other relevant acts. The amendment not only made substantial modifications to the contents of those laws but also integrated them into an independent act as the current Companies Act. Formally, there were 13 amendments before the 2014 Amendment to the Companies Act. However, they were technical amendments, which usually accompanied amendments of other laws. The 2014 Amendment is usually regarded as the first substantial amendment to the Companies Act. *See, e.g.,* Gen Goto, *The Outline for the Companies Act Reform in Japan and Its Implications*, 35 ZEITSCHRIFT FÜR JAPANISCHES RECHT (JOURNAL OF JAPANESE LAW) 13, 14 (2013).

60. For an overview of the amendment, see Goto, *supra* note 59, at 17-30.

61. *See* Companies Act, art. 328, para. 1 (act no. 86 of 2005) (amended 2014) (Japan).

62. *Id.* art. 847-3.

63. *Id.* art. 206-2.

64. *See id.* art. 179-1, para. 1.

65. *See* Goto, *supra* note 59, at 17. *See also* Shinsaku Iwahara, *Kaisyahōsei no Minaoshi ni kansuru Yōkōan no Kaisetsu I* [Explanatory Comments on “The Draft Outline for the Amendment of Companies Act” I], 1975 SHŌJI HŌMU [COM. L. REV.]4, 10-12 (2012).

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	Corporate Law Section (CLS) of the Legislative Council (LC)		
2010.5.14		LDP “Japan Phoenix Strategies”	
2010.6.4		Kan Cabinet (DPJ) was inaugurated.	
2010.8.25	The first round of the CLS starts (4th meeting).		
2011.1.26	The second round of the CLS (9th meeting).		
2011.3.11	Suspension of the discussions at CLS because of the great earthquake.		The great earthquake at <i>Tohoku</i> region.
2011.7.27	Restarting the discussion at the CLS (11th meeting)		
2011.9.2		Noda Cabinet (DPJ) was inaugurated.	
2011.9.7			The <i>Daiō Seishi</i> scandal uncovered.
2011.10.14			<i>Olympus</i> discharges Woodford from its CEO.
2011.11.8			<i>Olympus</i> discloses the past non-disclosures of large losses.
2011.12.7	The 16th meeting of the CLS: adopts the interim report and puts on public comment (notice and comments) procedure.		
2012.1.13		The first reshuffle of Noda Cabinet (DPJ)	
2012.2.22	The third round of the CLS starts (17th meeting).		
2012.4.1		LDP “On the Reform Proposal of Corporate Governance”	
2012.4.12		DPJ “An Interim Proposal toward Reinforcing Corporate Governance”	

2012.4.18	The 19th meeting of the CLS: discussions on outside directors		
2012.6.4		The second reshuffle of Noda Cabinet (DPJ)	
2012.6.13	The 21st meeting of the CLS: the first appearance of “comply or explain” approach.		
2012.7.18	The 23rd meeting of the CLS: proposals of a new version of “comply or explain” approach.		
2012.8.1	The 24th meeting of the CLS: the final draft of the Outline on the Amendments of CA adopted.		
2012.9.7	General meeting of LC: The Outline for the Amendments of CA adopted.		
2012.10.1		The third reshuffle of Noda Cabinet (DPJ)	
<b>2012.11.16</b> <b>-12.16</b>		The dissolution of House of Representatives (HR). LDP wins the general election.	
2012.12.26		Abe Cabinet was inaugurated.	
2013.5.10		LDP “The Interim Proposals”	
2013.6.13		LDP “The Proposals on Adaptations to International Accounting Standards”	
2013.6.14		Cabinet resolution “Japan Revitalization Plan: Japan is Back”	
2013.6.20		LDP “J-Files (Manifesto of the LDP 2013)”	
2013.11.29	Proposals for amendment of CA and related laws by		

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	the Cabinet at 185th Diet (Proposal by the Cabinet no. 22 & 23)		
2014.4.23	The bill passes the Judicial Committee of the HR.		
2014.4.25	The bill passes the Plenary Sitting of the HR.	A group of Diet members of DPJ and other parties submit another proposal to amend CA (Proposal to HR no. 15 at 186th Diet).	
2014.6.19	The bill passes the Judicial Committee of the House of Councillors (HC).		
2014.6.20	The bill passes Plenary Sitting of the HC.		
2014.6.27	The amendment of CA promulgated as Law no. 90 of 2014.		

### A. Background of the 2014 Amendment on Outside Directors

Before the amendment, a listed firm could choose between being a company with a board of *kansayaku* (statutory auditors), in which directors manage a company and *kansayaku* monitor the directors' management, or a company with a committee structure.<sup>66</sup> The former is the traditional type of Japanese corporate governance in which a company must have a board of directors and a board of *kansayaku*.<sup>67</sup> Half or more of *kansayaku* had to be outside *kansayaku*<sup>68</sup> (this is

66. See Companies Act, art. 327, paras. 3-4 (2005) (amended 2014); Tokyo Stock Exchange, Securities Listing Regulations, art. 437, para. 1, item 2 (2013) (amended 2015). The 2014 Amendment of the Companies Act and the following amendment of the Listing Regulations enabled firms to choose another type of corporate governance, a company with an audit and supervisory committee. See Companies Act, art. 327, paras. 2-4, 6 (amended 2014); Tokyo Stock Exchange, Securities Listing Regulations, art. 437, para. 1, item 2 (amended 2015). A company with an audit and supervisory committee has no *kansayaku* (Companies Act, art. 327, paras. 3-4 (amended 2014) but has a committee with the majority of its members being outside directors (*id.* art. 331, para. 1) that plays the audit role and to some extent other monitoring functions (*id.* art. 329-2, para. 3). This type of company lies in-between traditional *kansayaku* system and a board with a committee structure. For the general description of a company with an audit and supervisory committee, see Iwahara, *supra* note 65, at 5-8.

67. See Companies Act, art. 2, item 10 & art. 327, para. 1, item 2 (amended 2014). In addition to a board of *kansayaku*, a large company and/or a listed company must appoint an accounting auditor who must be qualified as a CPA or an auditing firm consisting of CPAs. *Id.* art. 328; Tokyo Stock Exchange, Securities Listing Regulations, art. 437, para. 1, item 3 (amended 2015).

68. Companies Act, art. 335, para. 3 (amended 2014).

still true post-amendment), while the company did not have to appoint any outside directors.

A company with committees was introduced in the 2002 Amendment of the Commercial Code, which intended to let Japanese firms adopt a governance system similar to that of American firms.<sup>69</sup> This type of corporation cannot appoint *kansayaku*,<sup>70</sup> and the main role of the board of directors is to monitor managers rather than make daily business judgement decisions. Accordingly, a company with a committee structure has to form three committees (nomination, compensation, and audit committees) in order to perform the monitoring role effectively.<sup>71</sup> A majority of each committee's members must be outside directors,<sup>72</sup> which means at least two outside directors must be appointed.<sup>73</sup>

In 2012, 97.8% of the listed firms in the Tokyo Stock Exchange adopted the *kansayaku* system.<sup>74</sup> Also in 2012, 53.7% of the listed firms adopting the *kansayaku* system had at least one outside director,<sup>75</sup> though the Companies Act did not require companies with *kansayaku* to do so. When the agenda at the Corporate Law Section of the Legislative Council involved determining whether to mandate all listed firms to have at least one outside director, almost all listed firms stuck to the *kansayaku* system while half of them accepted appointing the outside directors.

### B. The Process of the 2014 Amendment of Companies Act

During the drafting of the 2014 Amendment, there were three proposed alternatives regarding outside directors: (a) a mandatory rule requiring listed firms to have at least one outside director, (b) maintaining the status quo, or (c) a “comply or explain” approach. Option (a) was a simple rule mandating listed firms to appoint outside directors, which affected roughly 40% of the listed firms without outside directors prior to the amendment.<sup>76</sup> Option (b) was to create no rule mandating companies with *kansayaku* to appoint any outside directors.<sup>77</sup> Option (c) did not force companies with *kansayaku* that had no outside director to appoint

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69. See Ronald J. Gilson & Curtis J. Milhaupt, *Choice as Regulatory Reform: The Case of Japanese Corporate Governance*, 53 AM. J. COMP. L. 343, 352-55 (2005).

70. Companies Act, art. 327, para. 2 (amended 2014).

71. *Id.* art. 2, item 12 & art. 400, para. 1.

72. *Id.* art. 400, para. 3.

73. The Companies Act does not prohibit a director of a company with committees to concurrently serve as a member of different committees. See *id.* art. 400.

74. Tokyo Stock Exchange, TSE-Listed Companies White Paper on Corporate Governance 1, 16 chart 14 (2013), <http://www.jpx.co.jp/english/equities/listing/cg/tvdivq0000008jb0-att/b7gje60000024usu.pdf>. However, some of the outside directors were not independent directors. See *id.* at 51-52.

75. *Id.* at 23.

