

# *Newsletter*

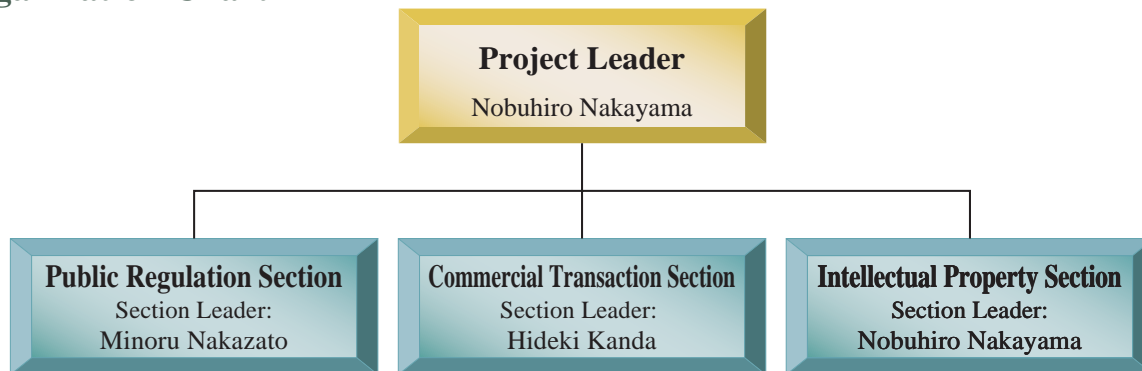
*English Edition No.4 Autumn-Winter 2006-2007*



21st Century Center of Excellence Program "Soft Law" and the State-Market Relationship

# 1 Organization of Research and Education

## Organization Chart



(Dated as of April 1st, 2007)

## Project Scholastic Member

Minoru Nakazato (Section Leader): Graduate Schools for Law and Policies ("GSLP")/Tax Law Takeshi Igarashi: GSLP/American History of Politics and Diplomacy Mitsuaki Usui: GSLP/Public Finance Law Akira Kotera: Graduate School of Arts and Science/International Economic Law Katsuya Uga: GSLP/Administrative Law Masahiko Iwamura: GSLP/Social Security Law Yoshihiro Masui: GSLP /Tax Law Tadashi Shiraishi:GSLP/Competitive Law	Hideki Kanda(SectionLeader):GSLP/ Commercial Law Yoshiaki Miyasako:GSLP/ International Business Law Shinsaku Iwahara:GSLP/ Commercial Law Tomonobu Yamashita:GSLP/ Commercial Law Takashi Uchida: GSLP/Civil Law Tomotaka Fujita: GSLP/Commercial Law Hiroyuki Kansaku:GSLP/ Commercial Law Toshihiro Matsumura: Institute of Social Science/Industrial Organization, Public Economics Akira Kamo: GSLP/Civil Law	Nobuhiro Nakayama (Section Leader): GSLP /Intellectual Property Daniel Foote: GSLP/Law and Society Kichimoto Asaka: GSLP/Anglo-American Law Tetsuya Obuchi: GSLP/Intellectual Property Takashi Araki: GSLP/Labor Law Hiroki Morita: GSLP/Civil Law
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### Project Professor

Hiroyasu Watanabe: Waseda Graduate School of Finance  
 Hidetaka Aizawa: Graduate School of International Corporate Strategy, Hitotsubashi University  
 Noboru Kashiwagi: Chuo Law School  
 Masato Dougauchi: Waseda Law School  
 Takeshi Nakashima: Bank of Japan  
 Masanobu Kato: Shinsei Patent Office  
 Hiroyuki Seshimo: Senshu University, Faculty of Commerce

### Project Associate Professor

Hiroyasu Ishikawa: Gakushuin University Faculty of Law  
 Kazuaki Kagami: Toyo University, Faculty of Economics  
 Naoki Okubo: Gakushuin University, Faculty of Law  
 Kiyokazu Yamagami: Tokyo Metropolitan University, Graduate Schools of Social Science  
 Takeshi Fujitani:Hokkaido University School of Law  
 Hiroyuki Watanabe: Waseda University, Graduate School of Law  
 Sota Kimura: Tokyo Metropolitan University, Faculty of Urban Liberal Arts  
 Yuri Matsubara: Meiji University, School of Commerce

