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The Divergent Designs of Mandatory Takeovers in Asia

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June 2021

Umakanth Varottil
National University of Singapore and ECGI
Wai Yee Wan
City University of Hong Kong, Singapore Management University

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Abstract

Optimal takeover regulation aims to promote efficient changes of corporate control while curbing inefficient takeovers. Viewed from a comparative perspective, the Anglo-American prototypes spearhead not only the discourse but also the dissemination of takeover regulation globally. At the one end of the spectrum, the law in the United States (U.S.) follows the "market rule," whereby transfers of corporate control benefit from a regulatory freehand. At the other end of the spectrum lies the "mandatory bid rule" (MBR), epitomized by takeover regulation in the United Kingdom (U.K.). Under the U.K.'s version of the MBR, an acquirer who acquires de facto control over a target must make a general offer to the remaining shareholders to acquire all of their shares at the same price it paid to acquire the controlling block.

In this article, we aim to analyze how and why six significant Asian jurisdictions adopted the MBR and its variants. This is puzzling given that the jurisdictions display considerable divergence in terms of structural, legal, and institutional foundations, not only with their Anglo-American counterparts but also even among themselves. In this article, we challenge the prevailing notion that the binary Anglo-American approach constitutes the framework for the dissemination of takeover regulation worldwide.

We claim that because of the political economy of takeover regulation in the Asian jurisdictions, the choice to adopt various intermediate positions is by design and not by default. Considering the market rule provides suboptimal protection to minority shareholders and the MBR curbs the market for corporate control, the intermediate positions aim to balance these somewhat conflicting objectives. Our study contributes to the wider debate surrounding the appropriate takeover regulation and, more specifically, the claims made by the proponents of the market rule on the one hand and the MBR on the other.

Keywords: Mandatory bid rule, Asia, transfers of corporate control, mergers and acquisitions, takeover regulation

JEL Classifications: K22

Umakanth Varottil*
Associate Professor
National University of Singapore, Faculty of Law
Eu Tong Sen Building
469G Bukit Timah Road
Singapore 259776 , Singapore
phone: +65 6516 3606
e-mail: v.umakanth@nus.edu.sg

Wai Yee Wan
Professor of Law
City University of Hong Kong, Centre for Chinese & Comparative Law
Academic 1, 83 Tat Chee Avenue
Kowloon Tong, Hong Kong
phone: +(852)-3442-9111
e-mail: waiywan@cityu.edu.hk

*Corresponding Author



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Umakanth Varottil
Wai Yee Wan

v.umakanth@nus.edu.sg
waiywan@cityu.edu.hk

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THE DIVERGENT DESIGNS OF MANDATORY TAKEOVERS IN ASIA

Umakanth Varottil[*] *& Wai Yee Wan*[**]

ABSTRACT

Optimal takeover regulation aims to promote efficient changes of corporate control while curbing inefficient takeovers. Viewed from a comparative perspective, the Anglo-American prototypes spearhead not only the discourse but also the dissemination of takeover regulation globally. At the one end of the spectrum, the law in the United States (U.S.) follows the "market rule," whereby transfers of corporate control benefit from a regulatory freehand. At the other end of the spectrum lies the "mandatory bid rule" (MBR), epitomized by takeover regulation in the United Kingdom (U.K.). Under the U.K.'s version of the MBR, an acquirer who acquires de facto control over a target must make a general offer to the remaining shareholders to acquire all of their shares at the same price it paid to acquire the controlling block.

In this article, we aim to analyze how and why six significant Asian jurisdictions adopted the MBR and its variants. This is puzzling given that the jurisdictions display considerable divergence in terms of structural, legal, and institutional foundations, not only with their Anglo-American counterparts but also even among themselves. In this article, we challenge the prevailing notion that the binary Anglo-American approach constitutes the framework for the dissemination of takeover regulation worldwide.

We claim that because of the political economy of takeover regulation in the Asian jurisdictions, the choice to adopt various intermediate positions is by design and not by default. Considering the market rule provides suboptimal protection to minority shareholders and the MBR curbs the market for corporate control, the intermediate positions aim to balance these somewhat conflicting objectives. Our study contributes to the wider debate surrounding the appropriate takeover regulation and, more specifically, the claims made by the proponents of the market rule on the one hand and the MBR on the other.

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[*] Associate Professor, Faculty of Law, National University of Singapore.

[**] Professor, School of Law, City University of Hong Kong.

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I. INTRODUCTION

At the core of takeover law and regulation lie two, sometimes contradictory, objectives. On the one hand, takeover regulation is facilitative in nature, as it enables a market for corporate control.[1] At the same time, it also bears a commitment to protect the interests of the target's shareholders.[2] The goal of takeover regulation is to strike an appropriate balance between these two objectives.[3] Translated into efficiency terms, this suggests that optimal takeover regulation must promote efficient changes of corporate control while curbing inefficient takeovers.[4]

Viewed from a comparative perspective, the Anglo-American prototypes spearhead not only the discourse but also the dissemination of takeover regulation globally.[5] At one end of the spectrum, the law in the United States (U.S.) follows the "market rule," whereby transfers of

[1] Paul Davies, *Control Shifts via Share Acquisition Contracts with Shareholders (Takeovers)* in JEFFREY N. GORDON & WOLF-GEORG RINGE (EDS.), THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 555, 568 (2018).

[2] Luca Enriques, *The Mandatory Bid Rule in the Takeover Directive: Harmonization without Foundation*, 1 ECFR 440, 448 (2004).

[3] Robin Hui Huang & Juan Chen, *Takeover Regulation in China: Striking a Balance Between Takeover Contestability and Shareholder Protection*, in UMAKANTH VAROTTIL & WAI YEE WAN (EDS.), COMPARATIVE TAKEOVER REGULATION: GLOBAL AND ASIAN PERSPECTIVES 218 (2017).

[4] *See e.g.*, Lucian Arye Bebchuk, *Efficient and Inefficient Sales of Corporate Control*, 109 Q.J. ECON. 957 (1994); Marcel Kahan, *Sales of Corporate Control*, 9 J. L. ECON. & ORG. 368 (1993).

[5] *See infra*, Part IIC.

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corporate control benefit from a regulatory free hand.[6] Controlling shareholders are not required to share with minority shareholders certain benefits such as control premiums they may obtain during control transfers.[7]

At the other end of the spectrum lies the "mandatory bid rule" (MBR), epitomized by takeover regulation in the United Kingdom (U.K.).[8] Under the U.K.'s version of the MBR, an acquirer who acquires *de facto* control (represented by 30% voting rights) over a target must make a general offer to the remaining shareholders to acquire all of their shares at the same price it paid to acquire the controlling block.[9] The MBR deprives controlling shareholders of their exclusivity to the control premium, as they must share it with the minority shareholders.[10] It also enables the minority to exit the company in the event of a change in control of the target at a reasonable price.[11] Although the MBR has its benefits, it makes takeovers costly, thereby impinging upon the market for corporate control[12] and, in turn, arguably entrenching controlling shareholders and managements of target companies.[13]

Conventional wisdom indicates that the MBR and, to a very limited extent, the market rule have formed the models for minority exit and protection worldwide.[14] For example, the U.K. takeover regulation has influenced the adoption of the MBR in continental Europe.[15] Outside Europe, the MBR has taken root globally, including in several jurisdictions in Asia. Six significant Asian economies of China, Japan, Korea, India, Singapore, and Hong Kong, among others, have adopted varying versions of the MBR.[16]

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[6] Bebchuk, *supra* note 4, at 964; ALESSIO PACCES, RETHINKING CORPORATE GOVERNANCE: THE LAW AND ECONOMICS OF CONTROL POWERS 342, 371 (2012); Hubert de La Bruslerie, *Equal opportunity rule vs. market rule in transfer of control: How can private benefits help to provide an answer?*, 23 J. CORP. FIN. 88, 89-90 (2013).

[7] However, the law in the U.S. restricts controlling shareholder action applying fiduciary duty principles. *See* text accompanying *infra* notes 34-35.

[8] The Panel on Takeovers and Mergers, *The City Code on Takeovers and Mergers*, §9 (hereinafter the "U.K. Code").

[9] *Id.* Paul Davies, Klaus Hopt & Wolf-Georg Ringe, *Control Transactions* in REINIER KRAAKMAN, ET. AL., THE ANATOMY OF CORPORATE LAW (3rd edn.) 237 (2017).

[10] *Id.*, at 227; Einer Elhague, *The Triggering Function of Sale of Control Doctrine*, 59 U. CHI. L. REV. 1465, 1465 (1992); Luca Enriques & Matteo Gatti, *Creeping Acquisitions in Europe: Enabling Companies to be Better Safe than Sorry*, 15 J. CORP. L. STUD. 55, 63 (2015); Nicholas Jennings, *Mandatory Bids Revisited*, 5 J. Corp. L. Stud. 37, 43-47 (2005).

[11] Davies, Hopt & Ringe, *supra* note 9, at 227-228; PACCES, *supra* note 6, at 388; Jennings, *supra* note 10, at 41-43.

[12] Johannes W. Fedderke & Marco Ventoruzzo, *The Biases of an 'Unbiased' Optional Takeovers Regime: The Mandatory Bid Threshold as a Reverse Drawbridge* in VAROTTIL & WAN, *supra* note 3, at 165; Deborah A. DeMott, *Current Issues in Tender Offer Regulation: Lessons from the British*, 58 N.Y.U. L. REV. 945, 945 (1983); Enriques, *The Mandatory Bid Rule in the Takeover Directive*, *supra* note 2, at 441-442.

[13] See e.g., Fedderke & Ventoruzzo, *supra* note 12, at 169, 177.

[14] The popularity of the MBR outstrips that of the market rule. *See infra*, Part IIC.

[15] Jeremy Grant, Tom Kirchmaier & Jodie A. Kirchner, *Financial tunnelling and the mandatory bid rule*, 10 EBOR 233, 236 (2009); Klaus J. Hopt, *European Takeover Reform of 2012/2013 – Time to Re-Examine the Mandatory Bid*, 15 EBOR 143, 153-54 (2014); Georgios Psaroudakis, *The Mandatory Bid and Company Law in Europe*, 7 ECFR 550, 551 (2010); Marco Ventoruzzo, *Takeover Regulation as a Wolf in Sheep's Clothing: Taking U.K. Rules to Continental Europe*, 11 U. PA. J. BUS. L. 135, 135 (2008).

[16] *See infra*, Part IIIA.

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In this article, we aim to analyze how and why these six Asian jurisdictions adopted the MBR and its variants. This is puzzling because the jurisdictions display considerable divergence in terms of structural, legal, and institutional foundations, not only with their Anglo-American counterparts but also even among themselves. Several questions emerge. Does the rationale for adopting the MBR, which originated in the U.K. where public companies display dispersed shareholding, apply equally in the Asian jurisdictions where concentrated shareholding is the dominant characteristic? If the MBR tends to stymie takeovers and entrench controllers, why do regulators in the Asian jurisdictions veer toward the MBR more than the market rule? Why do controlling shareholders, an influential group in the context of Asian corporate governance, still favor a version of the MBR if it means that they must pay a higher premium to consolidate their control and, when they sell, share their control premium with the minority shareholders?

In this article, we challenge the prevailing notion that the binary Anglo-American approach constitutes the framework for the dissemination of takeover regulation globally. Existing literature largely focuses on how jurisdictions have either adopted (with or without variation) the U.K.'s stringent approach using the MBR for effecting transfers of control or, in some cases, the U.S.'s light-touch approach of the market rule.[17] Some jurisdictions in Asia such as Singapore and Hong Kong have faithfully transplanted the UK's version of MBR in its essence and in practice.[18] Others such as China, Japan, and India have made appropriate modifications, including allowing partial offers in a wide range of circumstances, generous creeping acquisitions, and an array of exemptions from the MBR.[19] Korea's version of the MBR maintains it closer to the market rule than to that of the U.K.-style MBR.[20]

Our thesis is that the MBR and its variants are choices that each of the Asian jurisdictions makes as to where its regime lies along a spectrum between a strong MBR (closely resembling the U.K. version) and a diluted MBR (closely resembling the market rule). Contrary to the Anglo-American discourse, which is dichotomous, our study demonstrates that the Asian analysis displays greater divergence.[21] Although it is enticing to treat this result as a failed transplant of the MBR, the position carries a lot more nuances that receive scant attention in the literature. Arising from Asia's divergent approaches, we challenge the notion that there can be one size that fits all models for the MBR, not only for all economies that adopt them but also for all companies within the same economy. Our study also establishes the unintended consequences of the implementation of the MBR.

[17] *See e.g.*, Davies, Hopt & Ringe, *supra* note 11; Davies, *supra* note 1, at 554-568;
[18] *See infra*, Part IIIA.
[19] *Id*.
[20] *Id*.
[21] *See also*, Yueh-Ping Yang & Pin-Hsien Lee, *Is Moderation the Highest Virtue: A Comparative Study of a Middle Way of Control Transaction Regimes*, 41 DEL. J. CORP. L. 393, 416 (2017).

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We claim that the political economy of takeover regulation in the Asian jurisdictions suggests that the choice to adopt various intermediate positions is by design and not by default. Given that the market rule provides suboptimal protection to minority shareholders and the MBR curbs the market for corporate control, the intermediate positions seek to balance these somewhat conflicting objectives. Any form of MBR operates as a signaling effect that takeover regulation in a jurisdiction comports with international practice,[22] but the deviations from the rule tend to be material enough to provide incumbents with the necessary protection against hostile takeovers and obtain control premium through exceptional means.[23] As controlling shareholders tend to bear significant influence in the process of carving out takeover regulation in the Asian jurisdictions, it is not surprising that they have advocated for a position that helps moderate the effect of control transfers in that manner that favors the incumbents.

Our study contributes to the wider debate surrounding the appropriate takeover regulation and, more specifically, the claims made by the proponents of the market rule on the one hand and the MBR on the other.[24] Although the inclusion of the MBR in the E.U. Takeover Directive spawned several studies of the MBR in the 2000s,[25] there is comparatively less traction for the analysis of the MBR in the Asian context. Some studies have focused on the incorporation of the MBR in individual Asian jurisdictions,[26] and others have focused on comparing specific aspects such as partial offers in a handful of Asian jurisdictions.[27] Through our broader study of six jurisdictions with varying legal traditions and economic landscapes, we seek to more extensively tease out the distinctions in the design and implementation of the MBR in Asia.

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[22] *See* text accompanying *infra* notes 250-253.

[23] *See infra* Part III.

[24] *See e.g.*, William D. Andrews, *The Stockholder's Right to Equal Opportunity in the Sale of Shares*, 78 HARV. L. REV. 505 (1965); Bebchuk, *supra* note 4; de La Bruslerie, *supra* note 6; Erik Berglof, et. al., *European Takeover Regulation*, 18 ECONOMIC POLICY 171 (2003); Clas Bergstrom, Peter Hogfeldt & Johan Molin, *The Optimality of the Mandatory Bid Rule*, 13 J.L. ECON. ORG. 433 (1997); Mike Burkart & Fausto Panunzi, *Mandatory Bids, Squeeze-Out, Sell-Out and the Dynamics of the Tender Offer Process*, in GUIDO FERRANI, ET. AL. (EDS.), REFORMING COMPANY AND TAKEOVER LAW IN EUROPE (2004); DeMott, *supra* note 12; Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698 (1982); Elhauge, *supra* note 10; Jesper Lau Hansen, *Mandatory Bid Rule - The Rise to Prominence of a Misconception*, The, 45 SCANDINAVIAN STUD. L. 173 (2003); Mark Humphery-Jenner, *The impact of the EU takeover directive on takeover performance and empire building*, 18 J. CORP. FIN. 254 (2012); Kahan, *supra* note 4; Ruth Luttmann, *Changes of Corporate Control and Mandatory Bids*, 12 INT'L REV. L. ECON. 497 (1992); Joseph A. MacCahery & Erik P. Vermeulen, *Does the Takeover Bids Directive Need Revision?*, TILBURG LAW SCHOOL RESEARCH PAPER NO. 005/2010, available at https://ssrn.com/abstract=1547861; Edmund Philipp Schuster, *The Mandatory Bid Rule: Efficient, After All?*, 76 MLR 529 (2013); Simone M. Sepe, *Private Sale of Corporate Control: Why the European Mandatory Bid Rule is Inefficient*, ARIZONA LEGAL STUDIES DISCUSSION PAPER NO. 10-29 (2010), available at https://ssrn.com/abstract=1086321; Ying Wang & Henry Lahr, *Takeover Law to Protect Shareholders: Increasing Efficiency or Merely Redistributing Gains?*, 43 J. CORP. FIN. 288 (2017).

