

SHAREHOLDERS' RIGHTS IN JAPAN

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I. INTRODUCTION

The issue of shareholders' rights in Japan has become a source of tension between the United States and Japan only recently, largely as a result of the Pickens-Koito affair.¹ If this affair is merely *sui generis*,² then it is likely that the issue will cease to be a

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1. In March of 1989 Boone Co., a private investment firm based in Dallas, Texas, bought from Azabu Jidosha K.K., a Japanese auto importer, a 20.2% stake in Koito Manufacturing Co., a Japanese auto-parts maker. T. Boone Pickens is the chairman and majority shareholder of Boone Co. and its public spokesman. Kitaro Watanabe is the president of Azabu Jidosha. So far Boone Co. has accumulated more than \$1.2 billion in shares (a 26.2% stake in Koito) and has become Koito's largest stockholder. Takao Matsuura, *How a Japanese Firm Foiled T. Boone Pickens*, S. F. CHRON., Jan. 8, 1990, at C5.

Toyota buys approximately 50% of Koito's production, owns 19% of its stock, and three of its former employees are Koito directors. On June 28, 1990, Pickens attended Koito's annual shareholder meeting in Tokyo. Andrew J. Littlefair, Koito Investment Briefing 1 (June 28, 1990) (unpublished report, on file with author) [hereinafter Littlefair]. Littlefair is Pickens' assistant. At the meeting Koito's president, Takao Matsuura, said that Pickens was not a real shareholder but a greenmailer acting on behalf of the Azabu Group. He also said that Pickens' statements to the press had been malicious and had harmed the name and credit of Koito. Pickens said that during the meeting his questions were not answered or otherwise evaded and that management allowed the labor union president to deliver a speech against Boone Co. during the question and answer session. Moreover, Pickens and other American investors were harassed by Japanese shareholders who constantly interrupted and subjected them to verbal abuse. All of Pickens' proposals at the meeting were defeated, among them the election of four directors, an increase in dividends, an "anti-greenmail" amendment to the articles of incorporation, and a greater disclosure policy. 1 Transcript of Koito Annual Meeting of June 28, 1990, at 16, 18, 24 (Boone Co. trans.) [hereinafter Koito Annual Meeting].

Pickens has sued Koito twice. He lost the first suit, and the second one was pending when Pickens announced plans to sell his stake in Koito. George Melloan, *What T. Boone's Slim Pickin's Say About Japan*, WALL ST. J., May 6, 1991, at A17. This affair has received wide coverage in the American and Japanese press. Littlefair, *supra*, at 23-33.

2. For example, if this affair is an artificial dispute created by Pickens to extract greenmail from Koito. See Letter from Takao Matsuura to T. Boone Pickens, Jr. (Dec. 10, 1990) [hereinafter Matsuura Letter].

source of tension without the need for further government action.³ If the affair is not *sui generis*, however, a confrontation is likely to result every time an American national becomes an unsolicited minority shareholder in a Japanese corporation, and the issue of shareholders' rights will continue to be a source of tension in the years to come.⁴ As the opportunities for Americans to buy substantial minority interests in Japanese corporations increase,⁵ so will increase the potential for confrontations harmful to Japan-United States economic relations.⁶

3. So far, Japanese and United States officials involved in the Structural Impediments Initiative have addressed this issue in a cursory manner by simply stating that "the Committee on Legislation will reexamine the Company Law with a view to enhancing . . . shareholders' rights . . ." Joint Report of the U.S.-Japan Working Group on the Structural Impediments Initiative, at V-7 (June 28, 1990) (unpublished report, available from the U.S. Dep't of the Treasury) [hereinafter S.I.I. Report]. By arguing that this affair is really a trade and antitrust issue, Pickens has tried to justify his claim that actions taken by the U.S. Federal Trade Commission, the Justice Department, the President and the U.S. Congress are government actions related to his case. See Littlefair, *supra* note 1, at 2.

4. This problem has not arisen before because in the past Japanese corporations sought American investors as a source of technology, not capital. Through application of the "negative principle" that all foreign exchange transactions were prohibited except where expressly permitted, the Japanese government controlled and minimized foreign ownership of domestic productive assets. See Merit E. Janow, *Mergers and Acquisitions in Japan: A New Option for Foreign Companies?*, 26 COLUM. J. TRANSNAT'L L. 573, 580-81 (1988). In 1980 a "positive principle", permitting all transactions except those specifically prohibited, became effective. *Id.* As a result, purchases by foreign investors of less than 10% of the outstanding shares of a Japanese listed company do not require prior notification to and approval from the Minister of Finance because they are not considered direct investment. *Id.* at 582. Pickens benefitted from this new attitude of the Japanese government. Although he had to comply with the notification requirements, the Minister of Finance approved his purchase of 20.2% of Koito stock. See Littlefair, *supra* note 1, at 1. To the extent that there have been takeovers of Japanese companies by foreigners, these have been friendly, solicited transactions where there was a previous relationship between the two corporations. W. CARL KESTER, *JAPANESE TAKEOVERS: THE GLOBAL CONTEST FOR CORPORATE CONTROL* 94 (1991). This comment is concerned primarily with new, unsolicited investors with no other connection or interest in Japan other than their investment.

5. Yuko Mizuno, *Popularity of Equity Financing Threatening "Keiretsu" System*, JAPAN ECON. J. 36 (Dec. 30, 1989 - Jan. 6, 1990) Mizuno reports that the equity-financing boom of the past decade resulted in the issuance of enormous volumes of convertible and warrant bonds that can be easily converted into stock. Some corporations are concerned that unwelcome investors will try to corner the bonds. *Id.* Some insiders may also want to sell to outsiders. See KESTER, *supra* note 4, at 274. The fact that the Azabu group was able to acquire such a large block of stock suggests that some shareholders in Japan are willing to divest their substantial holdings.

6. Pickens' complaints in various U.S. fora have attracted the attention of several Congressmen who reportedly describe the treatment foreign shareholders receive in Japan as unfair, inequitable, non-reciprocal, and discriminatory. See Littlefair, *supra* note 1, at 34-36 (section entitled "Congressional Commentary on the Koito Affair" reproduces comments favorable to Pickens' cause made by the following members of Congress: Orrin Hatch, Steve Symms, Lloyd Bentsen, Tom Daschle, John Glenn, Harry Reid, Daniel K. Inouye, Jesse Helms, Richard Gephardt, Bill Gray, Bob Michel, Tom Campbell, Sam Gibbons, Lamar Smith and Matthew Rinaldo).

The objective of this paper is to analyze shareholders' rights in Japan and to use the Pickens-Koito affair as a means of focusing the discussion. Section Two provides a general background by looking at the role played in corporate Japan by shareholders, the stock company (*kabushiki kaisha*)⁷, and the stock market mechanism since the Meiji Restoration. Section Three presents a summary of the arguments made by Pickens and Koito, and surveys Japanese shareholders' statutory rights and some issues concerning the exercise of those rights. Section Four analyzes the arguments made on both sides of the Pickens-Koito affair from revisionist and traditionalist perspectives. Section Five identifies various developments suggesting that the exercise of shareholders' rights in Japan is likely to become more substantial in the coming years. Finally, Section Six offers a brief discussion of the desirability of using foreign governmental pressure, administrative guidance and public opinion to shape and accelerate developments in shareholders' rights in Japan.

II. FROM THE MEIJI RESTORATION TO THE INTERNATIONALIZATION OF JAPANESE CAPITAL MARKETS

A. Sources of Long-Term Corporate Funding in Japan

Generally speaking, stockholders' equity has played a minor role in the financing of Japanese corporate operations since the Meiji Restoration began in 1868. During this period,

rapid industrialization under the financial circumstance of shortage of investment funds contributed to the formation of a unique structure of business financing with banks possessing the dominant position in providing funds. *Zaibatsu* companies,⁸ moreover, with their sufficient accumulation of internal funds, did not have to depend on the external funds raised in the securities markets.⁹

In addition, the stock corporation structure (*kaisha*) created at that time enjoyed government incentives, subsidies, and programs or were capitalized by the government from the outset.¹⁰ Thus, whatever equity new *kaisha* needed came from private sources, usually either a few individuals or an organized group.¹¹

7. SHŌHŌ [Commercial Code] Law No. 48 of 1899 (as amended), in *DOING BUSINESS IN JAPAN* 42, app. 5A (Zentaro Kitagawa trans., 1990) [hereinafter *DOING BUSINESS IN JAPAN*].

8. Lockwood, *The Great Combines*, in 1 *THE JAPAN READER* 285 (Jon Livingston et al. eds., 1973) [hereinafter Lockwood]; the four largest *zaibatsu* (money cliques) in fact developed into an early version of conglomerates on a vast scale. *Id.*

9. JAPAN SECURITIES RESEARCH INSTITUTE, *SECURITIES MARKET IN JAPAN* 14 (1990).

10. Lockwood, *supra* note 8, at 285-86.

11. Such sources might be a wealthy individual, a wealthy family, or, as in the case of the 15th National (Peers) Bank, a collection of the 250 or so former feudal lords.

In sum, outside shareholder have been largely irrelevant to the financial needs of Japanese corporations. Even today corporations continue to favor debt as the main source of long-term financing.¹² Japanese corporations have felt little or no need to attract and maintain outside shareholders either by offering attractive yields or by reassuring them with adequate information. In fact, when outsiders have provided corporate funds, it has mainly been by depositing savings in the corporations' financial lenders.¹³ Finally, it is noteworthy that the current absence of both a no-thin-capitalization rule and minimal capital requirements in the law reflects tacit government sanction of corporate debt reliance to the exclusion of outside shareholders.¹⁴

B. The Role of the Stock Market and Kaisha Mechanisms

1. The Pre-Pacific War Period

Although the adoption of the stock corporation structure during the Meiji Restoration was more than a formalistic exercise in emulating western laws and usages — a common response to pressure from western nations¹⁵ — the Kaisha was initially used merely as an administrative control device among private investors.¹⁶ Given that the Stock Exchange Ordinance establishing the Tokyo and Osaka exchanges was passed in 1878, such a limited use of the stock corporation structure cannot be blamed on a lack of a stock market mechanism.¹⁷ Rather, due to the reliance of Japanese corporations on retained earnings, debt, and government assistance, Japanese stock markets initially served two primary functions: they provided liquidity for those who already owned stocks (secondary market) and served as centers for speculation.¹⁸ Their function as a "primary market" supplying new shareholders was minimal.¹⁹ Even during the period between the two World Wars, when the stock market saw its role as a source of long-term corporate funds briefly enhanced,²⁰ zaibatsu families maintained control of the

Andrew Fraser, *Hachisuka Muchiaki (1846-1918) From Feudal Lord to Modern Businessman*, in *JAPANESE MANAGEMENT IN HISTORICAL PERSPECTIVE* 29 (Tsunehiko Yui & Keiichiro Nakagawa eds., 1989).

12. See Makato Utsumi, *Capital Market Issues: A Japanese Perspective*, E. ASIAN EXEC. REP., Oct. 15, 1984, at 19.

13. *Id.*

14. See TAKASHI KUBOI, *BUSINESS PRACTICE AND TAXATION IN JAPAN* 31 (rev. ed. 1989).

15. See HIDEO TANAKA & MALCOLM D.H. SMITH, *THE JAPANESE LEGAL SYSTEM* 199 (1976).

16. Fraser, *supra* note 11, at 29-31; see also Lockwood, *supra* note 8, at 286-87.

17. JAPAN SECURITIES RESEARCH INSTITUTE, *supra* note 9, at 14.

18. *Id.*

19. *Id.*

20. *Id.*

corporations.²¹

2. The Post-Pacific War Period

After World War II, the stock market in Japan played a predominantly political role. Thanks to the "Securities Democratization Movement",²² the number of individual investors dramatically, from fewer than 5 million in 1950 to approximately 18 million in 1965.²³ However, statistics for the period since show that the growth of shareholders ended in 1965 and that their number has remained virtually stagnant ever since.²⁴ The actual growth in the number of shareholders was less dramatic than the figures suggest due to the statistical distortion resulting from double counting shareholders who owned shares in more than one company.²⁵ Overall, Japanese outsiders were allowed to enter the corporations but only as a minority interest.²⁶ Furthermore, in spite of Japanese government efforts to expand the Japanese shareholder base, individual ownership of corporate stock has decreased steadily since 1950.²⁷ Indeed, while individual investor ownership declined from 61.3% in 1950 to 20.1% in 1987, the quantity of shares owned by business corporations, securities companies, and financial institutions rose to 74% of all listed shares.²⁸

Taking the opportunity of the World War I [sic], the development of heavy industries took place, which resulted in the remarkable expansion of the stock market as well as the bond market. In the period between the two world wars, some Zaibatsu companies privately owned by the Zaibatsu families offered their shares to the public and came to be listed on the stock exchange. However, the outbreak of World War II brought about the strict control and regulation by the government over the stock markets; thus, financial policy gave priority to the war industry in allocating funds. Under such unusual financial circumstance, the securities market came to lose its function as a free market for securities issuance and trading.

Id.

