Hostile Takeover Regimes in Asia: A Comparative Approach

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A key corporate governance mechanism that shareholders of a company can rely on as a tool to discipline management is the market for corporate control. 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. In both the United States (U.S.) and the United Kingdom (U.K.), public markets are characterized by dispersed shareholdings and active markets for corporate control. However, notwithstanding the similarities in shareholder structures and systems of corporate governance, the regulation of hostile takeovers differs remarkably between the U.S. and the U.K. The U.K. adopts a strict board neutrality rule in which shareholders are the primary arbiters of the success of a takeover offer. In contrast, in Delaware, where more than 50% of U.S.


3. 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).
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publicly traded companies are incorporated, the state company law allows the board of the target a significant (though not exclusive) say in the outcome of the takeover offer.

A. Armour and Skeel’s Theory of Interest Group Politics

In their seminal work, Armour and Skeel argue that interest group politics is the reason behind the differences in takeover regulation in the U.S. and the U.K. The U.K. system, exemplified by the City Code on Takeovers and Mergers (the “UK Takeover Code”), prioritizes shareholder protection, and is attributable to the U.K.’s self-regulatory regime and aggressive lobbying by strong institutional shareholders. In contrast, U.S. courts serve as arbiters of takeover disputes—where the judgment of corporate boards and management is given greater leeway in the determination of the interests of the company. Armour and Skeel make an important contribution by explaining that the process of takeover regulation influences the outcome or substance of the regulation. U.K. takeover regulation is shaped by institutional shareholders preempting legislative intervention while U.S. regulation is derived from judge-made case law, largely from courts in Delaware.

B. Application of Armour and Skeel’s Theory in Asia

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 issue because the U.S. and the U.K. have significantly influenced takeover regulation throughout the world, including in Asia. Six of the most significant economies in Asia (China, Hong Kong, Japan, India, Korea and Singapore), which also have the largest takeover

5. For a discussion on the scope of the powers of the board vis-a-vis the shareholders in hostile takeovers pursuant to the company law in states other than Delaware, see Michal Barzuza, The State of State Antitakeover Law, 95 VIRGINIA LAW REVIEW 1973 (2009).
6. Armour & Skeel, supra note 2, at 1781.
8. Armour & Skeel, supra note 2, at 1730.
9. However, takeover regulation in the U.S. is in part governed by the Williams Act, a federal statute. See infra note 25 and accompanying text.
markets in the region, have adopted features of the U.S. model, the U.K. model, or both. This list of jurisdictions covers the emerging economies of China and India, the leading Asian financial centers of Singapore and Hong Kong, and the established economies of Korea and Japan. This combination also includes a balanced representation of both common law (India, Hong Kong and Singapore) and civil law (China, Japan and Korea) jurisdictions, enabling us to examine the influence of legal tradition on takeover regulation. A study of takeover regulation in these six jurisdiction provides a substantial and representative understanding of takeover regulation in Asia.

Although influenced by the U.S. and U.K. models for takeover regulation, Asian countries still differ significantly from them. In particular, while in the U.S. and the U.K., most companies have dispersed share ownership, the shareholder structures in Asia tend to be far more concentrated. Moreover, the legal institutions supporting Asian takeover regulation, such as securities regulators, stock exchanges, and the judiciaries, have different approaches from those in the U.S. or the U.K. in dealing with takeover regulation. Given these fundamental differences, would the considerations that shaped the mode of takeover regulation in the U.S. or the U.K. continue to be relevant in Asia? If not, what factors uniquely 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 regulatory regimes in Europe, Japan and China (with modification). However, if Armour and Skeel’s theory is correct and comprehensive, at least two puzzles remain in explaining the development of takeover regulation in Asia: (1) how Asian jurisdictions prefer a board neutrality rule rather than an approach that would favor controlling shareholders; and (2) the existence of formal convergence of regulation without necessarily extending to functional convergence.

11. 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: Continuing Concern for Minority Shareholders; Umakanth Varottil & Wai Yee Wan, Comparative Takeover Regulation: Global and Asian Perspectives, 281-83 (2017); Stephen Choi, The Future Direction of Takeover Law in Korea, 7 JOURNAL OF KOREAN LAW 25, 34-35 (2007). For India, see Marianne Bertrand, Paras Mehta and Sendhil Mullainathan, Ferreting Out Tunneling: An Application to Indian Business Groups, 117 Q. J. ECON. 121, 121-22 (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).

12. Ventoruzzo, supra note 3.


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C. The Two Puzzles

First, with the (at least partial) exception of Japan, the other five Asian jurisdictions are dominated by public companies with concentrated shareholdings. Institutional minority shareholders do not have the kind of clout or influence in shaping takeover regulation that is otherwise present in jurisdictions with widely-held shareholders, such as in the U.K. Yet, even though concentrated shareholding is the norm, several Asian jurisdictions (such as India, Hong Kong and Singapore) nonetheless adopt the U.K.-inspired board neutrality rule. One would expect that the controlling shareholders in Asian jurisdictions would be indifferent or would prefer the U.S. approach that favors the incumbent management or controlling shareholders.

Second, we expect some degree of functional convergence in the substantive rules among the jurisdictions that have adopted the similar processes in 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 jurisdictions or legal transplants that have adopted the U.S. model of takeover dispute resolution would be likely to reach the same results. However, drawing from the evidence pertaining to Asian jurisdictions (Korea, China, and Japan) that have adopted the U.S. model of settling hostile takeover disputes by the courts, we find that the legal exportation of the takeover regulation has led only to somewhat superficial formal, but not functional, convergence of regulation.

D. Limitations of Armour and Skeel’s Theory?

In reflecting on these two puzzles, we seek to answer three questions. First, who are the relevant interest groups when choices regarding the initial takeover regulation are made in the Asian economies? Second, what explains the continued functional divergence of the recipient Asian jurisdictions’ takeover laws and regulations from the laws and regulations of the exporting country, in this case the U.S. and the U.K.? Third, are there any unintended consequences of legal transplantation of the U.S. and/or U.K. model of takeover regulation in the recipient jurisdictions (the Asian economies)?

