Greetings from Columbia Law School!
As we begin a new academic year, we would like to update alumni and friends on the activities of the Center for Japanese Legal Studies during 2011–12.

FACULTY EXCHANGE WITH THE UNIVERSITY OF TOKYO

(Left to right) Professors Atsushi Omura, Kazuo Ohtake, Robert Jackson, and Trevor Morrison

The Center for Japanese Legal Studies continued the faculty exchange with the University of Tokyo Law School this year. Professors Atsushi Omura and Kazuo Ohtake visited Columbia Law School while Professors Robert Jackson and Trevor Morrison traveled to Japan.

Professors Omura and Ohtake lectured at Columbia Law School in Professor Milhaupt’s course on Japanese Law. Professor Omura, an expert in civil law, gave a series of lectures on recent Supreme Court decisions on contracts, including ones related to subleases and consumer protection. Professor Ohtake, who teaches and practices in all areas of business law, gave a series of lectures on the development and regulation of the Japanese legal profession. While at Columbia, the professors also took part in social and academic gatherings with students and faculty.

Professor Trevor Morrison J.D. ’98, the Isidor and Seville Sulzbacher Professor of Law and co-director of the Roger Hertog Program on Law and National Security, teaches and writes about constitutional law, federal courts, and national security law. While in Tokyo to teach a short course called “Selected Issues in U.S. Constitutional Law” at the University of Tokyo, Professor Morrison also gave two other presentations. The first was a lecture titled “The U.S. Supreme Court and the Obama Administration” presented to nearly 100 attorneys (including many Columbia alumni) at the firm of Nagashima Ohno & Tsunematsu. Professor Morrison discussed recent and upcoming high-profile decisions of the U.S. Supreme Court during the Obama presidency, including on matters of campaign finance law, immigration, and healthcare. Professor Morrison’s second lecture was a presentation of his current research to law faculty members and other researchers at the University of Tokyo. He focused on issues of U.S. constitutional law in the separation of powers area, especially the role that historical governmental practice plays in establishing the content of executive and legislative power under the U.S. Constitution.

Associate Professor Robert J. Jackson Jr., the Milton Handler Fellow at Columbia Law School, guest-lectured in Professor Hideki Kanda’s seminar on Comparative Capital Markets Law. Professor Jackson’s lecture, called “Regulation of Executive Pay in the Wake of the Financial Crisis,” focused on changes to U.S. securities law wrought by provisions in the Dodd-Frank Act governing executive pay. While in Tokyo, Professor Jackson held a discussion with a group of Columbia graduates at the law firm Mori Hamada & Matsumoto on the future of international rules addressing the governance of large financial institutions. Professor Jackson’s short course at the University of Tokyo, called “Topics in U.S. Corporate Law,” emphasized the economics and mechanics of shareholder voting, fiduciary duties, and mergers and acquisitions in the United States. The class concluded with a lecture on the future of takeover defenses, including the poison pill.
SPEAKER SERIES

The Center for Japanese Legal Studies hosted a number of speakers from academia and practice during the past year. On March 21, Professor Zenichi Shishido from Hitotsubashi University gave a lecture titled “Reverse Engineering SOX vs. J-SOX: A Lesson in Legislation Policy.” He argued that although the Sarbanes-Oxley Act of 2002 (SOX) and the Japanese version of the same law (J-SOX) are very similar, SOX strengthened the power of corporate monitors, while J-SOX did not. He cited the recent Olympus case as an example of how governance can go wrong even under a “perfect” J-SOX auditing procedure.

Ken Miura and Yuto Matsumura LL.M ’02, both partners at Mori Hamada & Matsumoto (MHM), gave a talk, “Recent Developments of Japanese Law Firms,” on February 21. They overviewed the dramatic changes in Japanese law firms over the past decade, using MHM as their example. They discussed the rapid increases in size of major Japanese law firms and the resulting consequences for training, promotion, and firm management.

