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The Abolition of Independent Directors in Indonesia: Rationally Autochthonous or Foolishly Idiosyncratic?

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Abstract

This Article examines Indonesia's unprecedented 2018 decision to abolish the requirement for independent directors on the boards of its listed companies, a move that contradicts global corporate law and governance norms. Our empirical analysis of annual reports revealed that by 2023 there was not a single reported independent director in Indonesia's 20 largest listed companies. This conspicuous departure from global corporate law and governance norms reflects a pivot towards reliance on independent commissioners within Indonesia's ostensibly "two-tier board" system, to align with Indonesia's unique civil law traditions. It also represents Indonesia's desire to reassert its regulatory autonomy in the wake of the International Monetary Fund's imposition of the Anglo-American concept of independent directors as a conditionality for its economic lifeline to Indonesia in the wake of the 1997 Asian Financial Crisis. Based on empirical evidence, in-depth interviews, and legal analysis, we argue that while Indonesia's abolition of independent directors has some tenuous theoretical validity, it presents significant corporate governance risks. Independent commissioners provide only a partial substitute for independent directors, with their effectiveness potentially compromised by controlling shareholders' influence, limited legal authority, and potential pressure from corrupt government practices. Moreover, our hand collected data on political connections between independent commissioners and the government raises concerns about their true independence, particularly in state-owned enterprises. Drawing on our findings, we propose bespoke reforms tailored to Indonesia's controlling shareholder dominated context, which is defined by powerful state-owned enterprises and family firms in a system that has struggled with corruption. The aim of our reforms is to transform Indonesia's independent commissioner system into an effective autochthonous corporate governance mechanism so that it can realize its enormous potential as the world's fourth most populous country and seventh largest economy. We conclude by situating Indonesia's approach within the broader evolution of corporate law and governance globally, suggesting that as regionalization supplants globalization, this departure from Anglo-American-cum-global "good" corporate governance norms may signal a shift towards more localized governance solutions in an increasingly multipolar global economy.

Keywords: Independent directors, controlling shareholders, SOEs, corporate boards, minority shareholders, Indonesian corporate law and governance, comparative corporate law and governance, legal transplants, halo signaling

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The Abolition of Independent Directors in Indonesia: Rationally Autochthonous or Foolishly Idiosyncratic?

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This Article examines Indonesia's unprecedented 2018 decision to abolish the requirement for independent directors on the boards of its listed companies, a move that contradicts global corporate law and governance norms. Our empirical analysis of annual reports revealed that by 2023 there was not a single reported independent director in Indonesia's 20 largest listed companies. This conspicuous departure from global corporate law and governance norms reflects a pivot towards reliance on independent commissioners within Indonesia's ostensibly "two-tier board" system, to align with Indonesia's unique civil law traditions. It also represents Indonesia's desire to reassert its regulatory autonomy in the wake of the International Monetary Fund's imposition of the Anglo-American concept of independent directors as a conditionality for its economic lifeline to Indonesia in the wake of the 1997 Asian Financial Crisis.

Based on empirical evidence, in-depth interviews, and legal analysis, we argue that while Indonesia's abolition of independent directors has some tenuous theoretical validity, it presents significant corporate governance risks. Independent commissioners provide only a partial substitute for independent directors, with their effectiveness potentially

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compromised by controlling shareholders' influence, limited legal authority, and potential pressure from corrupt government practices. Moreover, our hand collected data on political connections between independent commissioners and the government raises concerns about their true independence, particularly in state-owned enterprises.

Drawing on our findings, we propose bespoke reforms tailored to Indonesia's controlling shareholder dominated context, which is defined by powerful state-owned enterprises and family firms in a system that has struggled with corruption. The aim of our reforms is to transform Indonesia's independent commissioner system into an effective autochthonous corporate governance mechanism so that it can realize its enormous potential as the world's fourth most populous country and seventh largest economy. We conclude by situating Indonesia's approach within the broader evolution of corporate law and governance globally, suggesting that as regionalization supplants globalization, this departure from Anglo-American-cum-global "good" corporate governance norms may signal a shift towards more localized governance solutions in an increasingly multipolar global economy.

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Part I: Introduction

The independent director is the paradigmatic example of Anglo-America's influence over global corporate governance. The concept of the independent director was created in the United States in the 1970s and quickly became a defining feature of American corporate governance.[1] In the 1990s, the United Kingdom made America's concept of independent directors a hallmark of its inaugural code of corporate governance.[2] Over the next decade, UK-style corporate governance codes, with independent directors at their core, proliferated around the world.[3] By the 2000s, the global ubiquity of independent directors transformed them into a universal litmus test for "good" corporate governance.[4] Following the 2008 Global Financial Crisis, some countries questioned the extent to which independent directors should be relied on to promote good corporate governance.[5] However, despite some rethinking of their role and ambiguous empirical evidence of their effectiveness, today conventional wisdom suggests that no credible system of corporate governance can exist without independent directors.[6]

At first glance, Asia exemplifies the global adoption of the Anglo-American idea that independent directors are required for "good" corporate governance. Prior to the 1997 Asian

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[1] Dan W. Puchniak & Luh Luh Lan, *Independent Directors in Singapore: Puzzling Compliance Requiring Explanation*, 65 AM. J. COMP. L. 265, 273-274 (2017) [hereinafter Puchniak & Lan, *Independent Directors in Singapore*]; Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1477-1478 (2007) [hereinafter, Gordon, *The Rise of Independent Directors in the United States*].

[2] Puchniak & Lan, *Independent Directors in Singapore, supra* note 1, at 274; Harald Baum, *The Rise of the Independent Director in the West: Understanding the Origins of Asia's Legal Transplants, in* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH 21, 43-45 (Dan W. Puchniak et al. eds., 2017).

[3] Puchniak & Lan, *Independent Directors in Singapore, supra* note 1, at 275; Baum, *supra* note 2, at 22-23.

[4] Dan W. Puchniak & Kon Sik Kim, *Varieties of Independent Directors in Asia: A Taxonomy, in* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH 89, 93 (Dan W. Puchniak et al. eds., 2017) [hereinafter Puchniak & Kim, *Varieties of Independent Directors in Asia*]; Baum, *supra* note 2, at 21, 48; Gen Goto, Alan K. Koh & Dan W. Puchniak, *Diversity of Shareholder Stewardship in Asia: Faux Convergence*, 53 VAND. J. TRANSNAT'L L. 829, 876-877 (2020) [hereinafter, Goto, Koh & Puchniak, *Diversity of Shareholder Stewardship in Asia*]; Jeffrey N. Gordon, *Convergence and Persistence in Corporate Law and Governance*, *in* OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 28, 29 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018) [hereinafter Gordon, *Convergence and Persistence in Corporate Law and Governance*]; Dan W. Puchniak, *Multiple Faces of Shareholder Power in Asia: Complexity Revealed, in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 511, 518 (Jennifer G. Hill & Randall S. Thomas eds., 2015) [hereinafter Puchniak, *Multiple Faces of Shareholder Power in Asia*]; Lucian Bebchuk & Asaf Hamdani, *The Elusive Quest for Global Governance Standards*, 157 U. PA. L. REV. 1263, 1301-1302 (2009) [hereinafter Bebchuk & Hamdani, *The Elusive Quest for Global Governance Standards*].

[5] Wolf-Georg Ringe, *Independent Directors: A Theoretical Framework, in* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH 58, 60 (Dan W. Puchniak et al eds., 2017) [hereinafter Ringe, *Independent Directors: A Theoretical Framework*]; Baum, *supra* note 2, at 27; Paul L. Davies & Klaus J. Hopt, Corporate Boards in Europe—Accountability and Convergence, 61 AM. J. COMP. L. 301, 305 (2013) [hereinafter Davies & Hopt, *Corporate Boards in Europe*]; Klaus J. Hopt & Patrick C. Leyens, *The Structure of the Board of Directors: Boards and Governance Strategies in the US, the UK and Germany*, *in* RESEARCH HANDBOOK ON COMPARATIVE CORPORATE GOVERNANCE 116, 127 (Afra Afsharipour & Martin Gelter eds., 2021); Roberta S. Karmel, *Is the Independent Director Model Broken?* 37 SEATTLE U. L. REV. 775, 776 (2014).

[6] Baum, *supra* note 2, at 23 ("Today, no sophisticated European jurisdiction can do without a UK- style 'comply or explain' corporate governance code, which in turn must deal with independent directors in one way or another in order to be considered credible. In short, at least until very recently, independent directors were a largely unquestioned prescription for a panoply of corporate governance problems in Europe as well. The American cult of the independent director appears to have become ingrained in parts of Europe's corporate governance DNA."); Yaron Nili, *The Fallacy of Director Independence*, 2020 WIS. L. REV. 491, 496 (2020).

Financial Crisis, boards in Asia were dominated by corporate insiders, with independent directors being either non-existent or playing a marginal role on boards throughout Asia.[7] Legal reforms following the Asian Financial Crisis resulted in "many of the laws and regulations in Asia's leading economies [appearing] to do more to promote or require 'independent directors' on the boards of listed companies than those in many leading Western economies".[8] The past decade has even seen Japan and Taiwan, which traditionally have championed insider dominated boards, reform their laws to make independent directors mandatory in their listed companies.[9] As one of us concluded in a book on "Independent Directors in Asia" published in 2017, "it is now indisputable that the 'independent director' is a ubiquitous feature of corporate governance throughout Asia – and its rise appears to have no immediate end in sight'".[10]

Then, in 2018, Indonesia did what most in the global corporate governance community would see as unthinkable: abolish the requirement (or even suggestion) for boards of listed companies to have independent directors – the culmination of a movement that began in resulting in the elimination of a feature of Indonesian corporate governance that existed for over a decade.[11] Despite Indonesia having the world's fourth largest population, seventh largest economy (GDP PPP), and being on a trajectory of high economic growth, this surprising corporate governance development has received scant attention from comparative corporate law scholars.[12] To the best of our knowledge, there has been no in-depth analysis, either within Indonesia or internationally, of Indonesia's abolition of the requirement for independent directors to be on the boards of its listed companies.

This Article aims to fill this gap in the literature by undertaking a quantitative and qualitative analysis of this significant development in Indonesian corporate governance. Our empirical analysis of the annual reports of Indonesia's 20 most valuable public companies reveals that in the year following the abolition of the requirement for independent directors, 81% of the companies that previously reported having independent directors had none.[13] By 2023, there was not a single independent director in any of Indonesia's 20 largest listed companies – a fact

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[7] Puchniak & Kim, *Varieties of Independent Directors in Asia, supra* note 4, at 89.
[8] Puchniak & Kim, *Varieties of Independent Directors in Asia, supra* note 4, at 91; Kyung-Hoon Chun, *Korea's Mandatory Independent Directors: Expected and Unexpected Roles, in* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH 176, 177 (Dan W. Puchniak et al. eds., 2017).
[9] Hsin-Ti Chang, *Dissenting Opinions of Independent Directors in Taiwan: An Empirical Study*, 15 U. PA. ASIAN L. REV 1, 2 (2019); Gen Goto, Manabu Matsunaka & Souichirou Kozuka, *Japan's Gradual Reception of Independent Directors: An Empirical and Political-Economic Analysis, in* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH 135, 136 (Dan W. Puchniak et al. eds., 2017) [hereinafter Goto, Matsunaka & Kozuka, *Japan's Gradual Reception of Independent Directors*]; Gen Goto, *Recent Board Reforms in Japan and the Roles of Outside/Independent Directors?* 12 J. JAPANESE L. 33, 39-40, 47 (2018) [hereinafter Goto, *Recent Board Reforms in Japan*]; Hideki Kanda, *Corporate Governance in Japanese Law: Recent Trends and Issues*, 11 HASTINGS BUS. L. J. 69, 74-75, 80-81 (2015); Gen Goto, *The Outline for the Companies Act Reform in Japan and Its Implications,* 35 J. JAPANESE L. 13, 19. (2013).
[10] Puchniak & Kim, *Varieties of Independent Directors in Asia, supra* note 4, at 93.
[11] The Indonesia Stock Exchange (IDX), *Amendment to the Rule Number I-A concerning Listing of Shares (Stock) and Equity-Type Securities Other Than Stock Issued by the Listed Company,* Decree No. KEP-00183/BEI/12-2018, December 27, 2018, (Republic of Indonesia).
[12] The OECD indicates that Indonesia is the 7th largest economy based on purchasing power parity. See Indonesia https://www.oecd.org/en/countries/indonesia.html (last visited Oct. 1, 2024).
[13] See *infra* Appendix 1 – Independent Directors in Top 20 Indonesian Companies, 44-51.

that, to the best of our knowledge, was unknown prior to our research.[14] This watershed development raises three questions which this Article seeks to answer.

First, despite conventional wisdom that independent directors are required for good corporate governance, why did Indonesia abolish its requirement for independent directors in its listed companies? To answer this question, we undertook an in-depth review of all publicly available information surrounding the legal amendment. As explained in Part II, it appears that the requirement for independent directors was abolished because it was seen as functionally redundant in the context of Indonesia's ostensibly "two-tier board" system – in which a supervisory board – called "the board of commissioners" – was viewed as fulfilling the role of independent directors.[15] Relatedly, the original implementation of the American concept of the independent director was done under extreme economic pressure from the International Monetary Fund (IMF), which was seen as an afront to Indonesia's civil law "two-tier board" tradition and its national sovereignty. Regardless of the rationale, this reform has made independent commissioners on the board of commissioners (rather than independent directors on the board of directors) the focal point for good corporate governance in Indonesia.

Second, given that independent commissioners have become the focal point for good corporate governance in Indonesia, what impact is this likely to have on Indonesian corporate governance? To answer this question, we conducted semi-structured interviews with ten independent commissioners in several of Indonesia's large and midsize listed companies involved in various industries.[16] As explained in Part III, based on these interviews and an analysis of the corporate law, it appears that independent commissioners provide only a partial substitute for independent directors for promoting good corporate governance in listed companies in Indonesia. In addition, evidence based on these interviews suggests that the ability of independent commissioners to promote good corporate governance may be compromised by controlling shareholders' influence, their limited legal authority, and potential pressure placed upon them from corrupt government practices.[17] Moreover, based on our hand-

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[14] See *infra* Appendix 1 – Independent Directors in Top 20 Indonesian Companies, 44-51.

[15] We say that Indonesia's board system is *ostensibly* a "two-tier board" system because its supervisory board lacks fundamental powers that exist in the supervisory board in the archetypical German two-tier board system and in the Netherlands two-tier board system, which is the system in which the Indonesian board is historically rooted. As we explain below, it may be more accurate to call the Indonesian "two-tier board" a "double board". However, as prominent corporate governance organizations, such as the OECD, classify Indonesia as having a "two-tier board" system and other terms for non-one tier boards are uncommon, we generally refer to the Indonesian board in this article as a "two-tier board". However, we put the term two-tier board in quotation marks when referring to Indonesia's "two-tier board" to signify that its status as an archetypical two-tier board is questionable. For a more detailed explanation, *see infra* Part III.C, 27-32.

[16] See *infra* Appendix 2, 52.

[17] See, e.g., SIMON BUTT, CORRUPTION AND LAW IN INDONESIA (2017) (detailing Indonesia's post-Suharto anti-corruption regime, especially the role of the Corruption Eradication Commission (KPK)); Michael Mietzner, *Dysfunction by Design: Political Finance and Corruption in Indonesia*, 47 CRITICAL ASIAN STUD. 587 (2015) (explaining how elites preserved systemic corruption by intentionally designing opaque party finance structures); Rajeswary Ampalavanar Brown, *Indonesian Corporations, Cronyism, and Corruption*, 40 MOD. ASIAN STUD. 953 (2006) (describing how SOEs and charitable foundations were used by elites under Suharto to divert public wealth); Christian Leuz & Felix Oberholzer-Gee, *Political Relationships, Global Financing, and Corporate Transparency: Evidence from Indonesia*, 81 J. FIN. ECON. 411 (2006) (showing that politically connected firms in Indonesia avoided global markets to evade scrutiny, undermining transparency); King, Dwight Y. King,

collected data, which aims to illuminate the level of political connections between independent commissioners and the government, it appears that there may be a risk of the independence of "independent" commissioners being compromised by political interests – especially in Indonesia's powerful state-owned enterprises.[18] Ultimately, we conclude that Indonesia's reliance on independent commissioners – rather than independent directors – may have some tenuous theoretical validity based on its ostensibly "two-tier board" system; but even this rationale suffers from the fact that its so-called "two-tier board" may not even qualify as a "two-tier board" when viewed through a comparative lens. Given this legal impediment and the practical risks we have highlighted above, reforms to Indonesia's independent commissioner system are required to ensure that independent commissioners in practice can fulfil the heavy responsibility that has been placed upon them.

Third, given Indonesia's substantial reliance on independent commissioners and the weaknesses that exist in its current regulatory framework and controlling shareholder dominated corporate governance context, what reforms could be made to ensure that independent commissioners provide an effective tool to address Indonesia's corporate governance challenges? To answer this question, in Part IV we draw on information from our semi-structured interviews with independent commissioners, hand-collected data on political connections between independent commissioners and the government, and leading comparative corporate law and governance research on board independence. Based on our analysis of this information, we suggest bespoke reforms to improve the effectiveness of Indonesia's independent commissioner system that takes account of Indonesia's level of development, its concentrated shareholder landscape, the dominance of its state-controlled and family-controlled listed companies, and its ongoing battle with corruption. These suggested reforms, which are another significant contribution of our Article, aim to transform Indonesia's current system of independent commissioners into an autochthonous corporate governance mechanism that "fits" Indonesia's local context and quells the corporate governance maladies that may jeopardize Indonesia achieving its enormous potential.

We conclude this article in Part V by illuminating what Indonesia's idiosyncratic abolition of its requirement for independent directors may suggest about the global evolution of corporate law. The original transplant of Anglo-American-cum-global independent directors into Indonesia's civil law, "two-tier", corporate board system over two decades ago was unsurprising. It was part of a global trend, which was accentuated in Asia, of "legal misfits" being imported into systems of corporate governance to demonstrate adherence to Anglo-

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Corruption in Indonesia: A Curable Cancer?, 53 J. INT'L AFF. 603 (2000) (analyzing institutionalized corruption under Suharto and proposing reform pathways); Vishnu Juwono, *Berantas Korupsi: A Political History of Governance Reform and Anti-Corruption Initiatives in Indonesia 1945–2014* (PH.D. DISSERTATION, LONDON SCH. ECON. 2016), https://etheses.lse.ac.uk/3381/ (mapping Indonesia's corruption and anti-corruption trajectory from independence to the end of the Yudhoyono presidency). Most recently, Indonesia's challenges with public sector corruption are reflected in its 2024 score of 37 on Transparency International's Corruption Perceptions Index, ranking 99th out of 180 countries globally. TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2024 (2025), https://www.transparency.org/en/cpi/2024/index/idn.

[18] *Id.*

American-cum-global norms of "good" corporate governance.[19] However, as regionalization replaces globalization and Asia's economic prowess continues to rise, green shoots of autochthonous solutions to corporate governance maladies have recently been sprouting across Asia.[20] In this new era of more bespoke local corporate governance solutions, Indonesia's previously unthinkable break with a hallmark of Anglo-American-cum-global "good" corporate governance – the independent director – perhaps portends the "new normal" in what may be a more regional and autochthonous future for corporate governance globally. More broadly, Indonesia's decision may reflect an emerging trend of reasserting national regulatory autonomy as the global consensus around Anglo-American governance norms gives way to a more multipolar, regionalized order—intensified by recent geopolitical shifts, including the economic nationalism of the Trump era.