15. Interest groups could either be institutional shareholders (for example, in the U.K.), target management (for instance, in the U.S.), or controlling shareholders, including business families and the states (in several jurisdictions in continental Europe and Asia). 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.
Armour and Skeel’s theory of interest group politics in takeover regulation is helpful, yet incomplete, when it is extended to the Asian legal transplants.\(^{16}\) 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 jurisdictions based on differences in the legal institutions supporting such regulation. In addition, the theory based on the roles of the various actors in the market has the potential of explaining the differences among jurisdictions that are recipients of transplants from the U.S. and the U.K. Thus, it provides an elegant framework to examine the factors that led to the design of takeover regulation in each of the Asian jurisdictions discussed.

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 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 regard for cross-country diffusion of regulations. 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. The theory disregards the potential influence of controlling shareholders found in economies with closely-held shares. We argue that controlling shareholders play an important role in shaping the outcome of takeover regulation, and this is true of all of our six Asian jurisdictions (with the partial exception of Japan, where most of its public companies are widely held). 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. Hostile takeovers have not built up substantial momentum, even in Asian jurisdictions, such as Japan, where

\(^{16}\) 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 Ventoruzzo, supra note 3, at 137.
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companies are widely held. The lack of hostile takeovers does not imply that discussions of such takeovers and the target board’s role in setting up defences are irrelevant (or even less relevant) in the Asian jurisdictions. Despite the fact that there is no uniform approach in the Asian jurisdictions, the analysis undertaken in this article is imperative given that there are still occasional instances of hostile takeovers in Asia that capture a great deal of attention.

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 subsequent adaptation) of a model of regulation serves as a signal of its commitment to a free market and open economy, and displays the importance of investor protection. At the same time, the adaptation of the U.S. and the U.K. models to different Asian jurisdictions not only causes divergence among jurisdictions, but is often driven by the need of the state to play to local influences—primarily those of controlling shareholders.

In this article, we argue that takeover regulation in Asia must be viewed through a different lens altogether. 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 continue 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 Asian jurisdictions’ adoption of U.S. and U.K.’s takeover regulation. Despite the presence of entirely different shareholding structures and legal institutions raising significant questions about the efficacy of the transplantation of such legal frameworks. Second, we seek to extend the scope of the comparative study of hostile takeover regimes and the influence of various interest groups in shaping takeover regulation, to a wider set of jurisdictions in Asia. Third, our study is relevant to emerging countries considering reforms to 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.

17. 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”. For further discussion on 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).
Part III explains why hostile takeovers are important in Asia, despite the existence 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 focus on 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. Finally, part VI offers a brief conclusion.

PART 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. Specifically, the differences arise from the varying influence of powerful lobbying groups, namely the institutional shareholders in the U.K. and the firm managers in the U.S., which affect the mode and the content of the regulation. Institutional shareholders in the U.K. opted for self-regulation and collectively acted together to write the U.K. Takeover Code, where the board neutrality rule is one of the most prominent features. In so doing, they pre-empted the possibility of state-imposed or legislative measures. The U.K. also had a closely-knit body of finance and legal professionals within the City of London who were receptive to the concept of self-regulation, which is essential for the operation of the U.K. Code. Their account of takeover regulation is broadly consistent with the existing scholarship on the influence of institutional shareholders on other aspects of corporate governance. This is similar to how shareholders in the 1970s were instrumental in procuring the listing rules of London Stock Exchange, which subject all large transactions to shareholder approval.

18. Armour & Skeel, supra note 2, at 1771. See also Armour, Jacobs & Milhaupt, supra note 2, at 230-31.
19. Id.
20. UK Takeover Code, § 21. The mandatory bid rule is another important aspect of the UK Takeover Code. Id. at § 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.
22. Id.
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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. For example, federal legislation, principally in the form of the Williams Act of 1968, which provides for shareholder disclosure requirements and prevents bidders from using unfair or coercive tactics, was ostensibly enacted to “level the playing field” between bidders and target managers. The Act had the effect of favoring target managers. Additionally, with respect to Delaware state law, corporate directors and managers litigate before the courts against hostile bidders, and through repeat litigation, are able to convince the judiciary to lay down pro-managerial decisions.

Armour and Skeel consider the position in the U.K. prior to the emergence of the U.K. Takeover Code to demonstrate that the process of takeover regulation affects the shape of substantive rules. Prior to the U.K. Takeover Code, when the Takeover Panel did not exist, 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. Thus, they argue that “using litigation to resolve such matters involves a structural bias in favor of the directors.” Accordingly, in response to the case law, institutional shareholders in the U.K. chose to band together to write the Takeover Code. Institutional shareholders in the U.S., however, could not replicate the U.K.’s transition because federal legislation precluded forming such links among the institutional shareholders and pre-empted self-regulation by the market players. Here, the questions are 1) whether the experiences of the U.S. and the U.K. in takeover regulation are confined to their peculiar political economy and 2) whether they can be generalized outside these two jurisdictions and applied to Asia. The next part discusses the comparative takeover scholars’ works that seek to extend the theory of interest group politics in the context of takeover regulation outside of the U.S. and the U.K.

25. Id. at 1755.
26. Id. at 1781.
27. Id. at 1782-84.
28. Id. at 1782-84.
29. Id. at 1784.
30. Id.
31. Id.
B. The Extension of Interest Group Politics outside the U.S. and the U.K. to Asia

Following 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. to other tools of takeover regulation (such as the mandatory bid rule) that are beyond the regulation of hostile takeovers. For example, Ventoruzzo argues that Armour and Skeel’s narrative of takeover regulation can be broadly applied to the rest of Europe (outside of the U.K.). However, not all application has been positive. Ventoruzzo 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.32 Armour, Jacobs and Milhaupt extended the theory of interest group politics to Japan, another advanced economy, and have broadly discussed the implications for China, India and Brazil.33 In the context of emerging economies, Xi argues that the theory of interest group politics may be extended to China with modifications.34 He has used the theory to analyze the mandatory bid rule in China, and argues that in such context, the theory applies but needs refinement to take into account the state regulator’s private interests.35

However, what is missing in the current scholarship is an updated discussion on whether the interest group politics theory, which 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 as discussed in the literature).36 Asia is fast becoming a significant player in the global M&A market,37 and the U.S. and the U.K. have been key exporters of their mode of takeover regulation. To test out this theory, we use the case studies of our six Asian jurisdictions (Japan, Korea, China, India, Hong Kong and Singapore).

