FUNCTIONALITY OF TAKEOVER REGIMES IN ASIA

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Abstract: *Takeover laws play a critical role in regulating the market for corporate control and therefore directly impact public M&A in a country. While the last few decades have seen a rapid evolution in the takeover deal space, the takeover regimes in certain developing countries, like India, are at a nascent stage. There is abundant scholarship surrounding the developed takeover regimes, like that of the United Kingdom and the United States. In this article, the authors seek to investigate the local peculiarities of the developing countries to which the Anglo-American takeovers regimes have been imported and the ways in which they have shaped the practical operation of these borrowed regimes.*

I. INTRODUCTION

Takeover regimes across the globe have witnessed a steady evolution. This has been driven primarily by the interplay between a dynamic market for corporate control and principles of corporate governance associated with control acquisitions. Broadly, takeover deals can be divided into – (i) friendly acquisitions, wherein the acquirer and the management of the target are in agreement with the incident of transfer of control; and (ii) hostile acquisitions, wherein the management of the target is opposed to the change in control of the company. The ability of the incumbent management to resist hostile takeover bids constitutes a crucial aspect of takeover regimes and depends on the powers bestowed on the board under the relevant takeover laws.

Takeover laws generally aim to minimise agency costs in a control deal and also protect the interests of the minority stakeholders. In this light, the varying policy decisions with respect to the role of the board and shareholders when a company is faced with a takeover bid, as reflected in takeover laws, have had a practical impact on the nature of deals and attractiveness of targets in various jurisdictions. While there is an abundance of literature on the jurisprudence of takeover laws in developed jurisdictions like the United Kingdom ('**UK**') and the United States ('**US**'), much less attention has been paid to the regimes in emerging economies in Asia.

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Admittedly, the takeover regimes of the UK and the US have inspired the substantive legal frameworks in emerging Asian jurisdictions. This is in spite of some fundamental differences in economic and commercial factors which have thus far been believed to explain the policy decisions in the context of the UK and the US. However, it is worth delving into the different contexts in which the Anglo-American takeover laws have been imported and the local factors in each of these jurisdictions that have shaped the practical operation of these borrowed legal arrangements. In furtherance of such study, this paper will be divided into two parts. Part 1 argues that the import of western regimes in spite of the varying contexts in Asia can be explained by local peculiarities in these jurisdictions. This part is further divided into two sections – *first*, the takeover regimes in significant jurisdictions in Asia are juxtaposed with the respective corporate landscapes; and *second*, the non-legal factors affecting defences against takeovers in Asia. Part 2 seeks to study the practical implications of grafting western laws to the Asian context. It is further divided into two sections – *first*, the operation of defences against hostile takeovers in Asian jurisdictions; and *second*, the effect of legal regimes on targets in Asian jurisdictions in a globalized market for corporate control.

II. PART 1: RATIONALE FOR IMPORT OF ANGLO-AMERICAN LEGAL FRAMEWORKS

A. Markets for Coroporate Control in Asia

The takeover laws of the UK, embodied in the City Code on Takeovers and Mergers ('**UK Code**') and of the US, embodied in the Delaware General Corporation Law ('**Delaware Law**') are perceived as the model laws that have inspired the relatively nascent takeover regimes on the regulation of the market for corporate control.[2] Admittedly, there are ostensible similarities with the takeover laws in the UK or US to be found in Asian jurisdictions. It has been argued that the takeover laws in the UK and US, specifically the laws governing the defences to takeover bids and the role of the board and shareholders of the target can be explained by the prominence of different lobbying groups (institutional shareholders and management groups) in the two leading jurisdictions.[3] Having established the non-applicability of such a theory in various

[2] Umakanth Varrotil and Wan Wai Yee, 'Hostile Takeover Regimes in Asia: A Comparative Approach' (2018) NUS Law Working Paper 2018/011 1, 2-3.
[3] John Armour and David A Skeel, 'Who Writes the Rules for Hostile Takeovers and Why? The Peculiar Divergence of US and UK Takeover Regulation' (2007) 95 Georgia Law Journal 1727, 1793-1794.

jurisdictions in Asia,[4] it has been argued that the regimes from the UK and the US have been 'artificially grafted' onto markets that are fundamentally different in their conditions as a result of lazy drafting by blindly importing existing frameworks.[5]

It is our argument however that there is merit in investigating the claim of mechanical transplantation of takeover frameworks in jurisdictions in Asia. To this end, we juxtapose the substantive takeover laws governing the defences to hostile bids of emerging jurisdictions in Asia – India, China, Japan and South Korea – with the incumbent laws in the US and UK to identify the crucial distinctions between the apparently similar models of takeover regimes.

