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Takeovers, Poison Pills and Protectionism in Comparative Corporate Governance

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FESTSCHRIFT FUR KLAUS J. HOPT ZUM 70 GEBURTSTAG AM 24 AUGUST 2010 (Festschrift for Klaus J. Hopt for his 70th birthday on 24. August 2010), August 2010, pp. 795-815, S. Grundmann, B. Haar & H. Merkt et al, eds., De Gruyter, 2010

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Abstract

The regulation of hostile takeovers constitutes an interesting corporate governance microcosm. It is an area where clear contrasts in approach, regarding the balance of power between shareholders and the board of directors, are evident across different jurisdictions. Takeovers also reflect the dynamic operation of legal regulation (which includes the strategic responses of regulated parties themselves), and the growing tension between globalization and protectionism.

This paper analyses the regulation of hostile takeovers across a number of Western and Asian jurisdictions. First, the paper discusses the rise of takeovers and takeover defences in the United States. Against this backdrop, it examines recent developments in some other common law jurisdictions, such as the United Kingdom and Australia. It also raises the experience of the European Takeover Bid Directive, which Professor Hopt has described as "sobering", in view of the large number of members states adopting a protectionist stance towards the directive's implementation.

The theme of protectionism in takeovers is continued in discussion of takeovers and takeover defences in relation to two major Asian economies, Japan and China. As the paper shows, in spite of the apparent promise of open capital markets offered by globalization, protectionism is on the rise internationally and takeovers play a central role in this evolving story.

Keywords: hostile takeovers, takeover defences, poison pills, corporate governance, shareholders, directors, United States, United Kingdom, EU, Australia, Japan, China

JEL Classifications: G30, G 32, G34, G38, K22, K33

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Takeovers, Poison Pills and Protectionism in Comparative Corporate Governance

Jennifer G. Hill*

1. Introduction

"Forgive me, then, for bringing owls to Athens as a thanks-offering".

Goethe [1]

By the turn of the last decade, a range of factors had propelled comparative corporate governance to governmental and scholarly prominence.[2] Fanned by globalisation[3] and the influential "law matters" thesis,[4] a central issue at that time became whether corporate governance regimes around the world would converge.[5] Whereas some scholars considered this to be inevitable,[6] others suggested that the very notion of "convergence" is ambiguous,[7] and that the process is likely to be "slow, sporadic, and uncertain."[8]

This paper examines takeovers through a comparative law lens, and in the shadow of these fin de siècle debates. Takeover regulation constitutes an interesting corporate governance microcosm, where clear contrasts in approach are evident across jurisdictions. Context is crucial in this area, since takeover regulation confronts a range of principal-agent problems[9] that may vary depending upon underlying corporate ownership structures.[10] Takeovers also reflect the dynamic operation of legal regulation,[11] which includes the strategic responses of regulated parties themselves.[12] The structure of this paper is as follows. First, it discusses the rise of takeovers and takeover defences in the United States. Against the backdrop of the American experience, the paper then considers recent developments around the world, including in some other Western jurisdictions and two major Asian economies, Japan and China. As the paper shows, in spite of the apparent promise of open capital markets offered by globalisation and convergence theory, protectionism is on the rise internationally and takeovers play a central role in this evolving story.

2. Takeovers, Takeover Defences and the Balance of Power Between the Board and Shareholders in the US

2.1 The Rise of Takeovers in the US

> "[O]ur corporate law is not static. It must grow and develop in response to, indeed in anticipation off, evolving concepts and needs".
>
> *Unocal Corp v Mesa Petroleum Corp*[13]

The traditional mechanism in the United States for achieving corporate reconstructions was by way of merger, a procedure initiated and controlled by a company's board, rather than its shareholders.[14] Hostile takeovers made their first appearance in the US in the 1960s,[15] and subsequently attained renown during the 1980s, aided by a smorgasbord of novel financing techniques, such as junk bonds.[16] Takeovers offered the opportunity for potential acquirers to appeal directly to shareholders, thus bypassing the need to negotiate with the board.

The takeover boom of the 1980s[17] revived corporate theory, which had languished since the early 20th century, raising fundamental questions about the nature and purpose of the corporation.[18] Under agency theory, the market for corporate control emerged as the market's "ultimate disciplinary tool."[19] Supporters of a free market for corporate control differed, nonetheless, on the role of directors in responding to an unsolicited bid. Some scholars suggested a limited power in target management to seek out competing bids;[20] others advocated complete board passivity.[21] The divergence reflects differing conceptions of "efficiency". Professors Davies and Hopt have noted this tension, describing how rules that facilitate competing offers to enhance the bid price in particular transactions can, by deterring future initiating offers, effectively chill overall systemic efficiency of the market for corporate control.[22]

Not everyone was equally sanguine about the corporate governance benefits of the market for corporate control. Takeovers, particularly of the bust-up variety, exposed stark conflicts of interest between various stakeholders in the corporate enterprise.[23] Some influential managerialist commentators argued that the hostile takeover trend encouraged short-termism, predatory conduct by professional investors,[24] harmed stakeholders and the community, and constituted a fundamental attack on the central role of the board under US corporate law.[25] This critique provided an ideological justification for broad managerial discretion and paternalism toward shareholders, permitting the directors to fight fire with fire.[26]

Unocal Corp. v Mesa Petroleum Corp.[27] constituted a watershed decision in terms of consideration of agency conflicts, and the allocation of power between parties, in the takeover context. Recognising a target board's "omnipresent specter" of self-interest, the Delaware Supreme Court assessed board conduct

by reference to an enhanced scrutiny test, requiring the board's response to be "proportionate" to the threat posed by the hostile bid to the corporate enterprise.[28] Yet the level of scrutiny under the *Unocal* test was malleable, and directors enjoyed considerable leeway in the exercise of their discretion, including the right to consider the interests of non-shareholder constituencies.[29] *Revlon, Inc. v MacAndrews & Forbes Holdings*, *Inc*.[30] subsequently constrained managerial power where a target company was up for sale, holding that in these circumstances stockholder interests would be paramount and obliging directors to attain the highest share price.[31] Yet, in spite of *Revlon*[32] and some early Delaware Chancery Court case law that gave real bite to *Unocal's* proportionality test for assessing target board conduct,[33] later Supreme Court decisions firmly reinstated a presumption of managerial fiat, in the absence of board action that was preclusive, coercive, or had the primary purpose of interfering with the shareholder franchise.[34] Such approach is premised on the image of the board as less a gatekeeper than prime guardian of shareholder interests.[35] This protector role for the board has been viewed as a vital antidote to the danger of coercive bids and as necessary to stimulate auctions to increase share price.[36]

2.2 The Poison Pill (and Other Managerial Barricades) and the Current Shareholder Empowerment Debate

"The takeover wars are over. Management won."

Grundfest[37]

These legal developments legitimised defensive conduct[38] by US target boards from a theoretical perspective. All that was needed as a practical matter was an impregnable commercial strategy to impede unwelcome bids. This emerged with the 1982 creation of the celebrated poison pill, or shareholder rights plan.[39] Poison pills involve the issuance of a new class of preferred stock to common shareholders of a potential target company prior to an acquisition.[40] The stock contains inchoate rights, which will only be triggered by the acquisition of a specified percentage of target's stock.[41] The rights typically entitle the target company's shareholders, but not the hostile bidder, to acquire additional common stock at a discounted price. The essence of the poison pill has been described as "discriminatory dilution"[42] that makes a takeover bid more expensive and less palatable to a prospective acquirer. A significant part of the poison pill's allure was that it could be adopted by the board without the need for shareholder approval.[43]

US courts have typically been kind to poison pills. Within two years of their implementation, the Delaware Supreme Court declared poison pills valid;[44] only in relatively rare cases have they been judicially rejected.[45] *City Capital Assocs. v Interco, Inc.*[46] represents an atypical case in which Chancellor Allen identified troubling aspects of poison pills from an accountability perspective, stating that in certain circumstances they threatened "to diminish the legitimacy and authority of our corporation law."[47]

Some US commentators have suggested that the potency of this form of takeover defence has been overstated.[48] Nonetheless, when combined with a staggered board, the poison pill is indeed a formidable barrier to hostile bids.[49] Under Delaware law, directors may be elected for a staggered term of up to three years,[50] and, unless the certificate of incorporation provides otherwise, these directors can only be removed "for cause."[51] Such a limitation effectively insulates the directors by preventing an acquirer from obtaining control of the board in a single election.

