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### Hostile takeover regimes in Asia: A comparative approach

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# Hostile Takeover Regimes in Asia: A Comparative Approach

Umakanth Varottil\*

Wai Yee Wan\*\*

## I. INTRODUCTION

The market for corporate control operates as a key corporate governance mechanism in that shareholders of a company can rely on it as a tool to discipline management. Where the share price is depressed because of a company's failure to maximize shareholder returns, prospective acquirers may unlock value by acquiring the company and replacing the company's management.<sup>1</sup> The United States (U.S.) and the United Kingdom (U.K.), whose public markets are characterized by dispersed shareholdings, have active markets for corporate control. However, notwithstanding the similarities in shareholding structures and systems of corporate governance, the regulation of hostile takeovers differs remarkably between the U.S. and the U.K.<sup>2</sup> The U.K. adopts a strict board neutrality rule<sup>3</sup> in which shareholders are the primary arbiters of the success of a takeover offer. In contrast, in Delaware, which is home to more than 50% of U.S. publicly traded companies,<sup>4</sup> the board of the target has a significant (though not exclusive) say in the outcome of the takeover offer.

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<sup>1</sup> Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965); Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981).

<sup>2</sup> See, e.g. John Armour & David Skeel, *Who Writes the Rules for Hostile Takeovers, and Why? – The Peculiar Divergence of U.S. and U.K. Takeover Regulation* 95 GEO. L.J. 1727-1794 (2007); John Armour, Jack Jacobs & Curtis Milhaupt, *The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework*, 52 HARV. INT'L L.J. 219 (2011).

<sup>3</sup> The board neutrality rule, also referred to as the “no frustration” rule, provides that when a target company becomes the subject matter of a takeover, the board of the target must not take any action that might frustrate the offer, without first obtaining the approval of the shareholders. See, Marco Ventoruzzo, *Takeover Regulation as a Wolf in Sheep's Clothing: Taking UK Rules to Continental Europe*, 11 U. PA. J. BUS. L. 135, 141 (2008).

<sup>4</sup> *Why Choose Delaware as Your Corporate Home?*, DEL. Div. OF CORPs., available at <http://www.corp.delaware.gov/>.

In their seminal work, Armour and Skeel argue that the reasons behind the differences between takeover regulation in the U.S. and the U.K. are based on interest group politics.<sup>5</sup> The U.K. system, as exemplified by the City Code on Takeovers and Mergers<sup>6</sup> (the “UK Takeover Code”), prioritizes shareholder protection, and is attributable to the UK’s self-regulatory regime and aggressive lobbying by strong institutional shareholders. In the U.S., in contrast, where the courts remain the arbiter of takeover disputes, the judgment of the boards and management is given greater leeway in their determination of the interests of the company.<sup>7</sup> Armour and Skeel make an important contribution in explaining that the process of takeover regulation does influence the outcome or the substance of the regulation. U.K. takeover regulation is shaped by institutional shareholders pre-empting legislative intervention while U.S. regulation is derived from judge-made case law, largely from Delaware.<sup>8</sup>

Influential as it is, can the theory of interest group politics, and its application to takeover regulation, be extended outside of the U.S. and the U.K., particularly to their legal transplants in Asia? From a theoretical perspective, the key determinants of the outcome of takeover regulation on legal transplants is an important question because the U.S. and the U.K. have both been significant exporters of takeover regulation.<sup>9</sup> In particular, their respective regimes on hostile takeovers have been disseminated around the world, and Asia is no exception. Six of the significant economies in Asia (China, Hong Kong, Japan, India, Korea and Singapore), which are also the largest takeover markets in the region, have adopted features of either or both of the U.S. and the U.K. models. A study of takeover regulation in these six countries would provide a substantial representative understanding of takeover regulation in Asia more broadly. They cover the leading emerging economies of China and India, the leading Asian financial centres of Singapore and Hong Kong and the significant economies of Korea and Japan. This combination includes a balanced representation of both common law (India, Hong Kong and Singapore) and civil law (China, Japan and Korea) countries that enables us to examine the influence of legal tradition on takeover regulation.

Yet, Asia differs significantly from the U.S. and the U.K. In particular, while the U.S. and the U.K. are largely represented by companies with dispersed share ownership, the shareholding structures in Asia are far more concentrated.<sup>10</sup> Moreover, the legal institutions supporting

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<sup>5</sup> Armour & Skeel, *supra* note 2, at 1781.

<sup>6</sup> Panel on Takeovers and Mergers, *The Takeover Code: The City Code on Takeovers and Mergers*, 12th edn (2016).

<sup>7</sup> Armour & Skeel, *supra* note 2, at 1730.

<sup>8</sup> However, takeover regulation in the U.S. is in part governed by the Williams Act, a federal statute. *See, infra* note 24 and accompanying text.

<sup>9</sup> For the trends in diffusion of corporate law in general through legal transplants, see Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51. AM. J. COMP. L. 163, 165 (2003); Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, 2009 BYU L. REV. 1813, 1812-13 (2009). For a broader discourse on legal transplants, see ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1993); Pierre Legrand, *The Impossibility of Legal Transplant*, 4 MAASTRICHT J. EUR. & COMP. L. 111, 112 (1997).

<sup>10</sup> In addition to concentration of shareholding, cross-shareholdings or circular shareholdings as well as pyramid holding structures may also be present. For example, in Korea, *see*, Hyeok-Joon Rho, *M&A in Korea*:

takeover regulation, such as the securities regulator, the stock exchange and the judiciary, are very different from those in the U.S. and the U.K. in dealing with matters of takeover regulation. Given these fundamental differences, would the considerations that shaped the optimal mode of takeover regulation in the U.S. or the U.K. continue to be relevant to Asia? If not, what factors stimulated the design and implementation of takeover regulation in our Asian jurisdictions? Our exploration of these questions forms the crux of this article.

A strain of existing scholarship argues that notwithstanding these differences, Armour and Skeel's account of takeover regulation continues to be relevant in explaining the diversity of takeover regulation regimes in Europe,<sup>11</sup> Japan<sup>12</sup> and China (with modification).<sup>13</sup> However, if Armour and Skeel's theory is correct and complete, there are at least two puzzles in explaining the account of takeover regulation in Asia. First, with the exception (at least partially) of Japan, all of the other five Asian jurisdictions are dominated by public companies with concentrated shareholdings. Institutional minority shareholders do not have the kind of clout that is otherwise present in jurisdictions with widely-held shareholdings. They certainly do not bear the type of influence they displayed in shaping takeover regulation in the U.K. Yet, why do several Asian jurisdictions (such as India, Hong Kong and Singapore) adopt the U.K.-inspired board neutrality rule even though concentrated shareholdings are the norm? One would expect that the controlling shareholders in Asian jurisdictions would be either indifferent or would prefer the U.S.-approach that favours the incumbent management or controlling shareholders.

Second, we would expect some degree of functional convergence in the substantive rules among the countries that have adopted the same types of processes of takeover regulation. In particular, Armour and Skeel argue that the U.S. model of judge-made law results in managers and boards prevailing in the outcome of regulation of hostile takeovers. Using the U.K. example prior to the adoption of the UK Takeover Code, they argue that a similar result can be seen when the judiciary is the arbiter of takeover disputes in hostile takeovers. Thus, we would expect that jurisdictions or legal transplants that have adopted the U.S.-model of takeover dispute resolution are likely to reach the same results. However, drawing from the evidence pertaining to our Asian jurisdictions (Korea, China, and Japan) that have adapted the U.S. model of settling hostile takeover disputes by the courts, we find that the legal

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*Continuing Concern for Minority Shareholders*, in UMAKANTH VAROTTIL & WAI YEE WAN, COMPARATIVE TAKEOVER REGULATION: GLOBAL AND ASIAN PERSPECTIVES 281-283 (2017); Stephen Choi, *The Future Direction of Takeover Law in Korea* 7 JOURNAL OF KOREAN LAW 25 (2007), 34-35. For India, see Marianne Bertrand, Paras Mehta and Sendhil Mullainathan, *Ferretting Out Tunneling: An Application to Indian Business Groups*, 117 Q. J. ECON. 121 (2002). Moreover, apart from holding absolute control, a dominant shareholder may, in certain circumstances, be able to exercise control while holding only a fraction of the equity, through the mechanism referred to as the "controlling-minority structure" (CMS). See, Sang Yop Kang, *Transplanting a Poison Pill to Controlling Shareholder Regimes—Why It Is So Difficult*, 33 NW. J. INT'L L. & BUS. 619, 640 (2013).

<sup>11</sup> Ventoruzzo, *supra* note 3.

<sup>12</sup> Armour, Jacobs & Milhaupt, *supra* note 2.

<sup>13</sup> Chao Xi, *The Political Economy of Takeover Regulation: What Does the Mandatory Bid Rule in China Tell Us?*, [2015] J.B.L 142.

exportation of the takeover regulation has led only to somewhat superficial formal but not functional convergence of regulation.

In reflecting on the two puzzles, we seek to answer the following questions. First, what are interest groups that are relevant in the choice of initial takeover regulation in the Asian economies?<sup>14</sup> Second, after such selection has occurred, what are reasons for the continued lack of functional convergence between the takeover law and regulation of the exporting (U.S. and the U.K.) and recipient countries (the Asian economies)? Third, are there any unintended consequences of legal transplantation of the U.S. and/or U.K. model of takeover regulation in the recipient countries (the Asian economies)?

Armour and Skeel's theory of interest group politics in takeover regulation is both helpful and incomplete when it is extended to the Asian legal transplants.<sup>15</sup> The beneficial aspect of the theory is that the broader narrative on the role of the various actors in the market for corporate control may explain why the takeover rules developed in advanced economies often operate quite differently in the recipient countries due to the differences in the legal institutions supporting such regulation. Furthermore, there are important differences even among jurisdictions that are recipients of transplants from the U.S. and the U.K. The theory provides an elegant framework to examine the factors that led to the design of takeover regulation in each of our Asian jurisdictions.

At the same time, there are significant limitations in applying Armour and Skeel's theory to our Asian jurisdictions. First, substantial differences are inherent in the manner in which takeover regulation emerged in the U.S. and the U.K. on the one hand, and in our Asian jurisdictions on the other. Armour and Skeel are essentially concerned with indigenous development of takeover regulation purely based on local factors, without having regard to cross-country diffusion of regulations. On the other hand, the narrative in Asia is rather different in that the jurisdictions therein are concerned with incorporation of takeover rules from other jurisdictions and adapting them to suit local circumstances. Here, the political economy implications are felt in choices such as which established jurisdiction should one borrow takeover regulation from, and what changes or modifications need to be made to implement them in an effective manner.

Second, Armour and Skeel's theory is developed in the context of advanced economies with dispersed shareholdings, without taking into account the influence of controlling shareholders found in economies with closely-held shareholdings. We argue that controlling shareholders

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<sup>14</sup> Interest groups could either be institutional shareholders (for example, in the U.K.), target's management (for instance, in the U.S.), or controlling shareholders (in several jurisdictions continental Europe and Asia, including business families and the state). The role of interest groups may vary from jurisdiction to jurisdiction, and in many cases it might be difficult to identify precisely the interest groups who have influenced the shape of takeover regulation. In other cases, regulation may be driven by policy makers and academics without being resisted by the business community.

<sup>15</sup> One scholar notes a similar outcome in the context of European jurisdictions, finding that the evaluation of those jurisdictions is "both consistent with and contrary to Armour and Skeel's analysis". *See*, Ventrizzo, *supra* note 3, at 137.

play an important role in shaping the outcome of takeover regulation, and this is true of all of our six Asian jurisdictions. While controlling shareholders do not find a part in the Armour and Skeel story, they play a lead role in shaping takeover regulation in Asia. Third, and related to the above, Armour and Skeel construct their theory around two of the most active takeover markets in the world. On the other hand, Asia has witnessed a sparse incidence of hostile takeovers. The usual explanation for this phenomenon relates to the presence of concentrated shareholdings. But, matters are more complex and hostile takeovers have not built up any momentum even in those companies in Asian jurisdictions such as Japan that are dispersedly held. It does not thereby imply that a discussion of hostile takeovers and the role of the target's board in setting up defences is irrelevant (or even less relevant) in the Asian jurisdictions. The analysis is imperative given that there continues to be incidences, albeit occasional ones, of hostile takeovers in Asia that continue to capture a great deal of attention, with the Asian jurisdictions lacking a uniform approach.

Fourth, the differing roles of the state are also relevant in the development of takeover regulation between advanced and emerging economies. In advanced economies of the U.S. and the U.K., judicial decisions and the U.K. Takeover Code have respectively pre-empted the need for legislation governing hostile takeovers. However, in several economies, the state often has an interest in playing a far more active role: the selection (and subsequently adaptation) of a model of regulation serves a signal of its commitment to a free market and open economy and the importance of investor protection. At the same time, the adaptation of the U.S. and the U.K. models in their implementation to different Asian jurisdictions not only cause divergence among jurisdictions, but the adaptations are often driven by the need of the state to play to local influences, primarily that of controlling shareholders.

