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ABSTRACT

Since the UK adopted the world's first stewardship code in 2010, stewardship codes have proliferated across Asia. Given the UK Code's prominence, it is tempting to assume that every other stewardship code preforms the same function as the UK Code. This assumption belies the truth: all these codes – regardless of whether they have in fact drawn inspiration from the UK Code – have taken different trajectories due to each adopting jurisdiction's distinctive institutional and legal context.

Using empirical evidence and in-depth case studies of stewardship in Japan and Singapore, this article reveals how any reception of UK-style stewardship concepts is only skin-deep. Even where the text of stewardship codes in Asia resemble the UK Code in form, their functional impact on corporate governance significantly depart from, or even run counter to, the intended functions of the UK Code. The article illustrates how stewardship codes in Asia have been used as a convenient vehicle for local governments and/or market players to achieve their own particular interests through an inexpensive, non-binding, and malleable vehicle, the formal adoption of which sends a signal of "good corporate governance" to the rest of the world. While such practices explain and contextualize the widespread adoption of stewardship codes in Asia, they also compound the challenge of drawing positive or normative conclusions from this development. The observation advanced in this article is important as leading corporate governance scholars, prominent international organizations, and market participants, have appeared content to draw such conclusions unaware that stewardship codes generally do not fulfill a similar function to the UK Code in Asia.

The article concludes by explaining how adopting globally recognized mechanisms of "good corporate governance" at a superficial formal level, and then altering their function to serve local purposes, appears to be a rising trend in corporate governance in Asia (and elsewhere). This phenomenon, which we coin "faux convergence", calls for the re-examination of important and impactful theories about corporate governance convergence. As an initial foray, this article develops an expanded taxonomy of corporate governance convergence and lays the foundation for future research on "faux convergence".

CONTENTS

I. INTRODUCTION 4

II. STEWARDSHIP'S RISE IN THE UK AND SPREAD ACROSS THE GLOBE 10

III. STEWARDSHIP THROUGH ASIAN LENS(ES): THE CONTRIBUTION OF JAPAN AND SINGAPORE CASE STUDIES 20

IV. THE MANY FACES OF STEWARDSHIP: TWO ASIAN CASES 23

A. Japan: Stewardship Against Management and in Service of Shareholder Oriented Objectives 23

1. The Problem: Perception of Poor Corporate Performance under Lifetime Employee-Dominated Management Backed by Stable Shareholders 23

2. The Liberal Democratic Party Administration's Grand Design 27

3. Japanese Stewardship Code 28

B. The Singapore Case Study: Similar Name, Divergent Functions 31

1. Stewardship as a Mechanism for Signaling and Maintaining the Status Quo31

2. The Curious Case of the Singapore Family "Stewardship" Code 36

C. Stewardship Codes in Asia as a Challenge to UK-Defined "Global" Stewardship 39

V. "FAUX CONVERGENCE": EXPANDING THE COMPARATIVE TAXONOMY 41

VI. CONCLUSION 46

I. INTRODUCTION

In 2010, when the United Kingdom enacted the world's first stewardship code (UK Code), the impetus behind it was clear. Institutional investors had come to hold a substantial majority of the shares in UK listed companies.[1] However, most institutional investors lacked the incentive to use their shareholder power to monitor management.[2] In turn, they were branded as "rationally passive" shareholders.[3] As the theory goes, left unmonitored by institutional investors, who collectively controlled the UK's shareholder float, the management of UK listed companies engaged in excessive risk-taking and short-termism, which were identified as significant contributors to the 2008 Global Financial Crisis (GFC).[4] Thus, the original objective, or intended function, of the UK Code was to motivate institutional investors to become responsible and engaged shareholders.[5] Specifically, its aim was to incentivize them, through the use of soft law, to act as "good stewards" by exercising their control over listed companies through their collective voting rights – with the goal of mitigating the excessive risk-taking and short-termism by corporate management to avoid another financial crisis.[6]

Since the adoption of the UK Code in 2010, stewardship codes and similar initiatives have proliferated throughout Asia. Asia's largest developed economy (Japan), Asia's tiger

[1] *See* Office for National Statistics, Ownership of UK quoted shares: 2016 (Nov. 29, 2017) tbl. 4 ("Beneficial ownership of UK shares by value"), at https://www.ons.gov.uk/economy/investmentspensionsandtrusts/bulletins/ownershipofukquotedshares/2016/pdf (last visited Jul. 29, 2019) (reporting that as of Dec. 31, 2016, 12.3% of the beneficial ownership of UK-listed shares was held by individuals, 29.4% by institutional investors, 53.9% by foreign investors, and 4.3% others); *id.* at tbl. 5 ("Rest of the world holdings of UK quoted shares by beneficial owner") (reporting that of the shares held by beneficial owners in North America and the other parts of "Rest of the World", individuals held 1.4% and 1.2%, institutional investors 97.3% and 58.8%, and others 1.4% and 39.9%, respectively) (note that rounding errors exist); see also Paul Davies, *Shareholders in the United Kingdom*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 355, 357–60 (Jennifer G. Hill & Randall S. Thomas eds., Edward Elgar 2015) (reporting older data).

[2] *See* Lucian A Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSPECTIVES 89, 96–100 (2017).

[3] Ronald J. Gilson & Jeffery N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 895 (2013); Gerald F. Davis, A New Finance Capitalism? Mutual Funds and Ownership Re-concentration in the United States, 5 EUR. MGMT. REV. 11, 19–20 (2008).

[4] See eg Iris H.-Y. Chiu & Dionysia Katelouzou, *From Shareholder Stewardship to Shareholder Duties: Is the Time Ripe?*, *in* SHAREHOLDER DUTIES 131, 131 (Hanne S. Birkmose ed., Kluwer Law International 2017); Paul Davies, *Shareholders in the United Kingdom*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 355, 373 (Jennifer G. Hill & Randall S. Thomas eds., Edward Elgar 2015); Brian R. Cheffins, *The Stewardship Code's Achilles' Heel*, 73 MOD. L. REV. 1004, 1005–1006 (2010).

[5] Brian R. Cheffins, *The Stewardship Code's Achilles' Heel*, 73 MOD. L. REV. 1004, 1014–1015 (2010).

[6] Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 Seattle U. L. Rev. 497, 506 (2018); Iris H.-Y. Chiu & Dionysia Katelouzou, *From Shareholder Stewardship to Shareholder Duties: Is the Time Ripe?*, in SHAREHOLDER DUTIES 131, 135 (Hanne S. Birkmose ed., Kluwer Law International 2017); Brian R Cheffins, The Stewardship Code's Achilles' Heel, 73 Mod. L. Rev. 1004, 1004–1006 (2010).

economies (Hong Kong, Singapore, South Korea, and Taiwan), and two of Asia's most important high-growth economies (Malaysia and Thailand) have all adopted stewardship codes.[7] Asia's largest economy (China) recently inserted provisions into its revised corporate governance code to promote shareholder stewardship among institutional investors.[8] In addition, several of Asia's most important developing economies (including India and the Philippines) have placed the creation of a stewardship code on their corporate governance reform agendas.[9]

In this context, at least at first blush, it appears that the proliferation of stewardship in Asia is a shining example of a successful corporate governance transplant from the UK to Asia and evidence of the corporate governance convergence theory. Indeed, one leading comparative corporate law professor recently declared that Asia has "jumped on the stewardship code bandwagon".[10] Two other leading UK law professors suggest that the widespread transplant of UK-style stewardship codes "is likely driven by the [same] common concerns shared by many jurisdictions."[11] It appears that other leading professors, market players, and international organizations view the spread of UK-style stewardship as one of the most significant developments in global corporate governance.[12] The assumption is that shareholder stewardship has been transplanted around the world based on the UK model and aims to solve the corporate governance problems that the UK Code was designed to address (i.e., to motivate institutional investors to monitor corporate management to prevent them from engaging in the type of excessive risk-taking and short-termism that led to the GFC and, more recently, to promote an Environmental, Social, and Governance (ESG) agenda).[13] This assumption

[7] ISS Corporate Solutions, *Prepping for the Trend: Stewardship Code Coming to Asia* (ISS Corporate Solutions 2019) at https://www.isscorporatesolutions.com/prepping-for-the-trend-stewardship-code-coming-to-asia/ (last visited Jul. 24, 2019).

[8] Katherine Sung, *Regime Change Begins at Home: China's New Governance Code* (Glass Lewis, Oct. 4, 2018) https://www.glasslewis.com/regime-change-begins-at-home-chinas-new-governance-code/ (last visited Sept. 8, 2019).

[9] See e.g. *SEBI Panel Moots New Code for Institutional Investors* (Press Trust of India, Jul. 19, 2015) https://www.business-standard.com/article/pti-stories/sebi-panel-moots-new-code-for-institutional-investors-115071900212_1.html (last accessed Sept. 8, 2019); Securities and Exchange Commission (Republic of the Philippines), *Philippines Corporate Governance Blueprint 2015* 20–21 (Oct. 29, 2015) http://www.sec.gov.ph/wp-content/uploads/2015/01/SEC_Corporate_Governance_Blueprint_Oct_29_2015.pdf (last visited Sept. 8, 2019).

[10] Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497, 507 (2018).