76. HÖMUSHÖ MINJIKYOKU SANJIKAN-SHITSU [COUNSELOR'S OFFICE OF CIVIL AFFAIRS BUREAU, MINISTRY OF JUSTICE], KAISHA HÖSEI NO MINAOSHI NI KANSURU CHÜKAN SHIAN [INTERIM PROPOSAL CONCERNING REVISION OF COMPANIES ACT] 1 (2011) (Japan), <http://www.moj.go.jp/content/000084699.pdf>.

77. *Id.*

one, but it did require those firms to disclose the reason for not having any outside directors.<sup>78</sup> If (c) had been adopted, some listed firms without an outside director would appoint one, and the remaining firms would have to explain their reason for not appointing an outside director. Initially, only options (a) and (b) were on the table.<sup>79</sup> Some academics and a representative from the Securities Exchange insisted on (a) and opposed (b), while other academics and representatives from business associations, such as *Keidanren* (essentially managers of large firms), fiercely resisted (a) and supported (b).<sup>80</sup>

After it had become clear that the members of the Corporate Law Section of the Legislative Council (“Corporate Law Section”) would not reach an agreement, (c) was proposed as a compromise at the Corporate Law Section’s 21st meeting.<sup>81</sup> At the time, it was a pure “comply or explain” approach, which required listed firms to provide the reason for not having any outside directors.<sup>82</sup> However, a new version of (c) was proposed at the Section’s 23rd meeting.<sup>83</sup> The new proposal required large listed companies<sup>84</sup> with a board of *kansayaku* and no outside directors to disclose in the companies’ annual business report the reason why it would be “inappropriate” for them to appoint any outside directors.<sup>85</sup> In contrast to the initial version, this version clearly favors “comply” over

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78. HŌSEI SHINGIKAI KAISHA HŌSEI BUKAI [THE CORPORATE LAW SECTION OF THE LEGISLATIVE COUNCIL], DAI 21-KAI KAIGI GIJROKU [THE MINUTE OF THE 21ST MEETING] 1-2 (2012) (Japan), <http://www.moj.go.jp/content/000100831.pdf>.

79. HŌSEI SHINGIKAI KAISHA HŌSEI BUKAI [THE CORPORATE LAW SECTION OF THE LEGISLATIVE COUNCIL], DAI 4-KAI KAIGI GIJROKU [THE MINUTE OF THE 4TH MEETING] 27-28 (2010) (Japan), <http://www.moj.go.jp/content/000054772.pdf>; HŌSEI SHINGIKAI KAISHA HŌSEI BUKAI [THE CORPORATE LAW SECTION OF THE LEGISLATIVE COUNCIL], KAISHA HŌSEI BUKAI SHIRYŌ 2 [SECTION MATERIAL NO. 2], at 5 (2010) (Japan), <http://www.moj.go.jp/content/000052932.pdf>.

80. *See, e.g.*, THE CORPORATE LAW SECTION OF THE LEGISLATIVE COUNCIL, *supra* note 78, at 3-7. The chairperson of the Section also stated that business leaders fiercely resisted the mandatory rule. *See* Iwahara, *supra* note 65, at 10.

81. THE CORPORATE LAW SECTION OF THE LEGISLATIVE COUNCIL, *supra* note 78, at 1-2.

82. HŌSEI SHINGIKAI KAISHA HŌSEI BUKAI [THE CORPORATE LAW SECTION OF THE LEGISLATIVE COUNCIL], KAISHA HŌSEI BUKAI SHIRYŌ 21 [SECTION MATERIAL NO. 21], at 1 (Apr. 18, 2012) (Japan), <http://www.moj.go.jp/content/000097726.pdf>.

83. HŌSEI SHINGIKAI KAISHA HŌSEI BUKAI [THE CORPORATE LAW SECTION OF THE LEGISLATIVE COUNCIL], DAI 23-KAI KAIGI GIJROKU [THE MINUTE OF THE 23RD MEETING] 1 (2012) (Japan), <http://www.moj.go.jp/content/000101603.pdf>. In addition to the new version of the comply or explain rule, a supplementary resolution, recommending that stock exchanges provide in their listing regulations that listed firms make an effort to appoint at least one independent director (who, which must be qualified as an outside director) was proposed at the meeting. *See id.* at 5. The supplementary resolution was ultimately approved at the general meeting of the Legislative Council together with the outline for the 2014 Amendment. HŌSEI SHINGIKAI [THE LEGISLATIVE COUNCIL], KAISHA HŌSEI NO MINAOSHI NI KANSURU YŌKŌ [THE OUTLINE FOR THE AMENDMENT OF COMPANIES ACT] 28 (2012) (Japan), <http://www.moj.go.jp/content/000102013.pdf>.

84. A “large company” is defined as a stock company with capital of 500 million yen or larger or with debt of 20 billion yen or larger. Companies Act, art. 2, item 6 (act no. 86 of 2005) (amended 2014) (Japan).

85. HŌSEI SHINGIKAI KAISHA HŌSEI BUKAI [THE CORPORATE LAW SECTION OF THE LEGISLATIVE COUNCIL], KAISHA HŌSEI BUKAI SHIRYŌ 26 [SECTION MATERIAL NO. 26], at 1 (2012), <http://www.moj.go.jp/content/000100364.pdf>.

“explain” by raising the cost of making sufficient explanations.<sup>86</sup> The new version was ultimately adopted by the Corporate Law Section<sup>87</sup> at the General Meeting of the Legislative Council.<sup>88</sup> Under this proposal, the non-complying firms’ disclosures would be made in their annual business reports, whose contents were stipulated in the ordinance under the Companies Act.<sup>89</sup>

### C. An Intervention by the LDP

About two months after the adoption of the final report by the Legislative Council, the Democratic Party of Japan (DPJ)’s representatives (Prime Minister Noda and his Cabinet<sup>90</sup>) lost power and the House of Representatives was dissolved. Following a crushing victory by the LDP in the general election, Prime Minister Abe inaugurated his Cabinet in December 2012.<sup>91</sup> Immediately after the inauguration, the LDP and the Cabinet published several reports and proposals on their new policies, mainly focusing on economics, as shown in the second row of Table 1. It is notable that the LDP and Cabinet advocated for reforming corporate governance, including the board structure of listed firms. In May 2013, a working team of the LDP issued an interim report recommending the government to take action and ensure that listed firms had at least one outside director.<sup>92</sup> The next month, the Cabinet made a resolution towards economic recovery, which explicitly referred to corporate governance reforms, including the appointment

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86. See Goto et al., *supra* note 46, at 157-58.

87. HŌSEI SHINGIKAI KAISHA HŌSEI BUKAI [THE CORPORATE LAW SECTION OF THE LEGISLATIVE COUNCIL], DAI 24-KAI KAIGI GJIROKU [THE MINUTE OF THE 24TH MEETING] 5 (2012), <http://www.moj.go.jp/content/000102042.pdf>.

88. HŌSEI SHINGIKAI [THE LEGISLATIVE COUNCIL], DAI 167-KAI KAIGI GJIROKU [THE MINUTE OF THE 167TH GENERAL MEETING] 9 (2012), <http://www.moj.go.jp/content/000103130.pdf>.

89. THE LEGISLATIVE COUNCIL, *supra* note 83, at 5.

90. The Cabinet is formed by the Prime Minister and other ministers appointed by the Prime Minister. See NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 66, para. 1, art. 67, para. 1 (Japan).

91. The Minute of House of Representatives no. 1, 182th Special Sess., Dec. 26, 2012 Special Issue 1, at 6 (KANPŌ) [Official Gazette]; The Minute of House of Councillors no. 1, 182th Special Sess., Dec. 26, 2012 Special Issue 1, at 4 (KANPŌ) [Official Gazette] (Resolutions appointing Shinzo Abe as the 96th Prime Minister).

92. JIYŪ MINSHUTŌ NIHON KEIZAI SASEI HONBU [THE HEADQUARTER FOR REVIVING JAPANESE ECONOMY OF THE LDP], CHŪKAN TEIGEN [THE INTERIM PROPOSALS] 1, 29-30 (2013), [https://www.ji-min.jp/policy/policy\\_topics/pdf/pdf100\\_1.pdf](https://www.ji-min.jp/policy/policy_topics/pdf/pdf100_1.pdf).



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of outside directors.<sup>93</sup> In June 2013, the LDP reiterated its willingness to establish corporate governance reforms in its policy manifesto.<sup>94</sup>

Based on these reports and proposals, the Abe government inserted a new article in the bill for amending the Companies Act.<sup>95</sup> As noted earlier, an amendment proposal, discussed at a session of the Legislative Council, is drafted as a bill by the staff of the MOJ.<sup>96</sup> In standard practice, politicians of a ruling party do not intervene at the last minute of a bill's submission, since they are able to exert influence well beforehand, if so inclined. However, for this amendment, since the LDP came into power after the final report by the Legislative Council had been submitted to the Minister of Justice of the DPJ government, the LDP were not able to exert their influence in advance.