In this article, we argue that takeover regulation in Asia must be viewed through a different lens altogether.<sup>16</sup> It is true that Asian regulators have cross-referred, arguably excessively, to the U.S. and the U.K. while framing their takeover regulation. But, a deeper analysis of the factors that were at play when choices were (and are continuing to be) made will enable a more informed appreciation of the manner in which such takeover regulation is likely to be implemented.

We contribute to the existing literature on comparative takeover regulation, corporate governance and comparative law in the following respects. First, we highlight the trends in the importation of takeover regulation by Asian countries from the U.S. and the U.K., although the presence of entirely different shareholding structures and legal institutions raise significant questions about the efficacy of the transplantation of such a legal framework. Second, we seek to extend the scope of the comparative study of hostile takeover regime, and the influence of various interest groups in shaping takeover regulation, to a wider set of

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<sup>16</sup> It might very well be that Asia as a whole cannot be viewed through a single lens, and that there needs to be "jurisdiction-specific lenses". On this point in relation to the power of shareholders in Asian jurisdictions, see, Dan. W. Puchniak, *Multiple faces of shareholder power in Asia: complexity revealed*, in JENNIFER G. HILL & RANDALL S. THOMAS (EDS.), *RESEARCH HANDBOOK ON SHAREHOLDER POWER* (2015).

countries in Asia, than examined by current scholarship. Third, our study is relevant to emerging countries considering their reforms of takeover regulation.

The rest of the article is organized as follows. Part II discusses the existing theoretical framework in comparative takeover regulation to establish where our study fits in the scholarship relating to the political economy of takeovers. Part III explains why hostile takeovers are important in Asia, notwithstanding the landscape of concentrated shareholdings or (in the case of Japan) stable shareholdings. Part IV examines the evolution and design of takeover regulation in each of our Asian jurisdictions with a view to ascertaining the possible influences of various interest groups on regulatory outcomes. Part V explores the key lessons and implications that emerge from our study of six Asian jurisdictions, and Part VI concludes.

## II. ESTABLISHING THE THEORETICAL FRAMEWORK FOR COMPARATIVE TAKEOVER REGULATION

### *A. The Theory of Interest Group Politics in Takeover Regulation in the U.S. and the U.K.*

In their influential work, Armour and Skeel argue that the reasons for the differences in the regulation of hostile takeovers in the U.S. and the U.K. are based on interest group politics or political economy.<sup>17</sup> Specifically, the differences arise from the varying influence of the powerful lobbying groups, namely the institutional shareholders in the U.K. and the managers of firms in the U.S., which affect the mode and the content of the regulation.<sup>18</sup> Institutional shareholders in the U.K. opted for self-regulation and collectively acted together to write the U.K. Takeover Code, of which the board neutrality rule is one of the most prominent features.<sup>19</sup> Thus, in so doing, they pre-empted the possibility of state-imposed or legislative measures.<sup>20</sup> The U.K. also had a closely-knit body of finance and legal professionals within the City of London and who were willing to buy into the concept of self-regulation that is essential for the operation of the U.K. Code.<sup>21</sup> Their account of takeover regulation is broadly consistent with the existing scholarship on influence of institutional shareholders on other aspects of corporate governance, such as the fact that they were also instrumental in procuring that the listing rules of London Stock Exchange subject all large transactions to shareholder approval in the 1970s.<sup>22</sup>

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<sup>17</sup> Armour & Skeel, *supra* note 2, at 1771. See also, Armour, Jacobs & Milhaupt, *supra* note 2, at 230-31.

<sup>18</sup> *Id.*

<sup>19</sup> UK Takeover Code, § 21. The other is the mandatory bid rule. *Id.*, § 9. The mandatory bid rule obligates acquirers who obtain effective control over the target company to make an offer to the remaining shareholders of the target to acquire their shares. Umakanth Varottil, *Comparative Takeover Regulation and the Concept of 'Control'*, [2015] SING. J.L.S 208, 209.

<sup>20</sup> Armour & Skeel, *supra* note 2, at 1771-72.

<sup>21</sup> *Id.*

<sup>22</sup> Paul Davies, *Shareholders in the United Kingdom* in Randall Thomas & Jennifer Hill, *Research Handbook on Shareholder Power* 363 (2015).

In contrast, in the U.S., institutional shareholders neither had the same influence nor held the same levels of stock in the publicly listed companies as those in the U.K. Instead, as Armour and Skeel argue, corporate directors and managers exerted much greater influence on the development of takeover law.<sup>23</sup> Federal legislation, principally in the form of the Williams Act of 1968, which provides for shareholding disclosure requirements and prevents bidders from using unfair or coercive tactics, was ostensibly enacted to “level the playing field” between bidders and target managers, but it instead had the effect of favoring target managers.<sup>24</sup> With respect to state law, in Delaware, corporate directors and managers litigate before the courts against the hostile bidders, and thus through repeat litigation, are able to convince the judiciary to lay down pro-managerial decisions.<sup>25</sup>

Armour and Skeel turn to the position in the U.K. prior to the emergence of the U.K. Takeover Code as an instance to demonstrate that the process of takeover regulation affects the shape of substantive rules.<sup>26</sup> Prior to the U.K. Takeover Code, when the Takeover Panel had not yet been formed, all disputes relating to takeovers were resolved before the courts. The corpus of case law from the English courts of that era shows that the courts generally upheld management’s decisions that were entered into in good faith and with a legitimate business purpose, even if such decisions had the effect of frustrating a hostile bidder.<sup>27</sup> Thus, they argue that “using litigation to resolve such matters involves a structural bias in favor of the directors”,<sup>28</sup> and that in response to the case law, institutional shareholders in UK chose to band together to write the Takeover Code. While institutional shareholders must have been aware of such bias in the U.S., the situation could not be replicated due to the presence of federal legislation which precluded the forming of such links among the institutional shareholders and which pre-empted self-regulation by the market players.<sup>29</sup> The question that arises is whether the experiences of the U.S. and the U.K. in takeover regulation are confined to their peculiar political economy and whether they can be generalized outside these two jurisdictions and applied to Asia. The next sub-Part discusses the work of comparative takeover scholars that seeks to extend the theory of interest group politics in the context of takeover regulation outside of the U.S. and the U.K.

#### *B. The Extension of Interest Group Politics outside the U.S. and the U.K. to Asia*

Following from Armour and Skeel’s work, comparative takeover scholars have sought to extend their theory of interest group politics outside of the U.S. and the U.K. as well as to other tools of takeover regulation (such as the mandatory bid rule) that are beyond the regulation of hostile takeovers. In the context of advanced economies, in Europe, Ventoruzzo

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<sup>23</sup> Armour & Skeel, *supra* note 2, at 1780-1784.

<sup>24</sup> *Id.*, at 1755.

<sup>25</sup> *Id.*, at 1781.

<sup>26</sup> *Id.*, at 1782-1784.

<sup>27</sup> *Id.*, at 1782-84.

<sup>28</sup> *Id.*, at 1784.

<sup>29</sup> *Id.*



argues that their narrative of takeover regulation can be broadly applied to the rest of Europe (outside of the U.K.), although he argues that the effect of the U.K.-style takeover regulation (particularly the mandatory bid rule and the board neutrality rule) has led to unintended consequences in Italy due to the varied ownership structure in that jurisdiction.<sup>30</sup> Armour, Jacobs and Milhaupt extended the theory of interest group politics to Japan, another advanced economy, and broadly discuss the implications for China, India and Brazil.<sup>31</sup> In the context of emerging economies, in the case of the Chinese mandatory bid rule, Xi argues that the theory of interest group politics may be extended to that country, but that it needs refinement to take into account the state regulator's private interests.<sup>32</sup>

However, what is missing in the current scholarship is an updated discussion on whether the interest group politics theory, which is developed in the context of advanced economies of the U.S. and the U.K., can be generalized in their application to their legal transplants in significant economies within Asia (in addition to Japan and China discussed in the literature).<sup>33</sup> Asia is fast becoming a significant player in the global M&A market,<sup>34</sup> and the U.S. and the U.K. have been key exporters of their mode of takeover regulation. In this, we use the case studies of our six Asian jurisdictions (Japan, Korea, China, India, Hong Kong and Singapore) to test the theory.

As outlined in Section I above, there are two puzzles in using Armour and Skeel's theory to fully account for the narrative of takeover regulation in our Asian economies. First, all of the Asian jurisdictions (except for Japan) are dominated by public companies with concentrated shareholdings, and yet most of the Asian jurisdictions adopt the UK-based board neutrality rule (India, Hong Kong and Singapore) or a weaker version thereof (China and Korea), where concentrated shareholdings are the norm. Second, there is no functional convergence in the substantive rules among the countries that have adopted the same types of processes of takeover regulation.

In reflecting upon the two puzzles, we examine the demand for, and supply of, takeover regulation. The demand comes from the interest groups, including the relevant shareholders of the publicly listed companies, corporate managers and directors; the supply side comes from the institutions responsible for the enactment of the law and regulation, such as legislature, judiciary, takeover panels (or their equivalents) and other agencies (such as self-regulatory bodies comprising market participants).<sup>35</sup>

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<sup>30</sup> Ventrizzo, *supra* note 3, at 141.

<sup>31</sup> Armour, Jacobs & Milhaupt, *supra* note 2.

<sup>32</sup> Xi, *supra* note 13.

<sup>33</sup> On a related note, given that a decade has elapsed since the publication of Armour and Skeel's seminal work, this may be an opportune moment to take stock of the broader implications of their theoretical framework to understanding takeover regulation as well as its application to countries around the world, and more specifically in Asia.

<sup>34</sup> See references in Umakanth Varottil & Wai Yee Wan, *Comparative Takeover Regulation: The Background to Connecting Asia and the West*, in UMAKANTH VAROTIL & WAI YEE WAN (EDS.), *COMPARATIVE TAKEOVER REGULATION: GLOBAL AND ASIAN PERSPECTIVES* 6-9 (2017).

<sup>35</sup> See, Armour, Jacobs & Milhaupt, *supra* note 2, at 223-24.

On the demand side, the interest group politics theory, as conceptualized by Armour and Skeel, was developed with reference to advanced economies and had dispersed shareholdings in mind. Thus, their focus is on the role that the institutional minority shareholders may (or may not have) played. They did not take into account the influence controlling shareholders, which are not as relevant in the context of the U.S. and the U.K. Yet, as demonstrated in Part III below, the influence of the controlling shareholders needs to be given adequate attention due to the predominance of these shareholders in Asia. The absence of strong minority institutional shareholders may not necessarily lead to the choice of the U.S. model. Scholars have demonstrated the influence of the controlling shareholders in the development of a separate but closely related rule in takeover regulation, that is, the mandatory bid rule. In relation to India and Singapore, each of us has separately argued that controlling shareholders (being the state or the families) are influential in the selection and application of the mandatory bid rule which may ostensibly favour minority shareholders in the U.K., but actually operates to reinforce control by the controlling shareholders in both countries.<sup>36</sup> In the case of Japan, “stable shareholders” play a significant role in maintaining incumbency within firms.<sup>37</sup> Often considered to carry a shareholding pattern similar to that of the U.S. and the U.K., scholars have predicted the rise of successful hostile takeovers in Japan.<sup>38</sup> However, their prediction has not materialized, and it would appear that there are other factors at play, particularly the presence of stable shareholders.<sup>39</sup> These stable shareholders have an important role in influencing the outcome of the takeover contests, often in favour of directors and management.<sup>40</sup>

We then focus on the supply side of rule production, that is, the role of the state and the legal institutions in takeover regulation. Armour and Skeel have argued that in the U.K. and the U.S., the U.K. Takeover Code and judicial lawmaking have respectively pre-empted the requirement for legislation. However, the relative neutral position adopted by the U.K. and the states in the U.S. (with the exception of some of the states which have put in place anti-

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<sup>36</sup> For India, see, Umakanth Varottil, *The Nature of the Market for Corporate Control in India*, in VAROTTIL & WAN, *supra* note 34, at 378. For Singapore, see, Wai Yee Wan, *Legal Transplantation of UK-Style of Takeover Regulation in Singapore*, in VAROTTIL & WAN, *supra* note 34, at 431-433.