[11] Iris H.-Y. Chiu & Dionysia Katelouzou, *From Shareholder Stewardship to Shareholder Duties: Is the Time Ripe?*, in SHAREHOLDERS' DUTIES 131, 135 (Hanne S. Birkmose ed., Kluwer Law International 2017).

[12] See Part III below.

[13] *Id*. The recently issued UK Stewardship Code 2020 now contains provision on ESG. Financial Reporting Council, *UK Stewardship Code 2020*, FINANCIAL REPORTING COUNCIL, at https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Final2.pdf (last visited Oct. 31, 2019) ("Principle 7: Signatories systematically integrate

seems reasonable as all Asian jurisdictions that have adopted stewardship codes claim to have been inspired by the UK Code and, at least based on a superficial textual analysis, have generally used a similar instrument (stewardship principles) and broadly similar language in those principles.[14] At this high level of abstraction, it is not unreasonable to conclude, as many experts have, that the UK stewardship model has been transplanted to Asia.[15]

However, if we drill down deeper beyond the label of stewardship and a superficial textual analysis, it is clear that there are significant differences in the function of stewardship (*i.e.*, its intended and actual impact on each jurisdiction's corporate governance) between the UK and most Asian jurisdictions – and also *within* Asia. In fact, in some Asian jurisdiction's shareholder stewardship functions in a way that appears to run counter to the UK model. As explained in this article, the Japanese government adopted a stewardship code with the aim of reforming its traditional lifetime employee, risk-averse, and stakeholder-oriented governance system towards a more shareholder-oriented, profit maximizing, and less risk-averse governance system. In Singapore, its stewardship codes appear to be designed to entrench its successful state-controlled and family-controlled system of corporate governance. These functions are alien to the UK model and demonstrate the diversity in the role played by stewardship codes within Asia.

The fact that stewardship fulfills different functions in Asia than in the UK should not surprise. Throughout most of Asia controlling shareholders – often families, the state, or other affiliated or group corporations – have actual or *de facto* control over the corporate governance of most listed companies through their voting rights.[16] Asia's corporate controllers are similar to the UK's institutional investors in that they control the shareholder float in virtually all listed companies in their jurisdictions. However, the nature of Asia's corporate controllers is diametrically opposed to the UK's institutional investors with respect to the most important feature related to shareholder stewardship:

stewardship and investment, including material environmental, social and governance issues, and climate change, to fulfil their responsibilities.").

[14] Dionysia Katelouzou & Mathias Siems, *Textual Analysis & Networks* (forthcoming).

[15] *See e.g.* ISS Corporate Solutions, *Prepping for the Trend: Stewardship Code Coming to Asia*, (ISS Corporate Solutions 2019) https://www.isscorporatesolutions.com/prepping-for-the-trend-stewardship-code-coming-to-asia/ (last visited Jul. 24, 2019) ("Following the formal release of Stewardship Codes ("the Code") in Japan, Malaysia, Hong Kong, and Taiwan, three other countries including Singapore, South Korea, and Thailand are following suit as a way of promoting sustainable growth as well as corporate and shareholder value by means of active voting and constructive engagement. The UK Code is modeled after by other codes, with nuanced differences.").

[16] Dan W. Puchniak, *Multiple Faces of Shareholder Power in Asia – Complexity Revealed*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 511, 512–515, 521–522 (Jennifer G. Hill & Randall S. Thomas eds., Edward Elgar Publishing 2015) (discussing Japan). While Japan has been characterised as a dispersed shareholding jurisdiction, it has a number of unique characteristics that bring it closer to a block shareholding jurisdiction. See Gen Goto, *Legally "Strong" Shareholders of Japan*, 3 MICH. J. OF PRIVATE EQ. VENTURE CAP. L. 125, 144–147 (2014) (explaining developments in Japan's cross-shareholding arrangements).

Asia's corporate controllers are "rationally engaged shareholders"[17] whereas the UK's institutional investors are "rationally passive shareholders".[18] From this perspective, Asia does not lack "shareholder stewards" whereas the UK does. A related important observation is that although institutional investor ownership has been on the rise in most Asian jurisdictions, family and state controlling shareholders continue to dominate public listed companies generally.[19] Accordingly, in most jurisdictions in Asia institutional investors do not have the ability to control – or, perhaps more importantly, to threaten to change control – in most listed companies.

From an agency-costs perspective, it is also well recognized that in most Asian jurisdictions the primary corporate governance problem is not the lack of engagement or managerial monitoring by those who control the shareholder float.[20] Rather the problem is that the controlling shareholder is engaged and monitors management for their own interests, and not necessarily as a "good steward" for the benefit of minority shareholders, the environment, or society.[21] As a result, the problems that spawned the UK Code (i.e., excessive risk taking and short-termism by unmonitored management) and the solution provided by the UK Code (i.e., to incentivize institutional investors to collectively make use of their control over the shareholder float) are largely absent in Asia. Rather,

[17] *See e.g.* Dan W. Puchniak, *Multiple Faces of Shareholder Power in Asia – Complexity Revealed*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 511, 526–32 (Jennifer G. Hill & Randall S. Thomas eds., Edward Elgar Publishing 2015) (discussing private benefits of control accruing to controlling shareholders in Asian jurisdictions of China, Japan, and Singapore).

[18] See Part II below.

[19] *See* Adriana De La Cruz et. al. OWNERS OF THE WORLD'S LISTED COMPANIES 11–12, 13–16, 35, 37–8 (2019) http://www.oecd.org/corporate/owners-of-the-worlds-listed-companies.htm (based on an analysis of selected listed companies); Ernest Lim, A CASE FOR SHAREHOLDERS' FIDUCIARY DUTIES IN COMMON LAW ASIA 52–55 (Malaysia), 56–59 (India) (Cambridge University Press 2019); Dan W Puchniak, *Multiple Faces of Shareholder Power in Asia – Complexity Revealed*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 511, 514, 521–23 (Jennifer G. Hill & Randall S. Thomas eds., Edward Elgar Publishing 2015) (explaining varieties of block shareholdings in China, Japan, and Singapore). While state and family controlling shareholders do not generally dominate listed companies in Japan, it is fair to say that institutional investors do not collectively exercise majority control over most listed companies: Gen Goto, *Legally "Strong" Shareholders of Japan*, 3 MICH. J. OF PRIVATE EQ. VENTURE CAP. L. 125, 144–145 (2014).

[20] *See* Dan W Puchniak, *Multiple Faces of Shareholder Power in Asia – Complexity Revealed*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 511, 524–26 (Jennifer G. Hill & Randall S. Thomas eds., Edward Elgar Publishing 2015) (describing blockholders in Asia).

[21] *See e.g.* Ernest Lim, A CASE FOR SHAREHOLDERS' FIDUCIARY DUTIES IN COMMON LAW ASIA 41–42 (Cambridge University Press 2019) ("If shareholders can exercise corporate powers for their own benefit at the company's expense, there is a greater risk of doing so by controlling shareholders in concentrated ownership jurisdictions. … I examine the concentrated ownership structure of the four common law jurisdictions in Asia and provide concrete examples of how controlling shareholders have engaged in extractions of private benefits of control to the detriment of the company."); Christopher Chen et al, *Board Independence as a Panacea to Tunneling? An Empirical Study of Related-Party Transactions in Hong Kong and Singapore*, 15 J. EMP. LEGAL STUD. 987, 988 (2018) ("Tunneling represents a form of agency costs. It poses a significant problem in the Far East, whose publicly listed companies are dominated by ownership concentration, thereby raising the possibility of extracting private benefits at the expense of the company."); Dan W Puchniak, *Multiple Faces of Shareholder Power in Asia – Complexity Revealed*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 511, 526–527 (Jennifer G. Hill & Randall S. Thomas eds., Edward Elgar Publishing 2015).

entrenched management backed by controlling or affiliated shareholders is the norm, and institutional shareholders (whether passive or active) most often lack the voting power to seize control.

In this context, the original function of UK-style stewardship would appear to be largely irrelevant in Asia. This makes the purported meteoric rise of stewardship codes in Asia puzzling. Why has a UK corporate governance mechanism, designed for a problem that largely does not exist in Asia, which provides for a solution that is largely unavailable in Asia, been implemented throughout Asia? The short answer is, that the rise of UK-style stewardship has generally occurred in Asia on a formal level (i.e., the adoption of broadly similar stewardship principles), but often not on a functional level (i.e., the intended or actual impact on corporate governance). In fact, surprisingly, this article reveals that some of the intended and actual functions of stewardship codes in Asia significantly depart, or even run counter to, the intended functions of the UK Stewardship Code.

It appears that one of the many reasons for the popularity of stewardship codes in Asia is that they provide a convenient vehicle for local governments and/or market players to achieve their own particular interests through an inexpensive, non-binding, and malleable vehicle, the formal adoption of which sends a signal of "good corporate" governance – as shareholder stewardship has established itself as an indicia or norm of "good corporate governance" around the world. While this makes the widespread adoption of stewardship codes in Asia understandable, it creates a problem in terms of drawing positive or normative conclusions from this development. This observation is important as leading corporate governance scholars, prominent international organizations, and market participants, repeatedly draw such conclusions based on the erroneous assumption that stewardship codes generally fulfill a similar function across jurisdictions.[22]

Adopting globally recognized mechanisms of "good corporate governance" at a superficial formal level and then altering their function to serve local purposes appears to be a rising trend in corporate governance in Asia (and elsewhere).[23] This trend suggests that corporate governance convergence at a superficial (*i.e.* formal) level is occurring, but that corporate governance remains considerably local, path dependent, and, ultimately, divergent in practice.[24] This trend has been recently coined as "divergence within convergence" by Jeffrey Gordon,[25] who cites the recent research of two of the authors on

[22] *See* Part II below.