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. Yet, most of
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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 jurisdictions 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).38

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, the developers’ focus is on the role that the institutional minority shareholders may (or may not have) played. They did not take into account the influence of 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 studied the influence of the controlling shareholders in the development of a separate, but closely related rule in takeover regulation: the mandatory bid rule. In relation to India and Singapore, each of us has separately argued that controlling shareholders, whether it is the state or the family, 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.39 In the case of Japan, “stable shareholders” play a significant role in maintaining incumbency within firms.40

Often considered to carry a shareholding pattern similar to that of the U.S. and

38. See Armour, Jacobs & Milhaupt, supra note 2, at 223-24.
39. For India, see Umakanth Varottil, The Nature of the Market for Corporate Control in India, in VAROTIL & WAN, supra note 37, at 378. For Singapore, see Wai Yee Wan, Legal Transplantation of UK-Style of Takeover Regulation in Singapore”, in VAROTIL & WAN, supra note 37, at 431-433.
40. See e.g., Masao Nakamura, The Security Market and the Changing Government Role in Japan, 5 ASIAN EDUCATION AND DEVELOPMENT STUDIES 388, 397-99 (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 VAROTIL & WAN, supra note 37, 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).
the U.K., scholars have predicted the rise of successful hostile takeovers in Japan.\textsuperscript{41} However, their prediction has not materialized, and it would appear that there are other factors at play, particularly the presence of stable shareholders.\textsuperscript{42} These stable shareholders have an important role in influencing the outcome of the takeover contests, often in favour of directors and management.\textsuperscript{43}

We then focus on the supply side of rule production: 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 relatively neutral positions adopted by the U.K. and the state governments in the U.S. (with the exception of some of the states which have anti-takeover statutes)\textsuperscript{44} does not necessarily exist in many Asian economies. One possibility is that in some economies the state has a special interest in signaling its commitment to an open economy and protecting its 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.\textsuperscript{45} 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 and the signal from the state of its commitment to protecting minority shareholders by ensuring they obtain control.\textsuperscript{46} In Korea, the mandatory bid rule received not only opposition from

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\item[\textsuperscript{42}] See Puchniak & Nakahigashi, \textit{supra} note 40, at 243-45.
\item[\textsuperscript{43}] \textit{Id}.
\item[\textsuperscript{44}] For evidence that states’ anti-takeover provisions do not affect firms’ decisions to incorporate, see Marcel Kahan, \textit{The Demand for Corporate Law: Statutory Flexibility, Judicial Quality, or Takeover Protection?}, 22(2) \textit{JLEO} 340 (2006).
\item[\textsuperscript{45}] Xi, \textit{supra} note 14.
\item[\textsuperscript{46}] Robin Hui Huang & Juan Chen, \textit{Takeover Regulation in China: Striking a Balance Between Takeover Contestability and Shareholder Protection}, in \textit{VAROTTIL & WAN, supra} note 37, at 222-23. See also Wei Cai, \textit{The Mandatory Bid Rule in China}, 12 \textit{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.
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Korean entrepreneurs, but also the International Monetary Fund and International Bank for Reconstruction and Development, for blocking takeover bids of financially distressed firms. As a result, the rule, which was enacted in 1997, was repealed soon after in 1998 in the wake of the Asian financial crisis.

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, 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 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 importing a new concept may have unintended consequences for law as a whole. Thus, we show that the adoption of one aspect of takeover regulation, hostile takeovers, may not actually have the intended effect because of the absence (or presence) of other legal institutions.

Third, our study offers some lessons relating to the “legal origins” strain of literature, 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.

47. Rho, supra note 11, at 293. See also Hwa-Jin Kim, The Market for Corporate Control in Korea, in HWA-JIN KIM (ED.), KOREAN BUSINESS LAW (2012).
48. See VAROTTIL & WAN, supra note 37.
51. See generally, 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).
PART 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: (1) a favourable shareholding structure and (2) depressed share prices relative to the asset values. 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, widely-held companies do exist in these jurisdictions and 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-specific 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 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 be exposed to hostile takeovers. As shown in sub-part 2 below, the number of such companies is significant 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

52. See Armour, Jacobs & Milhaupt, supra note 2, at 222.
53. 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, 1163 (1984) (explaining the disciplinary hypothesis where bidder pays a premium over market price because the assets are not optimally utilised).
54. See e.g., 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).
55. The literature on shareholding structures in all of our Asian jurisdictions in the context of takeover regulation can be found in VAROTIL & WAN, supra note 37. For China, see Huang & Chen, supra note 46, at 214-16; for Japan, see Puchniak & Nakahigashi, supra note 40, at 250; for Korea, see Rho, supra note 11, at 281-83 (on the use of controlling minority shareholder structures among the chaebols or conglomerates owned by controlling family members); for India, see Varottil, supra note 39, at 373-77; for Hong Kong, see David C. Donald, Evolutionary Development in Hong Kong of Transplanted UK-Origin Takeover Rules, in VAROTIL & WAN, supra note 39, at 391-93; for Singapore, see Wan, supra note 39, at 428-31.
56. Wan, supra note 39, at 420.
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policymakers 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. Although widely-held companies are not the norm in Asia, they do exist. In a study by Carney & Child of widely-held companies in East Asia (that excludes India and China), as of 2008, Japan has the largest number of widely-held corporations (57.4%) followed by Korea (28.9%). Singapore and Hong Kong have among the lowest number of widely-held corporations, at 8.4% and 6.3% respectively. Carney & Child’s findings are generally consistent with those presented in Comparative Takeover Regulation.