The new article 327-2 of the present Companies Act requires listed large companies with a board of *kansayaku* that have not appointed outside directors to explain the reason why it is "inappropriate" for the companies to have any such directors at its general shareholder meeting.<sup>97</sup> The scope of the rule and the content of the explanation are the same as the proposal of the final report by the Legislative Council.<sup>98</sup> However, there are two differences: (1) it adds (not replaces) further disclosure at a general shareholder meeting, and (2) the rule is provided in the Companies Act itself, in addition to the ordinance under the Companies Act.<sup>99</sup>

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93. THE CABINET RESOLUTION "JAPAN REVITALIZATION STRATEGY: JAPAN IS BACK" 15-16 (2013), [http://www.kantei.go.jp/jp/singi/keizaisaisei/pdf/en\\_saikou\\_jpn\\_hon.pdf](http://www.kantei.go.jp/jp/singi/keizaisaisei/pdf/en_saikou_jpn_hon.pdf). As for the outside director issue, the Cabinet proposed "amend[ing] the Companies Act and promote the installation of external directors who can supervise from an outsider's perspective without being bound to company constraints or interests." *Id.* at 15. A day before the Cabinet resolution, the Policy Research Council of the LDP referred to advancing appointments of outside directors and other reforms in a report on adaptation to international accounting standards among Japanese firms. JIYŪ MINSHUTŌ SEIMU CHŌSAKAI, KINYŪ CHOUSAKAI & KIGYŌ KAIKEI NI KANSURU SHŌHINKAI [THE FINANCIAL RESEARCH COMMISSION & SUBCOMMITTEE ON CORPORATE ACCOUNTINGS OF THE POLICY RESEARCH COUNCIL OF THE LDP], KOKUSAI KAIKEI KIUN HENO TAIŌ NI TSUITE NO TEIGEN [THE PROPOSALS ON ADAPTATIONS TO INTERNATIONAL ACCOUNTING STANDARDS] 7 (2013), [https://www.jimin.jp/policy/policy\\_topics/pdf/pdf111\\_1.pdf](https://www.jimin.jp/policy/policy_topics/pdf/pdf111_1.pdf).

94. JIYŪ MINSHUTŌ [THE LDP], J-FILE 2013: SŌGŌ SEISAKUSHŪ [MANIFESTO OF THE LDP 2013] 10 (2013), [https://jimin.ness.nifty.com/pdf/sen\\_san23/j-file-2013-06-27-1.pdf](https://jimin.ness.nifty.com/pdf/sen_san23/j-file-2013-06-27-1.pdf).

95. The Bill to Amend the Companies Act, Cabinet Submitted Bill no. 22, 185th Special Sess. 1, 60 (2014) (Japan), <http://www.moj.go.jp/content/000116474.pdf> (adding art. 327-2 to the Companies Act). See Saburō Sakamoto et al., *Heisei 26nen Kaisai Kaisyahō no Kaisetsu I* [Explanatory Comments on the 2014 Amendment of the Companies Act I], 2040 SHŌJI HŌMU [COM. L. REV.] 28, 34-35 (2014) (noting that there was a remark, which affected the final bill, at the Judicial Affairs Section of the Policy Research Council of the LDP that an article for urging listed firms to appoint outside directors should be created not only in the ordinance, but also in the main body of the Companies Act).

96. See *supra* text accompanying note 47.

97. Companies Act, art. 327-2 (act no. 86 of 2005) (amended 2014) (Japan).

98. See *supra* Part II.B.

99. Based on the final report of the Legislative Council, an article requiring firms without outside directors to disclose the reason why it is "inappropriate" for them to appoint any in their business reports was added in the ordinance under the Companies Act. KAISHA HŌ SHIKŌ KISOKU [ORDINANCE FOR ENFORCEMENT OF THE COMPANIES ACT], Ordinance No. 12 of 2006, art. 214, paras. 2-3 (Japan). The LDP Cabinet added the similar disclosure duties. See Companies Act, art. 327-2 (amended 2014) (providing for a similar duty to disclose at general meetings; ORDINARY FOR ENFORCEMENT OF THE COMPANIES ACT, art. 74-2 (providing for a similar duty to disclose in shareholder materials).

The first point entails a risk of rescission of resolutions made at a shareholder meeting when a director of a non-complying firm gives a false or misleading explanation for the firm's non-compliance.<sup>100</sup> Since managers of listed firms take the risk of rescission of a resolution seriously, adding the article 327-2 created an additional pressure to choose "comply". In addition, the MOJ added articles in the enforcement ordinance of the Companies Act that substantially prevent non-complying firms from making a formalistic explanation.<sup>101</sup>

In contrast, the second point is not necessarily significant from a purely legal perspective. However, there are symbolic and political implications. First, it demonstrates that the Companies Act is now formally embracing a board of directors with outsiders even for a company with *kansayaku*. This cuts into the deep-rooted values of post-war Japanese corporate governance, which respected autonomous governance by insiders. Even after the 2002 Amendment introduced the committee structure as an alternative, the traditional *kansayaku* system and the monitoring model, which utilized outside directors, were officially deemed to be equivalent.<sup>102</sup> The original version of the "comply or explain" approach reflect the attitude respecting autonomous decision making by firms. Second, from a political perspective, the LDP benefits because it can claim credit for a reform on a difficult issue of corporate governance by putting the relevant article in the Companies Act, rather than leaving the MOJ bureaucrats to set the rule in the ordinance.

#### PART IV: ROLES OF POLITICIANS IN THE 2014 REFORM

The process of the 2014 Amendment of the Companies Act clearly illustrates that politicians are important in the course of reforms purporting to enhance shareholder interests. There were no changes in the coalition of interest groups

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100. See Sakamoto et al., *supra* note 95, at 36-37; Shinsaku Iwahara et al., *Zadankai: Kaisei Kaisyahō no Igi to Kongo no Kadai Jō* [Round Table Discussion, Impacts and Future Issues of the Companies Act Amendment Part I], 2040 SHŌJI HŌMU [COM. L. REV.] 6, 11-12 (2014).

101. ORDINANCE FOR ENFORCEMENT OF THE COMPANIES ACT, art. 74-2, para. 3, art. 214, para. 3. The articles provide that a firm with the disclosure duty must explain the reason "in accordance with a circumstance of each company." This intends to prohibit the firms from relying on boilerplate language for the disclosure. See Sakamoto et al., *supra* note 95, at 36; Iwahara et al., *supra* note 100, at 10-11. For a discussion on an effect of the rule in English, see Goto et al., *supra* note 46, at 157-60. However, the actual risk of a recession by making a formalistic explanation is limited. For a detailed discussion on possible explanations for non-compliance under the 2014 amended Companies Act, see Wataru Tanaka, *Torishimariyakukai no Kantoku Kinou no Kyōka: Comply or Explain Rule wo Chūshin ni* [Improvements on the Monitoring Function of a Board of Directors: Focusing on Comply or Explain Rule], in RONTEN SHŌKAI HEISEI 26NEN KAISEI KAISYAHŌ [DETAILED DISCUSSIONS ON ISSUES CONCERNING THE 2014 AMENDMENT OF THE COMPANIES ACT] 17, 24-39 (Hideki Kanda ed., 2015).

102. See HŌSEI SHINGIKAI KAISHA HŌSEI BUKAI [THE CORPORATE LAW SECTION OF THE LEGISLATIVE COUNCIL], DAI 2-KAI KAIGI GJIROKU [THE MINUTE OF THE 2ND MEETING] 18 (2010), <http://www.moj.go.jp/content/000049083.pdf> (A representative from a business association noting that both types of governance structure have equivalent value).

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during the process. Rather, the LDP intervened at the last minute of the lawmaking process. Furthermore, differences in the policies between the DPJ and the LDP played critical roles.

### A. Can Coalition Theory Explain the 2014 Amendment?

According to the discussion by Gourevitch and Shinn,<sup>103</sup> there must be a change in the coalition of interest groups following changes in the preferences of the interest groups regarding a change in a rule. However, no change in the coalition can be observed during or before the 2014 Amendment. Therefore, we can reject the explanation that the reform to the board structure in the amendment was caused by “transparency” coalition<sup>104</sup> in their model.<sup>105</sup>

Labor Unions were one of the main supporters of the DPJ government. Backed by the DPJ, a representative from The Japanese Trade Union Confederation (“*Rengo*”) obtained a seat at the Corporate Law Section for the first time.<sup>106</sup> However, the representative was isolated from other members, partly because he insisted on providing employees with a right to appoint a member of a board of *kansayaku* and other proposals that were clearly against or irrelevant to the interests of other stakeholders.<sup>107</sup> As reflected in the remarks of the representative and attitudes at the Corporate Law Section meetings, *Rengo* was indifferent to the interests of shareholders and making a coalition with shareholders or specialists supporting shareholder-oriented reforms.<sup>108</sup> In addition, except for a representative from the Tokyo Stock Exchange in the Corporate Law Section, there were almost no members representing only the interests of institutional shareholders.<sup>109</sup>

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103. GOUREVITCH & SHINN, *supra* note 9. See *supra* Part II.A for details.

104. See GOUREVITCH & SHINN, *supra* note 9, at 65-66.

105. However, it should be noted that the failure to explain the 2014 Amendment in Japan does not mean a shareholder friendly reform never occurs in the path shown in the “transparency coalition”.