By the early 1990s, a confluence of factors, such as the rise of constituency statutes, proliferation of poison pills, and less hospitable financial market conditions for takeovers,[52] led one commentator to declare that the takeover wars were over, with management the clear victor.[53] Nonetheless, this assessment was perhaps premature. These battles may simply have shifted to a new corporate governance arena: the current US shareholder empowerment debate.[54] A broad-based law reform agenda is now underway to grant shareholders stronger rights vis-à-vis management in a range of contexts, including nomination of directors[55] and executive remuneration decisions.[56] These reform proposals have provoked fierce controversy and backlash in the United States.[57] Also, in recent times there has been a sharp decline in staggered boards[58] and poison pills[59] at US companies due to institutional investor pressure.

3. A Comparison Between Takeover Law in the United States and Some Other Western Jurisdictions

> "While the focus in the UK has been on attracting capital, the focus in the US has been on attracting managers".
>
> Rickford[60]

> "The experience with the implementation of the 13th Directive on Takeovers is sobering indeed".
>
> Hopt[61]

An apparent assumption of the "law matters" hypothesis was that there exists a standardised common law model of corporate governance, offering superior legal protections to those found in civil law jurisdictions.[62] In fact, however, takeover laws in the United States and other common law jurisdictions, such as the United Kingdom[63] and Australia,[64] have divergent origins and have followed different paths in allocating power between shareholders and directors in takeovers.[65]

Takeovers emerged earlier in the United Kingdom than the US, and appear to have been generally welcomed there as a panacea to the country's post-WWII economic malaise.[66] A number of scholars have noted, and sought to explain, the United Kingdom's clear preference for shareholder interests in the takeover context,[67] in comparison with the US pattern of deference to management.[68] One possible explanation relates to regulatory structure. Some scholars have suggested that the UK self-regulatory regime, under the City Code on Takeovers and Mergers ("City Code"),[69] has favoured institutional investors,[70] unlike the US judicial model which supported managerial interests. There has also been a far lower level of tactical litigation in the United Kingdom than in the United States.[71] The contours of UK takeover regulation have been modified in recent times in accordance with European developments discussed below.[72]

Australian takeover law provides an interesting contrast to these jurisdictions. The Australian regime, which has been described as "unique",[73] has several home-grown features[74] that have tended to privilege equality of opportunity and fairness for minority shareholders over economic efficiency.[75] The regime is particularly restrictive by international standards. Like many other jurisdictions, but unlike the US, Australian takeover law ensures that majority and minority shareholders share equally any control premium. However, whereas UK law permits private control transactions that pass the relevant takeover threshold provided a general offer or "mandatory bid"[76] is then made to all shareholders, Australian takeover law prohibits an acquirer from passing the threshold *except* by means of a general bid.[77]

Takeover disputes in Australia were, as in the United States, traditionally decided by the courts. However, this changed in 2000, when, in an attempt to reduce widespread tactical litigation,[78] resolution of takeover disputes shifted to the Australian Takeovers Panel.[79] This procedural shift also resulted in a doctrinal change in the assessment of defensive conduct by target boards. The Takeovers Panel departed from the courts' previous fiduciary duty analysis of directors' defensive conduct, substituting its own "frustrating action" policy, which focused on the effect, rather than the purpose, of the directors' actions.[80] This constituted a major shift in the balance of power between

the board of directors and shareholders during a bid under Australian law.[81] The board is further constrained in both Australia and the United Kingdom by the fact that neither US-style poison pills,[82] nor US-style staggered boards[83] are legally permissible. Another common jurisdiction, Canada, permits poison pills,[84] but they have evolved in an idiosyncratic way, to confer paramount control on shareholders.[85]

What of Europe? Much ink has been spilled in recent years analysing the 13th Directive on Takeovers, ("Takeover Bid Directive"),[86] and the Byzantine route to its introduction,[87] so discussion here will be limited to a few salient points. The directive's apparent goals were to stimulate takeover activity in Europe and to create a level playing field through harmonisation.[88] Key elements of the directive – the mandatory bid rule in Article 5 and the anti-frustration rule in Article 9 – were based on the London City Code.[89] The controversial breakthrough rule in Article 11, which sought to achieve proportionality between capital and control, derived from recommendations of the 2002 Report of the High Level Group of Company Law Experts.[90]

Ultimately, the Takover Bid Directive may exemplify the potential gap in regulatory reform between motivation and outcome.[91] According to one commentator, if the main goal of the directive was maximisation of takeovers, then it has been "a spectacular failure".[92] Harmonisation[93] was weakened by a political compromise that rendered the anti-frustration and breakthrough rules merely optional under Article 12.[94] The majority of member states, perhaps unsurprisingly, have elected to opt out of these rules[95] and some, such as France, have strengthened their anti-takeover defences.[96] Also, in 2007 the proposed "one share, one vote" rule was abandoned in what has been called "a rare policy capitulation"[97] by the European Commission.

In a recent paper, Professor Hopt describes the experience with the Takeover Bid Directive as "sobering," in view of the large number of member states that appear to have adopted a protectionist stance towards the directive's implementation in response to populist fears of globalisation.[98] As the discussion below illustrates, this theme of economic protectionism is also of growing importance in parts of Asia.

4. Takeovers, Defensive Mechanisms and Protectionism: Recent Develpments in Asia

4.1 Japan

> "Until recently, Japan seemed destined to become the Galapagos Islands of the financial world".
>
> Nakamoto[99]

Japan constitutes a fascinating and evolving case study in the takeover realm.[100] In contrast to the United States, hostile acquisitions were until recently non-existent in Japan, due to the insulation provided by Japan's elaborate system of cross-shareholding and *keiretsu* relationships.[101] However, from the 1990s onwards, Japan's capital market structure altered significantly as a result of corporate law reforms to enhance flexibility,[102] the unravelling of stable cross-shareholdings, and increased foreign ownership.[103] These changes provided a basis for hostile takeovers and increased attention to shareholder interests.[104]

The effect of these corporate governance developments was revealed starkly in 2005, when Livedoor, an upstart Japanese internet company, launched a hostile takeover bid for Nippon Broadcasting,[105] transforming the "unthinkable" into reality.[106] In resultant litigation, the Tokyo District Court granted injunctive relief against a planned defensive stock warrant issue by the target board, on the basis that the directors' conduct was designed to maintain current managerial and ownership control, and was "grossly unfair" under the Japanese Commercial Code.[107] This decision was subsequently affirmed by the Tokyo High Court.[108]

The Nippon Broadcasting litigation raised business community concern about the prospect of hostile takeovers, particularly by predatory foreign corporations.[109] A flurry of government reports and guidelines concerning takeover defences followed.[110] These included joint guidelines issued by the Ministry of Economy, Trade and Industry ("METI") and the Ministry of Justice ("Guidelines"),[111] which sanctioned the adoption of pre-bid defences in certain circumstances.[112] Although the ostensible purpose of these non-binding Guidelines was to prevent "excessive defensive takeover measures", in fact they provided Japanese companies with a blueprint for ensuring the validity of any defensive mechanisms.[113] According to principles embedded in the Guidelines, takeover defences should seek to enhance corporate values and shareholder interests, reflect the shareholders' will, and be "necessary and reasonable in relation to the threat posed".[114] Whereas the emphasis on shareholders' will reflects a central principle under, for example, the UK and Australian takeover regimes, the final requirement is pure Delaware law.[115] The Guidelines expressly contemplated discrimination against a hostile bidder, an important feature of poison pills.[116] International business groups in Japan expressed anxiety that METI's guidelines could obstruct, rather than improve, corporate governance and chill foreign investment.[117]

