

# Lessons from the Toshiba Scandal

## A Corporate Governance Perspective

Bruce ARONSON\*

- I. Introduction
  - II. Background and Events
    - 1. Background
    - 2. The 2015 Accounting Scandal
    - 3. Losses in the Nuclear Power Business and Insolvency
    - 4. Recovery through Asset Sales and Share Issuance
    - 5. New Strategic Plans and Clashes with Activist Shareholders
  - III. Lessons from the Toshiba Case
    - 1. No Company is Immune from Corporate Governance Failures
    - 2. The Role of the Board of Directors – Function over Structure
    - 3. Activist Shareholders Can No Longer be Ignored
    - 4. The Age of Conglomerates in Japan is Ending
  - IV. Conclusion
- Appendix – Timeline in the Toshiba Case

### I. INTRODUCTION

The Toshiba case may well be the worst corporate governance scandal in Japanese history. It was wholly unexpected, as Toshiba was an icon of the Japanese business establishment. In addition, Toshiba was known for (and proud of) its corporate governance, including the early adoption of a system of executive officers and the “American-style” structure of a company with committees.<sup>1</sup> Nevertheless, in 2015 it was revealed that Toshiba had padded its profits over seven years and three presidents, across multiple divisions, and with the involvement of top management. This led to its near-bankruptcy and forced the sale of important assets and the issuance of shares to foreign activist funds.

---

\* The author is Adjunct Professor and Senior Advisor to the Japan Center at the U.S.-Asia Law Institute, New York University School of Law.

All internet links in this text were last visited on 9 September 2022. All Toshiba Corporation news releases cited herein can be accessed at <https://www.global.toshiba/ww/news/corporate.html> (search by date).

1 See discussion in Section III.2. *infra*.

Various reforms, including a revamping of its corporate governance structure and internal controls and compliance systems, a new business plan, and the introduction of an outside CEO and foreign board members, seemed to have little effect. A series of problems continued, including fresh accounting irregularities at a significant subsidiary, allegations of pressuring foreign shareholders ahead of a general shareholders meeting, and ongoing clashes between shareholders and management which, as of September 2022, have yet to be finally resolved. In the company's own words, these scandals "damaged Toshiba's reputation and plunged it into the most serious crisis since its founding."<sup>2</sup>

This raises an important question: Given Toshiba's storied past and position in Japanese society, how could so many things go so wrong for so long? The Toshiba case provides an excellent "learning moment" for scholars to re-examine important issues regarding corporate governance in Japan. After summarizing the background and events of the Toshiba scandals in Section II, this Article considers four lessons from Toshiba's troubles in Section III – (1) no company, regardless of its prominence, is immune from corporate governance failures, (2) the actual functioning of the board and management is far more important than a company's formal corporate governance structure, (3) Japanese management can no longer afford to ignore or fail to deal fairly with activist shareholders, and (4) the age of the conglomerate is over in Japan, as investors demand that companies focus on their core capabilities. Section IV concludes that these four lessons represent global trends that have now reached Japan, with the result that internationalizing Japanese companies may be subject to a higher "penalty" for poor management and corporate governance.

## II. BACKGROUND AND EVENTS

### 1. *Background*

Toshiba was formed in 1939 through a merger of two companies originally founded in the 19<sup>th</sup> century.<sup>3</sup> It was known for electrical machinery and appliances, and rode the post-war boom of economic growth in Japan, becoming a diversified conglomerate. But the economic environment became more challenging for all Japanese electronics companies with the bursting of Japan's economic bubble in the early 1990s, followed by rapid technological change and the rise of low cost manufacturers in China.

---

<sup>2</sup> See the history section of Toshiba Corporation's website, <https://www.global.toshiba/ww/outline/corporate/history.html>.

<sup>3</sup> Generally, see *id.*

One measure to cope with these negative trends was to improve decision-making through corporate governance reform. Toshiba, along with Sony, pioneered a system of executive officers in the late 1990s, pushed down day-to-day decision making to the individual business divisions within Toshiba (confusingly called by the English name “companies”), and quickly converted to the new “American-style” board structure of a company with committees when it became available in 2003.<sup>4</sup>

More fundamentally, it looked for new, promising businesses in which it could play a leading role. One fateful decision was to focus on the nuclear power industry. Following initial optimism, nuclear power plants had fallen into disfavor following incidents that highlighted their considerable risk (in particular, the Three Mile Island accident in the U.S. in 1979 and the Chernobyl disaster in Ukraine in 1986). However, by the mid-2000s there was talk of a “nuclear renaissance”, particularly in the U.S., as new worries about carbon emissions combined with traditional concerns about fossil fuel prices and energy independence.<sup>5</sup>

In 2006 Toshiba purchased Westinghouse Electric Corporation (“Westinghouse”), the U.S. power plant division of British Nuclear Fuels. The purchase price of \$5.4 billion (600 billion yen) was three times higher than analysts had estimated the prior year, as Toshiba had to outbid rivals such as Mitsubishi Heavy Industries and General Electric at the height of interest in an anticipated “nuclear renaissance”.<sup>6</sup>

---

4 *Id.*

5 Globally, in 2005 nuclear power plants supplied 15% of the world’s electricity, with the U.S., France and Japan operating 57% of global nuclear capacity. See INTERNATIONAL ENERGY AGENCY, World Energy Outlook 2006 (2006) at 346, <https://iea.blob.core.windows.net/assets/390482d0-149a-48c0-959b-d5104ea308ca/weo2006.pdf>. The report noted that “Over the past two years, several governments have made statements favouring an increased role of nuclear power in the future energy mix and a few have taken concrete steps towards the construction of a new generation of safe and cost-effective reactors.” *Id.* at 344. For the U.S., see, e.g., L. SIKKEMA/M. SAVAGE, Nuclear Renaissance?, National Conference of State Legislatures, March 2007, <https://www.ncsl.org/research/energy/state-legislatures-magazine-nuclear-renaissance.aspx> (noting that George W. BUSH was “the most pro-nuclear power president in two decades,” and citing The Energy Policy Act of 2005 and the Nuclear Power 2010 program as part of a general effort to provide incentives and governmental cooperation for the construction and operation of new nuclear power plants).

6 H. TIMMONS, Toshiba Agrees to Buy Westinghouse for \$5.4 Billion, N.Y. Times, 6 February 2006. At that time Toshiba’s CEO stated publicly that nuclear power would increase 50% by 2020. *Id.* Westinghouse’s technology (pressurized water nuclear reactors) was reportedly the most commonly used in nuclear plants (distinct from Toshiba’s boiling water reactor, another commonly used type), covering half of nuclear plants globally and 60% of those in the U.S; in addition, China had al-

Following the financial crisis of 2008 and the Fukushima nuclear plant disaster in 2011, it became clear that Westinghouse was in serious trouble. By the fall of 2013 it was estimated that the U.S. nuclear business would incur \$1–2 billion in additional costs for design changes following the Fukushima meltdown.<sup>7</sup> It appeared highly unlikely that Toshiba could recoup the high price paid for Westinghouse, and would soon need to start writing down the 350 billion yen in goodwill recorded for that transaction. Meanwhile, Toshiba's overall business performance and financial position suffered in the wake of the 2008 financial crisis, with its one trillion yen of net assets being reduced to 450 billion yen.<sup>8</sup> Toshiba's management decided to not recognize or disclose the growing losses at Westinghouse in order to avoid the painful write-downs that might wipe out the company's shareholder equity.<sup>9</sup>

## 2. *The 2015 Accounting Scandal*

However, an anonymous whistleblower reported Toshiba's accounting problems to the Japanese financial authorities in early 2015. Japan's securities regulator, the Securities and Exchange Surveillance Commission (SESC) issued an order to Toshiba (12 February 2015) to report and be subject to a disclosure inspection under the Financial Instruments and Exchange Act (FIEA). Toshiba's initial informal internal review raised issues and Toshiba appointed an internal Special Investigation Committee (3 April 2015). This effort revealed additional concerns, and Toshiba established an Independent Investigation Committee under Japan Federation of Bar Association guidelines to investigate four areas of accounting concern (8 May 2015). The 334 page report issued by the Committee (20 July), and particularly the 90 page summary of the report (hereafter referred to as the "2015 Report")<sup>10</sup>, became the major source of information for the many articles written on Toshiba's accounting scandal.

---

ready announced a plan to build more than 25 new nuclear plants by 2020. *Id.* At that time Westinghouse was working on the construction of four nuclear power plants in the U.S. and four in China. Toshiba's main nuclear power rivals in Japan, Hitachi and Mitsubishi Heavy Industries, also entered into overseas partnerships (Hitachi with General Electric in the U.S. and Mitsubishi Heavy Industries with Areva in France). See, e.g., J. SOBLE, *Japan's Nuclear Industry Turns Focus Abroad*, *Financial Times*, 10 August 2010.

7 T. ABE/K. HOSOKAWA, *Toshiba Learns a Painful Lesson about Oversight*, *Nikkei Asia*, 25 January 2018.

8 ABE/HOSOKAWA, *supra* note 7.

9 INDEPENDENT INVESTIGATION COMMITTEE FOR TOSHIBA CORPORATION, *Investigation Report, Summary Version*, 20 July 2015, at 67, [https://www.global.toshiba/content/dam/toshiba/migration/corp/irAssets/about/ir/en/news/20150725\\_1.pdf](https://www.global.toshiba/content/dam/toshiba/migration/corp/irAssets/about/ir/en/news/20150725_1.pdf).