### Project Researcher

Koichi Shirasaki: Trade Win Co., Ltd  
 Rei Kawazoe: Graduate Schools for Law and Politics  
 Julien Mouret: Universite Montesquieu Bordeaux 4  
 Kei Yoshinaga: Graduate Schools for Law and Politics  
 Yoko Manzawa: Rikkyo University, Faculty of Law  
 Tomoko Mise: Musashi University, Faculty of Sociology  
 Kengo Tanaka: Tokyo Stock Exchange  
 Yuko Tsuchiya: Graduate Schools for Law and Politics  
 Huh Sookyeon: Graduate Schools for Law and Politics  
 Yuichi Nishimura: Graduate Schools for Law and Politics

### Project Assistant

Hitomi Nagano: Graduate Schools for Law and Politics  
 Masashi Takeo: Graduate Schools for Law and Politics

# 2 Activities

## COE “Soft Law” Seminars Series

No	Date	Topic	Speaker
15	October 2, 2006	The Role of State and Non-State Parties in the Creation and Enforcement of Norms	Tomotaka Fujita, Professor, The University of Tokyo
16	October 2, 2006	Rulemaking in International Finance: Basel II	Hideki Kanda, Professor, The University of Tokyo
17	October 23, 2006	Die deutsche GmbH im Wettbewerb der europäischen Gesellschaftsformen: Der Referentenentwurf für ein Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG)	Moritz Bälz, Associate Lawyer, Freshfields Bruckhaus Deringer, Frankfurt
18	February 2, 2007	The effectiveness of “freedom of organization” and “union autonomy” in Korea—mainly on the delay of “company-level multiple unions” and “prevention of payment to the full-time union officials” articles in Trade Union and Labor Relations Adjustment Act	Lee Heung-Jae, Professor, Seoul National University



## Symposium — “Soft Law and the State-Market Relationship”

No	Date	Topic	Speaker
7	September 30, 2006 October 1, 2006	Authors Workshop A Decade After Crisis: The Transformation of Corporate Governance in East Asia	See, page 6-7 for detail
8	March 5, 2007	“De Facto Standard” and Norm Creation	See, page 5 for detail

# The Eighth Symposium

## "De Facto Standard" and Norm Creation"

Date: March 5(Monday), 2007 14:00-18:30

Place: Auditorium-Academy Hills / Roppongi Forum

Chair: Hideki Kanda (Professor, University of Tokyo / COE Program Project Sub-leader)

Opening Remarks: Nobuhiro Nakayama (Professor, University of Tokyo / COE Program Project Leader)

### **Formation of De Facto Standards and Interaction between De Facto Standards and Hard Law in the Business**

#### **Law Area**

Speaker: Hiroshi Mitoma (Associate Professor, University of Tokyo / Attorney-at-Law, Nagashima Ohno & Tsunematsu)

Comment: Tomotaka Fujita (Professor, University of Tokyo)

### **Development of Accounting Standards as De Facto Standard**

Speaker: Atsushi Kogasaka (CPA, Partner, Deloitte Touche Tohmatsu-Japan)

Comment: Hideki Kanda

### **Interaction between Hard Law and De Facto Standards in the Area of International Taxation**

Speaker: Yuko Miyazaki (Visiting Professor, University of Tokyo / Attorney-at-Law, Nagashima Ohno & Tsunematsu)

Comment: Yoshihiro Masui (Professor, University of Tokyo)

Conclusion: Hideki Kanda

Closing Remarks: Nobuhiro Nakayama

Cooperation: Shoji-Homu Ltd.



## International Exchange

### < Visitors from Overseas >

2006

September 30, October 1

Curtis Milhaupt (Professor, Columbia Law School)

Kon-Sik Kim (Professor, Seoul National University); “The Role of Judges in Corporate Governance: Korean Experience”

Hwa-Jin Kim (Associate Professor, Seoul National University); “A Tale of Two Companies: The Emerging Market for Corporate Control in Korea”

Ok-Rial Song (Associate Professor, Seoul National University); “Improving Corporate Governance through Litigations: Derivative Suits and Class Actions in Korea”



Lawrence Liu (Professor, Soochow University Law School and National Taiwan University Management School); “Corporate Regulation in Taiwan: A Political Economy Perspective”