21. Lockwood, *supra* note 8, at 287.

22. JAPAN SECURITIES RESEARCH INSTITUTE, *supra* note 9, at 15. "In 1947, along with the dissolution of the zaibatsu and the liquidation of organizations that had suspended their operations in accordance with occupation policy, a mass release of stocks was made through the Securities Coordination Liquidation Committee." *Id.*

23. TOKYO STOCK EXCHANGE, FACT BOOK 1990 62 (1990) [hereinafter FACT BOOK 1990].

24. *Id.* at 62.

25. *Id.* at 62. The total number of shareholders as of 1989 was estimated at 22.7 million; the total number of individual shareholders, computed in a manner so as to avoid double counting, was estimated to be approximately 10 million. *Id.*

26. DANIEL I. OKIMOTO, BETWEEN MITI AND THE MARKET: JAPANESE INDUSTRIAL POLICY FOR HIGH TECHNOLOGY 43 (1989). Over 70% of outstanding Japanese shares are held by corporations, while less than 30% are held by individuals. *See also* Mizuno, *supra* note 5, at 36.

27. FACT BOOK 1990, *supra* note 23, at 59.

28. Richard H. Pettway et al., *The Market for Corporate Control, the Level of Agency Costs, and Corporate Collectivism in Japanese Mergers*, in JAPANESE CAPITAL

Even more significantly, with the democratization movement many outsiders simply went from being irrelevant to being a nuisance to corporate insiders. Empirical evidence shows that the influx of outside shareholders during this period had no impact on the loyalty of management to pre-existing shareholders.²⁹ To neutralize those minority outside shareholders who questioned the autonomy and control of majority insiders, management increasingly relied on *sokaiya* or "general meeting specialists."³⁰ Even today, for example, "it is the pre-existing stable shareholders that matter more than incumbent management" in the takeover context.³¹ Perhaps it is predictable, then, that management in large Japanese corporations enjoys a unique degree of operational autonomy,³² and the status of minority shareholders has been effectively diminished to that of a holder of preferred stock.³³

3. The Internationalization Decade

During the last decade the role of the stock market as a supplier of long-term corporate funds in Japan has been increasing. With the issuance of substantial quantities of convertible and warrant bonds, outsiders' funds are entering the corporate coffers directly rather than in the form of indirect bank loans.³⁴ Moreover, by continuing to treat investors as preferred stockholders, Japanese companies also continue to raise capital at a very low cost.³⁵ In fact the Japanese common stockholder has become so accustomed to be-

MARKETS: ANALYSIS AND CHARACTERISTICS OF EQUITY, DEBT, AND FINANCIAL FUTURES MARKETS 338-39 (Edwin J. Elton & Martin J. Gruber eds., 1990).

29. ROBERT A. FELDMAN, *JAPANESE FINANCIAL MARKETS: DEFICITS, DILEMMAS, AND DEREGULATION* 351 (1986). "Since Japanese managers have job security, perhaps they do not make decisions on the basis of reducing their employment risk at the expense of shareholders." *Id.*

30. Dean L. Rostrom, Comment, *Corporate Extortion in Japan: Sōkaiya Endure Commercial Code Amendment*, B.Y.U.L. REV. 699, 700 (1987).

Sōkaiya shareholders [general meeting specialists] are professional racketeers who acquire a relatively small number of shares in various corporations in order to gain access to each corporation's general shareholders' meetings. They extort monetary benefits from corporate management in two ways: (1) by offering their help in assuring a shareholders' meeting without incident, or (2) by making veiled threats to cause trouble at shareholders' meetings.

Id.

31. KESTER, *supra* note 4, at 278.

32. Janow, *supra* note 4, at 589.

33. JAMES C. ABEGGLEN & GEORGE STALK, JR., *Kaisha: The Japanese Corporation* 184 (1988). "The common stock shareholder of the Japanese company is more in the position of a preferred shareholder in a Western company . . . Dividends are paid, not as a percent of earnings but as a percent of the par value of shares in the company." *Id.*

34. Mizuno, *supra* note 5, at 36.

35. James E. Schrager & Julian Gresser, *A Passport to Japan's Equity Markets*, WALL ST. J., Apr. 29, 1991, at A14 (noting returns of 50 times earnings ratio).

ing treated as a preferred stockholder that even foreign and joint venture subsidiaries in Japan have been able to raise capital by taking advantage of this low cost feature.³⁶

C. The Japanese Public As a Captive Investor Market

Historically, the Japanese public investor has been a captive market to the Japanese corporate world. Until recently, the foreign securities industry had been prevented from offering new products and access to overseas markets to Japanese would-be investors. In spite of the Ministry of Finance's espousal of a policy of "national treatment,"³⁷ it remains a difficult task for foreign securities firms to gain full and easy access to the Japanese investor base and to participate actively in the full range of securities activities.³⁸ As a result, Japanese investors have had to accept whatever they were offered in terms of financial yields, board representation, and information on corporate activities. A breakdown of Japanese investment portfolios reflects the limited range of options available to outsiders and explains why many have kept their money in low yielding postal deposits.³⁹

III. THE DISPUTE

Section One shows that since the Meiji Restoration Japanese corporations have looked to insiders, banks or government to satisfy their needs for long-term funds. This has fostered an attitude of corporate indifference to the concerns of outside minority shareholders, as is embodied in practices such as low dividend payout ratios, limited access to corporate information and no access to membership on boards of directors. Outside minority shareholders have been forced into a passive posture by *sokaiya* coercion and by the position of Japanese investors as a captive source of funds with no access to overseas investment alternatives. Over the years Japanese investors have been rendered so passive, and corporate attitudes have become so ingrained and widely accepted, that Japanese investors are willing to provide financial support for foreign corporations even though they continue to be treated by the latter as though they are irrelevant to the whole process.

36. *Id.*

37. Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.-Japan, art. VII, § 1, 4 U.S.T. 2063. "Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party." *Id.*

38. DEPARTMENT OF THE TREASURY, NATIONAL TREATMENT STUDY 225, 231-34 (1990) (Report to Congress on Foreign Government Treatment of U.S. Commercial Banking and Securities Organizations) [hereinafter NATIONAL TREATMENT STUDY].

39. Mizuno, *supra* note 5, at 36.

It is in this context that the Pickens-Koito affair arose and in which it should be analyzed.

A. *Pickens vs. Koito*

1. Pickens' Argument

The public argument made by Pickens is that he has not been permitted to substantively exercise his Japanese statutory rights.⁴⁰ In a general sense, he blames the Japanese keiretsu⁴¹ structure⁴² and "anti-Americanism"⁴³ for his predicament. More specifically, Pickens argues that Toyota, a keiretsu "parent," dictates Koito's pricing policies and consequently obtains preferred prices.⁴⁴ Toyota allegedly exercises such power through three former employees who are now Koito directors.⁴⁵ In Pickens' opinion, this scheme gives Toyota hidden dividends to the exclusion of the other shareholders.⁴⁶ Allegedly in order to perpetuate and cover up this practice,

40. *Hearing of the Econ. and Comm. Law Subcomm. of the House Judiciary Comm. on Violations of U.S. Antitrust Laws by Foreign Gov'ts*, 100th Cong., 1st Sess. (1990) [hereinafter *House Judiciary Comm. Hearings*] available in LEXIS, Nexis Library, Fednew File. Pickens stated that "[W]e are not being treated like Koito's largest shareholder. In fact, we are not being treated like any kind of shareholder." *Id.*; see also Littlefair, *supra* note 1, at 1; News Conference with U.S. Business and Industrial Council on Taxation of Foreign Multinationals with Subsidiaries in the United States, National Press Club, Washington D.C., Oct. 9, 1990 [hereinafter *News Conference*], available in LEXIS, Nexis Library, Fednew File. At the news conference, Pickens stated that "I've asked for tax returns. They won't give me that, and I'm entitled to it; as a 10 percent owner of a Japanese company I'm entitled to all financial data. We lose in the Japanese courts, and they don't — they give me nothing in the way of financial data other than what's published." *Id.*

41. See KESTER, *supra* note 4, at 54. According to Kester, the term *keiretsu* refers to a group of companies federated around a major bank, trading company, or large industrial firm. The Japan Economic Institute defines *keiretsu* as a group of firms organized around a large bank, linked primarily by finances rather than by products; industrial *keiretsu* as a group of firms organized around an independent firm with pyramidal stockholding, strengthening control in the core firm; and distribution *keiretsu* as a group of firms, including retail outlets, organized by a manufacturer as a distribution system for its own products. Japan Economic Institute, JEI Report No. 2A, at 13-15 (Jan. 12, 1990) (unpublished report) [hereinafter *JEI Report*].

42. See *House Judiciary Comm. Hearings*, *supra* note 40. At the hearings, Pickens stated "I thought that I would be the heavy that broke the Koito company out of the keiretsu. I was wrong." *Id.*; see also *News Conference*, *supra* note 40. "Why don't they allow me to be represented on the board of directors? . . . I don't think they want us to see the keiretsu system; I don't think they want me to see how they price the lights from Koweto [Koito] to Toyota . . ." *Id.*

43. Pickens stated "I don't think that they can stand for an American to see corporate Japan from the inside . . . I don't think they can stand for Americans to be inside on a board in a large Japanese company." *News Conference*, *supra* note 40.

44. *House Judiciary Comm. Hearings*, *supra* note 40.

45. *Id.*

46. *Id.* See also *News Conference*, *supra* note 40. "Revenues have been up and profits have been up for Toyota for three straight years. Look at Koito; revenues have been up and profits have been down for three years and we now are 30 percent down

Koito's directors have refused to provide information to Pickens,⁴⁷ have opposed Pickens' proposed resolutions prohibiting preferential practices, have thwarted Pickens' attempts to appoint members to the Koito Board of Directors,⁴⁸ have opposed raising dividends,⁴⁹ and have allowed other Japanese shareholders to harass Pickens with impunity during a shareholders' meeting.⁵⁰

2. Koito's Argument

The argument publicly made by Koito⁵¹ is that Pickens has been allowed to exercise his statutory rights and that this dispute is an artificial one — created by Pickens for the sole purpose of obtaining greenmail⁵² from Koito on behalf of Watanabe.⁵³ Koito not only argues that Pickens was denied participation on the board because he “doesn't know anything about [its] operations,”⁵⁴ but also points out that Pickens was allowed to speak at the shareholders' meeting in the exercise of his statutory rights.⁵⁵ If Pickens' proposals were defeated, Koito asserts, it is merely because he was “new and outnumbered.”⁵⁶

Regarding Pickens' proposal to amend the articles of incorporation, Koito's perception is that “he submitted the proposal only to camouflage his intent to greenmail us.”⁵⁷ In Koito's opinion, Pickens' request for board representation was made “probably for dramatic effect,”⁵⁸ particularly in light of the fact that he owned only 20 percent of the stock.⁵⁹ “Rebuffed, Pickens could later say Koito

from what we were three years ago. I mean we really don't know — we really don't know what we make off our lights until Toyota decides late in the year to tell us.” *Id.*

47. Pickens' suits against Koito, filed at the Tokyo District Court on June 23, 1989 and January 12, 1990, respectively, were designed to challenge Koito's refusals to provide him with unpublished information. Boone Co. — Koito Investment Chronology 2-4 (1990) (unpublished report, on file with author) [hereinafter Investment Chronology].

48. Koito Annual Meeting, *supra* note 1, at 20-21.

49. Littlefair, *supra* note 1, at 1.

50. *Id.* at 9. *But see* Paul, Hastings, Janofsky & Walker, Koito 1990 Shareholder Meeting 2 (unpublished report, on file with author) [hereinafter Shareholder Meeting 2]. “The company did not provide the *sokaiya* with microphones or interpret their remarks into English, thereby sparing all attending the meeting, including the American shareholders, from the brunt of the comments.” *Id.*

51. Matsuura, *supra* note 1.

52. ROBERT C. CLARK, CORPORATE LAW 574 (1986). Greenmail is defined as causing “the target company to buy the shares already obtained by the hostile would-be acquirer at a substantial premium over the latter's cost, with the understanding that he, she, or it will stop the takeover attempt.” *Id.*

53. Matsuura, *supra* note 1; *see also* Matsuura Letter, *supra* note 2.

54. Matsuura, *supra* note 1.

55. *Id.* “[B]ut we accomplished our main goal: to let Pickens speak. No one can accuse us of breaking our own rules.” *Id.*

56. *Id.*

57. Koito Annual Meeting, *supra* note 1, at 18.

58. Matsuura, *supra* note 1.

59. *Id.*

overrode its biggest shareholder because he was not Japanese."⁶⁰ Koito's management also wondered why Pickens went "all the way to Capitol Hill, stirring up further ill will toward Japan, for three board seats. . . . [B]ilateral trade friction and Koito's shareholding policies are two different problems."⁶¹ Koito bases its suspicion of Pickens' motives on the fact that Pickens bought his stock from a Japanese speculator who had asked Koito twice already for greenmail.⁶² Koito points out that even if all the profit per share was appropriated for dividends, Pickens' return would not be enough to make his purchase of Koito stock a sound financial decision.⁶³ The same conclusion would be reached, in Koito's opinion, even if the cost of financing the transaction is taken into account.⁶⁴ Koito also points out Pickens' reputation as a "takeover artist"⁶⁵ and claims that he has engaged in numerous greenmail activities in the United States.⁶⁶ On this basis Koito concluded that "it is evident that Boone Company⁶⁷ is not a real shareholder of our Company, but a mere registered owner of our stock, and that Boone Company is performing greenmail activities towards us. . . ."⁶⁸

B. Statutory Shareholders' Rights in Japan

The shareholders' rights granted by Japanese corporation law⁶⁹ can be aggregated in three broad categories: vote, sue and sell.