As poison pills have declined in the United States,[118] they have increased dramatically in Japan. The number of Japanese companies using this defence rose from two in 2004 to 340 in 2007,[119] and 634 by 2008.[120] The efficacy of poison pills as a defence mechanism in Japan was demonstrated in 2007, when a plan by the activist US hedge fund, Steel Partners LLC ("Steel Partners"), which held a 10% interest in the Japanese company, Bull-Dog Sauce Co ("Bull-Dog"), to acquire the remaining shares, foundered when Bull-Dog's board adopted a poison pill that was subsequently approved by the target company's shareholders. The pill was a standard dilution scheme, but with a condition that the potential acquirer would receive cash in lieu of the shares to which other shareholders were entitled.[121] Steel Partners was unsuccessful in legal proceedings challenging the target board's conduct. The Tokyo District Court, High Court and Supreme Court all ruled that the defensive measure was lawful, though on somewhat different lines of reasoning.[122] The fact that the target shareholders had approved the defensive plan was a particularly significant factor in the District Court and Supreme Court judgments,[123] and it is open to doubt whether a similar defensive plan would be sanctioned if enacted solely by management.[124]

The Japanese *Foreign Exchange and Foreign Trade Act* of 1949[125] provides additional constraints by requiring advance notification and government approval for foreign investment in sectors deemed to be sensitive, such as national security.[126] In September 2007, Japan widened the scope of industries subject to such notification and government review.[127] The following year, METI raised national security objections to block an attempt by the UK hedge fund, The Children's Investment Fund, to double its stake to 20% in J-Power (Electric Power Development Co), a Japanese electricity company with nuclear power aspirations.[128] The acquisition by the Australian investment bank, Macquarie Bank, of a 20% stake in the Japanese company that owns Tokyo's Haneda airport facilities also prompted intense political debate.[129]

In spite of the resonance of US principles in recent corporate governance developments in Japan, few commentators consider this to provide evidence of any direct convergence toward a globalised standard.[130] For example, although accepting Delaware takeover law principles, Japan appear more cautious about the related concept of the independent director.[131] Institutional setting matters,[132] and it appears that Japan may have adapted certain Western corporate governance principles, without displacing, and perhaps even strengthening, its traditional concept of the community firm.[133] There have been some rare examples of successful shareholder activism, such as Steel Partners' 2009 victory in replacing the board of Aderans,[134] and recent evidence of a more shareholder-friendly stance by METI to encourage greater foreign investment.[135] Nonetheless, Japan's messages in this regard have been decidedly mixed.[136] Poison pills have arguably proven to be a functional equivalent of Japan's traditionally closed model of corporate governance,[137] and protective cross-shareholdings are

reappearing.[138] These developments have led the European Union Trade Commissioner to describe Japan, which has far less foreign investment than other developed economies,[139] as “a globalisation paradox”.[140] Others have simply declared that “Fortress Japan is back”.[141]

4.2 China

“China is not and has never been a law-oriented culture”.

Tay[142]

There is much current interest in corporate law developments in China. China is in the midst of “gaizhi,” or “transformation of the system.”[143] This development has converted China from a state-controlled system to one with a mixture of state and private enterprise elements.[144] China’s state-owned enterprises (“SOEs”) have been gradually transformed into partially privatised organisations, often in tranches.[145] This mode of restructuring has enabled the Chinese government to maintain strategic levels of control in certain enterprises.[146]

Like Japan, China was formerly insulated from the market for corporate control, but within the space of only a decade, M&A transactions are now a recognised feature of the corporate landscape.[147] These economic developments have generated a torrent of corporate legislation in a country which historically relied upon administrative regulations and *neibu*, rather than law.[148] The market regulator, the China Securities Regulatory Commission ("CSRC”) introduced new takeover regulations in 2002[149] and 2006,[150] with further amendments in 2008.[151]

China's emerging takeover law is interesting from the dual perspectives of the "law on the books" issue[152] and protectionism. China’s "on the books” takeover law is state of the art, containing, for example, a mandatory bid requirement of a 30% acquisition threshold to ensure sharing of a control premium and fairness between majority and minority shareholders.[153] However, to date, there has been a wide gap between China's formal takeover law and its operation in practice. The CSRC possesses a broad discretion to waive the 30% mandatory bid rule on a case-by-case basis. The CSRC has exercised this waiver power so often as effectively to subvert the operation of the mandatory bid rule altogether.[154] It also appears that the rule may not apply to acquisitions of control involving government-mandated transfers or allocation of State-owned assets.[155]

Trade protectionism is on the rise in China through a variety of different legal techniques.[156] Waivers of the mandatory bid rule could potentially be used in this way to discriminate between domestic and foreign bidders.[157] Waivers could constitute a subtle, and low visibility, way in which certain market players could receive favourable treatment within a protectionist framework.

In the wake of the global financial crisis, China has been on both sides of several recent international M&A skirmishes with protectionist overtones. In March 2009, the Chinese Ministry of Commerce ("Mofcom") used new competition laws, introduced as a condition to China's accession to the WTO,[158] to block a $2.4 billion bid by Coca-Cola Co for China Huiyuan Juice Group Ltd ("Huiyuan Juice"), in what would have been the largest foreign takeover of a Chinese company.[159] The Huiyuan Juice takeover bid was seen as a litmus test in determining China's willingness to give foreign companies greater latitude in acquiring Chinese companies.[160] Although Chinese officials publicly denied trade protectionism in relation to the proposed deal, critics have argued that the Mofcom decision perpetuates foreign investment obstacles, particularly where loss of leading Chinese brands is at issue.[161]

China's investments abroad have grown exponentially in recent years, rising from $143 million in 2002 to $40.7 billion in 2008.[162] Increasingly, however, Chinese companies seeking such investment opportunities have themselves experienced protectionist pressures.[163] A high profile example of this phenomenon occurred when the Chinese oil production company CNOOC Ltd withdrew an $18.5 billion bid for Unocal Corp in 2005, in the face of intense pressure from the US Congress.[164]

More recently, Chinese corporations, seeking to buy stakes in the Australian resource sector, have received variable responses from Canberra. Under Australian law,[165] the Federal Treasurer is the ultimate arbiter of foreign investment decisions, advised by the Foreign Investment Review Board (FIRB).[166] In March 2009, only one week after the Chinese government rejected Coca- Cola's bid for Huiyuan Juice, the Australian government blocked a $1.8 billion bid by China Minmetals Nonferrous Metals Co. for the Australian company Oz Minerals Ltd, on "national security" grounds.[167] However, in the same month, Canberra approved an acquisition by Hunan Valin Iron and Steel of up to 17.55% of Fortescue Metals, Australia's third largest iron ore exporter.[168]

The most controversial transaction in Australia to date is the attempted acquisition by Chinalco of a $19.5 billion stake in the Anglo-Australian mining group Rio Tinto ("Rio") in 2009.[169] This constituted the largest overseas investment ever announced by a Chinese company.[170] The proposal included terms that would have entitled Chinalco to a boardroom presence at Rio as well as joint venture marketing rights in

relation to the iron ore.[171] Critics of the proposed transaction relied on the Chinese government's veto of Coca-Cola's bid for Huiyuan Juice as justification for an analogous rejection by the Australian government of Chinalco's bid.[172] The government was, however, spared the need to rule on the acquisition,[173] since the planned deal ultimately collapsed in acrimonious circumstances.[174] Rio, faced with shareholder opposition, abandoned Chinalco's proposal in favour of a joint venture with its Anglo-Australian competitor BHP Billiton Ltd ("BHP").[175] Speculation continues as to the possibility that the Chinese government might attempt to use its anti-monopoly powers, which have extra-territorial force,[176] to challenge the Rio-BHP joint venture.[177]

Scholars have predicted that, in spite of China's adoption of many Western style reforms, it remains highly unlikely that legal convergence will occur.[178] Rather, as in the case of Japan, it seems probable that China will adapt these reforms and ultimately retain its own distinctive legal tradition.[179]

5. Conclusion

> "Convergence in one area will be paralleled by renewed divergence in another."
>
> Hirshman[180]

Fundamental differences exist in takeover regimes, not only between common law and civil law jurisdictions, but also within the common law world itself. The allocation of power between corporate controllers and shareholders will vary, depending upon underlying corporate theory and who is viewed as the greater threat – a hostile bidder or the target company's own management.[181] The paper discusses developments concerning takeovers and takeover defences in a number of jurisdictions, including some, such as Japan and China, which have not until recently had a market for corporate control.

