
The Rise of the Code of Conduct in Japan: Legal Analysis and Prospect

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I. INTRODUCTION

A code of conduct is a set of rules adopted by transnational corporations (TNCs)¹ to regulate working conditions and the management of contract factories. TNCs adopted codes of conduct to cope with rising public criticism in the late 1980s and 1990s toward unfair labor practices in contract factories in Third World countries. Among the many stories reported at that time, the most watched and remembered were those involving the low wages of Nike's contract factories in Indonesia² and the "sweatshops" in Saipan³ that fed the U.S. mainland apparel industry.

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1. See generally David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 908-09 (2003) (discussing the different terms used to refer to corporations operating in several countries, including transnational corporations (TNCs), multinational corporations (MNCs), and multinational enterprises (MNEs)). In this article, TNCs will be used based upon the definition set forth in the UN Code of Conduct for Transnational Corporations.

2. See, e.g., Edward A. Gargan, *An Indonesian Asset Is Also a Liability; Low Wages Woo Foreign Business, but the Price Is Worker Poverty*, N.Y. TIMES, Mar. 16, 1996, at 35.

3. See, e.g., Jeff Wong, *U.S. Firms Sued over Links to 'Sweatshops'*, ORANGE COUNTY REG., Jan. 14, 1999, at 3.

As the globalization of the economy progressed, Japanese TNCs, like American TNCs, transferred their production bases to developing countries like China, Vietnam, Malaysia, and Indonesia in search of low wage labor.⁴ The development of a code of conduct in Japan, however, is quite different from that of American TNCs; it is very domestic and, in a sense, very “Japanese.”

This article will analyze the development of Japanese codes of conduct and legal risks under Japanese law concerning unfair labor practices in foreign contract factories, and hypothesize about the direction of its evolution. Part I describes the development of codes of conduct in the international community and the efforts made through public and private initiatives. Part II discusses legal risks under Japanese law concerning unfair labor practices in foreign contract factories. Part III discusses the development of Japanese codes of conduct by focusing on two recent corporate scandals that drove Japanese corporations to adopt codes of conduct. Finally, Part IV analyzes the legal effect of adopting a code of conduct under Japanese law and hypothesizes about its future.

II. BRIEF HISTORY OF THE DEVELOPMENT OF CODES OF CONDUCT IN THE INTERNATIONAL COMMUNITY

Before discussing the development of codes of conduct in Japan, a brief survey of those in the international community is helpful in understanding the uniqueness of Japanese codes of conduct. As the globalization of the economy progressed, TNCs were economically motivated to transfer their production bases to developing countries, such as Latin American countries and South East Asian countries, for low wage labor and less employee protection.⁵ Simultaneously, the international community increased criticism of TNC behavior⁶ in host countries while various governmental and non-governmental organizations drafted

4. *Technology Transfer to Asia (I)*, NIHON KEIZAI SHINBUN [Nikkei Newspaper], Feb 21, 2003, at 27.

5. See S. PRAKASH SETHI, SETTING GLOBAL STANDARDS: GUIDELINES FOR CREATING CODES OF CONDUCT IN MULTINATIONAL CORPORATIONS 8 (2003).

6. See, e.g., David Binder, *Business Pose by U.S. Spies Reported*, N.Y. TIMES, Feb. 28, 1974, at 14 (referencing the involvement of the International Telephone and Telegraph Corporation, an American TNC, in the 1974 coup d'état in Chile, which overthrew then President Salvador Allende).

guidelines to control the TNCs' business conduct.⁷ Generally, codes of conduct in the international community have been developed by two parties: international organizations such as the United Nations or the Organization for Economic Cooperation and Development (OECD), and private parties such as TNCs or non-governmental organizations.⁸

A. Code of Conduct by International Organizations

1. UN Code

Among the many efforts by international organizations to create norms that regulate TNC business conduct, the United Nations' 1974 Code of Conduct for Transnational Corporations ("UN Code") will be discussed first. The UN Code had been under development since 1974, when the Economic and Social Council established a commission on TNCs.⁹ The commission was directed to study the role of TNCs in the international economy and to draft a code of conduct for them, which later became the UN Code.¹⁰

The UN Code consists of seventy-one articles.¹¹ The wording is somewhat generic¹² and no concrete burden is imposed on TNCs.¹³ For example, Article 14 regarding human rights simply states that "[t]ransnational corporations shall respect human rights and fundamental freedoms in the countries in which they operate."¹⁴ Despite its weakness, the UN Code met strong

7. See Weissbrodt & Kruger, *supra* note 1, at 902.

8. See *id.*

9. *Development and International Economic Co-operation: Transnational Corporations*, U.N. Economic and Social Commission, 2d Sess., Agenda Item 7(d), at 1, U.N. Doc. E/1990/94 (1990).

10. Review of the U.N. Code of Conduct for Transnat'l Corps., Hearing Before the Subcomm. on Human Rights and Int'l Orgs. of the Comm. on Foreign Affairs, 100th Cong., 1st Sess., at 3 (1987) [hereinafter Hearings] (statement of Hon. Alan Keyes, Assistant Sec'y of State).

11. See generally *Development and International Economic Co-operation: Transnational Corporations*, *supra* note 9.

12. Lance Compa & Tashia Hinchliffe-Darricarrère, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663, 670 (1995).

13. See Weissbrodt & Kruger, *supra* note 1, at 903.

14. Compa & Hinchliffe-Darricarrère, *supra* note 12, at 670 (quoting The UN Code).

opposition from industrialized countries, especially from the United States,¹⁵ and was not officially adopted.¹⁶

2. Global Compact

Another major UN effort is the Global Compact. The Global Compact was first addressed by the UN Secretary-General Kofi Annan at the World Economic Forum on January 13, 1999.¹⁷ He appealed to global business leaders to join the international initiative, to promote human rights, to improve labor conditions, and to protect the environment.¹⁸ The Global Compact's operational phase was officially launched at the UN Headquarters in New York on July 26, 2000.¹⁹ Although major UN agencies and TNCs expressed support for the Global Compact, it faced criticism from member state governments, especially the United States, from the business community, and even from academia.²⁰ The Global Compact has not accomplished the major success that was expected when it was launched.²¹

3. OECD Guidelines

Another international effort to regulate the business conduct of TNCs was conducted by the OECD. In 1976, it drafted the *Guidelines for Multinational Enterprises* ("OECD Guidelines"), which was revised in 2000.²² The OECD Guidelines are recommendations by the thirty OECD member governments.²³ Eight non-member countries — Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania and Slovenia — also expressed their endorsements for the OECD Guidelines.²⁴

15. *Hearings*, *supra* note 10, at 4.

16. *Id.* at 5.

17. *About the GC: What Is the Global Compact?*, at <http://www.unglobalcompact.org/Portal/Default.asp>. (last visited Apr. 20, 2004).