[23] *See* Dan W. Puchniak & Kon Sik Kim, *Varieties of Independent Directors in Asia: A Taxonomy, in* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, COMPARATIVE AND CONTEXTUAL APPROACH 131–132 (Dan W. Puchniak et. al. eds., Cambridge University Press 2017).

[24] *Id.*

[25] Jeffrey N. Gordon, *Convergence and Persistence in Corporate Law and Governance*, *in* OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 28, 29 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., Oxford University Press 2018) ("There has been convergence in many of the formal governance rules but local applications reveal considerable divergence."); *id.* at 30 ("In 2017, it would also be right to add the role of 'global governance,' the effort to set standards flowing from supranational public

the “varieties of independent directors in Asia” as evidence of this trend.[26]

The proliferation of “stewardship” throughout Asia also adds a new layer of gloss to Ronald Gilson’s impactful observation about the difference between formal convergence and functional convergence.[27] At first blush, the rise of stewardship in Asia would seem to challenge Gilson’s observation that functional convergence is likely to develop before formal convergence because formal convergence is costly.[28] In Asia, it appears that, at least superficially, “stewardship” has been formally adopted and that this formal convergence has been rapid and inexpensive – yet functional convergence has not occurred as stewardship has functioned to serve divergent local objectives and interests. However, a careful reading of Gilson’s work suggests that he was not contemplating the type of *superficial* formal convergence that has occurred with stewardship in Asia and appears to be increasingly common in other areas of corporate governance. In turn, as explained in detail in Part V below, rather than challenging Gilson’s theory, the rise of stewardship in Asia (and, we suspect, other similar corporate governance developments in Asia) likely adds a new category, “faux convergence”, to Gilson’s helpful convergence taxonomy.[29] Recognizing and understanding this type of “faux convergence” is important as it presents challenges for comparative corporate governance research and calls into question the utility of efforts by organizations such as the IMF, OECD, and

institutions [in promoting convergence].”); *id.* at 32 (“Section 4 looks at evidence of divergence, particularly ‘divergence within convergence,’ which seems to describe the general state of play.”); *id.* at 41 (“Divergence takes two forms: The first is a non-following of the convergent norm—for example, not requiring independent directors. The second, far more common, is divergence within the convergent norm: “divergent convergence.” Evidence of both forms of divergence is found in the OECD Corporate Governance Factbook (2017), a readily accessible current guide to worldwide corporate law and governance.”); *id.* at 43 (“Do these divergent elements within a convergent practice matter? The evidence is ‘yes, they should.’ First, the particulars of a reform can determine whether it is “high impact” or not.”); *id.* at 44 (“A more radical version of ‘divergence within convergence’ is advanced in a recent volume on independent directors in Asia, which argues both that (1) independent directors are ‘ubiquitous’ in Asia, found in higher proportion across more firms than in the ‘West,’ and that (2), functionally, there are ‘varieties’ of independent directors in Asia, differing substantially from the US variant and differing even within Asia. Adoption of a transplant, particularly under pressure of foreign investors or global governance institutions, does not determine how the new institution will function. That emerges over time, as the transplant is contextualized within the local ecology, and can lead to significant divergence in practice.”).

[26] *See generally* Dan W. Puchniak & Kon Sik Kim, *Varieties of Independent Directors in Asia: A Taxonomy*, *in* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, COMPARATIVE AND CONTEXTUAL APPROACH (Dan W. Puchniak et. al. eds., Cambridge University Press 2017).

[27] Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329, 356 (2001) (“In this essay, I have surveyed three kinds of corporate governance convergence: *functional convergence*, when existing governance institutions are flexible enough to respond to the demands of changed circumstances without altering the institutions' formal characteristics; *formal convergence*, when an effective response requires legislative action to alter the basic structure of existing governance institutions …”).

[28] Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329, 338 (2001) (“Functional convergence is likely the first response to competitive pressure because changing the form of existing institutions is costly.”).

[29] *See* Figure 1 below.

World Bank to promote global/universal mechanisms for "good" corporate governance.[30]

The balance of this article will proceed as follows. Part II provides a concise overview of the rise of stewardship in the UK and explains how the UK stewardship code model is assumed to be the global model. Part III explains why an examination of stewardship in Japan and Singapore provides valuable insights into Asia. In Part IV, the Japan and Singapore case studies will be used to demonstrate how different they are from the UK and each other in the way they function. Part V will discuss the implications of these case studies for the comparative corporate governance convergence debate and Part VI provides a brief conclusion.

II. Stewardship's Rise in the UK and Spread Across the Globe

The "Anglo-American"[31] corporate governance model based on the Berle-Means paradigm of widely-dispersed shareholders has been disrupted by the rise of institutional investors.[32] Today, a modest number of institutional shareholders collectively hold enough shares to exercise effective control over the majority of listed companies in the

[30] *See* Part V below.

[31] That this term has become entrenched in comparative corporate governance discourse is demonstrated by a Google search of the term "Anglo-American corporate governance" performed on July 24, 2019, which produced 18,900 results. The label of "Anglo-American" label is often used as shorthand for the idea that corporate governance systems in the UK and the US have certain characteristics in common. These include: 1) widely-held and liquid shareholdings; 2) a one-tier (unitary) model of the board of directors; 3) a so-called "common law" origin; and 4) an overall orientation that may be termed shareholder primacy. Although substantial differences (such as in shareholder power) between the two systems exist in both law and practice, we take the position that "Anglo-American" remains a useful point of departure when describing the shareholder landscape and context that underlies much of the comparative corporate law discourse – but which is quite distinct from the situation in almost every other jurisdiction. For an account and explanation of key differences between the US and the UK corporate governance systems, see CHRISTOPHER M. BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER (Cambridge University Press 2013).

[32] *See e.g.* Bernard S. Black & John C. Coffee Jr., *Hail Britannia?: Institutional Investor Behaviour Under Limited Regulation*, 92 Mich. L. Rev. 1997, 2001–07 (1994) (describing the institutionalization of British capital markets with comparisons to the US); BRIAN R. CHEFFINS, CORPORATE OWNERSHIP AND CONTROL: BRITISH BUSINESS TRANSFORMED 345–70 (Oxford University Press 2008) (describing the factors underlying the rise of institutional investors in the UK).

UK[33] and US.[34] This phenomenon of increasingly concentrated shareholding poses a fundamental challenge to the hitherto defining tension (or agency cost problem) between shareholders and managers that is fundamental to Anglo-American corporate governance discourse.[35] Concentration of voting power within relatively few institutional investors makes it *theoretically* possible for them to play a critical role in reducing shareholder-manager agency costs by acting as collective "good stewards" of their investee companies through the exercise of their voting rights.[36]

Yet left to their own devices, however, institutional investors seemed to do nothing of the sort. Memorably dubbed "the sleeping giants of British corporate life",[37] institutional

[33] *See* Adriana De La Cruz et. al. OWNERS OF THE WORLD'S LISTED COMPANIES 12, 37–8 (2019) http://www.oecd.org/corporate/owners-of-the-worlds-listed-companies.htm (based on an analysis of 482 listed companies representing 63% of total market capitalisation in the United Kingdom, finding that institutional investors held 63% of market capitalisation weighted ownership); Paul Davies, *Shareholders in the United Kingdom*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 355, 357–59 (Jennifer G. Hill & Randall S. Thomas eds., Edward Elgar 2015). For latest available figures, see Office of National Statistics (UK), *Ownership of UK quoted shares: 2016*, OFFICE OF NATIONAL STATISTICS (U.K.) (Nov. 29, 2017) https://www.ons.gov.uk/economy/investmentspensionsandtrusts/bulletins/ownershipofukquotedshares/2016 (last visited Jul. 24, 2019).

[34] *See e.g.*, Adriana De La Cruz et. al. OWNERS OF THE WORLD'S LISTED COMPANIES 12, 37–8 (2019) http://www.oecd.org/corporate/owners-of-the-worlds-listed-companies.htm (based on an analysis of 622 listed companies representing 31% of total market capitalisation in the United States, finding that institutional investors held 72% of market capitalisation weighted ownership; Ronald J. Gilson & Jeffrey N. Gordon *The Rise of Agency Capitalism and the Role of Shareholder Activists in Making It Work*, 31 J. App. Corp. Fin. 8, 11 (2019) (reporting that "by 2009, institutional investors held just over 50% of all U.S. public equities, and 73% of the equity of the 1,000 largest U.S. corporations."); Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. Rev 721, 725–26 (2019) ("Over the last fifty years, institutional investors have come to hold a majority of the equity of U.S. public companies. From 1950 to 2017, the institutional ownership of corporate equity increased tenfold, from 6.1% to 65%. As a result, institutional investors now control a large majority of the shares of public companies and have a dominant impact on vote outcomes at those companies.") (footnotes omitted).

[35] John C. Coates, IV, *The Future of Corporate Governance Part I: The Problem of Twelve* (manuscript at 2–5) Mar. 14, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247337 (explaining how the US approach to agency costs has or needs to evolve in response to institutional investors); Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence and Policy* (manuscript at 15–29) 119 COLUM. L. REV (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3282794 (explaining why institutional investors generate distinctive agency costs).