106. See Hōsei Shingikai Kaisha Hōsei Bukai Iin-tō Meibo [The Member Directory of the Corporate Law Section of the Legislative Council] 1 (2010), <http://www.moj.go.jp/content/000046842.pdf> (listing Naoto Ōmi, Deputy Secretary General of *Rengo*, as a member).

107. See HŌSEI SHINGIKAI KAISHA HŌSEI BUKAI [THE CORPORATE LAW SECTION OF THE LEGISLATIVE COUNCIL], *supra* note 102, at 22-31. The representative from *Rengo* also proposed giving workers legal rights to access information and express opinions on an M&A. *Id.* at 24.

108. One member of the Corporate Law Section explicitly criticized *Rengo*'s attitude, stating that they are narrowly focusing on the interests of workers, instead of turning their eyes to the common interests between shareholders and other stakeholders. *Id.* at 31-32.

109. See The Member Directory of the Corporate Law Section of the Legislative Council, *supra* note 106, at 1. Although a representative from the Pension Fund Association was a member of the section, the board of the association is dominated by directors who engage or previously engaged in managing pension funds of the member firms of the association. See Kigyō Nenkin Rengō-kai [Pension Fund Association], *Kigyō Nenkin Rengō-kai Yakuin Meibo* [The Directory of Board Executives], <https://www.pfa.or.jp/gaiyo/disclosure/disclosure02.html> (last visited Aug. 5, 2017). Typically, they are executive officers of the member firms themselves. Therefore, it is questionable to count a representative from the Pension Fund Association as a member with pure investor interests.

*B. Involvement of Politicians*

As discussed in the previous section, “transparency coalition” did not occur. Politicians, not interest groups, played an important role in the formation of this policy, and the preferences of ruling parties did matter. As discussed in Part III, the LDP intervened in the lawmaking process by adding article 327-2.<sup>110</sup> In the process of deliberation at the Corporate Law Section, it was difficult to further the idea of encouraging (or forcing) listed firms to appoint outside directors.<sup>111</sup> Thus, as a compromise between the opposing viewpoints, the Section decided to insert the variation of the “comply or explain” rule in the ordinance under Companies Act.<sup>112</sup> Just after returning to power, the LDP advanced the policy of promoting an appointment of outside directors. This example illustrates that politicians may be able to achieve what cannot be done under a rulemaking process where each interest group usually holds *de facto* veto power.<sup>113</sup>

Furthermore, in contrast to the LDP, the DPJ did not substantially make any interventions or try to influence the deliberation process of the Corporate Law Section in a shareholder-oriented manner. Although the DPJ government had the formal power to intervene in or influence the process, they did not exercise that power for two reasons: (1) the LDP were prioritizing the interests of employees rather than shareholders and (2) they viewed corporate governance reform as a tool for preventing illegal and unfair behavior of management, not for enhancing efficient management.<sup>114</sup>

The DPJ’s modest employee-oriented interventions in the rulemaking process reflect the first reason. At the beginning of the deliberation process, the DPJ government made some modest interventions, though not shareholder-oriented ones. First, the Minister of Justice of the DPJ government referred to “the necessity for securing further trusts from various stakeholders” as a basic objective of the amendment, in the consultation to the Legislative Council.<sup>115</sup> This essentially

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110. See *supra* Part III.C.

111. See THE CORPORATE LAW SECTION OF THE LEGISLATIVE COUNCIL, *supra* note 78, at 2-7.

112. See THE CORPORATE LAW SECTION OF THE LEGISLATIVE COUNCIL, *supra* note 83, at 1-5; Sakamoto et al., *supra* note 95, at 34. For the details of the variation of “comply or explain” approach, see *supra* Part III.B.

113. *Shingikai* (Councils) and other government committees making proposals to the ministers (such as the Legislative Council) and its subordinate groups (such as the Corporate Law Section), formally adopt the plurality voting rule. See e.g., HŌSEI SHINGIKAI REI [ORDINANCE ON THE LEGISLATIVE COUNCIL], Ordinance No. 134 of 1949, art. 7, para. 2 (Japan). However, when making a final decision, it is a convention to make the utmost effort to obtain unanimous consent from members. For a general discussion, see AKIRA MORITA, KAIGI NO SEJIGAKU II [POLITICS OF GOVERNMENT COUNCILS II] 62-72, 131-32 (2014). Therefore, even when members supporting a change in the status-quo compose the majority, they usually try to persuade opposing minority members. Opposing members have incentives to resist unless probabilities of a decision by voting is not high enough.

114. See *infra* note 124 and accompanying text.

115. SHIMON DAI KYŪ JŪ ICHI-GŌ [CONSULTATION BY MINISTER OF JUSTICE TO THE LEGISLATIVE COUNCIL NO. 91], <http://www.moj.go.jp/content/000023763.pdf>.

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meant prioritizing the interests of non-shareholder stakeholders in the amendment—specifically, the employees.<sup>116</sup> Second, as mentioned above, the DPJ government influenced the selection of members of the Corporate Law Section to include a representative from a labor union.<sup>117</sup> At this stage, it was unclear whether the DPJ was interested in corporate governance reforms for shareholder interests as the DPJ had made their non-shareholder-oriented view clearer.<sup>118</sup>

Right after the scandals at *Daiō Seishi* and *Olympus* were revealed,<sup>119</sup> the DPJ formed another working team to consider corporate governance reform.<sup>120</sup> The working team made an interim proposal in April 2012.<sup>121</sup> Although voices within the DPJ advocated for requiring listed firms to appoint outside director(s), the proposal did not adopt the idea and instead only referred to the appointment of outside director(s) in an unclear manner.<sup>122</sup> The DPJ also did not seem to exercise any influence on the deliberation of the amendments of the Companies Act at the Corporate Law Section afterwards.

The responses by the LDP contrast sharply with those of the DPJ. The LDP not only intervened in the lawmaking process but was also (and still is) interested in corporate governance reforms.

This difference can be traced to differences in the two parties' views on corporate governance reform.<sup>123</sup> Even when the DPJ referred to outside directors,

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116. Keiko Chiba, then Minister of Justice, remarked at the general meeting of the Legislative Council for making the consultation that “companies have various stakeholders. They have large presence at the current society. In light of the important social and economic roles played by companies, the laws on companies must win the trust from these broad range of stakeholders of companies.” HŌSEI SHINGIKAI [THE LEGISLATIVE COUNCIL], DAI 162-KAI KAIGI GIJUROKU [THE MINUTE OF THE 162ND GENERAL MEETING] 1 (2010), <http://www.moj.go.jp/content/000036301.pdf>.

117. See *supra* note 106 and accompanying text.

118. See MINSHUTŌ KŌKAI KAISYAHŌ PROJECT TEAM [PROJECT TEAM FOR PUBLIC CORPORATION LAW OF THE DPJ], KŌKAI KAISYAHŌ (KASYŌ) NO SEITEI NI MUKETE [TOWARD THE LEGISLATION OF PUBLIC CORPORATION LAW (TENTATIVE)] 1-2 (2009), [http://www.nikkei.co.jp/hen-sei/comp09/pdf/comp09\\_2.pdf](http://www.nikkei.co.jp/hen-sei/comp09/pdf/comp09_2.pdf). In this tentative report, the project team pointed out that “purposes of outside directors are not achieved” as an example of problems in corporate governance from equity market’s perspectives. *Id.* at 2. The project team proposes to tighten the qualifications of outside directors. *Id.* at 3. However, they do not discuss which “purpose” or functions of putting outsiders on a firm’s board are impaired or which part of the qualifications they want to strengthen. On the other hand, the project team clearly pointed out that employees have no say under the Companies Act except for the dissolution stage and proposes to create employee representative *kansayaku* system. *Id.* at 2-3.

119. For a relationship between the scandals and Japanese corporate governance system, see Bruce E. Aronson, *The Olympus Scandal and Corporate Governance Reform: Can Japan Find a Middle Ground between the Board Monitoring Model and Management Model?*, 30 UCLA PAC. BASIN L.J. 93 (2012).

120. See, e.g., *Kigyō Tōchi Kyōka he Kentō Chīmu Secchi: Minshu ga Houshin* [Creating a Working Team for Considering Improvements on Corporate Governance: The DPJ Decideds a Basic Policy], NIHON KEIZAI SHINBUN 1, 3 (2011); *Kigyō Tōchi Kyōka Saku, Nendonai ni Teigen* [Proposals for Improving Corporate Governance to be Made within the Fiscal Year], NIHON KEIZAI SHINBUN 1, 2 (2011).

121. *Syagai Torishimariyaku Sennin Gimuka ha Miokuri: Minshu ga Chūkan Teigen* [Mandatory Appointment of Outside Directors Abandoned: The DPJ Made an Interim Proposal], NIHON KEIZAI SHINBUN 1, 4 (2012). The original interim proposal has not been publicly disclosed by the DPJ.