[25] *See e.g.*, *supra* note 15. *See also*, Berglof, et. al., *supra* note 24; Humphery-Jenner, *supra* note 24; MacCahery & Vermeulen, *supra* note 24; Sepe, *supra* note 24.

[26] Several of these studies are contained in VAROTTIL & WAN, *supra* note 3. We list other studies *infra* Part III.

[27] Yang & Lee, *supra* note 21.

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Our choice of China, Hong Kong, Japan, India, Korea, and Singapore for this study merits explanation. They are six of the most significant economies in Asia, which also represent the largest takeover markets in the region.[28] This list of jurisdictions covers the hugely populated growth economies of China and India, the leading Asian financial centers of Singapore and Hong Kong, and the established economies of Korea and Japan.[29] This combination also includes a balanced representation of both common law (India, Hong Kong, and Singapore) and civil law (China, Japan, and Korea) jurisdictions, although the influence of legal tradition[30] on takeover regulation in the context of the MBR and the market rule is tenuous.[31] A study of takeover regulation in these six jurisdictions provides a substantial and representative understanding of takeover regulation in Asia.

Part II of this article sets out the broad features of the MBR and examines the dissemination of the rule worldwide, particularly in Asia. Part III analyzes specific features of the MBR in the six Asian jurisdictions and demonstrates how it is different from the Anglo-American approach. It also identifies the divergence among these six jurisdictions. Part IV rationalizes the divergent designs of the MBR in Asia using several well-established comparative law tools, including legal transplants and the political economy of regulation. Therein, we also seek to provide some normative observations regarding MBR as well as takeover regulation more generally. Part V concludes.

II. A FRAMEWORK FOR THE MBR

Before embarking on an analysis of takeover regulation in the Asian jurisdictions, it would be necessary to consider the evolution of the MBR as well as its objectives. This would enable us to examine the comparison between the MBR and the market rule across theoretical and efficiency considerations. Finally, the dissemination of the MBR into other jurisdictions, including through the E.U. Takeover Directive and further into various Asian jurisdictions, merits scrutiny.

A. Objectives and Utility of the MBR

[28] See, for example, S&P Global Market Intelligence, *Asia-Pacific Markets Monthly* (August 2020), demonstrating that for the periods Jan. 1, 2019 to July 31, 2019 and Jan. 1, 2020 to July 31, 2020, among the largest markets for M&A activity in Asia-Pacific (excluding Australia) by volume are China, Japan, South Korea, India, Singapore and Hong Kong.

[29] *See also*, Umakanth Varottil & Wai Yee Wan, *Hostile Takeover Regimes in Asia: A Comparative Approach*, 15 BERKELEY BUS. L.J. 267 (2019).

[30] The "law matters" thesis suggests that the legal framework governing financial markets and corporate governance had an important role to play in creating the conditions for economic growth in low and middle-income countries. Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *Law and finance*, 106 J. POL. ECON. 1113 (1998); Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008).

[31] Varottil & Wan, *supra* note 29, at 304-305.

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1. Reasonable exit right for minority shareholders

In some jurisdictions such as the U.S., only minimal restraints accompany a sale of control transaction.[32] Controlling shareholders do not bear an unqualified obligation to share with other target shareholders the control premium they may obtain from the acquirer.[33] However, sales of control cannot be carried out in an unrestrained manner, as controlling shareholders are subject to certain fiduciary duties when they decide to sell their shares.[34] These duties apply specifically to the selling controlling shareholders rather than the acquirer. Moreover, a fiduciary duties-based regime places the onus for determination of the scope of the duties as well as their breaches on courts, which they would exercise on an *ex post* basis on the facts and circumstances of each case.[35]

The market rule historically monopolized takeover regimes, and it was not until 1972 that the MBR found firm ground through its introduction into the U.K.'s City Code on Takeovers and Mergers (hereinafter the "U.K. Takeover Code").[36] The theoretical basis for the MBR lies in the equality of treatment to shareholders in a control shift resulting from the acquisition of shares.[37] When an acquirer acquires adequate shares[38] to obtain "control"[39] over the target, the MBR requires the acquirer to offer to buy out the remaining noncontrolling shareholders for cash at no less than the price at which it acquired control.[40] The controlling shareholders have no possibility whatsoever of obtaining any control premium or disguised payments that offer them exclusive benefits that they can avoid sharing with the minority shareholders.[41] That apart, the MBR operates as an exit right for minority shareholders to liquidate their holdings upon the occurrence of a change in control so that they are not locked in case the new controller runs the company in a manner that is in contrast to the minority's expectations.[42] The exit right also reduces the pressure on the remaining shareholders to tender.[43] In that sense, the MBR has twin elements: "sharing" and "exit."[44]

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[32] Davies, Hopt & Ringe, *supra* note 9, at 232; Yang & Lee, *supra* note 21.

[33] *Id*.

[34] Such fiduciary duties tend to attach to controllers during a sale when either (i) the acquirer is prone to looting, (ii) there is a sale of office by the controller, or (iii) there is a diversion of corporate opportunity. Elhauge, *supra* note 10, at 1503-1523; Sepe, *supra* note 24 at 17-18.

[35] Elhauge, *supra* note 10, at 1501.

[36] *See supra* note 8. *See also*, Ventoruzzo, *supra* note 15, at 145.

[37] PACCES, *supra* note 6, at 342; Luttmann, *supra* note 24, at 498-99; Thomas Papadopoulos, *The Mandatory Provisions of the EU Takeover Bid Directive and Their Deficiencies*, 1 LAW & FIN. MKT. REV. 525, 528 (2007).

[38] Our references in this article to "shares" generally relate to shares with voting rights. It is the acquisition of a sufficient proportion voting rights that confers "control" on the acquirer.

[39] For a discussion of "control" in the context of the MBR, *see*, Umakanth Varottil, *Comparative Takeover Regulation and the Concept of 'Control'"*, [2015] SING. J.L. STUD. 208.

[40] Davies, *supra* note 1, at 543.

[41] Andrews, *supra* note 24, at 513-15.

[42] Davies, *supra* note 1, at 543; Schuster, *supra* note 24, at 533; Jennings, *supra* note 10, at 42-43.

[43] Davies, Hopt & Ringe, *supra* note 9, at 227-28; Enriques, *The Mandatory Bid Rule in the Takeover Directive*, *supra* note 2, at 453.

[44] *Supra* notes 9-10.

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Unlike the market rule, which focuses on the selling controller, the MBR imposes obligations on the acquirer.[45] Moreover, it is not the actual harm caused by the change of control to the minority shareholders of the target that matters but the very act of control shift. Such an *ex ante* determination that all control transactions might likely impinge upon the interests of the minority shareholders provides them with the exit option together with a share in the control premium.[46] The MBR achieves through *ex ante* overarching regulation what the U.S. market rule does through *ex post* fact-based determination.[47]

The U.K.'s approach toward the MBR is arguably stringent as it represents a combination of several features. *First*, an acquirer triggers the MBR when it acquires *de facto* control over the target, irrespective of whether its plans for the target are beneficial or destructive to its other shareholders.[48] *Second*, once triggered, the acquirer must make an offer to *all* the remaining shareholders of the target to acquire their shares, i.e., a full offer.[49] Concomitantly, the U.K. approach disavows a partial offer in the discharge of the MBR obligation, only allowing partial offers in voluntary situations and with several restrictions.[50] *Third*, the acquirer must make the offer at a minimum price, which is at least the price at which it acquired control.[51] *Fourth*, once the acquirer has *de facto* control over the target but not legal control,[52] it cannot acquire further shares and consolidate its holdings, unless it makes a mandatory offer to all the remaining shareholders to acquire their shares.[53] *Fifth*, only limited exceptions accompany the MBR.[54] We refer to such a tightly circumscribed MBR emanating from and prevalent in the U.K. as the "strong form of the MBR."[55]

2. Efficiency-based analysis

Aside from a theoretical prism, scholars have examined the impact of the MBR on the basis of efficiency considerations. Davies observed that "the goal of takeover regulation should be to maximize the number of efficient shifts of control and to minimize the number of

[45] In the U.K., the MBR is enforceable through a court of law. *See*, Anna L. Christie & J.S. Liptrap, *Goldilocks (Control) and the Three Bears: Panel on Takeovers and Mergers v King*, EBOR (2020), available at ttps://link.springer.com/article/10.1007/s40804-019-00173-9.

[46] Elhauge, *supra* note 10, at 1501.

[47] *Id*.

[48] The U.K. Takeover Code, *supra* note 8, §9.

[49] *Id*.

[50] *Id*., §36. *See also*, DAVID KERSHAW, PRINCIPLES OF TAKEOVER REGULATION 186-87 (2016).

[51] The U.K. Takeover Code, *supra* note 8, §9.5. The minimum price must be "not less than the highest price paid by the [acquirer] or any person acting in concert with it for any interest in shares of that class during the 12 months prior to the announcement of that offer". *Id*.

[52] For a more detailed discussion of this provision, *see infra* Part IIIF.

[53] The U.K. Takeover Code, *supra* note 8, §9.1(b).

[54] There are two significant exceptions. One applies when the target issues new shares to the acquirer in exchange for cash or assets, and the independent shareholders of the target approve such issuance through a process known as the "whitewash waiver". The U.K. Takeover Code, *supra* note 8, *Notes on Dispensation from Rule 9 & Appendix 1*. The second exception applies when the financial situation of the target is so dire that it requires an immediate injection of capital. See U.K. Takeover Code, *supra* note 8, §9, note 3.

[55] Despite its severity, commentators have advocated for the MBR as a significant tool towards minority protection in the context of takeovers. Andrews, *supra* note 24; Luttmann, *supra* note 24; Schuster, *supra* note 24.

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inefficient shifts."[56] An ideally designed MBR will appropriately balance these two considerations[57] and "can be considered efficient only if the aggregate value of the inefficient transactions that it deters is higher than the aggregate value of the efficient sales of control that would occur in its absence."[58] However, there is no consensus as to an optimal design of the MBR that meets efficiency considerations. Kahan[59] and Bebchuk[60] argued that, in comparison with the market rule, the MBR not only generally eliminates inefficient transfers of corporate control but also discourages value-enhancing takeover transactions. Both acknowledged that it is not possible to tell whether one is more preferable to the other, as it would depend on several variables.[61] Schuster, conversely, challenged the conventional law and economics argument that the MBR is inefficient and instead focused on the relative efficiency of the MBR in comparison with the outcomes presented by the market rule.[62]

In the same vein, the critics of the MBR in Europe have argued that in jurisdictions with concentrated shareholdings and high private benefits of control, the controlling shareholder will not sell unless the acquirer is willing and able to compensate for the value of shareholding that considers these private benefits of control.[63] However, at the same time, the MBR compels the acquirer to offer the same premium to all remaining shareholders even where it has no desire to do so, thereby increasing the costs of the takeover.[64] Hence, by protecting the minority shareholders from being trapped in the target, the MBR also has the effect of benefiting the incumbent ineffective management, thus preventing value-enhancing transactions.[65] The market for corporate control thereby becomes inefficient.[66] By contrast, in the U.K., where the MBR is originated, there are very few companies with controlling shareholders, and private benefits of control are tightly regulated through the existing regulatory regime; hence, the costs of the MBR will be minimal.[67]

There are several limitations to the universal applicability of the economic models that have been developed thus far.[68] First, they have only been tested by way of empirical studies in jurisdictions in continental Europe that have adopted the MBR.[69] Second, the economic

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[56] Davies, *supra* note 1, at 540.
[57] *Id*.
[58] Sepe, *supra* note 24, at 28.
[59] Kahan, *supra* note 4.
[60] Bebchuk, *supra* note 4.
[61] *Id*., at 978; Kahan, *supra* note 4, at 377.
[62] Schuster, *supra* note 24, at 529.
[63] Luca Enriques, *The Mandatory Bid Rule in the Proposed EC Takeover Directive: Harmonization as Rent-Seeking?*, in FERRARINI, *supra* note 24. *See also*, Humphery-Jenner, *supra* note 24. *But see*, Wang & Lahr, *supra* note 24.
[64] Ventoruzzo, *supra* note 15, at 152.
[65] *Id*., at 157, 168.
[66] *See e.g.*, Enriques, *The Mandatory Bid Rule in the Takeover Directive*, *supra* note 2; Joseph A. McCahery, et. al., *The Economics of the Proposed European Takeover Directive* in FERRARINI, *supra* note 24; Burkart & Panunzi, *supra* note 24.
[67] *See*, Paul Davies, *The Transactional Scope of Takeover Law* in UMAKANTH VAROTTIL & WAI YEE WAN (EDS.), COMPARATIVE TAKEOVER REGULATION: GLOBAL AND ASIAN PERSPECTIVES 82-83 (2017).
[68] Bebchuk, *supra* note 4; Schuster, *supra* note 24.
[69] *See e.g.*, Humphery-Jenner, *supra* note 24; Wang & Lahr, *supra* note 24.

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models consider the MBR and the market rule in a binary fashion without considering possible hybrids of the two. For instance, partial offers have been allowed to discharge the obligations of making a mandatory offer in Asia (such as India) and are allowed more liberally in China and Japan. As outlined below, Asian jurisdictions have softened the MBR through pricing considerations and generosity in granting exemptions.

There is yet no comprehensive study of the MBR across Asian jurisdictions that encompass the efficiency perspective. An exception is that of Yang and Lee who have extended the efficiency analysis to partial offers in the context of East Asia.[70] Unlike in a strong form of the MBR, a partial offer allows an acquirer who would like to acquire *de facto* control of the target to make an offer for *all* or *part* of the remaining shares of the target.[71] Nevertheless, their analysis deals with partial offers as alternatives to the market rule and the MBR, without differentiating between whether the partial offer may be made on an *ex ante* (usually voluntary) basis or an *ex post* one (mandatory basis). We argue that the distinction is necessary because, in comparison with an *ex post* mandatory one, there are fewer objections to the partial offers when it is an *ex ante* voluntary offer, as compared to an *ex post* mandatory one.[72] Furthermore, we go beyond partial offers and investigate the efficiency considerations of the MBR using other parameters such as the trigger thresholds, pricing considerations, creeping acquisitions and waivers, and exemptions from the MBR.[73]

B. Dissemination of the MBR Worldwide

Despite the inconclusiveness of the debate surrounding the desirability and efficiency of either the market rule or the MBR, it is somewhat puzzling that the MBR has gained popularity worldwide.[74] Here, we seek to explore the dissemination of the MBR more generally before discussing the impact of its reception into the Asian jurisdictions.

The transition of the MBR from the U.K. into the E.U. Takeover Directive provides one model, as that has already been subject to a great deal of analysis.[75] More universally, it is clear that the MBR, which originated in U.K. with dispersed shareholding as the norm, elicits unanticipated results when replicated in other jurisdictions such as continental Europe where companies with concentrated shareholding dot the corporate landscape.[76] The original intention of the MBR in the context of the U.K.'s dispersedly held companies was that the minority shareholders must obtain the benefit of exit and sharing when an acquisition of a

[70] Yang & Lee, *supra* note 21 (wherein the authors analyze takeover regulation in China, Japan, Korea and Taiwan).

[71] *Id*., at 397.

[72] For example, even the U.K. displays a more liberal dispensation towards partials offers when they are voluntary. *See*, *supra* note 50 and accompanying text.

[73] *See infra*, Part III.