The 2015 Report's findings were shocking: Toshiba had overstated its profits by over 150 billion yen (\$1.2 billion at the then prevailing exchange rate), equal to about one-third of all of its pre-tax profits over the seven years from FY 2008 – FY 2014.<sup>11</sup> This overstatement was systematic: it occurred simultaneously within a number of business units over a long period of time, was known to some members of management, and in large part was a result of unachievable profit goals in the form of “Challenges” (using the English word) issued by top management to the various business divisions. Top corporate officials generally treated these “Challenges” as being mandatory rather than aspirational.<sup>12</sup>

Many of the accounting problems were relatively simple, e.g. intentionally overstating current profits and delaying the recognition of costs and losses, and were readily apparent without any special expertise in accounting.<sup>13</sup> Nevertheless, the internal control and audit systems were inadequate for the difficult task of discovering fraud that involved top management, and external disclosure did not provide adequate information for outside auditors or regulators.

Among the numerous causes of these problems cited in the 2015 Report, the factors that received the greatest public attention were the findings that there were “corporate cultures where the employees cannot act contrary to the intent of superiors”<sup>14</sup> and that the “internal control function (supervisory function) of the Board of Directors did not work”.<sup>15</sup> The recommendations for reforms were numerous and included the clarification of responsibility for past problems, changing the mindset of management and reform-

---

10 For a summary of the SESC's action and Toshiba's response leading to the establishment of the independent investigation committee, see *id.* at 13. The scope of the investigation covered the accounting treatment used in four areas: power projects that used the percentage-of-completion accounting method, parts transactions in the PC business, recording of operating expenses in the visual products business, and inventory valuation in the semiconductor business. *Id.* at 13.

11 2015 Report at 18; J. SOBLE, Scandal Upends Toshiba's Lauded Reputation, N.Y. Times, 21 July 2015. The final figure of overstated profits was some three times higher than Toshiba had initially suggested a few months before completion of the 2015 Report. I. MARLOW, Toshiba Vows More Management Changes Amid Accounting Scandal, The Globe and Mail, 21 July 2015.

12 2015 Report at 68.

13 Although top management's refusal to recognize additional costs on the U.S. nuclear power business was significant, the largest contributor to padding profits was simple “channel-stuffing” – selling expensively priced PC components to friendly companies at the end of a quarter to artificially – and temporarily – inflate profits. 2015 Report at 54.

14 2015 Report at 68.

15 2015 Report at 72.

ing corporate culture, changing accounting policies and abolishing “Challenges” in the budgeting process, strengthening internal control and compliance systems, and enhancing the supervisory role of the Board of Directors (particularly the Audit Committee), including by increasing the number of outside directors with relevant expertise.<sup>16</sup>

The aftermath of this eye-catching accounting scandal was extensive. It began with the resignation of Toshiba’s top management and half of its board and, revision of the company’s financial statements from FY 2008 through FY 2014.<sup>17</sup> It also included the largest fine ever levied by the Financial Services Agency,<sup>18</sup> a listing penalty handed down by Japan’s stock exchanges together with the designation of Toshiba’s stock as a “security on alert” and its subsequent demotion to the Second Section of the Tokyo Stock Exchange,<sup>19</sup> shareholder litigation against Toshiba in Japan and the U.S.,<sup>20</sup> a civil lawsuit filed by Toshiba against five former executives,<sup>21</sup> a criminal investigation against several Toshiba executives (although no indictment resulted),<sup>22</sup> and the first fine ever levied against an external auditor in Japan, Ernst & Young ShinNihon by the Financial Services Agency.<sup>23</sup> Shortly thereafter, stock exchange regulators created new guidelines on reacting to, and preventing, corporate scandals.<sup>24</sup>

16 2015 Report at 78–79.

17 TOSHIBA CORPORATION, Attachment, Outline of Measures to Prevent Recurrence, in Notice on Restatements of Past Financial Results, Outline of FY 2014 Consolidated Business Results, Submission of 176<sup>th</sup> Annual Securities Report and Outline of Recurrence Prevention Measures, etc., News Release, 7 September 2015.

18 The administrative fine of 7.37 billion yen (\$59.8 million at the time) set a new record that greatly surpassed the prior record of 1.6 billion yen levied against IHI Corporation in 2008. See T. URANAKA, Japan Securities Watchdog Recommends Record \$60 Million Fine for Toshiba, Reuters, 7 December 2015.

19 Toshiba was fined 91.2 million yen by the Tokyo Stock Exchange and 17.4 million yen by the Nagoya Stock Exchange. See TOSHIBA CORPORATION, Notice on Designation of Toshiba’s Shares as “Security on Alert” and Imposition of Listing Agreement Violation Penalty, News Release, 14 Sept. 2015. For a discussion of the designation of “security on alert” and Toshiba’s demotion to the Second Section of the Tokyo Stock Exchange see *infra* note 25.

20 For a summary, see TOSHIBA CORPORATION, Financial Report for the Year Ended March 31, 2022, at 52, <https://www.global.toshiba/content/dam/toshiba/ww/ir/corporate/finance/annual-report/pdf/ar2022/tfr2022e.pdf>.

21 See TOSHIBA CORPORATION, Notice on Receipt of Investigation Report from Executive Liability Investigation Committee, Filing of Action for Compensatory Damages Against Former Company Executives, An Action Filed in the U.S., and Other Matters, News Release.

22 NIKKEI, Securities Watchdog Inches Toward Criminal Case, 15 December 2015.

23 The Financial Services Agency levied a fine of 2.1 billion yen (\$17.3 million) and also prohibited the firm from accepting new clients for a period of three months.

### 3. *Losses in the Nuclear Power Business and Insolvency*

As noted above, following the issuance of the 2015 Report Toshiba restated seven years of earnings and was designated as a “security on alert” by the Tokyo Stock Exchange.<sup>25</sup> It became impossible for Toshiba to continue to hide the bad news concerning its investments in nuclear power. Like a gambler (or rogue bank trader) trying to make up for initial heavy losses, Toshiba decided to “double down” with an aggressive, but risky, strategy. In order to resolve outstanding issues related to delays in completing four reactors, in December 2015 Westinghouse purchased a nuclear construction company involved in the ongoing projects, CB&I Stone and Webster (“S&W”), with the intention of completing the projects on its own.<sup>26</sup>

Despite its well-known name, S&W had negative net worth and had previously been in bankruptcy. Toshiba again reportedly overpaid dramatically

---

NIKKEI, Ernst & Young’s Japan Arm Slapped with 2.1bn Yen Fine, Nikkei Asia, 23 December 2015. See also FINANCIAL SERVICES AGENCY, Disciplinary Action Against an Audit firm and Certified Public Accountants, 22 December 2015, <https://www.fsa.go.jp/en/news/2015/20151222-2.html>.

24 See JAPAN EXCHANGE REGULATION, Principles for Responding to Corporate Scandals, 2016, <https://www.jpx.co.jp/english/regulation/ensuring/listing/principle/index.html>; JAPAN EXCHANGE REGULATION, Publication of Principles for Preventing Corporate Scandals, 30 March 2018, [https://www.jpx.co.jp/english/regulation/ensuring/listing/preventive-principles/b5b4pj00000262qc-att/preventive\\_20180330.pdf](https://www.jpx.co.jp/english/regulation/ensuring/listing/preventive-principles/b5b4pj00000262qc-att/preventive_20180330.pdf).

25 JAPAN EXCHANGE GROUP, Continued Designation as Securities on Alert: TOSHIBA CORPORATION, 19 December 2016, <https://www.jpx.co.jp/english/news/1021/20161219-14.html>. This designation requires that the offending company improve its internal management system and report to the stock exchange. The exchange reviews the designation after one year. In Toshiba’s case, after one year the exchange determined that improvements had been made but that further improvements were required, and the designation as a security on alert would be continued. If the exchange were to determine that the company’s internal management system had not improved after 18 months then the company’s shares “shall” be delisted (on 15 March 2017). *Id.*

In March 2017 Toshiba was additionally designated as a “security under supervision” (a security that is seen as unlikely to achieve the required management improvements in time to avoid delisting), as it was delayed in filing two quarterly earnings reports due to uncertainties in its U.S. operations and disagreements with its external auditor. In August 2017 Toshiba was demoted to the Second Section of the Tokyo Stock Exchange due to negative shareholder equity, following the delay in releasing its annual report. See NIKKEI, Toshiba Demoted to Tokyo Exchange’s Second Tier, Nikkei Asia, 24 June 2017. Both designations of “security on alert” and “security under supervision” were later cancelled in October.

26 Toshiba immediately settled all outstanding disputes and stated that “[B]y acquiring CB&I S&W, Westinghouse can integrate end-to-end management and execution of all aspects of U.S. nuclear plant projects.” TOSHIBA CORPORATION, Westinghouse

by purchasing the company at “no cost,” with the assumption of significant liabilities for past (and possible future) cost overruns and delays in nuclear plant construction. This gambit was reportedly undertaken without any due diligence, which was postponed until after the acquisition.<sup>27</sup>

On the corporate governance side, Toshiba overhauled its board and management at the general shareholders meeting in June 2016, with a vow to come to grips with its problems and implement appropriate counter-measures.<sup>28</sup> In December 2016, one year after the purchase of S&W, Toshiba announced that it might incur several hundred billion yen (several billion dollars) in losses resulting from that acquisition in light of ongoing cost overruns and construction delays.<sup>29</sup> Although the actual losses were yet to be determined, the numbers cited in this two-page press release were far greater than Toshiba’s profits and immediately raised the possibility that it was, or might soon become, insolvent.<sup>30</sup>

Toshiba’s critical financial situation was soon confirmed by an announcement in February 2017 that Westinghouse would write down \$6.1 billion, that Toshiba’s forecast for the prior quarter’s results (the reporting of which had been delayed) was a loss of 390 billion yen, and that shareholder equity in Toshiba was a negative 150 billion yen.<sup>31</sup> Westinghouse filed for bankruptcy in the U.S. the following month.<sup>32</sup> Toshiba’s losses

---

Acquires CB&I Nuclear Construction and Integrated Services Subsidiary, News Release, 28 October 2015.