<sup>37</sup> E.g. see Masao Nakamura, *The Security Market and the Changing Government Role in Japan*, 5 ASIAN EDUCATION AND DEVELOPMENT STUDIES 388, 397-399 (2016), and discussion in Part III(D) below. Although their presence is usually counted towards dispersed shareholding in companies, the stable shareholders enjoy financial and non-financial relationships with target firms that lead them to respond to a takeover by acting in favor of management. See, Dan W. Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware*, in VAROTTIL & WAN, *supra* note 34, at 252-53 (a longer version of this chapter is in publication in the form of Dan W. Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware*, 14 BERKELEY BUS. L.J. (forthcoming), available at <https://ssrn.com/abstract=2830286>).

<sup>38</sup> Armour, Jacobs & Milhaupt, *supra* note 2; W. CARL KESTER, JAPANESE TAKEOVERS 239 (1991); Ronald J. Gilson, *The Poison Pill in Japan: The Missing Infrastructure*, [2004] COLUM. BUS. L. REV. 21, 22; Curtis J. Milhaupt, *In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan*, 105 COLUM. L. REV. 2171, 2173-74 (2005).

<sup>39</sup> See, Puchniak & Nakahigashi, *supra* note 37, at 243-45.

<sup>40</sup> *Id.*

takeover statutes)<sup>41</sup> does not necessarily find place in many of the economies in Asia. We highlight one possibility, which is that in some economies, the state has a special interest in signaling its commitment to an open economy and the protection of investors.

Again, with reference to the closely connected literature on the mandatory bid rule, we have seen that emerging countries are also influenced by other interests. In China, Chao Xi has argued that the interest group theory should take into account private interests of the Chinese securities regulator in driving state-led acquisitions, as evidenced from the shift in approach in the transition from a planned economy, which is administratively-driven, to a market economy where the securities markets play a much more important role.<sup>42</sup> Similarly, Huang and Chen have argued that the extensive and liberal exemptions to the mandatory bid rule granted by the China Securities Regulatory Commission (CSRC) demonstrates the compromise reached: the interest of the state in encouraging takeovers but also at the same time, signals its commitment to protecting minority shareholders by ensuring they obtain the control premium.<sup>43</sup> In Korea, the mandatory bid rule, which was put in place in 1997, was repealed quickly in 1998 in light of the Asian financial crisis, in view of not only opposition from Korean entrepreneurs, but also the International Monetary Fund and International Bank for Reconstruction and Development, as such rule was seen as blocking takeover bids of financially distressed firms.<sup>44</sup>

Having considered the existing literature on comparative takeover regulation, we now explain how our study fits into and extends the same. First, our study contributes to the determinants of takeover regulation in Asia, which have, until recently<sup>45</sup> received very little attention from a broader comparative perspective. Second, our study offers a cautionary tale on the unintended consequences of legal transplantation. It is something of a truism that any choice of legal rule or reform must be sensitive to local conditions and should take account of different implementing environments. Legal concepts tend to behave differently in diverse jurisdictions and the importation of a new concept may have unintended consequences for the rest of the body of law.<sup>46</sup> Thus, we show that the adoption of one aspect of takeover

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<sup>41</sup> For evidence that the states' anti-takeover provisions do not affect firms' decision to incorporate, see Marcel Kahan, *The Demand for Corporate Law: Statutory Flexibility, Judicial Quality, or Takeover Protection?*, 22(2) JLEO 340 (2006).

<sup>42</sup> Xi, *supra* note 13.

<sup>43</sup> Robin Hui Huang & Juan Chen, *Takeover Regulation in China: Striking a Balance Between Takeover Contestability and Shareholder Protection*, in VAROTTIL & WAN, *supra* note 34, at 222-23. *See also*, Wei Cai, *The Mandatory Bid Rule in China*, 12 EBOR 653, 665-68 (2011). However, at the same time, we note that the liberal granting of exemptions by CSRC may simply reflect the fact that the mandatory bid rule is not enforced in China and that such exemptions may ultimately harm minority shareholders. As such, these exemptions may not conclusively indicate that the CSRC is protective of shareholders' interests. We are indebted to Xingxing Li for drawing our attention to the alternative interpretation of the grant of exemptions to the mandatory bid rule.

<sup>44</sup> Rho, *supra* note 10, at 293. *See also*, Hwa-Jin Kim, *The Market for Corporate Control in Korea*, in HWA-JIN KIM (ED.), *KOREAN BUSINESS LAW* (2012).

<sup>45</sup> *See*, VAROTTIL & WAN, *supra* note 34.

<sup>46</sup> *See* Berkowitz, Pistor & Richard, *supra* note 9; John Armour, Simon Deakin, Priya Lele & Mathias Siems, *How Do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor and Worker Protection*, 57 AM. J. COMP. L. 79 (2009); Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MLR 11 (1998).

regulation (being the regulation of hostile takeovers) may not actually have the effect that is intended due to the absence (or presence) of other legal institutions.<sup>47</sup> Third, our study offers some lessons relating to the “legal origins” strain of literature,<sup>48</sup> which proffers that the degree of investor rights are influenced by the legal tradition of the countries and outside interest group politics. We argue that at least in the context of takeover regulation, the legal origins hypothesis has no support given that countries do change their regulation over time.

### III. WHY REGULATION OF HOSTILE TAKEOVERS MATTERS IN ASIA

#### A. Ownership Patterns and Hostile Takeovers

An active hostile takeover market can prevail only if two key elements are present: a favourable shareholding structure<sup>49</sup> and depressed share prices relative to the asset values.<sup>50</sup> The latter is largely a function of the markets and business cycles. While the shareholding structures of companies within Asian economies are largely concentrated, we argue that having an optimal takeover regulation matters for several reasons.

First, as the literature on shareholding structures in Asia points out,<sup>51</sup> widely held companies do exist in these jurisdictions, and indeed such companies are vulnerable to hostile takeovers. In other words, it is not the overall concentration of shareholdings in a jurisdiction that matters, but the individual, granular, company-wise approach that is important. Even though shareholdings on average may be concentrated (particularly in comparison with the Anglo-American situation), individual companies may be dispersedly held, thereby exposing them

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<sup>47</sup> See generally on the role of existing legal norms in shaping subsequent legal developments Spamann, *supra* note 9. See also, William Twining, *Social Science and Diffusion of Law*, 32 JOURNAL OF LAW AND SOCIETY 203 (2005); William Twining, *Diffusion of Law: A Global Perspective*, 49 JOURNAL OF LEGAL PLURALISM 1 (2005); David Cabrelli & Mathias Siems, *Convergence, Legal Origins and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis*, 63 AM. J. COMP. L. 109 (2015).

<sup>48</sup> Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, *Legal Determinants of External Finance*, 42 J. FIN. 1131 (1997); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *Corporate Ownership Around the World*, 54 J. FIN. 471 (1999); and Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, *Investor Protection and Corporate Governance*, 58 J. FIN. ECON. 3 (2000) (attributing the scope of the capital market to the type of legal system used in a country and the level of legal protection for investors: common law countries have the strongest legal protections of investors, while civil law countries have the weakest protections).

<sup>49</sup> See Armour, Jacobs & Milhaupt, *supra* note 2, at 222.

<sup>50</sup> John C. Coffee, *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance*, 84 COLUM. L. REV. 1162 (1984), at 1163 (explaining the disciplinary hypothesis where bidder pays a premium over market price because the assets are not optimally utilised).

<sup>51</sup> The literature on shareholding structures in all of our Asian jurisdictions in the context of takeover regulation can be found in VAROTTIL & WAN, *supra* note 34. For China, *see*, Huang & Chen, *supra* note 43, at 214-16; for Japan, *see*, Puchniak & Nakahigashi, *supra* note 37, at 250; for Korea, *see*, Rho, *supra* note 10, at 281-83 (on the use of controlling minority shareholder structures among the *chaebols* or conglomerates owned by controlling family members); for India, *see*, Varotttil, *supra* note 36, at 373-77; for Hong Kong, *see*, David C. Donald, *Evolutionary Development in Hong Kong of Transplanted UK-Origin Takeover Rules*, in VAROTTIL & WAN, *supra* note 36, at 391-93; for Singapore, *see*, Wan, *supra* note 36, at 428-31.

to the specter of a hostile takeover. A regime on hostile takeovers will likely affect a non-trivial number of firms in Asia.

Second, even in the case of controlled companies, if there is more than one significant blockholder, and no single blockholder controls a majority of the voting shares, the company continues to be exposed to hostile takeovers. As shown in sub-part 2 below, the number of such companies is not insignificant in Asia.

Third, there is some evidence of gradual diffusion of shareholdings, which makes it vital to attain the optimal balance of takeover regulation before the market players' interests become too vested in a diffused shareholders' model. Despite the lack of evidence of a vibrant market for corporate control in Asia and pessimism for such a market in the future, it would be imprudent for policy-makers and regulators to assume a continuation of the status quo. They must instead maintain a state of preparedness by designing a hostile takeover regime that bears clarity and certainty.

#### *B. Widely-held Companies and Evidence of Ownership Dispersion*

When ownership is dispersed in companies, they could become vulnerable to hostile takeovers. Widely held companies are not the norm in Asia, but they do exist. In a study by Carney & Child<sup>52</sup> of the largest 200 companies in East Asian countries by market capitalization for which the ultimate ownership can be traced (and this study includes all of our Asian countries, except for India and China), as at 2008, Japan was found to have the largest number of widely held corporations (57.4%) followed by Korea (28.9%).<sup>53</sup> Singapore and Hong Kong have among the lowest number of widely held corporations at 8.4% and 6.3%.<sup>54</sup> The findings of the authors of the *Comparative Takeover Regulation* are generally consistent with Carney & Child.<sup>55</sup>

We now turn to India and China, which are not covered by Carney & Child. In the case of India, one of us has found that for companies included in the three major indices, the CNX Nifty, the CNX 100, and the CNX 500, there exist companies (albeit in the minority) in which either the controlling shareholders hold less than 25% or they have no controlling shareholders, which are thereby exposed to hostile takeovers.<sup>56</sup> This list comprises 16% of

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<sup>52</sup> Richard Carney & Travers Child, Changes to the ownership and control of East Asian corporations between 1996 and 2008: The primacy of politics, 107 J. FIN. ECON. 494 (2008).

<sup>53</sup> *Id.*, at 505 (Table 4, Panel A (at the 10% cutoff level)). In their study, widely held companies are companies which have no controlling shareholders, defined at the levels of 10% or 20% of the voting rights. The number of companies for each country, however, differs as only the companies whose ultimate ownership can be traced are in the sample. For other studies on the dispersion of shareholdings in Japan, see Puchniak & Nakahigashi, *supra* note 37, footnote 2.

<sup>54</sup> *Id.*, at 505.

<sup>55</sup> See *supra* note 51.

<sup>56</sup> Varottil, *supra* note 36, at 376. The three indices represent the top 50, top 100 and top 500 companies respectively in terms of market capitalization among those listed on the National Stock Exchange of India Limited. *Id.*

the companies in the CNX Nifty, 9% companies in the CNX 100 and 6% companies in the CNX 500.<sup>57</sup> The larger companies in the CNX Nifty are more likely to be widely held, as compared with the smaller companies. With the preliminary indications of some dispersion of shareholdings and greater participation by outside shareholders, this could render the issue of hostile bids more important.<sup>58</sup>

In the case of China, since the 2005 *Share Split Reform* [*Guquan Fenzhi Gaige*],<sup>59</sup> the level of ownership concentration, which has been predominantly held by the state, has been reduced. The average concentration of shareholding has reduced from over 40% in 2004 to 36% in 2014.<sup>60</sup> Even in China, where hostile takeovers are thought to be difficult to achieve,<sup>61</sup> the hostile battle for control of Vanke, the largest property developer in China, demonstrates the possibility of a widely held company being a target for hostile bids.<sup>62</sup> A discussion of the Vanke takeover contest is useful as it is not only the most recent high-profile case Asia, but it also demonstrates the peculiar nature of hostile takeovers in Asian jurisdictions, and also the somewhat unconventional defensive tools employed by companies to fend off raiders.

In that case, prior to 2015, Vanke was widely held, with its largest shareholder, being the state-run conglomerate, China Resources holding 17%.<sup>63</sup> The Baoneng group, a much lesser-known firm which has acquired, among others, an insurer, amassed shares in Vanke, increasing its stake to 24.4% by December 2015, surpassing the shareholding held by China Resources.<sup>64</sup> Vanke's management promptly declared the shareholdings by Baoneng to be unwelcome. Vanke began undertaking defensive measures, by calling for a trading suspension and declaring Anbang, an insurer, to be a white knight.<sup>65</sup> However, the support of Anbang (which held 7.0%) was insufficient.<sup>66</sup> During the six-month trading suspension in the Vanke stock in the first half of 2016, the company looked for a white knight, which took the form of Shenzhen Metro, a property conglomerate.<sup>67</sup> Vanke proposed to issue shares to Shenzhen Metro, in exchange for the injection of its assets, so as make Shenzhen Metro its largest shareholder, thereby massively diluting Baoneng and China Resources.<sup>68</sup>

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*, at 377.