1. Vote

a. Generally

The basic principle is "one vote, one share,"⁷⁰ and governance of shareholder meetings is generally by majority rule.⁷¹ For example, directors are appointed at the general meeting of shareholders by majority rule.⁷² The law does not require that directors have any particular expertise or qualifications in order to serve on a board.⁷³

60. *Id.*

61. *Id.*

62. *Id.*; see also Koito Annual Meeting, *supra* note 1, at 16.

63. Koito Annual Meeting, *supra* note 1, at 14.

64. *Id.* at 15.

65. Matsuura, *supra* note 1.

66. Koito Annual Meeting, *supra* note 1, at 15.

67. Boone Company is the instrument used by Pickens to hold his investment in Koito. Littlefair, *supra* note 1, at 1.

68. Koito Annual Meeting, *supra* note 1, at 16.

69. DOING BUSINESS IN JAPAN, *supra* note 7, at 43 (referring to SHŌHŌ, art. 241).

70. *Id.* at 75 (referring to SHŌHŌ, art. 241).

71. *Id.* at 74 (referring to SHŌHŌ, art. 239).

72. *Id.* at 80 (referring to SHŌHŌ, art. 254(1)).

73. *Id.* at 80 (referring to SHŌHŌ, art. 254).

b. Election of Directors

Like their American counterparts, Japanese corporations have the option of not using cumulative voting.⁷⁴ Therefore, if Koito were an American company operating in the United States, Pickens would still be unable to appoint any directors unless a majority of Koito's shareholders chose to use cumulative voting. Pickens' argument was not that he has a statutory right to appoint directors in Koito but rather that, in view of the promises he made to Koito, he is entitled to be on the board. In Pickens' opinion, Gulf Oil, Unocal and Phillips certainly would have invited him to join their respective boards if he had promised them the same things he offered Koito.⁷⁵

c. Shareholders' Meetings and *Sokaiya*

The 1982 amendments to Japan's corporation law weakened the right of minority shareholders to participate in shareholders' meetings in two ways: first, it restricted the right to propose particular matters or to request explanations to shareholders owning a minimum of either 300 shares or 1% of the corporation's total shares; second, it withdrew the voting rights from fractional shares.⁷⁶ These revisions to the corporations code were aimed at weakening *sokaiya* who had been extorting money from corporations.⁷⁷ The *sokaiya* reacted negatively to this government effort and began sabotaging shareholders' meetings. Rather than lasting only thirty minutes, some shareholders' meetings reportedly lasted as long as thirteen and one half hours.⁷⁸ The *sokaiya* were able to do this by asking many embarrassing questions and threatening to sue if their questions were ignored or the question and answer section was cut short. If the threatened suit was ultimately successful, the meeting in question would be declared void, resulting in great cost and inconvenience to the corporation.⁷⁹ Corporations tried to

74. *Id.* at 81 (referring to SHŌHŌ, art. 256-63); compare DEL. CODE ANN. tit. viii, §§ 216(iii), 214 (1975); REV. MODEL BUS. CORP. ACT § 7.28(a), (b) (Supp. 1991); CAL. CORP. CODE § 301.5 (a) (West 1991) ("A listed corporation may, by amendment of its articles or bylaws . . . eliminate cumulative voting . . ."). *Id.*; see also CLARK, *supra* note 52, at 364. ("Most states permit cumulative voting, leaving the matter optional with the corporation. Some states have statutes mandating cumulative voting, and a few state constitutions require it as well."). *Id.*

75. *House Judiciary Comm. Hearings, supra* note 40. *But see* Letter from Hamilton Loeb of Paul, Hastings, Janofsky & Walker to Eduardo Recio (Nov. 1, 1991) (on file with author) [hereinafter Loeb Letter] (referring to Pickens' claim that he would have been on the boards of various U.S. corporations: "For anyone who was involved in the famous Pickens battles of the 1980's, his suggestion is flatly ludicrous").

76. Rostrom, *supra* note 30, at 703.

77. Before the 1982 amendments, as many as 25% of *Sokaiya* were affiliated with organized crime. *Id.* at 701.

78. *Id.* at 706 n.40, 701 n.11.

79. *Id.* at 706-07.

fight back by holding all shareholders' meetings simultaneously, with limited success.⁸⁰ Although more recently it seems that *sokaiya* and corporations have reached some kind of accommodation,⁸¹ the *sokaiya* performance at the June 28, 1990, Koito annual meeting shows how disruptive they still can be.⁸²

Koito may perceive Pickens as some kind of "American *sokaiya*." He asks what Koito considers to be embarrassing questions;⁸³ and, in Koito's opinion, he seeks to extort Koito in the form of greenmail.⁸⁴ This perception may be shared by the Japanese *sokaiya* and could explain the high level of hostility towards Pickens displayed by *sokaiya* at the June 1990 meeting.⁸⁵ Such a perception may also explain what Pickens has characterized as Koito management's apparent reluctance to bring the meeting under control, in spite of having security personnel at its disposal on the premises.⁸⁶

Yet a very different explanation is offered by Koito. Its representatives say that the *sokaiya* obtained their stocks from Watanabe and that their heckling was part of a plan to embarrass Koito as a means of coercing it to pay greenmail to Pickens.⁸⁷ Representatives

80. Ken Szymkowiak, *Prime Time For Sokaiya*, JAPAN ECON. J., July 28, 1990.

81. Rostrom, *supra* note 30, at 706.

82. Matsuura, *supra* note 1. For an illustration of the techniques used to slow down the meeting, see generally Koito Annual Meeting, *supra* note 1.

83. Pickens asked questions relating to pricing methods, social/entertainment expenses, officer remuneration, political contributions, and sale of Koito stock to friends and family. Koito Annual Meeting, *supra* note 1, at 29, 32, 38, 39, 113.

84. *Id.* at 16.

85. Examples of taunts directed at American shareholders at Koito's annual meeting include the following: "Japan has already defeated America in the economic war"; "Go home! Go home! Yankee go home!"; "Remember Pearl Harbor!"; "Japan has a history of 2000 years while U.S. has only 200 years"; (to an American woman shareholder) "What is your job? You are a stripper aren't you?"; "Damn you! Bastards! F—you!" Littlefair, *supra* note 1, at 6. *But see* Takao Matsuura, *Pickens' Financial Gimmicks*, WASH. TIMES, Nov. 3, 1991, at B5: "It is true that insults were shouted at Mr. Pickens and his entourage. But equally ugly remarks were shouted at me by the professional hecklers (known as *sokaiya*)." *Id.*

86. Littlefair, *supra* note 1, at 7. *But see* Matsuura, *supra* note 1; Loeb Letter, *supra* note 75 (as to whether the meeting was out of control: "It was not. Anyone who attended it, or any of the foreign press who watched it on closed circuit television . . . will verify that the meeting was run in an even-handed fashion that was worked out with Pickens' lawyers in the lengthy negotiations over the week preceding the meeting").

87. Paul Hastings, Janofsky & Walker, Fact Sheet on *Sokaiya* 2 (unpublished report) [hereinafter *Sokaiya* Fact Sheet] (on file with the author).

On the same day Pickens sought to register the shares he received from Kitaro Watanabe . . . a large group of *sokaiya* also suddenly registered as Koito shareholders. As reported in the press in Japan: 'In preparation for the showdown [at Koito's 1989 shareholder meeting], Watanabe placed 1000 shares in the names of each of 15 *sokaiya* (professional extortionists) and rightists related to Sumiyoshi Rengo, one of Japan's major underworld organizations. The shares will get some of the underworld's sharpest shooters fence-post seats at the meeting.' (*Tokyo Insider* 6/20/89 p.4).

also say that Koito never experienced problems with *sokaiya* until the Pickens episode.⁸⁸

d. Dividends and Fundamental Corporate Change

The level of dividends are set by directors and submitted as a proposal to the general meeting of shareholders. Amendments to the articles of incorporation, such as those suggested by Pickens, are adopted by special shareholder resolutions.⁸⁹ Both of these statutory mandates were met by Koito in the Pickens-Koito affair.

2. Sue

a. Derivative Suits

The right to sue directors on behalf of the corporation is extended to any shareholder who has held a share of stock continuously for at least six months.⁹⁰ In comparison to the standing United States requirement that the plaintiff be a shareholder at the time the wrong was committed or at the time she became a shareholder through a transfer by operation of law,⁹¹ a shareholder in Japan has a wider right to sue derivatively. In the United States a derivative suit may fail if the corporate defendant can successfully argue that the acts in question were designed to implement a corporate policy that has some business justification, even if it is arguably not the optimal policy.⁹² A similar standard seems to be adopted by Article 267 of the Japanese Commercial Code (*Shōhō*),⁹³ which probably explains why Pickens' suits were not filed under Article 267.

Although Article 267 provides a right to sue, it is unlikely that a shareholder familiar with Japanese social mores and the Japanese court system would want to file a suit likely to disturb harmony — "the key Japanese value."⁹⁴ Any suit would have to go through a court system which some consider very inefficient.⁹⁵ Nevertheless, the inefficient enforcement of legal rules has led to the creation of social mechanisms of control and order.⁹⁶ Thus, the shareholder in

Id.

88. *Id.*

89. DOING BUSINESS IN JAPAN, *supra* note 7, at 130.1 (referring to SHŌHŌ, arts. 342, 343, 345-349); *see also* REV. MODEL BUS. CORP. ACT, § 10.1-10.9.

90. DOING BUSINESS IN JAPAN, *supra* note 7, at 89 (referring to SHOŌHŌ, art. 267(i)).

91. REV. MODEL BUS. CORP. ACT, § 7.40.

92. CLARK, *supra* note 52, at 609 n.15 (discussing *Kamin v. American Express Co.*, 383 N.Y.S.2d 807 (1976), *aff'd* 387 N.Y.S.2d 993 (Sup. Ct. 1976).

93. DOING BUSINESS IN JAPAN, *supra* note 7, at 89 (referring to SHŌHŌ, art. 267).

94. EDWIN O. REISCHAUER, *THE JAPANESE TODAY* 136 (1988).

95. Masanobu Kato, *The Role of Law and Lawyers in Japan and the United States*, 1987 B.Y.U.L. REV. 627, 696.

96. *Id.* at 696.

Japan has an additional tool to protect his interest: social sanctions.

The recent Sumitomo affair offers a good illustration of the way social mechanisms can protect shareholders:⁹⁷ after a branch manager of the Sumitomo Bank was charged with granting illegal loans to finance takeover/raid activities, the Chairman of Sumitomo resigned, taking symbolic responsibility for the wrong action.⁹⁸ Thus, to the extent that a shareholder in Japan, such as Pickens, can manage to publicly expose wrongdoing, the need to sue is reduced. However, it can be very difficult for shareholders to gain access to a Japanese corporation's unpublished information.

b. Direct Suits

In Japan, as in the United States, a shareholder, *qua* shareholder, can sue a corporation. Pickens, for example, has sued Koito twice in the Tokyo District Court to obtain unpublished financial information.⁹⁹ As a holder of more than 10% of Koito's stock, Pickens has a statutory right to peruse corporate documents.¹⁰⁰ On the other hand, management may refuse to provide information for reasons similar to lack of proper purpose in the United States, such as seeking information to compete or profit or inadequate timing.¹⁰¹ Additionally, management may deny access to documents if it has reason to believe that the release would "hinder the management of the business"¹⁰² or "injure the common interest of the shareholders."¹⁰³

Generally speaking, due to the vagueness of the statutory language regarding access to information, the reach of shareholders' rights is unclear. For example, the Tokyo District Court has interpreted the rule narrowly to read that shareholders have no right of access to unpublished corporate tax returns.¹⁰⁴ If the Court finds in Pickens' pending case that Pickens does not have the right to see the full financial details of Koito's transactions with its clients, including Toyota, on the grounds that such a disclosure would "hinder

97. James Sterngold, *Stock Scandal in Japan Runs Deep*, N.Y. TIMES, Feb. 2, 1991, § 1, at 29.

98. *Id.* at 29.

99. Investment Chronology, *supra* note 47, at 2, 4.

100. DOING BUSINESS IN JAPAN, *supra* note 7, at 110.4 (referring to SHŌHŌ, art. 293.6).

101. *Id.* at 110.9-110.10 (referring to SHŌHŌ, art. 293.7); DEL. CODE ANN. tit. 8, § 220; REV. MODEL BUS. CORP. ACT, § 16.02; *see also* Telephone Interview with Hamilton Loeb of Paul, Hastings, Janofsky & Walker (Apr. 22, 1991) [hereinafter Loeb Telephone Interview]. "This is the defense used by Koito in the pending suit." *Id.*

102. DOING BUSINESS IN JAPAN, *supra* note 7, at 110.9 (referring to SHŌHŌ, arts. 293-297 (1)).

103. *Id.* at 110.9.