Some scholars have considered convergence of takeover law to be inevitable.[182] The developments discussed in this paper undoubtedly exhibit some common themes, such as the rise of protectionism in takeover law. However, they also show the dynamic nature of legal regulation, including adaptive conduct by regulated parties, and the uncertainty of outcome in legal transplantation, given underlying differences in legal cultures and enforcement mechanisms.[183] These developments serve as a reminder that a gap that often exists between motivation and outcome in regulatory reform,[184] and that convergence is indeed an uncertain process.[185]

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* Professor of Corporate Law, Sydney Law School; Visiting Professor, Vanderbilt University Law School; Research Associate, European Corporate Governance Institute. I am grateful to Greg Golding, Justice Randy Holland and Nico Howson for certain references, and to John Clayton Brett, Liam Burgess and Sean Wlodarczyk for their excellent research assistance.

[1] Letter from Goethe to Wilhelm von Humboldt, (Sept. 1, 1816), *available at* http://www.gutenberg.org/files/11366/11366-8.txt. Speaking on the subject of takeovers to an English audience in 2002, Professor Hopt said that he felt as if he were "carrying owls to Athens", or in the English vernacular, "carrying coals to Newcastle" (Klaus J. Hopt, *Takeovers, Secrecy, and Conflicts of Interest: Problems for Boards and Banks, in* TAKEOVERS IN ENGLISH AND GERMAN LAW 33, 33 (Jennifer Payne, ed., Hart Publishing, 2002)). I share this sentiment in writing on the same topic, given Professor Hopt's expertise in this area.

[2] Ronald J. Gilson & Mark J. Roe, *Understanding the Japanese Keiretsu: Overlaps Between Corporate Governance and Industrial Organization* 102 YALE L.J. 871, 872 (1993).

[3] *See* Arthur R. Pinto, *Globalization and the Study of Comparative Corporate Governance,* 23 WIS. INT'L L.J. 477 (2005).

[4] The "law matters" hypothesis postulated that capital market structure was directly linked to a country's corporate governance regime. *See, e.g.,* Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *Corporate Ownership Around the World,* 54 J. FIN. 471 (1999); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998).

[5] *See generally* Jennifer G Hill, *The Persistent Debate about Convergence in Comparative Corporate Governance,* 27 SYDNEY L. REV. 743 (2005).

[6] *See, e.g.,* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 468 (2001).

[7] *See*, *e.g.* Ronald J. Gilson, Globalising *Corporate Governance: Convergence of Form or Function*, *in* CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE 128, 158 (Jeffrey N. Gordon & Mark J. Roe eds., Cambridge Univ. Press 2004); Toru Yoshikawa & Abdul A. Rasheed, *Convergence of Corporate Governance: Critical Review and Future Directions*, 17 CORP. GOV.: AN INTL. REV. 388, 389-390 (2009).

[8] Curtis J. Milhaupt, *Property Rights in Firms*, *in* CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE 210, 213 (Gordon & Roe eds., Cambridge Univ. Press 2004).

[9] *See generally* Klaus J. Hopt, *Obstacles to Corporate Restructuring: Observations from a European and German Perspective*, *in* PERSPECTIVES IN COMPANY LAW AND FINANCIAL REGULATION 373, 376 (Michel Tison et al. eds., Cambridge Univ. Press, 2009).

[10] *See*, *e.g.*, Lucian A. Bebchuk & Assaf Hamdani, *The Elusive Quest for Global Governance Standards*, 157 U. PENN. L. REV. 1263; Klaus J. Hopt, *American Corporate Governance Indices as Seen from a European Perspective*, 158 U. PENN. L. REV. PENNUMBRA 27 (2009), *available at* http://www.pennumbra.com/responses/response.php?rid=79.

[11] *See* John C. Coffee, *Law and the Market: The Impact of Enforcement,* 156 U. PENN. L. REV. 229 (2007); Howell E. Jackson, *Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications*, 24 YALE JOURNAL ON REGULATION 253 (2007).

[12] See, *e.g.*, David A. Skeel, *Governance in the Ruin*, 122 HARV. L. REV. 696, 697 (2008); Curtis J. Milhaupt & Katharina Pistor, LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD. (Univ. of Chicago Press, 2008).

[13] 493 A. 2d 946, 957 (Del. 1985).

[14] Generally, a US statutory merger will be approved by the boards and shareholders of each constituent corporation. The board acts as gatekeeper in determining which transactions should be considered by shareholders. *See* CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: CASES AND MATERIALS 621, 755 (5th ed. 2006).

[15] *See* JESSE H. CHOPER, JOHN C. COFFEE & RONALD J. GILSON, CASES AND MATERIALS ON CORPORATIONS 945 (7th ed. 2008).

[16] *See*, e.g., Ronald Gilson & Reinier Kraakman, *Takeovers in the Boardroom: Burke versus Schumpeter*, 60 BUS. LAW. 1419, 1419 (2005).

[17] Between 1980 and 1988, for example, M&A activity in the United States increased from $44 billion to $247 billion. Marcel Kahan & Edward B. Rock, *How I Learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law*, 69 U. CHI. L. REV. 871, 873 (2002)

[18] *See* William Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264 (1992).

[19] Gilson & Kraakman, *supra* note 16, at 1424. *See also* Edward Rock, *America's Shifting Fascination with Comparative Corporate Governance,* 74 WASH. U. L.Q. 367, 374-375 (1996).

[20] *See, e.g.*, Lucian Arye Bebchuk, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028 (1982); Ronald J. Gilson, *Seeking Competitive Bids Versus Pure Passivity in Tender Offer Defens*e, 35 STAN. L. REV. 51 (1982).

[21] *E.g.*, Frank Easterbrook & Daniel Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981).

[22] *See* Paul Davies & Klaus Hopt, *Control Transactions, in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 225, 237 (Reineer Kraakman et al., eds., 2nd ed, Oxford Univ. Press, 2009).

[23] *Id.* at 229-230; John C. Coffee, *Shareholders versus Managers: The Strain in the Corporate Web*, 85 MICH L. REV. 1, 13 (1986).

[24] *See* Martin Lipton, *Takeover Abuses Mortgage the Future*, WALL ST. J., April 5, 1985.

[25] Martin Lipton, *Takeover Bids in the Target's Boardroom,* 35 BUS. LAW. 101,105-106 (1979).

[26] *Id.* at 113, 123.

[27] 493 A. 2d 946 (Del. 1985).

[28] *Id.* at 954. *See also* Ronald J. Gilson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?* 44 BUS. LAW. 247 (1989).

[29] *Unocal*, 493 A.2d at 955.

[30] 506 A.2d 173 (Del. 1986).

[31] *See generally* Leo E. Strine, Jr., *The Story of Blasius Industries v. Atlas Corp.: Keeping the Electoral Path to Takeovers Clear*, in CORPORATE LAW STORIES 243 (J. Mark Ramseyer ed., Foundation Press 2009).