<sup>59</sup> Huang & Chen, *supra* note 43, at 215; Robin Huang Robin Huang & Juan Chen, *The Rise of Hostile Takeovers and Defensive Measures in China: Comparative and Empirical Perspectives*, EUROPEAN BUSINESS ORGANIZATION LAW REVIEW (forthcoming) (copy on file with the authors), .

<sup>60</sup> Table 1, Robin Huang & Juan Chen, *The Rise of Hostile Takeovers and Defensive Measures in China: Comparative and Empirical Perspectives*, *id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* See also, The five things you need to know about the battle of Vanke, SCMP (Jan. 16 2017) (hereinafter "The five things").

<sup>63</sup> Tom Mitchell & Ben Bland, *Vanke's tussle points to China's first hostile takeover battle*, FINANCIAL TIMES (Dec. 28 2015) .

<sup>64</sup> *Id.* (table showing Vanke's largest shareholders as at Dec. 18, 2015 wherein China Resource's shareholding was at 17.3%).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *The five things*, *supra* note 62.

<sup>68</sup> *Id.*

Unsurprisingly, both Baoneng and China Resources opposed the transaction and Vanke ultimately withdraw its plans in the face of such shareholder opposition.<sup>69</sup> In the meantime, in June 2016, Baoneng openly demanded the removal of the founder-director and other board members of Vanke, arguing, among other things, that the founder was over-compensated.<sup>70</sup>

When the suspension on the trading of Vanke shares was lifted, Baoneng raised its stake to 25%.<sup>71</sup> In August 2016, a new player, Evergrande Group joined in the potential takeover fray, when it purchased a 4.7% stake in Vanke, which increased to 14.1% in November 2016.<sup>72</sup> Ultimately, the Chinese securities regulator stepped in and criticized the acquirers who make highly leveraged takeovers.<sup>73</sup> In December 2016 and January 2017, Evergrande and Baoneng respectively declared that each of them had no intention of taking over Vanke.<sup>74</sup> In March 2017, Evergrande Group transferred the voting rights in Vanke to Shenzhen Metro for a year<sup>75</sup> and in June 2017, ultimately sold its shareholdings to Shenzhen Metro.<sup>76</sup> Those holdings of voting rights, together with the sale of the shareholdings by China Resources to Shenzhen Metro and other acquisitions, meant that Shenzhen Metro held 29.4% of Vanke, surpassing Baoneng's shareholding.<sup>77</sup>

While the takeover had ended with regulatory intervention and without either Baoneng or Evergrande succeeding, the case illustrates how a widely held company was vulnerable to takeovers. The company did not have any embedded takeover defenses in its constitution, and the only available defence was that of a white knight.<sup>78</sup> Ultimately, it is the unorthodox tools such as trading suspension,<sup>79</sup> intervention by the Chinese regulators, and the assumption of control by a Chinese state-owned enterprise that helped the target stave off a hostile acquirer. These are entirely incongruent with the classic scenarios played out in hostile takeovers in the U.S. and the U.K.

### *C. Presence of More than One Significant Shareholder*

Majority-controlled companies and dispersedly held companies are not the only forms of companies. Other intermediate forms of shareholding exist as well. If there is more than one

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<sup>69</sup> *China Vanke drops white knight rail deal*, FINANCIAL TIMES (Dec. 19, 2016).

<sup>70</sup> *Id.*

<sup>71</sup> *The five things*, *supra* note 62.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Vanke's year at war, SCMP (Dec. 24, 2016); *Vanke sues over 'invalid' Baoneng stake*, SCMP (Feb. 8, 2017).

<sup>75</sup> Shenzhen Metro set to become Vanke's largest shareholder, SCMP (June 7, 2017).

<sup>76</sup> Shenzhen Metro to become biggest China Vanke shareholder as Evergrande cashes out, SCMP (Jun. 9, 2017).

<sup>77</sup> Shenzhen Metro to raise stake in China Vanke to nearly 30% with \$4bn share purchase from Evergrande, FINANCIAL TIMES (Jun. 12, 2017).

<sup>78</sup> Huang & Chen, *supra*, note 60.

<sup>79</sup> See, Xingxing Li, Institutional Activism and China's Under-enforced Corporate Governance Doctrines: Reflection on China's Takeover Regulation in the Aftermath of the Failed Baoneng/Vanke Takeover (draft paper on file with the authors).

significant shareholder and no single shareholder controls a majority of the voting shares in a company, the presence of more than one blockholder will make it difficult for any single blockholder to control the board.

There is evidence that such companies exist in almost all of our Asian jurisdictions. In India, based on the companies included in the three major indices,<sup>80</sup> there are a number of companies where the controlling shareholders hold less than a majority of shares, but outside shareholders or groups of shareholders hold at least 15% shares in the aggregate, with each individual shareholder or group holding at least 5%.<sup>81</sup> They constitute 12% companies in the CNX Nifty, 15% companies in the CNX 100 (15%) and 27% companies in the CNX 500 (27%).<sup>82</sup> Despite the presence of controlling shareholders, such companies may be exposed to unwelcome acquirers.

In Singapore, the data from Carney & Child show that, as of 2008, 75.9% of the listed companies in Singapore have the presence of a single ultimate owner.<sup>83</sup> There still remains a significant proportion of companies with no single ultimate owner, for which an acquirer may still be able to succeed in a takeover offer that is opposed by some large shareholders. Thus, the board neutrality rule will limit the potential for these large shareholders to procure the board to prevent bona fide bids from succeeding; this fills a regulatory gap by benefitting non-controlling shareholders, even among companies are not regarded as widely held.

#### *D. Ownership and Control in the Future*

As we have seen, hostile takeovers are a distinct possibility in Asia if the shareholding changes continue to move in the direction of greater dispersion. Although Hong Kong and Singapore are exceptions in that they demonstrate greater concentration,<sup>84</sup> China and India have shown evidence of greater shareholder dispersion in recent years.<sup>85</sup> It would be critical to put in place an optimal takeover regulatory framework *before* shareholdings become more widely dispersed and where the controllers begin to exercise their vested interests in retaining control. It is precisely because the number of companies that are subject to hostile bids is small that regulators can have more leeway in determining the appropriate legal framework. A U.K.-based board neutrality rule or a rule that limits takeover defences will be difficult to

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<sup>80</sup> See *supra* note 56.

<sup>81</sup> Varottil, *supra* note 36, at 377.

<sup>82</sup> *Id.*

<sup>83</sup> Carney & Child, *supra* note 52, at 508 (Table 8). Following Stijn Claessens, Simeon Djankov & Larry H.P. Lang, *The separation of ownership and control in East Asian Corporations*, 58 J. FIN. ECON. 81, 93 (2000), companies with single ultimate owners are defined as companies where (a) there is a single owner who has majority control or (b) there is a single owner holding at least 10% of the voting rights and there is no second shareholder holding at least 10%. In the case of (b), if there is a second shareholder that holds at least 10%, it may be more difficult for the first owner to control the board.

<sup>84</sup> For Hong Kong, see, Donald, *supra* note 51, at 392; for Singapore, see, Wan, *supra* note 36, at 431-433.

<sup>85</sup> For China, see, Huang & Chen, *supra* note 59, Figures 1 and 2; for India, see, Varottil, *supra* note 36, at 375-76. At the same time, it is necessary to note that the available empirical evidence is not conclusive, nor does it suggest an irreversible trend that ownership will continue to become dispersed over time.



be put in place once a large number of companies are potentially subject to hostile bids and the insiders view the rule as a threat to their continued survival. The concern is not trivial. Huang and Chen report that after the attempted hostile attempt by Baoneng to acquire Vanke, up to 20 companies have put in place anti-takeover provisions in their constitutions by August 2016 to repel future hostile acquirers.<sup>86</sup> Although it would be difficult to generalize in the broader Asian context, the threat could be real for a handful of companies that are exposed to hostile takeovers, however small that number may be.

Other factors too play a role in determining the future of hostile takeovers and their regulation in Asia. Japan represents a unique case and serves as an illustration on the political force of labour and why timing may matter. Puchniak and Nakahigashi have demonstrated that labour is a powerful political force and employee protection (not least in the form of the life-time employment phenomenon that marks the Japanese corporate landscape) has been an important force that influences the stable shareholders to be in their side.<sup>87</sup> Thus, even for the rest of Asia, if hostile takeovers are seen as precursors for widespread layoff, it may be difficult for the regulators to implement a board neutrality rule that enables a free market for corporate control. While it can be argued that the protection of stakeholders, including employees, can be analytically separate from the regulation of hostile bids, Japan has shown that both facets of the policy are perceived politically as closely linked together. In that sense, elements of corporate culture have an important role to play in the design and implementation of takeover regulation.<sup>88</sup>

Having considered the shareholding structures in Asia and debated the possibility of hostile takeovers in the region, we now analyze the evolution of takeover regulation in our six Asian jurisdictions by examining various factors, including interest group dynamics, which have been responsible for giving shape to the regulation. This will enable us to analyze the broader trends in Asian takeover regulation.

#### IV. EVOLUTION AND DESIGN OF HOSTILE TAKEOVER REGIMES IN ASIA

In this Part, we analyze the broad contours of takeover regulation in our Asian jurisdictions to identify any patterns. In doing so, we also adopt the approach of Armour and Skeel in ascertaining the rule making process in each of the jurisdictions as a means to help explain the substantive regulatory outcomes.<sup>89</sup> Such an analysis will also illuminate our understanding of the political economy of takeover regulation in those jurisdictions by studying the influence of various interest groups.

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<sup>86</sup> Huang & Chen, *supra* note 59, at 9, citing Stock C (2016) 反收购防卫过当 监管层忙喊停 (Fanshougou Fangwei Guodang Jianguanceng Mang Hanting, Regulator Calls off on Excessive Use of Takeover Defenses), available at <http://company.cnstock.com/company/scpdsy/tcsyrdgs/201608/3887377.htm>.

<sup>87</sup> Puchniak & Nakahigashi, *supra* note 37, at 274-77.

<sup>88</sup> For the role of culture in takeover regulation in specific Asian jurisdictions, *see*, Huang & Cheng, *supra* note 43, at 225 (for China); Puchniak & Nakahigashi, *supra* note 37, at 274-77.

<sup>89</sup> *See also*, Ventrone, *supra* note 3, at 136.

Interestingly, the legal transplants from the Anglo-American jurisdictions into Asia have followed a discernible pattern. Our civil law jurisdictions in Asia, viz., China, Japan and Korea, have adopted their regulations governing hostile takeovers either solely from the U.S. (Delaware) or through a combination of the U.S. and the U.K. modes of regulation (with greater emphasis on the U.S. approach).<sup>90</sup> This not only includes granting freedom to the target boards to devise defensive mechanisms, at least to some extent, but it also relies heavily on the courts to monitor management conduct. On the other hand, our common law jurisdictions, viz. India, Hong Kong and Singapore, have largely embraced the strict board neutrality rule that is characteristic of the U.K. approach, which leaves the target's board powerless in the wake of a hostile takeover offer, and instead confers the sole decision-making power upon the shareholders. Moreover, these jurisdictions drastically limit the role of the courts in resolving takeover disputes, and instead rely upon a takeover panel or the securities regulator to perform that role.<sup>91</sup>

A study of the nature of regulation as well as the evolution of the takeover regimes in each of our jurisdictions will help explain the factors that led to these patterns and provide indications regarding the outcome of takeover regulation and the path that is likely to be taken in the future. We begin with our civil law jurisdictions, and then deal with the common law jurisdictions.

#### *A. The Adoption of Hybrid Regulatory Mechanisms into Civil Law Asia*

Our civil law Asian jurisdictions have substantially looked to the U.S. (Delaware) to draw inspiration for devising methods to deal with hostile takeovers. While there are some indications of cross-referencing to the U.K., they are indeed minimal. As a result, the incumbents (i.e., managers and controlling shareholders) are equipped with powers to overcome unwelcome raids on their companies. In these regimes, the incumbents have not simply relied on concentrated shareholdings or, in the case of Japan, the support of stable shareholders, but instead have preferred to incorporate explicit defensive mechanisms as well as board freedom (in some cases, subject to concurrence of shareholders) to respond to hostile offers.<sup>92</sup> However, as we argue in this Part, our civil law jurisdictions have extracted

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<sup>90</sup> Somewhat similar trends have been found in relation to shareholder derivative actions. *See*, Dan W. Puchniak, *The Derivative Action in Asia: A Complex Reality*, 9 BERKELEY BUS. L.J. 1 (2013).