104. Loeb Telephone Interview, *supra* note 101. In its decision of June 23, 1989, the Tokyo District Court ruled that corporate tax returns are not discoverable under arts. 293-296.

the management of the business" or "injure the common interest of the shareholders," then the right of shareholders to peruse unpublished corporate documents would be virtually nonexistent.¹⁰⁵

3. Sell

Neither side in the Pickens-Koito affair is making an argument concerning the exercise of the right to sell.¹⁰⁶ Shareholders' rights in this area are basically the functional equivalent of those enjoyed by holders of American stock. The Japanese statute even provides for pre-emptive and appraisal rights.¹⁰⁷ In this regard, it is important to note that the power to administer the affairs of the corporation is statutorily vested in the directors of the corporation.¹⁰⁸

C. The Exercise of Statutory Shareholders' Rights

1. Vote

a. Shareholders' Meetings

Pickens' argument regarding shareholders' meetings boils down to a statement that, although he has been allowed to exercise his statutory rights, the concerted vote of the keiretsu shareholders has made his exercise of those rights an empty formality. He is essentially arguing that the purpose of giving a minority shareholder the ability to participate in shareholders' meetings and to submit motions is to give him the opportunity to convince the majority of the convenience of adopting his ideas. To demonstrate his point Pickens claims to have convinced more than 57% of Koito's small, individual, non-keiretsu shareholders to submit their proxies in favor of his proposals for the June meeting.¹⁰⁹ Thus, Pickens is claiming that he never had a real opportunity to convince the keiretsu shareholders because rather than considering his proposals on the merits, the keiretsu members dismissed them on the basis of his subordinate status as an outsider.¹¹⁰ Pickens asserts that Koito

105. This issue may never be resolved by the court, since Pickens has asked for the indefinite postponement of the hearing of the case, which is a way for Japanese lawyers to discretely desist from a cause of action. *Id.*

106. *DOING BUSINESS IN JAPAN*, *supra* note 7, at 55 (referring to SHŌHŌ, art. 204).

107. *Id.* at 77, 97 (referring to SHŌHŌ, arts. 245.2, 280.4-285.5); see also DEL. CODE ANN. tit. 8, § 262; REV. MODEL BUS. CORP. ACT, § 13.02.

108. *DOING BUSINESS IN JAPAN*, *supra* note 7, at 83-84 (referring to SHŌHŌ, art. 260 (1)).

109. Littlefair, *supra* note 1, at 8. "This is clear evidence that the average Japanese investor is dissatisfied with the keiretsu system in Japan," Pickens said. "Many of the proxy cards we have received say that 'Toyota's piracy' has to stop." *Id.* But see Shareholder Meeting 2, *supra* note 50, at 5. "Pickens garnered the support of less than 2% of the shareholders, other than himself." *Id.*

110. Pickens' suspicions of concerted action by keiretsu members is not without support. "According to a recent survey by Commercial Law Centre Inc., a Tokyo association, 57 percent of Japan's publicly traded companies resort to strengthening keiretsu

should benefit from the talent of all of its shareholders,¹¹¹ implying that the fact that a shareholder is "new and outnumbered" should not make it "predictable" that his proposals will inevitably lose.¹¹²

b. Dividends

Although shareholders in Japan have a right to receive dividends, Japanese corporations are typically characterized by a low payout ratio (28.13%)¹¹³ as compared to American corporations (50%).¹¹⁴ If an outside shareholder has no trading relationship with the corporation, thus preventing him from sharing in the corporation's wealth through means other than dividends, then she receives a return on her investment which is lower than that of an inside keiretsu shareholder.¹¹⁵ Such a return can be measured in monetary terms, such as price breaks, or in terms of strategic and operational advantages, such as a lower risk of not getting the business;¹¹⁶ and the different outcomes which result constitute, in the words of a Japanese observer, "unfair treatment"¹¹⁷ of outside minority shareholders.

Yet Japan's low dividend payout ratio is only part of the story. Market appreciation in the fifteen years between 1973 and 1987 resulted in an average stock return of 22%, thus compensating for the low payout ratio.¹¹⁸ The catch, however, is that a shareholder must sell her stock in order to realize the benefit; and if the market experiences a severe correction, as it did in 1990,¹¹⁹ then stockholders who sell will realize a diminished return. In any case, market appreciation is an unlikely source of income for Pickens, due to the reportedly high price at which he acquired his stock.¹²⁰

relationships when their shares are bought up by investor groups for a potential merger or acquisition." Yuko Mizuno, *supra* note 5, at 36.

111. Pickens made this argument when he said, "I have a simple request. Give me a chance. That's all I ask for. Allow me to participate. If I am not a good director, or if I don't help Koito, you can vote me out at the end of my term." Littlefair, *supra* note 1, at 5.

112. See Matsuura, *supra* note 1.

113. FACT BOOK 1990, *supra* note 23, at 57.

114. ABEGGLEN & STALK, *supra* note 33, at 183.

115. This is essentially Pickens' argument. See *House Judiciary Comm. Hearings*, *supra* note 40, at 2.

116. JEI Report, *supra* note 41, at 13-15.

117. Littlefair, *supra* note 1, at 29 (quoting Prof. Hideo Ishida of Keio University).

118. JAPANESE CAPITAL MARKETS: ANALYSIS AND CHARACTERISTICS OF EQUITY, DEBT, AND FINANCIAL FUTURES MARKETS, *supra* note 28, at xii (Preface).

119. Naoyuki Isono, *When The Bubble Bursts*, TOKYO FINANCIAL MARKETS 3 (Winter Supp. 1990).

120. Matsuura, *supra* note 1; Koito Annual Meeting, *supra* note 1, at 14; Takao Matsuura, *Boon-San, Either Put Up or Shut Up*, WALL ST. J., Apr. 18, 1990, at A22.

c. Illegitimate Voting Practices

The Joint Report of the U.S.-Japan Working Group on the Structural Impediments Initiative (S.I.I. Report) "clarifies" that the voting of stock in a manner designed to advance unfair trade practices is not allowed in Japan.¹²¹ In the case at hand, if Pickens could have shown that Koito's rejection of his proposals had the effect of ensuring the effectiveness of a cartel, group boycott or other practice that would be considered unfair, then he would have had a basis to complain to Japan's Fair Trade Committee (JFTC).¹²² For example, Pickens could have taken advantage of the new interpretation of the voting rules by linking the appointment of his nominated directors to Koito's ability to obtain new clients and suppliers in the United States or Japan. Denial of his motion would then have looked like an unfair attempt to discriminate against new clients or suppliers willing to deal with Koito on equal or more favorable terms than those of Toyota. Moreover, Pickens could have strengthened this argument by nominating the directors of prospective clients or suppliers. Finally, according to the S.I.I. Report, the JFTC can order disposition of stocks as a means of eliminating undesirable voting practices.¹²³ Thus, keiretsu member companies would have an incentive to accommodate Pickens' board representation demands in order to avoid penalties from the JFTC.

2. Sue

a. Disclosure of Corporate Information

While the lack of access to relevant information dilutes all shareholders' statutory rights in Japan, this problem is particularly critical to the exercise of the rights to demand and sue. The S.I.I. Report has called for the enhancement of disclosure requirements in the keiretsu context,¹²⁴ specifically demanding in Section 4 the re-

121. See S.I.I. Report, *supra* note 3, at V-2, V-3 (a)-(d).

122. *Id.*

123. *Id.* at V-2. The report notes:

When shareholding is used as a means of ensuring the effectiveness of conduct listed in a [Cartels], b [Group Boycotts], and c [Unilateral Refusal to Deal and other Unfair Trade Practices], . . . the FTC should clarify its interpretation that such conduct could be regulated Furthermore, when it is envisaged that unfair trade practices cannot be eliminated effectively without ordering disposition of stocks, the FTC can order such disposition.

Id.

124. The main concern of Section 4, "Enhancement of the Disclosure Requirements," is to promote transparency of relations among firms, presumably to facilitate strict enforcement of the Anti-Monopoly Act. Section 5, which deals explicitly with shareholders' rights, calls only for a reexamination of company law with a view to enhancing disclosure requirements, but gives no additional details. If shareholders could gain access to Section 4 reports, their ability to protect their rights would be greatly enhanced. *Id.* at V-6, V-7.

porting of related party transactions according to American standards¹²⁵ and the availability of financial statements, segmented financial reporting and unconsolidated financial reports — even for major customers and accounts.¹²⁶ If the concerns expressed in the S.I.I. Report are taken at face value, Koito's reluctance to provide information to Pickens concerning its dealings with Toyota might be explainable by the simple fact that Koito does not have such information.¹²⁷ However, if Japan's corporation law is not changed to specifically make available to shareholders such related party transaction reports, there is a risk that courts will find the documents to be off-limits. This will certainly be the case if the information in the reports is to be furnished to the government as part of the corporation's tax returns.¹²⁸

b. Disclosure of Shareholder Information

Japan's Law No. 43 of 1990 mandates that persons acquiring more than 5% of listed shares are required to file with the Minister of Finance a report containing, among other things, information concerning the price, purpose, and percentage of the interest obtained.¹²⁹ This is similar to provision 13(d) of the United States' Securities Exchange Act.¹³⁰ The effect of the rule is likely to be mixed. On one hand, it was designed to increase protection for investors.¹³¹ It is argued that this is exactly the effect that the rule had in the Pickens-Koito affair.¹³² On the other hand, the implementation of the 5% rule can be a set-back to those shareholders wishing to oust what they perceive to be entrenched management by denying them the element of surprise. Given the lack of symmetry in the availability of information to shareholders *vis a vis* incumbent management, the ultimate effect of the rule can be seen as a

125. *Id.* at V-6, § 4 (1), (2).

126. *Id.* at V-6, § 4 (2)-(4).

127. This seems to be Pickens' reading of the situation when he says, "we don't really know what we make off our lights until Toyota decides late in the year to tell us." News Conference, *supra* note 40.

128. Loeb telephone interview, *supra* note 101.

129. Amendments to the Securities & Exchange Act, Japan Bus. L. Guide (CCH) ¶ 99-025, § 1 (1991).

130. *Id.* See Securities Exchange Act of 1934, 15 U.S.C. § 13(d).

131. From the perspective of minority shareholders this provision is as significant in Japanese law as it is in American law. Small and minority shareholders can be at a substantial risk from the machinations of larger shareholders, who may have access to corporate information or may plan joint strategies that could do damage to the outside investors.

Loeb Letter, *supra* note 75.

132. "In the Pickens-Koito situation, an investor who relied on Pickens' statements about his supposed intent to be a long-term shareholder and his lack of greenmail purposes would have been in for a rude awakening once the disclosure of the Pickens-Watanabe agreement was forced by the new rule." *Id.*; see also Matsuura Letter, *supra* note 2.

furthering weakening of shareholders' ability to exercise their statutory rights.

In summary, shareholders in Japan possess statutory rights which are not very different from those prescribed under U.S. law. Koito asserts that Pickens has been allowed to exercise those rights, and its position is strengthened by a decision of the Tokyo District Court as well as by the fact that Pickens has abandoned his other suit. Although Pickens counters that he has not been allowed to substantively exercise his statutory rights, it is clear that he has not used all of the legal arguments available to him in the framework of the S.I.I. Report.

IV. RESOLVING THE DISPUTE

If there is one thing that Pickens and Koito can agree on, it is that Pickens is not welcome at Koito. Disagreement resumes, however, when each side tries to explain why this is so. This section analyzes those divergent explanations.

A. "Anti-Americanism"

A recent study of United States-Japan relations commissioned by Japan's Foreign Ministry states that Japan's rise as an economic superpower has re-awakened Japanese nationalism in the form of "anti-Americanism."¹³³ In the context of shareholders' rights, however, it is important to note that the indifference to the concerns of outside minority shareholders which is displayed by corporations in Japan has been a feature of the Japanese business environment since the Meiji Restoration, as described in Section One. Moreover, even if "anti-Americanism" is a factor with respect to shareholders' rights in Japan, the Pickens-Koito affair would not make a good illustration of this phenomenon.

Pickens' argument that he is not being asked to join Koito's board due to the xenophobic, anti-American attitude of Japanese companies is weak in at least two respects. First, recent reports indicate that some Japanese companies are refusing to accept former bank officers as nominees for directors¹³⁴ not because these individuals are non-Japanese, but because cash-rich corporations have repaid their loans completely and feel that they no longer need this connection to the banks.¹³⁵ Second, the "anti-Americanism" argument is further weakened by the fact that American corporations in

133. Carla Rapoport, *The Big Split*, FORTUNE, May 6, 1991, at 39 (referring to the findings of a study commissioned by Japan's Foreign Ministry and written by the International Institute for Global Peace, a Tokyo research organization).