We now turn to India and China. In India, Varottil has found there are companies within the three major indices—the CNX Nifty, the CNX 100, and the CNX 500—in which either the controlling shareholders hold less than 25% or they have no controlling shareholders and are thereby exposed to hostile takeovers. These companies comprise 16% of the companies in the CNX Nifty, 9% of companies in the CNX 100, and 6% of companies in the CNX 500. 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.

In China, the level of ownership concentration, which was predominantly held by the state, has been reduced ever since the 2005 Share Split Reform.

57. Milhaupt, In the Shadow of Delaware?, supra note 41, at 2184, predicting the rise of hostile takeovers with the declining concentration of the shareholdings in Japanese listed companies (the shareholdings were previously concentrated in the hands of financial institutions).

58. 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). The study was performed with reference to 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).

59. 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 40, footnote 2.

60. Id., at 505.

61. See supra note 55.

62. Varottil, supra note 39, 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.

63. Id.

64. Id. at 377.
The average concentration of shareholding has reduced from over 40% in 2004 to 36% in 2014. Even in China, where hostile takeovers are thought to be difficult to achieve, the hostile battle for control of Vanke, the largest property developer in China, demonstrates the possibility of a widely-held company being targeted for hostile bids. The Vanke takeover contest is significant for several reasons: (1) it is the most recent high-profile case in Asia; (2) it demonstrates the peculiar nature of hostile takeovers in Asian jurisdictions; and (3) it draws attention to the somewhat unconventional defensive tools employed by companies to fend off raiders.

Prior to 2015, Vanke was a widely-held corporation, with a state-run conglomerate, China Resources, as its largest shareholder, holding 17%. However, by December 2015, the Baoneng group, a much lesser-known private firm, amassed shares in Vanke and increased its stake to 24.4%, surpassing the shares held by China Resources. Vanke’s management promptly declared the share acquisitions by Baoneng to be unwelcome. Vanke began undertaking defensive measures by calling for a trading suspension and declaring Anbang, an insurer that held 7.0%, to be a white knight. However, Anbang’s support was insufficient due to the limited number of shares it held. During the six-month trading suspension in the Vanke stock in the first half of 2016, the company found another white knight, Shenzhen Metro, a property conglomerate. Vanke proposed issuing shares to Shenzhen Metro in exchange for the injection of its assets to make Shenzhen Metro its largest shareholder, thereby massively diluting Baoneng and China Resources’ shares. Unsurprisingly, both Baoneng and China Resources opposed the transaction and Vanke ultimately withdrew its plans because of the strong shareholder opposition.

66. See id. at Table 1.
67. Id.
70. Id. (table showing Vanke’s largest shareholders as at Dec. 18, 2015 wherein China Resource’s shareholding was at 17.3%).
72. Id.
73. Id.
74. The Five Things, supra note 68.
75. Id.
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of the founder-director and other board members of Vanke because of over-compensation.77

When Vanke shares’ trade suspension period ended, Baoneng raised its stake to 25%.78 In August 2016, a new player, Evergrande Group, joined in the potential takeover fray when it purchased a 4.7% stake in Vanke, which then increased to 14.1% in November 2016.79 Ultimately, the Chinese securities regulator stepped in and criticized the acquirers who had participated in highly leveraged takeover activities.80 In December 2016 and January 2017, Evergrande and Baoneng both declared that they had no intentions of taking over Vanke.81 The Chinese insurance regulator intervened as both Evergrande and Baoneng had utilized their insurance arms to finance highly leveraged takeovers.82 It banned Baoneng chairman Yao Zhenhua from the insurance industry for 10 years and Evergrande Life, Evergrande’s insurance arm, from investing in stocks. Consequently, in March 2017, Evergrande Group transferred the voting rights in Vanke to Shenzhen Metro for a year,83 and in June 2017, ultimately sold its shareholdings to Shenzhen Metro.84 Those voting rights, together with the sale of the shares by China Resources to Shenzhen Metro and other acquisitions, meant that Shenzhen Metro held 29.4% of Vanke, surpassing Baoneng’s shareholding.85

While the takeover 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 defense was finding a white knight.86 Ultimately, unorthodox tools such as trading suspension,87 intervention by the Chinese regulators, and the assumption of control by a Chinese state-owned enterprise helped the target stave off a hostile

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77. Id.
78. The Five Things, supra note 68.
79. Id.
80. Id.
81. Vanke’s Year at War, SCMP (Dec. 24, 2016); Vanke Sues Over ‘Invalid’ Baoneng Stake, SCMP (Feb. 8, 2017).
83. Shenzhen Metro Set to Become Vanke’s Largest Shareholder, SCMP (June 7, 2017).
84. Shenzhen Metro to Become Biggest China Vanke Shareholder as Evergrande Cashes Out, SCMP (Jun. 9, 2017).
85. Shenzhen Metro to Raise Stake in China Vanke to Nearly 30% with $4bn Share Purchase From Evergrande, FINANCIAL TIMES (Jun. 12, 2017).
86. Huang & Chen, supra, note 66.
acquirer. These are entirely incongruent with the classic scenarios played out in hostile takeovers in the U.S. and the U.K. 88

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 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 the Asian jurisdictions examined in this article. In India, the companies in the three major indices89 show that 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%.90 They constitute 12% of companies in the CNX Nifty, 15% of companies in the CNX 100 and 27% of companies in the CNX 500.91 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.92 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 not regarded as widely held.