18. *Id.*

19. *Id.*

20. See SETHI, *supra* note 5, at 115.

21. See *id.*; see also William H. Meyer & Boyka Stefanova, *Human Rights, the UN Global Compact, and Global Governance*, 34 CORNELL INT'L L.J. 501, 504 (2001).

22. ORGANIZATION FOR THE ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: REVISION 2000 (2002), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> [hereinafter THE OECD GUIDELINES] (last visited Apr. 20, 2004).

23. *Id.* at 5.

24. *OECD Guidelines for Multinational Enterprises: 2000 Review*, at http://www.oecd.org/document/29/0,2340,en_2649_34889_2439005_1_1_1_1,00.html (last

OECD Guidelines are voluntary principles consisting of three parts: The OECD Guidelines for Multinational Enterprises, Implementation Procedures of the OECD Guidelines for Multinational Enterprises, and Commentaries.²⁵ The OECD Guidelines provide norms for a wide variety of areas such as employment, industrial relations, human rights, environment, disclosure, competition, taxation, and science and technology.²⁶ One unique aspect is the complaint procedure for workers and trade unions.²⁷

4. ILO Code

The International Labor Organization (ILO) also drafted a code of conduct entitled: *Tripartite Declaration of Principles Concerning Multinational Enterprises of Social Policy* (“ILO Code”).²⁸ The scope of the ILO Code is broader than that of the OECD Guidelines by extending coverage to job creation, investment in the local economy, and subcontracting.²⁹ The ILO Code, like the OECD Guidelines, lacks a penal or enforcement

visited Sept. 12, 2004) (noting Argentina, Brazil, and Chile as three of the eight non-member countries adhering to the OECD Guidelines); *Estonia and Lithuania Adhere to the OECD Declaration on International Investment and Multinational Enterprises*, at http://www.oecd.org/infobycountry/0,2646,en_2649_201185_1_70387_119690_1_1,00.html (last visited Sept. 15, 2004) (noting Estonia and Lithuania as two of the eight non-member countries adhering to the OECD Guidelines); *Israel Joins OECD Declaration on International Investment and Multinational Enterprises*, at http://www.oecd.org/infobycountry/0,2646,en_2649_201185_1_70504_119690_1_1,00.html (last visited Sept. 15, 2004) (noting Israel's adherence to the OECD Guidelines); *Latvia Joins OECD Declaration on International Investment and Multinational Enterprises*, at http://www.oecd.org/infobycountry/0,2646,en_2649_201185_1_70594_119690_1_1,00.html (last visited Sept. 15, 2004) (noting Latvia's acceptance to adhere to the OECD Guidelines); *Slovenia Adheres to the OECD Declaration on International Investment and Multinational Enterprises*, at http://www.oecd.org/infobycountry/0,2646,en_2649_201185_1_70774_119690_1_1,00.html (last visited Sept. 15, 2004) (noting Slovenia's acceptance to adhere to the OECD Guidelines).

25. THE OECD GUIDELINES, *supra* note 22, at 9.

26. *Id.*

27. *Id.* at 36; *see also* Compa & Hinchliffe-Darricarrère, *supra* note 12, at 671.

28. INTERNATIONAL LABOR ORGANIZATION, TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY, available at <http://www.ilo.org/public/english/standards/norm/sources/mne.htm> [hereinafter THE ILO DECLARATION] (last visited Apr. 20, 2004).

29. *See id.*

system; therefore, the actual influence of these guidelines is questionable.³⁰

B. Code of Conduct by Private Parties

Simultaneously, with the efforts made by international organizations, private parties such as TNCs began creating self-regulating norms in the 1970s in response to increased criticism.³¹ Among these private initiatives are notably the Sullivan Statement of Principles (“Sullivan Statement”), which regulated South African business during the apartheid era,³² Levi-Strauss’s Terms of Engagement and Guidelines,³³ and Nike’s Code of Conduct.³⁴ Levi-Strauss’s Terms of Engagement and Guidelines are believed to be the first code of conduct developed by a TNC.³⁵ The development of Nike’s Code of Conduct was in part a response to criticism of Nike’s unfair labor practices, such as child labor, in its Indonesian contract factories.³⁶

30. See Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 *FORDHAM INT’L L.J.* 1963, 1970 (1996); Joshua P. Eaton, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, 15 *B.U. INT’L L.J.* 261, 273 (1997); Christopher R. Coxson, *The 1998 ILO Declaration on Fundamental Principles and Rights at Work: Promoting Labor Law Reforms Through the ILO as an Alternative to Imposing Coercive Trade Sanctions*, 17 *DICK. J. INT’L L.* 469, 478-79 (1999); Jane C. Hong, *Enforcing Corporate Codes of Conduct: Finding a Private Right of Action for International Laborers Against MNCs for Labor Rights Violations*, 19 *WIS. INT’L L.J.* 41, 48 (2000); Elisa Westfield, *Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century*, 42 *VA. J. INT’L L.* 1075, 1091-92 (2002).

31. See, e.g., Compa & Hinchliffe-Darricarrère, *supra* note 12, at 666.

32. The (Sullivan) Statement of Principles (Fourth Amplification), Nov. 8, 1984, 24 *I.L.M.* 1496 (1985) [hereinafter *The Sullivan Statement*].

33. LEVI STRAUSS & CO., *SOCIAL RESPONSIBILITY/GLOBAL SOURCING & OPERATING GUIDELINES*, available at <http://www.levistrauss.com/responsibility/conduct/guidelines.htm> [hereinafter *LEVI STRAUSS GUIDELINES*] (last visited Apr. 20, 2004).

34. See generally NIKE, INC., *NIKE CODE OF CONDUCT*, available at <http://www.nike.com/nikebiz/gc/mp/pdf/English.pdf> [hereinafter *THE NIKE CODE*] (last visited Apr. 20, 2004).

35. See Levi Strauss & Co., *Social Responsibility/Our Commitment*, at <http://www.levistrauss.com/responsibility/index.htm> (last visited Apr. 20, 2004) (claiming that “[i]n 1991, we became the first worldwide company to establish a comprehensive ethical code of conduct for manufacturing and finishing contractors working with the company”); see also Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives*, 30 *LAW & POL’Y INT’L BUS.* 111, 128 (1998).