134. KESTER, *supra* note 4, at 272.

135. "This has meant a shift in the balance of power among corporate stakeholders away from financial intermediaries, the traditional primary supplier of capital, and into

which Pickens has acquired substantial minority stakes in the past have not asked him to join their respective boards, and his argument that they would have done so if given the opportunity has not been substantiated.

B. Cultural Incompatibility

Koito's president has brought to the attention of the press the difference in philosophy between the parties: whereas Pickens' approach is to put the stockholders' interests first; Koito's approach is to consider the interests of employees, clients and local communities as well as shareholders.¹³⁶ In other words, the Pickens-Koito affair is arguably the result of a basic cultural difference between the West and the East. The individualistic West is concerned with each shareholder, while the communal East is concerned with the collective stakeholders.¹³⁷ There are several problems with this explanation.

First, Pickens' brand of shareholders' right is not universally accepted in the United States, as is supported by the fact that he founded the United Shareholders Association to promote his views on the subject.¹³⁸ In fact, over the last twenty years many state legislatures have passed anti-takeover statutes designed to thwart the activities of corporate raiders,¹³⁹ and the Federal Reserve has decided to restrict the actions of certain raiders in the banking industry.¹⁴⁰ Second, the "cultural difference" argument is grounded more in myth and emotion than in fact. For example, the idea of earning only reasonable profits for shareholders in the auto industry, while giving the real benefits of the enterprise to clients and employees, is neither new nor uniquely Japanese.¹⁴¹ It was Henry Ford who said that the Ford Motor Company was "organized to do as much good as we can, everywhere, for everybody concerned."¹⁴² Indeed, the question "for whom are corporate managers trustees?"

the hands of industrial managers." *Id.* at 272. This is an uncharacteristically shortsighted move by Japanese corporate managers.

136. Matsuura, *supra* note 1.

137. "[E]nterprises are . . . regarded in Japan as a 'community' or *gemeinschaft* to be preserved and not, as in the United States, simply as a vehicle of commerce." IYORI HIROSHI, *ANTITRUST AND INDUSTRIAL POLICY IN JAPAN* 60 (1984).

138. See Jonathan Weber, *Pickens Brings Anti-Japan Push to County*, L.A. TIMES, Nov. 21, 1989, at D7 (Pickens inaugurates the Orange County chapter of his "Shareholder Rights" organization).

139. As of mid-1988 twenty-nine states had enacted anti-takeover statutes. Frank J. Garcia, Note, *Protecting Non-shareholder Interests in the Market for Corporate Control: A Role for State Takeover Statutes*, 23 U. MICH. J. L. REF. 507, 526 n.113, 527 (1990).

140. Joel Kurtzman, *KKR on a Leash*, N.Y. TIMES, Apr. 28, 1991, at F2.

141. See *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

142. LEWIS D. SOLOMON, ET AL., *CORPORATIONS, LAW & POLICY* 1322 (2d ed. 1988) (citing ALLEN NEVINS & FRANK E. HILL, *FORD: EXPANSION AND CHALLENGE 1915-1933*, at 99-100 (1976)).

has been the subject of academic debate in the United States since 1932:¹⁴³

Recent decisions in the state and federal courts . . . have underscored the ambiguity which plagues this area of the law. Faced with such ambiguity in the case law, states have responded by amending their corporate codes to clarify the board's authority to consider non-shareholder interests.¹⁴⁴

Third, the idea that shareholders in the United States are motivated only by returns on investment is not supported by the facts. A recent survey indicates that shareholders of corporations traded in the United States want more money to be directed towards cleaning up plants, stopping environmental pollution, and making safer products. Higher dividends ranked third in a list of ten potential spending items.¹⁴⁵ Finally, corporations such as Digital Equipment — which retains earnings and doesn't pay dividends as a means of lowering capital costs — dispel the idea that all American corporations are managed as "cash cows" for the benefit of short term shareholders.¹⁴⁶

In sum, the Pickens-Koito affair is simply not a good illustration of cultural incompatibility. More accurately, this affair serves to show that American and Japanese majority shareholders often share the attitude that minority shareholders are irrelevant to the success of the corporation and are not as deserving of profit returns as other corporate constituents.¹⁴⁷

C. Keiretsu

With regard to the role of keiretsu in abrogating outside shareholders' rights, Pickens' argument against the keiretsu is weakened by the fact that several American corporations that are not keiretsu members did not invite him to join their boards even after he bought substantial minority interests. Furthermore, the 1919 case of *Dodge v. Ford Motor Co.* illustrates the point that the oppression of a substantial minority at the hands of a majority can occur just as easily in the United States, without keiretsu influence.¹⁴⁸ In this respect basically all that the confrontation between Pickens and Koito stands for is the proposition that keiretsu member companies, like non-keiretsu companies, sometimes hold the attitude that mi-

143. Joseph Biancalana, *Defining the Corporate Constituency: Asking the Wrong Question* 59 U. CIN. L. REV. 425, 464. "That was Dodd's question in 1932. It is our question today." Garcia, *supra* note 139, at 515.

144. Garcia, *supra* note 139, at 519-20.

145. Mark J. Epstein, *What Shareholders Really Want*, N.Y. TIMES, Apr. 28, 1991, § 3, at 11.

146. See ABEGGLEN & STALK, *supra* note 33, at 183.

147. CLARK, *supra* note 52, at 603.

148. See *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

nority shareholders are irrelevant to the success of their operations. What is needed is not necessarily the dismantling of the keiretsu but rather a change in the attitude prevalent since the Meiji Restoration that encourages *a priori* dismissal of potentially valuable shareholder input. This is the same counterproductive attitude that promotes the notion that when outside minority shareholders are not irrelevant, they must be nuisances, *sokaiya* or greenmailers.

Contrary to Pickens' assertions, the keiretsu structure has something to offer to all of its members. Even though it has been reported in some cases that its effect has been to raise the cost of capital for firms in the group and to make member firms less profitable than their independent counterparts, keiretsu offer important operational and strategic advantages.¹⁴⁹ In general, keiretsu have had a stabilizing effect on the operating performance of member firms and often serve as the "White Knight" that defends a corporation from takeover or the "Deep Pocket Partner" that delivers it from financial failure.¹⁵⁰ Furthermore, it has been noted,

A group of firms that trades with each other often can maximize its total profits by pricing intragroup exchanges at competitive levels and selling to outsiders at whatever the market will bear. As applied to the Toyota Group, for example, Koito may lower its prices and forgo some profit on its sales to Toyota in order to maximize the profit of the group; however, it obtains some kind of preferential treatment from the rest of the group, now or in the future. The deal is worth it to the rest of the Toyota Group if the motor vehicle manufacturer can sell a larger volume of cars — albeit at a somewhat lower price — and earn a higher profit than it could in the absence of such an arrangement.¹⁵¹

Therefore, even if Pickens' allegations concerning preferential pricing for Toyota were correct, and most analysts reportedly agree that they are,¹⁵² it still may be in Koito's best interest to give special prices to Toyota.¹⁵³

Yet this is not what Koito has argued. Instead, Koito's chairman stated publicly that "Toyota motor is a blue-ribbon client and a major shareholder, nothing more."¹⁵⁴ During the annual shareholders' meeting a Koito executive vice president further stated that "the profit ratio of our products for Toyota is not particularly lower than the profit ratio of our products for other customers."¹⁵⁵ Thus

149. See JEI Report, *supra* note 41, at 13-15.

150. *Id.*

151. *Id.* at 15-16.

152. James Sterngold, *A Pickens Drama, Far From Texas*, N.Y. TIMES, June 29, 1990, at D1.

153. Whether keiretsu pricing mechanisms and operational arrangements are in violation of Japanese or U.S. antitrust laws is beyond the scope of this paper.

154. Matsuura, *supra* note 1.

155. *Id.*

the questions remaining are why Koito would attempt to deny what, to many, is an obvious keiretsu relationship¹⁵⁶ and why Koito would risk the appearance of acting in bad faith. There are several possible explanations.

First, Koito may fear that acknowledging its keiretsu relationship with Toyota will expose it to scrutiny by both the Japanese and the United States trade commissions for possible anti-trust violations.¹⁵⁷ Perhaps in anticipation of collusion charges, Koito feels compelled to explain that although three of its directors had a prior career at Toyota, they retired from that firm before accepting their appointments at Koito and "are pure Koito men who have nothing to do with Toyota."¹⁵⁸ In anticipation of charges of unfair pricing practices, Koito argues that "there can never be such a fact that unreasonable markdown is offered to Toyota by the company. There is no such invisible dividends [sic] being paid to Toyota."¹⁵⁹ Yet, while fear of anti-trust enforcement is a reasonable explanation, it seems inadequate in light of the fact that the Toyota-Koito business relationship is well known and a successful denial is highly unrealistic. In any case, it is beyond the scope of this article to determine whether keiretsu relationships constitute a violation of the anti-trust laws of either Japan or the United States.¹⁶⁰

A second explanation for why Koito would deny its keiretsu affiliation comes from the background established in Section One. This is a situation in which an outside minority shareholder is asking insiders to explain themselves. Japanese corporations have dealt with such requests in the same way since the Meiji Restoration: they ignore them. From Koito's perspective, Pickens, as well any other minority investor in his position, should assume a more passive posture. No one asked him to invest in the corporation, and the corporation does not need his money or expertise to succeed. Koito's management, therefore, finds it justifiable to refuse even to discuss with its largest stockholder its business policies, labeling

156. "Toyota owns nearly 20% of Koito's stock; three of Koito's top executives, including its president, came from Toyota. In the Japanese business context, that makes Koito a firm member of the Toyota Keiretsu, or family." Sterngold, *supra* note 152.

157. Under article 266 (5) of the Commercial Code, directors are liable to stock companies for the "doing of any act which violates any law." See *DOING BUSINESS IN JAPAN*, *supra* note 7, at 87 (referring to SHŌHŌ, art 266 (5)). If Koito was violating antitrust laws under the direction of current directors, it would be understandable that the directors would want to cover it up. However, since covering up illegal activities is most likely illegal behavior under Japanese law, the directors' cover up would not be justified either.

158. Koito Annual Meeting, *supra* note 1, at 28.

159. *Id.* at 26.

160. For example, this article does not reach the question of whether or not admission by Koito of certain keiretsu involvement would constitute a *per se* antitrust violation.

them "corporate secrets of great significance."¹⁶¹

Overall, blaming the keiretsu structure for Pickens' predicament proves both too much and too little. Severing Koito's keiretsu relationships may actually harm the company, and will not do much to modify the attitude Japanese corporate insiders have towards outsiders. Indeed, eliminating interlocking shareholding may make things worse for minority shareholders by concentrating voting power in even fewer hands and resulting in even less room for minority shareholders to maneuver than there is now, since they would be dealing with a similarly monolithic power structure.

D. Greenmail

The circumstances surrounding the acquisition of Pickens' stock and Pickens' confrontational approach in many respects made it reasonable for Koito to assume that it was the victim of a well-orchestrated greenmail campaign that probably included *sokaiya*.¹⁶² Outside the Japanese corporate context this would be a simple case of a corporation fighting a hostile takeover. Within the Japanese corporate context, however, the greenmail argument, even if factually accurate, provides an all-too-convenient pretext for Koito to deny Pickens information, higher dividends and board representation. In other words, Pickens would have been treated in the same way, even if there had been no evidence suggesting greenmail activities on his part and even if he had been a long-term stockholder.

The typical treatment that bank officers receive offers a good illustration in support of this contention. "As investors, banks are increasingly being relegated to the role of straight equity holders and vendors of financial services."¹⁶³ This new status has meant, in some cases, denial of representation on boards of directors,¹⁶⁴ even though bankers are knowledgeable of corporate business.¹⁶⁵ The reason bank nominees are being rejected is not that they are greenmailers but rather that they are now perceived to be irrelevant to the corporate mission, despite the fact that they have been long-term shareholders. In sum, corporations are reaching decisions based on the current economic climate, with a heavy gloss of corporate attitude towards minority shareholders who are perceived to be

161. Koito Annual Meeting, *supra* note 1, at 57. Koito cannot give a concrete answer to questions concerning the profit ratio of products sold to Toyota and "whether the profit ratio of [its] product for Toyota is substantially lower than that for other customers . . . because the profit ratio is one of the corporate secrets of great significance." *Id.*

162. KESTER, *supra* note 4, at 274 (a rash of successful greenmailings has developed in recent years in Japan).

163. *Id.*

164. *Id.* at 272.

165. *Id.* at 274.

irrelevant. The greenmail argument simply does not explain what is at the root of this dispute.