27 See ABE/HOSOKAWA, *supra* note 7.

28 One corporate governance measure adopted in 2017 was to split off Toshiba’s divisions (“in-house companies”) into separate subsidiaries. TOSHIBA CORPORATION, 2017 Annual Report at 30–33 (highlighting the “new Toshiba”), [https://www.global.toshiba/content/dam/toshiba/migration/corp/irAssets/about/ir/en/finance/ar/ar2017/tar2017e\\_or.pdf](https://www.global.toshiba/content/dam/toshiba/migration/corp/irAssets/about/ir/en/finance/ar/ar2017/tar2017e_or.pdf).

29 TOSHIBA CORPORATION, Possibility of Recognition of Goodwill and Loss related to Westinghouse’s Acquisition of CB&I Stone and Webster, News Release, 27 December 2016. Goodwill from the acquisition of Westinghouse was originally estimated at \$87 million. In an attempt to place a value on the U.S. nuclear power plants under construction (including additional expenses due to costs overruns and delays in construction), Toshiba greatly increased the goodwill to several billion dollars, all of which could become subject to write-downs and resulting losses. *Id.*

30 Reported estimates of Toshiba’s upcoming losses ranged widely from 100 billion yen (Nikkei’s website) to 500 billion yen (NHK). See Y. NAKAMURA, Toshiba Drops on Reports of Nuclear Unit’s \$4.3 Billion Loss, Bloomberg, 26 December 2016.

31 TOSHIBA CORPORATION, Notice on Chapter 11 Filing by Westinghouse Electric Company and its Group Entities, News Release, 29 March 2017.

32 TOSHIBA CORPORATION, *supra* note 31.

would continue to mount and within a year the company's negative net worth would balloon to 750 billion yen.<sup>33</sup>

#### 4. *Recovery through Asset Sales and Share Issuance*

Beginning in 2016 Toshiba began an aggressive program of asset sales to shore up its weak financial position. Initial estimates predicted that large-scale asset sales over a two-year period might leave Toshiba with a sizeable equity cushion.<sup>34</sup> However, the subsequent losses at Westinghouse left Toshiba no choice but to put everything on the table. This included its crown jewel, Toshiba's memory chip business, which was the second largest business of its kind in the world and the only large and highly profitable business within the company.<sup>35</sup> Having already been designated as a "security on watch" by Japan's stock exchanges, Toshiba was in danger of being automatically delisted at the end of March 2018 for having liabilities exceed assets for a second straight year.

Under the circumstances, in September 2017 Toshiba agreed to sell a majority interest in the chip unit to a consortium led by Bain Capital for \$18 billion (Toshiba would retain a 40% minority interest).<sup>36</sup> However, the schedule to close the transaction by the end of March 2018 became highly doubtful, as Toshiba became embroiled in a prolonged legal dispute over the proposed sale with its joint venture partner, Western Digital Corp., and antitrust reviews were expected to take many months.

In January 2018 Toshiba announced its intention to sell Westinghouse for \$4.6 billion to a private equity affiliate of Canadian asset manager Brookfield Asset Management.<sup>37</sup> Although the nuclear plant construction business had

---

33 See, e.g., KYODO, Four Things to Know about Toshiba's \$5.33bn Share Sale, Nikkei Asia, 22 November 2017.

34 Toshiba quickly sold its medical system unit to Canon and announced that there "will be no untouchable areas" with respect to asset sales. See NIKKEI, Toshiba Eyes 200 Billion Yen in Asset Sales, Nikkei Asia, 19 March 2016. Reports at the time indicated that initial estimates of over one trillion yen in asset sales over two years could leave Toshiba with a robust 800 billion yen in equity by the end of the process "if all goes smoothly." *Id.* It did not.

35 See T. FUSE/K. YAMADA, Toshiba Selects Bain Group as Buyer of its Memory Chip Business--Sources, Reuters, 19 September 2017; L. LEWIS/P. WELLS, Toshiba Seals \$18bn Memory Chip Sale to Bain-led Group, Fin. Times, 20 September 2017 (noting that "the chip business, along with its nuclear operations, had been repeatedly identified by the company itself as the prime driver of future growth").

36 LEWIS/WELLS, *supra* note 35.

37 See, e.g., E. CROOKS, Toshiba sells Nuclear Group Westinghouse in \$4.6bn Deal, Financial Times, 4 January 2018, <https://www.ft.com/content/74afda84-f174-11e7-b220-857e26d1aca4>. The majority owner of one of Toshiba's U.S. projects (two

been a disaster, the buyer was attracted to the steady service business for nuclear power plants which produced consistent free cash flow.<sup>38</sup> However, the necessity of obtaining bankruptcy court and antitrust approvals meant that this deal would also not close by the end of March 2018.

Toshiba's "Plan B" was a quick and bold recapitalization plan to issue a large volume of shares to repair its balance sheet and avoid delisting. However, raising capital through the usual channels (such as a domestic public share offering brokered by Nomura Securities) faced some uncertainties and would take time, and time was now of the essence.<sup>39</sup> So instead Toshiba turned to Goldman Sachs, which utilized its Wall Street connections to assemble a group of 60 foreign investors for a large private placement of shares; these investors included prominent activist shareholders such as Elliott Management, Third Point and Farallon Capital Management. Although there was reluctance at Toshiba to accept such investors as the company's largest shareholders, under the looming delisting deadline it had little choice.<sup>40</sup>

In November 2017 Toshiba announced a private placement ("third-party allotment") of new shares of 600 billion yen (\$5.3 billion at the time), which was completed on December 5.<sup>41</sup> Combined with other improvements, the capital infusion of 600 billion yen would be enough to erase Toshiba's negative equity of 750 billion yen and avoid delisting, even without completing the chip sale.<sup>42</sup> But the new foreign investors would not be patient – they had little trust in the willingness of Toshiba's management to undertake the reforms necessary to "fix" its business in a way that would benefit shareholders.

---

power plants), Scana, also announced it would accept a takeover bid from Dominion Energy. *Id.*

38 CROOKS, *supra* note 37.

39 See J. KAWAKAMI, Goldman put Wall Street Connections to Work on Toshiba Deal, *Nikkei Asia*, 30 November 2017, <https://asia.nikkei.com/Business/Finance/Goldman-put-Wall-Street-connections-to-work-on-Toshiba-deal>.

40 *Id.* (although some outside directors expressed misgivings, then Toshiba president, Satoshi TSUNAKAWA, reportedly argued that the company had no choice).

41 See TOSHIBA CORPORATION, Notice regarding Financing Transaction, News Release, 19 November 2017, <https://www.global.toshiba/ww/news/corporate/2017/11/pr1902.html>.

42 See, e.g., KYODO, *supra* note 33. Due to improvements in Toshiba's corporate governance, the Tokyo Stock Exchange had ended Toshiba's "security on alert" status in October 2017, which removed the possibility of delisting due to corporate governance failures and made investors more receptive to a stock offering. See *id.*; JAPAN EXCHANGE GROUP, *supra* note 25. This large private placement was the equivalent of 54% of Toshiba's shares outstanding at the time; the issue price was 262.80 yen, or about 10% below the market price. KYODO, *Id.*

### 5. *New Strategic Plans and Clashes with Activist Shareholders*

The stage was set for a series of clashes between Toshiba's management and its new activist shareholders. Their purposes were often opposite, with management wanting to restructure and continue along fairly traditional lines, while activist investors preferred a sale of the company to a private investor to realize their gains from a relatively low-cost investment. These conflicting goals complicated the process of strategic review, and continuing problems at Toshiba added fuel to the fire. One example that illustrates the ongoing turmoil is the holding of five extraordinary general shareholder meetings over a period of seven years (2015–2022); most companies have none.<sup>43</sup>

Toshiba tried to get off on the right foot by bringing in an outside CEO, Nobuaki KURUMATANI, for the first time in its modern history (in April 2018), completing the sale of its chip business, renamed Kioxia, to the Bain-led consortium and announcing a new mid-term (five-year) business plan, Toshiba Next Plan, as a company-wide transformation plan.<sup>44</sup> At its June 2019 general shareholders meeting Toshiba invited four non-Japanese directors to its new “revolutionary” board that emphasized broad expertise and diversity to implement the Toshiba Next Plan.<sup>45</sup>

However, a new accounting scandal came to light in February 2020. A significant subsidiary, Toshiba IT-Services Corporation, was found to have

---

43 The basic documents for all of these shareholder meetings can be found on Toshiba's website at [https://www.global.toshiba/ww/ir/corporate/stock/meeting.html?utm\\_source=www&utm\\_medium=web&utm\\_campaign=since202203Corplr](https://www.global.toshiba/ww/ir/corporate/stock/meeting.html?utm_source=www&utm_medium=web&utm_campaign=since202203Corplr).

44 In August 2018 Toshiba also completed the sale (announced in January 2018) of Westinghouse for \$4.6 billion to an affiliate of Brookfield Asset Management. See *supra* notes 37–38 and accompanying text; WORLD NUCLEAR NEWS, Westinghouse Emerges from Chapter 11, 2 August 2018.

The Toshiba Next Plan called for strict supervision of low-profitability businesses through a clear criterion of 5% of ROS (return on sales) and for a stable business portfolio of primarily B-to-B, rather than consumer, businesses. Phase 2 of the plan aimed for further growth by leveraging digital technologies in the infrastructure and electronic device segments. See N. KURUMATANI, The Toshiba Next Plan, 8 November 2018, [https://www.global.toshiba/content/dam/toshiba/migration/corp/ir/Assets/about/ir/en/pr/pdf/tpr2018q2e\\_2.pdf](https://www.global.toshiba/content/dam/toshiba/migration/corp/ir/Assets/about/ir/en/pr/pdf/tpr2018q2e_2.pdf); see also TOSHIBA CORPORATION, *supra* note 2. The outsider CEO, Nobuaki KURUMATANI, later resigned in April 2021 as a result of an unsolicited, controversial bid from CVC Capital Partners (of which KURUMATANI was a former head of its Japan office) to take Toshiba private and allegations of conflict of interest. See, e.g., L. LEWIS/K. INAGAKI, Toshiba CEO's Sudden Resignation Throws \$20bn CVC Deal into Doubt, Financial Times, 14 April 2021.