36. See, e.g., *THE BIG ONE* (Dog Eat Dog Films 1998) (illustrating the criticism among literature and media coverage. In this movie, directed by American filmmaker

1. The Sullivan Statement

The Sullivan Statement is a set of principles advocated in 1976 by Leon H. Sullivan, a pastor of the Zion Baptist Church and member of General Motors' board of directors.³⁷ The Sullivan Statement focused on regulating American TNCs conducting business in South Africa during the apartheid era.³⁸ Initially, twelve major American TNCs expressed their support for the Sullivan Statement.³⁹

The Sullivan Statement consists of six principles: anti-discrimination, fair employment, equal wages, job training, promotion of non-white management, and improvement of the quality of life outside the workplace.⁴⁰ The Sullivan Statement lacks a penal provision for violations.⁴¹ Arthur D. Little, Inc., a reputable consulting firm, oversaw the function of the Sullivan Statement and assessed the progress made by the signatory companies.⁴² The Sullivan Statement, however, was not a great success and is believed to have failed its promise and potential.⁴³

2. Levi-Strauss's Terms of Engagement and Guidelines

Levi-Strauss's Business Partner Terms of Engagement and Guidelines for Country Selection ("Levi-Strauss Code"), adopted in 1991, is believed to be the first code of conduct code developed by a TNC.⁴⁴ The Levi-Strauss Code consists of five major areas: ethical standards, legal requirements, environmental requirements, community involvement, and employment standards.⁴⁵ The employment standards cover child labor, prison/forced labor, disciplinary practices, working hours, wages and benefits, freedom

Michael Moore, Moore discussed with Philip H. Knight, President and CEO of Nike, child labor in Nike's contract factories in Indonesia).

37. SETHI, *supra* note 5, at 95.

38. *Id.*

39. *Id.*

40. *See generally* The Sullivan Statement, *supra* note 32.

41. *See* SETHI, *supra* note 5, at 109.

42. *Id.* at 104.

43. *Id.* at 109; *see also* Compa & Hinchliffe-Darricarrère, *supra* note 12, at 666.

44. *See Social Responsibility/Our Commitment*, *supra* note 35, at <http://www.levistrauss.com/responsibility/index.htm>; *see also* Robert J. Liubicic, *supra* note 35, at 128.

45. LEVI STRAUSS GUIDELINES, *supra* note 33, available at <http://www.levistrauss.com/responsibility/conduct/guidelines.htm>.

of association, discrimination, and health and safety.⁴⁶ A unique element is the respect for freedom of association, which was not included in Nike's code of conduct, as explained below.

3. Nike's Code of Conduct

Nike's Code of Conduct ("Nike Code") was established in 1992 in response to criticism toward its unfair labor practices, including child labor, in its Indonesian contract factories.⁴⁷ The Nike Code consists of a preamble and six sections, covering forced labor, child labor, compensation and benefits, work and overtime hours, environment, health and safety, and documentation and inspection.⁴⁸

Unlike the Levi-Strauss Code, the Nike Code does not mention freedom of association for workers.⁴⁹ Although the Nike Code's content is standard, a distinct enforcement feature is its monitoring and checking system.⁵⁰ Nike established a Labor Practices Department in 1996 to check whether the performance of its contractors met the Nike Code.⁵¹ In addition, Nike hired Ernst & Young, one of the largest accounting firms, to independently monitor pay records, overtime compensation requirements, and other local law compliance matters.⁵²

The motivation of the TNCs, including Levi-Strauss and Nike, for adopting codes of conduct may vary. Some may not have originated from a purity of heart to care for the workers in the foreign contract factories.⁵³ It is, however, undeniable that these codes heightened the standards and were a driving force in increasing the awareness of TNC management and foreign contract factories and, possibly, in improving working conditions.⁵⁴

46. *Id.*

47. *See generally* SETHI, *supra* note 5, at 152-64 (explaining that Nike does not own a manufacturing factory and outsources production to foreign contract factories).

48. THE NIKE CODE, *supra* note 34, available at <http://www.nike.com/nikebiz/gc/mp/pdf/English.pdf>.

49. *Id.*

50. *See id.*

51. Ryan P. Toftoy, *Now Playing: Corporate Code of Conduct in the Global Theater. Is Nike Just Doing It?*, 15 ARIZ. J. INT'L & COMP. L. 905, 920 (1998).

52. *See generally id.* at 921.

53. *See* Sol Picciotto, *Rights, Responsibilities and Regulation of International Business*, 42 COLUM. J. TRANSNAT'L L. 131, 139 (2003).

54. Claire Moore Dickerson, *Human Rights: The Emerging Norm of Corporate Social Responsibility*, 76 TUL. L. REV. 1431, 1437-38 (2002).

III. LEGAL RISKS UNDER JAPANESE LAW ARISING FROM UNFAIR LABOR PRACTICES IN A FOREIGN CONTRACT FACTORY

Although Japan became the second largest economy in the 1970s,⁵⁵ it has not played a role in the aforementioned international efforts to regulate TNCs' business conduct in developing countries. Japan, neither a direct wrongdoer nor a victim of TNCs' malfeasance, remained out of the loop.

There are three major reasons behind this history. First, since the end of World War II, no serious unfair labor practices, such as child, indentured, or slave labor, have been reported in Japan because Japan's immigration policy prohibits immigration of simple labor.⁵⁶ Second, no serious unfair labor practices in the foreign contract factories of Japanese corporations have been reported.⁵⁷ Third, Japanese corporations with serious unfair labor practices in their foreign contract factories are exposed to little legal risk under Japanese law. Four legal theories are possibly applicable, but each legal theory is difficult to apply and does not directly impact Japanese corporations.⁵⁸ These four legal theories are observation of treaties under the Japanese Constitution,

55. See Infoplease, *Japan*, at <http://www.infoplease.com/ipa/A0107666.html> (last visited Dec. 6, 2004).

56. See *Shutsunyūkoku kanri oyobi nanmin nintei hō* [Immigration Control and Refugee Recognition Law] [Rev. 2003], Cabinet Order No. 319 of 1951, Article 7(1)(ii) & Annex 1-2, translated in 2 *Eibun-Horei-Sha* [Law Bulletin Series Japan] §§ XB (No. 2900), XB7-XB8, XB56-XB57 (2003) (allowing only foreign workers who have an expertise, such as a corporate executive, professor, banker, lawyer or scientist, to work in Japan); see also *Shutsunyūkoku kanri oyobi nanmin nintei hō dai nanajō daiikkō dainigō no kijyun wo sadameru shōrei* [Ministerial Ordinance to Provide for Criteria Pursuant to Article 7, Paragraph 1(2) of Immigration Control and Refugee Recognition Act], Ministry of Justice Ordinance No. 16 of 1990, available at <http://www.moj.go.jp/ENGLISH/IB/STANDARD/standard01.html> (last revised Feb. 27, 2004) (same). Before World War II, however, Japan also had a history of child labor and indentured labor, which had been deemed legal at one time. A typical case was that, in a lean year, tenant farmers in the Tohoku region (northern Japan) would send, or sometimes sell, their children to factories as workers or to wealthy families as domestic help. KENTARO TAKAHASHI ET AL., *HUNDRED YEARS OF AOMORI PREFECTURE : 100 YEARS OF AOMORI PREFECTURE AND PEOPLE 2* (1987).