“Law in Post-Fukushima Japan: How Legal Infrastructure is Facilitating Reconstruction” was the topic of a talk on November 8, given by Arthur Mitchell, senior counselor at the Tokyo office of White and Case. Mr. Mitchell discussed responses to the Fukushima disaster, such as energy initiatives, including funding for solar energy. He pointed out that Japan has one of the lowest incoming foreign investment rates in the world, due in his view to an unfavorable business environment. For the Tohoku region, he argued, attracting outside investment and creating a less regulated business environment will be crucial to its rebirth. During the Q&A session, Mr. Mitchell also discussed Japan’s participation in the Trans-Pacific Partnership, a new multilateral free trade agreement initiative.

Daniel Puchniak, assistant professor at the National University of Singapore, gave a talk on October 19 called “The Complexity of Derivative Actions in Asia: An Inconvenient Truth.” He said that the conventional wisdom that derivative actions do not exist in Japan and other parts of Asia is false. His research reveals that they occur in some form in most Asian countries, but that there is no easy way to classify them because Asia comprises many different cultures and systems. He argued that Japan is currently “leading the world in derivative actions against listed companies.” He also noted the presence of non-economically motivated and even “irrationally motivated” derivative suits in Japan.

VISITING SCHOLARS

The Center for Japanese Legal Studies was pleased to host several visiting scholars during the 2011–2012 academic year.

Takahito Kato is an associate professor at the Graduate School for Law and Politics, Faculty of Law, University of Tokyo. Professor Kato’s research interests are in the fields of corporate law, securities regulation, and banking law. While at Columbia, Professor Kato focused on the relationship between capital markets and regulation, especially how regulation contributes to investor protection and market efficiency.

Masayuki Murayama is a professor at the School of Law, Meiji University. His areas of interest are law and society and civil procedure. At Columbia he researched civil justice and dispute resolution, with a focus on legal responses to disaster, comparing the aftermath of Hurricane Katrina with that of the Fukushima earthquake and nuclear crisis.

Junji Yazaki, professor at Tokyo Metropolitan College, spent the fall 2011 and spring 2012 semesters at Columbia. His fields of expertise are company law, M&A, and corporate finance. At Columbia, he concentrated on comparative research of takeover regulation.

Yuta Yamasaki, an assistant judge in Japan, spent an additional year at Columbia as a visiting scholar following completion of his LL.M. degree in 2011. He specializes in civil litigation, and his research at Columbia pertained to critical race theory and equal protection.
The Center for Japanese Legal Studies oversaw the award of two Public Interest Fellowships. This past summer, Agnes Petrucione J.D.’14, was mostly involved in advocacy work at the Japan Association for Refugees (JAR), a non-profit organization and implementing partner of the United Nations High Commissioner for Refugees in Japan. JAR provides legal and social support to refugees in Japan and conducts advocacy work. She helped write a report for Japan’s obligations under the Convention against Torture. She also conducted research on foreign law and policy regarding refugees, and created a draft for a policy proposal on Japan’s refugee legislation. Agnes also researched third-country resettlement of refugees, did direct client-service work for refugee clients, and drafted a legal brief with her supervising attorney that was submitted to court. She also had the opportunity to attend various meetings with Japanese parliamentarians.

“I felt privileged to participate in the national debate on energy policies that is occurring in Japan and to contribute to a more positive outlook for renewable, green energy,” said Lauryn May J.D. ’14, a second recipient of a Japan Public Interest Fellowship. Lauryn worked for the Institute for Sustainable Energy Policies in Tokyo. ISEP is a non-profit organization, founded in 2000 by Tetsunari Iida, a former nuclear power engineer. ISEP promotes sustainable and renewable energy, such as hydropower, solar energy, biomass, wind power, and geothermal. Through ISEP, Lauryn attended meetings of Diet members and energy experts to discuss the future of nuclear power in Japan after Fukushima. With fellow interns and researchers, she presented U.S., Japanese, and other national energy policies. She also translated international policy research documents and conducted research into corporate Japan’s views on sustainable energy for a paper on “the true cost of nuclear power.”

Brandon A. Ceranowicz J.D. ’15, graduated magna cum laude in 2003 from the University of Pennsylvania with a degree in history and a concentration in Japanese Studies. He received departmental honors in Japanese Studies. After college, he taught English in Japan for six years to support his passion for traveling in Japan and visiting historically significant sites, such as temples, shrines, castles, and palaces. Brandon hopes to pursue a career in international law in Japan.