122. *Id.*

123. See Manabu Matsunaka, *Corporate Governance to Seiji Katei* [Corporate Governance and Political Process] in CORPORATE GOVERNANCE KAIKAKU NO TEIGEN [PROPOSALS TOWARD CORPORATE GOVERNANCE REFORMS] 429, 471-72 (Zenichi Shishido & Gen Goto eds., 2016).

the DPJ mainly expected to prevent illegal actions and other misbehavior by a firm's management.<sup>124</sup> In addition to the DPJ's employee-oriented preferences, its perspective on corporate governance was the second reason for not making any shareholder-oriented interventions. By contrast, the LDP has regarded this reform as central to its policies toward economic growth since 2010.<sup>125</sup> Each policy manifesto and other relevant materials refer to the encouragement of the appointment of outside directors in public firms.<sup>126</sup> Interestingly, the LDP also refers to other reforms that company executives may resist even more strongly than the outside director issue, such as dissolving cross-shareholdings.<sup>127</sup>

Although the LDP still keeps close ties between *Keidanren* and other business associations, they have set their course for shareholder-oriented reforms and clearing resistance from company executives. Indeed, the Abe Cabinet decided to enact the Corporate Governance Code in June 2014.<sup>128</sup> Based on this decision, the Financial Services Agency (FSA), together with Tokyo Stock Exchange, formed an expert committee to draft the Code in August 2014. Finally, stock exchanges in Japan implemented the Code in June 2015.<sup>129</sup> The Code recommends that listed firms separate management and monitoring functions by asking firms consider utilizing non-executive directors.<sup>130</sup> It further requires (but without any sanctions for violations) listed firms to have at least two independent directors on their boards.<sup>131</sup> In addition, it suggests that appointing at least one-third of their directors as independent directors will be beneficial for some listed firms, though in a careful and nuanced manner.<sup>132</sup>

## PART V: HOW POLITICIANS HAVE BEEN INVOLVED IN CORPORATE

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124. See, e.g., MINSHUTŌ KŌKAI KAISYAHŌ PROJECT TEAM, *supra* note 118, at 1.

125. See JIYŪ MINSHUTŌ SEICHŌ SENRYAKU TOKUMEI IINKAI [SPECIAL TASK COMMITTEE OF THE LDP FOR PROMOTING ECONOMIC GROWTH], NIHON PHOENIX SENRYAKU: KETSUDAN TO JIKKŌ NO 3NENKAN (CHŪKAN HŌKOKU) [JAPAN PHOENIX STRATEGIES: THREE YEARS FOR DETERMINATION AND TAKING ACTIONS (INTERIM REPORT)] 8 (2010), [https://www.jimin.jp/policy/policy\\_topics/pdf/seisaku-007.pdf](https://www.jimin.jp/policy/policy_topics/pdf/seisaku-007.pdf).

126. LDP's policy manifestos and relevant papers vary on whether to legally mandate. See *supra* Part III.C.

127. See, e.g., JIYŪ MINSHUTŌ NIHON KEIZAI SAISEI HONBU, *supra* note 92, at 6.

128. THE CABINET RESOLUTION, JAPAN REVITALIZATION STRATEGY: JAPAN'S CHALLENGE FOR THE FUTURE 1, 20 (revised 2014), <http://www.kantei.go.jp/jp/singi/keizaisaisei/pdf/honbunEN.pdf>.

129. See, e.g., Tokyo Stock Exchange, *Japan's Corporate Governance Code: Seeking Sustainable Corporate Growth and Increased Corporate Value over the Mid- to Long-Term* (2015), <http://www.jpix.co.jp/english/equities/listing/cg/tvdivq0000008jdy-att/20150513.pdf>.

130. *Id.* at 20.

131. *Id.* at 21.

132. *Id.* ("if a company in its own judgment believes it needs to appoint at least one-third of directors as independent directors based on a broad consideration of factors such as the industry, company size, business characteristics, organizational structure and circumstances surrounding the company, it should disclose a roadmap for doing so").

## GOVERNANCE REFORMS: A HISTORICAL PERSPECTIVE

This part considers how politicians have been involved in corporate lawmaking in postwar Japan. The following paragraphs divide the postwar amendments of the Commercial Code and the Companies Act into three periods: amendments before 1997, amendments from 1997 to 2005, and the 2014 Amendment. The distinction between the time frames corresponds with changes in the processes and incentives behind politicians' involvement in corporate law reforms.

Major reforms restricting the discretion of managers before 1997 can be explained by Culpepper's model. Although there was a change during the 1997 Amendment,<sup>133</sup> until 2005, reforms did not contradict the following model: politicians led manager-friendly reforms under relatively low salience. However, the intervention by the LDP during the 2014 Amendment cannot be explained by the model. The below sections offer an alternative explanation for the politicians' engagement in manager-unfriendly reform without heightened salience. The explanation is partly based on the Cioffi and Höpner's theory, with a reconstruction of the theory to adapt to the current situation in Japan. However, the explanation is tentative. Further research is needed to understand the commitment of politicians and political parties to corporate governance reforms.

### *A. Politicians Reacting to Exogenous Shocks*

Historically, interventions by a ruling party, or high possibilities of interventions, were behind most of the reforms limiting managers' autonomy in post-war Japan.<sup>134</sup> In particular, the amendments of the Commercial Code after the 1950 Amendment<sup>135</sup> and before the 1997 Amendment share this aspect.

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133. Shōhō no Ichibu o Kaisei Suru Hōritsu (Shū-hō) [Law to Amend Part of the Commercial Code (Public Law)], Act No. 56 of 1997 (Japan), [http://www.shugiin.go.jp/internet/itdb\\_housei.nsf/html/houritsu/14019970521056.htm](http://www.shugiin.go.jp/internet/itdb_housei.nsf/html/houritsu/14019970521056.htm). For details on the amendment, see *infra* Part V.B for details of the amendment.

134. See Manabu Matsunaka, *Kansayaku no Identity Crisis [An Identity Crisis of Kansayaku as an Institution]*, 1957 SHŌJI HŌMU [COM. L. REV.] 4, 8-9 (2012).

135. The 1950 Amendment was the first substantial reform on corporate governance of Japanese firms after the WW II. It involved the introduction of board of director system, shareholder access to corporate books and records and other reforms for reinforcing shareholder protection and limiting manager's discretions. Since the reform was conducted under strong pressure and heavy interventions by the General Head Quarters (GHQ), a mechanism of politicians' involvement might be quite different from those of reforms during the later periods. For the 1950 Amendment, see generally Masafumi Nakahigashi, *GHQ Aite no Kentō no Seika: Shōwa 25 & 26 nen no Kaisei [A Reward of a Good Fight against the GHQ: 1950 & 1951 Amendments of the Commercial Code]*, in NIHON KAISYAHŌ NO REKISHITEKI TENKAI [HISTORICAL DEVELOPMENT OF JAPANESE CORPORATE LAW] 218, 218-84 (Michiyo Hamada ed., 1999). Therefore, this paper distinguishes amendments during the occupational period. One might think that the 1950 amendment can be understood as a shareholder friendly reform under strong foreign pressures and therefore has a common mechanism with the 1993 Amendment. For a discussion of the 1993 Amendment, see *infra* notes 143-151 and accompanying text. However, the politicians resisted to the 1950 Amendment and to some extent pushed back the policies of the GHQ rather than urging the MOJ or the Legislative Council to take actions. See Nakahigashi, *supra*, at 275-84.

The first major reform after the occupational period was the 1974 Amendment of the Commercial Code<sup>136</sup> and the enactment of additional acts supplementing the Code that provided special rules for large companies.<sup>137</sup> The reform required large companies to appoint an accounting auditor and established the basic structure of the audit system of Japanese listed firms.<sup>138</sup> While the substance of the 1974 Amendment was deliberated at the Commercial Law Section, the Section was urged to prepare outlines for the amendment by the Cabinet who, in turn, had been under high public pressure after the notorious *Sanyo Tokushukou*<sup>139</sup> accounting scandal.

Additional scandals also pushed politicians to make another reform, which materialized as the 1981 Amendment.<sup>140</sup> One of the Amendment's main purposes was to limit the strong discretion of a representative director (equivalent to a CEO) by expanding the power of a board of directors.<sup>141</sup> Prior to the amendment, there had been so many scandals (including window dressings by famous firms and bribery scandals involving aerospace manufacturers) that the Minister of Justice requested that the Chair of the Commercial Code Section consider a revision of the Code to create a monitoring system to prevent illegal or unethical spending of corporate funds.<sup>142</sup>

The 1993 Amendment<sup>143</sup> required large companies to have a board of *kansayaku*<sup>144</sup> and an outside *kansayaku*.<sup>145</sup> The amendment was a result of the pressure not only of scandals that occurred after the collapse of the bubble economy,

136. Shōhō no Ichibu wo Kaisei Suru Hōritsu [Law to Amend Part of the Commercial Code], Act No. 21 of 1974 (Japan).

137. Kabushikigaisha no Kansa-tō ni Kansuru Shōhō no Tokurei ni Kansuru Hōritsu [Act on Special Provisions for the Commercial Code Concerning Audit, etc. of a Stock Company], Act No. 22 of 1974 (Japan) (repealed 2005). The act was abolished when the current Companies Act was enacted but its provisions were substantially consolidated into the current act. See *supra* note 59 and accompanying text.