The remainder of this Article will proceed as follows. In Part II, we explore the history of Indonesia's ostensibly "two-tier board" system, the context that led to the adoption of Anglo-American independent directors, and the rationale for Indonesia's surprising decision to abolish the requirement for independent directors in its listed companies. In Part III, we assess Indonesia's pivot to independent commissioners, drawing on interviews and empirical evidence to evaluate their effectiveness and potential limitations in promoting good corporate governance. In Part IV, we propose tailored reforms to enhance the independent commissioner system, considering Indonesia's unique regulatory landscape, level of development, and corporate ownership structures. Finally, in Part V, we conclude by situating Indonesia's departure from the global norm of independent directors within the broader context of evolving corporate governance trends, suggesting that this move may be a harbinger of a larger shift towards more regional and jurisdictionally autochthonous approaches to corporate governance globally.

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[19] Dan W. Puchniak, *The False Hope of Stewardship in the Context of Controlling Shareholders: Making Sense Out of the Global Transplant of a Legal Misfit,* 72 AM. J. COMP. L. 109, 143-144 (2024) [hereinafter Puchniak, *The False Hope of Stewardship*]; Dan W. Puchniak, *An Asian Solution for a Global Problem? Corporate Governance and the Environment in a Non-Anglo-American World,* 2 NYU LAW USALI EAST-WEST STUDIES 1, 1 (2022) [hereinafter Puchniak, *An Asian Solution for a Global Problem*]; Ernest Lim & Dan W. Puchniak, *Can a Global Legal Misfit be Fixed? Shareholder Stewardship in a Controlling Shareholder and ESG World, in* GLOBAL SHAREHOLDER STEWARDSHIP 599, 611 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022) [hereinafter, Lim & Puchniak, *Can a Global Legal Misfit be Fixed?*].

[20] Dan W. Puchniak & Samantha S. Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship: A Successful Secret,* 53 VAND. J. TRANSNAT'L. 989, 997, 1020-1021 (2020) [hereinafter Puchniak & Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship*]; Puchniak, *An Asian Solution for a Global Problem, supra* note 19, at 3 ("It is possible that reorienting stewardship codes in Asia to focus on controlling shareholders (as Singapore has already done) may provide a nudge towards ESG."); Lin Lin & Dan W. Puchniak, *Institutional Investors in China: Corporate Governance and Policy Channeling in the Market Within the State,* ECGI LAW WORKING PAPER NO. 590/2021, 48-50 (2021), Available at SSRN: https://ssrn.com/abstract=3858348. For a discussion about the rise of about regionalism, nationalism and globalization more generally *see also*, Roza Nurgozhayeva & Dan W. Puchniak, *Corporate Purpose Beyond Borders: A Key to Saving Our Planet or Colonialism Repackaged?* 57 VAND. J. TRANSNAT'L L. 1339 (2024) [hereinafter Nurgozhayeva & Puchniak, *Corporate Purpose Beyond Borders*].

Part II: The Adoption and Abolition of Independent Directors in Indonesia in Context

II.A. The Deep Colonial Dutch Roots of the Indonesian Company Law: Revealing the Path Dependence of Indonesia's "Two-Tier" Board

The historical roots of Indonesian company law are based on Dutch colonial law.[21] Prior to Indonesia's independence in 1945, it was a Dutch colony known as the Netherlands Indies, with a pluralistic legal system comprising Dutch colonial law, *Adat* (customary law and practices), and Islamic law.[22] On May 1, 1848, the Dutch Commercial Code – which itself was redrafted based on the French Napoleonic Codes – was adopted in the Netherlands Indies and contained 21 articles that governed the creation and governance of the limited liability company.[23] The 1848 Dutch Commercial Code can be seen as the genesis of Indonesia's current company law. It is noteworthy that "in 1928 the Netherlands updated its Commercial Code articles on the limited liability company for the first time [in its history], but the Netherlands Indies did not follow".[24] As such, from 1928, Indonesian company law and Dutch company law can be seen to have headed down distinctly different paths – despite Indonesia's Dutch Commercial Code origins.

The colonial era 1848 Dutch Commercial Code articles regulating Indonesian companies remained largely intact for almost 150 years, until a major overhaul of corporate law in 1995 which resulted in a separate piece of legislation being enacted to regulate companies: the 1995 Company Law.[25] While it has been generally suggested that the 1995 Company Law was enacted to catch up with "new market demands",[26] the precise impetus behind the sudden creation of the 1995 Company Law, after an almost 150-year ossification of corporate law on the books in Indonesia, has been labelled an "enduring mystery".[27] The reason for this mystery is because the creation of the 1995 Company Law occurred near the end of the autocratic dictator Suharto's three-decade military regime. The opaque nature of the legal system during

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[21] BENNY S. TABALUJAN, INDONESIAN COMPANY LAW: A TRANSLATION AND COMMENTARY, 18 (1997).
[22] Petra Mahy, *The Evolution of Company Law in Indonesia: An Exploration of Legal Innovation and Stagnation*, 61 AM. J. COMP. L. 377 (2013). *See also*, Benny S. Tabalujan, *The New Indonesian Company Law,* 17 U. PA. J. INT'L ECON. L. 883 (1996).
[23] Petra Mahy, *The Evolution of Company Law in Indonesia: An Exploration of Legal Innovation and Stagnation*, 61 AM. J. COMP. L. 377 (2013); *see also*, Sudargo Gautama, *Recent Developments Concerning Investment in Indonesia (with Special Reference to the New Company Law 1995)*, 1 SING. J. INT'L & COMP. L. 117, 130 (1997); Rachmadi Usmán, *DIMENSI HUKUM PERUSAHAAN PERSEROAN* TERBATAS [DIMENSIONS OF LIMITED LIABILITY COMPANY LAW], 2 (2004).
[24] Petra Mahy, *The Evolution of Company Law in Indonesia: An Exploration of Legal Innovation and Stagnation*, 61 AM. J. COMP. L. 377, 389 (2013); Staatsblad Nederlands no. 216/1928 (came into force on Apr. 1, 1929); Katharina Pistor et al., *Evolution of Corporate Law: A Cross-Country Comparison*, 23 U. PA. J. INT'L ECON L. 791 (2002).
[25] Petra Mahy, *The Evolution of Company Law in Indonesia: An Exploration of Legal Innovation and Stagnation*, 61 AM. J. COMP. L. 377, 389, 405 (2013).
[26] Undang-undang (UU) Nomor 1 Tahun 1995 tentang Perseroan Terbatas [Law No. 1/1995 concerning Company Law], Mar. 7, 1995, Elucidation Section (Republic of Indonesia), https://peraturan.bpk.go.id/Details/46102.
[27] Petra Mahy, *The Evolution of Company Law in Indonesia: An Exploration of Legal Innovation and Stagnation*, 61 AM. J. COMP. L. 377, 405 (2013); David K. Linnan, *Indonesian Law Reform, or Once More Unto the Breach: A Brief Institutional History,* in INDONESIA LAW AND SOCIETY 68, 68 (2d ed., Tim Lindsey ed., 2008).

the Suharto regime makes it almost impossible to find clear evidence about the specific forces or policy rationale that drove the adoption of the 1995 Company Law.[28]

The 1995 Company Law, with its 129 articles, which superseded the 21 articles governing company law in the 1848 Dutch Commercial Code, provided a considerably more comprehensive regulatory regime for Indonesian limited liability companies than had previously existed.[29] The 1995 Company Law introduced a number of modern company law concepts which by that time had become ubiquitous in corporate law regimes globally: piercing the corporate veil, directors' duties, the business judgement rule and the derivative action.[30] However, a number of corporate law concepts more aligned with Dutch civil law also appear to have influenced the 1995 Company Law, such as minimum capital requirements (common at that time in most civil law jurisdictions) and judicial investigatory powers into a company's affairs.[31] Most importantly in the context of this Article, the 1995 Company Law mandated a type of "two-tier board" system, with a supervisory board – called the "board of commissioners" (*Dewan Komisaris*) – and a management board – called the "board of directors" (*Direksi*).[32]

The fact that the 1995 Company Law was the first significant attempt, after almost 150 years, to substantially modernize the 1848 Dutch Commercial Code regime makes it a notable turning point in the historical development of Indonesian corporate law and governance. Unfortunately, as highlighted above, the opaque nature of the Suharto era legal system makes it difficult to pin-down the precise forces that drove this development. However, it seems likely that the 1995 Company Law's modern corporate law features were at least partially influenced by a 1990 World Bank Report that recommended substantial reforms to Indonesia's company law – which

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[28] Petra Mahy, *The Evolution of Company Law in Indonesia: An Exploration of Legal Innovation and Stagnation*, 61 AM. J. COMP. L. 377, 405 (2013); Adam Schwarz, A NATION IN WAITING: INDONESIA'S SEARCH FOR STABILITY 85 (2d ed. 2004); Anni Abbas Manopo, Masalah PT (Perseroan Terbatas) di Indonesia Sekarang [Current Problems of the Limited Liability Company in Indonesia], di Simposium Pembaharuan Hukum Dagang Nasional, Tanggal 10-12 Nopember 1980, Di Yogyakarta 85, 87 [at the Symposium on the Reform of National Company Law, November 10-12, 1980, in Yogyakarta 85, 87] (Badan Pembinaan Hukum Nasional, 1984), 88 (stating that as an academic in the law faculty he had not seen a copy of company law draft even if he made several requests to the Department of Justice).

[29] BENNY S. TABALUJAN, INDONESIAN COMPANY LAW: A TRANSLATION AND COMMENTARY 274 (1997); *see also*, Henri Gunanto, *The Impact of U.S. Law Propositions on Indonesian Commercial Law*, 29 LOY. L.A. L. REV. 1047, 1047 (1996).

[30] Petra Mahy, *The Evolution of Company Law in Indonesia: An Exploration of Legal Innovation and Stagnation*, 61 AM. J. COMP. L. 377, 412 (2013). However, similar to in most other civil law jurisdictions the derivative action required shareholders to hold a minimum percentage of shares (10% under the Companies Act) – whereas in common law jurisdictions normally a single shareholder has the right to pursue a derivative action. Harald Baum & Dan W. Puchniak, *The derivative action: an economic, historical and practice-oriented approach, in* THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH, 1, 54-55 (Dan W. Puchniak et al. eds., 2012); Dan W. Puchniak, *The complexity of derivative actions in Asia: an inconvenient truth, in* THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH, 90, 90-127 (Dan W. Puchniak et al. eds., 2012); Dan W. Puchniak, *The Derivative Action in Asia: A Complex Reality*, 9 BERKELEY. BUS. L. J. 1, 18 (2012); *see also,* Undang-undang (UU) Nomor 1 Tahun 1995 tentang Perseroan Terbatas [Law No. 1/1995 concerning Company Law], Mar. 7, 1995, Art 30 (Republic of Indonesia), https://peraturan.bpk.go.id/Details/46102.

[31] Undang-undang (UU) Nomor 1 Tahun 1995 tentang Perseroan Terbatas [Law No. 1/1995 concerning Company Law], Mar. 7, 1995, Art 114 (Republic of Indonesia), https://peraturan.bpk.go.id/Details/46102.

[32] Nindyo Pramono, *Hukum Perseroan Terbatas*, 385 (2004). Petra Mahy, *The Evolution of Company Law in Indonesia: An Exploration of Legal Innovation and Stagnation*, 61 AM. J. COMP. L. 377, 412 (2013); Benny S. Tabalujan, *The New Indonesian Company Law,* 17 U. PA. J. INT'L ECON. L. 883, 890-893 (1996).

was followed, in 1992, by a USAID funded project that brought experts to Indonesia to suggest ways to modernize Indonesian law, including its company law.[33]

Indonesia's Dutch civil law tradition seems to have been the inspiration for its "two-tier board" structure, as non-one-tier board structures do not generally exist in the United States or in other common law jurisdictions.[34] At the time that the Indonesian 1995 Company Law went into effect, it was mandatory under Dutch Law for boards in listed companies to have a two-tier board[35] – historically an optional feature under Indonesian and Dutch company law.[36] It is noteworthy that in 2011(in force since 2013) the Netherlands amended its company law to allow its listed companies to select between a one-tier board or two-tier board model[37] – a development that Indonesia did not follow.[38] As such, although the historical roots and inspiration for Indonesia's "two-tier" board system were influenced by Dutch civil law, its development appears to be a path dependent feature that was introduced into the DNA of Indonesian corporate law at the time of the inaugural 1848 Dutch Commercial Code and cemented into its corporate governance culture by the 1995 Company Law. As will be explained in Part III, the Indonesian "two-tier board" has unique features which make it functionally distinct from the Dutch two-tier board in important ways that are often overlooked.

Although the 1995 Company Law arguably set the stage for the entry of the independent director into Indonesian corporate law by reorienting it towards a modern corporate law system, there is no evidence at all that the concept of the independent director was even considered for adoption at that time. Viewed through a comparative corporate law lens, this is unsurprising. By 1995 the independent director had become entrenched as a central feature of corporate governance in the United States and had travelled to the United Kingdom.[39] However, it was not until after the Asian Financial Crisis in the late 1990s that the independent director was

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[33] Petra Mahy, *The Evolution of Company Law in Indonesia: An Exploration of Legal Innovation and Stagnation*, 61 AM. J. COMP. L. 377, 411 (2013); David K. Linnan, *Indonesian Law Reform, or Once More Unto the Breach: A Brief Institutional History, in* INDONESIA LAW AND SOCIETY 68 (2d ed., Tim Lindsey ed., 2008); JOHN BALL, INDONESIAN LAW AT THE CROSSROADS: COMMENTARY AND MATERIALS ¶ 7.104 (1996); Normin S. Pakpahan, HUKUM PERUSAHAAN INDONESIA: TINJAUAN TERHADAP UNDANG-UNDANG NO.1 TAHUN 1995 TENTANG PERSEROAN TERBATAS [INDONESIAN COMPANY LAW : ANALYSIS OF LAW NO. 1 OF 1995 ON THE LIMITED LIABILITY COMPANY] (1995).

[34] OECD, OECD CORPORATE GOVERNANCE FACTBOOK, 156 (2023); Jaswadi, *Corporate governance and accounting irregularities: Evidence from the two-tier board structure in Indonesia* (Doctoral Dissertation, Victoria University, 2013).

[35] Martin Gelter & Mathias Siems, *Letting Companies Choose Between Board Models: An Empirical Analysis of Country Variations*, 43 U. PA. J. INT'L L. 137, 148 (2022) ("For larger public companies (to be precise, those companies that fall under the so-called "structure regime"), a reform from 1971 required a supervisory board. However, the reform of 2011 (in force since 2013) then again allowed choice of the one-tier model under certain restrictions for these large public companies (e.g., requiring non-executive directors), while also clarifying the use of a one-tier board with both executive and non-executive members for all companies.").

[36] Gelter & Siems, *supra* note 35, at 142, 148. *Wetboek van Koophandel voor Indonesie* [Indonesian Commercial Code], *Stb.* 1847, 23 (Neth.), Art. 44.

[37] Gelter & Siems, *supra* note 35, at 148. *Wet bestuur en toezicht* (Wijzigingswet Boek 2 van het Burgerlijk Wetboek (aanpassing regels over bestuur en toezicht in naamloze en besloten vennootschappen)) [*Management and Supervision Act* (Act Amending Book 2 of the Civil Code (adjusting rules on management and supervision in public and private companies))], *Stb.* 2011, 275 (Neth.).

[38] Undang-undang (UU) Nomor 1 Tahun 1995 tentang Perseroan Terbatas [Law Number 1/1995 concerning Company Law], Mar. 7, 1995, Art. 1.

[39] Puchniak & Lan, *Independent Directors in Singapore, supra* note 1, at 273-274.

transformed into an Anglo-American-cum-global indicia for good corporate governance, which spread throughout Asia.[40] There is clear evidence that it was the existential threat posed to Indonesia by the Asian Financial Crisis, combined with pressure from the International Monetary Fund (IMF), which resulted in the "forced transplant" of the Anglo-American independent director into Indonesia's "two-tier board" system – the topic to which we now turn.

II.B. Transplanting the American Independent Director into Indonesia's "Two-Tier Board": The Asian Financial Crisis, IMF Pressure, and Signalling "Good" Corporate Governance

The Asian Financial Crisis of the late 1990s wreaked havoc on Indonesia's economy, exposing profound deficiencies in corporate governance practices and precipitating a severe economic downturn coupled with a loss of investor confidence.[41] This crisis laid bare the urgent need for regulatory overhaul to rectify systemic weaknesses and restore market trust.[42] The crisis revealed the pressing need for Indonesia to signal a commitment to robust corporate governance practices to the global market.

In 1998, as Indonesia teetered on the edge of a financial meltdown, President Suharto was forced to request an economic lifeline from the IMF, which precipitated his downfall.[43] To save Indonesia from financial collapse, the IMF extended financial assistance to Indonesia – but required the government to commit to a wide range of reforms, including a host of measures to strengthen its corporate governance.[44] In a Letter of Intent signed by the Indonesian government and the IMF on January 20, 2000, the Indonesia government agreed to issue a suite of rules and regulations to enhance Indonesia's corporate governance.[45] One of its prominent commitments was to make rules and regulations requiring public companies to have independent directors and independent commissioners.[46] In 2004, the Board of Directors of the

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[40] Puchniak & Kim, *Varieties of Independent Directors in Asia, supra* note 4, at 89, 116.

[41] DUDI M. KURNIAWAN & NUR INDRIANTORO, THE ROLE OF DISCLOSURE IN STRENGTHENING CORPORATE GOVERNANCE AND ACCOUNTABILITY, OECD THE SECOND ASIAN ROUNDTABLE ON CORPORATE GOVERNANCE, 9 (2000).

[42] DUDI M. KURNIAWAN & NUR INDRIANTORO, THE ROLE OF DISCLOSURE IN STRENGTHENING CORPORATE GOVERNANCE AND ACCOUNTABILITY, OECD THE SECOND ASIAN ROUNDTABLE ON CORPORATE GOVERNANCE, 25 (2000).

[43] Annasa Rizki Kamalina, *Kronologi Utang Indonesia ke IMF, 1998 hingga Lunas di Era SBY* [Chronology of Indonesia's Debt to the IMF, 1998 to Pay Off in the SBY Era], BISNIS.COM, https://ekonomi.bisnis.com/read/20230703/9/1671060/kronologi-utang-indonesia-ke-imf-1998-hingga-lunas-di-era-sby (last visited Apr. 4, 2024).

[44] GOV'T OF INDON., MEMORANDUM OF ECONOMIC AND FINANCIAL POLICIES (1998), https://www.imf.org/external/np/loi/011598.HTM.

[45] DUDI M. KURNIAWAN & NUR INDRIANTORO, THE ROLE OF DISCLOSURE IN STRENGTHENING CORPORATE GOVERNANCE AND ACCOUNTABILITY, OECD THE SECOND ASIAN ROUNDTABLE ON CORPORATE GOVERNANCE, 25 (2000); Internal Monetary Fund, Letter of Intent (January 2020). https://www.imf.org/external/np/loi/2000/idn/01/#:~:text=We%20request%20that%20the%20new,monetary%2C%20fiscal%20and%20external%20sectors (last visit Apr. 7, 2024).