57. See, e.g., *Jūgyōin nībun suru daisōdō ni*, *NIHON KEIZAI SHINBUN*, Apr. 24, 1996, at 13 (discussing one widely reported case in which an American subsidiary of Mitsubishi Motors Corporation was sued by the U.S. Equal Employment Opportunity Commission for sexual harassment in a factory located in America). This case, however, was between two developed countries; therefore, the context is different from cases to which the codes of conduct discussed in this article are applied.

58. See discussion *infra* Part II.A-D.

product liability claims, tort claims, and the corporate director's fiduciary duty.

A. Observation of Treaties under the Japanese Constitution

The Constitution of Japan provides for the observation of treaties and established international law.⁵⁹ Article 98 of the Constitution states that “[t]he treaties concluded by Japan... and [the] established laws of [the] nations... shall be faithfully observed.”⁶⁰ This obligation, however, only applies to the Japanese government and not to Japanese citizens or corporations.⁶¹ Therefore, even in cases where the conduct of a Japanese citizen or corporation in a foreign country is contrary to “[t]he treaties concluded by Japan and established laws of nations,” Article 98(2) of the Constitution does not provide victims of such conduct with a cause of action before the Japanese courts.

B. Product Liability Claims

Under the Product Liability Law, importers shall be liable for damages caused by defects in imported products.⁶² Article 3 of the Product Liability Law provides:

“The manufacturer⁶³ . . . shall be liable for damages caused by the injury, when he injured someone's life, body or property by the defect in his delivered product which he manufactured, processed, imported, or put the representation of name.

59. See generally NIHONKOKU KENPŌ [Constitution] (Japan). An official English translation is available at http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html (last visited Apr. 20, 2004).

60. NIHONKOKU KENPŌ, art. 98; see KŌJI SATO, KENPŌ [CONSTITUTIONAL LAW] 30 (3d ed. 1995) (1981) (discussing the established view among scholars that, based on Article 98(2) of the Constitution, treaties, conventions, compacts, and other international agreements are given precedence over national laws of Japan. The argument among scholars about whether superiority between the Constitution and treaties, conventions, compacts, and other international agreements is not yet settled); see also Sunagawa case, 13 KEISHŪ 3225 (Sup. Ct., Dec. 16, 1959) (holding that treaties, conventions, compacts, and other international agreements can be a violation of the Constitution. The main issue in the Sunagawa case was the constitutionality of the Japan-U.S. Security Treaty. The supreme court held that the Japan-U.S. Security Treaty was constitutional).

61. See NIHONKOKU KENPŌ, art. 98.

62. Seizōbutsu Sekinin Hō [Product Liability Law], Law No. 85 of 1994, art 3, translated at <http://www.consumer.go.jp/e/pla/index.html>.

63. Product Liability Law, art. 2(3)(1) (including “importer” in the definition of “manufacturer”).

However, the manufacturer . . . is not liable when only the defective product itself is damaged.”⁶⁴

If a consumer suffers damages as a result of a defect in an imported product, the consumer can sue the importer for the damages caused by the defective product.⁶⁵ The Product Liability Law defines “defect” as a “lack of safety that the product ordinarily should provide, taking into account the nature of the product, the ordinarily foreseeable manner of use of the product, the time when the manufacturer . . . delivered the product, and other circumstances concerning the product.”⁶⁶ Thus, “defect” under the Product Liability Law is limited to defects in product safety that might harm consumers. This does not include so-called “social quality,” such as if a product was produced without child labor or forced labor.⁶⁷ Therefore, as long as the product is free from safety defects, the Product Liability law does not provide Japanese consumers with a cause of action before the Japanese courts for injuries caused by an imported product made by child or forced labor in foreign contract factories.

C. Tort Claims

Under Japanese law, if the tortfeasor is a Japanese citizen or a corporation, a victim of a tort committed in a foreign country can sue the tortfeasor in both the Japanese court⁶⁸ and the court of the country where the tort was committed.⁶⁹ This theory, however, applies only in cases where a Japanese citizen or corporation is directly involved in the case. In cases where the tort, specifically an unfair labor practice, is committed solely by a foreign contract factory, Japanese law does not provide jurisdiction over the Japanese party behind the contract factory.⁷⁰ Therefore, workers in

64. Product Liability Law, art. 3.

65. *See id.*

66. *Id.* art. 2(2).

67. *See* ECONOMY PLANNING AGENCY CONSUMER AFFAIRS, CHIKUJYŌ KAISETSU SEIZŌBUTSU SEKININ HŌ [Annotated Product Liability Law] § 1, at 65 (1995).

68. MINPŌ [CIV. C.], Law No. 89 of 1896, art. 709 (Rev. 2003); MINJI MINSŌHŌ [C. CIV. PROC.], Law No. 109 of 1996, art. 4(1) (Rev. 2003); *see* Malaysian Airline case, 35 MINSHŪ 1224 (Sup. Ct., Oct. 16, 1980).

69. Hiroshi Sano, *Fuhō kōichi no kankatsuken* [Jurisdiction over International Tort], 3 SHIN SAIBAN JITSUMU TAIKEI, KOKUSAI MINJI SOSHOHŌ [New Court Practice Collection, International Civil Procedure Law] 91 (Akira Takakuwa & Masato Dōgauchi eds., 2002).

70. *Id.*

foreign contract factories must prove that the Japanese party is the real or joint tortfeasor and that there is reasonable causation between the act of the Japanese party behind the contract factory and the damages suffered by the victim.⁷¹ This proof is difficult to ascertain in typical contract relations between a Japanese party and its foreign contract factory.

Even if workers in foreign contract factories could prove that the real tortfeasor is the Japanese party and thereby establish jurisdiction before a Japanese court, the Japanese court can nonetheless reserve the right to deny jurisdiction on the basis that it is not reasonable to hold the case in Japan.⁷² A recent Japanese Supreme Court case held that if a Japanese court recognizes a circumstance in which having the case before it is contrary to notions of fairness, adequacy, and promptness of court procedure, then the Japanese court would not have jurisdiction over such international litigation.⁷³ Based on this holding, if the tort occurred in a foreign country in which one or both parties are located, it is likely that the Japanese court would deny jurisdiction over that matter.⁷⁴ Accordingly, tort claims by workers in foreign contract factories against Japanese corporations provide concrete and imminent pressure on Japanese corporations and their directors.⁷⁵

D. Director's Fiduciary Duty

The legal risks related to unfair labor practices in foreign contract factories can be triggered by a corporation's internal actions, rather than by outside pressures such as treaties, product liability claims, and tort claims. The Commercial Code of Japan⁷⁶ establishes the fiduciary duty of directors,⁷⁷ pursuant to which directors are responsible for constructing a risk control system

71. MINPŌ, Law No. 89, art. 709.

72. *Malaysian Airline* case, 35 MINSHŪ at 1226.