[36] *See* Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence and Policy* 119 COLUM. L. REV (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3282794 (arguing that index fund managers have incentives to underinvest in stewardship and defer excessively to corporate managers), *but see* Edward B. Rock & Marcel Kahan, *Index Funds and Corporate Governance: Let Shareholders Be Shareholders* (manuscript at 33–34, 42–44) Apr. 6, 2019 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3295098 (arguing that index fund managers have incentives to invest in acquiring company-specific information and engage in company-specific analysis).

[37] IV DAVID KYNASTON, THE CITY OF LONDON 434 (Pimlico 2002).

shareholders have by and large adopted a policy of passivity.[38] Notwithstanding the above, the expectation – or wishful thinking – that institutional investors would in fact exercise their power as "stewards" persisted among regulators, policymakers, and scholars alike for decades.[39] However, it was the GFC that caused the UK to place a greater emphasis on shareholder stewardship and to make it a pillar of its corporate governance model.[40]

As a response to the excessive risk-taking and short-termism by listed company management that contributed to the GFC, the UK Code aimed to create incentives for institutional investors to step up and play a preventative role. Although the UK Code initially took the form of a voluntary, opt-in "comply or explain" regime,[41] it was subsequently made mandatory for every UK-authorized asset manager in December 2010

[38] *See* Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence and Policy* (manuscript at 17–29) 119 COLUM. L. REV (forthcoming 2019) (explaining why index funds have incentives to underinvest in stewardship and defer excessively to management); Lucian A Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. Econ. Perspectives 89, 96–100 (2017) (offering economic reasons for passivity); BRIAN R. CHEFFINS, CORPORATE OWNERSHIP AND CONTROL: BRITISH BUSINESS TRANSFORMED 377–381 (Oxford University Press 2008) (discussing a mix of economic and political reasons for passivity). See also Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 890–91 (2013) (explaining disincentives arising from agency costs of agency capitalism); *id.* at 889, 895 (arguing that both investment managers and asset owners are "rationally reticent" in the sense that while they would not on their own initiative on governance issues but would be responsive to proposals from others)

[39] *See e.g.* Arad Reisberg, *The UK Stewardship Code: On the Road to Nowhere?*, 15 J. CORP. L. STUD. 217, 223–225 (2015) (describing the 'alleged success' of the UK Code put forward by regulators since its inception); Edward B. Rock & Marcel Kahan, *Index Funds and Corporate Governance: Let Shareholders Be Shareholders* (manuscript at 33–34, 42–44) Apr. 6, 2019 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3295098 (arguing that index fund managers have incentives to monitor management).

[40] For a concise summary of pre-GFC attempts at addressing stewardship, see Brian R. Cheffins, *The Stewardship Code's Achilles' Heel*, 73 MOD. L. REV. 1004, 1007–09 (2010).

[41] For the original 2010 Code, see FINANCIAL REPORTING COUNCIL, THE UK STEWARDSHIP CODE (Jul. 2010), *available at* https://www.frc.org.uk/getattachment/e223e152-5515-4cdc-a951-da33e093eb28/UK-Stewardship-Code-July-2010.pdf (last visited Oct. 14, 2019). That this was meant to be opt-in comply-or-explain – meaning that the targets of the Code were free to neither comply nor explain by simply not opting-in to the Code – can be inferred from the implementation report released at the same time. See FINANCIAL REPORTING COUNCIL, IMPLEMENTATION OF THE UK STEWARDSHIP CODE (Jul. 2010), 2 *available at* https://www.frc.org.uk/getattachment/34d58dbd-5e54-412e-9cdb-cb30f21d5074/Implementation-of-Stewardship-Code-July-2010.pdf (last visited Oct. 14, 2019) ("The FSA will shortly begin consultation on proposals to introduce a requirement for authorised asset managers to disclose whether or not they comply with the Code. In the meantime, the FRC would strongly encourage all institutional investors to publish by the end of September 2010 a statement on their website of the extent to which they have complied with the Code, and to notify the FRC when they have done so."). *See also id.* at 5 ("The Code is addressed in the first instance to those firms who manage assets on behalf of institutional investors. The FSA is expected to begin consultation in July 2010 on proposals to introduce a "comply or explain" disclosure requirement that would apply to those firms authorised by the FSA to manage assets on behalf of institutional investors. The FRC expects those firms to disclose on their websites to what extent they have complied with the Code, and how they have done so."). The use of the words "strongly encourage" (*id.* at 2) and "expects" (*id.* at 5) reveal that the regime was not intended – at least upon inception of the UK Code – to be mandatory.

to disclose whether they choose to comply or explain.[42] Later, in a bid to "improve the quality of reporting against the Code, encourage greater transparency in the market and maintain the credibility of the Code", the Financial Reporting Council (FRC) conducted a grading exercise ("tiering") by which they classified UK Code signatories into three "tiers" according to the quality of their statements on their approaches to stewardship, and where they have departed from the Code, their explanations for doing so.[43] The FRC subsequently removed the lowest Tier 3 category in August 2017,[44] but in the process about 20 out of the 40 asset managers graded as Tier 3 removed themselves as UK Code signatories.[45]

Despite these changes in the form of implementation, what the UK Code has been consistently criticized for has been its failure to provide adequate incentives to motivate institutional shareholders to act as "good stewards".[46] As Bebchuk, Cohen, and Hirst argue in an article that has gained significant attention, asset managers (who compete fiercely on relative performance) have almost no incentives to engage actively with investee company management.[47] From this perspective, stewardship codes are unlikely

[42] Financial Reporting Council, *UK Stewardship Code 2020*, FINANCIAL REPORTING COUNCIL, at https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Final2.pdf(last visited Oct. 31, 2019) ("Asset managers are required under the FCA Conduct of Business Sourcebook (COBS) to develop and explain how they have implemented an engagement policy for their listed equity investments, including how they monitor investee companies, their voting behaviour and their use of proxy advisors."); Financial Conduct Authority, Conduct of Business Sourcebook, r. 2.2.3:

"**Disclosure of commitment to the Financial Reporting Council's Stewardship Code.**

> A *firm*, other than a *venture capital firm*, which is *managing investments* for a *professional client* that is not a natural person must disclose clearly on its website, or if it does not have a website in another accessible form:
>
> (1) the nature of its commitment to the Financial Reporting Council's Stewardship Code; or
>
> (2) where it does not commit to the Code, its alternative investment strategy."

(last visited Jul. 24, 2019).

Curiously, but no direct reporting obligations as to compliance with the UK Code was imposed on foreign investors notwithstanding their dominating presence in the UK's public equity markets.

[43] Financial Reporting Council, 'Tiering of signatories to the Stewardship Code' (Financial Reporting Council, Nov. 14, 2016) https://www.frc.org.uk/news/november-2016/tiering-of-signatories-to-the-stewardship-code (last visited Jul. 24, 2019).

[44] Financial Reporting Council, 'FRC removes Tier 3 categorisation for Stewardship Code signatories' (Financial Reporting Council, Aug. 3, 2017) https://www.frc.org.uk/news/august-2017/frc-removes-tier-3-categorisation-for-stewardship (last visited Jul. 24, 2019).

[45] *Id*.

[46] The UK Code's lack of coercive force has since been and continues to be a source of much criticism. *See* Arad Reisberg, *The UK Stewardship Code: On the Road to Nowhere?*, 15 J. CORP. L. STUD. 217, 240–241 (2015) (discussing the lack of an enforcement mechanism for the Stewardship Code); Brian R. Cheffins, *The Stewardship Code's Achilles' Heel*, 73 MOD. L. REV. 1004, 1025 (2010) ("Correspondingly, even if the Stewardship Code fails to fulfil the objectives of its proponents, without additional study it would be unwise to replace its mixed comply-or-explain and voluntary approach with mandatory regulation designed to foster shareholder activism.").

[47] *See* Lucian A Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSPECTIVES 89, 96–100 (2017) (neither passively- nor actively-managed mutual fund

to have a significant impact without addressing the incentive deficit for "stewards"[48], regardless of whether their objective is to build long-term value, act in the public interest, or something else.

What began as a code for a single country (the UK) quickly took on a life of its own in spite of detractors.[49] As Hill pertinently observed, the UK Code's bold claims that "[s]tewardship aims to promote the long term success of companies … [and] [e]ffective stewardship benefits companies, investors and the economy as a whole"[50] "proved alluring from a comparativist standpoint, providing clear incentives for transplantation".[51] At least formally, it appears that the UK Code sparked a global stewardship movement, with broadly similar codes and other initiatives now existing in at least 18 jurisdictions over five continents – with many other jurisdictions also placing shareholder stewardship on their corporate governance reform agendas.[52] Yet amidst all this activity, what is conspicuously missing is any serious attempt to identify the precise actors in each national corporate governance context and define the subject(s) and goal(s) of stewardship in each. Put simply, the question that has not yet been fully interrogated is: what is the intended and actual function(s) of stewardship in Asian jurisdictions and does this depart from the original UK stewardship model? Instead, what largely prevails is an implicit assumption that the intended and actual function of "stewardship" in Asia has been (and is) similar to the UK.