[46] DUDI M. KURNIAWAN & NUR INDRIANTORO, THE ROLE OF DISCLOSURE IN STRENGTHENING CORPORATE GOVERNANCE AND ACCOUNTABILITY, OECD THE SECOND ASIAN ROUNDTABLE ON CORPORATE GOVERNANCE, 12 (2000).

Jakarta Stock Exchange issued a Decree (JSE Decree) requiring all listed companies to have at least one independent director on its board of directors. [47]

Another significant corporate governance development that emerged from Indonesia's IMF commitments occurred in August 1999 with the establishment of the National Committee for Corporate Governance (*Komite Nasional Kebijakan Corporate Governance*, which in 2004 was renamed *Komite Nasional Kebijakan Governansi*) (NCCG).[48] In 1999, with assistance from the World Bank, the NCCG drafted Indonesia's Good Corporate Governance Code (GCGC), with a final version released in 2001 and subsequent versions released in 2006, 2019 and 2021.[49] The inaugural GCGC was heavily influenced by the 1999 OECD Principles of Corporate Governance (OECD Principles).[50] In fact, in 1999, Indonesia's Capital Market Supervisory Agency (*Bapepam*) (CMSA) undertook a study specifically to evaluate the gaps that existed between Indonesian corporate governance and the OECD Principles.[51] Given the influence of the IMF, World Bank, and OECD Principles, it is unsurprising that the 2001 GCGC contained a recommendation that at least 20% of the members of the board of directors should be "outside directors", defined as being independent from the board of commissioners and controlling shareholders.[52]

Based on our review of all the versions of the GCGC, academic discourse, and policy papers, three aspects of the adoption of the independent director into Indonesian corporate governance in the wake of the Asian Financial Crisis are noteworthy. First, the IMF required Indonesia to adopt independent directors under the threat of an economic meltdown – it was in essence a legal transplant under duress. This was part of a larger trend which played out in other countries effected by the Asian Financial Crisis in which the IMF used its economic leverage to transplant Anglo-American-cum-global mechanisms of "good" corporate governance, of which the independent director was the most prominent.[53] This highlights how the evolution of corporate law, which has traditionally been seen as driven entirely by domestic forces, is increasingly influenced by powerful transnational organizations (e.g., the IMF, World Bank and OECD) – which over the last several decades have been dominated by the Global North, particularly the United States and the United Kingdom.[54] As discussed below, it also calls into

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[47] Jakarta Stock Exchange (JSX), *Listing Shares and Equity Securities Other than Shares Issued Public Companies*, Decree No. KEP-305/BEJ/07-2004, July 19, 2004 (Republic of Indonesia).
[48] NAT'L COMM. ON CORP. GOVERNANCE, INDONESIAN CODE FOR GOOD CORPORATE GOVERNANCE ¶ 2.1 (2001).
[49] NAT'L COMM. ON CORP. GOVERNANCE, PEDOMAN UMUM GOOD CORPORATE GOVERNANCE INDONESIA ¶ 1.1 [GENERAL GUIDANCE GOOD CORPORATE GOVERNANCE INDONESIA] (2006), https://www.ecgi.global/sites/default/files/codes/documents/indonesia_cg_2006_id.pdf; NAT'L COMM. ON CORP. GOVERNANCE, PEDOMAN UMUM GOVERNANSI KORPORAT INDONESIA [GENERAL GUIDANCE GOOD CORPORATE GOVERNANCE INDONESIA], https://knkg.or.id/wp-content/uploads/2022/06/PUGKI-2021-LORES.pdf
[50] NAT'L COMM. ON CORP. GOVERNANCE, INDONESIAN CODE FOR GOOD CORPORATE GOVERNANCE ¶ 2.1 (2001).
[51] ORG. ON ECON. COOP. & DEV., CORPORATE GOVERNANCE IN ASIAN: ROUNDTABLE ON CORPORATE GOVERNANCE ASIA 10 (2014).
[52] NAT'L COMM. ON CORP. GOVERNANCE, INDONESIAN CODE FOR GOOD CORPORATE GOVERNANCE ¶ 2.2 (2001).
[53] NAT'L COMM. ON CORP. GOVERNANCE, INDONESIAN CODE FOR GOOD CORPORATE GOVERNANCE ¶ 2.2 (2001); Chun, *supra* note 8, at 177.
[54] Mariana Pargendler, *The Rise of international Corporate Law*, 98 WASH. U. L. REV. 1765 (2021); Nurgozhayeva & Puchniak, *Corporate Purpose Beyond Borders, supra* note 20 .

question whether this corporate governance transplant, with its American origins, is a good "fit" for Indonesia's unique corporate governance context.[55]

Second, Indonesia's adoption of the independent director in the wake of the Asian Financial Crisis highlights how countries, especially developing countries and smaller jurisdictions, may be incentivized to adopt corporate governance reforms to "signal" to international markets that they meet the Anglo-American-cum-global standards of "good" corporate governance.[56] The preamble of every one of Indonesia's GCGCs mentions the importance of complying with international standards.[57] The use of the OECD Principles as a model for its adoption of the independent director is a further indication of Indonesia's motivation to signal its compliance with international standards. The format of Indonesia's GCGC, mirroring the UK's "comply or explain" corporate governance code model, which has been adopted in almost 90 countries,[58] may have been driven by "halo signalling".[59] As one of us has coined elsewhere, "halo signalling" is the adoption of corporate governance reforms to signal adherence to global standards of good corporate governance to attract international investment, without actually changing how corporate governance functions in practice – a theory which has recently been proven in an in-depth empirical study.[60]

Third, the corporate governance problems in Indonesia in the wake of the Asian Financial Crisis were significantly different than the corporate governance problems that inspired the creation of the independent director in the United States in the 1970s. The impetus for the

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[55] For an analysis of "legal misfits" in corporate governance see, Puchniak, *The False Hope of Stewardship, supra* note 19.

[56] As explained by Puchniak, "[a]s halo signaling does not involve the corporate governance mechanism effecting actual change, importance is placed on the jurisdiction's formal adoption of a mechanism that is considered to be the global gold standard of "good" corporate governance…. The fact that the U.K. Code is a poor fit is irrelevant as the impetus for adopting a code is to signal formal compliance with the "gold standard"—not to effect actual change.": *see* Puchniak, *The False Hope of Stewardship, supra* note 19, at 143. For other examples of "halo signalling" theory see, Puchniak & Kim, *Varieties of Independent Directors in Asia, supra* note 4, at 112; Puchniak & Lan, *Independent Directors in Singapore*, *supra* note 1, at 272; Alan K. Koh, Dan W. Puchniak & Gen Goto, *Shareholder Stewardship in Asia: Functional Diversity Within Superficial Formal Convergence, in* GLOBAL SHAREHOLDER STEWARDSHIP 613, 626 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022) [hereinafter Koh, Puchniak & Goto, *Shareholder Stewardship in Asia*].

[57] NAT'L COMM. ON CORP. GOVERNANCE, INDONESIAN CODE FOR GOOD CORPORATE GOVERNANCE, 1-2 (2001). "The objective of the Code is to provide a guide to excellence in corporate governance for the business world which has drawn on international best practice in corporate governance appropriately adjusted to suit the Indonesian legal and regulatory environment. The good corporate governance principles as set out in the Code are intended to be implemented as soon as possible." NAT'L COMM. ON CORP. GOVERNANCE, INDONESIAN CODE FOR GOOD CORPORATE GOVERNANCE ¶ 2.2 (2001); As also explained in the 2021 version" The National Committee on Governance Policy is obliged and committed to reviewing the General Guidelines for Indonesian Corporate Governance at least every two years based on domestic and international governance developments and make necessary adjustments." NAT'L COMM. ON CORP. GOVERNANCE, PEDOMAN UMUM GOVERNANSI KORPORAT INDONESIA (PUG-KI) 2021 i (2021)

[58] Puchniak & Lan, *Independent Directors in Singapore, supra* note 1, at 275-277.

[59] As explained by Puchniak "As halo signaling does not involve the corporate governance mechanism effecting actual change, importance is placed on the jurisdiction's formal adoption of a mechanism that is considered to be the global gold standard of "good" corporate governance…. The fact that the U.K. Code is a poor fit is irrelevant as the impetus for adopting a code is to signal formal compliance with the "gold standard"—not to effect actual change." Puchniak, *The False Hope of Stewardship, supra* note 19, at 143.

[60] Trang T. Nguyen & Charles C.Y. Wang, *Stewardship Codes and Shareholder Voting on Contested Ballot Measures,* Harvard Business School Working Paper, January 2024, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4986759 .

creation of the concept of the independent director in the United States was to solve the corporate governance problem of monitoring management in companies with dispersed shareholders.[61] In stark contrast, the primary corporate governance problem in Indonesia was – and is – the extraction of private benefits of control by controlling block shareholders at the expense of minority shareholders.[62] This problem is exacerbated in State-Owned Enterprises ("SOEs") – which comprise a significant portion of Indonesia's largest listed companies – as it raises the thorny issues of corporate governance enforcement and abuse of regulatory power in a country that has struggled with corruption.[63] Indonesian policymakers and scholars also viewed the independent director as a possible functional substitute for what many perceived as an impotent board of commissioners in the face of powerful family- and state-controllers.[64] There is no similar concern in the United States as it has no equivalent to a board of commissioners in its one-tier board system.

Indonesia appears to have been aware of the potential misfit between the original design of the American independent director and its starkly different corporate governance landscape. The definitions used for independence in the 2001 GCGC and JSE Decree define independence as requiring the director to be independent from controlling shareholders – recasting the concept of the independent director to better fit Indonesia's controlling shareholder dominated context.[65] In a similar vein, the 2001 GCGC suggested that the opinion of minority shareholders should be considered in the appointment of independent directors.[66] Although a formal mechanism to ensure minority shareholder voice in the appointment of independent directors never made it into the GCGC or any other Indonesian laws, it demonstrates that

[61] Gordon, *The Rise of Independent Directors in the United States*, *supra* note 1, at 1477. For comparative analyses highlighting the shift in US boards toward the managerial monitoring model, *see* Davies & Hopt, *supra* note 5, at 323; Puchniak, *Multiple Faces of Shareholder Power in Asia, supra* note 4, at 512; Puchniak & Lan, *Independent Directors in Singapore, supra* note 1, at 273.

[62] DUDI M. KURNIAWAN & NUR INDRIANTORO, THE ROLE OF DISCLOSURE IN STRENGTHENING CORPORATE GOVERNANCE AND ACCOUNTABILITY, OECD, THE SECOND ASIAN ROUNDTABLE ON CORPORATE GOVERNANCE, 4 (2000). See more generally, Yu-Hsin Lin, *Controlling Controlling-Minority Shareholders: Corporate Governance and Leveraged Corporate Control*, 2017 COLUM. BUS. L. REV. 454, 480 (2017) [hereinafter Lin, *Controlling Controlling-Minority Shareholders*].

[63] For an excellent overview of the corporate governance problems in state owned enterprises, *see* Curtis J. Milhaupt & Mariana Pargendler, *Governance Challenges of Listed State-Owned Enterprises Around the World: National Experiences and a Framework for Reform*, 50 CORNELL INT'L LAW J. 473 (2017).

[64] Rini Kustiasih, *Tata Kembali Regulasi Pengangkatan Komisaris BUMN* [Rearranging Regulations on the Appointment of SOE Commissioners], KOMPAS, July 22, 2022. https://www.kompas.id/baca/polhuk/2021/07/22/tata-kembali-regulasi-pengangkatan-komisaris-bumn.

[65] For comparative analyses highlighting the shift in US boards toward the managerial monitoring model, *see* Brian R. Cheffins, *Introduction to The History of Modern U.S. Corporate Governance* ix, at xxix, xli (Brian R. Cheffins ed., 2012) [hereinafter Cheffins, *Introduction to the History of Modern US Corporate Governance*]; NAT'L COMM. ON CORP. GOVERNANCE, INDONESIAN CODE FOR GOOD CORPORATE GOVERNANCE ¶ 3.2 (2001); *see also,* Jakarta Stock Exchange (JSX), *Revocation of provision letter C.2.e of Securities Listing Rule Number I-A regarding General Provisions for the Listing of Equity Securities on the Stock Exchange*, Decree No. KEP-339/BEJ/07-2001, July 20, 2001, (Republic of Indonesia).

[66] NAT'L COMM. ON CORP. GOVERNANCE, INDONESIAN CODE FOR GOOD CORPORATE GOVERNANCE ¶ 2.2 (2001).

Indonesia was at least aware that the majority voting mechanism in the design of the American independent director was a legal misfit.[67]

Taken together, these factors – the IMF's "forced transplant", Indonesia's desire to signal compliance with international standards, and the adaptation of the American independent director to better fit Indonesia's corporate governance context – highlight the multifaceted drivers behind the adoption of the independent director in Indonesia. This history represents not just a response to domestic corporate governance deficiencies but also a strategic move to satisfy the IMF's bailout requirements and to enhance Indonesia's attractiveness to international investors – thereby promoting its economic growth and facilitating its integration into the global economy. Through this lens, the evolution of the independent director in Indonesia exemplifies the complex interplay between domestic challenges and international influences in driving corporate governance, underscoring the importance of adopting corporate governance practices that both address domestic needs and resonate with global standards.

II.C. The Abolition of Independent Directors in Indonesia: Rationally Autochthonous or Foolishly Idiosyncratic?

As described above, at first blush, the integration of the Anglo-American independent director model into Indonesia's corporate governance framework seemed like a resounding triumph, ingeniously blending market signalling with adherence to global best practices, while moulding the American independent director to fit Indonesia's unique corporate governance context. Thus, it was unexpected when the 2006 revision of Indonesia's GCGC conspicuously omitted any reference to independent directors, shifting its focus to the enhancement of independent commissioners on the supervisory board of commissioners.[68] This regulatory pivot was further evidenced in the 2007 overhaul of the Company Law (2007 Company Law), which similarly bypassed independent directors in favour of emphasizing the role of independent commissioners within the board of commissioners as central to enhancing Indonesian corporate governance.[69] Despite this 2006/2007 legislative shift towards independent commissioners, and away from independent directors, the Jakarta Stock Exchange Listing Regulations maintained its requirement until 2018 for listed companies to have at least one independent director on the board of directors.[70]

Perhaps because the Jakarta Stock Exchange maintained its requirement for an independent director until 2018, the shift away from independent directors in the 2006 GCGC and the 2007

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[67] For the serious corporate governance risk of using a majority voting system to elect independent directors in companies with controlling shareholders *see*, Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271, 1287-1290 (2017) [hereinafter Bebchuk & Hamdani, *Independent Directors and Controlling Shareholders*]; For an analysis of how this issue applies in the Asian context s*ee,* Puchniak & Kim, *Varieties of Independent Directors in Asia, supra* note 4, at 129.

[68] NAT'L COMM. ON CORP. GOVERNANCE, PEDOMAN UMUM GOOD CORPORATE GOVERNANCE INDONESIA ¶ 1.1 [GENERAL GUIDANCE GOOD CORPORATE GOVERNANCE INDONESIA] (2006).

[69] Undang-undang (UU) Nomor 40 Tahun 2007 tentang Perseroan Terbatas [Law No. 40/2007 concerning Company Law], Aug. 16, 2007, Art.21 (Republic of Indonesia), https://peraturan.bpk.go.id/Details/39965; Miko Kamal, *The New Indonesian Company Law: Does It Support Good Corporate Governance*, 6 MACQUARIE J. BUS. L. 347 (2009).

[70] The Indonesia Stock Exchange (IDX), *Amendment to the Rule Number I-A concerning Listing of Shares (Stock) and Equity-Type Securities Other Than Stock Issued by the Listed Company*, Decree No. KEP-00183/BEI/12-2018, December 27, 2018, (Republic of Indonesia).

Company Law has received almost no mention in the academic discourse or popular commentary on Indonesian corporate law and governance.[71] However, these developments are milestones in the evolution of Indonesia's corporate governance system as they were the genesis of Indonesia's journey to remove the IMF imposed Anglo-American-style independent director and to restore the rationale undergirding its "two-tier board" system – which has been part of the DNA of Indonesian corporate governance from Dutch colonial times. Specifically, the rationale for the two-tier board system was that independent monitoring of management is a corporate governance function assigned to the board of commissioners under Indonesian corporate law – at least theoretically making the purpose of American-style independent directors on the board of directors functionally redundant.[72]

However, from an Anglo-American comparative corporate law perspective, Indonesia's removal of any mention of independent directors from its 2006 GCGC and its failure to include them in its 2007 Company Law was highly unorthodox – if not retrograde – given the context in which it occurred. During the 2000s, the global proliferation of UK-style corporate governance codes, the OECD Principles, and World Bank and IMF initiatives, made independent directors a – if not *the* – hallmark of Anglo-American-cum-global good corporate governance around the world.[73] This resulted in countries around the world – and especially in Asia – strengthening their rules and regulations to increasingly move independent directors to the core of their corporate governance systems.[74]

As discussed below, it is noteworthy that in the 2000s the world's two most economically powerful civil law jurisdictions at that time, Germany and Japan, strenuously resisted implementing independent directors on the basis that the Anglo-American creation was a legal misfit given their civil law, "two-tier board", systems and unique corporate law and governance contexts.[75] However, starting in the 2000s and extending into the 2010s, both Germany and Japan gradually built regulatory architectures that strengthened the role of independent directors in their corporate governance systems. They did this under international pressure as they were increasingly viewed as corporate governance outliers as the Anglo-American-cum-

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[71] We conducted searches of legal and academic databases, newspapers, and the internet in English and Indonesian but could not find any discussion of the removal of references to "independent directors" for the 2006 GCGC and 2007 Company Law.

[72] It is important to note that in practice there is significant convergence between how one-tier and two-tier boards function. *See*, Davies & Hopt, *supra* note 5, at 312-315. It is also noteworthy that the Anglo-American system of independent directors was inspired by and conceived as the functional equivalent to the German two-tier board system. See, MELVIN A. EISENBERG, STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS, 177-185 (1976) (discussing the German two-tier board system as an alternative governance structure to the independent director system in a one-tier board).

[73] Puchniak & Kim, *Varieties of Independent Directors in Asia, supra* note 4, at 91-95; Puchniak & Lan, *Independent Directors in Singapore, supra* note 1, at 274-275; Gordon, *Convergence and Persistence in Corporate Law and Governance, supra* note 4, at 32-33.

[74] Puchniak & Kim, *Varieties of Independent Directors in Asia, supra* note 4, at 91-95; Baum, *supra* note 2, at 22-24.