73. Bank Withdrawal Request case, 51 MINSHŪ 4055, 4059 (Sup. Ct., Nov. 11, 1997).

74. *See id.*

75. *See id.*

76. *See generally* SHŌHŌ [COM. C.], art. 254(3); MINPŌ, art. 644. The so-called corporate law is provided as a part of the Commercial Code.

77. *See generally* *Kabushiki kaisha no kikan* (2) [Organs of Joint Stock Corporation], 6 SHINPAN CHŪSHAKU KAISHA HŌ [NEW EDITION ANNOTATED CORPORATE LAW] §§ 254-280 (Katsuro Ueyanagi et al. eds., Rev. ed. 1987) (discussing that under Japanese corporate law, fiduciary duty does not clearly branch into duty of care and duty of loyalty). Duty of loyalty is not recognized as an independent duty of directors. The term "fiduciary duty" (*zenkan chūi gimu*) is used to refer to both duty of care and duty of loyalty.

corresponding to the scale and characteristics of their business.⁷⁸ For instance, if a director of a Japanese corporation realized that an unfair labor practice occurred in its foreign contract factory, which then attracted media attention and damaged the corporation's reputation or business, the director may be liable for damages as a result of violating his fiduciary duty. The director could also be sued in a shareholders representative suit. Although no such case exists in Japan,⁷⁹ the required level of fiduciary duty is heightened as the complexity and specialization in society progresses,⁸⁰ and as the public consciousness regarding international human rights improves. The above scenario is more realistic under current circumstances than it had been in the past.

IV. CODES OF CONDUCT OF JAPANESE CORPORATIONS

Despite relatively low legal risks, Japanese corporations are becoming more conscious of the importance of controlling contract factories. A Japanese corporation's motive, however, for adopting a code of conduct is quite different from that of TNCs. This Part discusses the reasons behind the unique development of Japanese codes of conduct compared with those of the international community; overviews the three generations of Japanese codes of conduct; and compares Japanese codes of conduct with those of the TNCs.

A. Code of Conduct for Quality Control

A Japanese corporation's motive for adopting a code of conduct is more domestic or "Japanese" than that of TNCs. The motive is quality control of products in domestic contract factories, not preventing unfair labor practices in foreign contract factories.

78. Daiwa Bank shareholders representative suit, 1721 HANREI JIHŌ 3, 32 (Osaka Dist. Ct., Sept. 20, 2000). Daiwa Bank suffered a loss of about \$1.1 billion due to off-the-book transactions of the U.S. treasury bill for eleven years by an executive vice president of the New York branch. Daiwa Bank had to withdraw from the U.S. market because of this scandal. *Daiwa Bank Shareholders Representative Suit Tokyo District Court Judgment*, NIHON KEIZAI SHINBUN, Sept. 21, 2000, at 3.

79. There is no official online database covering all published cases in Japan. There are, however, several private vendors providing an online database in Japan, like Westlaw or Lexis.

80. *Saiken (2)* [Creditor's Rights], 16 SHINPAN CHŪSHAKU MINPŌ, [NEW EDITION ANNOTATED CIVIL CODE] §§ 623-666 (Tōru Ikuyo & Toshio Hironaka eds., Rev. ed. 1989).

The following are two illustrative cases that drove Japanese corporations to consider adopting codes of conduct.

1. Sony Playstation Case

In fall 2001, cadmium in the connection cables of Sony's consumer video game console, Playstation 2, was found to exceed Holland's environmental standard.⁸¹ As a result, Sony recalled all Playstation 2 consoles from the European market and temporarily suspended shipments.⁸² The connection cable was procured from a Sony contract factory in China.⁸³ Sony realized that legal non-compliance in a foreign contract factory could affect Sony's reputation.⁸⁴ As one Sony manager said, "source management' became crucial."⁸⁵ In response to this case, Sony conducted on-site audits in 4,500 contract factories and checked whether the contract factories complied with local environmental and other regulations, including the protection of human rights.⁸⁶

2. Prima Meat Packers Case

Prima Meat Packers, Ltd. ("Prima"), the second largest meat packer in Japan, is a major manufacturer of a bacon product⁸⁷ sold under the private brands of Aeon Co., Ltd. ("Aeon"), the second largest supermarket chain in Japan.⁸⁸ Prima used albumin in its bacon product, which was prohibited under its contract with Aeon, without notifying Aeon.⁸⁹ Albumin is an allergenic material and

81. *Europe and America Go Ahead in Corporate Social Responsibility – Onsite Audit in Contract Factories*, NIHON KEIZAI SHINBUN, Aug. 3, 2003, at 29.

82. *The Economy Has Changed (2) – Customer Has Changed: Selling Reliance and Building New Affiliation*, NIHON KEIZAI SHINBUN, May 16, 2003, at 1.

83. *Europe and America Go Ahead in Corporate Social Responsibility – Onsite Audit in Contract Factories*, *supra* note 81, at 29.

84. *Id.*

85. *The Economy Has Changed (2) – Customer Has Changed: Selling Reliance and Building New Affiliation*, *supra* note 82, at 1.

86. *Europe and America Go Ahead in Corporate Social Responsibility-Onsite Audit in Contract Factories*, *supra* note 81, at 29.

87. *Aeon Withdraws Prima Meat Packer's Products: Use of Prohibited Material Under Contract*, NIHON KEIZAI SHINBUN, Feb. 2, 2003, at 35; *see also Prima Meat Packers Conceded the Use of Prohibited Material in Bacon Product – Reexamine All Products*, NIHON KEIZAI SHINBUN, Feb. 3, 2003, at 13.

88. *Id.*

89. *Id.*

the Food Sanitation Law requires it to be labeled on products.⁹⁰ Aeon did not label the use of albumin in its product because Prima had not notified Aeon.⁹¹ Therefore, Prima violated the Food Sanitation Law.⁹² Since the bacon products were sold as Aeon's private brand, Aeon was also exposed to the legal risk of consumer claims if the albumin caused allergic reactions.⁹³ In response to Prima's prohibited use of albumin, Aeon sued Prima for violating the Food Sanitation Law.⁹⁴ This action was exceptional in a Japanese corporate culture that tends to avoid legal disputes.⁹⁵

B. The Three Generations of Japanese Codes of Conduct

After a series of quality control problems in contract factories that significantly affected corporate brands and consumer credibility, Japanese corporations started paying more attention to checking the management and operation of contract factories through codes of conduct. Unfortunately, there is no official or unofficial data showing the number of Japanese corporations that have adopted a code of conduct applicable to its contract factories. Three public corporations—Prima, Bandai Co., Ltd., a major toy manufacture, and Aeon—have adopted codes of conduct. The codes of conduct of Prima and Aeon are posted on their web sites; Bandai, however, does not make its code of conduct publicly available.⁹⁶

In contrast to TNCs' codes of conduct that focus on preventing unfair labor practices in foreign contract factories, the

90. Shokuhin Eisei Hō [Food Sanitation Law], Law No. 233 of 1947, art. 19 (Rev. 2003).

91. *Aeon Withdraws Prima Meat Packer's Products: Use of Prohibited Material Under Contract*, *supra* note 87, at 35.