45 For the backgrounds of the 12 candidates for director, see TOSHIBA CORPORATION, Convocation Notice of the Ordinary General Meeting of Shareholders for the 180<sup>th</sup> Fiscal Year, 3 June 2019, [https://www.global.toshiba/content/dam/toshiba/migration/corp/ir/Assets/about/ir/en/stock/pdf/tsm180e\\_conv.pdf](https://www.global.toshiba/content/dam/toshiba/migration/corp/ir/Assets/about/ir/en/stock/pdf/tsm180e_conv.pdf). Toshiba's response to

engaged in fictitious and circular transactions with customers and suppliers. As a result, the next general shareholders meeting in July 2020 was highly contentious. Five directors proposed by activist shareholders (to give the activists a majority on the board) were defeated – but it turned out that some votes were not counted and, more importantly, it was alleged that Toshiba had obtained help from Japan’s Ministry of Economy, Trade and Industry (METI) to pressure large foreign shareholders to refrain from voting against management’s candidates.<sup>46</sup> This, in turn, prompted an extraordinary shareholders meeting that appointed a truly independent investigation committee (i.e., not selected by Toshiba management).

This committee produced a report that characterized the management of the general shareholders meeting in 2020 as unfair and contrary to the principles of the corporate governance code.<sup>47</sup> The report also highlighted the

---

ongoing concerns was received positively. In perhaps its most peaceful general shareholders meeting in recent times, each of the 12 board candidates received affirmative votes of over 99% of votes cast. TOSHIBA CORPORATION, Notice of Shareholder Voting Results at the Ordinary General Meeting of Shareholders for the 180<sup>th</sup> Fiscal Year, 1 July 2019, [https://www.global.toshiba/content/dam/toshiba/migration/corp/ir/Assets/about/ir/en/stock/pdf/tsm180e\\_extra.pdf](https://www.global.toshiba/content/dam/toshiba/migration/corp/ir/Assets/about/ir/en/stock/pdf/tsm180e_extra.pdf).

- 46 Toshiba allegedly coordinated with METI to have ministry officials threaten two foreign activist shareholders (Effissimo and 3D) with investigations under Japan’s new trade regulations (see *infra* note 48). When that failed, Harvard University’s endowment fund was approached. See B. DOOLEY, *Ousting Toshiba Chairman, Foreign Investors Score Breakthrough in Japan*, N.Y. Times, 25 June 2021. These allegations were later confirmed by the report of an independent investigation committee. See INVESTIGATORS OF TOSHIBA CORPORATION, *infra* note 47. Harvard, in an unusual move, abstained from voting and subsequently sold its stake in Toshiba. See A. TRIVEDI, *Toshiba Saga Manages to Make Hedge Funds Look Like the Good Guys*, Bloomberg, 14 June 2021.
- 47 INVESTIGATORS OF TOSHIBA CORPORATION, Investigation Report, 10 June 2021, in: Toshiba Corporation, Notice Regarding Receipt of the Investigation Report from the Persons Who Will be Charged to Investigate the Status of the Operations and Property of the Stock Company as Set forth in Article 316, Paragraph 2 of the Companies Act, News Release, 10 June 2021. The report found that the general shareholders meeting in 2020 was not conducted fairly (although this did not directly affect the voting outcome) and was contrary to the corporate governance code, in which General Principle 1 states that “Companies should take appropriate measures to fully secure shareholder rights and develop an environment in which shareholders can exercise their rights appropriately and effectively,” and Supplementary Principle 1.13 provides that “Given the importance of shareholder rights, companies should ensure that the exercise of shareholder rights is not impeded.” *Id.* at 51. In response to this report, Toshiba made some “last minute” changes to its nominees for director and executive officer at the upcoming general shareholders meeting on 25 June 2021. Two directors on the audit committee were replaced, as were

strong national security interest of the Japanese government in Toshiba due to its nuclear power and defense businesses,<sup>48</sup> and found collusion between Toshiba and the government in an attempt to suppress the voting rights of overseas investors.<sup>49</sup> The government's strategic interest in Toshiba was an additional complication – potentially both providing support for the company and, at the same time, also limiting the strategic options available to Toshiba to reach some accommodation with its activist shareholders.

In the general shareholders meeting the following year (June 2021), shareholders successfully ousted board chairman Osamu NAGAYAMA after critics accused the board of failing to address the allegations of pressuring overseas investors.<sup>50</sup> Toshiba pledged to undertake a full review of assets and engage with potential investors.<sup>51</sup> Later that year Toshiba announced a new plan to split into three separate companies.<sup>52</sup> Following negative reac-

---

two executive officers. TOSHIBA CORPORATION, Notice Regarding Company's Response to the Investigation Report, News Release, 13 June 2021.

48 The government listed Toshiba as a company that was important to national security under amendments to the Foreign Exchange and Foreign Trade Act in 2019 (which became effective on 7 June 2020). These amendments require some foreign investors to provide advance notification of investments of 1% or more (reduced from a prior 10% threshold) in specified core industries, including nuclear power and defense. See, e.g., G. READY/S. ODA, Japan Moves to Limit Foreign Investment in Half of Listed Firms, Bloomberg, 10 May 2020.

49 See INVESTIGATORS OF TOSHIBA CORPORATION, *supra* note 47; L. LEWIS/K. INAGAKI, How 'Dark Arts' and Dirty Tricks Turned Investors against Toshiba, Financial Times, 23 June 2021.

50 See, e.g., T. MOCHIZUKI/I. FURUKAWA, Toshiba Shareholders Oust Chairman in Rare Investor Victory, Bloomberg, 24 June 2021, <https://www.bloomberg.com/news/articles/2021-06-25/toshiba-shareholders-vote-to-oust-board-chairman-nagayama#:~:text=Toshiba%20Corp.,scandal%20and%20allegations%20of%20mismanagement>. Voting out NAGAYAMA was something of a surprise – he was an outsider who was not directly involved in the scandal over pressuring overseas shareholders and had pledged to reform Toshiba. He was expected to win by a narrow margin. See DOOLEY, *supra* note 46. However, his candidacy was opposed by proxy advisor Institutional Shareholder Services Inc., which is influential among the non-Japanese shareholders that own relatively half of the company's shares. See NIKKEI, U.S. Advisory Company Opposes Toshiba Divestment Plan, Nikkei Asia, 10 March 2022, and discussion in Section III.3. *infra*.

51 See, e.g., M. YAMAZAKI, Toshiba Shareholders Oust Chairman, in Shake-up for Japan Inc, Nippon.com, 26 June 2021.

52 TOSHIBA CORPORATION, Strategic Review Committee of Toshiba Board of Directors Provides Update to Shareholders on Process Leading to Separation Plan, News Release, 12 November 2021. The plan, which would constitute the largest spinoff in Japanese history, called for Toshiba to split into three standalone public companies: Toshiba (holding shares in its memory chip and technology businesses), energy and infrastructure business, and device and storage business. It was based on a recom-

tion from activist shareholders amid concerns over the costs of this proposal, Toshiba modified the plan to a two-company split and held an extraordinary general shareholders meeting (March 2022) to obtain nonbinding approval from shareholders.<sup>53</sup> Activist shareholder 3D Investment Partners made its own proposal to launch a new strategic review to facilitate the company selling itself to a buyer. Proxy advisor Institutional Shareholder Services Inc. (“ISS”) backed neither proposal<sup>54</sup> and both failed.

Following the rejection of its proposal, Toshiba appointed a new CEO, Taro SHIMADA, Toshiba’s chief digital officer and a former Siemens’ executive, and announced a new business strategy (June 2022) that called for a shift away from manufacturing towards an emphasis on growing its data business.<sup>55</sup> Meanwhile, in April 2022 Toshiba created a new independent special committee to solicit and consider proposals from private equity funds regarding strategic alternatives, including sale of the company.<sup>56</sup> And at the general shareholders meeting in June 2022 the company agreed to include two directors on the board who were recommended by its activist shareholders due to their expertise and experience in mergers and acquisitions.<sup>57</sup> Ten potential bidders were initially selected under the company’s

---

mendation from the company’s Strategy Committee composed of five independent directors. *Id.*

53 TOSHIBA CORPORATION, Toshiba Provides Update on Strategic Organization to Enhance Shareholder Value, News Release, 7 February 2022. The original plan to split into three public companies was modified into two companies: Toshiba (energy and infrastructure) and device/storage business (spun off to existing shareholders). This would lower costs, improve viability and monetize Toshiba shares of its memory chip business, Kioxia (which would all go to shareholders). *Id.*

54 See NIKKEI, *supra* note 50. The other major proxy advisor, Glass Lewis, opposed Toshiba’s proposal and supported the shareholder proposal by 3D. See S. DEVEAU, Toshiba’s Plan to Split Into Two Opposed by Investor Adviser Glass Lewis, Bloomberg, 10 March 2022.

55 DEVEAU, *supra* note 54.

56 TOSHIBA CORPORATION, Notice Regarding Commencement of Discussion with Potential Investors and Sponsors, News Release, 21 April 2022.