E. *Revisionist vs. Traditional Explanations*

On the basis of the previous analysis, it is fair to conclude that the arguments advanced by Pickens and Koito are inadequate to explain Koito's behavior towards Pickens. A common feature of both parties' arguments is their reliance on a revisionist understanding of the dispute.¹⁶⁶ Each party emphasizes its differences, whether real or perceived. Each calls for the abdication of the other side as the only possible solution.¹⁶⁷ Their attitudes are consistent with the findings of recent surveys on Japan-United States relations indicating that "a new orthodoxy seems to be falling into place, one of suspicion, criticism, and considerable self-justification."¹⁶⁸

If this was the end of the analysis, the conclusion would necessarily be that shareholders' rights in Japan will continue to be a source of tension in Japan-United States economic relations, particularly since there now seems to be a vocal and resourceful "loser" on the American side (Pickens). This conclusion would likely result in calls for an increased use of "managed" approaches to the issue, leading to increased friction between the two countries. For example, we could hear the American side calling for mandatory integration of boards of directors through changes in corporate bylaws, an approach Pickens seemed to favor at one point.¹⁶⁹ This idea would be a hard sell not only in Japan but also in the United States, where even the appearance of a quota has been enough to derail the approval of civil rights legislation.¹⁷⁰

In contrast, a traditional understanding of the situation offers a

166. What unites the so-called revisionist scholars and writers on Japan's contemporary political economy is their view that Japan's economy and society are not organized around classical notions of free markets, in which the direction of the economy is determined by the independent actions of consumers and corporations, all operating to maximize their profits and incomes. This challenges the conventional wisdom [hence "revisionism"] among American policy makers that Japan is fundamentally similar to the United States and other Western capitalist democracies. In their economic relations, Japan and the United States thus remain on a collision course.

Chalmers Johnson, *Trade, Revisionism, and the Future of Japanese-American Relations, in JAPAN'S ECONOMIC STRUCTURE: SHOULD IT CHANGE?* 105-06 (Kozo Yamamura ed., 1990)

167. See Matsuura, *Boone-san, Either Put Up or Shut Up*, *supra* note 120.

168. William Watts & Seizaburo Sato, *America and Japan: How We See Each Other*, 7 BULL. JAPAN-AMERICA SOC. WASH. 1 (1990).

169. News Conference, *supra* note 40 (Pickens, referring to the fact that Toyota had recently removed from its bylaws a Japanese-only membership rule for its board of directors: "They didn't put in that they wanted to integrate the board, none of that, they just removed that from the bylaws").

170. Boards of directors in the United States have invited union members, women,

more satisfactory explanation of this issue.¹⁷¹ As applied to the facts of this dispute, the traditional approach would assert that Koito considers all outside minority shareholders to be irrelevant because in the past they have not contributed to the financial or technological needs of the corporation. At this time, therefore, Pickens is welcome only as a passive investor, if at all. This is not a recent attitude but rather is the result of a process that began during the Meiji Restoration.

According to the traditional approach, and as implied by Section One of this paper, Koito's attitude towards outside minority shareholders will change to the extent that Koito needs capital or technology from them. This will be particularly true in the context of a global equity capital market, where Japanese corporations will have to become attractive to outside investors at a time when the "warnings grow louder of a serious shortage of world capital in the 1990's."¹⁷² Before it can be concluded that shareholders' rights in Japan are not likely to be a source of tension in the future, however, at least one additional question must be answered: are Japanese corporations likely to rely on equity markets as their main source of long-term funds in the foreseeable future? If not, then there will be no opportunity for significant numbers of American investors to become unsolicited minority shareholders of Japanese corporations, and shareholders' rights could cease to be a source of significant tension to Japan-U.S. relations.

V. OUTLOOK FOR THE FUTURE

The basic outlook for the future of shareholders' rights in Japan is that changes in the law will make Japanese capital markets more competitive and corporations will come under pressure to offer more information and better yields to prospective investors. However, it is not clear that changes in the law alone will lead to the opening of corporate boards to outsiders.

A. Harmonizing Japanese Corporate Law with the West

Over the last decade, changes in legislation in the securities area have been gaining momentum in Japan in response to foreign official pressure, market forces, and public opinion. More specifically, changes in the Japanese securities business were brought

and members of ethnic minorities on a purely voluntary basis, not in response to bylaw amendments or quotas.

171. Hugh Patrick, *Japan's Economic Performance: An Overview*, in *ASIA'S NEW GIANT: HOW THE JAPANESE ECONOMY WORKS* 43 (Hugh Patrick & Henry Rosovsky eds., 1976); see also KESTER, *supra* note 4, at 23, 271.

172. Bailey Morris, Editorial Statement, 2 *INT'L ECON. INSIGHTS* 1 (Mar.-Apr. 1991).

about in response to official U.S. pressure applied during the yen/dollar talks of 1984 and at the 1988 U.S.-Japan Working Group on Financial Markets.¹⁷³ In addition, the May 1988 partial amendments to Japan's Securities & Exchange Law, modifying corporate disclosure systems and strengthening insider trading regulations,¹⁷⁴ were issued after four consecutive years of negative net foreign investment in Japanese stocks. In the same year the amendments were passed, the market showed a positive response.¹⁷⁵ Finally, the June 1990 S.I.I. Report called for the reexamination of corporate law with a view to "enhancing disclosure requirements and shareholders' rights, and to simplifying mergers and acquisitions procedures."¹⁷⁶

B. Changes in Sources of Corporate Financing

Over the last few years, the Japanese financial landscape has been experiencing a fundamental transformation that continues to this day. The result of such change is that the ability of Japanese corporations to use debt and government assistance for financing will be substantially reduced. The only option remaining for Japanese corporate treasuries that wish to raise substantial quantities of long-term corporate funds will be the issuance of stocks and bonds to be sold on the open market. In order to be successful in attracting outside investors, corporations will have to increase dividend payout ratios to levels which are competitive with those offered by similar and alternative instruments in other stock markets of the world. The following is a more detailed analysis of this situation.

1. Loan Financing

Debt in the form of bank loans has become more expensive and less available in Japan. Debt has become more expensive not only because interest rates have increased, but also because "banks are watching their bottom lines carefully."¹⁷⁷ Consequently, to the extent that corporations in non-financial keiretsu are forced to obtain

173. NATIONAL TREATMENT STUDY, *supra* note 38, at 231.

174. See JAPAN SECURITIES RESEARCH INSTITUTE, *supra* note 9, at 22.

175. FACT BOOK 1990, *supra* note 23, at 45.

176. S.I.I. Report, *supra* note 3, at V-7. See also Loeb Letter, *supra* note 75:

I believe both the U.S. and Japanese negotiators would confirm that this topic had been on the bilateral agenda for some time, and the Pickens effort served only to confuse the negotiations by introducing a circus that could have diverted the negotiators from discussing serious issues. Both sides did the right thing: they ignored Pickens, despite his repeated efforts to get on the SII agenda.

Id.; see also Richard Alm, *Pickens in Quandary Over Stake in Koito*, DALLAS MORNING NEWS, Nov. 6, 1989, at 1D.

177. "In contrast to the low-margin, volume-oriented banking practices of the re-

loans from unrelated financial companies, the cost of financing is also likely to increase¹⁷⁸ (note, however, that corporations in financial keiretsu may actually experience a reduction in the cost of funds by borrowing from unrelated financial companies).¹⁷⁹

Loan financing has become less available for three reasons. First, non-bank lenders are in financial trouble, thus reducing the pool of funding for companies.¹⁸⁰ Second, banks are still trying to meet new reserve requirements.¹⁸¹ In practical terms this means that corporations will not be able to obtain as many loans as they need.¹⁸² What's more, in the event that banks decide to liquidate some of their equity holdings, banks may also lose some of their interlocking relationships.¹⁸³ One of the consequences would be that banks would have little incentive to charge less than market rates to their former affiliated firms, thus increasing those firms' debt-related costs.¹⁸⁴

Third, it is likely that the Japanese public will increasingly de-

cent past, Japanese banks are now . . . carefully tracking the profitability of their relationships with industrial clients." KESTER, *supra* note 4, at 205.

178. On why corporations may become unaffiliated with financial institutions, see Janow, *supra* note 4, at 589 n.83: "Listed companies are increasingly seeking to evaluate the unlisted stocks in their portfolios and are finding it necessary to manage their assets with an eye towards profitability over stability in relations." On why financial institutions may become unaffiliated with corporations, see KESTER, *supra* note 4, at 274: "Clients with whom their trust relationship has evolved into a price-oriented one are being culled from portfolios if returns are inadequate. Stability of share ownership is no longer a foregone conclusion, even in the event of hostile attack." On why financial institutions are likely to charge more, once they become unaffiliated, see *id.* at 205:

Since these will be non-recurring transactions, Japanese banks would likely insist that every transaction with a client be profitable on a stand-alone basis, which is not the normal banking practice with related companies. If financing is obtained from western banks, then the cost of funds will likely be a non-preferential, spot rate.

179. See JEI Report, *supra* note 41, at 15.

180. Nonbank lenders are defined as trading, leasing and consumer-finance companies; they are not banks or securities companies, though they are sometimes affiliated with major financial institutions or companies. Masayoshi Kanabayashi & Marcus W. Brauchli, *Japan's "Nonbank" Lenders Face Problems*, WALL ST. J., Mar. 11, 1991, § A, at 10b.

181. KESTER, *supra* note 4, at 202. Kester notes:

In July 1987, the pressure to improve capital ratios increased still further when the Bank of International Settlements (BIS) set 8% as the target ratio to be met by participating banks by 1992 A burst of new equity and convertible bond offerings totaling 2.6 trillion between January 1988 and June 1989 brought many banks in line with the BIS requirements. But some of this improvement was undone by the 30% slide in the Tokyo Stock Exchange in the first half of 1990, and the nearly 25% erosion in the value of the yen. Furthermore, given continued double digit growth in assets, another 2.6 trillion of capital is likely to be required over the next four years just to remain even with current levels.

Id.

182. *Id.* at 205.

183. Mizuno, *supra* note 5, at 35.

184. *But see* JEI Report, *supra* note 41, at 15.

posit less of its savings in banks or post office accounts, despite the higher interest rates now being offered for them.¹⁸⁵ There are three reasons for this a change in the savings portfolio of the Japanese public. First, in 1987 the tax-free small deposit system was abolished.¹⁸⁶ Second, Japanese stocks look more attractive after last year's drop in the market,¹⁸⁷ and if the National Treatment reforms allow foreign securities firms to gain access to the Japanese public, then foreign stocks and other investment products may become more readily available to Japanese investors in the near future.¹⁸⁸ Finally, the Japanese public is being encouraged to work fewer hours and consume more, which is likely to result in a lower savings rate.¹⁸⁹

2. The Japanese Government as a Source of Financing

It is unlikely that the Japanese government will pursue a long-term policy of financing private activity, either directly or indirectly. There is growing evidence that the Japanese government is shifting its emphasis to fulfilling a role similar to that of its western industrialized counterparts. Accordingly, it has launched a "Basic Plan for Public Investment" which contemplates an aggregate investment expenditure of about 430 trillion over the next decade.¹⁹⁰ Moreover, the government has shown concrete proof of its interest in letting market forces shape its economy. It did not intervene, for example, to halt the sharp decline in stock prices in 1990, in contrast to its attempts in 1964-65.¹⁹¹ Finally, Japan is under pressure from the OECD and the United States to let market forces shape Japan's financial sector.¹⁹²

185. Utsumi, *supra* note 12, at 19.

186. KUBOI, *supra* note 14, at 33 (This system remained in force for people over 65 and low-income families).

187. Kanabayashi & Brauchli, *supra* note 180, at 10b.

188. NATIONAL TREATMENT STUDY, *supra* note 38, at 225.

189. ABEGGLEN & STALK, *supra* note 33, at 182; S.I.I. Report, *supra* note 3, at II, § 3.

190. *Id.* at II, § 2 (1) (ii).

191. JAPAN SECURITIES RESEARCH INSTITUTE, *supra* note 9, at 18.

It was at this juncture that the Japan Joint Securities Corporation was founded in January 1964 with the cooperation of banks and securities companies to prevent a sharp decline in stock prices. In December of the same year, the Bank of Japan granted this corporation substantial loans to assist its operations. In addition, the Japan Securities Holding Association was organized by the securities companies themselves with the aid of the Bank of Japan in January 1965 to take over the excess stocks arising from the cancellations of investment trusts and the stockholdings of securities.

Id.

192. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PROGRESS IN STRUCTURAL REFORM: SUPPLEMENT TO OECD ECONOMIC OUTLOOK 47, at 19, 21 (1990); *see also* NATIONAL TREATMENT STUDY, *supra* note 38, at 225-39.

3. Financing from Internally Generated Funds

Over the last several years, slower economic growth and high profitability have allowed ever-increasing numbers of Japanese corporations to meet their financing needs from retained earnings.¹⁹³ However, two potential developments could make this source of funds insufficient in the future. The first is a drop in profitability.¹⁹⁴ If this occurs, internally generated funds most likely will decline. As a result, the even flow of resources to finance long-term investment plans will be threatened. Profitability may go down for several reasons, including increased competition and increased costs. Also, operations financing may be jeopardized if the Japanese economy experiences a cash shortage.