[75] Goto, *Recent Board Reforms in Japan, supra* note 9, at 35-38, 45-48; Goto, Matsunaka & Kozuka, *Japan's Gradual Reception of Independent Directors*, *supra* note 9, at 138-145; Ronald Gilson & Curtis Milhaupt, *Choice as Regulatory Reform: The Case of Japanese Corporate Governance*, 53 AM. J. COMP. L. 343, 353-354 (2005). For the German academic discourse, *see*, Baum, *supra* note 2, at 51-52; Ringe, *supra* note 5, at 81.

global independent director came to be seen as an essential hallmark of "good" corporate governance globally.[76]

In stark contrast, Indonesia's failure to even mention independent directors in its 2006 GCGC – after they were specifically promoted in its inaugural 2001 GCGC – was an almost unheard-of reversal in the promotion of independent directors; a move against an ostensibly unabating Anglo-American-cum-global corporate governance trend.[77] The failure to include any mention of independent directors in its 2007 Company Law was conspicuous, especially given the specific commitment to the IMF to implement independent directors in its January 20, 2000 Letter of Intent.[78]

However, what may appear irrational and retrograde from an Anglo-American-cum-global perspective, is understandable if one considers the transformation of Indonesia's political and economic situation in the years following the Asian Financial Crisis. As explained, the 2001 GCGC was forced upon Indonesia by the IMF as the country stared into an economic abyss following the Asian Financial Crisis. By 2006, Indonesia had finally repaid its loans to the IMF and, in turn, was no longer under its thumb.[79] There was extreme discontent with the stringent conditions imposed by the IMF as they were perceived as intrusive to national sovereignty and having imposed foreign measures on Indonesia without regard for its unique social, political, and economic realities.[80]

After President Susilo Bambang Yudhoyono was elected in 2004, his administration vociferously criticized the IMF for its one-size-fits-all approach, even likening it to a "loan

[76] In Japan, until 2019 the Companies Act did not require any independent directors in listed companies which selected the traditional "two-tier" board structure (i.e., a board of directors with a board of statutory auditors), although at least half of the statutory auditors must be outsiders (Japanese Companies Act, Art.335(3)). In 2019, the Companies Act was amended (and went into effect in March 2021) to require at least one "outside director" in all listed companies (Japanese Companies Act, Art.327-2). Also, under the revised 2021 Corporate Governance Code, listed companies in the top-tier market of the Tokyo Stock Exchange must "explain" if they do not have at least 1/3 independent directors (Japanese Corporate Governance Code, Principle 4-8). The definitions of "outside" and "independent" directors require independence from management and major controlling shareholders (Japanese Companies Act, Art.2, no.15, Japanese Corporate Governance Code, Principle 4-7 (iii)(iv)). In Germany, there was never any discussion of placing independent directors on its equivalent to Indonesia's board of directors. However, independent directors on German the supervisory boards – which is the rough equivalent to Indonesia board of commissioners – became mandatory in 2007 and independence was promoted on its supervisory board in "comply or explain" style corporate governance code which was adopted in 2002 and its independence criteria was enhanced in 2012: *see*, Baum, *supra* note 2, at 49-55.

[77] Puchniak & Kim, *Varieties of Independent Directors in Asia, supra* note 4, at 131.

[78] Internal Monetary Fund, Letter of Intent (January 2000) https://www.imf.org/external/np/loi/2000/idn/01/#:~:text=We%20request%20that%20the%20new,monetary%2C%20fiscal%20and%20external%20sectors; Gov't of Indon., Memorandum of Economic and Financial Policies (1998), https://www.imf.org/external/np/loi/011598.HTM.(last visit Apr. 8 2024).

[79] Annasa Rizki Kamalina, *Kronologi utang indonesia ke IMF, 1998 hingga lunas di era SBY* [Chronology of Indonesia's Debt to the IMF, 1998 to Pay Off in the SBY Era] BISNIS.COM, https://ekonomi.bisnis.com/read/20230703/9/1671060/kronologi-utang-indonesia-ke-imf-1998-hingga-lunas-di-era-sby (last visited Apr. 4, 2024)

[80] Eric Toussaint, *IMF and WB : The Destruction of Indonesia's Sovereignty – CADTM*, CADTM, https://www.cadtm.org/IMF-and-WB-the-destruction-of (last visited Apr. 4, 2024).

shark".[81] This sentiment underscored a broader desire to reclaim autonomy over domestic policy, including reclaiming Indonesia's autochthonous system of corporate governance – which as previously explained, had a long Dutch civil law history, with the "two-tier board" system at its core. This political reality and the absence of IMF pressure following Indonesia's loan repayments in 2006 explains the departure from the Anglo-American independent director in the 2006 GCGC and 2007 Company Law as the Anglo-American concept of the independent director was seen as an ill-suited imposition on Indonesia's path dependent, civil law-based, two-tier board system.

However, given the global embrace of the Anglo-American independent director, it is understandable why the Jakarta Stock Exchange in 2006/2007 may have not immediately removed the requirement that listed companies in Indonesia must have at least one independent director. Nevertheless, in 2018, the Jakarta Stock Exchange finally made the bold decision to remove the requirement for listed companies to have at least one independent director on the board of directors.[82]

Although from 2018 independent directors have no longer been legally required to be on the boards of listed companies in Indonesia, there is nothing preventing listed companies from continuing to have them on their boards. Especially for the largest listed companies, one may have thought that they may keep independent directors on their boards to bolster their corporate governance credentials with international investors. In today's world it is rare to come across any listed company, almost anywhere in the world, without a single independent director.

To determine the impact of the amendment of the Jakarta Stock Exchange Regulations on the practice of Indonesian corporate governance, we reviewed the annual reports of Indonesia's 20 largest listed companies from 2017 (the year before the amendment) until 2023 (the last year for which they are available) (see, Table 1 below). According to these annual reports, the amendment had a dramatic impact on the number of independent directors in Indonesia's largest listed companies. In 2017, the year before the amendment, 16 out of 20 (80%) of Indonesia's largest listed companies reported having at least one independent director – the four companies that did not report having an independent director were SOEs, which seem to have taken the position that they were not bound by the Jakarta Stock Exchange Rules governing independent directors.[83] Putting aside SOEs, by 2019, 81% (13 out of 16 companies)

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[81] Annasa Rizki Kamalina, *Kronologi utang indonesia ke IMF, 1998 hingga lunas di era SBY* [Chronology of Indonesia's Debt to the IMF, 1998 to Pay Off in the SBY Era] BISNIS.COM, https://ekonomi.bisnis.com/read/20230703/9/1671060/kronologi-utang-indonesia-ke-imf-1998-hingga-lunas-di-era-sby (last visited Apr. 4, 2024); *see also,* William E. Daniel, *Corporate Governance in Indonesian Listed Companies - A Problem of Legal Transplant,* 15 BOND L. REV. [I], 347-348 (2003).

[82] Willem Kurniawan, *OJK restui penghapusan kewajiban punya jabatan direktur independen* [OJK approves the elimination of the obligation to have an independent director position] KONTAN, Dec. 28, 2018, https://investasi.kontan.co.id/news/ojk-restui-penghapusan-kewajiban-punya-jabatan-direktur-independen.

[83] The four SOEs mentioned here, which did not report having an independent director in 2017, appear to have asserted their exemption from the requirement based on the interpretation that as SOEs, they were not bound by the Jakarta Stock Exchange Rules pertaining to independent directors. This interpretation stems from the understanding that although technically classified as public companies due to their listing status, SOEs operate under a different legal framework, particularly governed by Law no. 19/2003 regarding State-Owned Enterprises, which does not explicitly mandate the appointment of independent directors. While there is no specific legal

no longer reported having even a single independent director, with not a single company reporting having any independent directors within three years.[84] Remarkably, there are now no independent directors reported in any of Indonesia's 20 largest listed companies – the IMF imposed Anglo-American independent director in Indonesia is dead.

These statistics suggest that Indonesia's largest listed companies embraced the shift in government policy, which began in the 2006 GCGC and culminated in the amendment to the Jakarta Stock Exchange Listing Regulations in 2018, to abandon the Anglo-American independent director. Considering the regulatory change in 2018, this empirical evidence suggests that listed companies in Indonesia no longer see the corporate governance necessity nor feel inclined to bow to international market pressure to demonstrate good corporate governance by having independent directors on their boards. In semi-structured interviews, which we conducted with 10 independent commissioners in Indonesian listed companies, the primary rationale provided for the regulatory change to abolish the independent director was that independent commissioners were seen as a functional substitute for independent directors.[85] This rationale was similarly highlighted by the Director of Company Evaluation of the Jakarta Stock Exchange, who cited the independence provided by independent commissioners as the primary rationale for the abolition of the requirement for independent directors in listed companies.[86]

The rapid disappearance of independent directors from Indonesia's largest listed companies following the 2018 regulatory change suggests a widespread perception that these roles were ineffective or unnecessary within Indonesia's corporate governance framework. This perception is supported by arguments from both proponents and critics of the abolition, which shed light on the complex challenges faced in implementing this Anglo-American governance mechanism in Indonesia's unique context.

Based on our semi-structured interviews, supporters of the abolition argue that independent directors created unnecessary duplication and potential conflicts within Indonesia's "two-tier board" system. They contend that the independent function is more clearly defined within the Board of Commissioners, and that strengthening this existing system is more crucial than adhering to global trends.[87] Some companies have even created alternative positions, such as compliance directors and risk directors, to fulfill functions previously associated with independent directors, suggesting that the independent director role could be effectively

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exemption for SOEs from the requirement of independent directors under the Indonesian Stock Exchange (IDX) rules, the prevailing understanding among these entities seems to be that their status as majority government-owned entities exempt them from this obligation.

[84] See *infra* Appendix 1 – Independent Directors in Top 20 Indonesian Companies, 44-51.

[85] Interview 7. Dated on February 13, 2024.; Interview 2. Dated On December 9, 2023.; Interview 8. Dated on February 5, 2024.

[86] Monica Wareza, *Emiten Tak Lagi Wajib Miliki Direktur Independen, Kenapa?* [Issuers Are No Longer Required to Have Independent Directors, Why?] CNBC, Dec. 26, 2018, https://www.cnbcindonesia.com/market/20181226161205-17-48036/emiten-tak-lagi-wajib-miliki-direktur-independen-kenapa.

[87] Interview 9. Dated on February 13, 2024.

replaced or rendered redundant.[88] Moreover, proponents of abolition point to the persistent challenges in ensuring true independence, arguing that the mere presence of independent directors did not automatically eliminate conflicts of interest or guarantee impartial decision-making.[89]

On the other hand, critics of the abolition argue that relying solely on independent commissioners may be insufficient, given observed practical limitations. They cite instances where independent commissioners have been found to be professionally ineligible, practically ineffective, or prone to internal or external intervention.[90] Some interviewees recounted experiences of independent commissioners being overextended into management functions or lacking access to crucial corporate information, compromising their ability to provide effective oversight.[91] These criticisms suggest that while the independent director role may have been flawed in its implementation, its removal may have left a gap in corporate governance that has not been adequately addressed by existing mechanisms.

The fact that the Indonesian government and listed companies have placed so much faith in independent commissioners as the linchpin for good corporate governance, raises an obvious question: what impact is Indonesia's reliance on independent commissioners likely to have on Indonesian corporate governance? It is to this question that we now turn.

Part III: Independent Commissioners as the Linchpin in Indonesian Corporate Governance: Tenuous Justifications in Theory, Many Risks in Practice

Indonesia's pivot to independent commissioners as the focal point for good corporate governance raises critical questions about the efficacy of this approach. This Part examines the structure and function of independent commissioners within Indonesia's "two-tier" board system, assesses their potential strengths and weaknesses, and analyzes the practical challenges they face in promoting good corporate governance. Our analysis reveals a complex landscape where theoretical justifications for the independent commissioner model often collide with practical realities, potentially undermining the intended benefits of this governance mechanism.

III.A. The Basic Structure of the Indonesian "Two-Tier Board": Foundational to Indonesia's Path-Dependent Corporate Governance System

As explained above, Indonesia's corporate governance system is rooted in its Dutch civil law tradition, featuring a "two-tier board" system comprising the Board of Directors (BOD) and the Board of Commissioners (BOC). This structure, a legacy of Dutch colonial law which was entrenched as the mandatory board structure in the 1995 Company Law, assigns distinct roles to each board, creating a governance framework that, at least formally, diverges from the one-tier board structure common in Anglo-American jurisdictions.[92]

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[88] Interview 2. Dated on December 12, 2023.
[89] Interview 8. Dated on February 5, 2024.
[90] Interview 3. Dated on January 18, 2024.
[91] Interview 4. Dated on January 18, 2024.
[92] It should be noted that due to the global proliferation of one-tier board systems in which the board has subcommittees comprised of a majority, or even entirely, independent directors has significantly narrowed the gap

The BOD, designated as the organ of the company responsible for management, is tasked with the day-to-day operations of the company.[93] Directors must act in the interests of the company and manage it in accordance with the company's stated purposes and objectives.[94] This management function is counterbalanced by the supervisory role of the BOC. The BOC, as the supervisory organ of the company, has the duty to conduct both general and special supervision of, and provide advice to, the BOD.[95] Importantly, the BOC does not possess executive functions or authority under normal circumstances.[96] A fundamental principle underpinning this governance structure is that both the BOD and BOC must act in the best interest of the company – a fiduciary duty that is owed to the company itself, rather than directly to the shareholders.[97]

Within this "two-tier board" structure, at least formally, independent commissioners are intended to play a crucial role, particularly in publicly listed companies. Regulatory requirements mandate that at least 30% of the BOC members in listed companies must be independent commissioners.[98] The definition of "independence" for these commissioners requires them to satisfy four key criteria: (1) an independent commissioner must not have been working for, or have had authority to plan, lead, control, or supervise the activities of the public company within the last six months, with an exception made for cases of reappointment; (2) they must not hold shares in the company, whether directly or indirectly; (3) they must not be affiliated with the company, its significant shareholders (defined as those holding more than 20% of the company's shares with voting rights), or other commissioners or directors of the company; and (4) they must not have any business relationship, whether direct or indirect, with the business activities of the company.[99] These criteria aim to ensure that independent commissioners provide objective oversight and advice, free from potential conflicts of interest or undue influence from management or controlling shareholders.

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in terms of the functional difference between one-tier and two-tier boards: *see* Davies & Hopt, *supra* note 5, at 312-314; OECD, OECD CORPORATE GOVERNANCE FACTBOOK, 159 (2023).

[93] International Finance Corporation, INDONESIA CORPORATE GOVERNANCE MANUAL, 65 (2d ed. 2018). https://www.ifc.org/content/dam/ifc/doc/mgrt/indonesia-cg-manual-2nd-edition.pdf

[94] Undang-undang (UU) Nomor 40 Tahun 2007 tentang Perseroan Terbatas [Law Number 40/2007 concerning Company Law], Aug. 16, 2007, Art. 1(5), Art. 92 (1) (Republic of Indonesia), https://peraturan.bpk.go.id/Details/39965.

[95] Undang-undang (UU) Nomor 40 Tahun 2007 tentang Perseroan Terbatas [Law Number 40/2007 concerning Company Law], Aug. 16, 2007, Art. 1(6) (Republic of Indonesia), https://peraturan.bpk.go.id/Details/39965.

[96] However, the BOC may assume temporary management functions in two specific scenarios: if all members of the BOD are absent, or if all members of the BOD have conflicts of interests with the company. Undang-undang (UU) Nomor 40 Tahun 2007 tentang Perseroan Terbatas [Law Number 40/2007 concerning Company Law], Aug. 16, 2007, Art. 99(2b) (Republic of Indonesia), https://peraturan.bpk.go.id/Details/39965. It is noteworthy that a company's Articles of Association may allocate certain matters that require specific approval by the BOC, potentially enhancing the scope of the BOC's authority over management issues. Undang-undang (UU) Nomor 40 Tahun 2007 tentang Perseroan Terbatas [Law Number 40/2007 concerning Company Law], Aug. 16, 2007, Art. 117 (Republic of Indonesia), https://peraturan.bpk.go.id/Details/39965.

[97] Undang-undang (UU) Nomor 40 Tahun 2007 tentang Perseroan Terbatas [Law Number 40/2007 concerning Company Law], Aug. 16, 2007, Art. 97(2) *jo.* Art. 114(2) (Republic of Indonesia), https://peraturan.bpk.go.id/Details/39965.

[98] OJK Regulation No. 33/POJK.04/2014 on *Directors and Board of Commissioners of Issuing Companies or Public Companies*, Article 20.

[99] OJK Regulation No. 33/POJK.04/2014 on *Directors and Board of Commissioners of Issuing Companies or Public Companies*, Art. 21(2).

Indonesia's corporate law further enhances the intended role of independent commissioners by their integration into key governance mechanisms within the corporate governance systems of listed companies. Notably, the law requires there to be a lead independent commissioner on the audit committee, which must be comprised of members of the BOC and persons from outside the company.[100] The audit committee's role is multifaceted, encompassing the monitoring of corporate management on the BOD, assisting the BOC in ensuring the quality of financial reporting, overseeing the effectiveness of internal controls, and promoting good corporate governance.[101] The law places responsibilities on the audit committee that are expansive, with the expectation that it will contribute to the efficient operation of the corporation and promote transparency in corporate management.[102] In addition to the audit committee, the BOC must also establish nomination and remuneration committees, both of which must be chaired by independent commissioners.[103] This requirement further embeds independent commissioners in critical governance processes, with the aim of providing them with the power to influence decisions regarding board composition and executive compensation.

Empirical evidence suggests a high level of formal compliance with these requirements. Research indicates that more than 99% of publicly listed companies have adhered to the mandates for having the required number of independent commissioners and establishing an audit committee.[104] Taken together, the rules governing independent commissioners and the structure of the BOC highlights how independent commissioners have been placed at the core of Indonesia's corporate governance system – a feature that has been accentuated with the abolition of the independent director.

However, as we will explore later in this Part, formal compliance does not necessarily translate into effective governance in practice. Also, as we will consider below, the structure that the BOC has taken, with audit, nomination and remuneration committees led by independent commissioners, dovetails with the role played by independent directors globally – adding some credence in theory to Indonesia's view that maintaining the requirement for independent directors on its BOD would be functionally redundant given the role and powers that have been allocated to its independent commissioners on the BOC.[105]

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[100] OJK Regulation No. 55/POJK.04/2015 on *Establishment and Guidelines For the Implementation of The Audit Committee*, Art. 4 *jo.* Art. 5.
[101] Enny Susilowati Mardjono & Yahn-Shir Chen, *Earning Management and the Effect Characteristics of Audit Committee, Independent Commissioners: Evidence from Indonesia*, 21 INTERNATIONAL JOURNAL OF BUSINESS AND SOCIETY 569, 569-587 (2020).
[102] Enny Susilowati Mardjono & Yahn-Shir Chen, *Earning Management and the Effect Characteristics of Audit Committee, Independent Commissioners: Evidence from Indonesia*, 21 INTERNATIONAL JOURNAL OF BUSINESS AND SOCIETY 569, 569-587 (2020).
[103] OJK Regulation No. 34/POJK.04/2014 on *Nomination and Remuneration Committee of Issuers or Public Companies*, Art. 2.
[104] ANTONIUS ALIJOYO & JEFFREY S. SIREGAR, KOMISARIS INDEPENDEN PENGGERAK GOVERNANSI KORPORAT [Independent Commissioner of Corporate Governance], Jakarta: PT. Gramedia Widiasarana Indonesia, 49-250 (2022).
[105] OECD, OECD CORPORATE GOVERNANCE FACTBOOK, 158-159 (2023).

III.B. The Indonesian Board of Commissioners in a Comparative Context

To fully appreciate the unique aspects of Indonesia's governance model, it is instructive to consider it within a broader comparative context. While Indonesia's "two-tier board" system shares commonalities with other civil law jurisdictions, it possesses distinct features that set it apart from its counterparts in both the West and Asia.