While attending the University of California at Irvine, Kevin Casey J.D. ’15, worked summers at the National Security Agency, in part as a Japanese language analyst. He graduated cum laude in 2008. Kevin spent the first 18 years of his life in Japan. His mother is Japanese, and he “grew up not only speaking the language but also immersed in the culture.”

Geoffrey Walter J.D. ’13, was the 2011-12 recipient of the Isaac and Jacqueline Weiss Shapiro Fellowship in Japanese Law, which supports student research on Japanese law. Geoff worked with Professor Milhaupt to prepare a book chapter entitled “Takeover Law and Managerial Incentives in the United States and Japan.” Geoff focused on the evolution of hostile takeover activity in the United States, as developed by the Delaware judiciary, and the regulatory framework in Japan that emerged in the mid-2000s in response to a brief but unprecedented outburst of hostile takeover activity.

The Center for Japanese Legal Studies thanks alumni and friends for their generous financial support. We are particularly grateful to Mr. Fumihide Sugimoto for spearheading our fundraising campaign in Japan.

Thank you!
THE ROLE OF “NHK” AT COLUMBIA LAW SCHOOL

Columbia Law School students interested in Japanese law find community within the extremely active group called Nihon Houritsu Kenkyukai (Japanese Legal Studies Association) or “NHK.” (NHK is a pun on the name of the public broadcasting system in Japan, which is universally known by that acronym.) The student group serves a vital function at Columbia Law School, with support from the Center for Japanese Legal Studies, in bridging Japanese and non-Japanese students through social, community, and Japanese law-related academic events. NHK also serves as a network of information and contacts helping J.D. students find summer internships in Japan.

One important way that NHK connects students of diverse backgrounds is through language exchange. NHK boasts one of the most active language exchange programs at the Law School, typically grouping LL.M. students from Japan with non-Japanese J.D.s. NHK regularly achieves more pairings than any other student group and these partnerships have led to life-long friendships. Numerous social events hosted by NHK also bring together Japanese and non-Japanese members. NHK members visit izakayas (Japanese-style pubs)—naturally followed by karaoke sessions. NHK leaders also organize movie nights and other informal gatherings on and off campus. In these ways, NHK provides unique opportunities for J.D. students to make connections with Japanese LL.M. students, who include lawyers, judges, company officers, and prosecutors. Finally, NHK leadership works with the Center to bring in academics and practitioners for lunchtime lectures and seminars.

In short, NHK is a vital partner with the Center, responding to the needs of students and providing them with a warm community in which to learn.

NHK FUNDRAISERS FOR EARTHQUAKE RELIEF

Last year, NHK held its first sake-tasting party to raise funds for Japan’s recovery from the March 2011 earthquake, tsunami, and nuclear disaster. At the party, students tasted and learned about a wide variety of sake. To help promote this event, and to raise additional funds, NHK also held its first-ever bake sale before the sake-tasting get-together. NHK sent the proceeds from both events to the Institute for Sustainable Energy Policies for their Tsunagari Nukumori solar panel project. The sake tasting was such a success that NHK hopes to make it an annual tradition.
It seems like we have been here before: a rising East Asian economic power is on the verge of a major investment surge into the U.S., leading members of Congress to rattle their protectionist armor. Talk of currency manipulation and unfair trade is in the air.

Twenty-five years ago, Japan’s economic might—ostensibly backed by smart industrial policy, cartel-like keiretsu linkages and cheap bank credit—was the source of fear and loathing in Washington. Today, of course, all eyes are on China, but the atmosphere surrounding Chinese investment in the U.S. has a very familiar feel.

Congress established the U.S.–China Economic and Security Review Commission in 2000 to monitor the national security implications of bilateral economic ties with China. A hearing in February 2012 (at which I participated as a witness) was called to examine policy responses to Chinese state-owned enterprises (SOEs), and more specifically the challenges that Chinese government ownership poses to U.S. companies competing in China and within the U.S. It is only a slight exaggeration to say that at many points in the proceedings, if the word ‘China’ were substituted for ‘Japan’, the debate could literally have been a transcript of congressional testimony in the 1980s. This sense of déjà vu may be either wearying or amusing depending on one’s appreciation of political theatre.