88. While the U.K. takeover regulation constrains the ability of boards to maneuver around a hostile takeover offer, Delaware law offers target boards considerable wiggle room to fend off such an offer. See Armour & Skeel, supra note 2 at 1727. For instance, see Kraft’s successful takeover of Cadbury in the U.K., DAVID KERSHAW, PRINCIPLES OF TAKEOVER REGULATION 117-20. For the U.S., courts have circumscribed the discretion available to target’s boards. See e.g., Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).
89. See supra note 62.
90. Varottill, supra note 39, at 377.
91. Id.
92. Carney & Child, supra note 58, 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.
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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. While Hong Kong and Singapore have demonstrated greater concentration in the ownership of shares, China and India have seen greater shareholder dispersion in recent years. It would be critical to put in place an optimal takeover regulatory framework before shares become more widely dispersed and controllers begin to exercise their vested interests in retaining control. Because there are only a small number of companies subject to hostile bids, regulators can have more leeway in determining the appropriate legal framework. A U.K.-based board neutrality rule or a rule that limits takeover defenses will be difficult to 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. Although it would be difficult to generalize in the broader Asian context, there could be a real threat real for a handful of companies that are exposed to hostile takeovers.

Other factors also 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. 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 as closely linked.

93. For Hong Kong, see Donald, supra note 55, at 392; for Singapore, see Wan, supra note 39, at 431-433.
94. For China, see Huang & Chen, supra note Error! Bookmark not defined., Figures 1 and 2; for India, see Varottil, supra note 39, 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.
96. Puchniak & Nakahigashi, supra note 40, at 274-77.
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together politically. In that sense, elements of corporate culture have an important role to play in the design and implementation of takeover regulation.\(^97\)

In this section, we considered the shareholding structures in Asia and debated the possibility of hostile takeovers in the region. Now, we 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.

**PART IV: EVOLUTION AND DESIGN OF HOSTILE TAKEOVER REGIMES IN ASIA**

In this Part, we analyze the broad contours of takeover regulation in Asian jurisdictions to identify patterns that may exist. 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.\(^98\) 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.

Interestingly, the legal transplants from the Anglo-American jurisdictions into Asia have followed a discernible pattern, as we seek to demonstrate in this Part. Our civil law jurisdictions in Asia, specifically, 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).\(^99\) 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, particularly India, Hong Kong and Singapore, have largely embraced the U.K.’s strict board neutrality rule, which leaves the target’s board powerless in the wake of a hostile takeover offer. Instead, it 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.\(^100\)

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97. For the role of culture in takeover regulation in specific Asian jurisdictions, see Huang & Cheng, supra note 46, at 225 (for China); Puchniak & Nakahigashi, supra note 40, at 274-77.
98. See also Ventoruzzo, supra note 3, at 136.
99. 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).
100. 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 to varying
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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. There is minimal cross-referencing to U.K. law. 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. However, as we argue in this Part, our civil law jurisdictions have extracted 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, 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. China’s implementation of the rule has some superficial
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similarities to the U.K.’s position, but there are significant differences. For example, in China, 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.\textsuperscript{104} Moreover, China’s rule only applies in scenarios where a takeover offer has been announced.\textsuperscript{105} 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 version of the board neutrality rule is far more circumscribed compared to its U.K. equivalent,\textsuperscript{106} and such a selective adaptation will benefit state-owned enterprises and local Chinese interests.\textsuperscript{107} Japan and Korea have no such explicit rule.\textsuperscript{108} Target boards in all of these three jurisdictions are not bound to give the shareholders all the decision-making power in 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 plays 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.\textsuperscript{109} 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.

Kong for inspiration. \textit{See} Wei, supra note 46, 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. \textit{See} Guanghua Yu, \textit{Does One Size Fit All? Transplanting English Takeover Law into China}, in \textsc{C}HERYL \textsc{R.} \textsc{L}EHMAN, \textit{ET. AL. (EDS.), CORPORATE GOVERNANCE: DOES ANY SIZE FIT? 49} (2005)

104. Huang & Chen, supra note 46, at 228.
105. \textit{Id.}
106. \textit{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.
107. \textsc{J}UAN \textsc{C}HEN, \textit{REGULATING THE TAKEOVER OF CHINESE LISTED COMPANIES: DIVERGENCE FROM THE WEST}, 26 (2014).
108. For Japan, see \textsc{Enrico Colcera}, \textit{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, \textit{see} Rho, supra note 11, 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. \textit{See infra, Part IVA2.}
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Chinese law requires the target’s board to take decisions in the interests of the company and its shareholders. However, this provision is drafted in general terms and has caused a great deal of uncertainty, which has kept open the question of legitimacy of several takeover defenses. As we subsequently discuss, unlike Delaware, the courts and regulatory authorities have not had exposure to such a duty, which has added to the uncertainty, thereby benefiting the incumbents, such as controlling shareholders, rather than the acquirers.

Among the Asia jurisdictions, Japan has received the greatest amount of traction in the assessment of target responses to hostile takeovers using directors’ duties. 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. Under this doctrine, courts treat a share issuance to be valid if it was effected to raise capital rather than to maintain control. Puchniak and Nakahigashi argue that this is very different from the “proper purpose” duty imposed under English law, and that it set a very low bar for directors in Japanese companies.

This duty has been the subject matter of frenetic developments before both the courts and the regulators. In the much-discussed Livedoor case, the Tokyo High Court sought to explicitly 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. Following this, the Japanese government issued a set of informal (non-binding) Takeover Guidelines, which provided for pre-bid takeover defenses that target boards were allowed to establish. This led to several companies issuing “pre-warning rights plans” (PRPs) as a defensive mechanism against hostile takeovers. The PRPs are not akin to the U.S.’s poison pills because, among

10. 2014 Takeover Measures, art. 8.
12. Puchniak & Nakahigashi, supra note 40, at 263-64.
13. Id.
17. Puchniak & Nakahigashi, supra note 40, at 268. The circumstances include where the target is faced with a greenmail, asset stripping, and the like.
19. Puchniak & Nakahigashi, supra note 40, at 270. PRPs are press releases issued by the companies stating that if a takeover bid is commenced and the bidder acquires a specified threshold of
other reasons, they can be activated only with the approval of the shareholders.\textsuperscript{120} Defensive measures such as PRPs have also been litigated before the Japanese courts.\textsuperscript{121} Despite the elaborate treatment by the Japanese courts to takeover defenses, 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.”\textsuperscript{122} 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 pre-emptive rights of shareholders.\textsuperscript{123} In a somewhat restrictive interpretation, the Korean Supreme Court found that defending against a hostile takeover would not be considered “proper business purpose”.\textsuperscript{124} 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: through the sale of treasury shares to friendly parties to protect against raiders.\textsuperscript{125} Initially, the Korean courts issued contrasting rulings on the validity of treasury shares as a takeover defense. One approach found that issuing treasury shares was invalid unless there was a proper business purpose,\textsuperscript{126} while the other, broader, interpretation treated treasury shares to be different from the issue of new shares held by the company. Rho, \textit{supra} note 11, 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 shareholders other than the bidder.