57 Prior to the general shareholders meeting, Toshiba entered into nomination agreements with Farallon Capital Management (re candidate IMAI) and Elliot Management (re candidate BHANJI). The board was expanded from 8 members to 13; only two of the 13 members were insiders. All director candidates were approved by the nomination committee and the board. See TOSHIBA CORPORATION, Convocation Notice of the Ordinary General Meeting of Shareholders for the 183<sup>rd</sup> Fiscal Year, 13 June 2022, at 7–9, [https://www.global.toshiba/content/dam/toshiba/ww/ir/corporate/stock/meeting/pdf/tsm183e\\_conv.pdf](https://www.global.toshiba/content/dam/toshiba/ww/ir/corporate/stock/meeting/pdf/tsm183e_conv.pdf). However, in an unusual move, one member of the nomination committee, the former judge Mariko WATAHIKI, made public her vote in the nomination committee against the two director candidates proposed by Farallon Capital Management and Elliot Management. She resigned from Toshiba’s board following

new review process, but no deal has materialized to date.<sup>58</sup> Although the process is apparently moving forward, some ambiguity remains as to whether the company, or, for that matter, the Japanese government, will readily approve Toshiba's privatization and possible breakup.<sup>59</sup>

### III. LESSONS FROM THE TOSHIBA CASE

#### 1. *No Company is Immune from Corporate Governance Failures*

As noted in the Introduction, Toshiba's troubles took Japan by surprise due to the company's economic, political and social prominence as a leading member of Japan's business establishment. Toshiba executives regularly held important positions in leading industry organizations, such as Keidanren (Japan Business Federation), and in public policy committees such as the Council on Economic and Fiscal Policy, an influential governmental policy-making body within the cabinet office that reports directly to the prime minister. Its aura of respectability helped ensure that Toshiba's stock was widely held by pension funds and others as an example of a stable investment suitable for "widows and orphans".

None of this mattered. Like all Japanese electronics companies, Toshiba's traditional businesses, such as household appliances and later personal computers, were buffeted by changes in technology and the rise of low-cost competitors in Asia. In addition, unfavorable economic conditions, in particular the financial crisis of 2008, further reduced sales and profits and placed additional pressure on the company's performance and its management.<sup>60</sup> Downsizing or eliminating traditional businesses and developing new, promising

---

the general shareholders meeting. See M. OBE, *Toshiba Board Member Quits in Protest as Hedge Fund Managers Join*, Nikkei Asia, 28 June 2022.

58 Among the 10 proposals from bidders, 8 call for buying Toshiba and taking it private, and two call for a capital injection and business alliance. The special committee reviewing the offers has announced no schedule or timeframe for the completion of the review process. OBE, *supra* note 57.

59 Like his predecessors, current-CEO SHIMADA hopes to keep the company in one piece. M. FUJIKAWA/P. LANDERS, *Toshiba CEO Doesn't Want Buyer to Split Up Company*, Wall St. Journal, 7 June 2022, <https://www.wsj.com/articles/toshiba-ceo-doesnt-want-buyer-to-split-up-company-11654603201>. If Toshiba sticks to this position, the company could be less valuable to private equity investors who are accustomed to freely slicing and dicing companies to maximize shareholder return. *Id.* Jerry BLACK, the chairman of the special committee reviewing bids for Toshiba, has stated that he does not favor a breakup, which might also encounter difficulty with Japan's trade ministry. *Id.*

60 Pressure from management to continue to produce positive results during this tough economic environment resulted in the beginning of "channel stuffing" in the PC

areas of growth were both tremendous challenges that depended on innovation, flexibility and decisiveness rather than on establishment credentials.

Such pressures also tend to stress a company's corporate governance. The level of risk in new business plans and acquisitions is inherently higher than for ordinary, ongoing operations, and, accordingly, tests an organization's capabilities to evaluate the risks and provide meaningful oversight of management. Even more difficult is the ability to recognize and deal with mistakes and failures at a sufficiently early stage to permit recovery, as failure to disclose and cope with such losses often exacerbates the problem. There are numerous examples in Japanese corporate governance scandals of the cover-up being worse than the initial mistake.<sup>61</sup>

Other Japanese electronics companies had their own struggles during this period, but ultimately achieved better outcomes than Toshiba. Sony had poor performance from 2002 through 2015, and also had its corporate governance criticized for lack of management oversight, until it eventually recovered through development of its entertainment-related businesses.<sup>62</sup> In Japan, Toshiba was most often directly compared to Hitachi due to their similar mix of businesses. Prior to the accounting scandal in 2015, Toshiba always came out on top in that comparison; but since then the respective evaluations of the two companies reversed.<sup>63</sup> In the end, among all of Japan's troubled electronics companies, Toshiba, arguably the most prominent among them, surprisingly came out the worst.

## 2. *The Role of the Board of Directors – Function over Structure*

As mentioned above, another reason the troubles at Toshiba were so shocking was that the company was known for good corporate governance. It

---

business. See, e.g., N. LANE/R. ANDO, In Toshiba Scandal, the 'Tough as Nails' Target Setter, Reuters, 24 August 2015.

61 The example that was uppermost in everyone's minds at the time of the Toshiba scandal in 2015 was the Olympus scandal in 2011. In that case as well, top management concealed large losses (over \$1.5 billion) for a long period of time (over 20 years) through three company presidents, filed inaccurate securities reports and failed to provide necessary information to its board of directors. See B. ARONSON, The Olympus scandal and Corporate Governance Reform: Can Japan Find a Middle Ground Between the Board Monitoring Model and Management Model?, UCLA Pacific Basin Law Journal 30 (2012) 93, 106–114.

62 See B. ARONSON, Case Studies of Independent Directors in Asia, in: Puchniak/Baum/Nottage (eds.), Independent Directors in Asia: A Historical, Contextual and Comparative Approach (Cambridge 2017) 443–444. Recently, over half of Sony's revenue has come from its three gaming businesses. See P. LANDERS, Sony Chief Nobuyuki Idei Foresaw a Shift to Games, Music and Films, Wall St. Journal, 9 June 2022.

63 See *infra* notes 92–94 and accompanying text.

was one of the roughly two percent of listed Japanese companies that chose to replace traditional governance structures with an “American-style” system of executive officers and board committees with independent directors.

Additionally, Toshiba instituted a modified “hybrid” board committee system that it held out as a “best of both worlds” approach.<sup>64</sup> It attempted to combine insiders’ knowledge with outsiders’ independence to produce a structure that was more practical and effective for Japanese companies than a “pure” company with committees structure. For over a decade half of the Toshiba board (which in 2015 totaled 16 directors) consisted of “insider” executive directors and half were non-executive directors. The latter were equally divided between former senior company officials and independent directors. How did things go so wrong despite this sophisticated corporate governance structure?

The Toshiba case may be the best example of how good corporate governance depends on the board’s actual functioning rather than its structure. Although debate in Japan on corporate governance since the 1990s has focused largely on the questions of the introduction of independent directors and the most appropriate corporate structure for Japanese companies,<sup>65</sup> “good corporate governance” depends more on people and processes. Independent directors can only function effectively if they are provided with the information and operating environment that permits them to do so.<sup>66</sup> Such operating environment clearly includes the mindset of the company’s CEO and top management – a willingness to recognize that independent directors serve a useful function and to see the benefit of the give and take between management and the board in areas such as risk management.

Toshiba’s board may have had a carefully thought out structure, but it clearly lacked the right people and processes. An important problem that plagues many Japanese companies, regardless of corporate governance structure, is a president’s ability to essentially pick his successor – this also appears to have been the case with Toshiba.<sup>67</sup> As often noted, the head of

---

<sup>64</sup> See ARONSON, *supra* note 62, 447–450.

<sup>65</sup> See, e.g., G. GOTO/M. MATSUNAKA/S. KOZUKA, Japan’s Gradual Reception of Independent Directors: An Empirical and Political-Economic Analysis, in: Puchniak/Baum/Nottage (eds.), *Independent Directors in Asia: A Historical, Contextual and Comparative Approach* (2017) 135–175; ARONSON, *supra* note 61, at 95–106.

<sup>66</sup> See generally B. ARONSON, The Olympus scandal and Corporate Governance Reform: Can Japan Find a Middle Ground Between the Board Monitoring Model and Management Model?, *UCLA Pacific basin Law Journal* 30 (2012) 93, 129–139.

<sup>67</sup> *Id.* at 127–129. This was cited as a problem with Sony, which also had an “American-style” company with committees structure (including a nomination committee). See, e.g., ARONSON, *supra* note 60 at 443–444. With respect to the situation at Toshiba, see, e.g., NIKKEI, Three Toshiba Presidents Paved Road to Near-ruin,

the audit committee was an insider (former CFO) and other members of the audit committee were diplomats and others with no background in accounting issues.<sup>68</sup> There was no effective system for employees to question or challenge (or bring directly to the attention of the audit committee or the board) the unachievable profit targets established by top management for many years following the 2008 financial crisis.<sup>69</sup> The board may have had active discussions, but they were based on the misleading information provided by management and reflected in the company's business plans and financial statements (an example of "garbage-in, garbage-out"). The cover-up of mistakes and losses, combined with a subsequent "doubling down" on risky investments, ultimately placed the company in a precarious position.

As with other scandal-ridden Japanese companies, in 2015 Toshiba announced and embarked upon a broad-ranging plan to improve its corporate governance and business practices. These included the establishment of a Management Revitalization Committee to clarify management responsibility for the accounting scandal, propose new corporate governance structures and formulate measures to prevent any recurrence of accounting irregularities.<sup>70</sup> An Executive Liability Investigation Committee found responsibility on the part of five former top executives and filed a civil lawsuit against them.<sup>71</sup> Corporate governance reforms included establishing a new majority of outside directors on the board, outside directors for the posts of chairman of the board and chair of the audit committee, CEOs from outside the company and the introduction of a number of foreign directors to the board. Measures to prevent any recurrence of accounting problems included efforts to reform corporate culture, strengthen internal controls and reform business processes.<sup>72</sup>

---

Nikkei Asia, 15 April 2018 (tracing Toshiba's troubles back to presidential succession issues which began in 2003 and the early use of "buy-sell" transactions of PC parts to temporarily boost earnings).