The Indonesian system, like other civil law "two-tier board" structures, positions the BOC as a supervisory board and the BOD as a management board.[106] As indicated above, this division of roles can be seen as potentially rendering Anglo-American independent directors functionally redundant, as the supervisory board already fulfils the primary function for which the independent director concept was originally created in the United States – providing independent oversight of management.[107] The functional redundancy of inserting the American concept of the independent director into a two-tier board system was raised in Germany and Japan when powerful policymakers and market players initially resisted the introduction of independent directors into their two-tier board, civil law based, corporate governance systems.[108]

Despite this similarity with other civil law two-tier board systems, a critical distinction emerges when comparing the Indonesian BOC to its German counterpart, often considered the archetypal two-tier board system.[109] It is noteworthy that in Germany, independent directors were implemented only on its supervisory board, but never on its management board.[110] In this sense, Indonesia's current system, in which independent commissioners are only required on its supervisory board (the BOC), but not on its management board (the BOD), is roughly equivalent to the current German model for inserting independence into its two-tier board structure. In fact, as German law does not mandate a specific percentage of independent directors on its supervisory board, but only requires an "appropriate number" of such directors, Indonesia's current requirement that 30% of the BOC is comprised of independent commissioners arguably requires a more stringent level of independence than the German

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[106] OECD, OECD CORPORATE GOVERNANCE FACTBOOK, 159 (2023); BRIAN CHEFFINS, ADVANCED INTRODUCTION TO CORPORATE GOVERNANCE LAW AND REGULATION, ch 6, 20-22 (2024) (forthcoming); Davies & Hopt, *supra* note 5, at 311-312.

[107] Gordon, *The Rise of Independent Directors in the United States*, *supra* note 1, at 1538-1540 ("[t]he effect of the reforms on the board's role is to make the role of the independent director more important than ever….Directors, then, will have a particularised monitoring role, what might be called "controls monitoring", in addition to "performance monitoring.""). For comparative analyses highlighting the shift in US boards toward the managerial monitoring model, *see* Cheffins, *Introduction to the History of Modern US Corporate Governance*, *supra* n 65; Davies & Hopt, *supra* note 5, at 323 (2013); Puchniak, *Multiple Faces of Shareholder Power in Asia, supra* note 4; Puchniak & Lan, *Independent Directors in Singapore, supra* note 1, at 273-278 (detailing the history of the independent directors).

[108] Goto, *Recent Board Reforms in Japan, supra* note 9, at 47 (highlighting that the 2014 Companies Act Reform utilizes the idea behind the monitoring model to explain the key role of outside directors); Goto, Matsunaka & Kozuka, *Japan's Gradual Reception of Independent Directors, supra* note 9, at 138-145; Gilson & Milhaupt, *supra* note 75, at 347-354. For the German academic discourse, *see*, Baum, *supra* note 2, at 51-52; Ringe, *supra* note 5, at 81.

[109] Cheffins, *supra* note 106, at ch 6, 21 (forthcoming).

[110] Klaus J. Hopt, *The German law of and Experience with the Supervisory Board European Corporate Governance Institute,* ECGI LAW WORKING PAPER 305/216, 2, 4 (2016). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2722702; Ringe, *supra* note 5, at 81; Baum, *supra* note 2, at 51-53.

system.[111] This suggests that even after the abolition of independent directors on Indonesia's BOD it still meets – or even exceeds – the standard for independence currently adopted by Germany's archetypal two-tier board system.

Given Indonesia's Dutch civil law heritage, it is also instructive to consider the board structure of listed companies in the Netherlands. The two-tier board structure has a long history in Dutch law – the Dutch East India Company in the early 1600s had a "sort of supervisory board"[112] – with the two-tier board being an optional structure throughout much of the Netherlands' company law history until it was made mandatory in 1971 for large companies subject to the *structuurregime* (a regime that imposes enhanced governance rules, including mandatory supervisory boards, on large Dutch companies meeting certain thresholds).[113] In 2013, Dutch law introduced the option for companies, including listed companies, to adopt a one-tier board structure (with executive and non-executive directors) as an alternative to the two-tier model (with a supervisory board and a management board).[114]

Currently, for listed companies subject to the *structuurregime*, the Dutch Corporate Governance Code (a soft-law instrument applicable to listed companies) suggests that all but one of the supervisory directors should be independent from management and that at least a majority should be independent from significant shareholders.[115] There is no requirement or even suggestion under Dutch law for independent directors to be on the management board, as independent supervision is seen to be the function of the supervisory board. As such, although the requirements for independence on the supervisory board under Dutch law (at least a majority being independent from management and significant shareholders) are somewhat more onerous than under Indonesian law (30%), Indonesia's removal of independent directors from its management board appears, at first blush, to fit the theory of the two-tier board under Dutch law and German law.

However, there is a critical distinction between the Dutch/German supervisory board and Indonesian BOC that raises a serious limitation in terms of the effectiveness of Indonesian independent commissioners compared to their Dutch/German supervisory board counterparts. In the Dutch/German model, the supervisory board wields significant power over the

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[111] Ringe, *supra* note 5, at 81; Baum, *supra* note 2, at 53; OECD, OECD CORPORATE GOVERNANCE FACTBOOK, 162 (2023).

[112] Willem J.L. Calkoen, *The One-Tier Board in the Changing and Converging World of Corporate Governance: A comparative study of boards in the UK, the US and the Netherlands* 307 (Oct. 11, 2011) (Ph.D. thesis, Erasmus University Rotterdam), https://repub.eur.nl/pub/26502/ [https://perma.cc/K5G3-H7F3]. See also Gelter & Siems, *supra* note 35, at 142.

[113] Wet op de ondernemingsraden [Works Councils Act] art. 2 (Neth.); Burgerlijk Wetboek [Civil Code] bk. 2, arts. 63a–63f (Neth.), https://wetten.overheid.nl/BWBR0003045/2021-07-01/1.
See also Wet structuurregeling [Structure Regime Act], *Stb.* 1970, 433 (Neth.) (original enactment mandating the two-tier board for qualifying large companies). See Burgerlijk Wetboek [Civil Code] bk. 2, art. 63a(1) (Neth.) (defining the threshold for application of the *structuurregime* based on capital, employee count, and works council requirements).

[114] Burgerlijk Wetboek [Civil Code] bk. 2, art. 129a (Neth.), https://wetten.overheid.nl/BWBR0003045/2021-07-01/1.

[115] THE DUTCH CORPORATE GOVERNANCE CODE, Principle 2.1.7-2.1.8 (available at https://www.airbus.com/sites/g/files/jlcbta136/files/2023-01/Dutch_Corporate_Governance_Code_2022.pdf).

management board due to its authority to appoint and remove management board members.[116] In contrast, the BOC (and BOD) in Indonesia is generally elected by a majority vote of the shareholders.[117] This significantly reduces the power that the BOC has over the BOD in comparison to the Dutch/German supervisory board over its management board. Two leading European comparative corporate law experts have noted how this feature of the Dutch/German two-tier board model makes it "more likely to attenuate the direct influence of shareholders on management".[118] As explained below, the absence of this attenuating factor on the direct influence of shareholders on management is significant in Indonesia's corporate governance environment where concentrated shareholding predominates and wealth-tunneling by controlling shareholders is a serious problem.

It is noteworthy that Indonesia is not unique in having a two-tier board system in which both its management board and supervisory board are elected by the shareholders. In China, Asia's largest economy with a civil law two-tier board system, companies have a supervisory board and management board which are both elected by shareholders.[119] Historically in Japan, Asia's second largest economy with a civil law heritage, its companies had a board structure consisting of a supervisory board and management board, which were both elected by shareholders.[120] Currently, Japan allows companies to select among three board models, with the third model introduced in 2014 to promote the appointment of independent directors being equivalent to its historical two-tier board system in which both boards are elected by shareholders.[121] In this sense, Indonesia's two-tier board system seems more similar to those in China/Japan than in Germany/Netherlands. One of us in a book on "Independent Directors in Asia" referred to the so-called "two-tier boards" in China/Japan as "double boards" to highlight their supervisory boards' lack of appointment/removal rights, distinguishing them from the archetypical Dutch/German two-tier board.

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[116] Hopt, *supra* note 110, at 13-14; Anne Lafarre*, Shareholder Voting and Engagement in the Netherlands: The Dutch Institutional Approach, in* THE CAMBRIDGE HANDBOOK OF SHAREHOLDER ENGAGEMENT AND VOTING 403, 407 (Harpreet Kaur et al. eds., 2022).

[117] However, it is possible for BOC members to "temporarily dismiss" a BOD member. However, even if the BOC, temporarily dismisses a BOD member who do not carry out her duties, the power to permanently dismiss the BOD member remains with the majority shareholders; Undang-undang (UU) Nomor 40 Tahun 2007 tentang Perseroan Terbatas [Law Number 40/2007 concerning Company Law], Aug. 16, 2007, Art. 97(2) *jo.* Art. 114(2) (Republic of Indonesia) https://peraturan.bpk.go.id/Details/39965; OJK Regulation No. 32/POJK.04/2014 on Plan and Implementation of The General Meeting of Shareholders of Public Companies. Therefore, it could be the case that even if the BOC views the director as having breached her duty, she could remain on the BOC if she is supported by the majority shareholders – or worse, if her wrongful behavior is pursuant to the majority shareholders' orders.Undang-undang (UU) Nomor 40 Tahun 2007 tentang Perseroan Terbatas [Law No. 40/2007 concerning Company Law], Aug. 16, 2007, Art.106(1) (Republic of Indonesia), "https://peraturan.bpk.go.id/Details/39965.

[118] Gelter & Siems, *supra* note 35, at 146.

[119] For the evolvement of the two-tier board system in China, *see* Wei Zhang, *Learning from Your Rival? A Surprising Convergence of Chinese and American Corporate and Securities Laws*, 9 UCI JRNL. OF INT'L, TRANSNATIONAL, & COMP. L. 101, 109-110 (forthcoming); OECD, OECD CORPORATE GOVERNANCE FACTBOOK, 158 (2023).

[120] Goto, *Recent Board Reforms in Japan, supra* note 9, at 43 ("to secure the independence of members of the audit-plus committee from the management, appointment to the audit-plus committee is not to be made by the board of directors, which may be dominated by insiders, but by the shareholders' meeting"); OECD, OECD CORPORATE GOVERNANCE FACTBOOK, 159 (2023).

[121] Goto, *Recent Board Reforms in Japan, supra* note 9, at 35, 37-38, 41-43; OECD, OECD CORPORATE GOVERNANCE FACTBOOK, 159 (2023).

In comparing the Indonesian "two-tier board" to those in China/Japan, it is also important to recognize that in China/Japan independent directors were introduced at the management board level in their "two-tier board" models, similar to how the IMF required Indonesia to have independent directors on its BOD.[122] The requirement to have independent directors on the management board arguably overcomes the more limited power that supervisory boards have in China, Japan, and Indonesia with their lack of appointment and removal powers over the management board (which distinguishes them from the more powerful Dutch/German supervisory board). In this context, Indonesia's 2018 abolition of the independent director requirement from its BOD conspicuously distinguished it from China and Japan as it now does not require an independent director on its management board, despite its supervisory board lacking appointment and removal powers.[123]

Thus, from a comparative perspective, Indonesia's removal of independent directors from its 2006 GCGC, 2007 Company Law, and then their ultimate abolition from Indonesian law upon the amendment of the 2018 Jakarta Stock Exchange Listing Regulations, resulted in Indonesia becoming somewhat of an outlier based on its Dutch civil law history and compared to other major Asian jurisdictions with "two-tier boards". Its BOC lacks the power of the Dutch/German supervisory board due to their absence of appointment and removal rights – rendering independent commissioners less powerful than independent directors on the Dutch/German supervisory board. It diverges from China/Japan in not requiring independent directors on the management board in companies with a "two-tier board" structure where both boards are elected by shareholders. The amendments starting in 2006 and culminating in 2018 to remove independent directors from Indonesia's corporate governance system also run counter to a seismic trend during this period – especially in Asia – to enhance the prominence and power of independent directors in corporate governance.[124] From this perspective, Indonesia's abolition of the independent director may appear to be a retrograde development that contradicts global norms of good corporate governance.

However, this view may be too extreme. Despite Indonesia's removal of the requirement for an independent director on the BOD, it still requires at least 30% of the BOC to be independent commissioners.[125] This may allow Indonesia to signal to international investors that it still takes independence seriously – but in a way that conforms to its traditional "two-tier board" system. Indeed, the OECD Corporate Governance Factbook 2023 lists Indonesia as requiring 30% of its board to be "independent directors" – the report (erroneously) does not distinguish between independent directors on supervisory boards or management boards.[126] It also (erroneously) does not distinguish between different types of two-tier boards by distinguishing between ones

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[122] For the evolution of the two-tier board system in China, *see* Zhang, *supra* n 119, at 109-110 (forthcoming). For the comparative Japanese perspective, *see* Goto, *Recent Board Reforms in Japan, supra* note 9, at 35 (2018).
[123] In Japan, there is a requirement in companies that elect to have a two-tier board to have outside members on the supervisory board and at least one outside director on the management board making it roughly equivalent to the Indonesian system prior to the abolition of independent directors for the BOC in 2018. For a more in-depth discussion on Japanese law, *see supra* note and accompanying text.
[124] Puchniak & Kim, *Varieties of Independent Directors in Asia, supra* note 4, at 91.
[125] OJK Regulation No. 33/POJK.04/2014 on *Directors and Board of Commissioners of Issuing Companies or Public Companies*, Article 20.
[126] OECD, OECD CORPORATE GOVERNANCE FACTBOOK, 163 (2023).

that vest the supervisory board with appointment/removal rights and others that do not.[127] In this sense, perhaps Indonesia may, at least from a "halo signaling" perspective, get the best of both worlds: satisfying its domestic audience by claiming to have removed the misfitted Anglo-American IMF imposed independent director transplant and yet still satisfying international investors that it takes independence seriously.[128] Although "halo signaling" to international investors has been proven empirically to be important, the ultimate test for any system of corporate governance – and its ability to attract foreign investment in the long-term – is most likely how it addresses corporate governance problems in practice.[129] It is to this that we now turn.

III.C. Problems with Heavy Reliance on BOC for Independence and Good Corporate Governance

Our research, based on empirical evidence, interviews with ten independent commissioners, and an analysis of the corporate law, reveals a series of significant challenges that arise from Indonesia's heavy reliance on independent commissioners as a core mechanism for ensuring good corporate governance. These challenges can be categorized into three main areas: (1) the limited legal authority and practical power of independent commissioners; (2) the dominance of controlling shareholders over the BOC; and (3) the risks associated with government-linked independent commissioners. Each of these areas presents substantial obstacles to the effective functioning of independent commissioners within Indonesia's corporate governance framework.

III.C.1. Limited Legal Authority and Practical Power of Independent Commissioners on the BOC

As highlighted above, according to the Indonesian company law independent commissioners lack the power to appoint or remove members of the BOD. In certain circumstances, the BOC may "temporarily dismiss" a BOD member.[130] However, such a "temporary dismissal" must be affirmed by a majority of the shareholders for the BOD member to be permanently removed.[131] Given that shareholders elect both the BOC and BOD by majority vote this places the locus of corporate governance power firmly in the hands of the majority shareholder which, as explained below, is problematic in Indonesia as majority shareholder abuse is arguably the

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[127] OECD, OECD CORPORATE GOVERNANCE FACTBOOK, 163 (2023).

[128] As explained by Puchniak, "[a]s halo signaling does not involve the corporate governance mechanism effecting actual change, importance is placed on the jurisdiction's formal adoption of a mechanism that is considered to be the global gold standard of "good" corporate governance…. The fact that the U.K. Code is a poor fit is irrelevant as the impetus for adopting a code is to signal formal compliance with the "gold standard"—not to effect actual change.": *see* Puchniak, *The False Hope of Stewardship, supra* note 19, at 143. For other examples of "halo signaling" theory *see*, Puchniak & Kim, *Varieties of Independent Directors in Asia, supra* note 4, at 118-119; Puchniak & Lan, *Independent Directors in Singapore, supra* note 1, at 272; Koh, Puchniak & Goto, *Shareholder Stewardship in Asia*, *supra* note 56, at 626.

[129] For empirical proof that the Halo Signaling theory plays out in practice, *see* Trang T. Nguyen & Charles C.Y. Wang, *Stewardship Codes and Shareholder Voting on Contested Ballot Measures,* Harvard Business School Working Paper, January 2024 (on file with the authors).

[130] Undang-undang (UU) Nomor 40 Tahun 2007 tentang Perseroan Terbatas [Law No. 40/2007 concerning Company Law], Aug. 16, 2007, Art.106(1) (Republic of Indonesia), https://peraturan.bpk.go.id/Details/39965.

[131] Undang-undang (UU) Nomor 40 Tahun 2007 tentang Perseroan Terbatas [Law No. 40/2007 concerning Company Law], Aug. 16, 2007, Art.105(1) (Republic of Indonesia), https://peraturan.bpk.go.id/Details/39965.

most acute problem in Indonesian corporate governance.[132] The BOC's lack of appointment and removal powers also calls into question the ability of the BOC to effectively monitor the BOD as it reduces their ability to compel the BOD to act in accordance with the rules and regulations that are designed to provide the BOC with supervisory power.