\textsuperscript{120} \textit{Id.}.
\textsuperscript{121} Cases such as \textit{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 Köto Saibansho [Tokyo High Court], 15 June 2005, 1186 Hanrei TAIMUZU 254 (\textit{Nireco}), and the \textit{Bulldog Sauce}, Saikō Saibansho [Supreme Court], 7 August 2007, 61 Minshū 2215; 1252 Hanrei TAIMUZU 125 (\textit{Bulldog Sauce}); Oda, ‘Case No. 30’, \textit{supra} note 116, at 323-330, have received extensive commentary. Puchniak & Nakahigashi, \textit{supra} note 40, at 271-73; Milhaupt, \textit{Bulldog Sauce for the Japanese Soul?}, \textit{supra} note 118; Milhaupt, \textit{In the Shadow of Delaware?}, \textit{supra} note 41, at 2178-80; Armour, Jacobs & Milhaupt, \textit{supra} note 2, at 25-51.

\textsuperscript{122} Puchniak & Nakahigashi, \textit{supra} note 40, at 273.
\textsuperscript{123} Korea Commercial Code, § 418. \textit{See also} Rho, \textit{supra} note 11, at 300-01.
\textsuperscript{124} Rho, \textit{supra} note 11, at 300, referring to 2008Da50776, 30 January 2009 (Korea Supreme Court).

\textsuperscript{125} 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, \textit{supra} note 11, 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 shareholders other than the bidder.

\textsuperscript{126} Rho, \textit{supra} note 11, at 301-02 (referring to the Daelim case, 2005Gahap8262 (Jun. 29, 2006, Seoul Western District Court)).
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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). Since then, the Korean courts have begun adopting the permissive approach, which has become the prevalent norm. Although a more recent phenomenon, Korean boards are able to unleash their cache of treasury stock to disarm hostile acquirers.

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. Similar to Delaware, the three civil law jurisdictions in Asia that we discuss have placed substantial reliance upon the courts to enforce the takeover measures. The similarity ends there. Unlike Delaware, which “has taken thirty years for [its] takeover jurisprudence to evolve to its present state”, 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. Apart from the fact that the dearth of hostile takeovers has resulted in this situation, it has also been attributed to the lack of qualified judges and an inadequate body of

127. Id. at 302 (referring to the Sovereign case, 2003 Kahap4145 (Dec. 23, 2003, Seoul Central District Court)).
128. 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).
129. Kim, supra note 47, at 240.
130. Gilson, supra note 41, at 39; Kang, supra note 11, at 662.
131. None of these legal systems place much reliance on independent directors to regulate hostile takeovers. For example, as to Japan, see Gilson, supra note 41, at 41.
133. Huang & Chen, supra note 46, at 227; CHEN, supra note 107, at 149. See also Li, supra note 87.
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precedents. Moreover, in China, shareholders are less likely to bring private actions to enforce fiduciary duties of boards. Even when actions are brought, shareholders are very unlikely to succeed.  

Similarly, in Japan, the task of regulating takeovers has been thrust on to the court system, inspired largely by Delaware. It has been noted that “it would be a serious mistake to underestimate the weight of that burden”. Despite having created a relatively robust body of case law (in contrast to China and Korea), the takeover jurisprudence developed by the courts “leaves important questions unanswered”. 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. Moreover, the practice of the Korean courts is to allow ample wiggle room to directors facing hostile takeovers.

Clearly, all of our civil law jurisdictions have gravitated towards a system wherein 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. 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 a model (similar to Delaware) that places reliance on the courts (and, to a limited extent, U.K.

135. CHEN, supra note 107, at 138.
136. Id. at 18. Although China has had a good number of cases brought by shareholders against directors by way of derivative action, 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).
138. Gilson, supra note 41, at 42.
139. Puchniak & Nakahigashi, supra note 40, at 263.
140. Choi, supra note 11, at 25. See also, Kang, supra note 11, at 624.
141. Rho, supra note 11, at 305.
142. See CHEN, supra note 107, at 27 (in the context of China).
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takeover jurisprudence) in order to keep up with global standards. As a result, they have paid short shrift to home-grown mechanisms of takeover regulation. 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. In order to enable a market for control, it is not sufficient to introduce changes in the substantive law. 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 considering 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, the Ministry of Economy, Trade and Industry (METI) established a Corporate Value Study Group that was the precursor to the Takeover Guidelines. The Working Group not only embraced Delaware doctrine on the ability of target companies to respond to hostile takeovers, but it also explicitly rejected the U.K.-based board neutrality rule. 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 individuals trained in the U.S., with lesser experience of U.K. law. 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

143. Milhaupt, In the Shadow of Delaware?, supra note 41, 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 40, at 244.
144. Milhaupt, In the Shadow of Delaware?, supra note 41, at 2204.
146. Id.
147. See text accompanying supra note 116.
148. See supra note 118. See also, Milhaupt, In the Shadow of Delaware?, supra note 41, at 2195-97.
150. Jacobs, supra note 109, at 325.
151. Alger, supra note 145, at 325.
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protective of management than the [U.K. Takeover] Code”. 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.

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. However, this move was not successful due to the concern that it may seek to benefit the incumbent business elites. Nevertheless, due to the circular and pyramid shareholdings, as well as wide discretion granted to target boards, hostile takeovers have failed to gain momentum. 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.

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, governments cannot but afford to have regard to the incumbents in designing the scope and content of takeover regulation.