68 See, e.g., N. LANE/E. EMOTO, How Toshiba Delayed a \$100 Million Loss with Two Words: 'Uncorrected Misstatement,' Reuters, 5 August 2015; ARONSON, *supra* note 62, at 448.

69 See generally the 2015 Report, *supra* note 9.

70 TOSHIBA CORPORATION, Notice on Publication of the Full Version of the Investigation Report by the Independent Investigation Committee, Action to be Taken by Toshiba, and Clarification of Managerial Responsibility, News Release.

71 See TOSHIBA CORPORATION, *supra* note 21.

72 See TOSHIBA CORPORATION, *supra* note 17. Measures to "reform corporate culture" included a review of budgetary control (replacing a "top-down" process of setting budgetary goals with a "bottom-up" approach and other measures), improved awareness and strengthening of compliance, and education on accounting compliance. Measures to strengthen internal controls included a new confidential reporting line to the audit committee in addition to the traditional whistleblower

The success of these reforms continues to be questioned. The Tokyo Stock Exchange was satisfied that Toshiba's corporate governance reforms had at least met minimal regulatory requirements and were sufficient to remove its "security on watch" designation.<sup>73</sup> But significant new corporate governance problems arose: another accounting scandal at a major subsidiary in 2020 and management's widely criticized efforts to pressure foreign shareholders ahead of the general shareholders meeting in June 2021<sup>74</sup> and commentators generally condemned Toshiba's reforms as favoring form over substance.<sup>75</sup> More fundamentally, Toshiba's management found it extremely difficult to satisfy the demands of a new set of shareholders – foreign activist investors.

### 3. *Activist Shareholders Can No Longer be Ignored*

Although there was previous shareholder activism in Japan,<sup>76</sup> "modern" shareholder activism – in which activists' public campaigns are aimed at providing benefits for all shareholders and not just for themselves (unlike "corporate raiders" of the past) – has entered Japan over the past several years. Japan, in fact, was a good market for such activism, due to the large number of Japanese companies that had low-priced stock (many below book value) and substantial cash-on-hand, and were ripe for both increased payouts to shareholders and business restructuring.<sup>77</sup> Over the past few years, it has become increasingly difficult for the management of Japanese companies to simply ignore activist shareholders as being "short-term investors" who were not true stakeholders of the company.

---

function operated by management. Business process reform consisted of new accounting treatment of the four problematic areas covered by the 2015 Report. *Id.*

73 See JPX TOKYO STOCK EXCHANGE, *supra* note 16.

74 See *supra*, notes 46–49 and accompanying text.

75 For example, it was noted immediately that Toshiba was continuing to provide insufficient information to independent directors and was failing to heed their advice, even after making independent directors a majority of the board following the 2015 accounting scandal. See NIKKEI, Lessons from the Toshiba Scandal, Nikkei Asia, 24 November 2015. For a more recent evaluation, see, for example, B. MASTERS, Toshiba Scandal is a Moment to Stand up and be Counted, Fin. Times, 16 June 2021 (stating that "Toshiba has had three financial scandals in the past six years, and the government has intervened at least twice to help management fend off investor challenges. If that's a transformed corporate culture, what was the old one like?").

76 See, e.g., J. BUCHANAN/D. CHAI/S. DEACON, Hege Fund Activism in Japan: The Limits of Shareholder Primacy (2012).

77 See, e.g., M. BIRD, Foreign Investors Can Learn to Love Japan Again, Wall St. Journal, 7 December 2020.

Although an extreme case in which foreign activist investors ended up owning a significant percentage of the company's stock, Toshiba provides the clearest example of the strength of this trend.<sup>78</sup> Foreign activists have successfully pressured Toshiba over the last few years to add activists' representatives to the board and to undertake a strategic review process which could result in the sale of Toshiba to a private equity investor.

It is of course, necessary to distinguish between "foreign investors" in general and shareholder "activists." Following Toshiba's large private placement to foreign investors in December 2017, over 70% of Toshiba's shares were held by foreign investors (as opposed to the average percentage of foreign ownership of the Japanese stock market as a whole, which is about 30%).<sup>79</sup> At the time of the vote on competing proposals for Toshiba's future in 2022, the percentage of shares held by foreign investors was about 50% of the total shares.<sup>80</sup> The percentage of shares held by "activist shareholders," although less clear, was recently estimated to be roughly a quarter of the company's shares – led by large Toshiba shareholders, Effissimo Capital Management and Farallon Capital Management, which together owned about 10% of the company.<sup>81</sup>

The inclusion of such activists in Toshiba's shareholder structure raises the biggest issue with regards to shareholder activism in Japan – can activists obtain the support of traditional institutional investors (both domestic

---

78 The ouster of board chairman Osamu NAGAYAMA in the general shareholders meeting of June 2121 prompted the comment in a news report that "activist investors have gone from largely impotent onlookers to influential voices in the space of just a few years, and the company's [Toshiba's] annual general meeting was a new milestone." See T. MOCHIZUKI/I. FURUKAWA *supra* note 50. In another account it was referred to as "a breakthrough for foreign investors who have been pushing to make Japan's insular corporations more transparent and accountable." See DOOLEY, *supra* note 46.

79 Toshiba's percentage of overseas investors jumped from 38.2% in FY 2017 (as of 31 March 2017) to 72.3% in FY 2018 (as of 31 March 2018). TOSHIBA CORPORATION, 2019 Integrated Report at 74, <https://www.global.toshiba/content/dam/toshiba/migration/corp/ir/Assets/about/ir/en/finance/ar/ar2019/tir2019e.pdf>. For the Tokyo market as a whole, in 2020 foreigners owned 30.2% of shares of listed companies. See JPX TOKYO STOCK EXCHANGE, 2020 Share Ownership Survey, <https://www.jpx.co.jp/english/markets/statistics-equities/examination/b5b4pj0000047w2y-att/e-bunpu2020.pdf>.

80 According to the most recent data in Toshiba's annual reports, the percentage was 50.5% as of 31 March 2021. TOSHIBA CORPORATION, 2021 Integrated Report at 77, [https://www.global.toshiba/content/dam/toshiba/ww/ir/corporate/finance/annual-report/pdf/ar2021/tir2021e\\_a4.pdf](https://www.global.toshiba/content/dam/toshiba/ww/ir/corporate/finance/annual-report/pdf/ar2021/tir2021e_a4.pdf).

81 REUTERS/BLOOMBERG, Toshiba Shareholders Endorse Two Directors from Activist Hedge Funds, Japan Times, 28 June 2022.

and foreign) in campaigns against poorly performing Japanese companies by arguing that they are pursuing the interests of all shareholders.<sup>82</sup> This tactic, which originated in the U.S., has now arguably taken root in Japan,<sup>83</sup> and the Toshiba case is a good example. Activists' received support from a clear majority of shareholders (58%) at an extraordinary shareholders meeting to appoint their own investigators to examine management's "dirty" tactics in pressuring foreign shareholders.<sup>84</sup> And at another extraordinary shareholders meeting in 2022 – featuring management's plan to split the company into two parts versus shareholders' plan for a new strategic review committee to sell the company – prominent proxy advisor ISS treated the two sides equally and did not back either proposal.<sup>85</sup>

The role of ISS should be highlighted. Following the 2017 amendment of the Stewardship Code that required disclosure of individual votes, domestic institutional investors in Japan generally conduct their own independent analysis of Japanese companies and vote in accordance with their own proxy voting guidelines.<sup>86</sup> However, many foreign institutional investors rely on the recommendations of proxy advisors, particularly ISS, in making their voting decisions with regard to Japanese companies. The negative results for the vote on the company's strategic plan in the extraordi-

---

82 This possibility is premised on the significant decline in cross-shareholding, under which the management of many Japanese companies was strongly supported by 'stable' friendly shareholders who had business dealings with the company. For recent data, see TOKYO STOCK EXCHANGE, INC., TSE-Listed Companies White Paper on Corporate Governance 2021, at 31–35, <https://www.jpex.co.jp/equities/listing/cg/tvdivq0000008jb0-att/nlsgeu000005qnsz.pdf>.

83 See, e.g., C. ENGLISH, Japan Becomes a Hotbed of Investor Activism After a Win at Toshiba, *Barron's*, 16 July 2021. For examples, apart from Toshiba, in which domestic Japanese institutional investors supported proposals against management made by foreign investors, see, e.g. M. YAMAZAKI, No Longer Silent, Japan Asset Managers Flex Muscle in Legacy to Abe, *Japan Times*, 25 July 2022.

84 In a rare win for activist investors over company management, this shareholders' proposal received support from nearly 58% (47.9%) of the total votes. TOSHIBA CORPORATION, Notice of Shareholder Voting Results at the Extraordinary General Meeting of Shareholders, 5 April 2021, [https://www.global.toshiba/content/dam/toshiba/migration/corp/irAssets/about/ir/en/stock/pdf/tsm2021e\\_extra.pdf](https://www.global.toshiba/content/dam/toshiba/migration/corp/irAssets/about/ir/en/stock/pdf/tsm2021e_extra.pdf).

85 See NIKKEI, *supra* note 50. Both proposals failed. It should be noted that, in an effort to obtain some show of support and momentum for its proposals, Toshiba did not present its plan to shareholders for approval. That would have required a special resolution and a two-thirds vote of shareholders. Instead, it requested shareholders to provide a nonbinding, ordinary resolution that only requires a majority vote. However, even that bar could not be cleared. It should also be noted that previously ISS had opposed the re-election of Toshiba chairman NAGAYAMA, who was ousted in a close contest. *Id.*

86 See M. YAMAZAKI, *supra* note 51.

nary shareholders meeting in 2022 contrast with the positive results in the earlier general shareholders meeting of 2020 when Toshiba, having obtained the support of both major proxy advisory firms, was initially successful in fending off new director nominations by activist investors.<sup>87</sup>

Given the increasingly active governance role of large Japanese institutional investors, we may expect this trend to continue. As in the U.S., even large, prominent companies in Japan are no longer safe if they encounter serious difficulties due to poor investments and management.