The efficacy of independent commissioners is also significantly compromised by the BOD's ability to unilaterally determine that related party transactions (RPTs) and conflict of interest transactions (CITs) do not require BOC consideration, or otherwise deliberately restructure RPTs/CITs to avoid the BOC's scrutiny.[133] This power effectively sidelines independent commissioners from crucial oversight roles in areas that are particularly susceptible to abuse and self-dealing. More generally, matters that require BOC consultation and approval are not always articulated in a company's corporate constitution. Excluding independent commissioners from the approval process for RPTs and CITs is especially concerning given Indonesia's controlling shareholder-dominated corporate landscape in which wealth-tunneling by controlling shareholders has been identified as a major corporate governance risk.[134]

Moreover, independent commissioners often find themselves severely constrained by limited access to relevant information and investigative resources.[135] This information asymmetry significantly hampers their ability to serve as effective monitors of the BOD.[136] As one respondent in our interviews noted, independent commissioners often face hurdles in supervising the BOD due to lack of access to relevant information and investigative resources. The respondent commented that "it could be the case that the BOD may deceive ICs, and ICs often do not have the resources or power to get the necessary information."[137]

The structural limitations of the BOC further exacerbate these challenges. Except for certain financial services companies,[138] generally the BOC must always act as a group.[139] Given that independent commissioners normally compose a minority of the BOC, this requirement for collective action significantly limits their power to have a meaningful impact on corporate decision-making.[140]

The cultural context in which these governance mechanisms operate adds another layer of complexity. Indonesian corporate culture often results in independent commissioners being

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[132] Ulya Y. Prisandani, *Shareholder activism in Indonesia: revisiting shareholder rights implementation and future challenges*, 64 INTERNATIONAL JOURNAL OF LAW AND MANAGEMENT 225, 225-238 (2022).
[133] Interview 1. Dated on December 9, 2023.
[134] Interview 1. Dated on December 9, 2023; Art. 1(4) of OJK Rule No. 42/POJK.04/2020 requires a conflict of interest causes potential loss. A mere establishment of conflict relationship does not render it to be a conflict of interest. The directors who try to avoid BOC's scrutiny would typically blur the occurrence of actual or potential loss by restructuring the deal.
[135] Interview 1. Dated on December 9, 2023.
[136] Interview 4. Dated on January 18, 2024.
[137] Interview 4. Dated on January 18, 2024.
[138] For example, in insurance industry, based on Art. 32 of OJK Rule No. 73/POJK.05/2016 independent commissioners of an insurance company is vested with extra authority by the OJK to oversee the policy or action of the BOD which may be detrimental to the policy holders, consumers, beneficiaries, or participants by among other things calling the board meeting and directly making a report to the chief executive of the OJK.
[139] Undang-undang (UU) Nomor 40 Tahun 2007 tentang Perseroan Terbatas [Law No. 40/2007 concerning Company Law], Aug. 16, 2007, Art. 108 (4) (Republic of Indonesia), https://peraturan.bpk.go.id/Details/39965.
[140] Interview 2. Dated on December 12, 2023; Interview 9. Dated on February 13, 2024.

conflict-averse, fostering a culture of kinship that can lead them to simply follow the majority members who are not independent and who often carry out the majority shareholders' interests.[141] This tendency towards consensus and conflict avoidance can further dilute the effectiveness of independent commissioners in challenging management decisions or raising concerns about potential governance issues. [142] As discussed below, this culture of consensus and conflict avoidance has been amplified by a struggle to find competent independent commissioners. [143]

III.C.2. Dominance of the Controlling Shareholder over the BOC

The power dynamics between controlling shareholders and the BOC present another significant challenge to the independence and effectiveness of independent commissioners. The appointment and removal mechanisms for BOC members, including independent commissioners, are heavily skewed in favor of controlling shareholders, potentially compromising the very independence these commissioners are meant to provide. Generally, BOC members are appointed by a majority vote of the shareholders and can be removed by a similar majority vote. [144] Crucially, the removal of a BOC member can occur at any time and for any reason, subject only to a majority shareholder vote. This creates a precarious position for independent commissioners, who may feel pressured to align with the interests of controlling shareholders to maintain their positions.[145]

The powerful election and removal rights that controlling shareholders wield over independent commissioners call into question their ability to effectively monitor and challenge these same shareholders. This creates a significant corporate governance risk, particularly acute in the Indonesian context where most listed companies have powerful controlling shareholders – either families in private companies or the state in SOEs.[146]

Our interviews with independent commissioners and academic research suggest that the appointment of independent commissioners in private owned listed companies (POEs) is often dictated by the controlling shareholder; while in SOEs, it is determined by the relevant government minister.[147] This, combined with the controlling shareholder's strong selection and removal rights, frequently results in the appointment of ineffective independent commissioners who may lack the necessary independence to perform their functions effectively. In POEs, there is a risk that friends or associates of the controlling shareholder are elected as independent commissioners, potentially compromising their objectivity. In SOEs, the risk is that

[141] Interview 3. Dated on December 14, 2023.
[142] Interview 2. Dated on December 12, 2023; Interview 3. Dated on December 14, 2023; Interview 9. Dated on February 13, 2024.
[143] Interview 9. Dated on February 13, 2024.
[144] Undang-undang (UU) Nomor 40 Tahun 2007 tentang Perseroan Terbatas [Law No. 40/2007 concerning Company Law], Aug. 16, 2007, Art. 111 (Republic of Indonesia), https://peraturan.bpk.go.id/Details/39965; OJK Regulation No. 33/POJK.04/2014 on Directors and Board of Commissioners of Issuers or Public Companies, Art. 23.
[145] Interview 9. Dated on February 13, 2024.
[146] Richard W. Carney & Natasha Hamilton-Hart, *What Do Changes in Corporate Ownership in Indonesia Tell Us?* 51 BULLETIN OF INDONESIAN ECONOMIC STUDIES 123, 123-145 (2015); Interview 2. Dated on December 12, 2023; Interview 4. Dated on January 18, 2024.
[147] Interview 2. Dated on December 12, 2023.

independent commissioners are chosen based on political power and connections rather than relevant expertise or independence.[148]

One of the independent commissioners we interviewed shared a particularly telling experience. He recounted being dismissed from the BOC due to his disapproval of a BOD business decision that he deemed not commercially feasible and heavily driven by the controlling shareholders' interests.[149] The interviewee confirmed that such dismissals regularly occur when independent commissioners challenge the BOD with respect to transactions that benefit the controlling shareholder. [150] This anecdote vividly illustrates the vulnerability of independent commissioners to retaliation when they attempt to fulfill their oversight responsibilities in a manner that conflicts with the interests of controlling shareholders.

Furthermore, the ability of independent commissioners to effectively perform their supervisory functions may be compromised by a dominant controlling shareholder using their functional authority to assign them to perform tasks beyond the scope of authority of the BOC. Our interviews revealed that independent commissioners sometimes were pressured by the controlling shareholder to perform management functions in areas in which they had expertise, such as the digital economy and bankruptcy. [151] When BOC members performed such managerial roles, they were left unsupervised and it distracted from their primary supervisory function as independent commissioners.[152]

III.C.3. Government-Linked ICs: A Risk of Corruption and Reason for Incompetence

The prevalence of government-linked independent commissioners introduces another layer of complexity and potential compromise to Indonesia's corporate governance landscape. Our hand-collected data on Indonesia's 100 largest companies reveals a striking statistic: 29.11% of independent commissioners (69 out of 237) previously held positions as high-ranking government officials, military officers, police officials, or presidential campaign officers.[153] When focusing solely on SOEs within the top 100 companies, this percentage rises dramatically to 45.3% (29 out of 64), compared to 21.9% (38 out of 173) in privately owned listed enterprises (POEs).[154] As described below, there is some evidence suggesting that this problem has been significantly exacerbated following Indonesia's 2024 presidential election.

While there may be legitimate reasons for former government officials to serve as independent commissioners, such as their expertise in navigating complex regulatory environments, the high proportion of politically connected appointees raises significant concerns. Board seats

[148] Interview 3. Dated on December 14, 2023; Interview 6. Dated on February 1, 2024; Interview 8. Dated on 5 February, 2024.
[149] Interview 4. Dated on January 18, 2024.
[150] Interview 4. Dated on January 18, 2024.
[151] Interview 2. Dated on December 12, 2023; Interview 5. Dated on January 21, 2024.
[152] Interview 2. Dated on December 12, 2023; Interview 5. Dated on January 21, 2024.
[153] Data collected during the course of September – December 2022; Bonardo Wahono, "Fortune Indonesia 100: Seratus Perusahaan Terbesar Indonesia", [One Hundred Largest Companies in Indonesia] https://www.fortuneidn.com/business/bonardo/fortune-indonesia-100-seratus-perusahaan-terbesar-indonesia
[154] Data collected during the course of September – December 2022; Bonardo Wahono, "Fortune Indonesia 100: Seratus Perusahaan Terbesar Indonesia" [One Hundred Largest Companies in Indonesia], https://www.fortuneidn.com/business/bonardo/fortune-indonesia-100-seratus-perusahaan-terbesar-indonesia

given to politically connected independent commissioners – especially in SOEs – may in some cases be used (or perceived to be used) to "reward" government officials, potentially exacerbating issues of corruption. In the case of private companies, the prevalence of politically connected independent commissioners may suggest that these companies feel compelled to navigate government regulations through personal connections, a troubling indication in a system that has grappled with corruption issues in the past.

Our interviews with independent commissioners corroborated these concerns. Multiple interviewees identified the selection of independent commissioners based on political connections – rather than relevant skills or expertise – as a significant problem.[155] This issue is particularly pronounced in regional SOEs, where governors, mayors, and regents receive a portion of the shares in these companies and may use their shareholder power to elect their political connections as independent commissioners.[156]

A recent and particularly egregious example illustrates the ongoing nature of this challenge. In the 2024 presidential election, at least 14 presidential campaign officers of the President-elect, who was supported by the incumbent President, were appointed as independent commissioners in strategic Indonesian state-owned oil and gas companies, a state electricity company, and a state mining company just days after the election – even before the results were officially confirmed.[157] Such blatantly political appointments underscore the difficulties in maintaining true independence in these crucial oversight roles.

Independent commissioners appointed through political connections face substantial challenges in performing their functions independently. Political agendas in state-owned enterprises often blur the distinction between national, corporate, and personal interests, undermining transparency and accountability.[158] This is especially problematic in projects initially deemed to be of important national interest, where the lines between public policy and corporate governance can become dangerously blurred.[159]

Furthermore, board members of SOEs often face a unique challenge: the fear of facing criminal charges, even when acting in good faith and with due diligence – despite Indonesia ostensibly having a business judgement rule. As explained in detail in Part IV below, this fear stems from the treatment of SOEs as extensions of the government,[160] potentially exposing board members

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[155] Interview 3. Dated on December 14, 2023; Interview 4. Dated on January 18, 2024.
[156] Interview 10. Dated on March 7, 2024.
[157] Amelia Yesidora, *Sejumlah Pendukung Prabowo dapat Jatah Komisaris BUMN, Ini Daftarnya* [A Number of Prabowo Supporters Get SOE Commissioner Allotments, Here's the List] https://katadata.co.id/berita/nasional/6669591ec4b89/sejumlah-pendukung-prabowo-dapat-jatah-komisaris-bumn-ini-daftarnya, (last visited Jul. 25, 2024).
[158] Milhaupt & Pargendler, *supra* note 63, at 477-479 ("[t]hese can be benign, as in the pursuit of corporate policies that enhance social welfare, even if they fail to maximize shareholder value. However, they can also be malign, as when SOEs favor political allies in awarding contracts to the detriment of both citizens and minority shareholders. Consequently, while the strong role of the state as a shareholder may mitigate managerial agency problems, it opens the door to private benefits of control, political favoritism, and corruption.")
[159] Interview 4. Dated on January 18, 2024. Interview 6. Dated on February 1, 2024; Interview 8. Dated on February 5, 2024.
[160] The issue lies on the unclarity of "assets separation" under state financial/treasury laws and business judgment rule protection under the Indonesian Company Law. Consequently, law enforcers often regard SOEs' assets as State's assets, where losses suffered by the SOEs are seen as State's loss basing the corruption accusation.

to accusations of corrupt practices.[161] This legal vulnerability can further inhibit independent commissioners from effectively challenging management decisions or raising concerns about potential governance issues in SOEs.[162]

In conclusion, the heavy reliance on independent commissioners within Indonesia's corporate governance framework, while ostensibly having some tenuous justification in theory based on Indonesia's "two-tier board" structure, faces significant practical challenges. The limited authority of independent commissioners, combined with the overwhelming influence of controlling shareholders and the prevalence of politically motivated appointments, raises serious questions about the effectiveness of this approach in promoting good corporate governance. These issues are particularly acute in the context of Indonesia's concentrated ownership landscape and the significant role of SOEs in the economy.

As we will explore in the next Part, addressing these challenges will require targeted reforms that consider Indonesia's unique corporate governance context and aim to enhance the independence and effectiveness of independent commissioners in practice. Such reforms must navigate the complex interplay between corporate law, political influences, and cultural norms to create a more robust and effective system of corporate governance in Indonesia.

Part IV: Reforming Independent Commissioners to Fit Indonesia's Corporate Governance Context: Hope for the Future

This Part proposes a comprehensive framework to enhance the effectiveness of independent commissioners in Indonesia's corporate governance system. Building on the analysis above, we present four key reforms tailored to address the specific challenges in Indonesia's corporate landscape while drawing on leading academic research and international best practices. First, we recommend modifying the election process for independent commissioners to give minority shareholders a meaningful voice. Second, we argue for expanding the authority of independent commissioners, particularly in overseeing related party transactions and managing conflicts of interest. Third, we propose implementing a mandatory cooling-off period for government officials and senior members of political parties and campaign teams before they can serve as independent commissioners, aiming to reduce political influence and strengthen independence. Fourth, we address the specific challenges faced by independent commissioners in SOEs, proposing reforms to respond to recent jurisprudence suggesting that board members in SOEs may be charged with corruption for making poor business decisions, despite Indonesia ostensibly having a business judgement rule. These proposals are designed to tackle the governance issues identified earlier and offer a path towards a more robust and effective system of corporate oversight in Indonesia. While ambitious, these reforms are necessary to align Indonesia's corporate governance practices with evolving global standards while respecting the country's unique legal and corporate governance context.

IV. A. A Portion of the ICs Should be Elected by Minority Shareholders

[161] Supreme Court of Indonesia, No. 121 K/Pid.Sus/2020, (March 9, 2020); Supreme Court of Indonesia, No. 2935 K/Pid.Sus/2021, (August 24, 2021); Supreme Court of Indonesia, No. 5124 K/Pid.Sus/2022, (September 6 2022).
[162] Interview 3. Dated December 14, 2023. Interview 8. Dated on February 5, 2024.

Drawing on Bebchuk and Hamdani's seminal research, we propose a paradigm shift in the election mechanism for Board of Commissioners (BOC) members in Indonesia.[163] Specifically, we advocate for a portion of these members to be elected by minority shareholders, a practice that has shown promise in various jurisdictions globally.[164] This approach is predicated on the notion that enhanced accountability to public investors can significantly bolster the efficacy of independent commissioners in their oversight role, particularly in the context of companies with controlling shareholders.

It is well recognized that the role of independent directors in controlled companies differs from that in dispersed ownership companies, as the nature of the agency problem shifts.[165] In controlled companies, the horizontal agency problem between controlling and minority shareholders becomes more prominent than the vertical agency problem between ownership and management. Recognizing this distinction, several jurisdictions have implemented specific provisions to ensure minority shareholders can elect at least some directors in companies with controlling shareholders.[166]

Italy, for instance, has adopted "a stricter requirement for a majority of independent directors in cases involving integrated company groups with pyramid structures that may contribute to more concentrated control."[167] The Italian model also mandates that at least one board member must be elected from a slate of candidates presented by minority shareholders.[168] Similarly, in Israel, at least two outside directors must be approved or appointed by a majority of the

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[163] Bebchuk & Hamdani, *The Elusive Quest for Global Governance Standards, supra* note 4, at 1302 ("[t]o be sure, under the assumption that the controlling shareholder dominates the company, a director's close ties with the company would normally imply her lack of independence from the controller as well. But the opposite does not hold: independence from the company does not necessarily imply independence from the controller."). Around the same time, Umakanth Varottil also recognized the problems of implementing independent directors in India – a corporate governance environment in which controlling shareholder predominate. Varottil suggested reforms to ensure minority voice in the election of independent directors: *see* Umakanth Varottil, *Evolution and Effectiveness of Independent Directors in Indian Corporate Governance*, 6 HASTINGS BUS. L.J. 281, 283, 314-317 (2010).

[164] OECD, OECD CORPORATE GOVERNANCE FACTBOOK, 186-187 (2023) (outlining the legal position of Brazil, India, Israel, Italy, Mexico, Peru, Portugal, Spain, Turkey and the UK regarding board representation of minority shareholders).

[165] John Armour, Henry Hasmann & Reiner Kraakman, *Agency Problems and Legal Strategies*, in REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 29, 30 (3d ed. 2017); John Armour et al., *The Basic Governance Structure: The Interests of Shareholders as a Class*, *in* REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 49, 72-77 (3d ed. 2017) (discussing the different jurisdiction's approaches to the agency problem using independent directors); OECD, OECD CORPORATE GOVERNANCE FACTBOOK, 135 (2023). *See also*, Luca Enrique & Paolo Volpin, *Corporate Governance Reforms in Continental Europe*, 21 JOURNAL OF ECONOMIC PERSPECTIVES 117, 122-125 (2007) (observing that agency problems become more severe in controlled companies compared to dispersed ownership companies).

[166] OECD, OECD CORPORATE GOVERNANCE FACTBOOK, 186-187 (2023). *See also*, Aurelio Gurrea-Martínez, *Towards a Credible System of Independent Directors in Controlled Firms*, 35 AUSTRALIAN J. CORP. L. 31 (2020).

[167] OECD, OECD CORPORATE GOVERNANCE FACTBOOK, 135 (2023). *See also*, Bebchuk & Hamdani, *The Elusive Quest for Global Governance Standards, supra* note 4, at 1299-1300; Giovanni Strampelli, *How to Enhance Directors' Independence at Controlled Companies*, 44 J. CORP. L. 103, 143-144 (2018); Bebchuk & Hamdani, *Independent Directors and Controlling Shareholders, supra* note 67, at 1283-1284. For a discussion on the Italian position describing measures with reference to related-party transactions, *see* Guido Ferrarini et al., *Corporate Boards in Italy*, *in* CORPORATE BOARDS IN LAW AND PRACTICE: A COMPARATIVE ANALYSIS IN EUROPE (Paul Davies et al. eds., 2013) 367, 400-405.

[168] OECD, OECD CORPORATE GOVERNANCE FACTBOOK, 186 (2023). *See also*, Bebchuk & Hamdani, *The Elusive Quest for Global Governance Standards, supra* note 4, at 1301; Bebchuk & Hamdani, *Independent Directors and Controlling Shareholders, supra* note 67, at 1291.

minority shareholders,[169] while India provides for the nomination of one director by small shareholders.[170] In Peru, corporations are obliged to constitute their board of directors with representation of the minority, and Portugal requires public listed companies to provide mechanisms for minority shareholder representation on the board.[171] The United Kingdom has taken a unique approach for premium listed companies with controlling shareholders, requiring their constitutions to provide for the election of independent directors by a dual voting structure, necessitating approval from both shareholders as a whole and independent shareholders as a separate class.[172] The Brazilian Corporate Law provides perhaps one of the most relevant examples as it provides minority shareholders with special appointment rights with respect to the board of supervisors (*conselho fiscal*)[173] (and additionally allows minority shareholders holding specific percentages of voting or non-voting shares to elect one or two board members to the board of directors (*conselho de administracao*)).[174] The diversity of countries which have adopted a mechanism for minority shareholder voice in the election of independent board members suggests that Indonesia could examine these experiences and fashion a system to ensure more minority voice in the election of independent commissioners.

Implementing such a reform in Indonesia, however, is not without its challenges. The country's corporate governance framework is characterized by high quorum requirements for shareholder meetings, a feature that can prove particularly onerous for minority shareholders.[175] This is compounded by a pervasive pattern of passive behavior among minority shareholders, a phenomenon that is not unique to Indonesia but is particularly pronounced in its corporate landscape.[176] The geographical peculiarities of Indonesia, an archipelagic nation spanning over 17,000 islands, further exacerbate these challenges by making physical attendance at shareholder meetings a logistical hurdle for many investors.

Moreover, the limited role of institutional investors in Indonesia's capital markets presents an additional obstacle.[177] Unlike in more developed markets where institutional investors can serve as a counterbalance to controlling shareholders, their influence in Indonesian listed companies is frequently marginal or nonexistent.[178] This lack of institutional investor engagement is particularly problematic given the potential of such entities to coordinate minority shareholder interests and promote more effective corporate governance.