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

Moving to the common law jurisdictions in Asia, specifically India, Hong Kong, and Singapore, anecdotal evidence indicates that these jurisdictions have been subject to fewer hostile takeovers compared to the civil law jurisdictions under study. Their takeover regimes have closely followed the U.K. model, where 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.

154. Rho, supra note 11, at 305.
155. Id. See also Kim, supra note 47, at 254.
156. Rho, supra note 11, at 305.
157. See text accompanying supra notes 125 to 129.
158. 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).
159. Kang, supra note 11, at 639.
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Target boards in these jurisdictions are powerless because they do not have access to a wide array of takeover defenses. Instead, they must submit to the decisions of the shareholders, who possess primary decision-making powers regarding the outcome of all kinds of takeovers, including hostile ones. Moreover, unlike the civil law jurisdictions under study, 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 that a regulatory set up which immobilizes target boards to facilitate a market for corporate control, there has not been a frequent flow of hostile takeovers. Among other factors, this is largely because the U.K. model, 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 goals of the Asian corporations, where the role of takeover regulation is to facilitate control shifts between a selling controlling shareholder and an acquirer. Because of the different ways that takeovers are perceived in the U.K. and Asia, the transplantation of the U.K. model into the Asian corporate sphere 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 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. By virtue of this rule, target boards are immobilized from undertaking any defensive action once a takeover offer is imminent or has been made. Target boards may try to stop the takeover by issuing new shares or convertible securities, selling or disposing of material assets, or entering into contract otherwise than in the ordinary course of business, only if they have the prior approval of the shareholders. The inability of the target managements to fend off a hostile acquirer without referring back

160. 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 is also the case 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 L. & ECON. 153, 159, 173 (2008).
161. Varottil & Wan, supra note 37, at 25.
162. 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.
to shareholders operates as a significant impediment. Despite the incapacity of
target boards to defend themselves, why are there relatively few 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 points
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 the common law
jurisdictions in Asia under study (as it is in the U.K.) requires shareholders to
approve transactions that constitute customary takeover defences.\footnote{163} 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.\footnote{164}
Similarly, the board cannot undertake a sale of substantial assets of the
company without the prior approval of the board.\footnote{165} 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 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
withdrawing the decision-making power of the target’s board (that is
effectively conflicted) in a hostile takeover and transferring it to the
shareholders can be effective. These shareholders then are able to ultimately
decide the fate of the takeover. However, when such a rule is juxtaposed to the
Asian context, unintended results ensue, given that the principal agency
problem is one between the controlling shareholders and the minority
shareholders.\footnote{166} 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 arguably often counter 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.

\footnote{163} 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 Ventoruzzo, supra
note 3, at 159; Wan, supra note 39, at 420.

\footnote{164} Companies Act, 2013, § 62(1)(c) (for India); Companies Ordinance (Cap. 622), § 141 (for
Hong Kong); Companies Act (Cap. 50), § 161 (for Singapore).

\footnote{165} Companies Act, 2013, § 180 (for India); Companies Ordinance (Cap. 622), Companies Act
(Cap. 50), § 160 (for Singapore).

\footnote{166} See Ventoruzzo, supra note 3, at 141.
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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 the common law Asian jurisdictions under study 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.167 However, to the knowledge of the authors, 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 disputes relating to takeover regulation, let alone in the context of hostile situations. This is attributable to two factors. First, because of the lack of hostile takeovers in these jurisdictions, the courts have not had the opportunity to clarify directors’ duties. Second, takeover disputes in these jurisdictions are resolved outside the court system, a matter that will be discussed next.

3. Oversight and Monitoring by Regulatory Bodies

The civil law and common law jurisdictions in Asia follow divergent approaches when dealing with the oversight and monitoring of parties’ conducts in a hostile takeover. 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. In contrast, the common law jurisdictions not only regulate takeovers through ex ante rules, but resolve disputes either by a takeover panel or by the securities regulator. In these common law jurisdictions, similar to the U.K., the involvement of courts is limited in resolving takeover disputes.

Hong Kong and Singapore have established both the Takeovers and Mergers Panel and the Securities Industry Council (SIC) 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.

167. For the leading cases law, see supra note 114.
Membership of these takeover panels is represented by a wide range of interests, including participation from the industry, investor community and professionals. The idea behind establishing such panels is to ensure speed, flexibility and certainty. Courts only have limited oversight in respect of decisions of the panel.

In contrast, India has not adopted a panel-like approach towards the enforcement of takeover regulation. Instead, the Securities and Exchange Board of India (SEBI), the securities regulator, performs the function of regulating takeovers. However, even here, courts are generally kept outside the purview of takeover disputes. The resolution of takeover disputes outside the court system has implications in the political economy, as we discuss in the next subpart.

4. The Role of Interest Groups

In each of the common law jurisdictions in Asia under study, there is evidence that incumbents, such as controlling shareholders, have acted to preserve the status quo in the design and implementation of the legal regime pertaining to hostile takeovers. In India, controlling shareholders of Indian companies have a great deal of influence in shaping the takeover regulation in a manner that militates against a market for corporate control.

In the context of Singapore, Wan has argued that the adoption of the U.K.-style of takeover regulation is the result of interaction among the relevant interest groups, namely significant shareholders (such as business families or the state) and the regulator. One example that demonstrates this phenomenon is a consultation exercise conducted by the SIC where 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


169. 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 VAROTIL & WAN, supra note 37, at 134-62.


171. 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).

172. See text accompanying infra notes 183-184.

173. Varottil, supra note 39, at 378. For a more detailed discussion on India, see text accompanying infra notes 183-184.