[74] *See e.g.*, Ventoruzzo, *supra* note 15 (for Europe); VAROTTIL & WAN, *supra* note 3 (for Asia); Carlos Berdejo, *Oligarchs, Foreign Powers, and the Oppressed Minority: Regulating Corporate Control in Latin America*, 30 DUKE J. COMP. & INT'L L. 1 (2019) (for Latin America).

[75] *See supra* notes 15 and 25.

[76] Davies, *supra* note 1, at 533.

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sufficient number of shares creates *de facto* control.[77] However, in the context of concentrated shareholding, the MBR tends to prevent value-enhancing takeovers and hence operates as an incumbent friendly mechanism.[78] Since any acquirer crossing the MBR threshold would be required to make an offer to all shareholders that is costly, controllers who already hold shares in excess of that threshold enjoy protection from unwanted suitors for the company.[79] This weakens the market for corporate control as a corporate governance mechanism meant to protect outside shareholders from the actions of both the managers as well as the controlling shareholders.[80]

Hence, one consequence of the MBR in jurisdictions with controlling shareholders is that it results in a greater concentration of shareholding.[81] As Sepe argued, the concentration of ownership coupled with a high level of extraction of private benefits of control provides a recipe for hostile takeovers carried out at a lower cost.[82] To fend themselves against such a possibility, controlling shareholders may likely solidify their position in the company further, leading to an increase in shareholding concentration levels.[83] Hence, Bebchuk found that the MBR "may lead to an increase in the incidence of controlling shareholder structures."[84]

In concluding this part, we find that the MBR has become the mainstay in several jurisdictions worldwide. This is despite the criticism that it not only prevents inefficient transfers of controls but also curbs efficient ones. Although the MBR originated in the dispersed shareholding context, it is largely subject to implementation in the concentrated shareholding setting, which is more common globally (except in the Anglo-American setting). Such a worldwide evolution of the MBR phenomenon provides a useful setting for a detailed examination of the MBR regime in the select Asian jurisdictions.

III. MBR IN ASIA: STRUCTURE AND OPERATION

The dissemination of the MBR into the Asian context offers fertile ground to analyze the implications of the rule from a comparative perspective. The MBR forms the cornerstone of takeover regulation in the six Asian jurisdictions.[85] In their rulemaking process, all jurisdictions cross-refer in varying degrees to the Anglo-American approaches to takeover regulation, particularly to the U.K. Takeover Code. However, as we aim to demonstrate, the Asian jurisdictions have developed their own versions of the MBR that, in most cases, are

[77] Fedderke & Ventoruzzo, *supra* note 12, at 166.
[78] Ventoruzzo, *supra* note 15, at 140.
[79] *Id*.
[80] *Id*., at 168. *See also*, John Armour & David Skeel, *Who Writes the Rules for Hostile Takeovers, and Why? – The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727, 1737 (2007).
[81] Hansen, *supra* note 24, at 180
[82] Sepe, *supra* note 24, at 44.
[83] *Id*.
[84] Bebchuk, *supra* note 4, at 987.
[85] Umakanth Varottil & Wai Yee Wan, *Comparative Takeover Regulation: The Background to Connecting Asia and the West*, in VAROTTIL & WAN, *supra* note 3, at 25.

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significantly at variance with the U.K.-style strong form of the MBR and, in some cases, even fall closer to the market rule. In this part, we explore the evolution of the MBR in the six Asian jurisdictions. Thereafter, we discuss its unique features in each jurisdiction, followed by how the rule operates in practice therein.

A. Evolution of the MBR in Asia

Each of the six Asian jurisdictions studied in this article has experienced a rather different trajectory in the adoption and alteration of the MBR. This is despite the close attention that their regulators paid to the U.K. Takeover Code while drawing up their MBR. In some cases, any similarity with the U.K. has eroded over time, as the design of the MBR has undergone alteration to suit the specific needs of the recipient Asian jurisdiction.[86] In other cases, the evolution over time has brought either some degree of convergence between different Asian jurisdictions or even considerable divergence.[87] The evolutionary story is not only complex, but it also evidences subtle but essential variations in the MBR as it applies in the different Asian jurisdictions.

1. China

Chinese takeover regulation began with a wholesale transplant of the U.K. version of MBR via Hong Kong in the form of the 1993 Interim Provisions on the Management of the Issuing and Trading of Stocks.[88] Interestingly, Chinese companies, predominantly state-owned enterprises (SOEs), were keen to raise funds in the Hong Kong stock market.[89] Hong Kong by then already followed the U.K.-style MBR. Moreover, as a former colony, its laws had a strong resemblance to English law.[90] Experts in Hong Kong also advised Chinese legislators, leading to the influence of Hong Kong law (and indirectly the U.K.-style MBR) in China.[91] Under such MBR, the trigger threshold was set at 30%, which is identical to the U.K. Takeover Code, and acquirers were required to make a full offer to the remaining shareholders, thereby shunning any form of partial offers.[92]

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[86] This is evident from the examples of China (*infra* Part IIIA.1) and India (*infra* Part IIIA.4).

[87] For example, one study shows that over time the Chinese MBR has diverged from its U.K. origin, and has taken on similarity with Japanese MBR. Robin Hui Huang & Charles Chao Wang, *The Mandatory Bid Rule Under China's Takeover Law: A Comparative and Empirical Perspective*, 53 INT'L LAW. ___ (2020), *available at* https://ssrn.com/abstract=3557668.

[88] *Id*., at 109-110. *See also*, Hui Huang, *The New Takeover Regulation in China: Evolution and Enhancement*, 42 INT'L LAW. 153, 160 (2008); Hui Huang, *China's Takeover Law: A Comparative Analysis and Proposals for Reform*, 30 DEL. J. CORP. L. 145, 171 (2005).

[89] Huang & Wang, *supra* note 87, at 6-7. *See also*, Wei Cai, *The Mandatory Bid Rule in China*, 12 EBOR 653, 654-55 (2011); Chao Xi, *The Political Economy of Takeover Regulation: What Does the Mandatory Bid Rule in China Tell Us?*, [2015] J.B.L. 143, 145.

[90] Wei, *supra* note 89, at 654.

[91] *Id*., at 654-5; Xi, *supra* note 89, at 145; Huang & Wang, *supra* note 87, at 6-7.

[92] The MBR was incorporated into the Securities Law of the P.R.C. (promulgated by the Nat'l People's Cong., Dec. 29, 1998, effective July 1, 1999). In 2002, the Chinese Securities Regulatory Commission issued the Measures for Regulating Takeovers of Listed Companies (Takeover Measures). The latest edition was issued on March 20, 2020. See also Huang & Wang, *supra* note 87, at 7-8; Huang & Chen, *supra* note 3, at 212.

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Although the design of the Chinese MBR was identical in its key characteristics to that of the U.K.-style MBR, there were hardly any mandatory offers in more than a decade since its inception, although several changes of control transactions did trigger the rule. The reason is that the securities regulator, China Securities Regulatory Commission (CSRC) possessed "virtually unfettered discretion"[93] to grant exemptions and waivers from the application of the MBR. Hence, changes of control occurred without providing either an exit or sharing option to the minority shareholders. Through this, the Chinese takeover regime followed the MBR mostly in breach.

The year 2006 represents a turning point for Chinese takeover regulation, as the design of the MBR experienced alteration.[94] The regulators wholeheartedly accepted partial offers, thereby eliminating the erstwhile taboo against it.[95] Since 2006, partial offers have gained acceptance alongside full offers under the MBR. With these reforms, the current takeover regime in China broadly allows for three types of takeovers.[96] *First*, an acquirer who holds less than 30% shares in the target and wishes to enhance its shareholding beyond that limit may make a full or partial offer to acquire shares from the remaining shareholders,[97] so long as the partial offer is for no less than 5% of the outstanding shares.[98] In case of excess tendering, the acquirer must accept shares on a *pro rata* basis.[99] This enables an acquirer to cross the 30% threshold using a partial offer. A controlling shareholder who wishes to transfer control that enables the acquirer to cross the threshold must participate in the offer and cannot transfer such control privately.[100]

Second, if a shareholder holds 30% or more shares but less than 50% (thereby exercising *de facto* control), it can acquire further shares toward consolidation by making a partial offer, again for a minimum of 5% shares on *pro rata* terms.[101] The shareholder can also make a full offer for all of the shares, but this is unlikely in practice, unless the shareholder wishes to delist the company.

Third, if an acquirer who holds less than 30% shares wishes to acquire shares by private arrangement that would breach the threshold, then the acquirer can do so only by making a full (and not partial) offer to all the shareholders of the company.[102] To that extent, Chinese

[93] Xi, *supra* note 89, at 147.

[94] The revised MBR found its place in the 2006 Securities Law and CSRC's 2006 Takeover Measures (which replaced the earlier 2002 Takeover Measures). Huang & Wang, *supra* note 87, at 9-13.

[95] Xi, *supra* note 89, at 147.

[96] Wei Zhang, et. al., *Mandatory Bids in China: You Can Lead a Horse to Water, But You Can't Make Him Drink*, EBOR (2021 forthcoming), available at https://ssrn.com/abstract=3277222, at 5.

[97] 2006 Securities Law as amended in 2019, §65.

[98] Takeover Measures (2020 revision), arts. 25.

[99] 2006 Securities Law as amended in 2019, §65.

[100] Huang & Wang, *supra* note 87, at 32.

[101] Zhang, et. al., *supra* note 96, at 5.

[102] 2006 Securities Law as amended in 2019, §73; Takeover Measures (2020 revision), arts. 47-48. See also Huang & Wang, *supra* note 87, at 9-13 (discussing the conflict between the 2006 Securities Law and Takeover Measures first introduced in 2006).

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takeover law recognizes both partial offers as well as full offers but in different circumstances.[103] The first two methods allowing partial offers are *ex ante* voluntary offers but differ from the U.K.'s version in that Chinese takeover law lacks the restrictions before partial offers can be made. For instance, in the U.K. a partial offer that results in the acquirer holding more than 50% of shares requires the separate approval of independent shareholders.[104] Only the last method in China resembles the U.K. strong form of the MBR in requiring a full offer.

In China, creeping acquisitions are allowed for an acquirer who holds 30% or more of the shares so long as they do not exceed 2% over a 12 month period.[105]

When it comes to exemptions, although the 2006 reforms to Chinese takeover regulation seek to streamline the regime and limit the discretion conferred upon the CSRC to grant waivers, [106] the scope of exemptions is considerably wider in comparison with the strong form of the MBR found and practiced in the origin country.[107] In all, although China began with the U.K. form of MBR, it has deviated substantially.

2. Japan

The cross-referencing of Japanese takeover regulation to the U.K. Takeover Code is not only far more tenuous, but the Japanese regime deviated from the U.K.-style MBR from its very inception. The concept of MBR found its way into the Japanese takeover regime in 1990.[108] Although some scholars have mentioned that the U.K. Takeover Code inspired the Japanese MBR,[109] others argued that the Japanese takeover regulation charted its own path.[110] Such a contentious outlook arose because the Japanese MBR provides that when an acquirer seeks to purchase more than one-third of the shares in a listed target through an off-market purchase, it shall make an offer to the other shareholders.[111] However, fully recognizing partial offers, the regime allows the acquirer to determine how many shares it wishes to purchase in the

[103] Huang & Wang, *supra* note 87, at 10; Zhang, et. al., *supra* note 96, at 5.
[104] U.K. Takeover Code, §36.5.
[105] Takeover Measures (2020 revision), art 63.
[106] Huang & Chen, *supra* note 3, at 222; Xi, *supra* note 89, at 147-48.
[107] *See infra* Part IIIG.
[108] This occurred through an amendment to the Securities Exchange Act, which introduced Article 27-2(1). *See*, Tomotaka Fujita, *The Takeover Regulation in Japan: Peculiar Developments in the Mandatory Offer Rule*, 3 U. TOKYO SOFT L. REV. 24, 25 (2011). Since 2006, the Securities Exchange Act has been referred to as the Financial Instruments and Exchange Act (hereinafter "FIEA"). *Id*., at 26-27.
[109] John Armour, Jack B. Jacobs & Curtis J. Milhaupt, *The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework*, 52 HARV. INT'L L.J. 221, 249 (2011); Curtis J. Milhaupt & Mark D. West, *Institutional Change and M&A in Japan: Diversity Through Deals* in CURTIS J. MILHAUPT (ED.), GLOBAL MARKETS, DOMESTIC INSTITUTIONS: CORPORATE LAW AND GOVERNANCE IN A NEW ERA OF CROSS-BORDER DEALS 306 (2003).
[110] Fujita, *supra* note 108, at 24, 30; Dan W. Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware*, in VAROTTIL & WAN, *supra* note 3, at 258.
[111] FIEA, §27-2; Fujita, *supra* note 108, at 25; Puchniak & Nakahigashi, *supra* note 110, at 260.

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offer, so long as it caps such an offer at two-thirds of the target's shares.[112] In case shareholders tender shares in excess of the offer size, the acquirer may accept them on a *pro rata* basis.[113] Furthermore, the Japanese MBR triggers only when the acquirer crosses the threshold by way of private acquisition, and it does not apply to purchases of shares on the stock market.[114]

Such a regime is far from the strong form of the MBR practiced in the U.K. At the outset, the Japanese MBR is anathema to the U.K.-style regulation, as it does not provide either exit or sharing of takeover premium to *all* the remaining shareholders of the target. Hence, it fails the tests regarding both the "exit rule" and the "sharing rule." This is a clear indication that the objectives of the Japanese MBR are dissimilar to that of the strong form of the MBR. Even when tested against the U.K.'s version of the permitted *ex ante* partial offer resulting in change of control, the safeguard of shareholder approval is missing. Fujita argued that the goal of the Japanese MBR is to ensure transparency, rather than exit or sharing to minority shareholders, which are the hallmarks of the U.K. takeover regulation.[115] That explains why the Japanese MBR is attracted only for acquisitions through private arrangements and not for market acquisitions.

In 2006, the Japanese Securities and Exchange Act underwent an amendment to introduce another rule.[116] By this, an acquirer who wishes to acquire more than two-thirds of the shares of a listed target must make a mandatory offer to acquire *all* its remaining shares.[117] At the level of this trigger, partial offers are out of favor, as this offer requirement is akin to the strong form of the MBR. Nonetheless, this rule too is far from being consistent with the U.K. takeover regulation, primarily because of the high trigger threshold. The objective of the U.K. MBR is to provide the benefits of exit and sharing to the minority shareholders when an acquirer crosses the threshold of *de facto* control (set in the U.K. at 30% of voting rights).[118] However, that objective is altogether inconsistent with the Japanese rule, which applies when the acquirer already has not only *de facto* control but also majority control over the target. The utility of such an MBR to protect minority shareholders against the actions of an acquirer that is already in majority control is perplexing. Puchniak and Nakahigashi rationalize the rule on the basis that the "two-thirds trigger is rooted in a law-based approach: under Japanese company law a two-thirds shareholder vote is required to make fundamental

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[112] Puchniak & Nakahigashi, *supra* note 110, at 260. For examples of partial offers in Japan, *see*, Alan K. Koh, Masafumi Nakahigashi & Dan W. Puchniak, *Land of the Falling "Poison Pill": Understanding Defensive Measures in Japan on Their Own Terms*, 41 U PA. J. INT'L L. 687, 720 n.129 (2020). If the acquirer acquires more than two-thirds of the shares, the acquirer would have to make a mandatory bid for all of the remaining shares, *infra* note 116 (and accompanying text).

[113] *Id*. FIEA, §27-13.

[114] Fujita, *supra* note 108, at 29.

[115] *Id*., at 30-32.

[116] The Law Amending a Part of Securities Exchange Act (Law No. 65, 2006). Fujita, *supra* note 108, at 26-27.

[117] FIEA, §27-2(5) read with §8(5)(iii) of the Order for Enforcement of the Financial Instruments and Exchange Act. *See*, Puchniak & Nakahigashi, *supra* note 110, at 261.

[118] *See*, text accompanying *supra* notes 9-11.