The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ('**Indian Takeover Code**') imposes various restrictions on the board when there is a takeover bid. This is said to be an import of the 'Non-Frustration Rule' employed in the UK.[6] The 'Board Neutrality Rule' or the 'Non-Frustration Rule' in the UK is the obligation imposed on the incumbent board to not act in a manner that would obviate the bid.[7] However, there are certain crucial differences that make it different from the UK model of the non-frustration rule. *Firstly*, the restrictions kick in under the UK Code when there is an 'imminent offer',[8] whereas, in India, they kick in when there is a 'public announcement' of an offer.[9] *Secondly*, restrictions on the board may be lifted by an affirmative vote of the shareholders under both regulations. However, the UK Code requires above a 50% vote of the shareholders (a simple majority),[10] whereas the Indian Takeover Code requires above a 75% vote of the shareholders (a special majority).[11] This difference in the exception to the restrictions indicates that the legislators have duly considered the difference in shareholding patterns in the jurisdictions. *Thirdly*, one of the fundamental differences between the two regulations is that the UK Code imposes an active obligation of non-frustration on the board of the target whereas the Indian Takeover Code restricts

[4] Varrotil and Yee (n 2).
[5] ibid.
[6] Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 2011 ('SEBI Takeover Regulations'), reg 26.
[7] Marco Ventoruzzo, 'Takeover Regulation as a Wolf in Sheep's Clothing: Taking UK Rules to Continental Europe' (2008) 11 University of Pennsylvania Journal of Business Law 135, 141.
[8] City Code on Takeovers and Mergers, r 21.
[9] SEBI Takeover Regulations (n 6), reg 26.
[10] City Code on Takeovers and Mergers, r 21.
[11] SEBI Takeover Regulations (n 6), reg 26.

deviation from the ordinary course of business. This is because the UK Code is specifically worded to disallow the board to frustrate the bid, unlike the Indian Takeover Code.[12]

The Chinese Takeover Measures 2006 ('**Chinese Code'**) is said to have borrowed its provision governing the fiduciary duty of the management from the US. Under US laws the actions of the board that might contribute to the frustration of a bid are subject to judicial review. These board actions are deemed valid provided that they are rationalized by 'business judgement'.[13] However, the Chinese Code deviates from such a legal framework on two fronts. *Firstly*, unlike in the US, Chinese courts have not imposed or even referred to the provision on the board's fiduciary duty in determining the validity of board actions in response to hostile bids.[14] *Secondly*, the Chinese Code does not merely contain the ex-post judicial review rule as seen in the US but combines it with the board neutrality (or non-frustration rule) of the UK.[15] In doing so, it adopts a limited version of the board neutrality rule which only applies to post-bid defences and when the proposed board action 'materially' changes the target's assets.[16]

Japan and South Korea, on the other hand, follow the 'primary purpose rule' whereby the directors may issue shares exclusively for the purpose of raising capital in the ordinary course of business.[17] This appears to be principally borrowed from the board neutrality rule of the UK after the bid combined with the 'business judgement rule' inspired by the Delaware law in the US prior to the bid. However, it is practically very different as the language of the law contains no indication that it offers itself to be extended to other possible attempts to frustrate the bid (like selling the assets of the company).[18] Accordingly, even though the law may restrict the board from selling or issuing shares upon receiving a bid, it places no blanket restriction on board actions.[19] The Japanese restriction on the sale of shares by the board is arguably rationalised by