138. See Akira Tanabe, *Shōhō Kaisei Sanpō no Gaisetsu* [An Overview of Three Acts Amending the Commercial Code], 661 SHŌJI HŌMU [COM. L. REV.] 2, 3-4 (1974). For the development of corporate audit system including *kansayaku* in Japan, see Shinsaku Iwahara, *Kansayaku Seido no Minaoshi* [On the Revisions of Kansayaku System], in KIGYŌHŌ NO HENSEN [DEVELOPMENTS IN BUSINESS LAW] 1, 5-11 (Shigeyuki Maeda et al. eds., 2009).

139. See Iwahara, *supra* note 138, at 9; Hideyuki Matsui, *Yōbō no Fukuzai: Corporate Governance* [Demands behind the Amendments: Corporate Governance], in KAISYAHŌ NO SENTAKU: ATARASHI SYAKAI NO KAISYAHŌ WO MOTOMETE [CHOICES MADE BY CORPORATE LAW: IN SEARCH OF CORPORATE LAW FOR NEW SOCIETY] 368, 408-10 (Masafumi Nakahigashi & Hideyui Matsui eds., 2010).

140. Shōhō-tō no Ichibu wo Kaisei Suru Hōritsu [Act to Revise Part of the Commercial Code etc.], Act No. 74 of 1981 (Japan).

141. See Matsui, *supra* note 139, at 421-23.

142. See TAKEO INABA, KAISEI KAISYAHŌ [THE AMENDED CORPORATE LAW] 11-12 (1982). Inaba was one of expert staffs of the MOJ who deeply involved in the process of the amendment.

143. Shōhō-tō no Ichibu wo Kaisei Suru Hōritsu [Act to Revise Part of the Commercial Code etc.], Act No. 62 of 1993 (Japan) (amending both the Commercial Code and the Act on Special Measures for the Commercial Code on the Audit, etc. of Stock Company).

144. Kabushikigaisha no Kansa-tō ni Kansuru Shōhō no Tokurei ni Kansuru Hōritsu [Act on Special Provisions for the Commercial Code Concerning Audit, etc. of a Stock Company], Act No. 22 of 1974, art. 18, para. 1 (Japan) (repealed 2005).

145. *Id.* art. 18-2, para. 1.



but also from the U.S.-Japan Structural Impediments Initiative (SII).<sup>146</sup> The scandals included banks providing loans to Japanese mafias and several famous firms paying money to *sokaiya* racketeers.<sup>147</sup> In the SII, the U.S. government requested that the Japanese government enhance shareholder protection as a part of coping with structural impediments caused by *keiretsu*.<sup>148</sup>

An existing theory easily explains why politicians were involved in passing amendments to limit managers' autonomy during this period — scandals. All of the amendments are affected by scandals. In addition, the 1993 Amendment was pressured by another exogenous shock, namely the SII.<sup>149</sup> These exogenous shocks pressured politicians to take action. As Culpepper discusses, scandals raise the salience of corporate governance issues and the heightened salience draws politicians' interest to the topic.<sup>150</sup>

Similar to corporate scandals, foreign pressure may also raise the salience of an issue, but unlike scandals, it does not necessarily weaken the influence of a strong interested party, such as a manager. Foreign pressure urges politicians to take action (or at least make an effort to show progress), but only if the relationship with the country exerting the pressure is of importance and/or there is a threat of sanctions from neglecting that country's demands. Regarding the 1993 Amendment, many believe that pressure by the United States motivated Japanese politicians to make progress in shareholder-friendly reforms.<sup>151</sup> Additionally, academics insisting on shareholder-friendly reforms might utilize foreign pressure as a support for their arguments.

During this period, the involvement of politicians in corporate governance reforms were simple reactions to exogenous shocks. Politicians had to be perceived by the public as coping with scandals or foreign pressure. From this perspective, it is natural that most of the substantial reforms strengthened the *kan-sayaku* system. Although enhancing corporate governance was discussed in

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146. See Shuichi Yoshikai, *Heisei 5nen Shōhō Kaiseihō no Kaisetsu I* [Explanatory Comments on the 1993 Amendment on Commercial Code I], 1324 SHŌJI HŌMU [COM. L. REV.] 9, 10-11 (1993) (denying that the U.S. pressure was the cause of the shareholder-oriented reform but at the same time recognizing that the SII had been “a background” of the reform). Yoshikai was involved in the 1993 Amendment as an expert staff member of the MOJ.

147. See *id.* at 10. More scandals of *sokaiya* were revealed in the late 1990th, which led to another reform. For *sokaiya*, see MARK D. WEST, SECRETS, SEX, AND SPECTACLE: THE RULES OF SCANDAL IN JAPAN AND THE UNITED STATES 120-21, 325 (2006).

148. See Japan-U.S. Working Group on the Structural Impediments Initiative, *Japan Structural Impediments Initiative Report*, Keiretsu Relationship § II.5 (1990), [http://tcc.export.gov/Trade\\_Agreements/All\\_Trade\\_Agreements/exp\\_005583.asp](http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005583.asp) (last visited Feb. 8, 2018) (“The Committee on Legislation [of Japan] will reexamine the Company Law with a view to enhancing disclosure requirements and shareholders' rights, and to simplifying mergers and acquisitions procedures”).

149. See *supra* note 146 and accompanying text.

150. See CULPEPPER, *supra* note 3, at 6-7, 147-48. See also *supra* Part II. C.

151. See Iwahara, *supra* note 138, at 10 (stating that the Japanese government reacted to the foreign pressure); Matsui, *supra* note 139, at 442-45 (arguing that although the pressure from the U.S. was not the sole cause of the amendment, politicians did have to take the demand into consideration).

response to scandals, business leaders strongly resisted ideas to substantially reform the board of directors system. Therefore, the *kansayaku* system had been used as a scapegoat for the pressure to reform the board of director system: *kansayaku* had been empowered in lieu of reforming the board of director system.<sup>152</sup> Business leaders accepted reforming the *kansayaku* system as a compromise, because it did not cut into the autonomy of the directors. At the same time, it enabled politicians to claim that they had made reforms.<sup>153</sup>

### *B. Managers and the LDP Working Hand-in-Hand*

The 1997 Amendment was a tremendous change for the process of corporate lawmaking in general. The 1997 Amendment provided for stock options in the Commercial Code<sup>154</sup> and enacted an additional act permitting listed firms to purchase their own shares in order to pay out accumulated internal reserves.<sup>155</sup> The amendment was initiated by business associations, skipping the discussions at the Legislative Council.<sup>156</sup> The bill was not submitted to the Diet by the Cabinet, per the usual procedures.<sup>157</sup> Instead, it was prepared by a group of the LDP politicians who had accepted strong requests from business associations.<sup>158</sup> The bill was ultimately submitted by Diet members of the LDP and four other parties.<sup>159</sup>

This was an immense change because it had become clear that the power balance among business leaders and other members of the Commercial Code Section had changed dramatically. The 1997 Amendment demonstrated that if

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152. See Iwahara, *supra* note 138, at 11; Matsunaka, *supra* note 134, at 9.

153. Matsunaka, *supra* note 134, at 9.

154. Shōhō no Ichibu no Kaisei Suru Hōritsu [Law to Amend Part of the Commercial Code], Act No. 56 of 1997 (Japan).

155. Kabushiki no Shōkyaku no Tetsuzuki ni Kansuru Shōhō no Tokurei ni Kansuru Hōritsu [Act on Special Provisions of the Commercial Code Concerning Procedures for Retirement of Shares], Act No. 55 of 1997 (Japan) (repealed 2001).

156. For detailed explanation on the process of the 1997 amendment, see Yoshihiro Yamada, *Stakeholder to Kaisyahō: "Mushoku Tōmei no Kaisyahō" Riron to Sono Shinwaka [Stakeholders and Corporate Law: Myth of "Corporate Law without Political Color"]*, in KAISYAHŌ NO SENTAKU: ATARASHI SYAKAI NO KAISYAHŌ WO MOTOMETE [Choices Made by Corporate Law: In Search of Corporate Law for New Society], *supra* note 139, at 33, 112-119.

157. It is customary that an amendment bill of basic laws such as the Companies Act or the Commercial Code to be drafted by the staff of government agencies in charge of the law (the MOJ, in the case of these laws) according to a report by the Legislative Council or other relevant government committees and submitted by the Cabinet. In fact, the 1997 Amendment was the first time that the Commercial Code had been amended by a Diet member sponsored bill. See Shigeru Morimoto, *Giin Rippou ni yoru Stock Option Seido [Stock Option System Created by Diet Member Sponsored Bill]*, 1549 SHŌJI HŌMU [COM. L. REV.] 2, 7 (1997) (outlining the usual process for amending the Commercial Code and criticizing the process of the 1997 Amendment).