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corporate decisions."[119] In that sense, such a Japanese MBR is unique not only among the Asian jurisdictions but also more generally. Furthermore, after the close of the offer, the acquirer who has made the tender offer for all of the remaining shares is not under any obligation to acquire the shares of the shareholders who have not accepted the tender offer. By contrast, under U.K. company law, after the offer closes, if the acquirer has acquired 90% or more of the voting rights in the target, the minority shareholders can compel the acquirer to purchase their shares and are protected from being locked in with the acquirer.[120]

Compared with China, the Japanese MBR (at both thresholds discussed above) does not clearly comport with the objectives, structure, and practice of the strong form of the MBR evolved in the U.K. Some commentators argue fittingly that reference to the Japanese MBR in terms of U.K. takeover regulation is misplaced, and one must understand the Japanese takeover regime on its own idiosyncratic terms.[121]

3. Korea

The MBR has experienced a rather unusual path in Korea. Since the mid-1970s, Korean law has required that any acquirer who wishes to acquire more than 5% shares in a company outside the securities market from 10 or more shareholders during a 6 month window may do so only through a tender offer.[122] This rule is more akin to the tender offer mechanism found in the U.S. and a far cry from the strong form of the MBR for many reasons. *First*, the trigger for the tender offer requirement has no connection with the acquisition of *de facto* control, which forms the essence of a full-blown MBR. *Second*, the rule applies to off-market transactions and does not come in the way of acquisitions made in the securities market. Hence, similar to the Japanese rule,[123] the aim is not to ensure exit or sharing for minority shareholders[124] but to ensure transparency of the acquisition. *Third*, the tender offer rule focuses on partial offers implemented through *pro rata* acceptances.[125] In fact, commentators have gone to the extent of observing that the regulatory framework for Korean tender offers shares similarities with the U.S. Williams Act.[126]

[119] Puchniak & Nakahigashi, *supra* note 110, at 262.

[120] U.K. Companies Act 2006, s 983.

[121] Fujita, *supra* note 108, at 24, 28; Puchniak & Nakahigashi, *supra* note 110, at 260.

[122] Korean Securities and Exchange Act, §21. See Young-Cheol K. Jeong, *Hostile Takeovers in Korea: Turning Point or Sticking Point in Policy Direction?*, 18 ASIA PACIFIC L. REV. 113, 120-21 (2010), Kwang-Rok Kim, *The Tender Offer in Korea: An Analytic Comparison Between Korea and the United States*, PACIFIC RIM L. & POL'Y J. 498, 504 (2001). The current version of the rule appears in the Financial Investment Services and Capital Markets Act, §133(3) read with the Enforcement Decree of the Financial Investment Services and Capital Markets Act, §140.

[123] *See supra* Part IIIA.2.

[124] In fact, the Korean judiciary expressly recognizes, and market practice widely acknowledges, the concept of control premium. Hyeok-Joon Rho, *M&A in Korea: Continuing Concern for Minority Shareholders*, in VAROTTIL & WAN, *supra* note 3, at 292.

[125] Yang & Lee, *supra* note 21, at 405.

[126] Jeong, *supra* note 122, at 120; Kim, *supra* note 122, at 540.

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Korean takeover regulation witnessed a curious turn of events in the 1990s. Korea introduced an MBR on January 13, 1997.[127] Under this rule, any acquirer who acquires 25% shares in a target must make a tender offer at the same price such that it acquires 50% or more shares.[128] Such a rule transitioned Korean takeover regulation further along the spectrum toward the U.K.-style MBR.

However, such a Korean MBR was short-lived. Soon after the rule came to life, the Asian financial crisis engulfed the Korean economy.[129] As a condition for providing financial relief to Korea, the International Monetary Fund and the World Bank imposed requirements that Korea open up its economy to foreign investment.[130] More specifically, the newly minted MBR was found to act as an impediment against foreign acquirers taking control of financially distressed Korean companies.[131] Rho argued that there was a concerted move to restore the similarity of Korean takeover regulation to the U.S. position, as the officials within the multilateral institutions spearheading the reform package were more familiar with the U.S. system rather than the U.K. takeover regulation.[132] Interestingly, the Korean entrepreneurs who advocated for the MBR in the first place found that the rule was a double-edged sword: it not only prevented hostile takeovers but friendly ones too.[133] For these reasons, the Korean legislature repealed the MBR on February 24, 1998,[134] merely a year after it took root in Korea.

Despite the specific and rather grave circumstances that led to its repeal, the Korea takeover regulation has not witnessed any momentum seeking the resurgence of the MBR.[135] In these circumstances, only the longstanding 5% tender offer continues to hold sway, thereby making Korea an outlier among the six Asian jurisdictions.

4. India

The evolution of the Indian MBR suggests that although it aims to draw inspiration from the U.K.-style MBR, it displays significant differences both in design and in implementation. Takeover regulation in India has witnessed a checkered history.[136] With the establishment of the Securities and Exchange Board of India (SEBI) as a stock market regulator in 1992, it issued the first set of takeover regulations in 1994.[137] Since then, on the basis of the

[127] Jeong, *supra* note 122, at 120.
[128] *Id*.; Rho, *supra* note 124, at 293.
[129] *See*, Joongi Kim, *The Next Stage of Reforms, Korean Corporate Governance in the Post-Asian Financial Crisis Era*, 1 Asian J. Comp. L. 1, 3 (2006)
[130] Rho, *supra* note 124, at 293; Kim, *supra* note 122, at 501.
[131] Rho, *supra* note 124, at 293.
[132] *Id*.
[133] *Id*.
[134] *Id*.; Jeong, *supra* note 122, at 120; Kim, *supra* note 122, at 503.
[135] Rho, *supra* note 124, at 293.
[136] Varottil, *The Nature of the Market for Corporate Control in India*, in Varottil & Wan, *supra* note 3, at 347.
[137] The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 (hereinafter the "1994 Regulations").

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recommendations various committees appointed for the purpose,[138] SEBI issued a new set of takeover regulations in 1997,[139] introduced several rounds of amendments to them periodically (and most significantly in 2002),[140] and finally replaced them with the 2011 version of the regulations, which forms the present landscape of takeover regulation in India.[141]

These developments indicate the frenetic rulemaking activity by SEBI that has led to a constant change in the regulatory regime. Although the committees that made recommendations to SEBI for reforms considered the takeover regimes of 14 different countries,[142] some of the key recommendations appear to derive influence from takeover regulation in the U.K. and in countries that have adopted similar regulation.[143]

Under SEBI's current takeover regulations, the initial threshold for triggering the MBR is set at 25% of the target's shares with voting rights.[144] Any acquirer seeking to exceed this limit will have to make a mandatory offer to the remaining shareholders. Unlike the U.K.'s strong form of the MBR though, the acquirer can make a partial offer for a minimum of another 26% shares.[145] In case of excess interest on the part of the shareholders to tender in the offer, the acquirer must accept the offers on a *pro rata* basis.[146] The unique element of India's MBR is that an acquirer can trigger it even when it does not cross the 25% threshold.[147]

Finally, the Indian MBR provides for a creeping acquisition mechanism. Any person holding between 25% and 75% shares in the company is entitled to acquire up to 5% voting rights during each financial year without triggering the MBR.[148] If such an acquirer breaches this

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[138] Securities and Exchange Board of India, *Justice P.N. Bhagwati Committee Report on Takeovers* (1997), available at www.sebi.gov.in/commreport/bagawati-report.html (hereinafter the "Bhagwati Report 1997"); Securities and Exchange Board of India, *Report of the Reconvened Committee on Substantial Acquisition of Shares and Takeovers Under the Chairmanship of Justice P.N. Bhagwati*, available at www.sebi.gov.in/takeover/takeoverreport.pdf (hereinafter the "Bhagwati Report 2002"); Securities and Exchange Board of India, *Report of the Takeover Regulations Advisory Committee Under the Chairmanship of Mr. C. Achuthan* (2010), available at www.sebi.gov.in/commreport/tracreport.pdf (hereinafter the "TRAC Report").

[139] The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter the "1997 Regulations").

[140] Varottil, *The Nature of the Market for Corporate Control in India*, *supra* note 136, at 347-48.

[141] The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter the "2011 Regulations").

[142] Bhagwati Report 1997, *supra* note 138, at ¶xiii; TRAC Report, *supra* note 138, at 10.

[143] Varottil, *The Nature of the Market for Corporate Control in India*, *supra* note 136, at 348.

[144] 2011 Regulations, §3(1).

[145] 2011 Regulations, §7(1).

[146] Securities and Exchange Board of India, *Frequently Asked Questions on SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011*, ¶50.

[147] An additional qualitative trigger provides that even though an acquirer holds less than 25% voting shares, it will be subject to the MBR if it has the right to appoint a majority of the target's directors or to control the management and policy decisions of the target. 2011 Regulations, §4. For the purpose of the MBR, the regulation recognizes control whether it is exercised "directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner". 2011 Regulations, §2(e).

[148] 2011 Regulations, §3(2).

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annual limit, it will have to make an offer to the other shareholders to acquire at least another 26% shares on a *pro rata* basis. This suggests that any incumbent already holding *de facto* control over the company may entrench itself further through gradual bite-sized acquisitions, a facility unavailable to outside acquirers.

In all, although the Indian policymakers drew heavily on the U.K. model of the MBR, both acquirers as well as controllers enjoy several safety valves, including the partial offer and the creeping acquisition. Although the Indian regime appears, at least superficially, to be strict (including with the lower 25% threshold), certain key structural adjustments realign the Indian MBR further away from the strong form version.

5. Hong Kong and Singapore[149]

Among the six Asian jurisdictions, only Hong Kong and Singapore steadfastly follow the design of the strong form of the MBR that emanated in the U.K.[150] This is not surprising considering that the legal systems of both the former British colonies have drawn inspiration from the origin country.[151] Both the Codes on Takeovers and Mergers and Share Buy-backs in Hong Kong (hereinafter the "Hong Kong Takeover Code") instituted in 1992 and the Singapore Code on Takeovers and Mergers (hereinafter the "Singapore Takeover Code") in 1974 represent a wholesale adoption of the U.K. Takeover Code.[152] Since then, both jurisdictions have kept pace with developments in the U.K., and constantly updated their takeover codes that continue to maintain similarities between Hong Kong and Singapore takeover regulation on the one hand and that of the U.K. on the other. Although the Singapore Takeover Code experienced a significant round of consultation,[153] where there was a proposal to transition away from the U.K. model of takeover regulation toward that in the U.S., such a move came under considerable resistance from market participants and status quo therefore ensued.[154] It is hard to doubt the stickiness of the Hong Kong and Singapore takeover regulation to that in the U.K., and this holds even for the MBR.

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[149] We examine the takeover regulation in Hong Kong and Singapore together since they bear similarities in structure and design, although there could be some differences in the operation. *See e.g.*, Christopher Chen, Wei Zhang & Wai Yee Wan, *Regulating Squeeze-Out Techniques by Controlling Shareholders: The Divergence between Hong Kong and Singapore*, 18 J. CORP. L. STUD. 185 (2018).

[150] The only difference relates to creeping acquisitions. See text accompanying *infra* notes 159-161.

[151] Kwai Hang Ng & Brynna Jacobson, *How Global Is the Common Law? A Comparative Study of Asian Common Law Systems – Hong Kong, Malaysia, and Singapore*, 12 ASIAN J. COMP. L. 209 (2017); Dan W. Puchniak & Umakanth Varottil, *Related Party Transactions in Commonwealth Asia: Complicating the Comparative Paradigm*, 17 BERKELEY BUS. L.J. 1 (2020).

[152] Donald, *Evolutionary Development in Hong Kong of Transplanted UK-Origin Takeover Rules*, in Varottil & Wan, *supra* note 3, at 384; Wan, *Legal Transplantation of UK-Style Takeover Regulation in Singapore*, in Varottil & Wan, *supra* note 3, at 406.

[153] Securities Industry Council, *Consultation Paper on Revision of the Singapore Code on Take-overs and Mergers* (Nov. 1, 1999).

[154] *Id*., at 7-8. *See also*, Wan, *supra* note 152, at 407.

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In both jurisdictions, an acquirer triggers the MBR when it acquires 30% or more of shares with voting rights in the target.[155] In such a case, the acquirer must make an offer for *all* the remaining shares.[156] This represents the essence of both the sharing and exit rules. Unlike all the other jurisdictions examined thus far, the regulation in Hong Kong and Singapore do not permit partial offers when an acquirer triggers the MBR.[157] Moreover, the regulators view partial offers as a whole with a great deal of skepticism and permit them only in limited situations in voluntary takeovers, as is the case in the U.K.[158]

There is only one significant difference. Hong Kong and Singapore takeover regulations allow incumbents the facility of creeping acquisitions. If an acquirer already holds more than 30% voting rights in a company, it is entitled to acquire, in the case of Hong Kong, no more than 2% shares with voting rights over a 12 month period[159] and, in the case of Singapore, no more than 1% over a 6 month period,[160] without triggering the MBR. If the acquirer breaches this limit, the obligation to make a mandatory offer would activate. Although the U.K. takeover regulation initially devised the creeping acquisition rule, it has since moved away from it,[161] thereby requiring all incumbents to make a mandatory offer if they acquire any shares at all.

Structurally, barring the creeping acquisition rule, takeover regulation in Hong Kong and Singapore bears a close resemblance to the U.K. version. Moreover, both jurisdictions follow the U.K. approach to regulating takeovers as well through a takeover panel-type specialist body to administer and enforce takeover regulation.[162] However, there are some material dissimilarities in the impact of the implementation of the MBR in Hong Kong and Singapore on the one hand and the U.K. on the other. For example, in the U.K., block holding in excess of 30% is uncommon, perhaps due to the existence of the MBR.[163] However, the MBR in Hong Kong and Singapore has not produced a similar result, as it operates differently in jurisdictions with concentrated shareholding. As one of us has argued, in a concentrated shareholding setting, the MBR may have the effect of enhancing concentration even further, as evidenced in Singapore.[164] With an MBR that is similar to Singapore, Hong Kong too has witnessed a further concentration of shareholding in recent years.[165] Hence, the adoption of the U.K. model of MBR in jurisdictions with concentrated shareholding will not necessarily promote a diffusion of shareholding but may result in further concentration.[166]

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[155] Hong Kong Takeover Code, §26; Singapore Takeover Code, §14.
[156] *Id*.
[157] Hong Kong Takeover Code, §28; Singapore Takeover Code, §16.
[158] *Id*.
[159] Hong Kong Takeover Code, §26, Note 11.
[160] Singapore Takeover Code, §14.1(b).
[161] Wan, *supra* note 152, at 409. *See also*, Raymond da Silva Rosa, Michael Kingsbury & David Yermack, *Evaluating Creeping Acquisitions*, 37 Sydney L. Rev. 37, 42 (2015).
[162] *See*, Emma Armson, *Assessing the Performance of Takeover Panels: A Comparative Study*, in in VAROTTIL & WAN, *supra* note 3, at 105.
[163] Wan, *supra* note 152, at 432.
[164] *Id*.
[165] Donald, *supra* note 152, at 392; Wan, *supra* note 152, at 432.
[166] Consistent with earlier literature, we do not claim that abolishing the MBR will necessarily result in diffusion of shareholding. *See also*, Wan, *supra* note 152, at 432.

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B. Weak Form MBR in Asia?

Our study of the history and evolution of the MBR in Asia suggests that the rule in that region is not only different from the origins under the U.K. Takeover Code, but there is also considerable divergence among the various Asian jurisdictions themselves. Although Hong Kong and Singapore remain closely aligned with the U.K. version of the rule, China, Japan, Korea, and India have rules substantially diluted from the strong form of the MBR, primarily due to their willingness to allow partial offers in a wider range of circumstances. Among these, Korea is further afield from the strong form of the MBR and closer to the U.S. market rule, as its so-called MBR is more akin to the tender offer procedure mechanism under the U.S. Williams Act.