Two leading UK-based scholars, who have been active in UK and European stewardship discourse, have hitherto readily assumed that stewardship globally is the same as stewardship in the UK, and is driven by the same factors as in the UK:

managers have incentives to engage in stewardship than would be portfolio value-maximizing), *id.* at 102–103 (investment managers have active disincentives to oppose management).

[48] *Id.* at 108 ("stewardship codes putting forward aspirations, principles, or guidelines are likely to have less of an impact than if investment managers had appropriate incentives").

[49] *See* sources cited in *supra* note 46 and accompanying text to the note. *See also e.g.* Owen Walker, *Beacon of British stewardship needs a brighter flame*, Fin. Times (Jan 27, 2019) https://www.ft.com/content/1a3a57be-5c15-3e03-bae0-10bd5804bf20 (last visited Jul. 24, 2019).

[50] Financial Reporting Council, The U.K. Stewardship Code 1 (Sept. 2012), https://www.frc.org.uk/getattachment/d67933f9-ca38-4233-b603-3d24b2f62c5f/UK-Stewardship-Code-(September-2012).pdf

[51] Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 Seattle U. L. Rev. 497, 506–07 (2018).

[52] See e.g. ISS Corporate Solutions, *Prepping for the Trend: Stewardship Code Coming to Asia*, (ISS Corporate Solutions 2019) https://www.isscorporatesolutions.com/prepping-for-the-trend-stewardship-code-coming-to-asia/ (last visited Jul. 24, 2019) ("Following the formal release of Stewardship Codes ("the Code") in Japan, Malaysia, Hong Kong, and Taiwan, three other countries including Singapore, South Korea, and Thailand are following suit as a way of promoting sustainable growth as well as corporate and shareholder value by means of active voting and constructive engagement. The UK Code is modeled after by other codes, with nuanced differences."); Ernst & Young, 'Q&A on Stewardship Codes' (August 2017) <https://www.ey.com/Publication/vwLUAssets/ey-stewardship-codes-august-2017/$FILE/ey-stewardship-codes-august-2017.pdf> accessed 30 April 2019; Kerrie Waring, 'Investor stewardship and future priorities' (Spring 2017) <https://ethicalboardroom.com/investor-stewardship-and-future-priorities/> accessed 29 April 2019.

> “However, the [UK] Code has since taken its place in the transnational governance space and inspired international developments in the institution of Stewardship Codes in many other countries, including the Netherlands, Switzerland, Japan and Malaysia … the gradual internationalisation of soft law governance obligations of stewardship on the basis of the UK Stewardship Code is likely to be driven by the common concerns shared by many jurisdictions with listed markets in relation to the increasing presence of institutional investors (especially foreign ones) in their markets and the potentially active role they can play.”[53]

Scholars in the US have also been content to proceed based on a monolithic view of stewardship based on the UK model. Gordon has identified a global shift away from “efficiency” and towards political and social “stability” as the end-goal of corporate governance.[54] Among those interested in stability are large institutional investors due to their diversified portfolios and long-term horizons, as well as “global governance”[55] institutions. Together with resistance against short-termist hedge funds, Gordon points to the global stewardship movement as a manifestation of the increasing concern with stability.[56] Gordon’s vision of stewardship – as promoting long-term shareholder value and as a bulwark against short-term hedge fund activism – exemplifies the conventional understanding of global stewardship based on the UK model.[57]

[53] Iris H.-Y. Chiu & Dionysia Katelouzou, *From Shareholder Stewardship to Shareholder Duties: Is the Time Ripe?*, in SHAREHOLDERS’ DUTIES 131, 135 (Hanne S Birkmose ed., Kluwer Law International 2017). *See also* Iris H.-Y. Chiu, *Learning from the UK in the Proposed Shareholders’ Rights Directive 2014? European Corporate Governance Regulation from a UK Perspective*, 114 Zeitschrift für Vergleichende Rechtswissenschaft 121, 150–51 (2015) (“Further a number of authoritative bodies such as the Italian stock exchange and the Swiss International Investor Association have adopted and adapted the Code, as well as the Japanese National Pension Fund and Malaysian stock exchange. The Japanese Code is remarkably similar to the UK’s except that it emphasises the constructive dialogue between investors and companies, in the tradition of communitarian harmony important to Japanese tradition, and it compels investors to engage in an in-depth knowledge of investee companies in order to support engagement. … The Malaysian Institutional Investor Code to drive Stewardship ... is also remarkably similar to the UK Code except that institutional investors are to explicitly consider corporate governance and sustainability (environmental, social and governance) issues in their engagement.”) (footnotes omitted).

[54] “This is demonstrated by the growing global governance movement for ‘Stewardship Codes’ and the concerted campaign against the purported ‘short-termism’ of hedge funds.” eg Jeffrey N. Gordon, *Convergence and Persistence in Corporate Governance*, *in* OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 28, 54 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., Oxford University Press 2018). Interestingly, Gordon also suggests “family shareholding groups”, especially those planning for future generations, value stability. *Id.*

[55] Such as the IMF, World Bank, and OECD. *See* Jeffrey N. Gordon, *Convergence and Persistence in Corporate Governance*, *in* OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 28, 45 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., Oxford University Press 2018).

[56] Jeffrey N. Gordon, *Convergence and Persistence in Corporate Governance*, *in* OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 28, 54 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., Oxford University Press 2018).

[57] See also his earlier work Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863 (2013), a piece premised on “rationally reticent” institutional shareholder behaviour, the solution to which is arbitrage by a class of actors specializing in activism.

Reports in the popular press almost uniformly assume that stewardship movements across the world follow the UK model closely.[58] What is more troubling is the fact that the OECD, a key actor in global governance, has done largely the same. In the *G20/OECD Principles of Corporate Governance*, institutional shareholders are called on to "disclose their policies with respect to corporate governance", and the adoption of voluntary stewardship codes was cited in connection.[59] By the time the *OECD Survey of Corporate Governance Frameworks in Asia* was released in 2017, stewardship had become yet another box to tick, nestled under "Exercising voting rights" as a subset of "Governance-related responsibilities of institutional investors".[60] Despite observing in an earlier section that 13 out of the 14 Asian jurisdictions surveyed had concentrated shareholding structures,[61] nowhere in this document was the importance (or lack thereof) of

[58] *See e.g.* Owen Walker, *Beacon of British stewardship needs a brighter flame*, Fin. Times (Jan. 27, 2019) (last visited Jul. 24, 2019) ("[The UK Code] turned the UK into a leader in corporate oversight but it has since been overtaken by foreign imitators. … Many countries have followed the UK's lead, with more than 20 codes in place.");
Amanda White, *Top US funds embrace stewardship code*, Top1000Funds.com (Feb. 17, 2017) https://www.top1000funds.com/2017/02/top-us-funds-embrace-stewardship-code/ (last visited Jul. 24, 2019) ("Six of the 14 countries that have developed stewardship codes since 2014 are in Asia, the PRI states. Codes have typically been modelled after the UK Stewardship Code; they set out principles that aim to improve engagement between investors and companies to help improve long-term, risk-adjusted returns.");
Fiona Reynolds, *Stewardship codes guide best practice*, Investment Magazine (Sep. 6, 2017) https://www.investmentmagazine.com.au/2017/09/stewardship-codes-guide-best-practice/ (last visited Jul. 24, 2019) ("Australia can then join a long list of countries that have already developed stewardship codes in recent years, including the UK, Italy, Denmark, Switzerland, the Netherlands, the European Union, the US, Canada, Japan, Hong Kong, Philippines, South Korea, Malaysia, Taiwan, Thailand, Brazil and Singapore. // For many countries, stewardship codes can help foster sustainable, long-term growth and attract foreign investors which feel that stewardship codes can help ensure better corporate governance.");
Schroders, *Schroders sees wide adoption of stewardship codes in Asia*, AsianInvestor (Jul. 16, 2018) https://www.asianinvestor.net/article/schroders-sees-wide-adoption-of-stewardship-codes-in-asia/445470 (last visited Jul. 24, 2019) ("the UK Stewardship Code, introduced in 2010 by the Financial Reporting Council. The code sets the standard for investors in terms of monitoring and engaging with companies that improve corporate governance…. Asia is one region where these standards have been widely adopted. … Elsewhere, Singapore, Taiwan and Australia have their own versions, in response to a clear sign from regulators that they want investors to hold companies to account and encourage better performance.");
Masayuki Yuda, *Shareholders find their voice at Japan's annual meetings*, Nikkei Asian Rev. (Jul. 12, 2018) https://asia.nikkei.com/Business/Business-trends/Shareholders-find-their-voice-at-Japan-s-annual-meetings (last visited Jul. 24, 2019) ("Modeled on British versions, these initiatives [the Japanese corporate governance and stewardship codes] are shaking things up.").

[59] OECD, G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE 29–30 (2015), *available at* https://www.oecd-ilibrary.org/governance/g20-oecd-principles-of-corporate-governance-2015_9789264236882-en (last visited Jul. 24, 2019).

[60] OECD, OECD SURVEY OF CORPORATE GOVERNANCE FRAMEWORKS IN ASIA 2017 27 (2017) https://www.oecd.org/daf/ca/OECD-Survey-Corporate-Governance-Frameworks-Asia.pdf (last visited Jul. 24, 2019).