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[12] ibid.
[13] Chinese Takeover Measures 2006, art 8.
[14] Robin Hui Huang and Juan Chen, 'Takeover Regulation in China: Striking a Balance between Takeover Contestability and Shareholder Protection' in Umakanth Varottil and Wai Yee Wan (eds), *Comparative Takeover Regulation: Global and Asian Perspectives* (CUP 2017) 227.
[15] Chinese Takeover Measures 2006, art 33.
[16] ibid.
[17] Dan W. Puchniak and Masafumi Nakahigashi, 'The Enigma of Hostile Takeovers in Japan: Bidder Beware' in Umakanth Varottil and Wai Yee Wan (eds), *Comparative Takeover Regulation: Global and Asian Perspectives* (CUP 2017) 264.
[18] ibid.
[19] ibid.

the need to protect its dispersed, institutional shareholders which Japanese companies are characterized by and to minimize the agency costs in a bid scenario. This difference is further complicated by a series of Japanese court rulings which have upheld the board's decision to sell company shares to other favourable buyers (comparable to 'white knights') in the face of a hostile bid.[20]

Thus, a reading of the substantive takeover laws of the various jurisdictions demonstrates that it is inaccurate to describe the legal evolution of takeover regimes in the emerging jurisdictions of Asia as a 'legal transplant'. The claim that civil law countries have borrowed their takeover regimes from the US and common law countries have borrowed their takeover regimes from the UK,[21] is both reductionist and inaccurate. In addition to civil law countries like China and Japan adopting different versions of the board neutrality rule seen in the UK, there are crucial deviations seen between the legal frameworks in Asia, in substance and in practice. Therefore, the chronological precedence of the extant takeover frameworks cannot be evidence of the transplantation of these laws across Asian jurisdictions.

B. Role of Non-Legal Actors and Other Local Factors in Defending Against Hostile Takeovers

The takeover codes emerging in the mid-twentieth century were a culmination of local efforts by non-state actors like institutional shareholders and private regulators to prevent hostile takeovers while preserving the spirit of free market economies. Consequently, the Anglo-American experience of regulating the market for corporate control is set in the context of the legislative intent to minimize hostile takeovers and the centrality of laws in achieving such an end. Legislations have therefore played a primary role in these jurisdictions in determining the manner and extent to which a target can respond to a bid.[22] However, legislations in the Asian context operate against the backdrop of several non-legal factors and actors which invariably shape the available defences. Therefore, it is important to consider these factors in order to better identify the ways in which these regimes differ not only from their western counterparts but also one another. However, it is our argument that this is not to be taken as an indication of the futility of the substantive laws in securing the legislative aims and

[20] ibid.
[21] Armour and Skeel (n 3).
[22] David Kershaw, *Principles of Takeover Regulation* (OUP 2016) 29.

overall efficient corporate governance in the respective jurisdictions. This is because the laws in these jurisdictions operate, in addition to, other non-legal factors in shaping general corporate practices and the assessment of the laws alone presents an Anglo-centric lens. Therefore, it is worth delving into the surrounding factors which can be divided into three broad categories.

First, while the shareholder patterns in the western jurisdictions determined stakeholders in the law-making process,[23] in the Asian context the shareholdings provide context for the operation of the law itself. The shareholding patterns in the Asian jurisdictions differ both, from their western counterparts as well as from each other. The broad parameters characterising the shareholdings in these jurisdictions include the degree of concentration of shareholders, the classification of shares, and the nature and bearing of shareholders on the board decisions.

India, China as well as South Korea are characterized by concentrated shareholdings which make them less susceptible to hostile takeovers. Although Japan theoretically has dispersed shareholdings, its local peculiarities deem its shareholding unconducive to hostile takeovers.[24] In China, the shares of all public companies (listed on the stock market) have historically been categorised into tradeable and non-tradeable shares with the non-tradeable shares being held by the state or state agencies.[25] This has been reformed through the 'share split reform' in 2005 through which the previously non-tradeable shares could be publicly traded by erstwhile owners (the state and state-owned entities).[26] Consequently, even to this date, the state is typically the single controlling shareholding. The role of the state in the shareholding coupled with the bureaucracy of the country has led to the unpopularity of takeovers by public offers in China and more particularly deemed the occurrence of hostile takeovers logistically difficult to achieve. Although the role of the state is starkly different in India and South Korea, the shareholdings in the two jurisdictions render the domestic entities similarly prone to hostile takeover activity. In India block shareholdings and conglomerate structures controlled by the families have been historically popular and are common even in