Some commentators argue that the existence of either partial offers, creeping acquisition mechanisms, lax offer pricing norms and generous exemptions, or a combination thereof, make the MBR in the six Asian jurisdictions a weak form of the rule.[167] We, however, advance this analysis to demonstrate that, some aspects of the design of the MBR in the Asian jurisdictions as well as how regulators and courts implement it make it altogether unrecognizable from its customary U.K.-oriented conception. To that extent, they fall closer to the market rule along the spectrum than to the strong form of the MBR. To bolster our analysis, we now examine five key features of the MBR across the six Asian jurisdictions, namely, (i) the trigger thresholds, (ii) partial offer structures, (iii) pricing considerations, (iv) creeping acquisitions, and (v) exemption mechanisms. Table 1 sets out a summary of the operation of the key features of the MBR across the six Asian jurisdictions.

C. The Trigger Thresholds

In all the six jurisdictions, except for Korea, the MBR threshold is between 25% and one-third of the shares of the target.[168] This is entirely consistent with the U.K.'s well-established trigger at 30%. Despite the apparent similarities, any uniformity in approach between the Asian jurisdictions and the U.K., and among the various Asian jurisdictions themselves, is likely to lead to incongruous results.

Although a high percentage threshold for triggering the MBR would fail to provide the full benefit of the equal treatment rule to the minority shareholders, as it would let several control changes fall under the radar, a low percentage would have the converse effect of unduly triggering the MBR and thereby impeding control changes.[169] Rather than viewing the threshold in absolute terms, it would be necessary to examine it contextually—considering

[167] Davies, Hopt & Ringe, *supra* note 9, at 234.

[168] The limits are 25% (India), 30% (China, Singapore, and Hong Kong) and one-third (Japan). The other exceptional situations include 5% (Korea, following the U.S.-style tender offer rule), two-thirds (Japan, for post-legal control acquisitions), and the qualitative control trigger (India). *See supra* Part IIIA.

[169] Varottil, *Comparative Takeover Regulation and the Concept of 'Control'"*, *supra* note 39, at 214.

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the shareholding pattern of the relevant jurisdiction. In pegging the quantitative MBR threshold, the natural proposition would be that where shareholding is dispersed, the threshold must be lower, and where shareholding is concentrated, it must be higher.[170]

Critics have argued that the threshold has not been set appropriately in the U.K. as, "in a dispersed context, a holding of less than 30% may well be enough to give the holder *de facto* control of the company."[171] The converse scenario emerges in the Asian jurisdictions. Because of the concentration of shareholdings, the existing thresholds may prematurely attract the MBR, thereby preventing efficient transfers of control from occurring. This logic is evident in policymaking when Singapore raised the threshold from its original 20%–25% in 1985 and then to the present 30% in 2001[172] and when India raised it from 15%–25% in 2011.[173] However, this is arguably insufficient as the average concentration of shareholdings in the six jurisdictions (barring Japan)[174] exceeds the prescribed MBR thresholds.[175] The situation in India is somewhat compounded as an acquirer holding less than threshold could potentially trigger the MBR because of the qualitative factors.[176]

As demonstrated in this discussion, pegging the MBR thresholds in the Asian jurisdictions at or about the limit set in the U.K. is counterintuitive as is bound to generate abnormal results. Because of the concentration of shareholding in Asia, such a situation hinders control shifts without attracting the costly MBR and hence may diminish the market for corporate control. Arguably, the focus on minority shareholder protection obscures the need for beneficial takeovers. At the same time, Asian jurisdictions display a more nuanced position due to the presence of other safety valve mechanisms that release the pressure from an inflexible MBR, and we now turn to discuss the nuances they present.

D. The Attractiveness of Partial Offers

Partial offers are the norm in a majority of the six Asian jurisdictions being China, Japan, Korea, and India.[177] Hitherto, the academic analysis did not find significant differences in the

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[170] *Id*.; Marco Ventoruzzo, *Europe's Thirteenth Directive and U.S. Takeover Regulation: Regulatory Means and Political and Economic Ends*, 41 TEXAS INT'L L.J. 171, 197 (2006).

[171] Davies, *supra* note 1, at 555.

[172] Securities Industry Council, *supra* note 153, at 12-13; Wan, *supra* note 152, at 419; Lan Luh Luh, Ho Yew Kee & Ng See Leng, *Mandatory Bid Rule: Impact of Control Threshold on Take-over Premiums*, [2001] SING J.L. STUD. 433, 434.

[173] TRAC Report, *supra* note 138, at ¶2.8; Varottil, *The Nature of the Market for Corporate Control in India*, *supra* note 136, at 356.

[174] *See* KRAAKMAN, ET. AL., *supra* note 9, at 75; Clifford G Holderness, *The Myth of a Diffused Ownership in the United States,* 22 REV. FIN. STUD. 1377 (2009) (Figure 2 showing that the average percentage is less than 20% for Japanese companies based on a sample of 50 companies). *See also*, Richard W. Carney & Travers Barclay Child, *Changes to the ownership and control of East Asian corporations between 1996 and 2008: The primacy of politics*, (2013) 107 J. FIN. ECON. 494, 501.

[175] Adriana De La Cruz, Alejandra Medina & Yung Tang, *Owners of the World's Listed Companies*, OECD CAPITAL MARKET SERIES, PARIS 18 (2019).

[176] *See supra* note 147 and accompanying text.

[177] *See supra* Part IIIA.

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consequences of the design of the partial offer and the full offer,[178] except for Yang and Lee who extolled the virtues of the partial offer as an intermediate mechanism to achieve efficiency.[179] However, their model does not consider the difference between *ex ante* and *ex post* partial offers. As we can see, partial offers vary widely in Asia.

China, Japan, and Korea allow *ex ante* partial offer in more liberal circumstances. In an *ex ante* offer in these jurisdictions, once the acquirer has the intention of increasing its stake that would breach the MBR threshold, it must make such acquisition by way of an offer made to all shareholders, albeit a partial one with prorated acceptances.[180] At that stage, the rule prohibits the acquirer from undertaking any private acquisitions, including from controlling shareholders, which would breach the MBR thresholds.[181] Existing controllers are, therefore, only able to sell their shares by participating in that offer. They can sell their shares proportionately along with the other shareholders who tender their shares. The controllers cannot ensure the sale of all their shares: the greater the participation in the offer by the other shareholders, the lesser the ability of the controllers to sell their shares.[182] In the *ex ante* offer, the offer is how the acquirer crosses the MBR threshold, and the result is that the offer places *de facto* control in the hands of the acquirer.

Hong Kong and Singapore, which closely track the U.K. Takeover Code, allow *ex ante* partial offers, but they are associated with voluntary offers than mandatory ones.[183] The takeover codes in these jurisdictions are very restrictive on how partial offers can be used to consolidate control. *First*, no partial offers can be made without the prior approval of the takeover panel.[184] *Second*, partial offers that result in a change of control of the target require independent shareholder approval.[185] *Third*, there are restrictions in the acquirer acquiring shares in the target during and surrounding the period of the offer.[186] Hence, even while permissible in the form of a voluntary offer, Hong Kong and Singapore generally look down upon such offers, as they militate against the principle of equality of treatment. Once the MBR is triggered though, a *full* offer is a *sine qua non* in Hong Kong and Singapore.

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[178] For example, in his seminal study, Bebchuk notes: "But even though the proration version of the rule seems less demanding at first glance, … its consequences are largely the same as those of the complete acquisition version." Bebchuk, *supra* note 4, at 968.

[179] Yang & Lee, *supra* note 21, at 398.

[180] Yang & Lee, *supra* note 21, at 402; Fujita, *supra* note 108, at 28.

[181] Yang & Lee, *supra* note 21, at 397, 401.

[182] *Id*., at 437.

[183] Hong Kong Takeover Code, §28; Singapore Takeover Code, §16; UK Takeover Code, §36.

[184] Hong Kong Takeover Code, §28.1; Singapore Takeover Code, §16.1; UK Takeover Code, §36.1.

[185] Hong Kong Takeover Code, §28.5; Singapore Takeover Code, §16.4(c); UK Takeover Code, §36.5. In addition, in Singapore, the takeover regulator has made it clear that the partial offer can only be used to acquire a percentage of shares set out in the outset (and not as a range of shareholdings), to ensure that controlling shareholders do not use the partial offer as a means to fully exit from the target: Securities Industry Council, *Take-overs Bulletin*, Issue No. 4 (Jan. 2018), available at https://www.mas.gov.sg/-/media/MAS/resource/sic/Takeovers-Bulletin/Takeover-Bulletin-Issue-No-4-Jan-2018.pdf?la=en&hash=0FF9830927A342A9636A63F4CED0DC01FF975009

[186] Hong Kong Takeover Code, §§28.2, 28.3; Singapore Takeover Code, §16.4(b); UK Takeover Code, §36.2, 36.3.

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India is unique in that it not only recognizes *ex ante* voluntary offers[187] but also allows *ex post* partial offers when the MBR is triggered. *Ex post* offers arise when an acquirer either acquires or agrees to acquire *de facto* control over the target, which then obligates it to make an offer to the remaining shareholders to acquire their shares.[188] In this case, the acquisition of *de facto* control, for instance, through a private arrangement, is a *fait accompli*, and the mandatory offer is only a natural consequence that follows.[189] Conventional models tag *ex post* offers to full offers. For example, *ex post* offers pose no risk to minority shareholders in jurisdictions such as China,[190] Hong Kong, and Singapore, as well as in the U.K., as the MBR guarantees the benefits of exit and sharing to *all* the remaining shareholders.[191]

SEBI's takeover regulation in India offers acquirers the unique combination of an *ex post* partial offer. This not only erodes the beneficial effects of the partial offer contained in the *ex ante* scenario but also does not provide the exit and sharing opportunities to the other shareholders that emanate from a full offer. Such a design unduly favors the acquirer and the controller, as they can affect a control shift at the cost of the remaining shareholders. A private transfer of control from the existing controller to the acquirer is only conditional upon the acquirer making the offer as a follow-on step.[192] Nothing prevents the private transfer from occurring outside of the offer.[193] In that sense, the controller in a private arrangement obtains a full exit and can even command a control premium but the remaining shareholders can only participate *pro rata* in a partial offer. In case of excess tendering in the offer, the remaining shareholders get neither a complete exit nor a full share of the premium offered to the controller.[194] This dilutes the equality of opportunity rule.

As seen, even within partial offers, there is no uniformity among the Asian jurisdictions. Existing literature adopts a monolithic approach to partial offers, but we argue that seemingly minor variations in the design can have a widely different impact on the balance between the facilitation of a market for corporate control and minority shareholder protection.

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[187] The conditions for making a voluntary offer in India are less stringent compared to those in Hong Kong and Singapore. Neither the prior clearance from the regulator nor the approval of the independent shareholders are necessary to effect a voluntary offer. See, 2011 Regulations, §6; Securities and Exchange Board of India, *Frequently Asked Questions on SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011* 5-7 (Oct. 12, 2020) available at https://www.sebi.gov.in/sebi_data/faqfiles/oct-2020/1602498070087.pdf.

[188] Fujita, *supra* note 108, at 28-29.

[189] It is a different matter that the acquirer's failure to complete the mandatory takeover will invite regulatory consequences. *See supra* note 45.

[190] China offers a textbook example of this model. It allows for partial *ex ante* offers and full *ex post* offers, thereby drawing the benefits of both types. See *supra* notes 96-103 and accompanying text.

[191] It, however, does make the acquisition expensive for the acquirer.

[192] 2011 Regulations, §13(1).

[193] It is just that the completion of the private arrangement for transfer of control between the controller and the acquirer is subject to the completion of the mandatory offer formalities. *Id.*, §§22(3), 26(10).

[194] In case of excess tendering, only those shareholders are entitled to a share in the premium and exit only in respect of the shares that are accepted, and not for the remaining shares that they are unable to divest in the offer.

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E. Pricing Considerations

Under the strong form of the MBR practiced in the .K., the acquirer must make the offer to the remaining shareholders at a minimum price that is determined by the highest price the acquirer paid for shares during the 12 month period before the offer.[195] This is a manifestation of the sharing rule, upon which the MBR rests. Any derogation from the minimum pricing norms will undermine the robustness of the MBR.

In the Asian context, the minimum pricing norms are either flexible or non-existent in certain jurisdictions. In others, they are subject to manipulation and abuse. Artificially lower offer prices will lead to the lack of a strong response from the shareholders in the takeover offer, thereby facilitating the control shift on terms beneficial to the acquirer (lower cost of acquisition) and adverse to the interest of the minority (lack of sharing). These phenomena are worth examining using the examples of Japan and China.

Japanese takeover regulation provides a freehand to the acquirer to determine the price of a mandatory offer.[196] There are no minimum pricing norms aimed at minority shareholder protection.[197] Similarly, in Korea too, the acquirer may stipulate the terms and conditions of an offer, including price.[198] This enables the acquirer to fix an unattractive offer price that is lower than the prevailing market price.[199] Such an approach relies on a market price discovery mechanism by which the shareholders will likely refuse to tender in an offer with a depressed price. However, without a price floor prescribed by regulation, it also runs the risk that shareholders may tender in a low-priced offer due to information asymmetry and collective action problems.[200] Conferring excessive freedom in the hands of the acquirer to fix the offer price could shift the balance of power in favor of the acquirer in the interest of the minority shareholders.

In China, however, the CSRC prescribes a minimum price for the offer, which is the highest price at which the acquirer has acquired the same class of shares in the target during the 6 month period before the announcement of the offer.[201] A related benchmark suggests that if the offered price is lower than the daily average price during the 30 trading day period before the announcement of the offer, then the acquirer's financial advisor must issue an opinion

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[195] U.K. Takeover Code, §9.5. In Hong Kong and Singapore, the lookback period is reduced to six months. *See*, Hong Kong Takeover Code, §26.3; Singapore Takeover Code, §14.3.

[196] Katsumasa Suzuki, *Future Prospects of Takeovers in Japan Analyzed from the View of Share-Ownership Structures and Laws in Comparison with the United States and the European Union*, 42 COLUM. J. TRANSNAT'L L. 777, 791 (2004); Fujita, *supra* note 108, at 29.

[197] Joseph Lee, *The Current Barriers to Corporate Takeovers in Japan: Do the UK Takeover Code and the EU Takeover Directive Offer a Solution?* 18 EBOR 761, 761 (2018).

[198] Financial Investment Services and Capital Markets Act, §134(1)).

[199] Suzuki, *supra* note 196, at 791; Fujita, *supra* note 108, at 29.

[200] *See*, Kenju Watanabe, *Control Transaction Governance: Collective Action and Asymmetric Information Problems and Ex post Policing*, 36 NW. J. INT'L L. & BUS. 45, 49 (2016).

[201] China Securities Regulatory Commission, Measures for the Administration of the Takeover of Listed Companies, §35.

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supporting the fairness of the offer price.[202] Although this pricing mechanism appears robust, recent empirical evidence suggests widespread circumvention of the rule.

Huang and Wang found that the pricing rule is defective as it "leads to rent seeking."[203] Acquirers make offers at prices far below the prevailing market price by relying upon the opinion of financial intermediaries.[204] Huang and Wang also found that acquirers ignore even the negotiated pre-offer prices as benchmarks, for which they are yet to receive a sanction, or even criticism, from the CSRC, which suggests laxity in enforcement.[205] Zhang and his co-authors found that, apart from depressing the offer price as mentioned above, acquirers are likely to manipulate the stock price of the target (upward).[206] This creates a chasm between a low offer price and a much higher prevailing market price, by which the takeover offer is doomed to fail.[207] The loopholes in the minimum pricing norms, thus, enable the acquirer to modulate both the offer price as well as the market price of the target's shares to produce the outcome most beneficial to it, but this operates to the detriment of the target's minority shareholders.

Given the more robust pricing norms in Hong Kong, Singapore, and India,[208] there is no evidence yet of a common practice where acquirers utilize price as a means to sway the outcome of the offer. In that sense, acquirers may gain greater maneuverability on the pricing front in Japan, Korea, and China. However, when it comes to another aspect of the MBR, namely, the tide turns, as we now explore.