#### 4. *The Age of Conglomerates in Japan is Ending*

After clashing with activist shareholders for nearly four years, Toshiba announced (November 2021) a plan to split into three companies. That same week General Electric of the U.S. announced its own plan to similarly divide into three entities, and Johnson & Johnson announced it would spin off its stable consumer businesses and concentrate on the faster-growing pharmaceutical drug business.<sup>88</sup> Toshiba's plan was criticized as dividing itself into three "mini-conglomerates" (infrastructure, electronic devices and memory chips and other assets) which still lacked a clear core business, as opposed to the three GE companies that focused respectively on medical devices, power systems and aircraft engines.<sup>89</sup>

Although conglomerates had long become unpopular in the U.S.,<sup>90</sup> this represented something of a watershed in Japan. There are few examples of

87 TOSHIBA CORPORATION, Glass Lewis Joins ISS in Recommending Toshiba Shareholders Vote "FOR" the Election of All 12 Toshiba Director Nominees, News Release, 17 July 2020. It was for this shareholders meeting, following a new accounting scandal at a Toshiba subsidiary, that the company, fearful of the outcome, went to the Japanese government to obtain help in pressuring foreign investors. As noted above, this created a new firestorm, even though this government pressure was unnecessary and did not affect the outcome of the vote. See *supra* note 34. By the following year, after the investigative report on pressuring foreign investors was released, ISS changed its views and Toshiba changed some of its board candidates on short notice. *Id.*

88 The Johnson & Johnson example illustrates that the trend towards "deconglomeration" is not limited to traditional industrial companies like GE, but also extends to the thriving pharmaceutical drug industry. While large pharmaceutical companies formerly had stable, 'cash cow' over-the-counter and generic drug divisions that funded their expensive research for new drugs, investors now demand that they give up the diversified pharma conglomerate model and focus on high growth biotech. See, e.g., J. NATHAN-KAZIS, Big Pharma, Slimmed Down, *Barron's*, 20 June 2022, 21 (noting that "The era of the drug conglomerate is gone. In its place is big biopharma.").

89 See, e.g., M. FUKIKAWA/P. LANDERS, Toshiba, Like GE, Plans to Split Into Three Units, *Wall St. Journal*, 12 November 2021.

90 See, e.g., R. CLOUGH, Conglomerates Are Broken, *Bloomberg*, 1 February 2018 (noting that conglomerates have been unpopular for some time due to increasing

Japanese companies of such size and prominence that ended up willing to divide themselves for lack of a better alternative. Some commentators saw it as evidence of improvements in Japanese corporate governance, as Toshiba was now facing severe pressure for underperformance and poor management – such market and shareholder pressure might be expected in the West, but was unusual in Japan.<sup>91</sup> Unlike the Olympus case in 2011 where a “traditional” Japanese ally, the company’s main bank and major shareholder, strongly supported the company, Toshiba was basically now left on its own to face activist shareholders.<sup>92</sup>

In addition, activist shareholders had no interest in owning any “mini-conglomerates.” They, in essence, demanded the end of Toshiba as a conglomerate, pressing for an even more drastic solution than splitting up the company – sale of the company to a private equity investor. Such buyer would likely undertake a massive restructuring, and quite possibly carve the company up and sell it piecemeal if that produced the greatest return for shareholders.

The comparison of Toshiba with Hitachi remains popular because Hitachi undertook a more responsible and ultimately more successful restructuring. Following the 2008 financial crisis it set a new record for an annual loss by a Japanese manufacturer.<sup>93</sup> However, unlike Toshiba, it immediately admitted the problem and undertook a painful recapitalization. It is also credited with more substantive corporate governance reform.<sup>94</sup> Able to focus on research and development of new businesses, it is making good progress in transforming from a traditional industrial conglomerate to a company focused on IT services.<sup>95</sup>

---

capital market efficiency, technological change and increasing specialization of business, and discussing the possible breakup of GE).

91 J. STERNBERG, *The Toshiba Split: A Farewell to Poor Japanese Management?*, Wall St. Journal, 18 November 2021.

92 STERNBERG, *supra* note 91.

93 Hitachi reported a 787.3 billion yen net loss in 2009, “the largest for any Japanese manufacturer up to that point.” See Nikkei, *Hitachi Bets Big on Environment, Digital Tech to Buck Downturn*, Nikkei Asia, 16 August 2022.

94 See, e.g., M. OMATA, *Taking Another Look at Governance in Light of Toshiba Accounting Scandal*, blog, 25 March 2016, <https://english-meiji.net/articles/246/> (noting that “the board of directors underwent a complete change,” including the inclusion of four non-Japanese directors and a new culture of robust discussion such that “even the CEO was at a loss to furnish a reply at times.”).

95 Hitachi sold its traditional industrial businesses, including one of its “three crown jewels,” Hitachi Metals, in 2021. In turn, in the same year it made its largest acquisition of software engineering group Global Logic for US\$9.6 billion. See Y. HIROI, *Hitachi Shares Hit 20-year High as IT Shift Bears Fruit*, Nikkei Asia, 22 May 2021. In 2021 the company reported a record net profit for the second consecutive year

## IV. CONCLUSION

The Toshiba case is not yet resolved. As of this writing, the company is engaged in undertaking a process to screen potential purchasers. Looking back, Toshiba has often been indecisive and trapped between activist investors and its own (and possibly the Japanese government's) desire to avoid privatization and remain independent. With its value remaining flat for the past decade, it has neither rejected the advice of activists (like Sony) or preempted activists by disposing of industrial assets early on like Hitachi.<sup>96</sup> Although Toshiba's performance has improved somewhat over the last few years, it is not enough to satisfy activist shareholders who wish to cash out of their investments. This situation was foreseeable following Toshiba's large private placement to overseas investors in December 2017; in turn, Toshiba was largely forced into that situation by its own management failures.

The role of activist investors is increasing, but it remains to be seen just how far such activism can go. The forced sale of Toshiba would place an exclamation point on a number of continuing trends discussed herein: (1) the difficulties encountered by traditional Japanese companies in rapidly changing markets, (2) the importance of an effectively functioning corporate governance system as companies are forced into more drastic actions in response to this new environment, (3) the growing role of activist investors, who may increasingly be supported by traditional institutional investors, to extract a serious penalty from Japanese companies that display poor management and governance, and (4) a new bias against traditional Japanese conglomerates, as investors prefer to diversify portfolios on their own rather than leave that process to corporate management.

All of the above arguably represent global trends that have now reached Japan. As Japanese businesses continue to internationalize due to their home country's aging population and shrinking market, we can expect more companies to experience similar troubles. In that sense, although at first glance the Toshiba case may seem an extreme and unlikely one, it may also be a harbinger of a continuing trend that raises the "penalty" for Japanese companies that display poor management and corporate governance.

---

and a record high for its share price. *Id.* For a discussion of such transformation of Japanese companies, see U. SCHAEDE, *The Business Reinvention of Japan: How to Make Sense of the New Japan and Why it Matters* (2020).

96 G. REIDY, *The Paradox of Trying to Take Toshiba Private*, Bloomberg, 19 April 2022. This article further contrasts Toshiba's reluctance to take strong measures with the rapid bankruptcy and restructuring of Japan Airlines, suggesting that Toshiba's problems were essentially its own fault, and that bankruptcy might have been a better strategy than reluctantly selling a large number of shares to foreign activists in 2017. *Id.*

## APPENDIX – TIMELINE IN THE TOSHIBA CASE

- *1990s*: Toshiba adopts a “concentration and selection” policy for focusing on promising businesses and managing mature ones in response to a declining economic environment.
- *1996–2003*: Corporate governance reforms are undertaken to enhance the independence and speed of decision-making (introduction of executive officers in 1998 and “in-house companies” in 1999) and the board’s oversight function (adoption of company with committees structure in 2003).
- *2006*: Toshiba purchases Westinghouse in a big push into the nuclear power business.
- *July 2015*: Independent Investigation Committee discloses accounting malpractices across multiple divisions in Toshiba, which involved top management. In total, pre-tax profit was overstated by 150 billion yen (\$1.2 billion) over seven years.
- *September 2015*: Toshiba is designated as a “security on alert” by the Tokyo Stock Exchange.
- *December 2015*: Toshiba’s U.S. subsidiary, Westinghouse, purchases nuclear construction company CB&I Stone and Webster at “no cost,” but assumes potentially large liabilities.
- *June 2016*: The board and management of Toshiba are overhauled, with a new promise to deal openly with its losses and business problems.
- *December 2016*: Toshiba announces it will take a charge of several billion dollars in relation to the acquisition of CB&I Stone and Webster a year earlier.
- *March 2017*: Westinghouse files for Chapter 11 bankruptcy protection. Faced with over \$6 billion in liabilities linked to Westinghouse, Toshiba decides to put its prized memory chip unit up for sale.
- Having twice missed filing deadlines for its financial reports, Toshiba is designated a “security under supervision.”
- *August 2017*: Toshiba is demoted to the Second Section of the Tokyo Stock Exchange due to negative shareholder equity, following a delay in releasing its annual report.
- *September 2017*: Toshiba agrees to sell the chip unit to a consortium led by Bain Capital for \$18 billion; Toshiba retains a substantial minority stake (40%). However, delays in the deal’s closing could lead to delisting due to insolvency at fiscal year-end on 31 March 2018.
- *October 2017*: Toshiba’s designations as a “security on alert” and a “security under supervision” by the Tokyo Stock Exchange are cancelled.
- *November 2017*: Toshiba announces a private placement of shares to foreign investors and secures a cash injection of 600 billion yen (\$5.3 billion). This investment avoids a delisting but brings in prominent activist share-

holders including Elliott Management, Third Point and Farallon Capital Management.