174. Wan, supra note 39, at 408.
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175 The overwhelming response from market practitioners was to retain the U.K.’s board neutrality rule.176 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 positioned to hold the decision-making power at the shareholder level where they can exercise significant influence, rather than to grant it to boards.177 Even if controlling shareholders do not have holdings that are large enough to influence the directors of the target as to the fate of the takeover, an exercise of powers through shareholder decision-making could enable them to decide the outcome of a hostile takeover.178

In Hong Kong, the influence of controlling blockholders is evidenced in the manner, rather than design, of the implementation of takeover regulation. Given that the market for corporate control essentially relates to “the jockeying among blockholders for control of their corporate groups and the economy generally”,179 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”.180

The lawmaking, oversight, and monitoring process in takeover regulation plays an important role in how interest groups exert their influence. Armour, Jacobs and Milhaupt have noted that, unlike the judiciary, regulators and market actors tend to become the focus of interest groups while introducing new rules.181 Regulators appear to be somewhat responsive to such interest groups. Often, the effort to preempt a legislative outcome ends up conforming to the preferences of the dominant interest groups.182 For example, in India, SEBI usually creates takeover regulation by appointing a committee of experts


176 Id. at 8.

177 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 134, at 192-93.

178 Wan, supra note 39, at 420-21.

179 Donald, supra note 55, at 383.

180 Id. at 403.

181 Armour, Jacobs & Milhaupt, supra note 2, at 230.

182 Id. at 232.
to examine the issues and make recommendations. Such committees tend to strongly represent domestic Indian business interests and include leading corporate lawyers. Through this, the Indian legal 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 seen in the case of Singapore. 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 concerns that would make the design and implementation of takeover regulation in these jurisdictions vastly different from the origin country of the U.K.

PART V: IMPLICATIONS FROM THE STUDY OF TAKEOVER REGULATION IN ASIA

Our analysis of the six Asian jurisdictions indicates that they have adopted a dichotomous approach towards takeover regulation. While the civil law jurisdictions of China, Japan and Korea are aligned more closely to the U.S., particularly Delaware’s, position which 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 jurisdictions, there is one important commonality. No matter how the takeover regulation is designed or implemented, the controlling or dominant shareholders have been the focus of the rulemaking process. 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

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. For instance, the evolution of the takeover regime is important in understanding the substantive nature of the rules, and interest

183. Varottil, supra note 39, at 378.
184. Id.
185. See, supra notes 174 to 178, and accompanying text.
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groups tend to exert significant influence in the process its regulatory outcomes. However, divergences with Armour and Skeel do exist. Their analysis of the 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 jurisdictions in Asia, a different position ensues. This difference can be seen with the bifurcation that exists in Asia as well as the bifurcation between the U.S. and the U.K., as shown in Armour and Skeel’s framework. For instance, while the civil law jurisdictions in Asia have drawn their inspiration from the U.S., and 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.¹⁸⁶ Such factors are likely to be idiosyncratic not only 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”.¹⁸⁷

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

As we have seen, takeover regulation in the Asian jurisdictions mentioned 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.¹⁸⁸ Any rulemaking process by the regulators or lawmakers cannot afford to ignore the interests and

¹⁸⁶. See Puchniak & Nakahigashi, supra note 40, at 244.
¹⁸⁷. Ventoruzzo, supra note 3, at 141 (noting a similar result in the context of takeover regulation in continental Europe).
¹⁸⁸. 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 when their holdings might be diluted due to additional capital raising efforts.
concerns of controlling shareholders due to the political power that they wield. Here, the civil law jurisdictions in Asia follow a predictable pattern consistent with the interest group analysis of takeover regulation. The focus of the law and its implementation is on providing greater power to the incumbents to protect themselves against hostile takeovers, including allowing controlling shareholders to erect 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 controlling shareholders’ influence, as the directors owe their election and continuation in office to the shareholders (which the controllers strongly influence). Hence, we argue that any benefits conferred upon the board in the Asian context have to be viewed differently than 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: 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 be present in full force 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. The Armour and Skeel analysis fails to shed light on this conundrum.

We offer an alternative explanation. 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 why. 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)

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189. See supra Part I.
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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, 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, we find the legislature is usually less responsive to interest group influences in the takeover arena in the absence of a scandal. In that sense, addressing the 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 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. Moreover, the state has reasons to prefer well-tested approaches to takeover regulation, especially from developed economies, since they signal signs of development. For instance, imposing a board neutrality rule might be a sign that the economy is open to foreign acquisitions and foreign investment, which are means towards deepening the capital markets, reducing reliance on domestic investment, and enhancing economic growth. Due to these reasons, all of the Asian jurisdictions have shunned a purely homegrown approach in developing 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.

Competing interests have pulled individual Asian jurisdictions to varying degrees resulting in different outcomes from the same process. 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

190. See supra notes 163 to 165, and accompanying text.
191. See Armour, Jacobs & Milhaupt, supra note 2, at 229-32.
192. See supra Part IV.
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 of the Asian jurisdictions that follow similar approaches towards takeover regulation demonstrate differing outcomes. As we have seen, 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. Due regard must be given 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 began to gain ground 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 in determining takeover regulation.

Broadening the discussion to the sphere of corporate governance, it would be imprudent for Asian jurisdictions to rely heavily on the market for corporate control as a governance-enhancing mechanism, especially given the concentration in shareholdings. 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. 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)

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194. See supra Part IVA4 (in the context of our civil law Asian jurisdictions, particularly Japan).
195. See Puchniak & Nakahigashi, supra note 40, at 258 (in the context of Japan).
196. See supra note 51.
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rather than to other civil law jurisdictions. Second, and more intriguingly, the
diffusion of legal norms has occurred in rather counterintuitive ways. All the
common law jurisdictions in Asia under study have preferred not to use the
court system to resolve takeover disputes.197 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.

PART 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. with
the six Asian jurisdictions that have high volumes 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, sophistication of the regulators and courts, as well as cultural traits.
The evolution, design, and enforcement of takeover regulation has tend to
benefit the incumbents, who are usually the controlling shareholders, such as
business families and the state. These groups are ubiquitous in the Asian
corporate sphere. Ultimately, it is our case that Asian takeover regulation
(specifically, each individual jurisdiction) must be viewed on its own terms
rather than through an Anglo-American perspective.

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197. Similar findings regarding the use of courts can be found in the context of shareholder
derivative actions. See Puchniak, supra note 99, at 10-11, 14.