Wen-Yeu Wang (Professor, National Taiwan University); “An Analytical Framework for Controlling Minority Structures and Its Application to Taiwan”

Ronald Gilson (Professor, Stanford Law School); “Controlling Family Shareholders in Asia: Anchoring Relational Exchange”



Donald Clarke (Professor, George Washington University Law School); “The Role of Non-Leagal Institutions in Chinese Corporate Governance”

Nicholas Howson (Associate Professor, University of Michigan School of Law); “The Doctrine That Dared Not Speak Its Name — Anglo-American Fiduciary Duties in China’s Company Law and Case Law Intimations of Convergence”

Xin Tang (Associate Professor, Tsinghua University School of Law); “Protection of Minority Shareholders in China: A Task for Both Legislation and Enforcement”

Michael Klausner (Professor, Stanford Law School)



\*The above are speakers at the Seventh Symposium “Authors Workshop A Decade After Crisis: The Transformation of Corporate Governance in East Asia”.



# Authors Workshop

## A Decade After Crisis: The Transformation of Corporate Governance in East Asia

*Sept. 30-Oct. 1, 2006 Tokyo, Japan*  
*University of Tokyo, Room 101 of the Hongo Sogo Building*

### Saturday, Sept. 30

- 10:00-12:00 **Panel One: Japan**  
**Hideki Kanda:** *Regulatory Rulemaking: A Comparative Perspective*  
**Tomotaka Fujita:** *Transformation of the Management Liability Regime in Japan: In the wake of the 1993 Revision*  
**Kenichi Osugi:** *Games under Uncertainties: Transformation of M&A Rules in Japan*  
Commentator: **Curtis Milhaupt**
- 12:00-1:30 Lunch
- 1:30-3:30 **Panel Two: Korea**  
**Kon-Sik Kim:** *The Role of Judges in Corporate Governance: Korean Experience*  
**Hwa-Jin Kim:** *A Tale of Two Companies: The Emerging Market for Corporate Control in Korea*  
**Ok-Rial Song:** *Improving Corporate Governance through Litigations: Derivative Suits and Class Actions in Korea*  
Commentator: **Hideki Kanda**
- 3:30-4:00 Coffee Break
- 4:00-6:00 **Panel Three: Taiwan, and Share Structures in Asia**  
**Lawrence Liu:** *Corporate Regulation in Taiwan: A Political Economy Perspective*  
**Wen-Yeu Wang:** *An Analytical Framework for Controlling Minority Structures and Its Application to Taiwan*  
**Ronald Gilson:** *Controlling Family Shareholders in Asia: Anchoring Relational Exchange*  
Commentator: **Kon-Sik Kim**
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### Sunday, Oct. 1

- 10:00-12:00 **Panel Four: China**  
**Donald Clarke:** *The Role of Non-Leagal Institutions in Chinese Corporate Governance*  
**Nicholas Calcina Howson:** *The Doctrine That Dared Not Speak Its Name*  
— *Anglo-American Fiduciary Duties in China's Company Law and Case Law Intimations of Convergence*  
**Xin Tang:** *Protection of Minority Shareholders in China: A Task for Both Legislation and Enforcement*  
Commentator: **Michael Klausner**

*This workshop is sponsored by the Center of Excellence Program at the University of Tokyo, the Center on Financial Law at Seoul National University, and the Center for Japanese Legal Studies at Columbia Law School.*

Information: The University of Tokyo, Graduate Schools for Law and Politics  
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**October 16**

Rick Kreyer (Professor, Monash University); Lecture: “Trends in the formation of international tax rules,” at the Thirteenth Softlaw taxation workshop.

**October 23**

Moritz Bälz (Associate Lawyer, Freshfields Bruckhaus Deringer, Frankfurt); Lecture: “ Die deutsche GmbH im Wettbewerb der europäischen Gesellschaftsformen: Der Referentenentwurf für ein Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG),” at the Seventeenth COE Soft Law Seminar.

**November 15**

Michael Lang (Professor, Vienna University of Economics and Business Administration); Lecture: “The Role of the OECD Model Convention and the OECD Commentaries,” at the Fourteenth Softlaw taxation workshop.