92. *Id.*

93. Product Liability Law, art. 3.

94. *Aeon Indicted Prima Meat Packers for Use of Prohibited Material*, NIHON KEIZAI SHINBUN, Feb. 4, 2003, at 39. After receiving the indictment by Aeon, the Metropolitan Police Department searched the headquarters of Prima and heard from Prima employees as witnesses. The formal criminal procedure, however, was not commenced. *Food Sanitation Law Violation: Information of Prima*, NIHON KEIZAI SHINBUN, Oct. 11, 2003, at 39.

95. *Prima Meat Packers Problem Creates a Sensation Among Contract Factories*, NIKKEI SANGYO SHINBUN [Nikkei Industry Newspaper], Oct. 1, 2003, at 21. Some contractors said that they "never heard of such indictment" and sympathized with Prima. *Id.*

96. E-mail from Bandai Customer Center, Bandai Corporation to Koji Ishikawa (Feb. 23, 2004, 19:00:08) (on file with author). The author requested Bandai to disclose the code of conduct, but they refused.

Japanese codes of conduct originated without specific attention to the prevention of unfair labor practices in foreign contract factories. Subject to its scope and legal nature, the development of the Japanese codes of conduct can be classified into the following three generations:

The First Generation

- Abstract and spiritual (does not create any legal rights or duties);
- Unilateral expression of policy (counter-signature by the contract factory is not required);
- No reference to unfair labor practices and human rights.

The Second Generation

- Abstract and spiritual (does not create any legal rights or duties between the corporation and the contract factory);
- Unilateral expression of policy (counter-signature by the contract factory is not required);
- Some reference to unfair labor practices or human rights or both.

The Third Generation

- Concrete and detailed (creates legal rights and duties between the corporation and the contract factory);
- Legal nature is an agreement (counter-signature by the contract factory is required);
- Specifically focuses on the prevention of unfair labor practices or protection of human rights or both.

These are three movements in the development from the first generation to the third generation: from abstract and spiritual wording to concrete and detailed language; from a unilateral expression of policy to a bilateral legal agreement; and from little or no focus on unfair labor practices and human rights to a specific focus on labor practices or human rights or both.

In light of this classification, Prima's code of conduct is an example of the first generation, and Aeon's code of conduct is an example of the second generation. No existing Japanese code of conduct can be classified as third generation. In 2002, however,

Wal-Mart Stores, Inc., which has a more advanced code of conduct that can be classified as third generation, acquired The Seiyu, Ltd., Japan's fourth largest supermarket chain.⁹⁷ Through this acquisition, it can be expected that third generation codes of conduct will penetrate the Japanese business community.

1. Prima Meat Packers, Ltd. Code of Conduct

Prima's code of conduct consists of nine relatively spiritual and abstract principles as follows:⁹⁸

Preamble: The highest priority of Prima Meat Packers is to contribute to society, and we shall always be thankful to our customers and devote ourselves to food production.

We, as an economic entity, pursue profits through fair competition, but, at the same time, we shall make our best efforts to be a useful presence in society.

Our management and employees shall fully understand the above spirits and, based on the following nine principles, shall observe national and international laws, international rules and the spirit of those rules, and shall behave with common sense.

Principle I: Being honest and being faithful to the basics shall be the principle in every aspect of corporate activity, and law and internal rules . . . shall be observed.

Principle II: "Nothing is more important than product and quality" and "service for customers with constant innovation" shall be the principles, and we shall manufacture products with a priority on customer satisfaction and reliance.

Principle III: Fair, transparent, and free competition shall be observed in business. We shall maintain healthy relations with politics and the government.

Principle IV: We shall actively and fairly disclose corporate information, such as operational and business activities, to consumers and shareholders.

Principle V: We shall make efforts to protect the environment in business.

97. *Wal-Mart Acquires Seiyu*, NIHON KEIZAI SHINBUN, Mar. 15, 2002, at 1.

98. See generally PURIMAHAMU KŌDŌ KIHAN [Prima Meat Packers Code of Conduct], available at <http://www.primaham.co.jp/company/kihan.htm> [hereinafter THE PRIMA CODE] (Koji Ishikawa trans.) (last visited Apr. 20, 2004).

Principle VI: We shall achieve employee welfare, keep a safe and worker-friendly workplace, and respect the dignity and personality of employees.

Principle VII: We shall firmly confront antisocial organizations that threaten the order and safety of civil society.

Principle VIII: We shall respect the culture and customs of foreign countries, and do business that contributes to local development.

Principle IX: Management shall understand that its role is to realize the spirit of this code of conduct, to inform related parties of this code of conduct, and to prepare internal systems and nurture ethics.

Prima's code of conduct does not specifically focus on controlling contract factories; rather, it is an expression of Prima's own unilateral resolution.⁹⁹ There is no section dealing with labor standards in its contract factories, which lies at the core of the TNCs' codes of conduct.¹⁰⁰ Also, Prima's code of conduct does not create legal rights or duties binding Prima or its contract factories.¹⁰¹ Even though Prima's code of conduct was established after the albumin scandal, there is no section, except for the highly spiritual and abstract Principle I and Principle II, which detail how to concretely implement quality control and legal compliance in both Prima and its contract factories.¹⁰² Generally speaking, Prima's code of conduct is a kind of extension of corporate precepts and is remote from a common understanding of a code of conduct in the international community.¹⁰³

2. Aeon Code of Conduct

Aeon's code of conduct, which can be characterized as second generation, is more specific and closer to the codes of conduct in the international community.¹⁰⁴

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. See AEON, THE AEON CODE OF CONDUCT, available at http://www.aeon.info/aboutaeon/aeon_code_of_conduct/en/ [hereinafter THE AEON CODE] (last visited Apr. 20, 2004).

Established in April 2003, Aeon's code of conduct consists of six parts: "The Preamble," "The Aeon Code of Conduct Commitment," "Our Promise to Customers," "Aeon and the Local Community," "Aeon and its Business Partners," and "Aeon and its Shareholders."¹⁰⁵ As with Prima's code of conduct, Aeon's code of conduct covers not only contract factories, but also very broad areas, such as customer relations and investor relations, which is a unique element when compared with a TNC's code of conduct.¹⁰⁶

Among the six parts of Aeon's code of conduct, "Aeon and its Business Partners" is equivalent to a code of conduct dealing with labor standards in contract factories.¹⁰⁷ This part consists of the following preamble and five principles:

Preamble: Aeon respects innovative business partners who help the company achieve its objective of "Customer Satisfaction." We strive to work as equals with our business partners – dealing fairly and working for our mutual prosperity.