158. See Okiharu Yasuoka, *Stock Option Seido ni kakaru Shōhō Kaisei no Kei to Igi [Explaining the Circumstances and Impacts of the Amendment of the Commercial Code concerning Stock Option]*, 1458 SHŌJI HŌMU [COM. L. REV.] 2, 2-4 (1997). Yasuoka, who has been a member of the House of Representatives until now, led a project team of the then ruling parties for the amendment. He had worked as a legal practitioner before being a politician. See Yasuoka Okiharu Profile, <http://www.yasuoka.org/profile/#shokureki> (last visited Aug. 5, 2017).

159. Yasuoka, *supra* note 158, at 4.

## Politics of Japanese Corporate Governance Reform

managers cannot get what they wanted at the speed they wanted through the law-making process at the Legislative Council, they could choose to amend the law directly through LDP Diet members.<sup>160</sup> Furthermore, since actors of the corporate lawmaking process recognize this possibility, they have an incentive to compromise at a greater level, even when lawmaking through the Legislative Council.<sup>161</sup>

After the 1997 Amendment, the LDP kept close ties with business associations in the course of successive amendments to the Commercial Code until the 2005 revision, which separated the Companies Act from the Commercial Code and enacted it as an independent act. Most of the amendments from 1997 to 2005 involved relaxing existing formalistic and/or obsolete regulations and creating new methods for financing and M&A.<sup>162</sup> These amendments aimed to stimulate economic growth by promoting restructuring of firms and fully utilizing financial markets. In sum, LDP politicians in this period relaxed and renovated corporate law hand-in-hand with managers.<sup>163</sup>

The December 2001 Amendment<sup>164</sup>, though from the same period, has different characteristics. The Amendment strengthened monitoring systems by requiring the majority of *kansayaku* in large firms to be qualified as outside *kansayaku* and tightening qualifications for outside *kansayaku*.<sup>165</sup> Although the amendment enhanced monitoring of managers, it was not a product of high salience by scandals. Furthermore, the bill for the amendment was submitted by a

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160. See Yamada, *supra* note 156, at 129.

161. See *id.* at 129-35. 255 corporate and commercial law academics made a statement criticizing the process of the 1997 Amendment. Kenjiro Egashira et al., *Hirakareta Shōhō Kaisei Tetsuzuki wo Motomeru Shōhō Gakusya Seimei* [A Statement by Commercial Law Academics Demanding a Transparent Procedure for Amendments of the Commercial Code] 1457 SHŌJI HŌMU [COM. L. REV.] 76 (1997). This reaction is consistent with the view stated in the text. The new shortcut for a business association would undermine the influences of the Commercial Code Section where academics were the largest group. See, e.g., The Member Directory of the Commercial Code Section of the Legislative Council as of Mar. 8, 1997, reprinted in KAISYAHŌ NO SENTAKU: ATARASHI SYAKAI NO KAISYAHŌ WO MOTOMETE [CHOICES MADE BY CORPORATE LAW: IN SEARCH OF CORPORATE LAW FOR NEW SOCIETY], *supra* note 139, at 1179-80 (providing that 20 out of 58 all members (the total of full-members [*jin*] and sub-members [*kanji*]) and 17 out of 36 full-members are academics).

162. See Hideyuki Matsui, *Shikin Kyōkyūsyā to Kaisyahō* [Suppliers of Finance and Corporate Law], in KAISYAHŌ NO SENTAKU: ATARASHI SYAKAI NO KAISYAHŌ WO MOTOMETE [CHOICES MADE BY CORPORATE LAW: IN SEARCH OF CORPORATE LAW FOR NEW SOCIETY], *supra* note 139, at 527, 626-35 (discussing the deregulations on financing methods during 2001 to 2005); Masafumi Nakahigashi, *Yōbō no Kengen: Soshiki Saihen* [Manifestation of Demands: M&A], in KAISYAHŌ NO SENTAKU: ATARASHI SYAKAI NO KAISYAHŌ WO MOTOMETE [CHOICES MADE BY CORPORATE LAW: IN SEARCH OF CORPORATE LAW FOR NEW SOCIETY], *supra* note 139, at 257, 295-366 (discussing newly created methods for M&A during 1997 to 2005). For situations concerning M&A in this period, see CURTIS J. MILHAUPT & MARK D. WEST, ECONOMIC ORGANIZATIONS AND CORPORATE GOVERNANCE IN JAPAN: THE IMPACT OF FORMAL AND INFORMAL RULES 179-206 (2004).

163. See Yamada, *supra* note 156, at 130-32.

164. Shōhō Oyobi Kabushikigaisha no Kansa-tō ni Kansuru Shōhō no Tokurei ni Kansuru Hōritsu no Ichibu wo Kaisei Suru Hōritsu [Act to Revise Part of the Commercial Code and the Act on Special Provisions of the Commercial Code Concerning the Audit, etc. of the Stock Company], Act No. 149 of 2001 (Japan).

165. See Matsui, *supra* note 139, at 465-67.

group of Diet members of the LDP (the ruling party at that time) based on the proposals of business associations.<sup>166</sup> Through this amendment, the reform of the *kansayaku* system was proposed as a bargaining chip in exchange for creating exemptions for directors and *kansayaku* from liabilities to their corporation.<sup>167</sup> In order to cope with criticisms of the exemption rules, business associations had to package a tool to tighten the monitoring of directors. Therefore, although the LDP politicians engaged in legislation to limit managerial power to some extent, the December 2001 Amendment differs from the 2014 Amendment, which did not include such a “sweetener” for managers.

The role of politicians between 1997 and 2005 may not seem to neatly fit Culpepper’s theory. However, it can be understood as a variant of politics under low salience: business elites provided information to politicians and utilized experts in order to achieve their goals when the salience of corporate law issues was low.<sup>168</sup> Politicians were involved in the process, but had no incentive to reject the offers by managers or limit their autonomy. Interestingly, the rulemaking procedure during this period was always formal, i.e. via amendments to the Commercial Code or enacting a new act. This fact reinforces the interpretation of Culpepper’s model that the issue’s salience, rather than the actual forms of rule-making, is dominant.<sup>169</sup>

Furthermore, the activity of the LDP politicians during this period is connected to their involvement in the 2014 Amendment that followed. As discussed in the next section, we can observe the change in the role of politicians in the recent reforms and the fact that the LDP politicians seem to be no longer closely tied to managers. Some of the LDP politicians had accumulated deep experiences in corporate legislation during this deregulation age, which was useful for rule-making against managers. In addition, these experiences seem to have enabled politicians to discover a political interest in specializing in corporate legislation.

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166. JIYŪ MINSHUTŌ SEIMU CHŌSAKAI HŌMU BUKAI SHŌHŌ NI KANSURU SHŌINKAI [SUBCOMMITTEE ON THE COMMERCIAL CODE, THE JUDICIAL AFFAIRS SECTION OF THE POLICY RESEARCH COUNCIL OF THE LDP], KIGYŌ TŌCHI NI KANSURU SHŌHŌTŌ NO KAISEIAN YŌKŌ [GUIDELINE ON AMENDMENTS OF COMMERCIAL CODE AND OTHER ACTS CONCERNING CORPORATE GOVERNANCE], reprinted in 1524 SHŌJI HŌMU [COM. L. REV.] 37 (1999). See Editor, *Kigyō Tōchi Kankei Shōhō Kaiseian no Kokkai Teishutsu: Kansayaku Seido no Kyōka to Kabunushi Daihyō Soshō no Minaoshi* [Submission of a Bill to Amend the Commercial Code concerning Corporate Governance: Strengthening Kansayaku System and Revisions on Shareholder Derivative Suits], 1597 SHŌJI HŌMU [COM. L. REV.] 4, 4 (2001).

167. Iwahara, *supra* note 138, at 10. During the deliberation of the 2001 Amendment, a risk of huge personal liabilities for defendant directors in a shareholder derivative suit actually materialized in the *Daiwa Bank* case. Osaka Chihō Saibansho [Osaka Dist. Ct.], Sept. 20, 2000, 1721 HANREIJIHŌ 3 (Japan). See also KENJIROU EGASHIRA ET AL., KAISEI KAISYAHŌ SEMINAR: KIGYŌ TŌCHI HEN [SEMINAR ON COMPANY LAW REFORM: CORPORATE GOVERNANCE] 5 (2006) (a former member of a *Keidanren*’s committee in charge of corporate and other laws on economy referring to the *Daiwa Bank* case in the context of the 2001 Amendment).

168. See *supra* text accompanying note 40.

169. See *supra* text accompanying note 58.

### C. Shareholder-Oriented Interventions by the LDP

As we have seen, it has become clear that politicians have intervened in the process of the 2014 Amendment in a manner quite different from that of the previous two periods of corporate legislation. As discussed below, the LDP did not react to high salience caused by scandals. Rather, the salience of the outside director issue rose after the LDP publicized its policies.

During the 2014 Amendment process, the DPJ and the LDP reacted to the high salience of the outside director issue.<sup>170</sup> Figure 1 shows the transition in the level of salience of the issue during the deliberation period. Both parties formed working groups to consider reforms on corporate governance, right after the salience was heightened by the *Daiō Seihi* and *Olympus* scandals. Here, Culpepper's theory clearly holds.