[32] 506 A.2d 173 (Del. 1986).

[33] *See, e.g.*, City Capital Assoc. v. Interco, Inc, 551 A.2d 787, 798 (Del. Ch. 1988), where Chancellor Allen noted that the alleged "threat" was "far too mild" to justify the board's decision to keep a poison pill in place.

[34] *See, e.g.,* Paramount Comm'n, Inc. v. Time, Inc, 571 A.2d 1140 (Del. 1990). *See also* Unitrin, Inc v. American Gen Corp, 651 A.2d 1361 (Del. 1995); M.M. Companies, Inc v Liquid Audio, Inc, 813 A.2d 1118 (Del. 2003). *See also* Gilson & Kraakman, *supra* note 16, at 1428.

[35] *See* Stephen M. Bainbridge, *Unocal at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769, 772 (2006); Robert Thompson, *Takeover Regulation after the 'Convergence' of Corporate Law*, 24 SYDNEY L. REV. 323 (2002). *See* Leo E. Strine, *The Professorial Bear Hug: The ESB Proposal as a Conscious Effort to Make the Delaware Courts Confront the Basic 'Just Say No' Question*, 55 STAN. L. REV. 863, 872 (2002).

[36] *See, e.g.*, Leo Strine, *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 12 (2007).

[37] Joseph Grundfest, *Just Vote No: A Minimalist Strategy for Dealing with Barbarians Inside the* Gates, 45 STAN. L. REV. 857, 858 (1993).

[38] A wide variety of defensive tactics were used in the early 1980s, including, for example, shark repellents, greenmail and white knights. Kahan & Rock, *supra* note 17, at 874.

[39] Martin Lipton, *Twenty-Five Years After Takeover Bids in the Target's Boardroom: Old Battles, New Attacks and the Continuing War*, 60 BUS. LAW. 1369, 1372-1373 (2005). *See* William Carney & Leonard Silverstein, *The Illusory Protections of the Poison Pill,* 79 NOTRE DAME L. REV. 179, 181-2 (2003).

[40] For a detailed discussion of the technical operation of a shareholder rights plan, *see* Carney & Silverstein, *supra* note 39, at 183-186.

[41] *See* John Armour & David A. Skeel, *Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727, 1734 (2007).

[42] George Geis, *Internal Poison Pills*, 84 N.Y.U. L. REV. 1169, 1201 (2009); Tunde Ogowewo, *Tactical Litigation in Takeover Contests*, 2007 J. BUS. L. 589, n.2 (2007).

[43] Kahan & Rock, *supra* note 17, at 909. For discussion of a battle between the shareholders and directors of News Corporation concerning this aspect of poison pills, *see generally* Jennifer G. Hill, *Subverting Shareholder Rights: Lessons from News Corp's Migration to Delaware*, 63 VAND. L. REV. 1, 29ff (2010).

[44] *See* Moran v. Household International, Inc., 500 A.2d 1346 (1984). *See also* Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 519-522 (1987).

[45] The Delaware courts have invalidated some variations of the shareholder rights plan, such as so-called "dead hand" and "no hand" poison pills. See, *e.g.*, Carmody v. Toll Brothers, Inc., 723 A.2d 1180 (Del. 1998); Quickturn Design Systems, Inc. v. Shapiro, 721 A.2d 1281 (Del. 1998).

[46] 551 A.2d 787 (Del. Ch. 1988).

[47] City Capital Assoc. v. Interco, Inc, 551 A.2d 787, 799-800 (Del. Ch. 1988). Responding to the *Interco* case, Martin Lipton sent a memo to his clients depicting the decision as a "dagger aimed at the hearts of all Delaware corporations." Memorandum from Wachtell, Lipton, Rosen & Katz to clients, You Can't Say No

in Delaware No More, (Dec. 17, 1988), *reprinted in* Jeffrey N. Gordon, *Corporations, Markets, and Courts,* 91 COLUM. L. REV. 1931, 1959 n.95 (1991). *See also* Kahan & Rock, *supra* note 17, at 877.

[48] Kahan & Rock, *supra* note 17, at 871; *See* Carney & Silverstein, *supra* note 39, at 182. Carney and Silverstein consider that "the typical poison pill will make many bidders nauseous, but that it will not be fatal in most cases". *Id*. at 181. *Cf.* Geis, *supra* note 42, at 1201.

[49] *See* Lucian Bebchuk, John C. Coates IV, & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence and Policy,* 54 STAN. L. REV. 887, 890 (2002).

[50] DEL. CODE ANN., tit. 8, § 141(d) (2008).

[51] DEL. CODE ANN., tit. 8, § 141(k)(1) (2008).

[52] Kahan & Rock, *supra* note 17, at 878-879.

[53] Grundfest, *supra* note 37, at 858.

[54] Lipton, *supra* note 39, at 1369. *See generally* Jennifer G. Hill, *The Rising Tension Between Shareholder and Director Power in the Common Law World,* CORPORATE GOVERNANCE: AN INTERNATIONAL REVIEW (forthcoming 2010).

[55] *Cf.* Lucian Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 BUS. LAW. 329 (2010); Joseph Grundfest, *The SEC's Proposed Proxy Access Rules: Politics, Economics, and the Law*, 65 BUS. LAW. 361 (2010).

[56] *See generally* William Bratton & Michael Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653 (2010).

[57] *See, e.g.,* Lawrence Mitchell, *Protect Industry from Predatory Speculators,* FIN. TIMES, July 8, 2009, at 9; Martin Lipton, Jay Lorsch & Theodore Mirvis, *Schumer's Shareholder Bill Misses the Mark,* WALL ST. J., May 12, 2009, at A15.

[58] *See* Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129, 169 (2009); Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987, 1007-1009.

[59] *See* INST'L S'HOLDER SERV., POISON PILLS IN FRANCE, JAPAN, THE U.S., AND CANADA: TAKEOVER BARRIERS RISE IN EUROPE AND JAPAN, BUT FALL IN NORTH AMERICA 10-11 (May 2007), *available at* http://www.complianceweek.com/s/documents/PoisonPillPrimer.pdf.

[60] Jonathon Rickford, *Do Good Governance Recommendations Change the Rules for the Board of Directors?,* in CAPITAL MARKETS AND COMPANY LAW 461, 474 (Klaus J. Hopt & Eddy Wymeersch eds., Oxford Univ. Press, 2003).

[61] Klaus J. Hopt, *Obstacles to Corporate Restructuring: Observations from a European and German Perspective*, *in* PERSPECTIVES IN COMPANY LAW AND FINANCIAL REGULATION 373, 373 (Michel Tison et al. eds., Cambridge Univ. Press, 2009).

[62] *See* David A. Skeel, Jr., *Corporate Anatomy Lessons,* 113 YALE L.J. 1519, 1544-1545 (2004).

[63] *See* Brian R. Cheffins, CORPORATE OWNERSHIP AND CONTROL: BRITISH BUSINESS TRANSFORMED 360 (Oxford Univ. Press, 2008); Ross Cranston, *The Rise and Rise of the Hostile Takeover, in* EUROPEAN TAKEOVERS - LAW AND PRACTICE 77 (Klaus J. Hopt & Eddy Wymeersch eds., Butterworths 1992).

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64 *See generally* Elaine Hutson, *Regulation of Corporate Control in Australia: A Historical Perspective,* 7 CANTERBURY L. REV. 102 (1998).

65 *See* John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 18–22 (2001).

66 Takeovers developed from the 1950s in the United Kingdom. *See* Cheffins, *supra* note 63, at 360-361; Cranston, *supra* note 63, at 79.

67 *See, e.g.*, Armour & Skeel, *supra* note 41, at 1727. *See also* Paul Davies & Klaus Hopt, *Control* Transactions , *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 157, 172 (Reinier Kraakman et al. eds., Oxford Univ. Press, 2004).