The term "business partners" refers to all of the partners with whom we conduct business, including those who provide retail products, and facilities services, and our retail tenants.

Principle I: At Aeon, we cooperate with our business partners, all of whom are important to us, moving forward together to develop innovative business models that will open the gate to the next era.

We cultivate strong relations with our partners, together pursuing innovative business practices, better products, better services, and our mutual success.

Principle II: At Aeon, we clearly document agreements with business partners, and strictly follow such agreements to the letter.

We maintain equality with our business partners, connected through formal agreements. Both parties strictly adhere to all agreed-upon contract provisions.

105. *Id.*

106. See *id.*; see THE PRIMA CODE, *supra* note 98, available at <http://www.primaham.co.jp/company/kihan.htm>.

107. See THE AEON CODE, *supra* note 104, available at http://www.aeon.info/aboutaeon/aeon_code_of_conduct/en/.

Principle III: At Aeon, we respect business partners whose top priority is safety and customer peace of mind and assurance.

We and all of our business partners share the common goal of "Customer Satisfaction." If the smallest doubt exists regarding the safety or trust of a product or service, we work with our business partners to promptly ascertain the nature of the concern and resolve the issue.

Principle IV: At Aeon, we require our business partners to comply with both the letter and spirit of international standards and to practice them fully.

Aeon complies with and respects all generally recognized international standards, including those related to ISO, labor, environmental conservation, and quality management. We also require our business partners to strictly observe these same standards.

Principle V: At Aeon, we do not tolerate the acceptance of gifts, money, or special favors from our business partners.

We select business partners based on their ability to offer better products and services at fair price. Individuals do not accept any gifts, money, or special treatment from a business partner designed to secure our business in any situation. All efforts must confer benefits to the customers.¹⁰⁸

Compared with the Prima Code, the Aeon Code rises above a unilateral expression of corporate policy or mere spirit, and focuses specifically on relations with business partners.¹⁰⁹ Also, in Principle IV of the Aeon Code, there is a small shift from the second generation to the third generation, specifically a shift towards establishing a contract.¹¹⁰

C. Comparison of Codes of Conduct

Although the Aeon Code is one of the most advanced codes of conduct among Japanese corporations, there are still some gaps between the Aeon Code and the TNCs' codes of conduct.¹¹¹ For instance, Wal-Mart has a similar business structure to Aeon, but its

108. *See id.*

109. *See id.*

110. *See id.*

111. *See id.*

code of conduct, entitled *Standards for Suppliers* (“Wal-Mart Code”), applicable to Wal-Mart’s suppliers, is more concrete and detailed than the Aeon Code.¹¹² The following chart¹¹³ compares the Wal-Mart Code and the Aeon Code.

		Aeon	Wal-Mart
1	Legal nature	Unilateral expression of policy on supplier	Agreement between Wal-Mart and supplier
2	Scope of application	Business relations between Aeon and all its business partners including suppliers	Business relations between Wal-Mart and suppliers
3	Compliance with applicable laws	Abstractly mentioned	Concretely mentioned
4	Employee compensation	Abstractly referenced in Principle IV: “At Aeon, we require our business partners to comply with both the letter and spirit of international standards and to practice them fully. Aeon complies with and respects all generally recognized international standards, including those related to ISO, labor, environmental conservation, and quality management. We also require our business partners to strictly observe these same standards.”	Concretely mentioned
5	Hours of labor		Concretely mentioned
6	Forced labor		Concretely mentioned
7	Prison labor		Concretely mentioned
8	Child labor		Concretely mentioned
9	Discrimination/Human rights		Concretely mentioned
10	Workplace environment		Concretely mentioned
11	Concern for the environment		Concretely mentioned
12	Right of inspection	Not mentioned	Concretely mentioned

112. See WALMART STORES, INC., STANDARDS FOR SUPPLIER: SUPPLIER’S RESPONSIBILITIES, available at <http://www.walmartstores.com/Files/SupplierStandardsdoc.pdf> [hereinafter THE WALMART CODE] (last visited Apr. 20, 2004); see also THE AEON CODE, *supra* note 104, available at http://www.aeon.info/aboutaeon/aeon_code_of_conduct/en/.

113. See THE WALMART CODE, *supra* note 112, available at <http://www.walmartstores.com/Files/SupplierStandardsdoc.pdf>; see also THE AEON CODE, *supra* note 104, available at http://www.aeon.info/aboutaeon/aeon_code_of_conduct/en/.

13	Right of unannounced factory inspection	Not mentioned	Concretely mentioned
14	Termination of business relation	Not mentioned	Concretely mentioned
15	Confidentiality	Not mentioned	Concretely mentioned
16	Gift and gratuity from supplier	Clearly prohibited	Clearly prohibited
17	Disclosure of the code of conduct to employees of contract factory	Not mentioned	Disclosed to employees in local language
18	Violation reporting system	Not mentioned	Concretely mentioned
19	Counter-signature by supplier	Not required	Required

Among the many differences between the two codes, the most significant one is whether it creates legal rights and duties for the parties. Each section in the Wal-Mart Code begins with “[s]upplier shall” and provides a penalty for a supplier’s violation of the code.¹¹⁴ In contrast, there is no “shall” language in the Aeon Code; instead, it states “respect” and “cooperate.”¹¹⁵ Principle IV in the Aeon Code states: “we require our business partners to comply,”¹¹⁶ but there is no penalty in the Aeon Code for its suppliers’ violations of Principle IV.¹¹⁷

The difference in style between the Aeon Code and the Wal-Mart Code comes from the difference in perception of codes of conduct between the two companies. As discussed in Part II, the legal risk of Japanese corporations arising from contract factories is not as direct or significant as for TNCs, allowing Japanese corporations to adopt unilateral, declaration-type codes of conduct. Under the current Japanese legal environment, Japanese corporations will be legally protected if they point to the contract

114. THE WALMART CODE, *supra* note 112, available at <http://www.walmartstores.com/Files/SupplierStandardsdoc.pdf>.

115. THE AEON CODE, *supra* note 104, available at http://www.aeon.info/aboutaeon/aeon_code_of_conduct/en/.

116. *Id.*

117. *See id.*

factory as the violator. Therefore, there is little incentive for Japanese corporations to adopt contract-type codes of conduct like Wal-Mart and to check whether their contract factories follow those codes.