F. Creeping Acquisitions

Hong Kong, Singapore, India, and China all carry the creeper rule by which incumbents who hold *de facto* control over the target may consolidate their control without triggering the MBR.[209] Interestingly, although the four jurisdictions appear to have incorporated the creeper rule from the U.K., the takeover regulation in the jurisdiction of origin has done away with the creeper rule altogether. Under earlier versions of the U.K. Takeover Code, any person holding between 30% and 50% shares in the target could acquire up to another 1% shares during a 12 month period without an obligation to make an offer to the other shareholders.[210] However, lessons from the operation of the rule revealed that it resulted in adverse

[202] *Id*.
[203] Huang & Wang, *supra* note 87, at 31.
[204] *Id*.
[205] *Id*., at 164.
[206] Zhang, et. al., *supra* note 96, at 2, 23.
[207] *Id*.
[208] Hong Kong Takeover Code §26.3; Singapore Takeover Code §14.3; 2011 Regulations, §8(2). All three jurisdictions peg the minimum offer price to the highest price at which the acquirer acquired shares during the period of six months prior to the commencement of the offer. In India's case, there are other conditions such as the average market price of the target's shares during the 12 months preceding the announcement of the offer. *See also*, *infra* Table A.
[209] *See supra* Part IIIA.
[210] Wan, *supra* note 152, at 409.

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consequences to the target and its shareholders, as it made it easier for controllers to extract private benefits of control, and stood in the way of value-enhancing offers by outside acquirers.[211] Consequently, the U.K. Takeover Panel abolished the creeper rule in 1998.[212] Despite this, the four Asian jurisdictions have persevered with this rule and, in India's case, with immense generosity to incumbents.[213] In India, there is also sufficient evidence to indicate the extensive use of the creeping acquisition mechanism by controlling shareholders, including staving off potential hostile takeovers.[214]

The generous creeping acquisition limits and their extensive use create a significant distortion in the market for corporate control in Hong Kong, Singapore, India, and China. Incumbents can shore up their holdings without triggering the MBR, thereby depriving the public shareholders of the exit and sharing principles that form the stated philosophy of takeover regulation. At the same time, the creeping acquisition mechanism unduly favors the incumbents against outside acquirers such as hostile acquirers. Although incumbents possess headroom for acquisitions without triggering costly obligations under the MBR, outside acquirers enjoy no such ability. That outside acquirers will trigger the MBR when they cross the initial threshold, coupled with the reality that incumbents may use the creeping acquisition rule to put up a defense by building up their stake without being subjected to the costly MBR, would deter outsides from challenging the control enjoyed by the incumbents. This severely hampers the market for corporate control.

G. Waivers and Exemptions from the MBR

As a rigid MBR will thwart efficient changes of control, most jurisdictions incorporate a system of waivers and exemptions in their takeover regulation. This seeks to maintain a balance between facilitating efficient transactions and preventing inefficient ones. For example, in some cases, substantial shareholding may change hands without actually altering control over the target. In other cases, there may be further reasons for granting exemptions from the MBR: when the company issues new shares in exchange for capital investment,[215] when a takeover is inevitable in resuscitating a financially distressed company,[216] or where family controllers engage in succession planning.[217] Although the rationale for such waivers and exemptions is understandable, there is a wide spectrum of when these waivers are granted.

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[211] Nemika Jha, *Political Economy of Takeover Regulation in India: How Good is India's Mandatory Bid Rule?*, SJD THESIS AT FORDHAM UNIVERSITY SCHOOL OF LAW 117 (2019) (copy on file with the authors). *See also*, Enriques & Gatti, *supra* note 10, at 61-67.

[212] *See supra* note 161, and accompanying text.

[213] The headroom for creeping acquisitions up to 5% per year in India outweighs much smaller limits in Hong Kong (2% in a 12-month period) and Singapore (1% in a six-month period). *See supra* Part IIIA.

[214] Shaun J. Mathew, *Hostile Takeovers in India: New Prospects, Challenges, and Regulatory Opportunities*, [2007] COLUM. BUS. L. REV. 800 at 807-808.

[215] *See supra* note 54.

[216] *Id*.

[217] Jha, *supra* note 211, at 185.

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The U.K. Takeover Code specifies the situations where acquisitions within the same concert party group do not necessarily trigger the MBR.[218] Singapore and Hong Kong have largely followed the U.K. Takeover Code: transfers within the same concert part group can take place without attracting the MBR so long as there is no change in the overall control maintained by the concert party group.[219] Particularly, the Securities and Futures Commission of Hong Kong has emphasized the narrowness of the exception, both by way of a practice note[220] as well as a recent decision (see *Panel Decision: referral from Magang (Group) Holding Company Limited*).[221] In that decision, the Hong Kong Takeover Panel clarified that not all levels of companies that are ultimately controlled by the Government of the People's Republic of China through the State-owned Assets Supervision and Administration Commission should be regarded as acting in concert, as regards, must be made to the specifics of each case.[222]

However, outside of Singapore and Hong Kong, some of the Asian jurisdictions display an unduly wide scope on exemptions, which undermine the objectives of the MBR by providing benefits to incumbent controllers at the cost of the minority shareholders. In this subpart, we illustratively examine some of the key exemptions in the Asian jurisdictions, and the trends emanating from their utilization in practice.[223]

Exemptions from the MBR have historically formed a prominent part of Chinese takeover regulation.[224] Under the 2002 version of its takeover regime, the CSRC had considerable discretion in granting waivers from the MBR.[225] Between 2003 and 2007, the CSRC issued 178 waiver decisions, all of them favorably.[226] It did not reject any waiver application.[227] The waiver route turned out as a prominent mitigating factor against the severity of the MBR under the 2002 regime, especially since partial offers were impermissible.[228] Upon the introduction of the partial offer regime in 2006, it would have been natural to anticipate a

[218] U.K. Takeover Code, § 9, note 4.

[219] Singapore Takeover Code, §14, note 5; Hong Kong Takeover Code, §26, note 6.

[220] Securities and Futures Commission, *Practice Note 21 (PN21) – Note 6(a) to Rule 26.1 - Acquisitions of voting rights by members of concert group* (Mar. 2016).

[221] Takeovers and Mergers Panel, *Ruling on whether the mandatory general offer obligation that would result from the proposed transfer of an interest in Magang (Group) Holding Company Limited, the controlling shareholder of Maanshan Iron & Steel Company Limited, should be waived, and, if not, the applicable offer price per H share for the purposes of the offer* (Jul. 22, 2019).

[222] It should also be pointed out that there were other applications involving transfers within family block-holders where the Takeovers Executive has not granted the waiver. *See e.g.*, Takeovers and Mergers Panel, *Panel decision in relation to a referral by the Takeovers Executive to the Takeovers and Mergers Panel for a ruling on whether a general offer obligation will result from the proposed transfer of the controlling shareholding interest in The Cross-Harbour (Holdings) Limited (Stock Code 32) by Y.T. Realty Group Limited (Stock Code 75) to Mr. Cheung Chung Kiu and, if so, whether it should be waived* (Dec. 21, 2015).

[223] A comprehensive discussion of waiver and exemption regimes in MBR is beyond the scope of this article.

[224] Cai, *supra* note 89, at 665.

[225] Huang & Wang, *supra* note 87, at 17-18.

[226] Xi, *supra* note 89, at 149.

[227] However, Xi rationalizes this position by stating that there was an informal screening practice whereby parties would check with CSRC beforehand and weed out "unwarranted waiver applications". *Id*.

[228] Huang & Chen, *supra* note 3, at 221-22.

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diminished role for waivers and exemptions.[229] However, although the 2006 regime streamlined the exemption mechanism, the trend involving the use of exemptions continued, with acquirers both relying on automatic exemptions made available in specific circumstances and by approaching the CSRC for the exercise of its discretion in others. The CSRC continued its practice of liberally granting exemptions from the MBR.[230] Particularly, the exemptions include transfers where there is no actual change in control of the listed company (which is considerably broader than the U.K. Takeover Code where exemptions are limited to acquisitions within the same concert party group, taking into account the balance of interests), where independent shareholders waive the mandatory bid in the case of issuance of new shares and a catchall provision catering to "any other circumstance recognized by the CSRC for adapting to developmental changes of the securities market or to the requirements for protecting the lawful rights and interests of the investors."[231] Restructurings of SOEs also have specific exemptions.[232]

Recent empirical studies also reveal an excessively high approval rate for exemptions from the CSRC. One study indicates that, during the period between 2004 and 2010, of the 733 transactions triggering the MBR, the CSRC granted exemptions in 706 (96.32%) and required the acquirers to make the offer only in 27 (3.68%).[233] Another study of transactions between 2004 and 2012 also indicates an approval rate of over 96% by the CSRC for exemptions.[234] Such extreme statistics suggest that the MBR is largely in the books, and actual offers to noncontrolling shareholders are in fact the exception.

In India too, SEBI's takeover regulations exempt several transactions from the MBR. SEBI has narrowed and streamlined the exemptions over time. Some are automatic approvals that acquirers may avail after making certain disclosures, whereas in other cases the acquirer or the target may approach SEBI for a specific exemption. Despite streamlining, how acquirers have utilized the exemptions suggests that they have defied the purpose of takeover regulation in structuring a market for corporate control.[235]

An empirical study one of us conducted indicates that acquirers in India have been successful in extensively relying upon exemptions,[236] and in avoiding the MBR. During the period between 1997 and 2011, of the 4,404 transactions that triggered the MBR, the acquirers in 3271 (74%) transactions took advantage of the exemption route and only 1,133 (26%) made takeover offers.[237] Even in terms of transaction values, exemptions constituted 57%, whereas

[229] Huang, *The New Takeover Regulation in China: Evolution and Enhancement*, *supra* note 88, at 168.
[230] Huang & Wang, *supra* note 87, at 13.
[231] Regulation of Takeovers of Companies Listed in China, art 62, cited in Cai, supra note 89, at 659.
[232] Regulation of Takeovers of Companies Listed in China, art 63, cited in Cai, supra note 89, at 659.
[233] Huang & Wang, *supra* note 87, at 19.
[234] Zhang, et al., *supra* note 96, at 7 (citing Tang Xin and Hideki Kanda, *The Legal Rules of Public Tender Offers: From China to Japan*, (2019) 2 Tsinghua Law Review 28-48).
[235] Jairus Banaji, *Thwarting the market for corporate control: takeover regulation in India* 5 (2005), available at http://eprints.soas.ac.uk/10920/1/QEH_banaji.pdf.
[236] The exemptions are categorized under the 2011 Regulations, §10.
[237] Varottil, *The Nature of the Market for Corporate Control in India*, *supra* note at 368.

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offers constituted only 43%.[238] Although there seems to be some balance between offers and exemptions in the amounts, there is considerable disparity in the numbers of transactions.

The availability and use of exemptions of sizable magnitude indicate that several control transactions occur without the accompanying mandatory offer. More importantly, whereas incumbents are entitled to rearrange their shareholdings and garner their positions to defend themselves, outside acquirers cannot avail of similar exemptions and would have to acquire control through the costly mandatory offer process. Here again, it is evident that the exemption mechanism is intended to benefit the incumbents against possible outside acquirers. Although the data suggest that the use of the exemption mechanism in India is not as stark as in China, it is material enough to thwart the market for corporate control and favor the incumbents such as family and government controllers to consolidate their holdings without providing the exit or sharing option to the noncontrolling shareholders.

In both Japan and Korea, the MBR omits the acquisition of shares on the stock markets from the scope of the MBR. Commentators rationalize this exemption on the ground that the MBR in these jurisdictions aims at introducing transparency in control transfers rather than to ensure exit or sharing for the noncontrolling shareholders.[239] Moreover, since a stock market purchase is an anonymized transaction, an acquirer cannot transact with a specific controller to acquire shares.[240] Also, acquisitions on market mean that the acquirer would have to pay market prices.[241] Hence, noncontrolling shareholders have an opportunity similar to the controller to sell their shares on the stock market and to partake in any premium. Despite such a gallant regulatory intention, acquirers may circumvent the stock market acquisition to acquire shares from the controller without providing either exit or sharing to the remaining shareholders. For example, the acquirer and the controlling shareholder could execute a matched trade on the stock exchange that would excuse the acquirer from the MBR although the acquisition may exceed the threshold.[242] This is, however, subject to the securities regulation as well as rules of the stock exchange in the relevant jurisdiction.

Overall, the Asian jurisdictions display an excessive reliance on exemption and waivers by which acquirers end up avoiding their obligation to make an offer to the remaining shareholders. The available trends indicate that exceptions have in fact turned out to be the norm in certain Asian jurisdictions, thereby diluting the effect of the MBR and moving it further away from the strong form version practiced in the U.K..

In concluding this part, we find that although the existing discourse surrounding the comparative analysis of the MBR attributes its origin to the U.K.-style strong form of the MBR, the design of the rule in the six Asian jurisdictions varies considerably from its purported source. That apart, there is considerable divergence even among the Asian

[238] *Id*.
[239] Fujita, *supra* note 108, at 31-33; Yang & Lee, *supra* note 21, at 453-454.
[240] Yang & Lee, *supra* note 21, at 453.
[241] Tang & Kanda, *supra* note 234.
[242] Yang & Lee, *supra* note 21, at 454.

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jurisdictions, indicating that the idiosyncrasies in each of those jurisdictions play an essential part in the design, evolution, and implementation of the rule. Viewing them through a common lens is to misapprehend the problem.

IV. RATIONALIZING THE DIVERGENCE OF THE MBR IN ASIA

The divergent approaches to the MBR in Asia implore some key questions. Why did the six Asian jurisdictions design and implement their MBR in very specific ways? What are the factors that influenced the approach of the legislature and regulators? Does the political economy of the MBR in the Asian jurisdictions reveal the role of interest groups? Given the existing scenario with the MBR, one wonders whether noncontrolling shareholders gain adequate protection against inefficient control transfers or whether it is possible to extend alternative tools in company law to serve the purpose. A diluted version of the MBR coupled with an ineffective system of minority protection generally under company law leaves noncontrolling shareholders exposed to agency problems surrounding controlling shareholders, particularly in controlled companies that populate the Asian landscape. At the same time, a strong form of the MBR can deter value-enhancing acquisitions. On the basis of such analysis, we engage in a normative endeavor to expound some of the lessons that the review of the MBR in Asia offers to the study of the rule more generally.

A. MBR and the Theories of Legal Transplant

Given that the origin of the MBR is attributable to the U.K. Takeover Code and that of the market rule to the U.S. securities law, a discussion surrounding the theories of legal transplant is inevitable. Not only are the two systems the origins of the respective rules, but they are also responsible for the dissemination of the rules or their variants to countries around the world, including those in Asia.

The legal transplant theory developed by Watson (at least in his earlier extreme version) asserts that the transplantation of legal rules from one jurisdiction to another is "socially easy."[243] According to Watson, the law can be divorced from social, economic, and political contexts. His theory has been subject to a great deal of criticism on the ground that it fails to consider the role of culture in either the donor country or the recipient country.[244] Particularly, Legrand asserted that legal transplants cannot occur because once a host country receives a rule or system of law, one cannot compare it with its original formulation, and the

[243] ALAN WATSON, LEGAL TRANSPLANT: AN APPROACH TO COMPARATIVE LAW 95 (2nd ed, 1993). The strong and weak versions of Watson's theories were discussed in William Ewald, *Comparative Jurisprudence (II): the Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995). For a retrospective assessment, *see* John W. Cairns, *Watson, Walton, and the History of Legal Transplants*, 41 GA. J. INT'L & COMP. L. 637 (2013).

[244] LAWRENCE FRIEDMAN, LAW AND SOCIETY 76 (1977) (arguing that without an understanding of culture, legal systems and their institutions are merely "lifeless artefacts").

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local context and culture instead shape its continued form.[245] Law is but a "mirror" of the society.[246]

The legal systems of the six Asian jurisdictions do not clearly follow either of the two extreme theories of Watson or Legrand. The transplants of MBR (without rejection or significant modification) in Hong Kong and Singapore contradict the mirror theory, so does the adoption and continuation of the U.S.-style takeover regulation in Korea. Conversely, the Korean example also offers a rejection of the transplants (disproving Watson) when the U.K.-style MBR it adopted suffered a rejection within 1 year of its introduction. More importantly, China, Japan, and India tread a middle path of having adopted the U.K. MBR with significant variations to suit their individual circumstances.[247] These trends indicate, as Chen-Wishart noted, that the question is not whether a legal transplant is possible or not[248] but that the shape of a legal transplant "is contingent on a wide range of variables triggered by the particular transplant; the result can occupy any point along the spectrum from faithful replication to outright rejection."[249] This cannot be truer than in the dissemination of the MBR in Asia.