[23] ibid 112-114.
[24] Varottil and Yee (n 2).
[25] Juan Chen and Robin Hui Huang, 'The Rise of Hostile Takeovers and Defensive Measures in China: Comparative and Empirical Perspectives' (2019) 20 European Business Organization Law Review 363, 366.
[26] ibid.

medium-sized entities which are typically most susceptible to hostile bids.[27] South Korea, on the other hand, is abundantly characterized by '*chaebols*' or conglomerates owned by families wherein the promoters (the family members) hold minority shareholdings but retain control of the entity through circular controlling minority shareholder structures.[28] Japan, contrarily, depicts a unique case of dispersed but heavily concretised shareholdings. This is primarily due to cross-shareholding by the shareholders who hold small shares of various companies, not for the capital gains or dividends, but for maintaining their commercial relationships with the promoters and other shareholders through horizontally and vertically integrated '*zaibatsu*' and '*keiretsu*' companies.[29] This effectively leads to a significant portion of the shares of the listed companies not being traded at all.[30] This is the primary reason for there being no takeover activity (hostile or otherwise) in Japan in spite of a seemingly conducive market for corporate control.[31]

Second, a relatively less determinable factor which impacts takeover activity in the Asian jurisdictions is the cultural aversion to hostile takeovers. It must be noted that each of the discussed Asian jurisdictions is characterised by protectionist tendencies. This is attributable either to efforts of industrialization after the world war (as in the case of India, South Korea and Japan), or the attempt to protect local industries in the face of rapid globalization (as in the case of China and Singapore). This has created a strong sense of the need to protect property holders. In addition, countries like Japan have considered hostile takeovers to be a 'rude' commercial practice.[32] While these sentiments had long faded in the UK during the mid-twentieth century, the same continue to persist in the East.[33]

Third, is the surrounding jurisprudential climate which is specific to each jurisdiction. While the substantive law of the takeover code directly and inevitably impacts the

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[27] Ashima Obhan, 'Hostile Takeovers in India' (*Mondaq*) <www.mondaq.com/india/shareholders/804526/hostile-takeovers-in-india> accessed 20 November 2022.
[28] Stephen J. Choi, 'The Future Direction of Takeover Law in Korea' (2007) 7(1) Journal of Korean Law 25, 35.
[29] Puchniak and Nakahigashi (n 17).
[30] ibid.
[31] Joseph Lee, 'The Current Barriers to Corporate Takeovers in Japan: Do the UK Takeover Code and the EU Takeover Directive Offer a Solution?' (2017) 18 European Business Organization Law Review 761, 763-764.
[32] Puchniak and Nakahigashi (n 17) 274.
[33] ibid.

takeover contestability of domestic target entities, the takeover code operates alongside a host of other laws. For instance, Japan has a long legal history of lawmakers and the state fortifying labour laws which has been attributed to the ageing population and understaffed industries.[34] This, along with the general distaste for lay-offs has culminated in a strong jurisprudence of employee protection in the country.[35] In addition to the shareholding pattern, this is cited as another crucial reason for the effective absence of takeover activity in Japan as the resultant reorganisation of the workforce is either barred under other laws or generally frowned upon as a commercial practice.[36] China, India and South Korea, on the other hand, have shareholder protection as an underlying objective of various commercial laws.[37] Thus, the takeover codes which are relatively newer in these emerging jurisdictions function within and are influenced by the existing legal atmosphere and jurisprudence they operate in.

III. PART 2: IMPLICATIONS OF LEGAL REGIMES ON THE MARKET FOR CORPORATE CONTROL

A. Instances of Defence Against Hostile Takeovers in Asia

The most tangible manifestation of the laws governing the role of the board and the shareholders in a takeover is seen in the takeover contestability of hostile bids as well as the type of takeover defences available in the jurisdiction. Therefore, this paper seeks to examine the pioneering instances of hostile bids across these Asian jurisdictions. It seeks to understand the role of the substantive takeover laws as well as other surrounding factors specific to each jurisdiction in deal trends and more specifically the availability of certain takeover defences.