However, in May and June 2013, after the salience level was reduced to the same level as in the March 2011 when the salience level was reduced by the great earthquake in *Tohoku* (see Figure 1), the LDP announced further reforms on corporate governance, including promoting appointment of outside directors.<sup>171</sup> Here, the salience of the issue was raised by the LDP's announcement, not the LDP reacting to the already high salience. The salience rose right after the LDP publicized the report in May 2013. The newspaper articles around this period reported the policy issued by the LDP instead of scandals or calls for reforms. These phenomena clearly diverge from Culpepper's theory.

**Figure 1: Salience of "outside director"**

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170. Jiyū Mishutō Hōmu Bukai [The Judicial Affairs Division of the LDP] et al., *Kigyō Tōchi Kaikakuan ni tsuite* [On the Reform Proposal of Corporate Governance] (2012), [https://www.y-shi-ozaki.or.jp/contribution/pdf/20131112190917\\_pP5x.pdf](https://www.y-shi-ozaki.or.jp/contribution/pdf/20131112190917_pP5x.pdf). For the DPJ, see *supra* Part IV.B.

171. See JIYŪ MINSHUTŌ NIHON KEIZAI SAISEI HONBU, *supra* note 92, at 29-30; THE CABINET RESOLUTION "JAPAN REVITALIZATION STRATEGY: JAPAN IS BACK", *supra* note 93, at 15-16; JIYŪ MINSHUTŌ SEIMU CHŌSAKAI, KINYŪ CHOUSAKAI & KIGYŌ KAIKEI NI KANSURU SHŌINKAI, *supra* note 93, at 7; JIYŪ MINSHUTŌ, *supra* note 94, at 10.

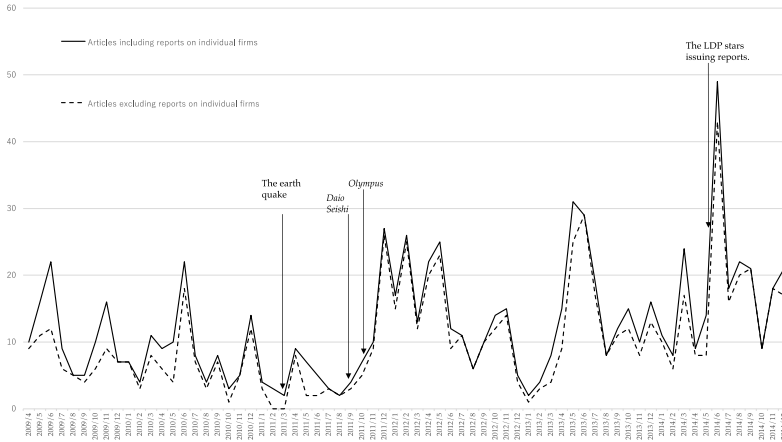


Figure 1 indicated the number of articles in each month, including “outside director (*shagai torishimariyaku*),” from April 1, 2009 to December 31, 2014 in *Nihon Keizai Shinbun*. Simple reports on changes of personnel are excluded. The solid line shows the number of articles including reports on individual firms. The dotted line shows the number of articles excluding those reports.

#### D. Do the Differences Among Politicians’ Involvements Matter?

These differences in the ways politicians involve themselves in corporate law reform are important because they have different impacts on the contents of the reform. When politicians make reforms hand-in-hand with managers, the reform is fast and managers approve of the content. Even when limiting the autonomy of managers, the reform will be modest and/or will be done in exchange for what managers want.

If politicians are simply reacting to exogenous events, as they were during the first period,<sup>172</sup> politicians still put pressure on relevant government authorities to cope with the events. Politicians are willing to give the authorities a great deal of autonomy on the condition that the public, who have limited expertise on the issue, accept the solutions. Along the same lines, even when politicians themselves are involved in reform in a hands-on manner, they might accept a compromise with managers as long as the politicians are being perceived by the public as addressing the events quickly and not being too permissive with managers (or other strong interest groups). These arguments are consistent with the amendments to the board structure of listed firms prior to 1993. Even when a scandal raised the salience of corporate governance enough for politicians to support a reform against managers’ interests, the amendments tended to end up making

172. See *supra* Part V.A.

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large reforms only on the *kansayaku* system, with moderate reforms on the board of directors system.<sup>173</sup>

Politicians' involvement during the most recent period has produced different results from those of the earlier periods. Politicians have clearer and more concrete ideas about the reform they want. Since such reforms are positioned as important parts of policies for economic growth, and economic growth is critical for getting broad support from the public, politicians are eager to pursue these reforms. Using corporate governance reform as a tool for stimulating economic growth is similar to the reforms in the late 1990s.<sup>174</sup> However, now, politicians of the LDP are no longer hesitant to confront managers when limiting the discretions and autonomies that managers enjoy.

### *E. Why Have the Mechanisms Changed Recently?*

For now, it is difficult to answer why the way of politician's involvement has changed recently. Since the number of reforms after the change is still very limited, it is difficult to extract the patterns and the logic behind them.

However, Cioffi and Höpner's idea that center-left parties committed to economic growth tend to initiate pro-shareholder reforms gives us a suggestion.<sup>175</sup> Although, from an ideological perspective, the LDP is far from being the center-left party that appears in Cioffi and Höpner's research, it shares most of the characteristics and the limitation on available policy, such as fiscal limitation, with the center-left party. In contrast to the DPJ, the LDP, since coming back to power in December 2012, has been committed to economic growth, which is represented by "*Abenomics*".<sup>176</sup> It also sees a reform on corporate governance as a means of promoting economic growth, especially for coping with low rates of return on equities of listed firms.<sup>177</sup> In particular, Japan shares many characteristics with the sample countries in Cioffi and Höpner's research: long-term economic stagnation, fiscal limitation, and globalization of economics. In addition, together with the continuous release of cross-holding shares, globalization of financial markets boosted shareholdings by foreign institutional investors.<sup>178</sup> Some of the foreign institutional investors have strongly criticized the Japanese style of corporate governance and insist on its reform.<sup>179</sup>

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173. See, e.g., Matsunaka, *supra* note 134, at 9.

174. See *supra* Part V.B.

175. See *supra* Part II.B.

176. See, e.g., Japan Gov, *Abenomics*, (updated Jan. 2018) <http://www.japan.go.jp/abenomics/index.html> (last visited Feb. 8, 2018).

177. See *supra* Part IV.B.

178. For the increase of shareholdings by foreign investors in Japanese listed firms, see, e.g., Hideaki Miyajima & Takaaki Hoda, *Ownership Structure and Corporate Governance: Has an Increase in Institutional Investors' Ownership Improved Business Performance?*, 11 PUB. POL. REV. 361, 367 tbs.1 & 2 (2015).

179. See, e.g., Asian Corporate Governance Association, *White Paper on Corporate Governance in Japan* 1, 7-8 (2008), [https://www.acga-asia.org/upload/files/advocacy/20170402191458\\_69.pdf](https://www.acga-asia.org/upload/files/advocacy/20170402191458_69.pdf).

As we observed in the reforms from 1997 to 2005, the LDP have had close ties with business associations. These ties may have loosened due to several reasons. First, a short-term factor might be the change of power in 2009, when the LDP lost its position as the ruling party. Business associations seemed to approach LDP politicians less often and some of the veteran politicians with close personal ties to the associations had to retire. In the long run, the change in the election system might have loosened the ties between the LDP and business associations in a fundamental manner. Since 1996, the electoral rule of the House of Representatives has moved from a single-non-transferable-vote system where multiple seats were assigned to each district to a mixed system of single-member districts with plurality rule and proportional representation districts. This change created an incentive for political parties to seriously consider the interests of median voters, which might have led to the weakening of ties between parties and interest groups such as business associations.<sup>180</sup>

#### PART VI: CONCLUSIONS

Even in a country with a strong bureaucracy and a complex issue like corporate governance that requires expertise to understand, Japanese politicians play an important role in changing laws. This paper argued that the involvement of politicians is important in shifting the status-quo against the interest of managers. It also tried to clarify the process of the involvement of politicians in the reforms of corporate law in Japan. Initially, politicians were simply reacting to exogenous shocks. During the aftermath of the bubble economy, close cooperation with managers emerged to stimulate economic growth. The recent reforms were the product of politicians rather aggressively cutting into the interests of managers who were their former friends.

What brought on the recent change still needs further research, but what matters is how serious a ruling party is about conquering long-standing stagnation and what options are left for the ruling party. If there are other options that seem to be effective for stimulating economic growth, the party might not be interested in corporate governance reform, when it is still uncertain whether such reform really would improve the overall economy.

Finally, it remains unanswered whether the recent LDP's attitude toward corporate governance reform is beneficial to Japanese society as a whole. Politicians' incentives may diverge from shareholders' interests, as managers' incentives often do.<sup>181</sup> If politicians perceive limiting managerial discretion as "shareholder-oriented reform," politicians might limit the discretion excessively, which would ultimately harm shareholder interest.

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180. Hatsuru Morita, *Reforms of Japanese Corporate Law and Political Environment*, 37 ZEITSCHRIFT FÜR JAPANISCHES RECHT 25, at 35-36 (2014).

181. See, e.g., Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005).