See, page 9-11 for detail

**November 24**

Randall R. Rader (Circuit Judge); Lecture: “Permanent Injunctions: EBAY” at the Fourteenth Intellectual Property Law Study Group.

**2007****February 2**

Lee Heung-Jae (Professor, Seoul National University) ; Lecture: “The effectiveness of “freedom of organization” and “union autonomy” in Korea—mainly on the delay of “company-level multiple unions” and “prevention of payment to the full-time union officials” articles in Trade Union and Labor Relations Adjustment Act” at the Eighteenth COE Soft Law Seminar.

**< The Project Members’ Overseas Research Activities >****2006****September**

Yoshihiro Masui (Professor, University of Tokyo)

Amsterdam / Brussels / Paris: Discussed current issues in the OECD Model Tax Convention on Income and Capital at the 60th Congress of the International Fiscal Association and collected materials on soft law approach from the staffs of European Commission and the OECD Committee on Fiscal Affairs.

**2007****February**

Yoshihiro Masui (Professor, University of Tokyo)

Paris: Collected materials and attended the Permanent Scientific Committee of the International Fiscal Association.



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## Seminar Report

### “The Role of the OECD Model Convention and the OECD Commentaries”

Prof. Dr. Michael Lang

Institute for Austrian and International Tax Law

Vienna University of Economics and Business Administration

#### 1. The Softlaw Taxation Workshop

According to Japan’s Constitution, no taxes shall be imposed except by law (Article 84). In other words, taxation must be based on statutes created by the legislative body of the government. Because statutes are binding and enforceable, tax law might appear most alien to the research project on “soft law.”

This superficial observation, however, misses an important point. In practice, tax lawmaking process is influenced by informal activities of both governmental and non-governmental actors. When such actors create and modify substantive taxation rules, various norms of non-binding nature play a significant role.

Three examples are pertinent.

(1) Accounting rules. When a private organization sets an accounting standard, such standard will be incorporated into the computation of tax base for corporate income tax purposes (Corporation Tax Law Article 22 Paragraph 4).

(2) Administrative circulars. Circulars issued by the National Tax Agency are not legally binding on taxpayers. Nevertheless they often function as a de facto standard in the interpretation of tax statutory rules. Sometimes such circulars go beyond the role of mere interpretation and fill the gap in existing statutes.

(3) Model Conventions. In the area of international taxation, states follow the structure of Model Conventions created by international organizations. Treaty negotiators use them as a starting point for treaty negotiation, and tax officials rely on the Commentary to the Conventions when they discuss treaty interpretation in the mutual agreement procedure.

The third area offers a number of research agenda for the softlaw taxation workshop, because the Model Conventions have a great impact on the practice of international income taxation. In the 14th seminar, Prof. Lang discussed the particular topic of the role of the OECD Model Convention and the OECD Commentaries.

#### 2. The OECD Model Tax Convention and its Commentaries

Prof. Lang first explained the practical relevance of OECD Model Tax Convention. The OECD recommends but not binds the OECD Member Countries to follow the OECD Model. In the real world, the Model has great influence on the bilateral tax treaties signed by the states. Thus the OECD Model is a good example of “soft law”.



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The historical origin of the OECD Model Convention dates back to early 20th century. The 1963 OECD Model Convention was replaced by the 1977 OECD Model Convention. After 1992, a loose leaf version was adopted in order to reflect frequent amendments to the Commentary. Changes to Commentaries are discussed and decided by the Committee of Fiscal Affairs whose members are delegates from the OECD member states.

### 3. Legal status of the OECD Commentaries

Prof. Lang then discussed the reason why OECD Commentary is relevant in the interpretation of bilateral tax treaties. The legal status of the Commentary must be analyzed in light of the interpretation rules of treaty law in general, which is crystallized in the Vienna Convention on the Law of Treaties (VCLT).

According to VCLT Article 31 Paragraph 1, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. VCLT Article 31 Paragraph 2 explains what “context” means for this purpose. Subsequent agreements and practices are to be taken into account together with the context (VCLT Article 31 Paragraph 3). Special meaning intended by the parties governs (VCLT Article 31 Paragraph 4). According to VCLT Article 32, historical documents such as preparatory work of the treaty are relevant only when VCLT Article 31 does not work properly.