- *April 2018*: For the first time an outsider, Nobuaki KURUMATANI, a former executive at Toshiba’s main creditor Sumitomo Mitsui Financial Group, is brought in as chief executive.
- *June 2018*: Toshiba completes the sale of its memory chip unit, renamed Kioxia, to the Bain consortium.
- *August 2018*: Toshiba completes the sale (announced in January 2018) of Westinghouse for \$4.6 billion to an affiliate of Brookfield Asset Management.
- *November 2018*: Toshiba announces a mid-term (five-year) Toshiba Next Plan as a company-wide transformation plan, with strict supervision of low-profitability businesses and a future as an infrastructure services and technology company.
- *June 2019*: Bowing to pressure from activist investors, Toshiba invites four non-Japanese directors to its new “revolutionary” board that emphasizes broad expertise and diversity.
- *February 2020*: New accounting irregularities are found at a consolidated subsidiary, Toshiba IT-Services Corporation, which engaged in fictitious and circular transactions with customers and suppliers.
- *July 2020*: At Toshiba’s annual general shareholders meeting five director candidates nominated by activist shareholders seeking to improve governance and change strategy are voted down.
- *September 2020*: Toshiba discloses that some votes were not counted at July’s general shareholders meeting by Toshiba’s agent, Sumitomo Mitsui Trust Bank Limited.
- *January 2021*: Toshiba reinstated to the First Section of the Tokyo Stock Exchange after 3 ½ years.
- *March 2021*: At an extraordinary shareholders meeting called by activist investors, a majority of shareholders approve an independent investigation into allegations that overseas investors were pressured ahead of the 2020 general shareholders meeting.
- *April 2021*: CVC Capital Partners makes an unsolicited and controversial \$21 billion offer to take Toshiba private. CEO KURUMATANI (a former Japan head of CVC) resigns.
- *June 2021*: The shareholder-commissioned investigation committee concludes the general shareholders meeting 2020 was “not fairly managed.”
- *June 2021*: Shareholders oust board chairman Osamu NAGAYAMA after critics accuse the board of failing to address the allegations about pressuring overseas investors. Toshiba pledges to undertake a full review of assets and engage with potential investors.

- *November 2021*: Toshiba proposes a split into three separate companies focused respectively on energy, infrastructure and the flash-memory chip company (Kioxia) and other assets.
- *February 2022*: Following pushback by activist shareholders and others, Toshiba modifies its proposal into a split into two companies.
- *March 2022*: At an extraordinary general meeting of shareholders, Toshiba's proposal to split into two entities is rejected. A competing shareholder proposal for a new strategic review to facilitate the sale of the company also fails.
- *April 2022*: The company establishes a special committee to solicit and consider proposals from private equity funds regarding strategic alternatives, including sale of the company.
- *May 2022*: Toshiba reports it has received 10 nonbinding bids for the company and initiates its review of the proposals.
- *June 2022*: At its general shareholders meeting Toshiba agrees to include two directors on the board who were recommended by its activist shareholders due to their expertise and experience in mergers and acquisitions.

[compiled from various sources including Reuters and Euronews]

#### SUMMARY

*The most significant, long-running corporate governance scandal in the history of Japan may finally be coming to a head. Toshiba has been a shocking case due to its prominence in the Japanese business establishment and its past emphasis on corporate governance. Its problems started with a decision to invest heavily in the nuclear power business in the U.S.; a decision that created significant losses that went unreported. These problems came to light in 2015 when it was discovered that Toshiba had padded its profits by \$1.2 billion (150 billion yen) over the prior seven years. Toshiba nevertheless proceeded to double down on its nuclear strategy by a disastrous purchase of a nuclear plant construction company. Losses made Toshiba desperate for new financing, and it sold a large volume of shares to some 60 foreign funds, including well-known activist investors. This led to years of clashes between Toshiba's traditional management, who wished to preserve Toshiba as a public company, and the activists who wished to sell the company to private investors. New problems arose despite corporate governance reforms and Toshiba's proposals to split the company into separate entities were rejected by shareholders. Under mounting pressure, the company is now considering proposals from private equity funds regarding strategic alternatives, including sale of the company. Ten potential bidders were initially selected, but no deal has materialized to date.*

*The following four lessons regarding corporate governance can be derived from Toshiba's troubles: (1) No company, regardless of its prominence, is immune from corporate governance failures, as traditional Japanese companies encounter difficulties in rapidly changing markets, (2) the actual functioning of the board and management is far more consequential than a company's formal corporate governance structure, as companies are forced into more drastic actions in response to this new business environment, (3) Japanese management can no longer afford to ignore or fail to deal fairly with activist shareholders, as activists may now garner the support of traditional institutional investors by pursuing the interests of all shareholders, and (4) the age of the conglomerate is over in Japan, as investors demand that companies focus on their core capabilities.*

*All of the above lessons arguably reflect global trends that have now reached Japan. As Japanese businesses continue to internationalize due to their home country's aging population and shrinking market, we can expect more traditional companies to experience similar troubles in adapting to a rapidly changing business and corporate governance environment. In that sense, although at first glance the Toshiba case may seem an extreme and unlikely one, it may also be a harbinger of a continuing trend that raises the "penalty" for Japanese companies that display poor management and corporate governance.*

#### ZUSAMMENFASSUNG

*Der bedeutendste, langjährige Corporate-Governance-Skandal in der Geschichte Japans könnte endlich zu einem Abschluss kommen. Der Skandal um Toshiba ist aufgrund der Prominenz des Unternehmens in der japanischen Geschäftswelt und seiner frühen Bemühung um eine gute Corporate Governance-Struktur ein besonders schockierender Fall. Die Probleme begannen mit der Entscheidung Toshibas, in großem Umfang in das Kernenergiegeschäft in den USA zu investieren; eine Entscheidung, die zu erheblichen Verlusten führte, die jedoch nicht offengelegt wurden. Diese Probleme kamen 2015 ans Licht, als entdeckt wurde, dass Toshiba in den vorhergehenden sieben Jahren seinen Gewinn um fiktive 1,2 Milliarden US-Dollar (150 Milliarden Yen) überhöht ausgewiesen hatte. Ungeachtet dessen intensivierte Toshiba seine Nuklearstrategie noch durch den wirtschaftlich katastrophalen Kauf eines Kernkraftwerksbauers. Die gigantischen Verluste ließen Toshiba verzweifelt nach neuen Finanzierungen suchen, und es veräußerte im Wege einer Kapitalerhöhung ein großes Aktienpaket an rund 60 ausländische Fonds, darunter bekannte aktivistische Investoren. Dies führte zu jahrelangen Zusammenstößen zwischen dem traditionell geprägten Management von Toshiba, welches das Unternehmen als Gesellschaft erhalten wollte, und den Aktivisten, die selbiges an private Investoren verkaufen wollten. Trotz Verbesserungen der Corporate Governance-Struktur traten neue Probleme auf, und die Vorschläge von Toshiba, das Un-*

ternehmen in separate Einheiten aufzuteilen, wurden von den Aktionären abgelehnt. Unter wachsendem Druck prüft das Unternehmen nun Vorschläge von Private-Equity-Fonds zu strategischen Alternativen, einschließlich des Verkaufs des gesamten Unternehmens an einen privaten Investor. Ursprünglich wurden dafür zehn potenzielle Bieter ausgewählt, aber bis heute ist kein Verkauf zustande gekommen.

Mit Bezug zur Corporate Governance können aus den Schwierigkeiten von Toshiba vier Lektionen gezogen werden: (1) Kein japanisches Unternehmen, unabhängig von seiner Bedeutung, ist immun gegen ein Corporate Governance-Versagen, da traditionell aufgestellte Unternehmen in einem sich rasch ändernden Marktumfeld jederzeit auf Schwierigkeiten stoßen können. (2) Die tatsächliche Arbeitsweise des Verwaltungsrates und des Managements ist weit wichtiger als die formale Corporate Governance-Struktur eines Unternehmens, denn als Reaktion auf ein geändertes Geschäftsumfeld kann dieses zu drastischen Maßnahmen gezwungen werden. (3) Japanische Unternehmensführungen können es sich nicht länger leisten, aktivistische Aktionäre zu ignorieren oder nicht fair mit ihnen umzugehen, da die Aktivisten heute auf die Unterstützung traditioneller institutioneller Investoren zählen können, wenn sie die Interessen aller Aktionäre verfolgen. (4) Das Zeitalter der Konglomerate ist (auch) in Japan vorbei, da Investoren verlangen, dass sich Unternehmen auf ihre Kernkompetenzen konzentrieren.

Alle vorstehend genannten Lektionen dürften globale Trends widerspiegeln, die jetzt Japan erreicht haben. Da die dortigen Unternehmen aufgrund der alternden Bevölkerung des Landes und des deshalb schrumpfenden Marktes weiter internationalisieren müssen, ist davon ausgehen, dass die stärker traditionell geprägten japanischen Unternehmen vergleichbare Probleme bei der Anpassung an ein sich schnell veränderndes Geschäfts- und Corporate Governance-Umfeld haben werden. Obwohl der Toshiba Fall auf den ersten Blick als ein extremes und außergewöhnliches Beispiel erscheinen mag, könnte er in diesem Sinne vielleicht doch der Vorbote eines anhaltenden Trends sein, gemäß dem sich die „Strafe“ für japanische Unternehmen erhöht, die ein schlechtes Management und eine schlechte Corporate Governance aufweisen.

(Die Redaktion)