<sup>91</sup> Here, we seek to clarify that the civil law – common law dichotomy plays out somewhat differently in the context of takeovers. Although some countries in Asia are generally categorized to be under the civil law system and others under the common law heritage, the manner in which takeover laws are developed and implemented in these jurisdictions is somewhat ambiguous. For example, all jurisdictions in Asia (regardless of the lineage of their legal system) seem to have drawn heavily from the U.S. and the U.K., both of which are categorized as common law jurisdictions for purposes of corporate law. *See*, La Porta, *et. al.*, *Law and Finance*, *supra* note 48, at 1130. Hence, although we have made the civil law – common law distinction while discussing our jurisdictions in this Part, we draw readers' attention to the fact that the division might amount to one that is more of convenience rather than strict principle.

<sup>92</sup> This Part explores in detail the extent of power given to target's boards, and how they are, in certain cases, circumscribed by the need to adhere to the will of the shareholders.

their regulatory principles and mechanisms from the Anglo-American viewpoint only at a formal level, and that there has not been any form of convergence from a functional perspective. This is a result of the interplay of various dominant influences, not least from the controlling shareholders and managers. In developing our arguments further, we explore some key features of takeover regulation in China, Japan and Korea, examine the manner in which they are enforced and then comment on their impact on interest groups, primarily controlling shareholders and managers.

### *1. Limited Applicability of the Board Neutrality Rule*

As we have seen,<sup>93</sup> the board neutrality rule is the staple ingredient in the regulation of hostile takeovers in the U.K., while it is absent in the U.S. Among our civil law jurisdictions in Asia, only China has imposed a form of board neutrality rule.<sup>94</sup> Although there are some superficial similarities with the U.K. position, there are significant differences. For example, it has been noted that a board's defensive measure is proscribed only if it results in any significant effect on the assets, liabilities, entitlements or business performances of the company.<sup>95</sup> Moreover, it only applies in scenarios where a takeover offer has been announced.<sup>96</sup> The limited application of the rule provides greater leeway to the boards of Chinese companies to respond to preserve their position in the wake (or in anticipation) of a hostile takeover attempt. The Chinese board neutrality rule is far more circumscribed compared to its U.K. equivalent,<sup>97</sup> and such a selective adaptation will benefit state-owned enterprises and local Chinese interests.<sup>98</sup> If China has incorporated a limited version of the board neutrality rule, Japan and Korea have no such explicit rule.<sup>99</sup> In that sense, target boards in all of these three jurisdictions are not bound to pass on to the shareholders all the decision-making power in

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<sup>93</sup> *Supra* Part IIA.

<sup>94</sup> Shangshi Gongsi Shougou Guanli Banfa [Measures for Regulating Takeovers of Listed Companies (2006 Takeover Measures)] (promulgated by the China Securities Regulatory Commission on 31 July 2006 and effective from 1 September 2006, amended in 2008, 2012 and 2014), art. 33. Some have argued that this is due to Chinese takeover regime's historical links with the U.K. Takeover Code through Hong Kong, as several members of the drafting committee of the regulations looked to Hong Kong for inspiration. *See*, Wei, *supra* note 43, at 654-55 (2011). This is also due to Hong Kong's proximity to mainland China and the Chinese regulators' desire for Chinese companies to list in Hong Kong, due to which Hong Kong's takeover regime became a natural example to follow. *See*, Guanghua Yu, *Does One Size Fit All? Transplanting English Takeover Law into China*, in CHERYL R. LEHMAN, ET. AL (EDS.), CORPORATE GOVERNANCE: DOES ANY SIZE FIT? 49 (2005)

<sup>95</sup> Huang & Chen, *supra* note 43, at 228.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*, at 233. The U.K. rule imposes a blanket ban on frustrating actions of target boards when a takeover offer is in the vicinity.

<sup>98</sup> JUAN CHEN, REGULATING THE TAKEOVER OF CHINESE LISTED COMPANIES: DIVERGENCE FROM THE WEST 26 (2014).

<sup>99</sup> For Japan, *see*, ENRICO COLCERA, THE MARKET FOR CORPORATE CONTROL IN JAPAN: M&AS, HOSTILE TAKEOVERS AND REGULATORY FRAMEWORK 215, 233 (2007) (noting that the law has not opted for a board neutrality rule). For Korea, *see*, Rho, *supra* note 10, at 305 (indicating that some scholars have in fact argued for the introduction of a board neutrality rule similar to that of the U.K.). At the same time, courts in Japan have deferred to the ability of boards to intervene in takeover offers only in scenarios where shareholders have approved the action, thereby indicating the existence of a functional equivalent of the board neutrality rule, albeit imposed by court rulings. *See infra* Part IVA2.

the wake of a hostile takeover, but can exercise some amount of leeway to affect the outcome.

## 2. *Fiduciary Duties of Directors as the Main Prong*

In all of our civil law jurisdictions in Asia, the conduct of the target's board is judged against the duties of directors, which play a major part in the regulation of hostile takeovers. Courts and regulatory authorities have sought to establish standards against which the board's actions can be measured. This is similar to the approach adopted in Delaware.<sup>100</sup> Although this aspect of civil law Asia bears a close comparison with Delaware law, we find that not only are there significant differences between the two systems, but target's management and controlling shareholders in civil law Asia are arguably subject to less stringent regulation, thereby hindering successful hostile takeovers.

Chinese law requires the target's board to take decisions in the interests of the company and its shareholders.<sup>101</sup> However, this is seemingly drafted in general terms and has caused a great deal of uncertainty, which has kept open the question of legitimacy of several takeover defences.<sup>102</sup> As we subsequently discuss, such a duty has not received much exposition from the courts or regulatory authorities, which has added to the uncertainty, thereby benefiting the incumbents such as controlling shareholders rather than the acquirers.

Among our jurisdictions, the assessment of target responses to hostile takeovers using directors' duties has received the greatest amount of traction in Japan. Historically, when targets responded to hostile takeovers by issuing shares to friendly stable shareholders, the action was challenged before the Japanese courts, which developed the "primary purpose" rule.<sup>103</sup> Under this doctrine, courts treat a share issuance to be valid if it was effected to raise capital rather than to maintain control.<sup>104</sup> Puchniak and Nakahigashi argue that this is very different from the "proper purpose" duty imposed under English law,<sup>105</sup> and that it set a very low bar for directors in Japanese companies.<sup>106</sup>

This duty has been the subject matter of frenetic developments before both the courts and the regulators. In the much-discussed *Livedoor* case,<sup>107</sup> the Tokyo High Court sought to explicitly

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<sup>100</sup> Jack B. Jacobs, Implementing Japan's New Anti-Takeover Defense Guidelines—Part 1: Some Lessons from Delaware's Experience in Crafting Fair Takeover Rules, 2 N.Y.U. J. L. & BUS. 323, 327 (2006); Kang, *supra* note 10, at 627-32.

<sup>101</sup> 2014 Takeover Measures, art. 8.

<sup>102</sup> Huang & Chen, *supra* note 43, at 227.

<sup>103</sup> Puchniak & Nakahigashi, *supra* note 37, at 263-64.

<sup>104</sup> *Id.*

<sup>105</sup> The proper purpose rule has been expounded by the English courts in *Hogg v. Cramphorn* [1967] Ch 254; *Howard Smith Ltd. v. Ampol Petroleum Ltd.* [1974] AC 821; *Eclairs Group Ltd v. JKN Oil & Gas plc* [2015] Bus LR 1395.

<sup>106</sup> Puchniak & Nakahigashi, *supra* note 37, at 264-65.

<sup>107</sup> See, Hiroshi Oda, *Case No. 30 – Corporate Law*, in MORITZ BÄLZ ET AL. EDS., BUSINESS LAW IN JAPAN – CASES AND COMMENTS (2012) 327, at 329.

recognize four circumstances where any issuance of shares or warrants by the target's board in the event of a hostile takeover can be made for the "primary purpose" of maintaining control.<sup>108</sup> Following this, the Japanese government issued a set of informal (non-binding) Takeover Guidelines, which provided for pre-bid takeover defences that target boards were allowed to establish.<sup>109</sup> This led to several companies issuing "pre-warning rights plans" (PRPs) as a defensive mechanism against hostile takeovers.<sup>110</sup> The PRPs are not akin to poison pills as developed in the U.S. because, among other reasons, they can be activated only with the approval of the shareholders.<sup>111</sup> Defensive measures such as PRPs have also been litigated before the Japanese courts.<sup>112</sup> Despite the elaborate treatment meted out by the Japanese courts to takeover defences, several questions remain unanswered and "the events in the decade following *Livedoor* show that Japan has defied predictions that it would become something akin to Delaware."<sup>113</sup> The lingering uncertainty in the hostile takeover regime in Japan could benefit incumbents and chill the market for corporate control.

Similarly, Korea has developed the "proper business purpose" test to enable target boards in case of a hostile takeover to issue shares in a manner that overcomes the statutory preemptive rights of shareholders.<sup>114</sup> In a somewhat restrictive interpretation, the Korean Supreme Court found that defending against a hostile takeover would not be considered "proper business purpose".<sup>115</sup> While this might appear to go against the comparative freedom granted to Chinese and Japanese boards to defend themselves, managements and controlling shareholders of Korean companies have come up with a unique solution to extricate themselves from the risks of hostile takeovers; and that is through the sale of treasury shares to friendly parties to protect against raiders.<sup>116</sup> Initially, the Korean courts issued contrasting

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<sup>108</sup> Puchniak & Nakahigashi, *supra* note 37, at 268. The circumstances include where the target is faced with a greenmail, asset stripping, and the like.

<sup>109</sup> Ministry of Economy, Trade and Industry and the Ministry of Justice, Guidelines Regarding Takeover Defense for the Purposes of Protection and Enhancement of Corporate Value and Shareholders' Common Interests 5-6 (May 27, 2005). See also, Curtis J. Milhaupt, *Bull-Dog Sauce for the Japanese Soul? Courts, Corporations, and Communities—A Comment on Haley's View of Japanese Law*, 8 WASH. U. GLOBAL STUD. L. REV. 345, 351 (2009).

<sup>110</sup> Puchniak & Nakahigashi, *supra* note 37, at 270.

<sup>111</sup> *Id.*

<sup>112</sup> Cases such as *Nireco*, Tōkyō Chihō Saibansho [Tokyo District Court], 1 June 2005, 1186 Hanrei TAIMUZU 274; Tōkyō Chihō Saibansho [Tokyo District Court], 9 June 2005, 1186 Hanrei TAIMUZU 265; Tōkyō Kōtō Saibansho [Tokyo High Court], 15 June 2005, 1186 Hanrei TAIMUZU 254 (*Nireco*), and the *Bulldog Sauce*, Saikō Saibansho [Supreme Court], 7 August 2007, 61 Minshū 2215; 1252 Hanrei TAIMUZU 125 (*Bulldog Sauce*); Oda, 'Case No. 30', *supra* note 107, at 323-330, have received extensive commentary. Puchniak & Nakahigashi, *supra* note 37, at 271-73; Milhaupt, *Bull-Dog Sauce for the Japanese Soul?*, *supra* note 109; Milhaupt, *In the Shadow of Delaware?*, *supra* note 38, at 2178-80; Armour, Jacobs & Milhaupt, *supra* note 2, at 25-51.

<sup>113</sup> Puchniak & Nakahigashi, *supra* note 37, at 273.

<sup>114</sup> Korea Commercial Code, § 418. See also, Rho, *supra* note 10, at 300-01.

<sup>115</sup> Rho, *supra* note 10, at 300, referring to 2008Da50776, 30 January 2009 (Korea Supreme Court).

<sup>116</sup> Korea Commercial Code required all shares acquired by an issuer to be cancelled or disposed off shortly thereafter. However, by way of reforms introduced in 2011, companies are permitted to keep alive shares that they have acquired, so long as they do not carry voting rights during the period such shares are held by the company. Rho, *supra* note 10, at 283. Treasury shares are an elegant takeover defense mechanism as the pool of stock is available to management such that they can sell it to friendly holders when a takeover offer is launched, thereby reinstating the voting rights associated with those shares and diluting the unwelcome acquirer. See, Sang

rulings on the validity of treasury shares as a takeover defense. One approach found that the issue of treasury shares was invalid unless there was a proper business purpose,<sup>117</sup> while the other broader interpretation treated treasury shares to be different from the issue of new shares and conferred full discretion upon the target's board to decide when and to whom treasury shares may be issued (thereby deferring to the business judgment of the directors).<sup>118</sup> Since then, the Korean courts have begun adopting the permissive approach, which has become the prevalent norm.<sup>119</sup> Although a more recent phenomenon, Korean boards are able to unleash their cache of treasury stock to disarm hostile acquirers.<sup>120</sup>

It is clear that the development of fiduciary duties in the takeover context in all of our civil law Asian jurisdictions have conferred sufficient leeway to the target's boards and controlling shareholders to stave off a hostile takeover. While comparisons can be made to Delaware law at one level, the takeover regimes in civil law Asia have proceeded on a different trajectory, although there is considerable diversity within each of those regimes.