The OECD Commentary that existed when the treaty in question was concluded certainly is a “supplementary means of interpretation” as defined in VCLT Article 32. However, this does not mean much for practical purposes, because recourse may be had to supplementary means of interpretation only in two ways: (i) to confirm the meaning resulting from the application of VCLT Article 31, or (ii) to determine the meaning when the interpretation according to VCLT Article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.

In the opinion of Prof. Lang, the Commentary that existed when the treaty was concluded constitutes a “context” in VCLT Article 31. Commentary is not exactly an “agreement” or an “instrument” as specified in VCLT Article 31 Paragraph 2, but is comparable to such an agreement or an instrument. Alternatively, parties must have intended to give special meaning in line with the Commentary (VCLT Article 31 Paragraph 4).

The situation is different with regard to the Commentary that did not exist when the treaty in question was negotiated. The relevance of recent version of the Commentary for treaty interpretation is significant because the Commentary is modified frequently. The Working Party No. 1 of the OECD Committee of Fiscal Affairs wishes to have an immediate impact on the international tax practice. Changing the Model Tax Convention itself would be too slow a process, because each state must renegotiate their bilateral treaties in order to reflect newer versions of the Model, which might

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take more than 30 years to complete. On the other hand, a new Commentary would take effect immediately because it is merely interpreting the existing treaties. Suppose that a bilateral treaty was signed in 1986, and its interpretation was clarified in 2006. In such a case, there is no need to renegotiate the treaty itself.

The problem with the lawmaking by Commentary modification is whether or not it has sufficient legal grounds. Prof. Lang believed that the approach lacks legal foundation, because recent version of the Commentary does not fall under any provisions of the VCLT Articles 31 and 32. VCLT Article 31 Paragraph 2 is not applicable because a recent version of the Commentary cannot be said to be “in connection with the conclusion of the treaty.” VCLT Article 31 Paragraph 3 also is not applicable because the Commentary is neither a subsequent “agreement” nor a subsequent “practice.” Parties could not possibly have intended to give special meaning to the then nonexistent Commentary (VCLT Article 31 Paragraph 4). Recent Commentary cannot be historical documents under VCLT Article 32.

Prof. Lang concluded that recent version of OECD Model and Commentary which did not exist at the time of treaty negotiation is not relevant in the interpretation of the treaty. In order to infuse the treaty with new ideas, it is not sufficient merely to change the Commentary. It is necessary to change the treaty text itself. This position is superior as a correct interpretation of the VCLT, and better matches the legality principle that is constitutionally guaranteed in each state.

#### 4. The lawmaking process in international taxation

After the lecture by Prof. Lang, there was a question and answer period. A student asked the influence of the OECD Model to non-OECD member states. Prof. Hiroshi Kaneko commented that he was impressed with Prof. Lang’s emphasis on the rule of law.

The workshop produced two lessons. Firstly, old and new versions of the OECD Commentaries need to be distinguished. There seems to be still room for debating which provision of the VCLT to apply to the OECD Commentaries. However, the fact remains that newer version requires a close analysis because the parties were not in a position to foresee the future modification of the Commentaries.

Secondly, the discussion on the legal status of the Commentary reflects one’s view on the proper role of the supranational organization such as the OECD, in tension with the autonomy of each sovereign state. Even if one may agree with the substantive position taken by the newer Commentary, one would still question the legitimacy of lawmaking process. Process needs to be examined in its own right.

## <Profile>

### Lee Heung-Jae (Project Professor)



- 1946, Born in Ha-dong, Korea
- Professor of law, Seoul National University
- Oct 2006 ~ Mar 2007, Project Professor on the COE Soft law Program, The University of Tokyo

My recent concern here in Japan is focused on the function of Employment insurance act, mainly its change in the age of long term slump of Japanese economy. Just like in Korea, Employment insurance act in Japan is accomplishing two tasks. First, offensively, it can fulfill protection against unemployment. Second, defensively, it can devise stable life of unemployed person. I am supposing the principle of Japanese flexible countermove to social danger of unemployment anxiety. The way how its unique application and interpretation in Japanese economy and society were taken is my primary concern here. Also, this can suppose a role model for Korean Employment insurance act and its variation in Korea society.