The second potential development is an increase in the level of economic activity. Under this scenario, financing of production activities to meet short term demand would compete with the need to finance long-term investment plans. The insufficiency of internally generated funds could become a particularly serious problem in an economic environment in which loans are more expensive and less available in the Japanese market.¹⁹⁵ Note that to the extent that interlocking stocks were given as collateral for loans, low post-1990 values of publicly traded stocks reduce the value of that collateral, which in turn reduces the amount of the loans granted against it. Selling such stock for cash to other keiretsu firms may not be possible in a climate of generally low liquidity, and selling to outsiders may not be strategically acceptable to firms.¹⁹⁶ It is unlikely that the Japan Securities Holding Association would be willing or able to help through price supports or absorption of excess stocks.¹⁹⁷ Finally, financial institutions may not care to participate in a protective operation.¹⁹⁸

An additional reason internally generated funds may prove insufficient is that research and development in industries such as aerospace, supercomputers, and biotechnology, as well as basic fundamental research, require large sums of money for long periods of time.¹⁹⁹ More and more corporations may get involved in these in-

193. KESTER, *supra* note 4, at 272.

194. See *Fujitsu's Pretax Profit Slipped 0.9% for Year as Sales Climbed 17%*, WALL ST. J., May 24, 1991, at A7.

195. KESTER, *supra* note 4, at 274.

196. Mizuno, *supra* note 5, at 36.

197. See JAPAN SECURITIES RESEARCH INSTITUTE, *supra* note 9, at 18.

198. KESTER, *supra* note 4, at 274.

199. For a general idea of costs and an illustration of the trend towards passing the burden for research costs from the government to both national and foreign corporations, see The Perth Corporation, *Japan: Space Technology Development*, 81 DEF. & FOREIGN AFF. DAILY 1, Apr. 28, 1981; *Japanese Agency Requests Funds for Projects*, AVIATION WEEK AND SPACE TECH., Oct. 4, 1982, at 25; Dave Peters, *An Overnight Shakeup Rocks Supercomputer World*, CHI. TRIB., May 28, 1989, at 10A; *Japan's Bio-*

dustries as part of the unrelated diversification plans being funded with the abundance of cash corporations currently enjoy.²⁰⁰ New investment by Japanese corporations has been growing less quickly than in the past and increasingly is being funded internally. Japanese corporations may eventually find, as have their counterparts in the rest of the world, that internal financing has its limits. Finally, some corporations may need funds due to losses experienced in *zaitoku* operations.²⁰¹ Consequently, the only practical source of funds available to Japanese corporations for financing long-term capital needs in the near future is going to be the stock market.²⁰²

4. The Stock Market Mechanism

For the first time since its adoption in Japan, the stock market mechanism is going to be positioned to fulfill its role as a source of long-term capital for Japanese corporations. All the elements seem to be falling into place: modern legislation, national treatment for all securities firms, corporate funding needs, and large amounts of savings in the hands of prospective investors.²⁰³ However, to bring those investors into the market, and to keep them happy, Japanese corporations will have to change their attitude towards minority shareholders. At a minimum that new attitude should manifest itself in a higher dividend payout ratio and a willingness to accept more input regarding the way businesses are run.²⁰⁴ Thus far Japanese corporations have been able to raise funds in equity markets by issuing convertible bonds and have not had to change their attitude towards shareholders. As pointed out previously, American corporations are taking advantage of this situation as well. The question then becomes whether corporations that are active in the Japanese equity markets can have their cake and eat it too: can they take advantage of the Japanese investor while ignoring her needs? At present the answer is "yes" unless Japanese shareholders have ac-

technology Market to Hit 5.1 Trillion by 2000, JAPAN ECON. J., Oct. 29, 1988, at 23; *MITI, Private Firms Back Research Center*, JAPAN ECON. J., July 7, 1990, at 5.

200. KESTER, *supra* note 4, at 272.

201. Janow, *supra* note 4, at 593. *Zaitoku* is defined as financial technology techniques; for example, Japanese companies are borrowing in international markets and seeking profitable returns through relending in Japan or reinvesting overseas). *Id.* See KESTER, *supra* note 4, at 272-3: "Much corporate free cash flow in Japan is being used in *zaitoku* operations — essentially speculation on the stock market and other types of financial risk taking Despite some impressive earnings from *zaitoku* operations, there have also been some colossal losses." *Id.*

202. KESTER, *supra* note 4, at 272.

203. FACT BOOK 1990, *supra* note 23, at 78. In 1985 listed companies raised 859 billion; in 1989 they raised 849 billion. *Id.*; see also Janow, *supra* note 4, at 606.

204. Some members of the Japanese press have recognized the importance of shareholders. See Littlefair, *supra* note 1, at 28: "Investors who offer funds to companies are just as important as customers who buy products. Management should never forget it" (quoting *Pickens vs. Koito* (Asahi Evening News television broadcast, July 1, 1989)).

cess to alternative investments inside and outside Japan. Nevertheless, during 1981 Japanese stock and bond prices reacted much more sensitively to the movements of foreign investors and to interest rates in the United States and Europe — an early sign that Japanese equity markets were gradually becoming linked to overseas financial markets.²⁰⁵

C. The Opening of Corporate Board Rooms to Outsiders

The reluctance to allow non-Japanese to serve on the boards of Japanese companies that Pickens has complained about²⁰⁶ can be traced to an emotional fear of foreign domination and distrust of the West since the Meiji Restoration period. As the *Shanghai Diary*, written by Takasugi Shinsaku in 1862, points out, at one time such fear was not completely unfounded.²⁰⁷ However, times have changed, and no one would argue that the Japan of today is the Japan of either 1862 or 1945. Indeed, the fact that some Japanese companies are refusing to accept former bank officers as nominees for directors suggests not fear and insecurity but excessive self-confidence. The controlling insiders are behaving arrogantly towards all those shareholders who are no longer perceived to be relevant or needed.²⁰⁸

The approach which encourages the Japanese to be bold and not be afraid of the West is also evident in the political arena. For example, Shintaro Ishihara, in his controversial book *The Japan that Can Say No*, identifies the need for the Japanese to become more cosmopolitan and less insular.²⁰⁹ He stops short, however, of advocating a triumphant or arrogant attitude by framing the issue in terms of "how do we, the outsiders [the Japanese], join the community of nations?"²¹⁰ His message is not hegemonic but rather

205. See JAPAN SECURITIES RESEARCH INSTITUTE, *supra* note 9, at 21.

206. News Conference, *supra* note 40. At the conference, Pickens stated:

If you go back to Toyota's bylaws, and it hasn't been but just a few years ago, they removed from the bylaws the statement there that there would never be anybody serve on a Toyota board unless they were Japanese. Now they took that out . . . I mean, they didn't put in that they wanted to integrate the board, none of that, they just removed it from the bylaws.

207. Takasugi Shinsaku, *Yūshu Niroku (Shanghai Diary)*, in 1 THE JAPAN READER 83-4: "Here most of the Chinese have become the servants of foreigners. We will have to be prepared for such things too in Japan"; Maki Izumi, *Letters from a Patriot in the Last Days of the Shogunate*, *id.*, at 85: "The foreigners have been planning and plotting various things for some years."

208. Institutional suppliers of capital used to play a key role in the life of a corporation. According to Kester, "[T]he close monitoring that once accompanied heavy borrowing has begun to atrophy. So too has the banks' ability to intervene quickly if necessary . . . Stability of share ownership is no longer a foregone conclusion, even in the event of hostile attack." KESTER, *supra* note 4, at 274.

209. SHINTARO ISHIHARA, *THE JAPAN THAT CAN SAY NO* 30 (Frank Baldwin trans., 1991).

210. *Id.* at 62.

one of cooperation among equals,²¹¹ fully rejecting cultural incompatibility arguments.²¹²

The treatment by the Japanese press of the Pickens-Koito controversy also offers some hope for the opening of corporate boards to outsiders. For example, some have recognized the international ramifications of the issues, recognized the role Japanese institutions and individuals play in the world, expressed concern for the fairness of the issue, and mentioned the desirability of avoiding friction.²¹³ To illustrate, the change in Toyota's bylaws to allow foreigners to join the board of directors suggests a softening by corporate insiders.

A conventional approach suggests that boards will be opened to outsiders if there are economic or technological reasons to do so. The appointment of two American General Motors executives to the board of the Japanese automaker Isuzu in December 1991 confirms this view. According to press reports, at the time of the appointment Isuzu expected to post a loss of \$376 million for the year ending October 31, 1991.²¹⁴ The same reports indicate that Isuzu asked General Motors, a 37.5% shareholder, to send personnel and money to help it with the development of new cars. The problem with this approach is that Japanese corporations may initially fail to see the link between shareholder board representation and willingness to invest.²¹⁵ To the extent that insiders recognize economic reasons to open boards, corporate institutional inertia may delay any response to the new reality.²¹⁶ The question that arises then is whether the Japanese and United States governments should

211. *Id.* at 13 (subtitled, "First Among Equals").

212. *Id.* at 102: "We must reject the special pleadings about 'unique Japanese practices that have evolved over the century' and say no to old-fashioned bureaucrats and politicians who speak for entrenched interests."

213. Littlefair, *supra* note 1, at 28-32. The section, "What the Japanese Press is Saying," quotes several excerpts from the local press.

214. *Isuzu Names American to No. 2 Post: GM Official Picked in Unusual Decision*, WASH. POST, Dec. 4, 1991, at F1 [hereinafter *Isuzu Names American*]; see also Loeb Letter, *supra* note 75:

Having observed the process unfold firsthand within Koito, I am quite confident that events would have transpired very differently had a serious investor put up real money with a real intent to be a long-term shareholder. Not that all the demands of such an investor would have been agreed to by Koito, but no responsible company would accede to the kind of treatment Pickens was attempting to impose on Koito. Indeed, no American company ever has.

215. This argument is different from the culturally based one that contrasts "typically unpatriotic" American and European multinationals with "nationalistic" Japanese corporations. See James Fallows, *Containing Japan*, ATLANTIC MONTHLY, May 1989, at 54.

216. The argument here is one of timing and not of culturally determined inability to accept outsiders. See *id.* at 48. "But Japanese society has always been short on abstract principles dictating proper treatment of those outside the network of obligations — such as foreigners." *Id.*

allow the market to take its course in opening the doors to outside minority shareholders or intervene like a Japanese bonsai gardener to improve the market's work.²¹⁷ This question is addressed in the next Section.

VI. FOREIGN OFFICIAL PRESSURE, ADMINISTRATIVE GUIDANCE AND PUBLIC OPINION

A. Foreign Official Pressure

Today Japan continues to change its financial sector legislation as it has during the last several years. Although the Japanese government has in the past acknowledged the positive effect that U.S. government pressure has had in this process,²¹⁸ it is not clear how effective pressure from the U.S. government is going to be in the future.

On one hand, the Japanese government emphasizes the importance of recognizing "that colleagues on the other side have different kinds of difficulties in arriving at the final goals."²¹⁹ It points out that the Japanese process requires extensive persuasion of various interest groups and that this "sometimes creates an incorrect impression — that Japan is slow, indecisive and noncommittal — in the United States."²²⁰ In other words, although the goals may be the same for the two governments, the datelines for meeting them may be quite different. This line of argument suggests that the changes the United States wants to see implemented in Japan will eventually take place and that additional pressure is, therefore, not needed.

On the other hand, the United States government reported in 1990 that, although by the late 1980's foreign securities firms were generally confident in principle about their right to establish operations in Japan and to enter all lines of business open to their domestic counterparts, full and easy access to the Japanese investor base and the entire range of securities activities has remained difficult.²²¹ Indeed, foreign firms operating in Japan argue that "a combination of Japanese laws and practices make difficult both the introduction of new products into Japan and the ability of Japanese investors to access foreign markets and products abroad."²²² Thus, in spite of

217. See OKIMOTO, *supra* note 26, at 49. "Instead of letting nature take its course, man can actually improve on what nature produces." *Id.*

218. Utsumi, *supra* note 12, at 21. Utsumi, then Minister of Financial Affairs with the Japanese embassy in Washington, D.C., noted: "I have no doubt that the United States Treasury has, therefore, played a very important role in accelerating Japan's liberalization in this field." *Id.*

219. *Id.*

220. *Id.*

221. NATIONAL TREATMENT STUDY, *supra* note 38, at 231.

222. *Id.* at 240.

more than sixteen years of U.S. government pressure on the Japanese government, the changes desired by the United States have not yet taken place. This suggests that either no change would have taken place without pressure from the U.S. government or such pressure was wholly ineffective.

Regardless of whether or not pressure on the Japanese government has been effective in opening capital markets to foreign competition, the reality is that the Japanese public continues to be a captive investor. This allows corporations active in Japanese equity markets (both Japanese and foreign) to impose unfavorable terms upon Japanese investors. For example, although corporations have been raising funds through equity markets in the form of convertible bonds, there is no evidence to suggest that new shareholders are going to be treated any differently than other minority shareholders once the bonds are converted into common stocks. In other words, corporations active in this market will treat shareholders as if they continue to be irrelevant to financial needs even though this is no longer the case. In fact, the opening of Japanese capital markets to foreign competition would benefit not only minority shareholders in Japan but also the Japanese financial services industry.²²³ Thus, in the absence of evidence suggesting that additional U.S. pressure would be counterproductive to the opening of the Japanese economy, such pressure should continue as a possible means of improving the position of shareholders in Japan, including that of American shareholders.