### 3. Oversight and Monitoring by Courts

Given the reliance on fiduciary duties of directors as a tool to regulate board conduct during hostile takeovers, it is imperative that appropriate oversight and monitoring mechanisms are in place to effectively implement the takeover regime. Such mechanisms could include an independent board, a robust court system and developed capital markets.<sup>121</sup> Similar to Delaware, all our three civil law jurisdictions in Asia have placed substantial reliance upon the courts to enforce the takeover measures.<sup>122</sup> The similarity ends there. Unlike Delaware, which “has taken thirty years for [its] takeover jurisprudence to evolve to its present state”,<sup>123</sup> the courts in civil law Asia do not possess the required expertise and sophistication to resolve disputes pertaining to complex takeover transactions.

In China, neither the courts nor the administrative regulators have had the occasion to enforce fiduciary duties in takeover situations.<sup>124</sup> Apart from the fact that the dearth of hostile

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Gon Kim, *South Korea: Treasury Shares as a Defence Mechanism Against Hostile Takeovers*, MONDAQ (Jan. 23, 2017), available at <http://www.mondaq.com/x/53152/M+A+Private%20equity/Treasury+Shares+As+A+Defence+Mechanism+Against+Hostile+Takeovers>.

<sup>117</sup> Rho, *supra* note 10, at 301-02 (referring to the *Daelim* case, 2005Gahap8262 (Jun. 29, 2006, Seoul Western District Court)).

<sup>118</sup> *Id.*, at 302 (referring to the *Sovereign* case, 2003 Kahap4145 (Dec. 23, 2003, Seoul Central District Court)).

<sup>119</sup> *Id.*, at 302-03. In a well-known decision involving the Samsung C&T merger case, the Seoul Higher Court allowed broad discretion of the board in selling treasury shares of Samsung C&T, 2015La20503 (Jul. 16, 2015).

<sup>120</sup> Kim, *supra* note 44, at 240.

<sup>121</sup> Gilson, *supra* note 38, at 39; Kang, *supra* note 10, at 662.

<sup>122</sup> None of these legal systems place much reliance on independent directors to regulate hostile takeovers. For example, as to Japan, *see*, Gilson, *supra* note 38, at 41.

<sup>123</sup> Jacobs, *supra* note 100, at 350.

<sup>124</sup> Huang & Chen, *supra* note 43, at 227; CHEN, *supra* note 98, at 149. *See also*, Li, *supra* note 79.

takeovers has resulted in this situation, it has also been attributed to the lack of qualified judges,<sup>125</sup> and an adequate body of precedents.<sup>126</sup> Moreover, a culture of shareholders bringing private actions to enforce fiduciary duties of boards, let alone succeed in them, is absent in the Chinese context.<sup>127</sup>

Similarly, in Japan, the task of regulating takeovers has been thrust on the court system, inspired largely by Delaware.<sup>128</sup> It has been noted that “it would be a serious mistake to underestimate the weight of that burden”.<sup>129</sup> Despite having created a relatively robust body of case law (in comparison with China and Korea), the takeover jurisprudence developed by the courts “leaves important questions unanswered”.<sup>130</sup> The experience from Korea is no different. It does not have specialized courts to deal with complex takeover disputes, and it would be difficult to build up adequate expertise among the judges.<sup>131</sup> Moreover, the practice of the Korean courts is to allow ample wiggle room to directors facing hostile takeovers.<sup>132</sup>

Clearly, all of our civil law jurisdictions have gravitated towards Delaware by relying on its law and practice, whereby courts are a bulwark of takeover regulation. But, the application of legal principles and practice into the Asian jurisdictions has demonstrated varying results. China, Japan and Korea have witnessed very few cases in the takeover arena (arguably due to the low incidence of hostile takeovers), due to which the doctrine in the area has not been enriched. Moreover, courts in civil law Asia suffer from insufficient capabilities and resources, and they have failed to develop the requisite legal tradition and institutional capacity.<sup>133</sup> Thus, in the absence of a robust court system, which is the primary driver for regulating target board’s conduct in case of a hostile takeover in civil law Asia, it would be imprudent to expect the expansion of a market for corporate control. Such a situation allows incumbents such as controlling shareholders and managers to entrench their positions further.

#### *4. Effect of Transplanting Delaware Law*

It is clear that China, Japan and Korea have adopted the Delaware model (and, to a limited extent, U.K. takeover jurisprudence) in order to keep up with global standards.<sup>134</sup> As a result,

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<sup>125</sup> Hui Huang, *China's Takeover Law: A Comparative Analysis and Proposals For Reform*, 30 DEL. J. CORP. L. 145, 185 (2005).

<sup>126</sup> CHEN, *supra* note 98, at 138.

<sup>127</sup> *Id.*, at 18. Although China has had a good number of cases brought by shareholders against directors by way of derivative action, and that too with a high success rate, very few such cases have been initiated in the context of hostile takeovers. See Hui Huang, *Shareholder Derivative Litigation in China: Empirical Findings and Comparative Analysis*, 27 BANKING AND FINANCE LAW REVIEW 619 (2012).

<sup>128</sup> Milhaupt, *Bull-Dog Sauce for the Japanese Soul?*, *supra* note 109, at 356.

<sup>129</sup> Gilson, *supra* note 38, at 42.

<sup>130</sup> Puchniak & Nakahigashi, *supra* note 37, at 263.

<sup>131</sup> Choi, *supra* note 10, at 25. *See also*, Kang, *supra* note 10, at 624.

<sup>132</sup> Rho, *supra* note 10, at 305.

<sup>133</sup> *See*, CHEN, *supra* note 98, at 27 (in the context of China).

<sup>134</sup> Milhaupt, *In the Shadow of Delaware?*, *supra* note 38, at 2204. In the case of Japan, however, there is some level of disagreement as some argue that Japan has developed its own unique model that is most appropriate for its own circumstances. *See*, Puchniak & Nakahigashi, *supra* note 37, at 244.

they have paid short shrift to home-grown mechanisms of takeover regulation.<sup>135</sup> However, any convergence with the Delaware model can only be said to be formal, and it is not substantial or functional. The application of Delaware law is bound to be inefficient unless local factors, socio-economic institutions and cultural implications are accounted for.<sup>136</sup> In order to enable a market for control, it is not sufficient to introduce changes in the substantive law.<sup>137</sup> There is a need to build an entire ecosystem that supports legislative or regulatory changes so as to achieve the desired results. The somewhat inchoate transplantation of Delaware law into our Asian civil law jurisdictions falls substantially short of that.

### 5. *The Role of Interest Groups*

In this context, it is worthwhile to consider the interplay of various interests that led to the hybrid situation in our civil law jurisdictions. Although the role of interest groups varies according to each jurisdiction, a confluence of various factors has been at play that ultimately resulted in a rather incumbent-friendly takeover regime. Two examples are worth discussing.

First, in Japan, following the *Livedoor* saga,<sup>138</sup> the Ministry of Economy, Trade and Industry (METI) established a Corporate Value Study Group that was the precursor to the Takeover Guidelines.<sup>139</sup> The Working Group not only embraced Delaware doctrine on the ability of target companies to respond to hostile takeovers,<sup>140</sup> but it also explicitly rejected the U.K.-based board neutrality rule.<sup>141</sup> Apart from the conceptual slant of the Working Group towards the Delaware approach from a substantive perspective, its findings were largely driven by the fact that a substantial membership of the Working Group consisted of individual trained in the U.S., with lesser experience of U.K. law.<sup>142</sup> Moreover, the influence of incumbents is demonstrated, albeit less starkly, as one scholar notes that “importantly for METI and the business constituency to which it responds, Delaware takeover jurisprudence is more protective of management than the [U.K. Takeover] Code”.<sup>143</sup> The domestic business interests have been vocal in asserting their opposition to hostile takeovers, as “Keidanren (a powerful Japanese business lobby) called for developing defensive measures to prevent “foreign predators” from taking control in Japan”. The end result is a regime that is flexible enough to suit the interests of various Japanese actors.<sup>144</sup>

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<sup>135</sup> Milhaupt, *In the Shadow of Delaware?*, *supra* note 38, at 2204.

<sup>136</sup> *Id.*, at 251. See also, Cristina Alger, *The Livedoor Looking Glass: Examining the Limits of Hostile Takeover Bids in Japan*, 3 N.Y.U. J.L. & BUS. 309, 317 (2006).

<sup>137</sup> *Id.*

<sup>138</sup> See, text accompanying *supra* note 107.

<sup>139</sup> See, *supra* note 109. See also, Milhaupt, *In the Shadow of Delaware?*, *supra* note 38, at 2195-97.

<sup>140</sup> Joseph Lee, *Critical exposition of Japanese takeover law in an international context* (Working Paper, 2015), available at <https://ssrn.com/abstract=2733229>.

<sup>141</sup> Jacobs, *supra* note 100, at 325.

<sup>142</sup> Alger, *supra* note 136, at 325.

<sup>143</sup> Milhaupt, *Bull-Dog Sauce for the Japanese Soul?*, *supra* note 109, at 358.

<sup>144</sup> Milhaupt, *In the Shadow of Delaware?*, *supra* note 38, at 2211.



The second example relates to Korea wherein corporate boards have comparatively limited flexibility to outmaneuver hostile acquirers. The Korean business community has lobbied with the government to enable companies to adopt additional takeover defenses, including the U.S.-style poison pills.<sup>145</sup> However, this move did not fructify due to the concern that it may seek to benefit the incumbent business elites.<sup>146</sup> Nevertheless, due to the circular and pyramid shareholdings as well as wide discretion granted to target boards, hostile takeovers have failed to gain momentum.<sup>147</sup> In any event, as discussed earlier, the use of treasury shares has more recently come to occupy a prominent defensive mechanism that could arguably obviate the need for a poison pill.<sup>148</sup>

In all, there is some evidence of local business elites within our civil law jurisdictions in Asia expressing their concern over the possibility of hostile takeovers. Since hostile takeovers could have a broader impact on the economy (e.g., through layoff of employees), particularly when the acquirer is a foreign entity,<sup>149</sup> governments cannot but afford to have regard to the incumbents in designing the scope and content of takeover regulation.<sup>150</sup>

### *B. Transplant of the U.K. Model into Common Law Asia*

Moving to our common law jurisdictions, viz., India, Hong Kong and Singapore, anecdotal evidence indicates that they have been subject to fewer hostile takeovers compared to our civil law jurisdictions. Their takeover regimes have closely followed that of the U.K. model, of which the board neutrality rule is the centerpiece. There is a great deal of homogeneity in the manner in which the three common law jurisdictions in Asia deal with hostile takeovers.

Target boards in these jurisdictions are powerless in that they do not have access to a wide array of takeover defenses, as they must simply submit to the decisions of the shareholders, who possess primary decision-making powers regarding the outcome of a takeover, including a hostile one. Moreover, unlike our civil law jurisdictions,<sup>151</sup> the resolution of takeover disputes takes place outside the court system, through the intervention of a takeover panel or the securities regulator. Although one might expect such a regulatory set up that immobilizes target boards to facilitate a market for corporate control, we are yet to witness a healthy flow of hostile takeovers. Among other factors, this is largely because the U.K. model, which was

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<sup>145</sup> Rho, *supra* note 10, at 305.

<sup>146</sup> *Id.* See also, Kim, *supra* note 44, at 254.

<sup>147</sup> Rho, *supra* note 10, at 305.

<sup>148</sup> See text accompanying *supra* notes 116 to 120.

<sup>149</sup> Another tool that is often used to address this concern is a national security review of takeovers by foreign acquirers, particularly in sensitive industries. See, Andreas Heinemann, *Government Control of Cross-Border M&A: Legitimate Regulation or Protectionism?*, 15 J. INT'L ECON. L. 843 (2012).

<sup>150</sup> Kang, *supra* note 10, at 639.

<sup>151</sup> It is noteworthy, however, that China's regulator, the China Securities Regulatory Commission has established a special internal committee comprised of professionals and experts in the field of takeovers to provide opinions to the Commission on specific matters. However, this body's role is different from that of the Takeover Panel in the U.K. (as also in Hong Kong and Singapore) in that it is not an independent body (as it is established as part of the regulator) and has no power to make a final decision. See, Hui Huang, *The New Takeover Regulation in China: Evolution and Enhancement*, 42 INT'L LAW. 153, 159, 173 (2008).

devised in the dispersed shareholding context where takeovers are seen as a method of shifting control of a target from its board to the acquirer, is inapplicable to the Asian scenario where the role of takeover regulation is essentially to facilitate control shifts between a selling controlling shareholder and an acquirer.<sup>152</sup> Such a mismatch in transplantation of rules from the U.K. to Asia can have unintended consequences. In developing these arguments further, we explore the key features of takeover regulation in India, Hong Kong and Singapore, examine the manner in which they are enforced and the comment on their impact on interest groups, primarily controlling shareholders (being business families or the state).