68 *See, e.g.,* Martin Gelter, *The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance*, 50 HARV. INT'L L.J. 129, 134 (2009).

69 Under the UK takeover regime, a specialised non-judicial body, the Panel on Takeovers and Mergers administers the City Code on Takeovers and Mergers.

70 Armour & Skeel, *supra* note 41, at 1730-32. *See also* Davies & Hopt, *supra* note 67, at 172. A central feature of the City Code is the pre-eminence of shareholder decisionmaking during a takeover, under the "frustrating action" principle. *See* PANEL ON TAKEOVERS AND MERGERS, CITY CODE ON TAKEOVERS AND MERGERS, R. 21 (U.K.), *available at* http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/code.pdf.

71 *See* Ogowewo, *supra* note 42, at 607–09.

72 *Id*. at 590-92.

73 Justin Mannolini, *Convergence or Divergence: Is There a Role for the Eggleston Principles in a Global M&A Environment?,* 24 SYDNEY L. REV. 336, 358 (2002).

74 The 1969 Second Interim Report of the Company Law Advisory Committee ("Eggleston Committee Report") has been described as the "conceptual *grundnorm*" of Australia's takeover regime. *Id*. at 337.

75 *Id*. at 338.

76 For discussion of the benefits and potential costs to a mandatory bid rule, *see* Paul L. Davies, *The Notion of Equality in European Takeover Regulation*, *in* TAKEOVERS IN ENGLISH AND GERMAN LAW 9, 22-28 (Jennifer Payne, ed., Hart Publishing, 2002).

77 Mannolini, *supra* note 73, at 357-58.

78 Simon McKeon & Jonathan Farrer, *Expanding the Jurisdiction of the Takeovers Panel in the Aftermath of Glencore: A New Chapter Begins?,* 26 COMP. & SEC. L.J. 517 (2008).

79 The general consensus appears to be that the Australian Takeovers Panel has been a success. *See generally* McKeon & Farrer, *supra* note 78; Emma Armson, *Models for Takeover Dispute Resolution: Australia and the UK,* 5 J. CORP. L. STUD. 401 (2005).

80 *See* Jennifer G. Hill, *Back to the Future? Bigshop 2 and Defensive Tactics in Takeovers*, 20 COMP. & SEC. L.J. 126, 129–30 (2002).

81 *See* GUIDANCE NOTE 12: TAKEOVERS PANEL, AUSTL. GOV'T § 2 (2003), *available at* http://www.takeovers.gov.au/content/Guidance_Notes/Current/downloads/GN12_2010.pdf.

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[82] For a detailed analysis of the reasons why U.S.-style poison pills are impermissible under Australian and UK law, *see* Jennifer G. Hill, *supra* note 80, at 134-38.

[83] *See* Corporations Act, 2001 § 203D (Austl.); Companies Act, 2006 c. 46 § 168(1) (U.K.), which grant shareholders an absolute right to remove directors with or without cause.

[84] *See* INST. S'HOLDER SERV., *supra* note 59, at 11-13.

[85] *See* Philip Anisman, *Poison Pills: The Canadian Experience*, *in* CORPORATIONS, CAPITAL MARKETS AND BUSINESS IN THE LAW: LIBER AMICORUM RICHARD M. BUXBAUM 12 (Theodor Baums et al. eds., Kluwer Law International, 2000); Ronald Podolny, *Fixing What Ain't Broke: In Defence of Canadian Poison Pill Regulation*, 67 U. TORONTO FAC. L. REV. 47, 51 (2009).

[86] Council Directive 2004/25, 2004 O.J. (L 142) 12. (EC).

[87] *See* Hopt, *supra* note 61, at 375; André Nilsen, *The EU Takeover Directive and the Competitiveness of European Industry*, (Oxford Council on Good Governance, 2004), *available at* http://ocgg.org/fileadmin/Publications/EY001.pdf; Klaus J. Hopt, *Takeover Regulation in Europe – The Battle for the 13th Directive on Takeovers*, 15 AUSTL. J. CORP. L. 1 (2002).

[88] Nilsen, *supra* note 87, at 1.

[89] Klaus J. Hopt, *Corporate Law, Corporate Governance and Takeover Law in the European Union: Stocktaking, Reform Problems and Perspectives*, 20 AUSTL. J. CORP L. 244, 261-262 (2007).

[90] *Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids in the European Union* 4-8, 29 (Jan. 10, 2002), *available at* http://ec.europa.eu/internal_market/company/docs/takeoverbids/2002-01-hlg-report_en.pdf).

[91] Donald C. Langevoort, *The Social Construction of Sarbanes-Oxley,* 105 MICH. L. REV. 1817 (2007).

[92] Luca Enriques, *European Takeover Law: The Case for a Neutral Approach*, 2 (UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 24/2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1523307.

[93] *See*, Eddy Wymeersch, *The Takeover Bid Directive, Light and Darkness*, (Fin. Law Inst., Working Paper 2008-01, Jan. 2008) (assessing harmonisation successes and failures in the directive), *available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=1086987.

[94] Complexity abounds, however, in the opt-in/opt-out interplay for member states and companies under Article 12. *See* Hopt, *supra* note 89, at 263.

[95] *See* COMM'N OF THE EURO. CMTIES., COMM'N STAFF WORKING DOCUMENT, REPORT ON THE IMPLEMENTATION OF THE DIRECTIVE ON TAKEOVER BIDS, 4 (2007); Hopt, *supra* note 61, at 378-79.

[96] France, for example, introduced a form of poison pill. *See* Wymeersch, *supra* note 93, at 7; INST. S'HOLDER SERV., *supra* note 59, at 6-7.

[97] Andrew Bounds & Kate Burgess, *EU Scraps Plan for "One Share, One Vote" Reform*, FIN. TIMES, Oct. 4, 2007, at 1; Hopt, *supra* note 61, at 392.

[98] Hopt, *supra* note 61, at 378-381. *See also* REPORT ON THE IMPLEMENTATION OF THE DIRECTIVE ON TAKEOVER BIDS, *supra* note 95, at 10. Professor Hopt notes, however, that another interpretation of the

directive's implementation is one of path dependency, rather than protectionism. Hopt, *supra* note 61, at 380.

99 Michiyo Nakamoto, *It's Time to Leave Home Again*, FIN. TIMES, Sept. 12, 2008, at 1.

100 Davies & Hopt, *supra* note 22, at 273.

101 *See* Gilson & Roe, *supra* note 2, at 882.

102 *See* Ronald Gilson, *The Poison Pill in Japan: The Missing Infrastructure* 1-2, (Euro. Corp Governance Inst., Working Paper No. 20, 2004).

103 The value of shares held in cross-shareholding arrangements in Japanese companies declined from 33% in 1991 to 11.1% in the fiscal year ending March 2006. *See* Andrew Morse & Sebastian Moffett, *Japan's Companies Gird for Attack – Fearing Takeovers, They Rebuild Walls; Rise of Poison Pills*, WALL ST. J., Apr. 30, 2008 at A1. Foreign ownership of Japanese shares increased from 4.1% in 1987 to 27.6% in 2008. *See* Alison Tudor, *Advocate Pitches Reform in Japan*, WALL ST. J., Apr. 9, 2009, at C2.

104 *See* MINISTRY OF ECON., TRADE, AND INDUS. AND MINISTRY OF JUSTICE, GUIDELINES REGARDING TAKEOVER DEFENSE FOR THE PURPOSES OF PROTECTION AND ENHANCEMENT OF CORPORATE VALUE AND SHAREHOLDERS' COMMON INTERESTS 2 (2005) [hereinafter GUIDELINES].