V. LEGAL ANALYSIS OF A JAPANESE CODE OF CONDUCT AND ITS PROSPECT

As discussed in Part II, the legal risk under Japanese law arising from unfair labor practices in a foreign contract factory is low. Causes of action before a Japanese court, such as a violation of international law, tort liability, or product liability, are remote for proceeding to a substantive court procedure.¹¹⁸ Accordingly, directors of Japanese corporations are not exposed to substantial legal risks related to such violations and have not needed to pay attention to those issues.¹¹⁹

However, a director's fiduciary duty may be one of the most viable causes of action before a Japanese court concerning unfair labor practices in a foreign contract factory.¹²⁰ In a recent shareholder representative case, the Osaka District Court held that directors shall be responsible for constructing a risk control system corresponding to the scale and characteristics of business:

“[F]or healthy operation, it is indispensable to have a clear grasp and control of various risks, namely risk control, arising from the type and nature of the business, such as credit risk, market risk, liquidity risk, office work risk, system risk, etc., and a *risk control system (so-called internal control system)* corresponding to the scale and characteristics of the business of the corporation is required. As a board resolution is required for important business execution (Article 260(2) of the Commercial Code), the general principles of a risk control system, which are fundamental to the operation, shall be decided at a board meeting, and the representative director and director in charge shall decide, based on the general principles, the details of the risk control system of each department. In this context, directors, as a member of the board or the representative director or director in charge, shall be responsible to establish a risk control system and to monitor the performance of the representative director and director in

118. See discussion *infra* Part II.A-D.

119. See *id.*

120. See discussion *infra* Part II.D.

charge, and this shall be also one element of the *director's duty of care and duty of loyalty*. . . ."¹²¹

It is not clear whether the term "internal control system" in the Osaka District Court judgment includes a code of conduct applicable to contract factories. Considering, however, that the Aeon Code was adopted in April 2003, three years after the Osaka District Court judgment, and that so far there has been no court case dealing with a code of conduct and a director's fiduciary duty, it might be a stretch to say that the judges of the Osaka District Court judgment wrote "internal control system" with the intent to include a code of conduct applicable to contract factories.

The situation, however, has changed since the Osaka District Court judgment in 2000. Many corporate scandals, other than the Playstation 2 case (2001) and the Prima Meat Packer case (2003), have harmed consumer credibility and thereby financially damaged corporations. Nippon Foods, Inc. and Yukijirushi Foods, Co., Ltd. are the two most illustrative cases after the Osaka District Court judgment. In 2001, an outbreak of Bovine Spongiform Encephalopathy (BSE), commonly termed "mad cow disease," occurred in Japan, and in order to save the beef industry, the Japanese government started a purchase program under which the government purchased domestic beef from beef processors.¹²² The purchase program covered only domestic beef because BSE was confirmed only in domestic beef at that time.¹²³ Two major beef processors, Nippon Foods, Inc., and Yukijirushi Foods, Co., Ltd., misused the government's purchase program.¹²⁴ They camouflaged foreign beef as domestic beef so that their beef could be purchased by the government.¹²⁵ After these deceptions came to light, Nippon Foods and Yukijirushi Foods, together with their parent corporations, suffered significant business and financial losses.¹²⁶ Further, because of severe criticism from consumers,

121. Daiwa Bank shareholders representative suit, 1721 HANREI JIHŌ at 32 (Koji Ishikawa, trans.) (emphasis added); Organs of Joint Stock Corporation, *supra* note 77, § 6. Among many shareholders representative suits, the Osaka District Court Judgment is the latest one that explains the details of an "internal control system."

122. *Beef Purchase Program*, NIHON KEIZAI SHINBUN, Aug. 7, 2002, at 35.

123. *Id.*

124. *Ham and Processed Foods in August 2002: Nippon Meat Packers' Sales 40 Down-Individual Consumers Left*, NIHON KEIZAI SHINBUN, Aug. 13, 2002, at 9.

125. *Id.*

126. *Id.*

Yukijirushi Foods, then a public corporation listed on the Tokyo Stock Exchange, went bankrupt only three months after the deception was discovered.¹²⁷

The above cases show that Japan has entered a new era in which consumer credibility possesses the power of life and death over corporations. Corresponding to the new era, it is reasonably expected that a director's fiduciary duty should also be heightened and expanded.¹²⁸ In fact, after the series of corporate scandals in the meat industry, including the Prima case, Japanese corporations became more conscious of quality control in contract factories. Like Aeon, they rapidly moved to adopt a code of conduct due to fear of losing consumer credibility.¹²⁹ This movement indicates that adopting a code of conduct to control contract factories is included in a director's fiduciary duty, or, at least, directors have started to think that they might be liable for a violation of this fiduciary duty if they do not adopt a code of conduct to prevent such scandals.

A shareholder representative suit that pursues a violation of a director's fiduciary duty in connection with a code of conduct and an unfair labor practice in foreign contract factories would further this movement. Can adopting a code of conduct be a defense against a claim for a violation of a director's fiduciary duty? Although the Osaka District Court judgment is not perfectly clear on this point, it is possible to read that the judgment implicitly held that a director's fiduciary duty is deemed fully performed only when an internal control system is established, performed, and monitored. Amplifying this thought, a director's fiduciary duty is fully performed when a code of conduct is established, performed and monitored. As a result, the Japanese code of conduct has to evolve from the second generation to the third generation and to enhance its characteristics as a contract. Otherwise, it will not be able to assure the performance and monitoring of foreign contract factories.

127. See *Yukijirushi Foods Dissolves*, NIHON KEIZAI SHINBUN [Nikkei Newspaper], May 1, 2002, at 13.

128. *Creditor's Rights*, *supra* note 80, at 226.

129. *Good Management: CSR Questions (2)*, NIHON KEIZAI SHINBUN, Jan. 15, 2004, at 13.

VI. CONCLUSION

As overviewed in Part I, codes of conduct in the international community have developed mainly from the concerns of unfair labor practice in foreign contract factories. In Japan, however, as surveyed in Part II, there has been little legal risk for Japanese corporations arising from foreign contract factories. Rather, as discussed in Part III, the legal risks arising from corporate scandals relating to the quality control of products, such as in the Sony Playstation 2 case and the Prima Meat Packers case, are more direct and pressing. The relatively low legal risk and the series of corporate scandals formed the starting point of the codes of conduct of Japanese corporations. It is quite different from those in the international community and, in a sense, it might sound very "Japanese" and probably shares its root with "*kaizen*," Toyota's famous way of improving the quality of products.¹³⁰

As discussed in Part IV, a director's fiduciary duty has changed with the change of society. In an era in which consumers have become more conscious of unfair labor practices in foreign contract factories, a director's fiduciary duty also will have to cover such concerns to protect the corporation. The code of conduct of Japanese corporations will evolve with the interaction between law and society. Consumer consciousness of international human rights has heightened with the progression of economic globalization. It is likely that corporations will follow.

130. See, e.g., Toyota, *Planet Kaizen*, at <http://www.toyota.com/planetkaizen> (last visited Dec. 6, 2004).