### *1. Board Neutrality Rule as the Pivot of Hostile Takeover Regulation*

In what amounts to a direct transplant of the mainstay of the U.K. model of regulating hostile takeovers, India, Hong Kong and Singapore display a steadfast adherence to the board neutrality rule.<sup>153</sup> By virtue of this rule, target boards are immobilized from undertaking any frustrating action once a takeover offer has been made or might be imminent. They can take any actions such as issue new shares or convertible securities, sell or dispose of material assets or enter into contract otherwise than in the ordinary course of business only with the prior approval of the shareholders. The inability of the target managements to fend off a hostile acquirer without referring back to shareholders operates as a significant impediment. Despite the incapacity of target boards to defend themselves, why do we not witness a steady stream of takeovers in our common law jurisdictions? We argue this is because the board neutrality rule is a hollow notion in the Asian context that is misleading and steers us towards erroneous results. We support our argument in two ways.

First, as asserted by several scholars, the board neutrality rule is merely illusory in light of the fact that the corporate law in our common law jurisdictions in Asia (as it is in the U.K.) requires shareholders to approve transactions that constitute customary takeover defences.<sup>154</sup> For instance, issuance of shares or convertible instruments (such as warrants) that dilute existing shareholders are to be authorized by a shareholder approval, although in certain cases general or omnibus approvals are possible.<sup>155</sup> Similarly, the board cannot undertake a sale of substantial assets of the company without the prior approval of the board.<sup>156</sup> In addition, listing rules of stock exchanges also impose restrictions on the ability of boards to carry out actions without shareholder authorization. Hence, the board neutrality rule arguably does

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<sup>152</sup> Varottil & Wan, *supra* note 34, at 25.

<sup>153</sup> Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, § 26(1), (2) (for India); The Singapore Code on Take-Overs and Mergers, § 5 (for Singapore); The Codes on Takeovers and Mergers and Share Buy-backs, r. 4 (for Hong Kong). The origin for these rules is the U.K. Takeover Code, § 21.

<sup>154</sup> This point was first elucidated in David Kershaw, *The Illusion of Importance: Reconsidering the UK's Takeover Defence Prohibition*, 56 INT'L & COMP. L.Q. 267 (2007). See also, Ventrone, *supra* note 3, at 159; Wan, *supra* note 36, at 420.

<sup>155</sup> Companies Act, 2013, § 62(1)(c) (for India); Companies Ordinance (Cap. 622), § 141 (for Hong Kong); Companies Act (Cap. 50), § 161 (for Singapore).

<sup>156</sup> Companies Act, 2013, § 180 (for India); Companies Ordinance (Cap. 622), Companies Act (Cap. 50), § 160 (for Singapore).

very little to alter the dynamics in the context of a hostile takeover, and can at best be described to be a policy statement of sorts.

Second, and more importantly, the board neutrality rule is an empty notion in jurisdictions where concentrated shareholding is dominant, as is the case in Asia. The rule originated in the dispersed shareholding context where it makes eminent sense to withdraw the decision-making power of the target's board (that is effectively conflicted) in a hostile takeover and to hand it over to the shareholders who decide the fate of the takeover. This is due to the agency problems that operate between the shareholders and managers. However, when such a rule is juxtaposed to the Asian context, unintended results ensue given that the principal agency problems is one between the controlling shareholders and the minority shareholders.<sup>157</sup> The managers do not play a significant role in the takeover context as they are essentially within the influence of the controlling shareholders. In such a scenario, the transfer of decision-making powers from managers to the shareholders makes no difference as the two constituencies' interests are aligned and are arguably often counter to the interests of the minority shareholders. Instead, the board neutrality rule has the function of further emboldening the controlling shareholders who are already well entrenched in the target.

Hence, the board neutrality rule, which was created to serve a distinct purpose in the U.K., i.e. to protect shareholders from managers, has a completely different effect altogether when transplanted to jurisdictions in Asia where concentrated shareholding is the norm. In Asia, it has the unintended effect of further bolstering the position of controlling shareholders. Hence, the inability of managers or controlling shareholders in our common law Asian jurisdictions to invoke conventional takeover defenses such as poison pills and scorched earth tactics does not matter.

## *2. The Relative Non-Use of Directors' Duties to Resolve Takeover Disputes*

In all of our common law jurisdictions in Asia, directors are fiduciaries and are required to act in the interests of the company, including in the context of takeovers. These include the duty of care, skill and diligence and the duty to act for proper purpose. Some of these duties have been developed substantially under English law, in particular the duty to act for proper purpose, which is usually triggered when the target undertakes actions to prefer a shareholder or investor in a manner that dilutes the interests of the acquirer.<sup>158</sup> However, to our knowledge, there are no significant cases in India, Hong Kong or Singapore that expound on the scope and import of directors' duties as a tool to resolve dispute relating to takeover regulation, let alone in the context of hostile situations. In our view, this is attributable to two factors. The first is the near absence of hostile takeovers in these jurisdictions, due to which the courts have not had the opportunity to clarify directors' duties. The second is that takeover disputes in these jurisdictions are resolved outside the court system, a matter that we now turn to.

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<sup>157</sup> See, Ventrone, *supra* note 3, at 141.

<sup>158</sup> For the leading cases law, see *supra* note 105.

### 3. Oversight and Monitoring by Regulatory Bodies

When it comes to oversight and monitoring of conduct of parties in a hostile takeover, the civil law and common law jurisdictions in Asia follow divergent approaches. The civil law jurisdictions draw their inspiration from the U.S., which focuses on litigation as a means of resolving takeover disputes in an *ex post* fashion. However, the common law jurisdictions not only regulate takeovers through *ex ante* rules, but disputes are resolved either by a takeover panel or by the securities regulator. In these instances, similar to the U.K., there is evidence of their intention to limit the involvement of the courts in resolving takeover disputes.

Both Hong Kong and Singapore have established the Takeovers and Mergers Panel and the Securities Industry Council (SIC) respectively to make decisions regarding takeover matters. They follow the Panel on Takeovers and Mergers in the U.K., which has constituted the model for such a regulatory mechanism. The membership of these takeover panels is represented by a wide range of interests, including participation from the industry, investor community and professionals.<sup>159</sup> The idea behind establishing such panels is to ensure speed, flexibility and certainty.<sup>160</sup> Courts only have limited oversight in respect of decisions of the panel.<sup>161</sup>

On the other hand, India has shied away from adopting a panel-like approach towards the enforcement of takeover regulation. Instead, it is the Securities and Exchange Board of India (SEBI), the securities regulator, that performs the function of regulating takeovers. Even here, courts are generally kept outside the purview of takeover disputes.<sup>162</sup> The resolution of takeover disputes outside the court system has implications in terms of political economy.<sup>163</sup>

### 4. The Role of Interest Groups

In each of our common law jurisdictions in Asia, there is evidence that incumbents such as controlling shareholders have acted to preserve the status quo in terms of the design and implementation of the legal regime pertaining to hostile takeovers. In India, controlling

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<sup>159</sup> See, David Kershaw, *Principles of Takeover Regulation* 115 (2016).

<sup>160</sup> For a detailed discussion of the performance of takeover panels on a comparative basis judged by these criteria, see, Emma Armson, *Assessing the Performance of Takeover Panels: A Comparative Study*, in VAROTTIL & WAN, *supra* note 34, at 134-62.

<sup>161</sup> *R v. Panel on Takeovers and Mergers, ex parte Datafin plc*, [1987] 1 QB 815; *R v. Panel on Takeovers and Mergers, ex parte Guinness plc*, [1990] 1 QB 146.

<sup>162</sup> This is because sections §§ 15Y and 20A of the Securities and Exchange Board of India Act, 1992 bar the jurisdiction of civil courts to entertain a suit or proceedings on matters in which SEBI is empowered to take action (e.g. securities law violations). This exclusion of civil jurisdiction has been interpreted widely with respect to SEBI. *Kesha Appliances P Ltd v Royal Holdings Services Ltd* [2006] 130 Comp. Cas. 227 (Bom).

<sup>163</sup> See text accompanying *infra* notes 174-175.

shareholders in Indian companies have displayed a great deal of influence in shaping the takeover regulation in a manner that militate against a market for corporate control.<sup>164</sup>

In the context of Singapore, one of us has argued that the adoption of the U.K.-style of takeover regulation is the result of interaction between the relevant interest groups, being significant shareholders (such as business families or the state) and the regulator.<sup>165</sup> A clear episode that demonstrates this phenomenon is a consultation exercise conducted by the SIC wherein it sought the views of market participants on whether Singapore should adopt the U.S. model of takeover regulation (with discretion to directors to determine the fate of a takeover) or to retain the current U.K. model (where shareholder decisions are paramount).<sup>166</sup> The overwhelming response from market practitioners was to retain the U.K. approach with the board neutrality rule.<sup>167</sup> This is perhaps attributable (at least in part) to the fact that in a concentrated shareholding scenario the incumbents who are the controlling shareholders are better off holding the decision-making power at the shareholder level where they can exercise significant influence, rather than to grant it to boards.<sup>168</sup> Even if controlling shareholders do not have holdings that are large enough influence the directors of the target as to the fate of the takeover, an exercise of direct powers through shareholder decision-making could enable them to decide the outcome of a hostile takeover.<sup>169</sup>

In Hong Kong, the influence of controlling blockholders is evidenced in other ways: in the manner of implementation of takeover regulation rather than its design. Given that the market for corporate control essentially relates to “the jockeying among blockholders for control of their corporate groups and the economy generally”,<sup>170</sup> the entire slew of takeover regulation adopted from the U.K. is hardly used, barring certain specific provisions that relate to matters pertaining to controlling shareholders attempting to enhance their control over the target. Donald has argued that the U.K.-oriented takeover regulation has been “applied essentially as a ‘code of responsible corporate ownership’” and that the U.K. transplant that is focused on dispersed shareholding scenarios may, in the context of Hong Kong, “be a distraction from the main problem on which regulators should focus”.<sup>171</sup>

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<sup>164</sup> Varottil, *supra* note 36, at 378. For a more detailed discussion on India, see text accompanying *infra* notes 174-175.

<sup>165</sup> Wan, *supra* note 36, at 408.

<sup>166</sup> Securities Industry Council (SIC), *Consultation Paper on Revision of the Singapore Code on Takeovers and Mergers* 7 (1999), available at <http://www.mas.gov.sg/~media/resource/publications/consultpapers/1999/Consultation%20Paper%20On%20Revision%20of%20the%20Singapore%20Code%20on%20Take%20Overs%20and%20Mergers.pdf>. The market practitioners consulted include investment banks and law firms.

<sup>167</sup> *Id.*, at 8.

<sup>168</sup> But, a significant constraint with the U.K. rule is that it is costly, both in terms of time and money, to hold a shareholder meeting to approve the use of defences. It is likely that defences may not be applied quickly enough to stave off a takeover that the controlling shareholder does not accept. See Huang, *supra* note 125, at 192-93.

<sup>169</sup> Wan, *supra* note 36, at 420-21.

<sup>170</sup> Donald, *supra* note 51, at 383.

<sup>171</sup> *Id.* at 403.

The lawmaking, oversight and monitoring process in respect of takeover regulation has an important role to play in the way interest groups exert their influence. As Armour, Jacobs and Milhaupt have noted that, unlike the judiciary, regulators and market actors tend to come under the focus of interest groups while introducing new rules.<sup>172</sup> Regulators appear to be somewhat responsive to such interest groups, and quite often the effort to preempt a legislative outcome ends up conforming to the preferences of the dominant interest groups.<sup>173</sup> For example, in India, SEBI usually devises takeover regulation by appointing a committee of experts to examine the issues and make recommendations.<sup>174</sup> Such committees tends to have a strong representation from domestic Indian business interests and also leading corporate lawyers.<sup>175</sup> Through this, the Indian industry has maintained a strong voice in the shaping of takeover regulation, which explains the nature of regulation that emboldens controlling shareholders and impedes a free market for corporate control. Similar public consultation exercises tend to provide avenues for dominant market participants to forcefully put forward their positions, as we have seen in the case of Singapore.<sup>176</sup> Moreover, the market-facing membership of the takeover panels in both Singapore and Hong Kong will likely attract local business elites such as controlling shareholders to assuage their concerns that would make the design and implementation of takeover regulation in these jurisdictions vastly different from the origin country of the U.K.