105 For detailed background of this control contest, *see generally* Sadakazu Osaki, *Regulation of Japan's Capital Markets and the Battle for Control of Nippon Broadcasting System,* 8 NOMURA CAPITAL MARKET REV. 25 (2005); Curtis Milhaupt & Katharina Pistor, *The Livedoor Bid and Hostile Takeovers in Japan: Postwar Law and Capitalism at the Crossroads, in* LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD 87 (Univ. of Chicago Press, 2008).

106 *See* Curtis Milhaupt, *In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan,* 105 COLUM. L. REV. 2171, 2172 (2005).

107 Osaki, *supra* note 105, at 34-36.

108 Nippon Hoso K.K. v. Livedoor K.K., 1173 Hanrei Taimusu 125 (Tokyo H. Ct., Mar 23, 2005) (translated in Curtis Milhaupt, *Bull-Dog Sauce for the Japanese Soul? Courts, Corporations, and Communities - A Comment on Haley's View of Japanese Law*, 8 WASH. UNIV. GLOBAL. STUD. L. REV. 345, 348-49 (2009); *Livedoor v Nippon Broadcasting System*, 25 WASEDA BULLETIN OF COMP. L. 125 (2005).

109 *See* Osaki, *supra* note 105, at 42; John Buchanan & Simon Deakin, *Japan's Paradoxical Response to the New 'Global Standard' in Corporate Governance*, 16-17 (Euro. Corp. Governance Inst., Working Paper No. 87, 2007); *Cf.* Press Release, European Business Council in Japan and American Chamber of Commerce in Japan, EBC and ACCJ Express Concern about Adverse Impact on Portfolio and Direct Investment in Japan, (June 29, 2005) [*hereinafter* "Press Release"] (deriding any soi-disant "foreign capital threat" as inaccurate and founded on emotionalism).

110 Hideki Kanda, *Takeover Defences and the Role of Law: A Japanese Perspective, in* PERSPECTIVES IN COMPANY LAW AND FINANCIAL REGULATION 413, 416-17 (Michel Tison et al. eds., Cambridge Univ. Press, 2009); Curtis J. Milhaupt & Katharina Pistor, LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD 87, 95 (Univ. Chicago Press 2008).

111 *See* GUIDELINES, *supra* note 104.

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[112] These circumstances included situations where, for example, the defense was in response to a coercive bid, where defensive measures could benefit shareholders. *Id.* at 2-5. The Tokyo High Court decision in the Nippon Broadcasting litigation also provided examples of exploitative takeovers, where defensive tactics might be justified. *Id* at 16; Osaki, *supra* note 105, at 25.

[113] GUIDELINES, *supra* note 104, at 1.

[114] *Id*, at 3-6.

[115] *See* Milhaupt & Pistor, *supra* note 110.

[116] GUIDELINES, *supra* note 104, at 7-8, 11-12.

[117] *See, e.g.*, Press Release, *supra* note 109.

[118] INST. S'HOLDER SERV., *supra* note 59.

[119] U.S. GOV'T ACCOUNTABILITY OFFICE, FOREIGN INVESTMENT: LAWS AND POLICIES REGULATING FOREIGN INVESTMENT IN 10 COUNTRIES 74 (2008) [hereinafter "USGAO Report"].

[120] *See* Morse & Moffett, *supra* note 103. (citing data of Swiss investment bank, UBS AG). *See also* Kanda, *supra* note 110, at 414-15.

[121] Curtis Milhaupt, *Bull-Dog Sauce for the Japanese Soul? Court, Corporations, and Communities—A Comment on Haley's View of Japanese Law*, 8 WASH. UNIV. GLOBAL. STUD. L. REV. 345, 353-54 (2009).

[122] *Id.* at 345, 354-56.

[123] In contrast, the Tokyo High Court focused on the bidder, categorising Steel Partners as an "abusive acquirer" due to its pattern of quickly selling off acquired corporations, thereby confirming the appropriateness of defensive methods. *Id.* at 354-55.

[124] Kanda, *supra* note 110, at 422-23; Buchanan & Deakin, *supra* note 109, at 16.

[125] *See e.g.,* Foreign Exchange and Foreign Trade Act, Law No. 228 of 1949, art. 26-27, 55-56.

[126] *See* USGAO Report, *supra* note 119, at 75.

[127] *Id.* at 12; Morse & Moffett, *supra* note 103, at A1.

[128] *See* Michiyo Nakamoto, *Japan Warms to Outside Investors*, FIN. TIMES, Jun. 26, 2008 at 1; Toshiyuki Sugiyama & Mariko Kotaki *J-Power Issue Forces Out Discussions*, NIKKEI BUSINESS ONLINE, April 21, 2008, *available at* http://business.nikkeibp.co.jp/article/eng/20080421/153726/.

[129] Alan Beattie, Stephanie Kirchgaessner & Raphael Minder, *Left in the Cold: Foreign Bidders Find Themselves Out of Favour*, FIN. TIMES, Apr 25, 2008, at 13.

[130] *See, e.g.,* Milhaupt & Pistor, *supra* note 105, at 87, 101.

[131] *See* MINISTRY OF ECON., TRADE AND INDUS., THE CORPORATE GOVERNANCE STUDY GROUP REPORT, 2, 2-4 (2009) (Japan). On the connection between takeover defences and independent directors, *see* Milhaupt & Pistor, *supra* note 105, at 101.

[132] Gilson, *supra* note 102.

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[133] Buchanan & Deakin, *supra* note 109, at 20-22.

[134] *See* Robin Harding, *US Investment Fund Unseats Aderans Board*, FIN. TIMES, May 29, 2009, at 18. *See also* Michiyo Nakamoto & Kate Burgess, *Dividends to Reap; Shareholder Activists Begin to Make Their Mark in Japan*, FIN. TIMES, July 3, 2008, at 7.

[135] *See* Tudor, *supra* note 103, at C2; Nakamoto, *supra* note 128.

[136] In 2008, for example, Takao Kitabata, a Vice Minister of METI, described shareholders as "fickle, irresponsible and greedy". *See* Michiyo Nakamoto, *One-way Street? As Its Companies Expand Abroad, Japan Erects New Barriers at Home*, FIN. TIMES, March 3, 2008, at 7.

[137] *See* David Skeel, *Governance in the Ruin,* 122 HARV. L. REV. 696, 707 (2008); Milhaupt & Pistor, *supra* note 105, at 102. *See also* Michiyo Nakamoto, *Fresh Poison Pill Fear in Japan*, FIN. TIMES, Feb. 25, 2008, at 17.

[138] *See* Nakamoto & Burgess, *supra* note 134; Morse & Moffett, *supra* note 103.

[139] *See* USGAO Report, *supra* note 119, at 73. In 2006, foreign direct investment in Japan was 2.5% of gross domestic project, compared to 44.6% in the UK and 33.2% in France. *See* Michiyo Nakamoto, *Struggle to Sweep Away Barriers to Change*, FIN. TIMES, March 19, 2008 at 1.

[140] Leo Lewis, *Peter Mandelson Raps Japan's Investment Hostility*, TIMES ONLINE, April 22, 2008.

[141] Morse & Moffett, *supra* note 103.

[142] Alice Erh-Soon Tay, *Communist Visions, Communist Realities, and the Role of Law*, 17 J. L. & SOC'Y 155, 159 (1990).

[143] Ross Garnaut, Ligang Song, Stoyan Tenev & Yang Yao, CHINA'S OWNERSHIP TRANSFORMATION, at xi (Int'l Fin. Corp. et al. eds., 2005).

[144] *Id*. *See* also Knowledge@Wharton, *The Long and Winding Road to Privatization in China*, May 10, 2006.

[145] *See generally* Ross Garnaut et al., *supra* note 143, at xi-xiv; Stephen Green, TWO-THIRDS PRIVATISATION' – HOW CHINA'S LISTED COMPANIES ARE – FINALLY – PRIVATISING (The Royal Inst. of Int'l Affairs, 2003).