The occurrence of successful hostile bids has been a rarity. The first occurrence was seen in 1998 when India Cements obtained a controlling stake in Raasi Cements when BV Raju, holding 32% shares in the target entity sold off the same.[38] Similarly, in 2015 Standard Greases & Specialities Private Limited successfully took over as co-promoter

[34] Lee (n 31) 765.
[35] ibid.
[36] ibid.
[37] Rho Hyeok Joon, 'M&A in Korea: Continuing Concern for Minority Shareholders' in Umakanth Varottil and Wai Yee Wan (eds), *Comparative Takeover Regulation: Global and Asian Perspectives* (CUP 2017) 279; Umakanth Varottil, 'The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony' (2016) 31 American University International Law Review 253, 255; Huang and Chen (n 14).
[38] Obhan (n 27).

and largest shareholder of Tide Water Oil Co. (India) Limited pursuant to an untriggered/voluntary tender offer process. Another successful hostile acquisition took place in 2019 when Larsen and Tourbo Limited gained a controlling stake in Mindtree Limited when VG Siddhartha, holding 20.4% in Mindtree, sold his stake in a bid to liquidate his holdings to pay off his debts.[39] Most recently, the acquisition of a 29% stake in NDTV by Adani in August 2022 is claimed to be without intimation to the board.[40] Since concentrated shareholding acts as a barrier for hostile takeovers in India, the success of such bids is usually seen to be a consequence of block shareholders selling their stakes. Accordingly, the white knight defence is the most commonly used takeover defence employed in India wherein the incumbent management identifies a favourable acquirer to acquire the shares in order to defeat the hostile bid. This has been seen in the case of ITC Group (in which British American Tobacco held 34.1%) making an offer to the shareholders of VST Industries (in which British American held 33.6%), leading to the failure of Radhakishen Damani's open offer.[41] Similarly, Mahindra and Mahindra agreed to acquire shares of the Great Eastern Shipping Company to defeat the takeover bid of the Dalmia Group.[42]

The popularity of the white knight defence is also seen in China owing to similar shareholding patterns. In 2004, Zhongxin made a public offer to acquire a controlling stake in Guangfa. In response, Guangfa incorporated Shenzhen Jifu which obtained 66.67% of the target entity along with associate companies Jilin Aodong and Liaoning Chengda, thereby making hostile takeover attempts infructuous.[43] In addition to the white knight defence, China is unique in frequently employing the 'Filing Complaint Defence' which entails filing lawsuits and applications against the unfavourable bidder which lengthens the takeover process in addition to draining the funds of the acquirer

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[39] Anirudh Laskar, 'With 60% Stake, L&T Completes its Hostile Takeover of Mindtree' (*Livemint*) <www.livemint.com/companies/news/with-60-stake-l-t-completes-its-hostile-takeover-of-mindtree-1561536743325.html> accessed 29 November 2022.

[40] Satish Kaushik, 'Adani Group vs NDTV: The Tale of Hostile Takeovers in Indian Corporate Industry' (*Livemint*) <www.livemint.com/news/india/adani-group-vs-ndtv-the-tale-of-hostile-takeovers-in-indian-corporate-industry-11661307221684.html> accessed 16 January 2023.

[41] 'ITC Makes Open Offer to Buy 20% Stake in VST' (*The Telegraph*) <www.telegraphindia.com/business/itc-makes-open-offer-to-buy-20-stake-in-vst/cid/933697> accessed 16 January 2023.

[42] Sundeep Khanna, 'Backstory: When Anand Mahindra Stepped in to Rescue GESCO from Hostile Takeover' (*CNBTV18*) <www.cnbctv18.com/business/companies/backstory-when-anand-mahindra-stepped-in-to-rescue-gesco-from-hostile-takeover-10631981.htm> accessed 16 January 2023.