## V. IMPLICATIONS FROM THE STUDY OF TAKEOVER REGULATION IN ASIA

Our analysis of the six Asian jurisdictions indicates that they adopt a dichotomous approach towards takeover regulation. While the civil law jurisdictions of China, Japan and Korea cross-refer more closely to the U.S. (Delaware) position that confers significant freedom to target boards, the common law jurisdictions of India, Hong Kong and Singapore cling to the U.K.-based board neutrality approach that passes on decision-making powers to the shareholders. Despite the different approaches adopted by these countries, there is one important commonality. No matter how the takeover regulation is designed or implemented, the interest group that has been the focus of the rulemaking process is the controlling or other dominant shareholders. This is not at all surprising given that all of these jurisdictions witness concentrated (or, in the case of Japan, stable) shareholding. But, as we have seen, the controlling shareholders have not simply rested in the comfort of their shareholding power, but instead have sought to bolster their position in the company. Here we consider some of the key lessons and implications that emerge from the study, and close with some normative observations regarding the possible direction that takeover regulation in Asia might take.

### A. *(In)consistency with the Theoretical Framework*

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<sup>172</sup> Armour, Jacobs & Milhaupt, *supra* note 2, at 230.

<sup>173</sup> *Id.*, at 232.

<sup>174</sup> Varottil, *supra* note 36, at 378.

<sup>175</sup> *Id.*

<sup>176</sup> *See, supra* notes 165 to 169, and accompanying text.

Juxtaposing our findings with the theoretical framework set out by Armour and Skeel, it is clear that the Asian scenario relating to takeover regulation supports their theory in that the process of evolution of the takeover regime is important in understanding the substantive nature of the rules, and that interest groups tend to exert significant influence in the process and therefore regulatory outcomes as well. However, delving one level deeper, divergences with Armour and Skeel emerge. Their analysis of origin country rules demonstrates differences in hostile takeover regimes (i.e., manager-oriented in the U.S. and shareholder-oriented in the U.K.) and the interest groups that were influential in the process (i.e., managers in the U.S. and institutional investors in the U.K.). When this framework is applied to the recipient countries in Asia, a different position ensues. Even though there is a similar bifurcation between the U.S. and the U.K. as in Armour and Skeel, wherein the civil law jurisdictions in Asia have drawn their inspiration from the U.S., while the common law jurisdictions from the U.K., ultimately the interest group that has been dominant in the process is the controlling shareholders, who are the business elite in these jurisdictions comprising either business families or the state. Armour and Skeel's account understandably does not account for controlling shareholders. While Armour and Skeel note that differences in the evolution of takeover regulation could result in different outcomes as regards dominant interest groups (e.g., managers versus shareholders), our analysis demonstrates that radically different regimes in hostile takeover regulation could nevertheless inure to the benefit of a single constituency, namely controlling shareholders.

For the aforesaid reasons, we argue that it would be unwise to draw inferences from theories based on takeover regulation emanating from the U.S. and the U.K. A direct application of these theories to our Asian jurisdictions is bound to result in incongruences due to the prevalence of local factors.<sup>177</sup> Such factors are likely to be idiosyncratic not just in relation to the U.S. and the U.K., but even relative to other Asian jurisdictions. Unless these factors are duly accounted for, "the same takeover rules might have different or even opposite effects in different markets".<sup>178</sup>

### *B. Pro-Incumbency: A Controlling Shareholder-Centric Approach*

As we have seen, takeover regulation in our Asian jurisdictions has adopted an incumbent-friendly approach, regardless of the specific model in play. Controlling shareholders tend to play a central role in entrenching themselves further in the companies they already control.<sup>179</sup> The rulemaking process cannot afford to ignore their interests and concerns. Here, our civil law jurisdictions in Asia follow a predictable pattern that is consistent with the interest group analysis of takeover regulation in that the focus of the law and its implementation is on providing greater power to the incumbents to protect themselves against hostile takeovers,

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<sup>177</sup> See, Puchniak & Nakahigashi, *supra* note 37, at 244.

<sup>178</sup> Ventrizzo, *supra* note 3, at 141 (noting a similar result in the context of takeover regulation in continental Europe).

<sup>179</sup> Even though controlling shareholders may not fear an imminent battle for control over their company due comfort of their significant shareholding, they nevertheless have an interest in ensuring the protection of their position in the future where their holdings might be diluted due to additional capital raising efforts.

including by erecting defenses. In these jurisdictions, while the board has been conferred these powers, the scenario is very different from the Anglo-American approach where there is a difference between ownership and management control. In Asia, given the concentrated shareholder structures, boards operate under the shadow of the controlling shareholders' influence, as the directors owe their election and continuation in office to the wishes of the shareholders (where the controllers have a major say). Hence, we argue that any benefits conferred upon the board in the Asian context have to be viewed differently from the Anglo-American approach. In Asia, conferring freedom to the boards to resist hostile takeover not only protects incumbent management, but also helps bolster the controlling shareholders' position in the company.

Moving on to our common law jurisdictions in Asia, the position is even more complex. We come back to a question we have raised before:<sup>180</sup> why have the incumbents rested easy with the board neutrality rule that takes away the powers of the board to defend against hostile takeovers? Why have they not protested against the limitations on corporate boards in common law Asia to establish takeover defenses such as poison pills and scorched earth tactics? We proffer some explanation in seeking to respond to these questions.

At the outset, if we were to apply the Armour and Skeel analysis, the board neutrality rule in common law Asia ought to have found its place due to the influence of institutional investors, as it did in the U.K. But, institutional investors do not appear to have played much of a role in the rulemaking process in common law Asia, due to which the Armour and Skeel analysis fails to shed light on this conundrum.

On the other hand, we argue that the adoption and continuation of the board neutrality rule may signify a level of inertia on the part of the regulators and the market participants. We offer several reasons. First, takeovers are yet to capture sufficient attention in common law Asia to warrant a paradigm shift in their regulation. Due to the high concentration of shareholdings, the threat perception from hostile takeovers is not yet material. Second, the board neutrality rule results in opposite and unintended consequences in common law Asia when compared with the U.K. model. The rule shifts power over the outcome of a hostile takeover from the board to the shareholders. Instead of disarming the power of the incumbents (e.g. managers in the U.K.), it has the effect emboldening them (e.g. controlling shareholders in common law Asia). It is little wonder that the business elites in the Asian jurisdictions see no reason disturb the status quo. Third, a mere change to the board neutrality rule that is situated within takeover regulation is insufficient to strengthen the controlling shareholders' position. Given the illusory nature of the rule,<sup>181</sup> there is a need to introduce reforms to company law to enable the use of takeover defenses such as poison pills. Applying interest group theory,<sup>182</sup> we find that legislature is usually less responsive to interest group influences in the takeover arena in the absence of a scandal. In that sense, addressing the

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<sup>180</sup> See, *supra* Part I.

<sup>181</sup> See, *supra* notes 154 to 156, and accompanying text.

<sup>182</sup> See, Armour, Jacobs & Milhaupt, *supra* note 2, at 229-32.



board neutrality rule or bringing about other changes to the takeover codes in common law Asia must be accompanied by reforms to corporate law, which might be harder to come by.

This leads us to some key questions. Given the peculiar nature of application of the Anglo-American rules to the Asian context, why have our Asian jurisdictions chosen to transplant them? What factors have motivated them to exercise that choice? We now turn to address these.

### *C. Role of the State in Influencing the Outcome of Transplantation*

Our analysis of the individual jurisdictions in Asia<sup>183</sup> indicates various reasons why they decided to borrow extensively from the Anglo-American approaches. Asian jurisdictions find it attractive to adopt “global standards”, which are easy to justify, especially when reforms need to be introduced in a time-bound manner.<sup>184</sup> Moreover, the state has reasons to prefer well-tested approaches to takeover regulation, especially from developed economies, as they carry a signaling effect. For instance, imposing a board neutrality rule might be a sign that the economy is open to acquisitions and foreign investment, as a means towards economic growth. Due to these reasons, all of our jurisdictions have shunned a purely homegrown approach towards takeover regulation. This is partly attributable to the fact that takeovers, in particular the hostile variety, is a relatively novel phenomenon in Asia compared to the West.

Since the state places importance on ensuring minority investor protection in order to promote deep and liquid capital markets, our Asian jurisdictions have sought to create a balance between protecting shareholder interests, for instance by the outright prohibition on certain defensive measures), and the promotion of corporate objectives and local business interests. This can be a difficult task due to the operation of several local factors, which explains why several our jurisdictions that follow similar approaches towards takeover regulation demonstrate differing outcomes. As we have seen,<sup>185</sup> such a move triggered by globalization without accounting for local peculiarities would at most result in formal convergence.

### *D. Broader Implications of the Findings*

As is evident, it is myopic to view takeover regulation in Asia merely through the lens of the Anglo-American approach.<sup>186</sup> Due regard must be had to the local factors and idiosyncrasies that map the Asian corporate landscape. Even the theoretical literature on takeover regulation has been steeped in the Anglo-American context, and has only recently begun to gain ground

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<sup>183</sup> See, *supra* Part IV.

<sup>184</sup> Milhaupt, *In the Shadow of Delaware?*, *supra* note 38, at 2204; Alger, *supra* note 136, at 325; Bliss Burdett Pak, *National Markets and New Defenses: The Case for an East Asian Opt-In Takeover Law*, 20 COLUM. J. ASIAN L. 385 (2007).

<sup>185</sup> See, *supra* Part IVA4 (in the context of our civil law Asian jurisdictions, particularly Japan).

<sup>186</sup> See, Puchniak & Nakahigashi, *supra* note 37, at 258 (in the context of Japan).

in other regions such as Asia. In the end, the specific circumstances and factors present in each individual jurisdiction may explain the regulatory choice it makes as regards takeovers.

Broadening the discussion to the sphere of corporate governance, it would be imprudent for Asian jurisdictions to consider the market for corporate control as a governance-enhancing mechanism. Policy-makers and scholars may very well divert their attention to other mechanisms that are appropriate in the Asian context. The focus of takeover regulation in Asia is hence narrowed to facilitating organized changes of control between parties in a manner that does not undermine the interests of minority shareholders.

Lastly, our research also reveals some lessons relating to the operation of legal systems. The ‘legal origins’ strain of literature posits that, in common law countries, the judiciary plays an important role in defining and enforcing investor rights.<sup>187</sup> Hence, minority investor protection is an important tool for the development of deep capital markets. On the other hand, civil law countries tend to rely heavily on governmental intervention in protecting minority shareholder interests. The legal origins analysis gives rise to curious outcomes in takeover regulation pertaining to our Asian jurisdictions. First, the originating countries for the diffusion of takeover regulation (i.e., the U.K. and the U.S.) are both common law jurisdictions. However, their regulations have been transplanted to Asian jurisdictions that follow common law as well as civil law. In other words, our Asian civil law jurisdictions have found it appropriate to look to the U.K. and the U.S. (as leading takeover markets) rather than to other civil law jurisdictions. Second, and more intriguingly, the diffusion of legal norms has occurred in rather counterintuitive ways. All our common law jurisdictions have preferred not to use the court system to resolve takeover disputes.<sup>188</sup> While the use of a takeover panel-like arrangement by Hong Kong and Singapore is understandable, given the preference displayed by the UK, the exclusion of courts from takeover regulation in India is less clear. Our Asian jurisdictions following civil law have, instead, embraced the use of *ex post* determination through courts as a means of regulating takeovers, especially through fiduciary duties of the target’s board. This phenomenon undermines the applicability of the ‘legal origins’ thesis, as it receives no support in takeover regulation.

## VI. CONCLUSION

Takeover regulation plays an essential role in the market for corporate control, which is an important mechanism of corporate governance. The origin of regulatory mechanisms as well as substantial literature in the field have hitherto taken on a strong Anglo-American flavor. In this article, we undertake a broader comparative approach by which we study the importation into Asia from the U.S. and the U.K. of the modes of regulating hostile takeovers. Our comparison extends in two ways: one, to compare the U.S. and the U.K. on the one hand, and

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<sup>187</sup> See, *supra* note 48.

<sup>188</sup> Similar findings regarding the use of courts can be found in the context of shareholder derivative actions. See, Puchniak, *supra* note 90, at 10-11, 14.

six Asian jurisdictions with high incidence of takeover activity, and the second to compare among these Asian jurisdictions themselves.

As we seek to demonstrate, the transplant of the U.S. and the U.K. takeover regulation to the Asian jurisdictions results in unintended consequences, attributable largely to differences in local factors, including shareholder pattern, capacity and sophistication of the regulators and courts, as well as cultural traits. The evolution, design and enforcement of takeover regulation has tended to benefit the incumbents, being controlling shareholders such as business families and the state that are ubiquitous in the Asian corporate sphere. Ultimately, it is our case that Asian takeover regulation (and that of each individual jurisdiction) must be viewed on its own terms rather than through an Anglo-American perspective.

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