Despite some important differences between U.S.–Japan and U.S.–China bilateral relations, the Japanese experience may provide important clues as to what we might expect as Chinese firms begin navigating the complex political, legal and cultural landscape for foreign investment in the U.S. A few observations can be made in light of this history.

Most basically, we need to distinguish between the political and legal environment for foreign direct investment (FDI) at the federal level and in the local communities where the investments are actually made. At the national level, Chinese firms (particularly SOEs) will confront substantial wariness when dealing with Congress and federal agencies. Before a foreign buyer acquires a U.S. firm, the transaction should be cleared by the Committee on Foreign Investment in the United States (CFIUS), which is charged with screening foreign acquisitions of U.S. companies for threats to national security and critical infrastructure’. These exceedingly broad and vague terms are left undefined in the law—thus increasing the discretion of CFIUS.

This process was established in the 1980s in response to congressional fears of strategic technology transfer and industrial espionage by Japanese acquirers. Technically, submitting a transaction for review is voluntary, but failure to do so leaves the deal open to being unwound on national security grounds—meaning any well-advised foreign acquirer, particularly a Chinese acquirer, treats the process as mandatory. Yet the prospect of triggering regulatory scrutiny almost certainly deters some Chinese investments, particularly in the aftermath of CNOOC’s infamous—and unsuccessful—bid for Unocal in 2005. The CFIUS process was a focal point in the political firestorm that led CNOOC to abandon its offer.

Given the prevailing sentiment during the congressional hearing in Washington, it seems possible that Congress will attach additional screening measures to the CFIUS process out of its wariness of Chinese FDI. Members of the commission seemed attracted to the Canadian approach to screening foreign investments, which includes a ‘net benefit’ test. That is, government reviewers are required to assess whether an acquisition of control by a non-Canadian company is of net benefit to Canada. In the case of a foreign SOE acquirer, the reviewers assess whether the Canadian business will still have the ability to operate on a commercial basis. The net benefit approach seems like an invitation to endless holdups and logrolling by domestic corporate and political stakeholders. Yet it is hard not to sympathise with policymakers in Washington; the U.S. foreign investment regime (and many other aspects of its market regulation, such as the antitrust regime and securities laws) was not designed with Global Fortune 500 companies connected to an authoritarian party-state in mind.

The Japanese experience suggests that while the federal political and regulatory climate may be very problematic for Chinese firms, U.S. state and local governments, as well as communities—where the businesses will actually operate—are likely to be much more receptive to Chinese investment. This is particularly true of greenfield investment, as opposed to acquisitions, although most economists view the two forms of FDI as essentially interchangeable. Japanese investors learned the hard way that passage into the U.S. is much smoother if a foreign firm integrates fully into the local community. Integration is facilitated by consistent and positive interaction with local suppliers, business people and politicians, and by learning as quickly as possible what it means to be a ‘good corporate citizen’—through employment practices, philanthropy and community involvement. Admittedly, for some Chinese firms, especially SOEs, this process may be significantly complicated by government ownership and Communist Party involvement in corporate personnel decisions.

Japan’s long-term experience of investing in the U.S. ultimately provides a positive example for Chinese investors. Despite the clamour in the 1980s, Japan is now an important, uncontroversial source of U.S.-directed FDI. Japanese affiliates employ hundreds of thousands of American workers, and a solid network of government and private sector actors help to sustain a relatively healthy bilateral investment climate. While a significant increase in Chinese FDI will almost certainly be met with considerable political backlash, 20 years from now, congressional and media attention will likely be elsewhere, while Chinese affiliates quietly go about their business in the U.S.
Columbia’s leadership in the field of Japanese law is embodied in the Center for Japanese Legal Studies. The Center initiates and administers a range of research projects, academic exchanges, and informal programs designed to enhance understanding of the Japanese legal system among the Columbia University community and beyond.

Please direct questions, comments, or changes of address to Paulette Roberts at prober@law.columbia.edu.
The Center for Japanese Legal Studies website: web.law.columbia.edu/japanese-legal-studies

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