[61] *Id*. at 5–6. The exception was Mongolia, on which nothing was said about shareholding structure other than that a majority of listed companies may be considered non-state-owned. *Id*. at 6. Of the thirteen

"institutional investors" explained nor "stewardship" defined nor its function explained with respect to each jurisdiction's context. The irresistible inference is that the authors had, consciously or not, implicitly assumed that all these stewardship-implementing jurisdictions understood stewardship in the same way because their stewardship codes were all seemingly modelled on the UK Code.

Even sophisticated governance and legal professionals are not immune to the uniform stewardship assumption.[62] A recent example is Ernst & Young's *Q&A on Stewardship Codes*.[63] EY cannot be faulted for clarity, as it states clearly its view of what stewardship codes are,[64] and how they are applied, following the orthodoxy set by the UK Code.[65] Yet its document does not contemplate the existence of shareholders other than institutional investors or their role in corporate governance.

Another telling example comes from Institutional Shareholder Services, the world's leading proxy advisory firm:[66]

> "Following the formal release of Stewardship Codes ("the Code") in Japan, Malaysia, Hong Kong, and Taiwan, three other countries including Singapore, South Korea, and Thailand are following suit as a way of promoting sustainable growth as well as corporate and shareholder value by means of active voting and constructive engagement. The UK Code is modeled after by other codes, with nuanced differences."

Even actors personally involved in implementing stewardship projects in their respective jurisdictions can portray themselves as following in the UK's footsteps without interrogating the fundamentals of what stewardship means for their respective contexts.

concentrated shareholding jurisdictions, only China was identified as having substantial institutional investor ownership (at 19.86%). *Id.* at 5.

[62] *See e.g.* Ruth Sullivan, *UK seen as model for stewardship guidelines*, Fin. Times (Aug. 1, 2010) https://www.ft.com/content/0e0bbc50-9c02-11df-a7a4-00144feab49a (last visited Jul. 24, 2019) ("Ms Waring believes it is too early to expect consistency between different stewardship or governance codes. But sharing basic principles on voting, monitoring and disclosure, as recommended by the ICGN, would provide a good shared basis, she says, adding: "The UK code could well be a model [for other countries]")." Kerrie Waring was then COO at the International Corporate Governance Network. *Id.*

[63] EY, *Q&A on Stewardship Codes* (Aug. 2017) https://www.ey.com/Publication/vwLUAssets/ey-stewardship-codes-august-2017/$FILE/ey-stewardship-codes-august-2017.pdf (last visited Jul. 24, 2019).

[64] *Id.* at 2 ("[Stewardship] codes ... aim to clarify basic governance expectations and responsibilities in ways that enhance the quality of investor-company dialogue and contribute to the long-term success of companies ...").

[65] *Id.* at 2 ("Stewardship codes typically apply to institutional investors ... Most stewardship codes are voluntary. This means institutional investors are encouraged to become code signatories and to disclose their commitment to the code's principles, where relevant.").

[66] ISS Corporate Solutions, *Prepping for the Trend: Stewardship Code Coming to Asia*, (ISS Corporate Solutions 2019) https://www.isscorporatesolutions.com/prepping-for-the-trend-stewardship-code-coming-to-asia/ (last visited Jul. 24, 2019).

In their 2016 book *Inspiring Stewardship*, Cossin and Ong[67] declared:[68]

> "Led by the development in the United Kingdom of a stewardship code in 2010, a number of other countries are developing similar codes (Japan, Singapore, South Africa, and others) to address this area and to define the scope of these responsibilities of ownership."

There is an element of irony in this characterization; as we shall see later, the intended and actual function of Singapore's own stewardship code ultimately turned out to be little like the UK's. In fact, in many respects, the manner in which stewardship functions in Singapore has turned the UK model of stewardship on its head – and, in many important respects, functions differently from any other jurisdiction in Asia.

There are exceptions to the overall tendency to characterize stewardship in other jurisdictions as essentially the same as in the UK, of which Hill's 2018 paper is a notable example. While noting that "[s]tewardship codes reflect the view that engagement by institutional investors is an integral part of any corporate governance system"[69] and that many Asian and other jurisdictions have "jumped on the stewardship bandwagon",[70] Hill proceeds to classify stewardship codes into three major categories by their source,[71] and discusses key differences between the UK and Japanese Codes.[72] Although Hill correctly identifies the difference in policy objectives between the two Codes,[73] she does not go so far as to consider the alternative possibility that stewardship itself means different things in these two jurisdictions. In a subsequent article, Hill summarized recent developments in Asia as follows: "Japan adopted its own Stewardship Code, based on the U.K. model, in 2014, and many other Asian jurisdictions have now followed suit."[74]

Similarly, while there is clear awareness in the *ICGN Global Stewardship Principles* that "there are different models of corporate finance and ownership of listed companies around the world" and "[family or state owned corporate models] can differ in very basic principles such as shareholder primacy versus stakeholder primacy, and may require

[67] They are respectively a business school professor, and a former brigadier-general in the Singapore armed forces as well as the CEO of the body that created Singapore's stewardship code. The story of Singapore's stewardship code is set out in full in Dan W. Puchniak & Samantha S. Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship: Similar Name, Divergent Forms, and Unrecognizable Functions*, VAND. J. TRANSNAT'L L. ____ (), and summarized in Part IV.B below.

[68] DIDIER COSSIN & ONG BOON HWEE, INSPIRING STEWARDSHIP 46 (Wiley 2016).

[69] Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497, 506 (2018).

[70] *Id.* at 507.

[71] *Id.* (regulatory- or quasi-regulator-issued); *id.* at 508 (private industry actors); *id.* at 509 (investors).

[72] *Id.* at 513–22.

[73] *Id.* at 520 ("A central policy factor underpinning the U.K. Stewardship Code was the need for effective risk control in the post-crisis era. The Japanese version, however, was far more focused on arresting declining profitability, unlocking value, and increasing investor returns.") (footnotes omitted).

[74] Jennifer Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, 2019 U. ILL. L. REV. 507, 516 (2019).

deeper consideration in terms of how stewardship can be effectively applied",[75] there is no further consideration of whether stewardship itself can stand as a more-or-less singular concept when applied to clearly different jurisdictional contexts.

Is the basic stewardship problem as understood in the UK stewardship discourse necessarily shared by the other jurisdictions that now form part of the global stewardship movement? First consider the hard facts. Most listed companies in jurisdictions other than the UK (or US) are under the *de facto* (if not outright *de jure*) control of families, states, or other corporations that are controlling blockholders.[76] Given the dominance of controlling shareholders in many jurisdictions, institutional shareholders control only a minority of the total voting power of listed companies. Consequently, institutional shareholders in most jurisdictions have little power to cause a change in corporate control or make a credible threat to do so.

Given these facts, instead of an "absent" steward, the principal corporate governance problem in these jurisdictions may be better characterized as the risk of an entrenched controlling shareholder using their very real power not to discharge the function of a steward, but rather to extract private benefits of control at minority shareholders' expense.[77] Why would a jurisdiction like that possibly jump on the stewardship bandwagon? Or is something else going on under the innocuous label of "stewardship"?

On the other hand, even in the relatively uncommon case of a jurisdiction without a predominance of controlling block shareholders, it is not necessarily the case that substantial shareholders behave passively and fail to engage in corporate governance. In fact, active shareholders may well take – under at least some conditions – a pro-management, pro-long-term position even at the cost of immediate short-term

[75] International Corporate Governance Network, *ICGN Global Stewardship Principles – Global Stewardship Principles and Endorsers* 23 (2016) https://www.icgn.org/sites/default/files/ICGNGlobalStewardshipPrinciples.pdf (last visited Jul. 24, 2019).

[76] *See e.g.* Adriana De La Cruz et. al. OWNERS OF THE WORLD'S LISTED COMPANIES 11–2, 37–8 (2019) http://www.oecd.org/corporate/owners-of-the-worlds-listed-companies.htm (based on an analysis of selected listed companies in Asia and countries other than the US and UK). While state and family controlling shareholders do not generally dominate listed companies in Japan, it is fair to say that institutional investors do not collectively exercise majority control over most listed companies: Gen Goto, *Legally "Strong" Shareholders of Japan*, 3 MICH. J. OF PRIVATE EQ. VENTURE CAP. L. 125, 144–145 (2014). *See also* Clifford G. Holderness, *The Myth of Diffuse Ownership in the United States*, 22 REV. FINAN. STUD. 1377, 1405–1406 (2009) ("First, although many believe that the United States has diffuse ownership, the evidence is to the contrary. Among a representative sample of U.S. public firms, 96% of them have blockholders. These blockholders in aggregate own an average of 39% of the common stock. Second, although virtually all commentators believe that ownership in the United States is more diffuse than elsewhere, again the evidence is to the contrary. The ownership concentration of U.S. firms is similar to like-sized firms elsewhere. On a country-by-country basis, the United States falls in the middle of the pack.").

[77] Dan W Puchniak, *Multiple Faces of Shareholder Power in Asia – Complexity Revealed*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 511, 526–527 (Jennifer G. Hill & Randall S. Thomas eds., Edward Elgar Publishing 2015) (observing that extraction of private benefits of control in Asia may take a different form from the Anglo-American paradigm).

disadvantage. An example would be long-term stable shareholders rallying to the defense of incumbent management against a concerted attack by a short-termist hostile raider in Japan.[78] Why would substantial, yet dispersed, shareholders ever do this? And why would such a jurisdiction introduce what would seem at first glance to be a UK-style stewardship code? The next Part answers these questions through a pair of case studies: Japan and Singapore.