[43] Chen and Huang (n 25) 385.

in costly litigation before regulators and courts.[44] This is frequently seen in China due to strong connections between targets and state agencies coupled with the bureaucracy and role of the state in the jurisdiction.[45] For instance, when Shenzhen Baoan sought to acquire Yanzhong Shiye in 1993, the target filed a complaint with the market regulator on the grounds of breach of certain disclosure rules.[46] More recently, Baoneng made a hostile takeover bid for shares in Vanke which had a significantly dispersed shareholding with the largest shareholder (Huarun) holding only 15.29% shares and no single shareholder having a stake of more than 3%. Boaneng was periodically increasing its shareholding in Vanke through its subsidiaries and held up to 23.53% by the end of 2015 which it subsequently increased to 24.97% in 2016. It raised funds for the takeover through the issuance of corporate bonds and insurance instruments. In March 2016, Vanke invited Shenzhen Metro (SOE) to transfer its assets which was opposed by both the block shareholders, Boaneng and Huarun, leading to its failure. Subsequently, it notified the Shenzhen Stock Exchange and the regulator that there were irregularities in the funding of the takeover. The regulator publicly criticized Boaneng's strategies in 2016 and the insurance regulator thereafter imposed penalties on its insurance subsidiary. By 2017, Huarun announced the transfer of its shares to Shenzhen Metro and Baoneng announced that it will not be seeking control of Vanke and reduced its holding to 15% by selling its stake.[47] Thus, there is a trend of incumbent management of target companies filing complaints in light of imminent hostile takeovers in China.

Japan, in spite of its dispersed shareholdings, has posed various barriers to hostile takeover attempts including the "pre-warning rights plan" through which the board issues a press release in case of an imminent hostile offer. The same also involves outlining the company's actions, including the setting up of a committee to determine the desirability of the proposed takeover on the company and its employees, which will be triggered if a substantial bid is made.[48] Courts have in certain circumstances upheld the issuance of such pre-warning rights plans with the caveat that it must align with the board's fiduciary duty to its members.[49] In other circumstances, they have granted an

[44] ibid.
[45] ibid.
[46] ibid.
[47] ibid.
[48] Puchniak and Nakahigashi (n 17).
[49] ibid.

injunction against such issuances without passing a ruling against pre-warning rights plans in general. Under the classic defence strategy of the 'poison pill' the board issues discounted shares to its existing shareholders in proportion to their present shareholding. This strategy operates as a shareholders' rights plan and is triggered by the open offer made by the hostile bidder which exceeds certain pre-defined thresholds. Consequently, such an issue effectively defeats the bid by diluting the bidder's share and driving up the cost of acquiring the proposed stake.[50] The popularity of this defence and its distinction from the classic 'poison pill' is attributable to the 'lifetime employment' corporate culture and employee-dominated boards.[51]

In South Korea, the most frequently adopted takeover defence involves the sale of shares representing the outstanding repurchased stock held by the issuing company (also known as 'treasury shares') to a favourable bidder or an existing shareholder.[52] Under Korean laws, when a company holds its own stock, it has no voting rights and such shares must be disposed within a period determined by the presidential decree to revive the voting rights.[53] The sale of treasury shares to a favourable bidder or a 'white knight' operates as a takeover defence. Besides making it easier to obtain votes favourable to the incumbent board, the repurchase and sale of company stock drive up the market price before the takeover. Further, the financial resources expended in the process of holding and dispensing these shares make it a less favourable target for the hostile bidder.[54] A pioneering instance was SK Group selling 9.67% of its treasury shares to its banks and creditors thereby defeating the potential bid for controlling stake by Sovereign Fund which was upheld by the court.[55] Similarly, Hyundai Elevator issued 10 million new shares which amounted to 178% of the existing shares at a 30% discount to the market price with a stipulation that no subscriber can hold more than 300 of the issued shares. Without entirely defeating the decision of issuing shares in the face of a hostile bid, the court held that such issuance can only take place to respond to hostile

[50] Erik Lie and Randall A. Heron, 'On the Use of Poison Pills and Defensive Payouts by Takeover Targets' (2006) 79(4) The Journal of Business 1783, 1783-1785.
[51] Puchniak and Nakahigashi (n 17) 277.
[52] Kim Sang Gon, 'Treasury Shares as a Defence Mechanism Against Hostile Takeovers' (*Mondaq*) <www.mondaq.com/maprivate-equity/53152/treasury-shares-as-a-defence-mechanism-against-hostile-takeovers> accessed 29 November 2022.
[53] South Korean Commercial Act, art 341 read with South Korean Securities and Exchange Act, art 46-2.
[54] Gon (n 52).
[55] ibid.

