Traditional Rules and their Transformation: M&A Rules in Japan and the Convergence Debate

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I. The Purpose of the Presentation

II. Comments on the Convergence Debate

III. How Takeover Rules were Transformed in 2005 and 2006

IV. Conclusion

Convergence Debate

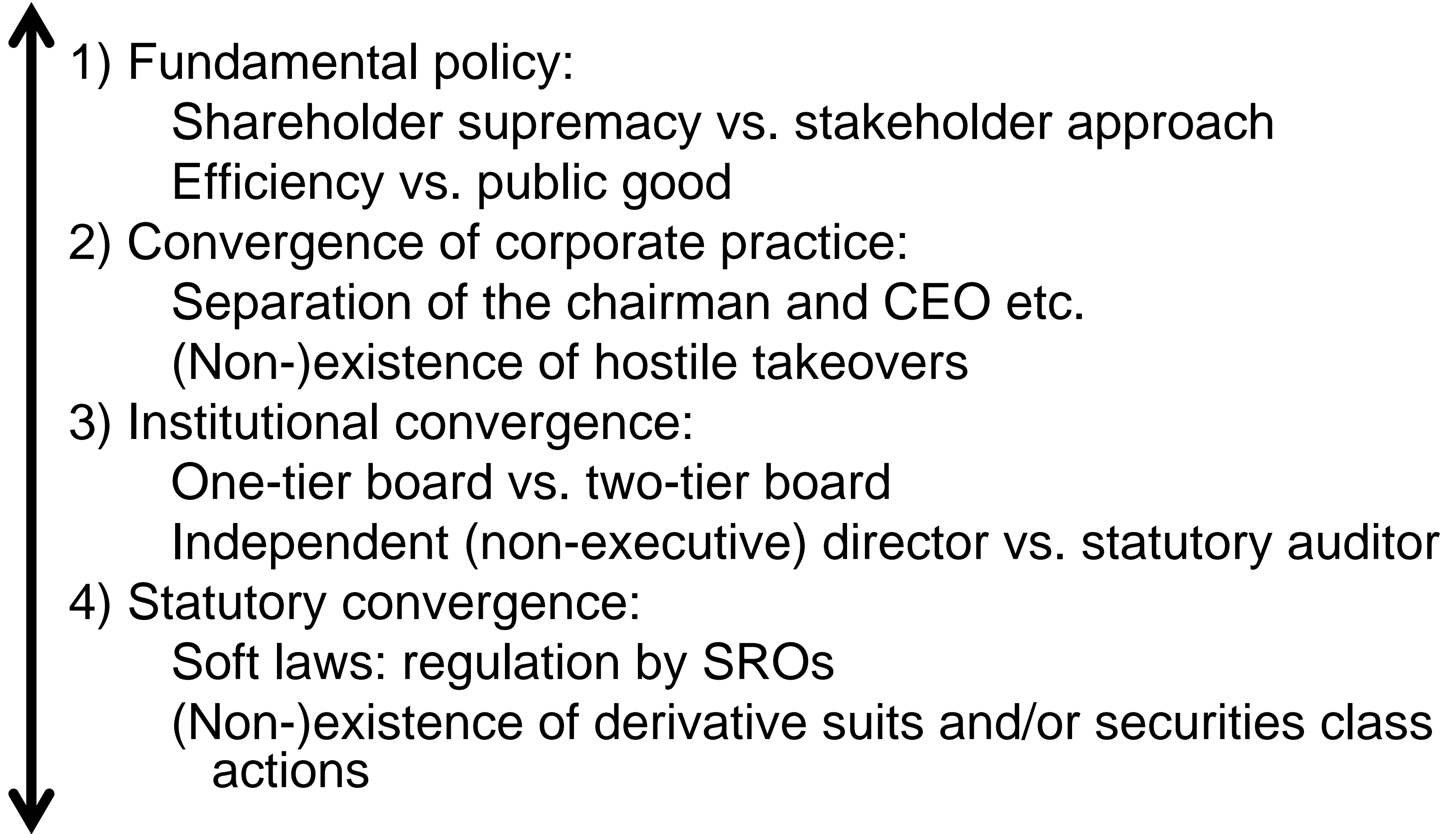
Ronald Gilson (1996) distinguished

"**formal convergence**" and

"**functional convergence**."

What exactly is converging?

<u>*Functional convergence*</u>



<u>*Formal convergence*</u>

Different Tiers

- Hansmann & Kraakman (2001) argued that the corporate law will be converging to **the shareholder model** globally.
- “Law and Finance” literature by La Porta et al. argued that **Anglo-American law is superior** to other law models such as German and French laws.

Two Proposals

- Emphasis on the *process* of legal transplant
  - an intentional attempt; selective and strategic

- Narrow definition of the topic and multi-tier analysis

	Shareholder oriented	Stakeholder oriented
Tender offer regulation & neutrality rule	The UK	Continental countries in Europe
Defensive tactics & judicial review	The US	Japan

II. Comments on the
Convergence Debate

Convergence Debate

The coverage of securities regulation and corporate law is different from a country to country.

- UK and Australia: a single statute includes both.
- Japan's securities regulation includes
  - regulations on investment banks and distributor of financial instruments
  - disclosure requirement and regulation on unfair trading

Different rules in different countries may work similarly.

- shareholders' derivative suits in Japan might work similarly to the securities litigations in the US.

III. How Takeover Rules were Transformed in 2005 and 2006

Table 1 at page 5

	Acquisition of shares	Defensive measures by the target board
The US	Regulation is not strict	Possible; however, they undergo a judicial review
The UK	Strictly regulated and supervised by the Takeover Panel	Prohibited

- “Cross-shareholding” has waned.
- The Ministry of Economy, Trade and Industry (METI) set up a study group “Corporate Value Study Group” in fall 2004.
- A well-known takeover case “Livedoor vs. NBS” broke out in Feb. 2005.

Year 2005: a Bustle and a Tentative Solution

The METI Report (May 2005)

- Recommended to use a poison pill.
- Silent about the judicial review when a poison pill is triggered.

Three Court Cases

- Livedoor vs. NBS (March 2005)
- The FSP Value Realization Master Fund Ltd. vs. Nireco (June 2005)
- Yumeshin v. Nihon Gijutsu Kaihatsu, (July 2005)

Cf. Osugi (2007)

The development of a takeover law was initiated as an intentional attempt to transplant the US model only selectively; this was nevertheless followed by the development of case law by judges who were not necessarily supposed to refer to US law. Thus, a combination of intentional (but partial) transplant and indigenous application made the legal system in Japan even more “Americanized.”

Year 2006: A Turning Point?

- Revision of the tender offer rule in the Securities Trading Act (2006)
- Japanization of the poison pill.
  - 106 out of 175 companies (60%) that adopted a poison pill resolved to adopt the plan at the shareholders' meeting.
  - Investor relations
  - To minimize the risk of injunction

Cf. The Nippon Steel Corporation

Why shareholders approve the pill?

- **Communication** between company managers and institutional investors becomes more often and substantial.

  - Coordination of the stakeholder model and the shareholder model?
  - Shareholders are more empowered by the Corporation Code in Japan.

IV. Conclusion

The largest impact of American corporate governance lies:

- NOT on the shareholder-oriented model.
- NOT on independent directors or disclosures and shareholders' litigation
- but on **the functional and economic way of viewing corporate law, contrasted with doctrinal emphasis**.

Thank you.