III. STEWARDSHIP THROUGH ASIAN LENS(ES): THE CONTRIBUTION OF JAPAN AND SINGAPORE CASE STUDIES

As we showed in Part II above, despite the appearance of a "global" stewardship movement, the reality of stewardship as it has manifested in each jurisdiction implementing it – or considering it – it is much more complex. To make our case for Asia, we examine two case studies, each featuring one Asian jurisdiction.

We have selected Japan and Singapore for several reasons. First, Japan and Singapore are both leading economies in Asia, which at various times have been potential models of corporate governance for the region and the world – and have on a number of metrics reached the zenith of economic performance in modern times. For this reason, they both have often been featured in leading comparative corporate law and governance scholarship.[79] Second, they are both developed countries, which makes comparing them easier, as issues arising in developing economies and developmental states can further

[78] *See* Dan W. Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware*, 15 BERKELEY BUS. L.J. 4, 36, 38 (2018) (discussing the *Bulldog Sauce* case); *id.* at 30–31 (discussing *Livedoor*); Dan W. Puchniak, *The Efficiency of Friendliness: Japanese Corporate Governance Succeeds Again Without Hostile Takeovers*, 5 BERKELEY BUS. L.J. 195, 246–50 (2008) (discussing the Oji Paper incident).

[79] For analyses by leading corporate law scholars featuring Japan, *see e.g.* Yoshiro Miwa & J. Mark Ramseyer, *The Fable of the Keiretsu*, 11 J. ECON. & MGMT. STRATEGY 169 (2002); Curtis J. Milhaupt, *In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan*, 105 COLUM. L. REV. 2171 (2005); John Armour et al., *The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework*, 52 HARV. INT'L L.J. 219 (2011); Gen Goto, *Legally "Strong" Shareholders of Japan*, 3 MICH. J. PRIV. EQUITY & VENTURE CAP. L. 125 (2014); JOHN ARMOUR & LUCA ENRIQUES ET. AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (3d. ed., Oxford University Press 2017). *See also* Alan K. Koh, *Appraising Japan's Appraisal Remedy*, 62 AM. J. COMP. L. 417 (2014). Japan has also found a following even amongst scholars who do not otherwise have special training or expertise in that jurisdiction. *See e.g.* Ronald J. Gilson & Mark J. Roe, *The Political Economy of Japanese Lifetime Employment*, *in* EMPLOYEES AND CORPORATE GOVERNANCE 239 (Margaret M. Blair & Mark J. Roe eds. 1999). Analyses featuring Singapore are comparatively more recent. *See e.g.* CURTIS J. MILHAUPT & KATHARINA PISTOR, LAW AND CAPITALISM (2008); Tan Cheng Han et. al., *State-Owned Enterprises and the Singapore Model*, 28 COLUM. J. ASIAN L. 61, 91 (2015); Luh Luh Lan & Umakanth Varottil, *Shareholder Empowerment in Controlled Companies: The Case of Singapore, in* RESEARCH HANDBOOK OF SHAREHOLDER POWER 573 (Jennifer G. Hill & Randall S. Thomas eds., Elgar Publishing 2015); Dan W. Puchniak & Luh Luh Lan, *Independent Directors in Singapore: Puzzling Compliance Requiring Explanation*, 65 AM. J. COMP. L. 265 (2017).

complicate already complex comparative analyses.[80] Third, Japan and Singapore present the opportunity to examine stewardship within Asia along several interesting and important dimensions, which allow us to consider how certain legal, economic, institutional, and cultural factors may impact the functioning of stewardship in Asia. Indeed, Japan and Singapore have clear differences in terms of their size, geography (north vs south), legal traditions (civil/US-mixed vs commonwealth), shareholding structure (dispersed/stable-cross shareholder-dominated vs state/family block shareholder-dominated), institutional architectures, and business cultures.

Japan, at first glance, seems an unlikely candidate for UK-model stewardship, with a largely civil law-based legal tradition and a recent history rich in US-inspired transplants. Even if a UK-style stewardship code were to be implemented in Japan, it would seem more prudent to expect differences in implementation and results than otherwise. Yet its nominally dispersed shareholding structure[81] – which distinguishes it from insider-blockholder-dominated Asia and bears some resemblance to the Anglo-American dispersed-shareholder model – and the presence of passive institutional shareholders suggests that it is one of the few (if not only) places in Asia where UK-style stewardship might plausibly take root. As we show below in Part IV, this was not to be, and not for reasons attributable to legal tradition – but more likely Japan's political environment, corporate governance system, and business culture. Japan thus illustrates powerfully how a *formally* similar dispersed shareholding structure, but a very different political-economy, corporate governance system, and business culture may nonetheless yield a competing vision of stewardship that all but turns the original concept on its head – and hints at possibilities for other non-UK/US jurisdictions where shareholding structure might otherwise seem promising for a UK-style stewardship movement.

Singapore is a Commonwealth jurisdiction with a legal tradition and corpus of commercial law that continues to this day to bear substantial similarity to the UK. One might be tempted to speculate that importation and implementation of UK-style stewardship would be relatively straightforward. Yet Singapore is broadly a typical Asian (ex-Japan) jurisdiction where listed companies are ordinarily dominated by blockholders such as family groups, and in the case of many of its largest companies, the Singapore state itself[82] – contrasts that offer the opportunity to examine if and how dispersed-shareholding-premised UK-style stewardship might work under a different shareholder environment. Singapore's case may also yield partial insights for other jurisdictions in

[80] Alan K. Koh & Samantha S. Tang, *The Future of* The Anatomy of Corporate Law *for Asia: A Forward Looking Critique*, 12 ASIAN J. COMP. L. 197, 198–99 (2017).

[81] Dan W Puchniak, *Multiple Faces of Shareholder Power in Asia – Complexity Revealed*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 511, 521 (Jennifer G. Hill & Randall S. Thomas eds., Edward Elgar Publishing 2015).

[82] On Singapore's shareholder landscape, see Dan W. Puchniak & Samantha S. Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship: Similar Name, Divergent Forms, and Unrecognizable Functions*, VAND. J. TRANSNAT'L L. ____ () II.B. ("Illuminating Singapore's Institutional Architecture and Shareholder Landscape").

Commonwealth Asia such as Malaysia, Hong Kong, and India – jurisdictions sharing certain similarities in their Commonwealth legal tradition and family/state dominated block-shareholder structures.[83] However, Singapore also has a unique institutional architecture, which has successfully placed constraints on the state from using its controlling power to extract wealth-reducing private benefits of control from Singapore's largest companies, and has resulted in the state indirectly functioning as an engaged shareholder steward at the core of Singapore's economic success.[84] While understanding this institutional architecture and the unique role of the Singapore state in corporate governance is critical for properly understanding the function – or, perhaps more accurately, lack thereof – of Singapore's stewardship code, it also suggests that the Singapore stewardship story (like Singapore's highly-successful economy) may be exceptional, and thus difficult to replicate.

From this perspective, we are aware that even the best comparative case study has its limits. As illustrative as two case studies might be, more would be even better – at least to a point. We acknowledge that it may be preferable – at least in terms of scope of coverage – to engage in a larger-scale study in which experts from a range of jurisdictions provide a larger number of national reports on which a general report can be compiled. This is, in fact, currently underway,[85] and there may well be other interesting findings when this is completed. Within the limits of one Article, and the jurisdictions in which we have in-depth knowledge and a high level of expertise, our goals must necessarily be more modest. However, at this juncture, where stewardship has generally been considered to perform a similar function in Asia as in the UK, we suggest the findings from these case studies are significant. Finally, as we elaborate in Part V below, Japan and Singapore illustrate powerfully a phenomenon that we have coined "faux convergence", and which broadens our understanding of convergence – and divergence – in legal phenomena in an age of relentless transplants.

[83] Dan W. Puchniak & Umakanth Varrotil, *Related Party Transactions in Commonwealth Asia: Complicating the Comparative Paradigm*, Berkeley Bus. L.J. _____ (forthcoming) Part II. ("The most likely explanation is that all our jurisdictions have similar formal legal rules because of their shared Commonwealth legal heritage. Singapore, Hong Kong, India and Malaysia traditionally sought guidance on matters of corporate law reform from other Commonwealth jurisdictions, especially the United Kingdom.").

[84] *See generally* Dan W. Puchniak & Luh Luh Lan, *Independent Directors in Singapore: Puzzling Compliance Requiring Explanation*, 65 AM. J. COMP. L. 265 (2017).

[85] The "Global Shareholder Stewardship Project" led by Dionysia Katelouzou and Dan W. Puchniak is aimed precisely at this goal. *See* Eur. Corp. Gov. Inst., *The Global Shareholder Stewardship Project*, ECGI.ORG (2019) at https://ecgi.global/content/global-shareholder-stewardship-project (last visited Aug. 11, 2019).