bids provided that – (a) it is protecting the long-term interest of the company and shareholders and (b) the board has followed the required procedures in deciding to issue the shares.[56]

B. Assessing the Impact of Domestic Legal Frameworks on Asian Entities

The broader landscape and trends of hostile takeover activity in the Asian jurisdictions demonstrate how the commercial and non-legal peculiarities of each jurisdiction including the shareholding patterns, role of the state and cultural considerations operate in consonance with the takeover provisions to culminate in the employment of various takeover defences. Arguments against the suitability of the takeover laws in Asian jurisdictions stem from assuming a western lens to evaluate the legislative history of takeover regimes. However, such analysis is erroneous on three counts – *first*, it ignores the differences in the law as well as its operation in Asian jurisdiction; *second*, it sees the law as an end in itself and stops short of delving into the implications of the legislative decisions in the Asian jurisdictions; and *third*, it holds the western experience as the standard for a 'suitable' takeover regime.

Whether relatively high takeover contestability has an overall positive, negative or neutral impact on the corporate governance in entities of an economy is unresolved.[57] It has been argued that while hostile takeovers are a disciplining tool to incorporate a culture of good corporate governance, even failed takeover attempts have the same impact of correcting inefficiencies in the incumbent management.[58] Further, it is seen that in the past few decades, emerging jurisdictions have seen various external changes in commercial conditions such as concentrated control of entities. This is due to the rapid growth of industries and the emergence of medium-sized entities which deviate from the traditional patterns in the emerging jurisdictions. Therefore, the trends of failed hostile takeover attempts in jurisdictions are not in itself sufficient to deem a takeover regime unsuccessful in attaining its objective of securing good corporate governance and minimizing agency costs in the market for corporate control.[59]

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[56] ibid.
[57] Eduardo Costa and Ana Marques, 'Corporate Governance and Takeovers: Insights from Past Research and Suggestions for Future Research' (2009) 6(3) Corporate Ownership and Control 211, 216-217.
[58] ibid.
[59] ibid 213.

IV. CONCLUSION

In the West, the development of industrialization and markets for corporate control as well as the legal development of takeover regimes was a simultaneous occurrence. Accordingly, it was not feasible for the laws to be informed by the commercial realities of the specific jurisdictions. As a result, the legal history of the takeover regimes and more particularly the role of the board and shareholders in contesting hostile bids have been rationalised, either by the legal system (civil law or common law) of the jurisdiction or the wherewithal of stakeholders bringing the law in existence. In the context of Asian jurisdictions, however, the takeover regulations came about only at the end of the twentieth century or early twenty-first century, which is decades after the rebuilding of industries and corporate markets in the respective jurisdictions. Therefore, what seems to be an afterthought can be argued to be laws informed by and operating within various jurisdiction-specific factors. Consequently, it is erroneous to assume that structural similarities with the laws of developed jurisdictions like the US and the UK have led to 'borrowed takeover regimes' in these emerging jurisdictions merely due to their chronological lag. Instead, these laws differ in crucial respects from their western counterparts. Moreover, they operate within a more complex and developed ecosystem of corporate laws and practices to assume functionality on their own.

This paper has analysed the various deviations of the laws seen in India, Japan, China and South Korea from those of western jurisdictions like the UK and the US. It has identified the legislative efforts to account for local considerations to equip the stakeholders with the wherewithal (with or without strong lobbying) to respond to takeover bids. This in turn has led to some takeover defences being more habitually used (than others). Further, it has delved into factors external to the substantive takeover codes of the countries which impact the functionality of the laws in the respective jurisdictions. It argues that the patterns of takeover activity (or the relative absence thereof) and corporate governance in the Asian jurisdictions is an intended consequence of the takeover regimes designed in consideration of local externalities. Finally, it has concluded that attempting to analyse and rationalise the takeover codes in these jurisdictions using the western experience as the reference point represents an Anglo-centric lens which does not befit the Asian experience.