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[169] OECD, OECD CORPORATE GOVERNANCE FACTBOOK, 186 (2023).
[170] For the corporate context in Brazil, *see* OECD, OECD CORPORATE GOVERNANCE FACTBOOK, 186 (2023). For the corporate context in India, *see* COMPANIES ACT 2013, §151 (INDIA).
[171] GENERAL CORPORATION LAW, Art. 164 (Peru).
[172] OECD, OECD CORPORATE GOVERNANCE FACTBOOK, 187 (2023); Luca Enrique, Henry Hansmann, Reinier Kraakman & Mariana Pargendler, *The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies* in REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH, 83 (3d ed. 2017).
[173] BRAZIL CORPORATIONS LAW, Art. 161.
[174] BRAZIL CORPORATIONS LAW, Art. 141.
[175] Undang-undang (UU) Nomor 40 Tahun 2007 tentang Perseroan Terbatas [Law No. 40/2007 concerning Company Law], Aug. 16, 2007, Art. 86(1) (Republic of Indonesia), https://peraturan.bpk.go.id/Details/39965.
[176] Kenneth Scott, *Corporate Governance and East Asia*, *in* FINANCIAL MARKETS AND DEVELOPMENT: THE CRISIS IN EMERGING MARKETS 335 (Alison Harwood, Robert Litan & Michael Pomerleano eds., 1999).
[177] Luther Lie & Yetty Komalasari Dewi, *An Ineffective Institutional Investors Law in Indonesia? Why Bother*, 11 INDON. L. REV., 231 (2021). See generally, Puchniak, *The False Hope of Stewardship, supra* note 19.
[178] Michael Bowe & Daniela Domuta, *Investor herding during financial crisis: A clinical study of the Jakarta Stock Exchange*, 12 PACIFIC-BASIN FINANCE JOURNAL, 387-418 (2004). See generally, Puchniak, *The False Hope of Stewardship, supra* note 19.

To address these challenges, a multifaceted approach is necessary. One potential solution lies in the modernization of Indonesia's voting infrastructure and education of retail investors. The implementation of secure and accessible remote voting systems could significantly lower the barriers to minority shareholder participation. Additionally, regulatory reforms to encourage the formation and active participation of institutional investor associations could help coordinate minority shareholder interests and amplify their voice in corporate governance matters. The Indonesian Financial Services Authority (OJK) and the IDX could play a pivotal role in facilitating these changes, potentially through the introduction of stewardship codes or other soft law mechanisms that encourage institutional investor engagement.[179]

Furthermore, consideration should be given to the adoption of a slate voting system, similar to that employed in Italy. Under such a system, minority shareholders would have the right to propose their own slate of candidates for independent commissioner positions. This approach has proven effective in increasing minority shareholder representation on boards in Italy and could be adapted to suit the Indonesian context.[180] However, careful calibration would be necessary to ensure that such a system does not lead to board fragmentation or undermine the ability of controlling shareholders to set long-term corporate strategy. It may also be worthwhile considering the Italian restrictions on the removal of their equivalent to Indonesian commissioners, which requires approval by the court to avoid their unjustified removal by majority shareholders and to fix their remuneration for several years to increase their independence from controlling shareholders.[181]

Finally, recent insightful research by Lin highlights a further important challenge that Indonesia may face when reforming its electoral system for independent commissioners to protect minority shareholders from controlling shareholder abuse.[182] Lin's empirical study reveals that controlling shareholders often form repeat relationships with nominally independent directors, reappointing them to positions at other controlled entities. This phenomenon, which Lin terms "controlling shareholder patronage," can create conflicts of interest that undermine director independence.[183] In the Indonesian context, where family-controlled and state-owned

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[179] *See generally*, Dionysia Katelouzou & Dan W. Puchinak, *Global Shareholder Stewardship*, *in* GLOBAL SHAREHOLDER STEWARDSHIP, 3 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022); Nathaniel Mangunsong & Yetty K. Dewi, *Should Indonesia Adopt a Stewardship Code?* (Working Paper).

[180] Bebchuk & Hamdani, *Independent Directors and Controlling Shareholders, supra* note 67, at 1291 ("[a] 2013 study found that minority slates were submitted in forty percent of director elections"); Strampelli, *supra* note 167, at 132-137 (2018).

[181] Matteo Erede, *Governing Corporations with Concentrated Ownership Structure: Can Hedge Funds Activism Play Any Role in Italy?*, CLEA Annual Meeting Paper, 22-23 Available at SSRN: http://ssrn.com/abstract=1397562 (2009); Yaron Nili, *Missing the Forest for the Trees: A New Approach to Shareholder Activism*, 4 HARV. BUS. L. REV 157, 191-192 (2014) ("the prevalence of controlling shareholders within Italian corporations has necessitated the retention of mandatory provisions protecting minority shareholders").

[182] Da Lin, *Beyond Beholden,* 44 J. CORP. L. 515, 555-556 (2019) [hereinafter, Lin, *Beyond Beholden*] ("merely increasing the degree to which minority investors can influence director elections, without reducing controlling shareholders' ability to reward directors after the deal, cannot effectively induce nominally independent directors to have robust freezeout negotiations with controlling shareholders").

[183] *Ibid* at 518-519, 531-542 ("[i]n many cases, the director was independent in the conventional sense when she negotiated the freezeout, meaning that she had no ongoing or prior connections with the controller at that time. But after the freezeout closed, she obtained a job at another company that the controlling shareholder controlled.

enterprises dominate the corporate landscape, the risk of such patronage may be particularly acute.[184] Considering Lin's findings, it is crucial that any reforms to increase minority shareholder voice in independent commissioner elections also address the issue of post-appointment patronage. This could involve restrictions on independent commissioners taking positions with other entities controlled by the same shareholder for a certain period after their board service, or enhanced disclosure requirements regarding such relationships.

By implementing these reforms, Indonesia can enhance the independence and effectiveness of its corporate governance system, aligning it more closely with international best practices while addressing the specific challenges posed by its concentrated ownership landscape. Such changes would not only strengthen the role of independent commissioners but also provide a more robust mechanism for minority shareholder protection, ultimately contributing to a more balanced and effective corporate governance framework in Indonesia.

IV.B. ICs Should be Given the Broad Authority to Police RPTs

Building upon Strampelli's incisive analysis, this Article contends that Independent Commissioners (ICs) should be vested with expansive authority to approve or reject Related Party Transactions (RPTs) and Conflict of Interest Transactions (CITs).[185] This proposition is of salience in Indonesia's corporate milieu, which is characterized by a preponderance of controlling shareholders and complex group company ownership structures.[186]

The rationale for this reform is rooted in the recognition that RPTs and CITs represent a significant risk factor for minority shareholder expropriation in controlled companies.[187] By empowering independent commissioners with broad oversight authority over these transactions, the corporate governance framework can establish a more robust check against potential abuses by controlling shareholders. This approach aligns with international best practices and reflects

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From a director's perspective, these findings mean that she can obtain future benefits from the controlling shareholder if she acts in the controlling shareholder's interests").

[184] *Ibid* at 519, 551-554 ("[t]here has also been no serious discussion about how courts might obtain information on a director's expectations about future events, even though basic game theory teaches us that the director's behavior will be shaped by these beliefs. Courts are sometimes presented with evidence that a director received post-negotiations benefits from the controlling shareholder or that a particular controlling shareholder has a reputation for re-appointing friendly directors to other boards, but we have no principled framework for incorporating these insights into doctrine").

[185] Strampelli, *supra* note 167, at 142-144 ("[f]irst, enhanced-independence directors may be provided with a veto power over transactions that are influenced by controlling shareholder's without being actively involved in the negotiations. Second, enhanced-independence directors may be given a "weaker" veto power over the transaction."). *See also*, Bebchuk & Hamdani, *Independent Directors and Controlling Shareholders, supra* note 67, at 1307 (2017).

[186] Tony Tony, *Corporate Governance of Financial Conglomerates in Indonesia: Legal Issues and Gaps*, *in* CORPORATE GOVERNANCE IN BANKING AND INVESTOR PROTECTION: FROM THEORY TO PRACTICE (Belén Díaz Díaz, Samuel Idowu & Philip Molyneux eds, 2018) 151, 151-184 (2018).

[187] Dan W. Puchniak & Umakanth Varottil, *Related Party Transactions in Commonwealth Asia: Complicating the Comparative Paradigm*, 16 BERK. BUS. L. J. 1, 5 (2020); Luca Enriques & Tobias Tröger, *The Law and (Some) Finance of Related Party Transactions: An Introduction*, *in* THE LAW AND FINANCE OF RELATED PARTY TRANSACTIONS 1, 5 (Luca Enriques & Tobias Tröger eds, 2019).

a growing consensus among corporate governance scholars regarding the critical role of independent directors in mitigating agency conflicts in controlled firms.[188]

To operationalize this reform, several key measures should be considered. Firstly, the establishment of a mandatory IC committee tasked with reviewing all material RPTs and CITs would create a dedicated forum for scrutiny of these high-risk transactions. This committee should be granted the authority to engage independent advisors and access all relevant information necessary for a thorough evaluation of proposed transactions. Secondly, the implementation of a "two-tier" approval process, whereby material RPTs and CITs require both IC committee approval and ratification by a majority of minority shareholders, could provide an additional layer of protection against abusive related party dealings.

Moreover, enhanced disclosure requirements pertaining to the IC committee's decision-making process and rationale for approving or rejecting RPTs and CITs would foster greater transparency and accountability. Such disclosures should be sufficiently detailed to allow minority shareholders and market participants to assess the fairness and propriety of these transactions independently. This increased transparency could also have a deterrent effect, discouraging controlling shareholders from proposing transactions that are likely to face scrutiny and potential rejection.

The implementation of these reforms would necessitate amendments to Indonesia's Company Law and capital market regulations. The OJK, as the primary regulator of Indonesia's financial services and capital market sectors, would play a crucial role in drafting and enforcing these new provisions. Additionally, the Indonesia Stock Exchange (IDX) could support enforcement by enhancing its supervision, thereby ensuring that all listed companies adhere to these more stringent governance standards.

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[188] On the use of independent directors in controlled firms, *see generally*, Ronald J. Gilson, *Controlling Shareholders and Corporate Governance*, 119 HARV. L. REV. 1641, 1647 (2006); Carrado Malberti & Emiliano Sironi, *The Mandatory Representation of Minority Shareholders on the Board of Directors of Italian Listed Companies: An Empirical Analysis*, BOCCONI LEGAL STUDIES RESEARCH PAPER NO. 18 (2007); Bebchuk & Hamdani, *The Elusive Quest for Global Governance Standards, supra* note 4, at 1302; Varottil, *supra* note 163, at 283, 314-317; Marco Ventoruzzo, *Empowering Shareholders in Directors' Elections: A Revolution in the Making*, 8 ECFR 105 (2011); Bruno Salama & Viviane Prado, *Legal Protection on Minority Shareholders of Listed Corporations in Brazil*, Available at SSRN: https://ssrn.com/abstract=1856634 (2011); María Gutiérrez Urtiaga & Maribel Saez, *Deconstructing Independent Directors* EUROPEAN CORPORATE GOVERNANCE INSTITUTE - LAW WORKING PAPER NO. 186/2012, Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1986842 (2012); Guido Gerrarini & Marilena Filippelli, *Independent Directors and Controlling Shareholders Around the World* EUROPEAN CORPORATE GOVERNANCE INSTITUTE - LAW WORKING PAPER NO. 258/2014, Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443786 (2014); Zohar Goshen & Assaf Hamdani, *Majority Control and Minority Protection*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (Jeffrey Gordon & Wolf-Georg Ringe eds, 2015) 449; Bebchuk & Hamdani, *Independent Directors and Controlling Shareholders, supra* note 67, at 1283-1284 (2017); Baum, *supra* note 2, at 21; Lin, *Controlling Controlling-Minority Shareholders, supra* note 62; Matteo De Poli et al, *The Minority Directors in the Corporate Governance of EU Listed Institutions: A Chimera or a Possibility?* 24 MAASTRICHT J. EUROPEAN AND COMP. L. 43 (2017); Giovanni Strampelli, *supra* note 167; Bobby Reddy, *The Fat Controller: Slimming Down the Excesses of Controlling Shareholders in UK Listed Companies* 38 OXF. J. LEG. STUD. 733 (2018); Lucian Bebchuk & Asaf Hamdani, *The Perils of Small-Minority Controllers*, 107 GEO. L. J. 1453 (2019); Lin, *Beyond Beholden*, *supra* note 182; Nili, *supra* note 6; Gurrea-Martínez, *supra* note 166. More specifically, *see* Puchniak & Kim, *Varieties of Independent Directors in Asia, supra* note 4, at 119-123.

It is worth noting that similar reforms have been implemented with some success in other jurisdictions with concentrated ownership structures. For instance, Hong Kong's listing rules require independent board committee approval and independent financial advisor opinions for certain connected transactions.[189] Similarly, Singapore's listing rules mandate shareholder approval for material interested person transactions.[190] While Indonesia has some similar rules,[191] taking into account its local context and the problems discussed above, we suggest that more stringent requirements are needed, such as enhancing the authority for independent commissioners to act alone (not only collectively as a board) and increasing the scope of authority for independent commissioners to review RPTs/CITs.[192] Adapting these international practices to the Indonesian context could significantly strengthen the country's corporate governance framework.

IV.C. There Should be a Political Cooling Off Period for All ICs

Based on our hand collected data, the phenomenon of independent commissioners being recruited from the ranks of powerful government officials is a distinctive feature of Indonesia's corporate governance landscape.[193] While this practice may offer certain advantages in terms of navigating complex regulatory environments, it also presents significant risks of political influence and potential corruption in corporate decision-making. To address this issue, we propose a mandatory "cooling-off period" for government officials and those with strong connections to the ruling political party (e.g., campaign officers for the ruling party) before they may serve as independent commissioners.

This cooling-off period would serve multiple purposes. Primarily, it would reduce the risk of direct political influence on corporate governance by creating a temporal buffer between an individual's governmental role and their corporate oversight responsibilities. This separation is crucial for maintaining the independence and objectivity of independent commissioners, particularly in a country where the lines between state and corporate interests can often be blurred. Moreover, such a measure would enhance the perceived independence of independent commissioners, thereby bolstering investor confidence in the integrity of corporate governance mechanisms.

The appropriate duration of this cooling-off period warrants careful consideration. A period of two to three years could be sufficient to mitigate immediate conflicts of interest while still allowing corporations to benefit from the expertise of former government officials. However, the specific duration should be determined based on a thorough analysis of Indonesia's political and corporate landscape, potentially involving consultations with relevant stakeholders including the OJK, IDX, and corporate governance experts.

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[189] MAIN BOARD LISTING RULES, (2020) Cap. 14A, 21, rr. 14A.40-14A.45 (H.K.); OECD, OECD CORPORATE GOVERNANCE FACTBOOK, 109, 111 (2023).
[190] SGX-ST LISTING MANUAL: MAINBOARD RULES RULEBOOK, (1999), rr. 912, 917(4) (Sing.); Puchniak & Varotill, *supra* note 187, at 22-24.
[191] OJK Regulation No. 42/POJK.04/2020 on Affiliated Party Transactions and Conflict of Interest Transactions.
[192] Interview 1. Dated on December 9, 2023.
[193] See *supra* Section III.C.3, 30-32.

Implementation of this cooling off period would require amendments to Indonesia's Company Law and potentially to regulations governing the appointment of directors and commissioners in state-owned enterprises. The OJK and the SOEs ministry could play a pivotal role in enforcing this requirement, potentially through the establishment of a registry of former government officials subject to the cooling off period.

It is worth noting that similar cooling off periods have been implemented in other jurisdictions, albeit often in the context of post-government employment restrictions rather than specifically for independent director roles. For instance, the United States imposes a one-year cooling off period for former senior executive branch employees before they can engage in certain lobbying activities.[194] While not directly analogous, such examples demonstrate the feasibility and acceptance of cooling off periods as a tool for managing conflicts of interest. Drawing an analogy to existing safeguards in other areas of corporate oversight underscores the feasibility and normative appropriateness of this measure.

This proposal also finds support within Indonesia's existing corporate governance architecture. The implementation of a political cooling-off period for independent commissioners would not be without precedent in Indonesia's corporate governance framework. Clear domestic precedent for such a safeguard exists in the auditing context: external auditors are subject to a mandatory cooling-off period after completing a term of service with a company, to preserve their independence and avoid familiarity threats. Specifically, under OJK Regulation No. 13/POJK.03/2017, a public accountant may audit the same client for up to three consecutive financial years, after which a two-year cooling-off period is required before reassuming the audit role.[195] Although external auditors are arguably more closely tied to the company through their direct contractual relationships, the principle underpinning this rule—safeguarding the integrity of corporate oversight by mitigating conflicts of interest—applies with at least equal, if not greater, force to independent commissioners who have recently held powerful political positions. If Indonesian law already accepts the necessity of a cooling-off period to protect auditor independence, the case for imposing a similar buffer to insulate corporate boards from undue political influence is arguably even stronger.

Critics might argue that such a cooling off period could deprive corporations of valuable expertise and connections. However, this concern can be mitigated by ensuring that the pool of potential independent commissioner candidates is sufficiently broad and diverse. Efforts to develop a professional class of independent commissioners, through training programs and certification processes, could help ensure a steady supply of qualified candidates who are not subject to the cooling off period.

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[194] Under the Securities Exchange Act of 1934, the SEC has adopted amendments imposing a mandatory colling off period for rule 10b5-1 trading plans. As the law currently stands at the time of writing, rule 10b5-(1)(c)(1) of the Securities Exchange Act has been amended to include a minimum 90-day "cooling-off" period between the time that the plan is in force and the first trade conducted under the plan. The reason as to why the rule was amended is to discourage corporate insiders from abusing the previous rule 10b5-1 plan: *see*, Securities and Exchange Commission, Final Rule: Insider Trading *Arrangements and Related Disclosures*, 31 (Available at https://www.sec.gov/files/rules/final/2022/33-11138.pdf).

[195] Otoritas Jasa Keuangan (OJK) [Financial Services Authority], Reg. No. 13/POJK.03/2017 on the Use of Public Accountants and Public Accounting Firms in Financial Services Activities (2017), https://ojk.go.id/id/berita-dan-kegiatan/publikasi/Documents/Pages/Penggunaan-Akuntan-Publik-dan-KAP-dalam-Kegiatan-Jasa-Keuangan/POJK%20No.%2013_POJK.03_2017.pdf.

Furthermore, this reform should be viewed as part of a broader effort to professionalize and enhance the independence of corporate boards in Indonesia. Complementary measures could include mandatory training programs for independent commissioners, more stringent disclosure requirements regarding independent commissioners' backgrounds and potential conflicts of interest, and regular evaluations of independent commissioner performance and independence.

In conclusion, the implementation of a political cooling off period for independent commissioners represents a significant step towards enhancing the independence and integrity of corporate governance in Indonesia. By creating a meaningful separation between political office and corporate oversight, this reform would directly address concerns about political influence and corruption in the corporate sector, thereby fostering greater trust in Indonesia's capital markets and corporate governance framework.

IV.D. ICs in SOEs: Clarifying Asset Separation, The Business Judgement Rule and Anti-Corruption Measures

A lack of clarity and potential conflicts between The State Financial Law (Law 17/2003), the Treasury Law (Law 1/2004), the Anti-Corruption Law (Law 30/2002 as amended by Law 19/2019), the Indonesian Company Law,[196] and the SOEs Law[197] have created significant challenges for the governance of SOEs, particularly regarding the separation of corporate assets and state assets. This issue has profound implications for the duties and potential liabilities of board members, including independent commissioners, and requires urgent legislative attention to ensure effective corporate governance in SOEs.