[146] *See* Zhiwu Chen, *Privatisation Would Enrich China*, FIN. TIMES, Aug. 7, 2008, *available at* http://www.ft.com/cms/s/0/79a95b7e-64b0-11dd-af61-0000779fd18c.html?nclick_check=1; *Caught Between Right and Left, Town and Country – Governing China*, THE ECONOMIST, Mar. 10, 2007, at 382.

[147] *See* Hui Huang, *The New Takeover Regulation in China: Evolution and Enhancement*, 42 INT'L LAW. 153, 154 (2008).

[148] Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN L. 1, 6-7 (2006).

[149] *Measures for Administration of the Acquisition of Listed Companies* were promulgated by the CSRC on September 28, 2002 and became effective on December 1, 2002. *See generally* PAUL, WEISS, RIFKIND, WHARTON & GARRISON, MEASURES FOR ADMINISTRATION OF THE ACQUISITION OF LISTED COMPANIES 2-5 (2002) [hereinafter *Measures*].

[150] *See* CHINA SEC. REGULATORY COMM'N, MEASURES FOR THE ADMIN. OF THE TAKEOVER OF LISTED COS., *translated in* CHINA L. & PRAC., Nov. 2006, at 40; *China Overhauls Takeover Code of Listed Companies*, CHINA L. & PRAC., Oct. 2006, at 31. *See generally* Hui Huang, *supra* note 147.

[151] *See* CHINA SEC. REGULATORY COMM'N, MEASURES FOR THE ADMIN. OF THE TAKEOVER OF LISTED COS. (REVISED), *translated in* CHINA L. & PRAC., Oct. 2008.

[152] *See* Skeel, *supra* note 62, at 1543; Gerard Hertig, *Convergence of Substantive Law and Convergence of Enforcement: A Comparison*, in CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE 328 (Jeffrey N. Gordon & Mark J. Roe eds., Cambridge Univ. Press, 2004).

[153] Huang, *supra* note 147, at 159-162.

[154] By the end of 2000, for example, the CSRC had granted an exemption from the mandatory bid rule with respect to every takeover by private agreement, one hundred and twenty one in total. *See id.* at 168, n. 108 (citing Bingan Li, *A Discussion of the Exemption from the Mandatory Bid Rule* (2003) 18(6) FALU LUNTAN [LEGAL FORUM] 50).

[155] *See Measures*, *supra* note 149, at 2-5.

[156] *See, e.g.,* Mark Wu, *Antidumping in Asia's Emerging Giants* (2010) (unpublished comment, on file with the author) (discussing China's increasing use of antidumping laws for protectionist purposes).

[157] A range of other possible obstacles exist for foreign investors. *See* Wayne Chen & James Weng, *The Art of Investment: Tactics for Acquiring PRC Listed Companies*, CHINA L. & PRAC., March 2007.

[158] *See China Blocks Coke*, FIN. TIMES, Mar. 19, 2009, at 12. On the implications generally of China's entry into the WTO, *see* Donald C. Clarke, *China's Legal System and the WTO: Prospects for Compliance,* 2 WASH. U. GLOBAL STUD. L. REV. 97 (2003).

[159] *See* David Barboza & Bettina Wassener, *China Blocks Coke's Bid for Juice Company*, N.Y. TIMES, Mar. 19, 2009, at 10; Gordon Fairclough & Carlos Tejada, *China's Coke Decision Threatens to Chill Investment*, WALL ST. J., March 19, 2009, at B9.

[160] Fairclough & Tejada, *supra* note 159, at B9.

[161] *See* Rick Carew, James T. Areddy & Gordon Fairclough, *China Denies Protectionism in Coca-Cola Ruling – Rejection of $2.4 Billion Takeover Bid for Huiyuan Prompts Questions on Foreign-Investment Deals in Pipeline,* WALL ST. J., March 20, 2009, B4. On protection of leading Chinese trademarks or trade names, *see generally* Lubman, *supra* note 148, at 27; Peter A. Neumann & Tony Zhang, *China's New Foreign-Funded M & A Provisions: Greater Legal Protection or Legalized Protectionism?,* CHINA L. & PRAC., Oct. 2006, at 21.

[162] Jamil Anderlini, William MacNamara, & Sundeep Tucker, *Outmanoeuvred*, FIN. TIMES, June 12, 2009, at 7.

[163] Aries Poon & David Winning, *Cnooc Chairman Says Slowdown, Protectionism Sour Climate for Acquistions*, WALL ST. J., April 2, 2009, at B9.

[164] *Id.*

[165] The main sources of regulation of foreign investment in Australia are the *Foreign Acquisitions and Takeovers Act* 1975 and the Australian Government's *Foreign Investment Policy*.

[166] For a discussion of Australia's foreign investment regulatory regime, including proposed 2009 amendments to extend its reach, *see* Greg Golding & Rachael Bassil, Australian Regulation of Foreign Direct Investment by Sovereign Wealth Funds and State Owned Enterprises: Are Our Rules Right?, Address to the Law Council Corporations Law Committee, 2009 Corporate Law Workshop (Sept. 12, 2009).

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[167] *See* Peter Smith & Sundeep Tucker, *Australia Quashes Bid for Oz Minerals*, FIN. TIMES, March 28, 2009, at 1; Peter Smith & Sundeep Tucker, *"National Security" Seen as Weak Defence of Oz Decision*, FIN. TIMES, March 28, 2009, at 11.

[168] Peter Smith, *Hunan Stake in Fortescue Approved*, FIN. TIMES, April 1, 2009, at 16.

[169] For background on the deal, *see generally Outmanoeuvred, supra* note 162.

[170] Patti Waldmeir, *Chinalco's Overseas Ambition Left in Tatters*, FIN. TIMES, June 5, 2009, at 19.

[171] *See* Smith & Tucker, *National Security*, *supra* note 167, at 11.

[172] *See* Elizabeth Knight, *Dust-up Over Juice Company is a Free Kick for the Anti-Chinalco League*, SYDNEY MORNING HERALD, March 20, 2009, at 19; Peter Smith, *Rio Deal Critic Takes Heart*, FIN. TIMES, March 19, 2009, at 16.

[173] *See* Peter Smith, *State Spared Tough Decision*, FIN. TIMES, June 5, 2009, at 15.

[174] The state-controlled newspaper, the Beijing Times, was particularly critical of events, stating, "Poor Chinalco prepared the wedding clothes but when the peach was ripe somebody else plucked it." *Outmanoeuvred, supra* note 162.

[175] *See* Holman W. Jenkins, Jr., Editorial, *China's War for Ore*, WALL ST. J., July 15, 2009, at A13.

[176] *See* C.T. Johnson, *More Shots Fired in Chinalco-Rio Spat*, CHINA STAKES, June 13, 2009, *available at* http://www.chinastakes.com/2009/6/more-shots-fired-in-chinalco-rio-spat.html.

[177] John Garnaut, *Staring Down the Dragon: BHP's Battles in China*, SYDNEY MORNING HERALD, Jan. 30, 2010, at 1.

[178] *See, e.g.,* Lubman, *supra* note 148, at 91-92; Erh-Soon Tay, *supra* note 142, at 159-161.

[179] *See* Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective,* 52 STAN. L. REV. 1599 (2000); Eric W. Orts, *The Rule of Law in China,* 34 VAND. J. TRANSNAT'L L. 43 (2001).

[180] Albert Hirschman, *Ideology: Mask, or Nessus Shirt?, in* COMPARISON OF ECONOMIC SYSTEMS: THEORETICAL AND METHODOLOGICAL APPROACHES 289 (Alexander Eckstein ed., UCLA Press 1971).

[181] Hill, *supra* note 5, at 748.

[182] *See, e.g.,* Hansmann & Kraakman, *supra* note 6, 457-58.

[183] *See* Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998).

[184] Langevoort, *supra* note 91.

[185] Milhaupt, *supra* note 8, at 213.

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