I think Basic rights to work (Art.32 of Constitution of Korea, as in Japanese Constitution Art.27) should be observed, and at the same time, the importance freedom of contract, especially that of employment contract should not be overlooked. The harmony of these two goals can be concretized by the principle of mutual aid, which is the purpose and function of Employment insurance act. Integration of society instead of two extremes accelerated nowadays both in Japan and Korea can be an alternative to overcome instability of employment, and at the center of this theme is located the idea of interpreting and reconsidering of Employment insurance act. Flexibility through systematical change of labor market is apparently causing a crisis of labor law, but I am expecting labor law of mutual aid through proper countermove of Employment insurance act.

Methodically, classification of phases in the labor market, by noticeable facts in the market, and then macro analysis about change of functional principle of Employment insurance act will be fulfilled. These works will be accomplished mainly through legal historical approach. Also, including interviews with authority concerned and fieldwork, variety methods of legal societal approach will be added. Applicants of Employment insurance act, system of award, finance of insurance, and other works by the law will be examined. The scope of protection about short-term employee and contract worker, restructuring in the employment stabilization work, confirmation of insurance finance will be analyzed with special concern. Other micro issues will also be touched through the procedure of concretizing of these themes.

In short, Japanese feature and its background of Employment insurance act coping with systematic changes of labor market is main concern here.

# 3 Outcome

## COE Soft Law Discussion Paper Series

This center distributes each research paper as a “Discussion Paper,” written either by each project member or each researcher outside our university. The “Discussion Paper” is available in hardcopy form and for download from our web site (<http://www.j.u-tokyo.ac.jp/coelaw/outcome.html>).



No	Author	Title
COESOFTLAW 2006-5	Luke Nottage	Responsive Re-regulation of Consumer Product Safety: Hard and Soft Law in Australia and Japan
COESOFTLAW 2006-6	Hiroshi Noda	A study of the original intent and actual practice of the “Comply or Explain” principle – With special reference to the UK’s “Combined Code on Corporate Governance”
COESOFTLAW 2006-7	Takeshi Igarashi	The United States in the Age of Globalization
COESOFTLAW 2006-8	Kichimoto Asaka	The Constitution-making of Tokelau: Necessity (or Unnecessity) of Constitution in a Customary Society
COESOFTLAW 2007-1	Tomotaka Fujita & Toshihiro Matsumura	The Evolution of Social Norm: Economic Modeling
COESOFTLAW 2007-2	Sota Kimura	A Basis of Hard Law – Order of Preference, Expectation, Schema of Generalization

## Soft Law Journal

In January 2005, the first Soft Law Journal was issued in order to report the results of the research at the Center of the project and to demonstrate our achievements for the next generation of researchers. Three volumes will be issued annually.

### No.7 2006 CONTENTS

#### <Report>

“Four Stages on Distribution of Captured Rent”

Koichi KUSANO

#### <Conversazione>

“Four Stages on Distribution of Captured Rent —Hostile Takeovers from Japanese Perspective—”

Koichi KUSANO, and others

#### <Article>

“A Direction of Legislation for Tax on Trust from the Observation of Official Notice of Tax on Trust of Real Estate”

Shuta KOBAYASHI

“Changing Corporate Governance in Korea”

Kon Sik KIM / Hironori KAWAMINAMI

“Responsive Re-regulation of Consumer Product Safety: Hard and Soft Law in Australia and Japan”

Luke NOTTAGE / Hitoshi NASU

### No.8 2007 CONTENTS

#### <Article>

“A study of the original intent and actual practice of the "Comply or Explain" principle

-- With special reference to the UK's "Combined Code on Corporate Governance”

Hiroshi NODA

“The Role of Trade Associations in Minimizing and Resolving Disputes: the Case of Franchise Associations”

Souichirou KOZUKA

“The Evolution of Social Norm: Economic Modeling”

Tomotaka FUJITA and Toshihiro MATSUMURA

#### <Lecture>

“Die deutsche GmbH im Wettbewerb der europäischen Gesellschaftsformen: Der Referentenentwurf für ein Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG)”

Dr. Moritz BÄLZ / Hiroyuki KANSAKU

#### <Note>

“Rulemaking in Banking Supervision and Basel Committee on Banking Supervision”

Sayuri OIDA



March 31, 2007

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