In interpreting the above laws, the Constitutional Court found that SOEs' assets are essentially state assets,[198] contradicting the Indonesian Company Law's principle that a company's assets are distinct from its shareholders'.[199] This legal ambiguity has effectively nullified the asset separation doctrine for SOEs, despite their status as separate legal entities.[200]

This erosion of asset separation has led to a troubling situation where any financial loss incurred by an SOE, even those resulting from sound business decisions, is considered a loss to the

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[196] Undang-undang (UU) Nomor 40 Tahun 2007 tentang Perseroan Terbatas [Law No. 40/2007 concerning Company Law], Aug. 16, 2007, Art.3(1) (Republic of Indonesia), https://peraturan.bpk.go.id/Details/39965.

[197] Undang-Undang (UU) Nomor 19 Tahun 2003 tentang Badan Usaha Milik Negara [Law No. 19/2003 concerning State Owned Enterprise], Jun. 19, 2003, Art. 1(10) (Republic of Indonesia), https://peraturan.bpk.go.id/Details/43919/uu-no-19-tahun-2003. The law was amended at the end of February 2025 and the official draft bill was only made available to the public several weeks after the amendment. As such, any analysis related to the State Owned Enterprises Law in this Article refers to the old, pre-February 2025 version, of the State Owned Enterprises Law.

[198] Constitutional Court of Republic Indonesia, No. 62/PUU-XXI/2013, (September 18, 2014).

[199] Undang-undang (UU) Nomor 40 Tahun 2007 tentang Perseroan Terbatas [Law No. 40/2007 concerning Company Law], Aug. 16, 2007, Art.3(1) (Republic of Indonesia).

[200] Undang-undang (UU) Nomor 19 Tahun 2003 tentang Badan Usaha MIlik Negara [Law No. 19/2003 concerning State Owned Enterprises], Jun. 19, 2003, Art.35(2)-39 (Republic of Indonesia), 43919. For an enlightening comparative perspective on this issue generally see, Mariana Pargendler, *Veil Peeking: The Corporation as a Nexus for Regulation*, 169 U. PA. L. REV. 717, 773-776 (2021).

state.[201] Consequently, board members involved in such decisions may face corruption charges based on alleged "negligence."[202] While the Business Judgment Rule theoretically protects decisions made in good faith and with due care, its application remains discretionary. There have been instances where individuals were held criminally liable despite the apparent applicability of this rule.[203]

To address these issues and strengthen corporate governance in Indonesian SOEs, we propose a three-part approach. First, there is an urgent need for legislative clarification on the distinction between corporate assets and state assets in SOEs. This should align with international best practices and reinforce the principle of separate legal personality fundamental to corporate law. Such a distinction would ensure that poor business decisions are not automatically treated as corrupt practices or misuse of state assets.[204] Second, we advocate for strengthening the application of the Business Judgment Rule in SOEs. This could involve establishing clearer criteria for its application and potentially shifting the burden of proof to better protect board members acting in good faith and with due diligence. Finally, once the asset separation issue is resolved, we propose implementing robust safe harbour provisions and whistleblower protections.[205] These measures would be crucial for board members, particularly independent commissioners, who identify and report genuine cases of corruption, fraud, or self-dealing within SOEs. Such provisions would encourage vigilance and promote transparency without fear of unjust repercussions against them by the incumbent government.

By implementing these reforms, Indonesia can significantly enhance its SOEs governance framework. This would protect board members acting in good faith while ensuring SOEs can operate effectively in a competitive environment, maintaining appropriate accountability for state resources. Moreover, these changes would align Indonesian SOEs governance more closely with international standards, potentially increasing investor confidence and improving overall SOEs performance.

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[201] Undang-undang (UU) Nomor 17 Tahun 2003 tentang Keuangan Negara [Law No. 17/2003 concerning State Finances], Apr. 5, 2003, Art.2(g) (Republic of Indonesia), 43017. Efendi et al., *Kerugian Bisnis Persero: Business Judgment Rule versus Delik Korupsi*, 6 *J. Pembangunan Hukum Indones.* 193, 198–201 (2024).

[202] Peraturan Pemerintah (PP) Nomor 23 Tahun 2022 tentang Perubahan Atas Peraturan Pemerintah Nomor 45 Tahun 2005 tentang Pendirian, Pengurusan, Pengawasan dan Pembubaran Badan Usaha Milik Negara (BUMN) [Government Regulation No. 23/2022 concerning Amendment to Government Regulation Number 45 of 2005 concerning the Establishment, Management, Supervision and Dissolution of State-Owned Enterprises (BUMN)], Jun. 8, 2022, Art. 27(3) (Republic of Indonesia), 43017.

[203] Supreme Court of Indonesia, No. 121 K/Pid.Sus/2020, (March 9, 2020); Supreme Court of Indonesia, No. 2935 K/Pid.Sus/2021, (August 24, 2021); Supreme Court of Indonesia, No. 5124 K/Pid.Sus/2022, (September 6 2022); Hidayat Salam, *JK Mengaku Bingung dengan Kasus Dugaan Korupsi Karen Agustiawan* [JK Admits to Being Confused by Karen Agustiawan's Alleged Corruption Case], KOMPAS, May 16, 2024. https://www.kompas.id/baca/polhuk/2024/05/16/jk-mengaku-bingung-dengan-kasus-dugaan-korupsi-karen-agustiawan.

[204] It should be noted that in certain contexts public law constraints in mixed enterprises may produce positive results for corporate governance: *see*, Puchniak & Lan, *Independent Directors in Singapore, supra* note 1, at 305-317. *See generally*, Mariana Pargendler et al., *In Strange Company: The Puzzle of Private Investment in State-Controlled Firms*, 46 CORNELL INT'L. L. J. 569 (2013).

[205] It is noteworthy that the idea of whistleblowing protections to address corporate governance issues that perpetuate corruption is not entirely novel. In an insightful article focusing on addressing the problem of corruption and controlling shareholders, Davis and Pargendler suggest the use of whistleblowing protections as one of several mechanisms to address this problem: *see* Kevin E. Davis & Mariana Pargendler, *Corruption and Controlling Shareholders*, 25 THEORETICAL INQUIRIES IN LAW 107, 129 (2024). *See for eg*, Securities Exchange Act of 1934, 15 U.S.C. § 78u-6 (2022) (US).

Part V: Conclusion – Indonesia's Corporate Governance Evolution: Harbinger of a New Global Paradigm?

This Article has examined Indonesia's unprecedented decision to abolish the requirement for independent directors on the boards of its listed companies, a move that stands in stark contrast to prevailing global corporate law and governance norms. Our analysis reveals a complex interplay of historical, political, and economic factors that have shaped this distinctive trajectory in Indonesian corporate governance.

The initial adoption of independent directors in Indonesia, as we have demonstrated, was largely a product of external pressures and the perceived need to signal compliance with Anglo-American-cum-global standards of "good" corporate governance in the aftermath of the Asian Financial Crisis. This transplantation of a foreign concept into Indonesia's civil law, "two-tier board" system exemplified a broader trend of importing "legal misfits", often driven by "halo signaling", into diverse corporate governance landscapes, particularly across Asia.[206] However, Indonesia's subsequent pivot away from this model, culminating in the 2018 abolition of the independent director requirement, represents a significant departure from this global convergence narrative. [207]

Our empirical findings underscore the profound impact of this regulatory shift. By 2023, not a single independent director was reported in Indonesia's 20 largest listed companies, marking a complete reversal from the pre-2018 landscape.[208] This dramatic change reflects Indonesia's conscious decision to realign its corporate governance framework with its Dutch civil law heritage and "two-tier board" structure, eschewing the Anglo-American model in favor of a system centered on independent commissioners within the board of commissioners.

While this move may have some tenuous theoretical grounding based on Indonesia's corporate "two-tier board" system, our research has identified significant practical challenges that may undermine its effectiveness. The limited legal authority of independent commissioners, the pervasive influence of controlling shareholders, and the prevalence of politically connected appointments in a system that has struggled with corruption all pose substantial risks to the

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[206] For an analysis on "legal misfits", *see generally*, Puchniak, *The False Hope of Stewardship, supra* note 19; Puchniak, *An Asian Solution for a Global Problem, supra* note 19, at 1-6; Lim & Puchniak, *Can a Global Legal Misfit be Fixed?*, *supra* n 17. For a discussion on "halo signalling", *see* Puchniak & Kim, *Varieties of Independent Directors in Asia, supra* note 4, at 112; Puchniak & Lan, *Independent Directors in Singapore, supra* note 1, at 272; Koh, Puchniak & Goto, *Shareholder Stewardship in Asia*, *supra* note 56, at 626.

[207] For a discussion on the non-convergent theory of global corporate governance, *see* Puchniak & Varotill, *supra* note 187, at 38-41 (arguing that there is a need to understand the local context and its respective complexities rather than assuming convergence towards a simple global model); Goto, Koh & Puchniak, *Diversity of Shareholder Stewardship in Asia*, *supra* note 4, at 868-869 (arguing that the adoption of stewardship codes in some Asian jurisdictions serves more as a signal of compliance with global governance ideals than a substantive change in corporate governance); Puchniak & Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship, supra* note 20, at 997; Koh, Puchniak & Goto, *Shareholder Stewardship in Asia*, *supra* note 56, at 621-623.

[208] See *infra* Appendix 1 – Independent Directors in Top 20 Indonesian Companies, 44-51.

robustness of this governance mechanism. These challenges underscore the need for targeted reforms to enhance the independence and efficacy of independent commissioners in practice.

To address these issues, we have proposed a suite of bespoke reforms tailored to Indonesia's specific corporate landscape. These include modifying the election process for independent commissioners to empower minority shareholders, expanding the authority of independent commissioners in overseeing related party and conflict of interest transactions, implementing a mandatory cooling-off period for government officials and politically connected persons before they can serve as independent commissioners, and strengthening the business judgement rule and adopting whistleblowing protections for independent commissioners in SOEs. These proposals aim to strike a balance between respecting Indonesia's unique legal and corporate governance context and addressing the practical shortcomings of the current system.

Indonesia's bold departure from the global norm of independent directors may portend a broader shift in the evolution of corporate governance globally.[209] As regionalization supplants globalization and Asia's economic influence continues to grow, we are witnessing the emergence of more autochthonous solutions to corporate governance challenges across the region.[210] Indonesia's approach, while idiosyncratic, may well be at the vanguard of this trend towards more localized governance solutions in an increasingly multipolar global economy. This shift has accelerated in the wake of the Trump administration's turn toward economic nationalism and its retreat from multilateralism, which undermined the perceived universality of Anglo-American governance ideals.

This development invites us to reconsider the long-held assumption of inevitable global convergence towards Anglo-American corporate governance norms.[211] Instead, it suggests a future characterized by greater diversity in governance models, with jurisdictions crafting solutions that are more closely attuned to their specific legal traditions, ownership structures, levels of development, and economic realities. Indonesia's experience demonstrates both the potential and the pitfalls of such an approach, offering valuable lessons for other jurisdictions seeking to chart their own course in corporate governance.

As we look to the future, the success of Indonesia's governance model will depend on its ability to effectively address the challenges we have identified while maintaining the flexibility to adapt to evolving economic and regulatory landscapes. The reforms we have proposed represent a starting point for this ongoing process of refinement and adaptation.

Ultimately, Indonesia's abolition of independent directors, once considered unthinkable in the context of global corporate governance norms, may be a harbinger of a new era of corporate

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[209] Nurgozhayeva & Puchniak, *Corporate Purpose Beyond Borders, supra* note 20, at 9-10 ("the future of transnational organization-based corporate governance will be more complex and regional in our increasingly multipolar world"); Puchniak & Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship, supra* note 20, at 997, 1019-1021.

[210] Nurgozhayeva & Puchniak, *Corporate Purpose Beyond Borders, supra* note 20, at 64-65 ("it appears that in this new regionalized world transnational organization-based corporate governance may be more regionally focused and less influential than in the past"); Puchniak & Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship, supra* note 20, at 1019-1021.

[211] Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439 (2001).

governance evolution. This era may be characterized by a more nuanced understanding of the interplay between global standards and local contexts, leading to the development of governance frameworks that are both internationally credible and domestically effective. As such, Indonesia's experience offers a compelling case study in the complex dynamics of corporate governance reform in an increasingly diverse and regionalized global economy.

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Appendix 1

Independent Directors in Top 20 Indonesian Companies

Name	Presence of Independent Director in Company							Notes	ID Staying on After the abolition of ID	Value of the Company (Feb '24)
	2017	2018	2019	2020	2021	2022	2023			
BCA (BBCA)	☑	☑	□	□	□	□	□	Erwan Yuris Ang became a director for BCA in 2011, for the period 2014-2019 Erwan Yuris Ang was labeled as Indpendent Director, as of 2020 Erwan Yuris Ang still a member of the BoD even though the position of ID has been abolished, He resigned in 2021	Yes	76.395 Billion USD
BRI (BBRI.JK)	□	□	□	□	□	□	□	No Independent Director	-	58.256 Billion USD
Mandiri (BMRI.JK)	□	□	□	□	□	□	□	No Independent Director	-	41 Billion USD

Bayan Resources (BYAN)	☑	☑	□	□	□	□	□	2008-2016 R. Soedjoko Tirtosoekotjo was Independent Director, in 2017-2019 Soemarno Witoro Soelarno labeled as Independent Director position abolished in 2020 and he is not on the BoD	No	41 Billion USD
Telkom Indonesia (TLKM)	□	□	□	□	□	□	□	No Independent Director	-	25.118 Billion USD
BNI (BBNI)	□	□	□	□	□	□	□	No Independent Director	-	25.117 Billion USD
Chandra Asri Petrochemical (TPIA.JK)	☑	☑	□	□	□	□	□	Suryandi joined the BoD in October 2013 and is still currently serving in the BoD. From 2014-2018 he was labelled as an Independent Director, during his tenure he has always served as Director of HR and Corporate Affairs	Yes	25.116 Billion USD

ASTRA (ASII.JK)	☑	☑	□	□	□	□	□	2014-2016 Djony Bunarto Tjondro is an Director with Gunawan Geniusahardja as Independent Director, 2017 Bambang Widjanarko Santoso is labeled as Independent Director, 2018 Bambang Widjanarko Santoso is Regular Director and Independent Director is Djony Bunarto Tjondro, 2019 the Position of Independent Director is abolished and Djony Bunarto Tjondro is Vice President Director, 2020 Djony Bunarto Tjondro is President Director	Yes	13.408 Billion USD
Indofood Sukses Makmus (ICBP)	☑	☑	□	□	□	□	□	2017 Sulianto Pratama was appointed as Independent Director, 2018 the label independent was removed but he was still a director until 2019	Yes	8.538 Billion USD

Sumber Alfaria Trijaya (AMRT)	☑	☑	□	□	□	□	□	Theignatius Agus Salim was Independent Director from 2015-2018, the position of Independent Director and the name Theignatius Agus Salim were absent from the 2019 Annual Report onwards	No	7.238 Billion USD
Unilever Indonesia (UNVR.JK)	☑	☑	☑	☑	□	□	□	Sancoyo Antarikso joined the BoD in Mei 2012, from 2015-2019 he was labelled as an Independent Director, He resigned in 2020 from the Position of Governance & Corporate Affairs Director and Corporate Secretary	Yes	6.602 Billion USD
Hanjata Mandala Sampoerna (HMSP)	☑	☑	□	□	□	□	□	2018 Yos Adiguna Ginting was appointed as Independent Director, 2019 YAG was moved to Independent Commissioner, and	No	6.378 Billion USD

								replaced by Johannes B. Wardhana. 2020 Johannes B. Wardhana resigned as Independent Director, and 2020 there were no Independent Directors		
Dian Swastika Sentosa (DSSA)	☑	☑	□	□	□	□	□	Since 2012 labelled as "Non-Affiliated Director," then in 2017-2019 Susi susantijo labeled as Indpendent Director, 2020 Susi susantijo was appointed as a member of the Member of the Nomination Committee	Yes	6.3 Billion USD
Sinar Mas Agro Resources and Technology (SMMA)	☑	☑	□	□	□	□	□	Director since 2012, in 2017-2019 Ir. Lukmono Sutarto labeled as Independent Director, 2020 Ir. Lukmono Sutarto was appointed as a member of the Board of Commissioners	Yes	5.852 Billion USD

Barito Pacific (BRPT.JK)	☑	☑	☑	☑	☑	☑	□	Henky Susanto joined the BoD on June 2003, from 2015-2018 he was labelled as an Independent Director, resigned in 2018. Replaced in 2018 by David Kosasih as Independent Director. David Kosasih was labelled as Independent Director until 2022, but he is still serving on the BoD until now.	Yes	5.794 Billion USD
United Tractors (UNTR)	☑	☑	☑	□	□	□	□	Edhie Sarwono joined the BoD in 2007, from 2014-2020 he was labelled as Independent Director, with the position of Independent Director being abolished in 2020, however Edhie Sarwono is still a member of the BoD until now.	Yes	5.562 Bilion USD

Adaro Energy Indonesia (ADRO.JK)	☑	☑	□	□	□	□	□	A Director Since 2013, Julius Aslan has been Director and Chief of HRFA-IT, but in 2017-2018 Julius Aslan was labeled as Independent Director, but since 2019 the independent label was dropped and he is continuing as Director and Chief HRGA – IT Officer as of 2020	Yes	4.904 Billion USD
Indah Kiat Pulp and Paper (INKP)	☑	☑	□	□	□	□	□	Appointed Director in 2014, Suryamin Halim was always labeled as Independent Director, and resigned in 2019 with no one replacing him as ID.	No	3.03 Billion USD
Gudang Garam (GGRM)	☑	☑	□	□	□	□	□	Appointed Director in 2012, since 2014 - present Sony Sasono Rahmadi has been labeled as Independent Director	Yes	2.479 Billion USD

Indika Energy (INDY)	☑	☑	□	□	□	□	□	Director since 2009, 2014-2018 Eddy Junaedy Danu was labeled as Independent Director and Head of Legal and Corporate Risk Management, Eddy Junaedy Danu Continued in that role in 2019, but resigned in 2020	Yes	1.166 Billion USD

Notes:

1. Out of the Top 50 Companies by Market Capitalization in the Indonesian Stock Exchange, these companies were chosen because they have been consistently in the top 50 Companies by Market Cap since 2014 and therefore also have been though the changes in IDs regulation
2. The source for the valuation is available at https://idx.co.id/en/market-data/statistical-reports/digital-statistic/monthly/biggest-market-capitalization-most-active-stocks/biggest-market-capitalization. However, the value stated is in Indonesian Rupiah, to achieve the numbers in the value column, the number from the website was divided by Rp. 15.775,28, the Bank Indonesia Rate of Conversion for The Indonesian Rupiah to the United States Dollar as effective on March 4th, 2024.
3. Out of Top 20 Indonesian Public Companies from 2014-2022:
    a. 80% (16 Companies) of those Companies had Independent Directors 2017, the 4 that did not have Independent Directors were SOEs.
    b. Out of 16 Companies that had Independent Directors in 2017, by 2019, 81.25% (13 out of 16) did not report having any independent directors and by 2023 none of the companies reported having any independent directors.

Appendix 2

Interview	Date
Interview 1	December 9, 2023
Interview 2	December 12, 2023
Interview 3	December 14, 2023
Interview 4	January 18, 2024
Interview 5	January 21, 2024
Interview 6	February 1, 2024
Interview 7	February 1, 2024
Interview 8	February 5, 2024
Interview 9	February 13, 2024
Interview 10	March 7, 2024

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