Although putting pressure on the Japanese government may be redundant because it shares with the United States government the goal of internationalization of its capital markets, it may still make sense to continue to apply such pressure.²²⁴ The pressure may help the Japanese government to overcome internal political opposition to change by deflecting most of the political costs.²²⁵ Thanks to U.S. pressure, the Japanese government will be able to blame the accelerated pace of change on the United States.²²⁶ Moreover, for-

223. See Michael E. Porter, *Japan Isn't Playing by Different Rules*, N.Y. TIMES, July 22, 1990, § 3, at 13. *But see* Fallows, *supra* note 215, at 46 (quoting Karel van Wolferen: "A truly open market would undermine the domestic order, so how, in their [Japanese administrators'] eyes, could this ever be considered a gain for Japan?").

224. Some suggest that U.S. government pressure is not redundant at all. See Fallows, *supra* note 215, at 45, 52 (asserting that while some parts of the Japanese government have become a home for a small tribe of Japanese "internationalists," the Japanese government's effect as a whole is restrictive due to the influence of special-interest politics).

225. "Many Japanese seem to understand why the constant nagging occurs and why it eventually improves their standard of living. 'Will people say they want imported rice or beef?' one Japanese friend said. 'Of course not. Will they accept it when we "give in" to American demands? Yes, and most will be grateful.'" See *id.* at 45-46, 52.

226. The argument would be that the U.S. is asking for a concession and Japan once more will accommodate its long time ally, just as it has done with voluntary import

eign pressure may also help the Japanese government to focus national attention on the issue, particularly during times when leadership is continuously rotating.²²⁷

B. Administrative Guidance

There are several reasons why the Japanese government may want to exercise some degree of administrative guidance in the opening of corporate boards and in the offering of higher dividend yields to investors. In the first place, some of the current board members (or the keiretsu interests they represent) may have problems recognizing in a timely manner the need and merits of having outside directors, whether or not they are Japanese nationals. A related problem is organizational inertia: it is not easy to do things differently, even when there is a perceived benefit. Therefore, some prodding may be needed from the government before changes take place.

A case in point is the issue of philanthropy. *The Chicago Tribune* recently reported that the Japanese government has offered Japanese companies operating in the United States a large tax deduction if they give money to hospitals, schools and philanthropic activities in their communities.²²⁸ In addition, the Japanese Chamber of Commerce is distributing a handbook containing advice for Japan-based companies in America on how to participate effectively in communities, such as by supporting local charities and volunteering to work for local organizations,²²⁹ in order to address the fact that "most Americans feel this is common sense. . . most Japanese feel this is not common sense, this is unusual."²³⁰ Tsutomu Karino, an executive director of the Japanese Chamber of Commerce, explained that the handbook was issued because the American tradi-

restraints. Politicians like Ishihara would then complain and say that Japan can and should say no. The result would be that the blame would be shared or even passed to the U.S. government, while those in Japan that understand the economic need for the measure will support the Japanese government on the merits of its decision. Note, however, that even Ishihara recognizes that in some areas, such as the Japanese distribution system, desired changes will not come about without U.S. pressure on Japanese politicians. See ISHIHARA, *supra* note 209, at 94.

227. Over the last decade the top executives of the Japanese government have rotated unexpectedly as a result of political scandal. The current Prime Minister may not be an exception. There is always the danger that the untimely rotation of Prime Ministers will have the effect of slowing down the process, if for no other reason than that new personnel may have a different understanding of the issues or an altogether different agenda. See Edward Neilan, *Miyazawa Hurt By Loss in Key By-election Race*, WASH. TIMES, Feb 10, 1992, at A7: "Speculation has already begun on how long Mr. Miyazawa can hope to remain in office in view of scandals plaguing his administration." See also *Curtains for Kaifu?*, TIME, Apr. 22, 1991, at 57.

228. *Japan Backs Philanthropy in U.S.*, CHI. TRIB., Feb. 22, 1990, § 1, at 20C.

229. *Id.*

230. *Id.*

tion of volunteerism is not much developed in Japan.²³¹

Likewise, a tradition of treating outside minority shareholders as relevant partners in business has been nonexistent in Japan since the Meiji Restoration created stock companies. Therefore, although it may be common sense for foreign companies operating in Japanese capital markets to treat shareholders differently in order to attract and retain them, this may be overlooked by managers of Japanese corporations wearing the blinders of outdated attitudes.²³² If this is the case, the Japanese economy may suffer as a result of Japanese companies' inability to raise sufficient long-term funds. Such an undesirable result calls for the intervention of the Japanese government. In the case of philanthropy, "the Japanese government's tax incentive was paired with a bluntly worded message from the government that Japanese companies have themselves to blame for much of the tension with the United States."²³³ Very much the same could eventually be said in the context of shareholders' rights if Japanese corporations accept the funds of American investors and then make the exercise of shareholders' rights an empty formality.

The Japanese government may also find that it is important to open the boards of Japanese corporations as a means of training top executive talent to operate in a cosmopolitan and diverse work environment. This is important if Japan aspires to play a leading role in organizations such as the World Bank, the International Monetary Fund, and the International Court of Justice, where the Japanese are in the minority and where credibility is a prerequisite to leadership.²³⁴ It is not only important that the Japanese are in fact capable of functioning in such an environment, but also that non-Japanese members of those bodies believe them to be so. The Japanese government views Japan's increased exposure to international thinking as a desirable development in other contexts,²³⁵ and it is reasonable to assume that it will have a similar perspective in this area. Opening the board rooms of Japanese corporations will also go a long way in countering the growing feelings of distrust and fear of foreign domination that hamper the development of U.S.-Japan economic relations.²³⁶

231. *Id.*

232. By this it is not suggested that Japanese managers are incapable of changing their practices in order to adapt to changes in their environment. Recent reports on changes at Honda in Japan suggest that, above all, Japanese managers are pragmatic in their approach. See Clay Chandler & Paul Ingrassia, *Just as U.S. Firms Try Japanese Management, Honda Is Centralizing*, WALL ST. J., Apr. 11, 1991, at A1.

233. *Japan Backs Philanthropy in U.S.*, *supra* note 228, at C20.

234. "As a diplomatic leader, Japan is still reluctant and inexperienced." Fallows, *supra* note 215, at 42.

235. See Utsumi, *supra* note 12, at 19.

236. Watts & Sato, *supra* note 168, at 3.

Finally, not all foreign investors have Pickens' resources or commitment. Over time Pickens could have become an "insider" — he even had the word of Koito's president that he had a shot at it.²³⁷ Yet it certainly would have taken him more than fourteen months to develop the trust that is required to become an insider.²³⁸ If he had held Koito stock for several years, had shown a continuous interest in the firm and had demonstrated that he had something to offer,²³⁹ Pickens most likely would have become a director.²⁴⁰ Part of Pickens' expression of interest in Koito could have been by learning basic Japanese business etiquette; such rules are not secret, nor are they difficult to follow.²⁴¹ In this case, the relationship between Pickens and Koito's president seems to have been unnecessarily poisoned by their first meeting.²⁴² A basic text on the subject warns that "little or no hard business will be done at the first meeting. The visitor's main aim should be to establish himself as the sort of person that the Japanese like to do business with: reliable, flexible interesting and interested."²⁴³ Unfortunately, this advice was not followed by Pickens during his first meeting with Koito's president.²⁴⁴ Perhaps, however, the Japanese government will try to affect changes in business practice and etiquette if it finds that corporations are failing to attract the volume of investments needed to adequately finance their operations.

C. Public Opinion

Pickens and Koito tried to manipulate the public through the press by, among other things, staging a walkout,²⁴⁵ name-calling,²⁴⁶ and accusing the Japanese press of "censorship."²⁴⁷ The public de-

237. *House Judiciary Comm. Hearings, supra* note 40. Pickens, referring to an audience with Matsuura, stated: "He told me there — he said we may consider you as a member of the Board at some time in the future if we can develop a trust between ourselves." *Id.*

238. "Now for 14 months I have done exactly what I said I'd do. I don't know how long it takes to develop this trust to put me on that Board. But I'm entitled to be on it." *Id.*

239. For example, Pickens' takeover expertise may be quite valuable to Japanese corporations for whom this is a new technique. See Matsuura, *supra* note 1.

240. "You should be prepared for a wait of two years or more before beginning business in earnest, and up to five years before a firm business relationship is established." THE ECONOMIST BUSINESS TRAVELER'S GUIDE: JAPAN 83 (1987) [hereinafter BUSINESS TRAVELER'S GUIDE].

241. For a good summary, see *id.* at 76-88.

242. See Matsuura, *supra* note 1 (most of Matsuura's complaints about Pickens are related to etiquette pitfalls by the latter).

243. BUSINESS TRAVELER'S GUIDE, *supra* note 240, at 83.

244. Matsuura, *supra* note 1.

245. Sterngold, *supra* note 152, at D1.

246. Matsuura, *Boone-San, Either Put-Up or Shut-Up, supra* note 120, at A22. See also Melloan, *supra* note 1, at A17.

247. Pickens claims that Japanese newspapers' decision to run his advertisements,

bate conducted in the press by the two sides also included an attempt by Koito to neutralize Pickens' lobbying efforts in Congress.²⁴⁸ In spite of these actions, public opinion has had a moderating role with respect to shareholders' rights in Japan. Enough of the facts of the Pickens-Koito affair got out that the public realized this was a complex issue. No clear villain emerged from press coverage, and the public consequently adopted a wait-and-see attitude that provided helpful maneuvering room for the governments of both countries.

VII. CONCLUSION

The history of shareholders' rights in Japan since the Meiji Restoration strongly suggests that Koito would have treated Pickens essentially the same way even had he not been perceived as a greenmailer and even independent of Koito's keiretsu membership. Traditionally, outside minority shareholders have been perceived by corporations as irrelevant. They have not been the source of most long-term corporate funds, and corporations have not had a need to attract or retain them. As a result, dividend payout ratios have been kept low, unpublished information has not been forthcoming, and board representation has been restricted. Those minority investors who have sought to substantively exercise their rights have been coerced into conformity by *sokaiya* acting on behalf of the corporation. The Japanese public has become a passive investor resigned to receiving a small return on its savings and to playing no role in corporate governance due to its position as a captive source of funds. This situation has allowed even non-Japanese corporations to raise corporate funds at low cost in Japanese capital markets. It is in this context that the Pickens-Koito affair arose and in which it should be analyzed.

which exposed the effects of the keiretsu system, without naming Honda or Toyota by name amounted to censorship. See Investment Chronology, *supra* note 47, at 5-6. However, reluctance to publish the names of corporations may be explained by the general attitude in Japan against comparative advertising. See, e.g., Yumiko Ono, *Pepsi Challenges Japanese Taboo as It Ribs Coke*, WALL ST. J., Mar. 6, 1991, at B1. "Four years ago Japan's Fair Trade Committee erased restrictions against advertisements comparing products, but both companies and TV networks have been reluctant to air them Says Toshio Yamaki, a professor of advertising at Tokyo Keizai University, 'As a Japanese, I wonder if it's necessary to take such hysterical action [to promote a product]. You would never see Nissan do such a thing against Toyota, or vice versa.'" *Id.*

248. "Perhaps Mr. Pickens' legendary political fund-raising ability opens more doors in Washington than he otherwise might deserve." Matsuura, *Boone-San, Either Put-Up or Shut-Up*, *supra* note 120, at A17. See also Loeb Letter, *supra* note 75 (referring to Matsuura's comment: "[it] did raise, properly, the question of whether Pickens was trading on his fund-raising support for members of Congress in pushing his own personal agenda; no implications were made or intended about the members of Congress who might have been the targets of this effort").

The revisionist arguments advanced by both sides, particularly "anti-Americanism" and cultural incompatibility, are inadequate to explain the Pickens-Koito affair or to satisfactorily defuse it. In contrast, a traditional analysis of the issue suggests that the current economic and legal developments in Japan will increasingly lead Japanese corporations to change their practices toward minority shareholders, largely out of economic self-interest in an effort to attract and retain outside investors who may provide long-term corporate funds. As a result of such changes, the exercise of statutory shareholders' rights in Japan should cease to be an empty formality.

With regard to the future, the Japanese government may find that it is in Japan's best interest to exercise administrative guidance to nurture and accelerate the desired changes in corporate practices with respect to shareholders. This will be particularly true if Japanese corporations fail to attract or retain sufficient numbers of shareholders. The Japanese government's administrative guidance may be especially useful in opening Japanese corporate board rooms to representatives of outside minority shareholders, particularly foreign ones. However, this is an area where the economic and strategic benefits to the corporation and to Japan may not be obvious to most Japanese managers.

Further United States government pressure on the Japanese government to accelerate the opening of Japanese capital markets to foreign competition is desirable and could be helpful to the Japanese government in advancing its economic internationalization agenda. The opening of Japanese capital markets is essential for strengthening the bargaining position of Japanese investors *vis a vis* corporations raising capital in Japan. Finally, public opinion has played a moderating role in the Pickens-Koito affair, despite the efforts of both sides to manipulate it.

In summary, shareholders' rights in Japan will cease to be a source of tension between Japan and the United States only to the extent that both countries allow, promote and nourish a market-based approach in addressing shareholders' concerns.