What explains this phenomenon? Why did the Asian jurisdictions cross-refer, either consciously or inadvertently, the takeover regulation in the Anglo-American setting? We argue that the Asian jurisdictions borrowed the ideas surrounding the MBR from the U.K. market, given its prominence as a strong minority protection tool, principally as a signaling mechanism to demonstrate to foreign investors that their domestic legal standards are in tune with global norms and expectations.[250] The signaling function plays an essential role, as investors, particularly from the western economies, are generally concerned about the level of investor protection in markets in which they invest.[251] The minority shareholder protection and equal treatment themes surrounding the MBR add further significance. Target companies and their incumbents are also likely to apply pressure on their governments and regulators to

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[245] Pierre Legrand, *The Impossibility of "Legal Transplants*", 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997). *See also*, Gunther Teubner, *Legal irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MLR 11 (1998).

[246] For a discussion on the "mirror" theory, *see* Ewald, *supra* note 243, at 492; Mindy Chen-Wishart, *Legal Transplant and Undue Influence: Translation or a Working Misunderstanding?*, 62 Int'l Comp. L.Q. 1, 2-3 (2013).

[247] Watson's extreme version of the theory is too narrow in its failure to take into account the relevance of the particular legal culture, politics and economics into which an institution or legal rule is transplanted. His argument that the transplantation of law is "socially easy" is open to question, as can be seen from the examples relating to the modifications of the MBR.

[248] Chen-Wishart, *supra* note 246, at 2.

[249] *Id*., at 2.

[250] Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51. AM. J. COMP. L. 163, 164 (2003); Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMP. L. 97 2002. Spamann notes that "a country can develop a policy, totally autonomously, and yet utilize foreign statutory language for technical simplicity or as a decoy." Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, [2009] BYU L. REV. 1813, 1852.

[251] Pistor, *supra* note 250, at 97. *See also*, Chen-Wishart, *supra* note 246, at 10.

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introduce a conducive regime that will enable them to raise capital from attractive terms.[252] Such an effort motivated by the need to create a signaling effect leads to some level of convergence in the norms, at least at a superficial level.[253]

However, a more nuanced analysis of transplants is also needed.[254] The question regarding the precise manner in which a rule came into a jurisdiction is more vital than where or from which legal family the transplantation occurred.[255] For example, the MBR underwent minimal to substantial modifications from the strong form of the MBR, either at the time it took shape in the Asian jurisdictions or over time thereafter. Even when received as a wholesale transplant, experience reveals that the operation of the rule has been vastly different from the country of origin. For example, acquirers defied the strong form of the MBR in force in China before 2006 as a matter of course through a waiver mechanism routinely administered by the CSRC.[256] By liberally allowing partial offers, China, Japan, and India have avoided the full rigor of the MBR, thereby signifying a "cautious legal transplant."[257] In Hong Kong and Singapore, the results of a strong form of the MBR in terms of its unintended effects on shareholding patterns have been counterintuitive compared with that in the U.K, although there is sufficient similarity between the various rules.[258]

This analysis of the diffusion of the MBR in Asia indicates that the impact of a rule received in a jurisdiction is driven predominantly by its ability to match with local conditions.[259] Even ostensibly subtle variations can make a whole lot of difference,[260] and one must specifically focus on the transformations that the imported law undergoes in its host jurisdiction and how its role differs therein.[261] Legislators and regulators adopt rules from foreign jurisdictions, but they either adopt them at the time of incorporation or modify them subsequently on the basis of their experience in implementing them.[262] Accordingly, as Teubner argued, the "result is not more uniform laws but more fragmented laws as a direct consequence of globalizing processes."[263] In such a paradigm, legal rules tend to be mixed in nature without exceptions,

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[252] See Anthony Ogus, *Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law*, 48 INT'L COMP. L.Q. 405, 407 (1999). They could exert pressure using the threat of migrating elsewhere if the regime is not conducive to trade or capital flows. Nuno Garoupa & Anthony Ogus, *A Strategic Interpretation of Legal Transplants*, 35 J. LEGAL STUD. 339, 340 (2006).

[253] Pistor, *supra* note 250, at 97.

[254] *See*, Chen-Wishart, *supra* note 246, at 2; Meryll Dean, *Legal Transplants and Jury Trial in Japan*, 31 LEG. STUD. 570, 590 (2011); David Cabrelli & Mathias Siems, *Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis*, 63 AM. J. COMP. L. 109, 110 (2015).

[255] Berkowitz, Pistor & Richard, *supra* note 250, at 167.

[256] See text accompanying *supra* notes 224-228.

[257] Davies, Hopt & Ringe, *supra* note 9, at 235.

[258] See text accompanying *supra* notes 164-166.

[259] Beth Ahlering & Simon Deakin, *Labor Regulation, Corporate Governance, and Legal Origin: A Case of Institutional Complementarity*, 41 LAW & SOC'Y REV. 865, 879, 903 (2007).

[260] Dean, *supra* note 254, at 589.

[261] Teubner, *supra* note 245, at 12.

[262] Katharina Pistor, et al, *The Evolution of Corporate Law: A Cross-Country Comparison*, 23 U. PA. J. INT'L ECON. L. 791, 797 (2002). *See also*, Petra Mahy, *The Evolution of Company Law in Indonesia: An Exploration of Legal Innovation and Stagnation*, 61 AM. J. COMP. L. 377, 380 (2013).

[263] Teubner, *supra* note 245, at 13. He goes on to observe: "Against all expectations that globalisation of the markets and computerisation of the economy will lead to a convergence of economic regimes and to functional

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with "only that the mixture is different, and the levels of combinations and therefore the extent of the mix varies."[264] Viewed through this lens, the issue relates much less to whether a legal transplant succeeds or fails but rather to the extent to which the law has developed as an assortment of principles in each jurisdiction. The evolution and state of play of the MBR in the six Asian jurisdictions clearly reflect the fragmentation of approaches to the rule and the different combinations that arise in the varying characteristics among the rules, even raising the specter of whether a legal transplant is a "misleading metaphor"[265] in such contexts.

Finally, while considering a legal transplant, one must bear in mind the objectives of the rule in the jurisdiction of origin as well as in the host jurisdiction.[266] If the rule originated to serve a specific purpose but was transplanted into another jurisdiction that sought to achieve a different objective, the operation of a similar rule will be vastly different in each jurisdiction.[267] Our analysis of the MBR emphasizes this point. For instance, the MBR in Korea and Japan (which bear the exception for purchases made on the stock exchange) focus on the goal of achieving transparency in the acquisition of control, unlike in jurisdictions such as the U.K., Hong Kong, and Singapore, where the objective of the MBR is to confer exit and sharing benefits to the noncontrolling shareholders.[268]

Related to this is the fact that attempts at legal transplants, harmonization, and convergence may offer a smokescreen to legislators and regulators to adopt the MBR from other jurisdictions and redesign them (either marginally and significantly) to suit the purposes of specific interest groups. For example, Ventoruzzo lamented that in the efforts toward the harmonization of European takeover regulation, the "notions of good corporate governance can be manipulated to turn against their own purposes."[269] Similarly, although the origins of the MBR relate to minority shareholder protection, the incorporation of the rule in Asian jurisdictions may act against the interest of the very constituency it sought to benefit and instead inure to the benefit of insiders such as managers and controlling shareholders, especially in the case of companies with concentrated shareholding.[270] It is to this phenomenon that we now turn.

B. The Political Economy of the MBR in Asia

equivalence of legal norms in responding to their identical problems, the opposite has turned out to be the case." *Id.*, at 24.

[264] Esin Orucu, *Law as Transposition*, 51 INT'L & COMP. L.Q. 205, 221 (2002).

[265] Teubner, *supra* note 245, at 11.

[266] Ahmad A. Alshorbagy, *On the Failure of a Legal Transplant: The Case of Egyptian Takeover Law*, 22 IND. INT'L & COMP. L. REV. 237-238 (2012).

[267] *Id*.

[268] See text accompanying *supra* notes 115, 123-124.

[269] Ventoruzzo, *supra* note 15, at 138.

[270] Jha, *supra* note 211, at 12.

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The role of interest group politics in takeover regulation has attracted an established line of scholarship.[271] In their seminal work, Armour and Skeel argued that it is beneficial to view takeover regulation from the lens of interest group politics, using the supply and demand side of takeover regulation.[272] Analyzing the contrasting approaches between the U.K. and the U.S. in their regulation of hostile takeovers, they argued that the U.K.'s self-regulatory regime and aggressive lobbying by strong institutional shareholders have resulted in a pro-shareholder regime. By contrast, the U.S. courts serve as arbiters of takeover disputes—where the judgment of corporate boards and management obtain greater leeway in the determination of the interests of the company. The discussion on interest group politics theory is ensconced mainly in the debate surrounding hostile takeovers.[273] There is only burgeoning literature regarding its applicability to analyze the dissemination of the MBR into other jurisdictions, particularly in Asia, and that covers individual analyses of countries such as China[274] and India.[275] Through this work, we seek not only the applicability of the interest group theory more broadly to the dissemination of the MBR worldwide but also its specific applicability to the Asian jurisdictions under consideration herein.

A key question arises: whose interests would be relevant to the incorporation of the MBR into a jurisdiction? First, we look at the supply side of regulation; we examine the role of the state or the regulator. In emerging markets where the private benefits of control are high and minority shareholders are weak, Pargendler argued that the MBR serves the important function to protect minority shareholders.[276] However, the adoption and subsequent modification of the MBR in Asian jurisdictions pose an interesting problem. Available evidence demonstrates that the legal transplantation of the Anglo-American models in emerging economies, without more, is insufficient in achieving strong financial markets in the absence of effective legal institutions.[277]

The evolution of the Chinese MBR provides interesting insights on the supply side of regulation. Under the 2002 takeover regime, the CSRC wielded significant power by granting "itself a central and pivotal role in the Chinese market for corporate control" by exercising its discretion to grant waivers from the MBR.[278] In his study, Xi found that SOEs "controlled by the top levels of the Chinese central and local governments" fared better under this regime

[271] Enriques, *The Mandatory Bid Rule in the Takeover Directive*, *supra* note 2, at 456-457; Umakanth Varottil & Wai Yee Wan, *Comparative Takeover Regulation: The Background to Connecting Asia and the West*, in VAROTTIL & WAN, *supra* note 3, at 33.

[272] Armour & Skeel, *supra* note 80, at 1794. *See also*, Armour, Jacobs & Milhaupt, *supra* note 109.

[273] In other work, we document the influence of controlling shareholders in the design of regulation of hostile takeovers in the six Asian jurisdictions that are the subject matter of study herein. Varottil & Wan. *Hostile Takeover Regimes in Asia*, *supra* note 29

[274] Xi, *supra* note 89.

[275] Jha, *supra* note 211.

[276] Mariana Pargendler, *Takeovers, Ownership Structures and Control Premiums: A Comparative Analysis*, available at https://www.seer.ufrgs.br/ppgdir/article/download/49628/31028.

[277] Katharina Pistor, Martin Raiser & Stanislaw Gelfer, *Law and Finance in Transition Economies*, 8 ECONOMICS OF TRANSITION 325(2000).

[278] Xi, *supra* note 89, at 143.

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than did other SOEs or private acquirers.[279] The preferential treatment that the Chinese securities regulator has provided to SOEs in case of control shifts has raised some level of controversy. However, the supply side of regulation in China after 2006 is confounding, as the CSRC ceded its discretionary powers by limiting the exemption regime and allowing partial offers. Xi argued that such a modification to the MBR regime reflects the private interests of the Chinese securities regulator in driving state-led acquisitions and industrial development (as evidenced from the shift in approach in the transition from a planned economy).[280] Another objective is to reflect the state's interests in encouraging takeovers and yet at the same time signaling its commitment to protecting minority shareholders.[281]

Moving to the demand side, the institutional shareholders have played an essential role in shaping takeover regulation in the U.K.[282] However, in jurisdictions where there is a concentration of shareholding, controlling shareholders tend to influence the shape of the regulation as well as the manner of its implementation.[283] Considering the significant concentration of shareholding in the Asian jurisdictions (barring Japan),[284] such a phenomenon is evident in this region as well. To illustrate our argument, we use the example of the design of the MBR in India, where controlling shareholders[285] of Indian companies (where shareholding is generally concentrated) form the dominant interest group influencing takeover regulation.

Two specific features of the Indian MBR provide direct evidence of interest group influence from the promoters. The first relates to partial offers. Ordinarily, promoters must be suspicious of partial offers, as they enable an outsider acquirer to wrest control over the company without undertaking a full offer that is costly. Therefore, partial offers expose the incumbents to the market for corporate control in comparison with full offers. Why did the promoter faction not oppose the idea of partial offers? The answer lies in an idiosyncrasy of acquisition financing in India. Domestic acquirers in India face regulatory constraints in raising bank financing to effect takeovers.[286] However, foreign acquirers raising financing overseas are not subject to the same limitation. After a consultation process,[287] SEBI concluded that a full offer requirement would impose an undue burden on cash-strapped domestic acquirers and thereby expose Indian companies to takeovers by well-funded foreign

[279] *Id*.
[280] *Id*., at 143, 164.
[281] *Id*., at 164. Huang & Chen, *supra* note 3, at 222-223. *See also* Cai, *supra* note 89, at 665-668 (2011).
[282] Armour & Skeel, *supra* note 80, at 1767-76.
[283] The European experience is instructive, where shareholdings are concentrated and the MBR is incorporated in the EU Takeover Directive. Reports indicate that market participants, particularly controlling shareholders, often circumvent the MBR. Grant, Kirchmaier, & Kirshner, *supra* note 15.
[284] *See supra* note 174 and accompanying text. However, the presence of stable shareholders in Japan makes it somewhat unique and different from jurisdictions that typically have dispersed shareholding. Dan W. Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware*, 15 BERKELEY BUS. L.J. 4, 17-22 (2018).
[285] In Indian regulation and literature, controlling shareholders are generally referred to as "promoters". Varottil, *The Nature of the Market for Corporate Control in India*, *supra* note 136, at 346.
[286] *Id*., at 363.
[287] Bhagwati Committee Report, 1997, *supra* note 138, ¶6.12.

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acquirers. Evidently, the approach toward partial offers adopted by Indian takeover regulation has been to placate domestic business interests that were apparently feeling the threat of potential takeovers by foreign companies. The interests of domestic industry prevailed in the regulatory process.[288] In that sense, an extraneous matter such as a quirk in the law relating to acquisition financing and the purported discrimination between domestic and foreign acquirers motivated the introduction of the partial offer requirement in India. Although this issue came up during further reform efforts in the takeovers arena, it has not gained enough momentum to attract change, and the scenario prevails even today.[289]

The second aspect of India's takeover design relates to creeping acquisitions, which, as we have seen,[290] is an incumbent friendly measure. The transparency surrounding the demand for this regulation is evident when an earlier consultation process "appreciated the fact that in a competitive environment, it may become necessary for person(s) in control of the company to consolidate their holdings either suo moto or to build their defenses against takeover threats."[291] This is an explicit recognition of the influence of the Indian promoter groups to protect themselves from the challenges arising from a vibrant market for corporate control.[292]

Such an apparently muddled design of the MBR did not emerge by accident but through extensive consultation processes wherein the influence of interest groups is evident.[293] The committees that recommended different versions of the takeover regulations not only had strong representation from the Indian industry but also comprised leading Indian corporate lawyers.[294] The Indian industry received a dominant voice in the shaping of takeover regulation. The interest group theory explains why takeover regulation in India (and in varying forms, other Asian jurisdictions), the regulatory process is often subject to capture by the incumbents.

If, as these illustrations reveal, the design of the MBR in the Asian jurisdictions is incumbent friendly, the MBR will play a more diluted role in protecting the interest of minority shareholders against actions of controlling shareholders and acquirers when there is a control shift. This leads to the question of whether there are alternative mechanisms in the Asian context that operate to rein in the actions of acquirers and controllers in case of control shifts, which are likely to augur to the benefit of minority shareholders.

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[288] This position remained unchanged when the Takeover Regulations were reviewed subsequently. See Bhagwati Report 2002, *supra* note 138, ¶5.

[289] The status quo is beneficial to controlling shareholders, as the *ex post* partial offer scenario in India enables them to exit the target in entirely while it only provides a partial exit to minority shareholders. *See supra* Part IIID.

[290] *See supra* Part IIID.

[291] Bhagwati Committee Report, 1997, *supra* note 138, ¶6.2.

[292] Banaji, *supra* note 235, at 4.

[293] Jha, *supra* note 211, at 93.

[294] *Id*., at 92-93; Varottil, *The Nature of the Market for Corporate Control in India*, *supra* note 136, at 379.

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C. Functional Substitutes to the MBR

Scholars have argued that stringent rules under company law that prevent controlling shareholders from self-dealing could operate as a functional substitute to the MBR.[295] Hence, there could be some level of functional convergence between the fiduciary duties of controlling shareholders (prevalent in the U.S. in the context of the market rule) and the MBR.[296] Extending this argument further, one may hypothesize that in the context of an inchoate MBR present in several Asian jurisdictions, the reliance upon controlling shareholder fiduciary duties could fill the gap in protecting minority shareholders during a control shift. However, our analysis reveals that such an approach is unconducive to the Asian context.

As far as we are aware, none of the six Asian jurisdictions imposes any form of fiduciary duty on controlling shareholders seeking to transfer control to an acquirer. For example, with the weakest form of MBR among the six jurisdictions, it would be reasonable to expect Korea to use alternative strategies to address minority shareholder protection in case of a takeover. However, controlling shareholders in Korean companies are free to seek control premium from acquirers, which they need not share with the other shareholders.[297] The available duties of controlling shareholders and possible remedies for breach are not "perfect or fully efficient."[298] Duties under Korean law still focus on directors: controlling shareholders are accountable only if they fall within the scope of shadow directors.[299] Statutory shareholder remedies such as derivative actions are restricted to breaches of directors' duties[300] and not to controlling shareholders' duties. These limitations have led to a call for more robust duties on controlling shareholders of Korean companies in the context of takeovers.[301] A similar position ensues in common law Asia as well. The law does not impose U.S.-style fiduciary duties on controlling shareholders, particularly in the context of the sale of control.[302]

It is therefore clear that the strategy of the Asian legislators and regulators is to rely largely upon the MBR rather than to address minority shareholder protection during control shifts by treating controlling shareholders as fiduciaries and to impose duties on them. Although scholars have argued for imposing fiduciary duties on controlling shareholders in the Asian context,[303] several limitations could accompany such a strategy. *First*, controlling

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[295] Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329, 336 (2001). ALESSIO M. PACCES, RETHINKING CORPORATE GOVERNANCE: THE LAW AND ECONOMICS OF CONTROL POWERS 357 (2012).

[296] Gilson, *supra* note 295, at 337.

[297] Rho, *supra* note 124, at 292.

[298] *Id*.

[299] Korea Commercial Act, §401-2.

[300] Korea Commercial Act, §§402, 403.

[301] Stephen J. Choi, *The Future Direction of Takeover Law in Korea*, 7 J. KOREAN L. 25, 36 (2007).

[302] *See e.g.*, Jha, *supra* note 211, at 212 (on India). More generally, *see,* ERNEST LIM, A CASE FOR SHAREHOLDERS' FIDUCIARY DUTIES IN COMMON LAW ASIA (2019) (arguing for the importance of duties on controlling shareholders).

[303] *See e.g.*, Choi, *supra* note 301; LIM, *supra* note 302.

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shareholders' fiduciary duty involves a principle-based approach that adopts an *ex post* fact-based determination by the courts.[304] Unlike the MBR, which is a bright-line rule, the fiduciary duty standard requires judicial determination on a case-by-case basis. *Second*, there could be issues surrounding the enforcement of controlling shareholders' fiduciary standards.[305] A lot depends upon the legal and institutional machinery within each jurisdiction to determine whether shareholders can succeed in legal action against controlling shareholders for breaches of duty. The sophistication and speed of the judiciary, the manageability of costs, and the availability of appropriate incentives to shareholders and plaintiff law firms would determine the success (or failure) of the fiduciary duty approach.[306] The MBR, conversely, relies largely on the securities regulator or a specialist takeover panel to enforce.

In these circumstances, despite the divergent (and, in some cases, arguably imperfect) designs of the MBR in the six Asian jurisdictions, it would be imprudent to discard or devalue the rule and rely on the fiduciary duties of controlling shareholders, which are suboptimal in the Asian context. The continued importance of the MBR in Asia leads us to make some recommendations to redesign it in light of the vast divergence therein.

D. Addressing the Objectives: A Normative Analysis of the MBR in Asia

The experience from the six Asian jurisdictions clearly demonstrates considerable divergence in the objective, evolution, design, and implementation of the MBR. These jurisdictions populate several points along the spectrum between the strong form of the MBR and the market rule. This highlights the complexities surrounding the MBR in Asia. Considering the lessons emanating thus far, do we need to reconsider the utility of the MBR in Asia as meeting the twin objectives set out in Part II above of minority shareholder protection and ensuring efficient-based control shifts? Should the Asian jurisdictions go to the extent of eliminating the MBR in favor of the market rule? If not, how must jurisdictions redesign the MBR to address the complexities arising from the deep divergence in the rule within Asia to address the twin objectives of minority investor protection and ensuring a vibrant market for corporate control?

To begin with, we do not go to the extent of advocating the abolition of the MBR, at least in the Asian context. There is consensus that the rule performs the role of minority protection in the form of exit and sharing, and the controversy surrounds only the nature and extent of its role in this regard. Moreover, the market rule prevails in jurisdictions such as the U.S. because a robust regime that imposes fiduciary duties on controlling shareholders in control shifts accompanies the rule. Until such a controlling shareholders' fiduciary regime, which is

[304] See text accompanying *supra* note 35.
[305] *Id*.
[306] For example, Indian courts suffer from backlog and delays. M.J. Antony, *Only Bad News*, THE BUS. STANDARD (Jan. 14, 2014). *See also*, Jayanth Krishnan, *Globetrotting Law Firms*, 23 GEO. J. OF LEGAL ETHICS 57 (2010).

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either nascent or non-existent in Asia in the context of control shifts, develops further, it is our position that the MBR must remain, at least as a default role. Our task then leads us to an exploration of the possible modifications to its design in Asia.

As is clear thus far, "the tradeoff between eliminating inefficient transfer of control and forgoing efficient transfer of control will play out differently in different jurisdictions."[307] This is true not only among jurisdictions but also between various companies within the same jurisdiction. As one research has found, "no single and comprehensive rule such as the MBR is the best choice for all corporations and all potential takeover situations."[308] It boils down not only to a jurisdiction-level analysis but also to a company-level analysis.

Noting the utility of the MBR, the question is whether it is always appropriate to have a one-size-fits-all rule for all companies within each jurisdiction. Some have argued that it is optimal to leave the decision whether to have the MBR and its precise design to the shareholders of the company and in turn to the market.[309] Enriques and his co-authors argued that takeover regulation must maintain a neutral, "unbiased" approach that offers companies a menu of options to choose from.[310] This is because companies vary in their governance techniques on the basis of their shareholding pattern and other conditions affecting their governance.[311] Each company will experience a combination of these factors that is appropriate to its own circumstances. Furthermore, the theory recognizes that such a mix of factors will change over time.[312] Thus, takeover regulation must provide for a default MBR, from which the shareholders may opt out.[313]

Although the default MBR theory is attractive, it has also come under some criticism. Fedderke and Ventoruzzo argued that such a default MBR "is not always the most efficient and fair option."[314] The claim rests on at least two grounds. *First*, they argued that default rules work well only when parties possess "similar bargaining strength."[315] In an orchestrated control shift, the selling controller and the acquirer will likely have a superior bargaining position compared with the noncontrolling shareholders. *Second*, default rules need the support of efficient financial markets, which do not suffer from information asymmetry between the various players.[316] In the MBR scenario, leaving the rule to market forces will enable the more informed constituencies to gain an upper hand.[317] Therefore, Fedderke and

[307] Zhang, et. al., *supra* note 96, at 24.
[308] Bergstrom, Hogfeldt & Molin, *supra* note 24, at 447.
[309] Sepe, *supra* note 24, at 26.
[310] Luca Enriques, Ronald J. Gilson & Alessio M. Pacces, *The Case for an Unbiased Takeover Law (with an Application to the European Union)*, 4 HARV. BUS. L. REV. 85 (2014).
[311] *Id*., at 102.
[312] *Id*., at 88.
[313] Huang, *The New Takeover Regulation in China: Evolution and Enhancement*, *supra* note 88, at 161; Charlie Xiao-chaun Weng, *Lifting the Veil of Words: An Analysis of the Efficacy of Chinese Takeovers Law and the Road to a "Harmonious Society"*, 25 Colum. J. Asian L. 180, 216 (2012).
[314] Fedderke & Ventoruzzo, *supra* note 12, at 176.
[315] *Id*.
[316] *Id*., at 177.
[317] *Id*.

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Ventoruzzo argued that such a default regime will always operate in the interests of the incumbents and that it "could easily morph into a *free rein* of the most powerful, informed, or organized constituencies."[318]

Although there is merit in the critic of the default rule, the idea is worth considering in a manner that mitigates its countervailing factors. We are sanguine about the default MBR, but we also suggest additional checks and balances in the implementation of the idea. To begin with, each jurisdiction may prescribe a default rule that defines the various elements, including the trigger threshold, whether a full offer or a partial offer, minimum pricing requirements, creeping acquisition limits, and exemptions. These parameters must be clearly written, with there being no ability to exempt the MBR beyond what is stated in therein. The default rule will apply to all listed companies at the time of its introduction and to all companies listing thereafter. The rule may be situated in the company's corporate constitution.

Nevertheless, it is open to the company to alter any of the elements of the MBR by way of the shareholder resolution. To mitigate the concern that such a rule will be incumbent friendly, we propose a shareholder approval requirement that satisfies two conditions cumulatively. First, the modification of the MBR must command the approval of a majority of all shareholders of the company or such a higher threshold that may be required under the laws of individual jurisdictions.[319] The controlling shareholders will undoubtedly sway this decision. To ensure a balance against the dominance of the controlling shareholders, our model recommends that the shareholder approval must, second, receive the support of a majority among all the noncontrolling shareholders.[320] This additional condition will ensure that the modification of the MBR is not only a matter left to the influence of the controlling shareholders but also has the support of the minority shareholders.[321] This will ensure the deviations from the default rule can occur only when it benefits the larger shareholder body and not merely the incumbents.

This indeed imposes rigorous conditions for deviating from the default rule, thereby diminishing the utility of the model, but such a balance will soften the rigidity of the existing MBR. By ensuring a transparent process that leaves decision making in the hands of the shareholders, it overcomes the problems of the current system in which, as we have seen, acquirers rely on large-scale exemptions and other means of circumventing the MBR. The

[318] *Id*.

[319] For example, in several jurisdictions, a higher majority requirement applies for amendment to the constitution. *See*, Companies Act, 2013, §14(1) (in India); Companies Act (Rev. Ed. 2006), §26.

[320] In some jurisdictions such as Hong Kong, Singapore, India and Malaysia, material related party transactions require the approval of shareholders through MoM voting. Puchniak & Varottil, *supra* note 151.

[321] Such a dual-voting requirement is not unique. For example, in case of premium-listed companies in the U.K., independent directors must be elected by a majority of the shareholder body as a whole and also by the non-controlling shareholders as a separate class. See Dan W. Puchniak & Kon Sik Kim, *Varieties of Independent Directors in Asia*, in DAN W. PUCHNIAK, HARALD BAUM & LUKE NOTTAGE (EDS.), INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL & COMPARATIVE APPROACH 100 (2017).

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imposition of a higher threshold for deviations from the default rule is an inevitable fallout of the need to protect the noncontrolling shareholders against unilateral actions of incumbents.

V. CONCLUSION

Achieving the twin goals of takeover regulation in promoting efficient changes of corporate control and curbing inefficient changes is a challenge for all takeover regulators. In this article, we conduct a study of the mandatory takeover regimes in six Asian jurisdictions in a comparative frame with the U.S. and the U.K. We first compare the MBR in the U.K. and the market rule in the U.S., and then analyze the implications for either rule on the market for efficient corporate control and minority shareholder protection. We find that the six Asian jurisdictions have not adopted either approach wholesale but instead have made modifications that lie along a spectrum between the strong MBR rule in the U.K. and a diluted MBR rule that resembles the U.S. In fact, the choice as to the modifications bears little similarity with the origins of the rules. Rather, jurisdictions, in making the choices, base the decisions on the political economy of each jurisdiction, including the need to signal to the investing community its commitment toward adopting international practice on takeover regulation, the varying shareholding patterns, and the capacity of the regulatory authorities. We demonstrate the continued influence of controlling shareholders in framing the ultimate rule that is to be adopted, and this rule often benefits the incumbent controlling shareholders, which tend to be business families and the state.

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Table 1: MBR (intensity)



	Market rule							**Strong form MBR**
Jurisdiction	**U.S.**	**Korea**	**Japan**	**China**	**India**	**Hong Kong**	**Singapore**	**U.K.**
Trigger threshold	None at the federal level	Acquirer purchasing more than 5% off the market from 10 or more shareholders must do so via a tender offer	(1) One-third (for off-market purchase) (2) Two-thirds of shares	30%	Either 25%, or where there is "control"	30%	30%	30%
Allowing partial offer	Yes, voluntary partial offer is allowed under the tender offer regulation which requires the purchase pro rata the shares tendered	Yes, allow *ex ante* partial offer	Yes, allow *ex ante* partial offer for (1) above	Yes, allow *ex ante* partial offer	Yes, allow (i) *ex ante* partial offer that is voluntary; and (ii) *ex post* partial offer that is mandatory	Yes, allow *ex ante* partial offer, but only voluntarily	Yes, allow *ex ante* partial offer, but only voluntarily	Yes, allow *ex ante* partial offer, but only voluntarily
Price at which the offer must be made	Tender offer regulations require that the bidder pays the same for shares acquired in the tender offer. However, the acquirer can	No prescribed price for the offer	No prescribed price for the offer	The highest price at which the acquirer has acquired shares in the last 6 months. If offered price is lower than the daily average	No less than the highest of (a) the highest price paid for acquisition that triggered the offer; (b) volume-weighted	No less than the price paid for shares in the last 6 months or during the offer	No less than the price paid for shares in the last six months or during the offer	No less than the price paid for shares in the last 12 months or during the offer

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	acquire shares from controlling shareholder outside tender offer and not share the control premium			price during the 30-day period before the announcement of the offer, the acquirer's financial advisor must issue a fairness opinion	average price paid by the acquirer for shares in the last 12 months; (c) highest price paid for shares in the last six months; and (d) the volume-weighted average market price of the shares for 60 trading days before the offer			
Allowing creeping acquisitions without triggering MBR	Not applicable	Not applicable	Not applicable	Yes, 2% every 12 month period	Yes, if holding between 25 to 75% shares, the acquirer can acquire up to 5% each financial year	Yes, 2% every 12 month period	Yes, 1% every 6 month period	No
Waivers and exemptions	Not applicable	MBR not applicable to market acquisitions of shares	MBR not applicable to market acquisitions of shares	The high number of waivers and exemptions granted pursuant to the takeover regulation and by CSRC	The relatively high number of waivers and exemptions granted pursuant to the SEBI takeover regulation and by SEBI	Few waivers and exemptions, all tightly prescribed No discretion to have a blanket waiver/exemption	Few waivers and exemptions, all tightly prescribed No discretion to have a blanket waiver/exemption	Few waivers and exemptions, all tightly prescribed No discretion to have a blanket waiver/exemption

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