IV. THE MANY FACES OF STEWARDSHIP: TWO ASIAN CASES

A. JAPAN: STEWARDSHIP AGAINST MANAGEMENT AND IN SERVICE OF SHAREHOLDER ORIENTED OBJECTIVES

1. *The Problem: Perception of Poor Corporate Performance under Lifetime Employee-Dominated Management Backed by Stable Shareholders*

To understand how the impetus behind Japan's adoption of the Japanese Stewardship Code ("Japanese Code") is distinct from the UK, the Japanese corporate governance context must be understood on its own terms.[86] In recent years, an increasingly popular view within Japan is that Japanese enterprises – including listed firms – have performed poorly, with low return on equity,[87] low productivity,[88] and a lack of concentration on core competencies.[89] Many of Japan's listed companies have accumulated vast cash reserves that have been perceived as underutilized.[90] Cash-rich Japanese companies have come under significant pressure from foreign investors and some domestic shareholders to either invest their cash reserves, or return them to shareholders.[91] Corporate Japan's reluctance to put capital to more aggressive use has not only kept returns on equity low, but has arguably depressed economic growth as well, given that Japanese companies have failed to maximize capital productivity by investing in research and development that

[86] While this Article will not go into the details, readers may find Gen Goto, *The Outline for the Companies Act Reform in Japan and Its Implications*, No. 35 J. JAPAN. L. 13 (2013), Hatsuru Morita, *Reforms of Japanese Corporate Law and Political Environment*, No. 37 J. JAPAN. L. 25 (2014) and Souichirou Kozuka, *Reform after a Decade of the Companies Act: Why, How, and to Where?*, No.37 J. JAPAN. L. 39 (2014) helpful as recent overviews of Japan's corporate landscape.

[87] *See e.g.* Final Report of the Ito Review on Competitiveness and Incentives for Sustainable Growth: Building Favorable Relationships between Companies and Investors 7–9 (Aug. 2014) (archived at https://web.archive.org/web/20180324202512/http://www.meti.go.jp/english/press/2014/pdf/0806_04b.pdf).

[88] *See e.g.* Kawakita Hidetaka (川北英隆), Kigyono Rieki Kouzou to Kabuka no Teimei (企業の利益構造と株価の低迷) [Structure of Japanese Companies' Profits and Sluggish Stock Price], NLI Research Institute Report, Feb. 2012, p.18, at p.20-23 (available at https://www.nli-research.co.jp/files/topics/39658_ext_18_0.pdf?site=nli); Miyagawa Tsutomu (宮川努), Seisansei to wa Nanika: Nihon Keizai no Katsuryoku wo Toinawosu (生産性とは何か－日本経済の活力を問いなおす) [What is Productivity?: Revisiting the Vitality of Japanese Economy] (Chikuma Shobō, 2018).

[89] *See e.g.* TOYAMA KAZUHIKO (冨山和彦), SENTAKU TO SHASHŌ (選択と捨象) [Selecting and Discarding] 66–69 (Asahi Shimbun Shuppan, 2015).

[90] *See e.g.* Ishika Mookerjee, Fox Hu & Min Jeong Lee, *Japan Companies Are Sitting on Record $4.8 Trillion in Cash*, BLOOMBERG, Sep. 3, 2019, at https://www.bloomberg.com/news/articles/2019-09-02/japan-s-companies-are-sitting-on-record-4-8-trillion-cash-pile (last visited Sep. 12, 2019) (reporting that cash holdings of Japan-listed firms have more than tripled since March 2013 to JPY506.4 trillion).

[91] *See e.g.* Mookerjee et al, *supra* note 90 (reporting investor-side criticism); MURAKAMI YOSHIAKI (村上世彰), SHŌGAI TŌSHIKA (生涯投資家) [A LIFETIME INVESTOR] 206–07 (Bungei Shunjyu, 2017).

would lead to innovative technologies, increase labor productivity, or otherwise put their resources to more profitable use.[92] Japan's problems are, in turn, intertwined with Japan's institutional and economic environment.

Two features of Japan's corporate culture have reinforced risk-averse tendencies of many listed companies. First, lifetime employee-dominated management remains a key feature in many of Japan's listed companies. Given that insolvency proceedings would likely result in dire consequences for both managers and employees – large-scale staff retrenchment – lifetime employee-managers have significant incentives to build up strong cash reserves to fend off the specter of insolvency.[93] However, cash-rich companies with low share prices, as is the case for many Japanese listed companies, would ordinarily be targets for hostile takeovers.[94] Hostile takeovers are similarly catastrophic for Japanese lifetime-employee-managers, whose incentives and economic situations are extremely different from American corporate executives.[95] The market for corporate control should have restrained Japanese companies from amassing massive cash reserves. But Japanese firms have little to fear; unlike the United States, hostile takeovers in Japan have been practically non-existent so far.[96]

The absence of hostile takeovers[97] can be explained by the second key feature of

[92] *See e.g.* Final Report of the Ito Review, *supra* note 87, at 20.

[93] *See infra* notes 104–107 and accompanying text.

[94] Dan W. Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware*, 15 BERKELEY BUS. L.J. 4, 9 (2018); Alan K. Koh, Masafumi Nakahigashi & Dan W. Puchniak, *Land of the Falling "Poison" Pill: Understanding Defensive Measures in Japan on Their Own Terms*, 41 U. Pa. J. Int'l L. _____ (forthcoming).

[95] It has been observed that in the US, listed company managers have vastly different economic incentives because they may enjoy windfalls and the prospect of employment at other listed firms in the case of successful hostile takeovers, whereas Japanese listed company managers may risk losing even modest sums of retirement money (which may not receive the legally-required shareholder approval were the hostile acquirer successful), and their re-employment opportunities are much more limited. *See* Fujinawa Ken'ichi (藤縄憲一), *Tekitai-teki Baishū to Taikō-saku wo meguru Giron ni tsuite* (敵対的買収と対抗策を巡る議論について) [*On the Debate Surrounding Hostile Acquisitions and Their Countermeasures*], RIETI, Feb. 13, 2006, at https://www.rieti.go.jp/jp/events/bbl/06021301.html (last visited Aug. 11, 2019).

[96] Dan W. Puchniak & Masafumi Nakahigashi, *The Enigma of Hostile Takeovers in Japan: Bidder Beware*, 15 BERKELEY BUS. L.J. 4 (2018). See also, Alan K. Koh, Masafumi Nakahigashi & Dan W. Puchniak, *Land of the Falling "Poison" Pill: Understanding Defensive Measures in Japan on Their Own Terms*, 41 U. Pa. J. Int'l L. _____ (forthcoming) (Part III) (observing that "Not a single hostile takeover has ever succeeded in Japan.").

[97] "We define a successful hostile takeover as one where 1) the bid is unsolicited and actively opposed by incumbent management; 2) the bid satisfies the mandatory bid rule trigger (*i.e.* aimed at acquiring at least two-thirds' of the company's shares); 3) the bid achieves its objectives; and 4) and the bidder replaces incumbent senior management, including the board. This excludes management-initiated leveraged buyouts (MBOs), and partial offers in which the bidder intended only to secure a less than two-thirds' stake in the company." Alan K. Koh, Masafumi Nakahigashi & Dan W. Puchniak, *Land of the Falling "Poison" Pill: Understanding Defensive Measures in Japan on Their Own Terms*, 41 U. Pa. J. Int'l L. _____ note 126 (forthcoming) (Part III). For an account of shareholder activism short of hostile takeovers, see generally JOHN BUCHANAN, DOMINIC HEESANG CHAI & SIMON DEAKIN, HEDGE FUND ACTIVISM IN JAPAN: THE LIMITS OF SHAREHOLDER PRIMACY (Cambridge University Press 2012).

Japanese corporate governance: stable shareholders. “Stable shareholders” are a subset of Japan’s dispersed shareholders who are “sympathetic ‘insider(s)’ that generally refrain from taking action detrimental to the incumbent management because of their existing business relationships with the company”.[98] These domestic stable shareholders have supported management against hostile acquirers even when doing so came at a financial cost, as was the case in the *Livedoor* and *Bulldog Sauce* cases.[99] Further, stable shareholders often voted in favour of “poison pill” adoption and renewal.[100] The traditional hostility to hostile acquirers shared by stable shareholders and lifetime-employee management has functioned as a powerful shield against hostile takeover attempts thus far.[101]

With powerful incentives for lifetime-employee managers to behave excessively conservatively, and without a market for corporate control or an effective alternative such as shareholder activism[102] to discipline them for doing so, there is a widespread perception that the employee-dominated governance in Japan’s listed companies must be shaken up. Japan’s key corporate governance challenges are therefore not the same concerns behind the original UK Code – that is, restraining excessive managerial risk-taking and shareholder short-termism. Rather, the exact opposite appears to be true: Japan’s conservative managers are shying away from the risks entailed in putting their cash reserves to productive use, for fear of endangering the long-term financial survivability of the company, and the welfare of their employees. Ironically, this approach is arguably at odds with the long-term *success* of their companies, and potentially even Japan’s economy as a whole.

Apart from the corporate governance and institutional environment, scholars and business insiders have offered two persuasive explanations for managerial conservatism. First, in Japan’s deflationary environment, the opportunity cost of holding cash is low

[98] Ronald J. Gilson, *Reflections in a Distant Mirror: Japanese Corporate Governance Through American Eyes*, 1998 Colum. Bus. L. Rev. 203, 209 n.19 (1998); Alan K. Koh, Masafumi Nakahigashi & Dan W. Puchniak, *Land of the Falling “Poison” Pill: Understanding Defensive Measures in Japan on Their Own Terms*, 41 U. Pa. J. Int’l L. _____ (forthcoming) (Part III)

[99] For the judgments, see Tokyo High Ct. [Tokyo Kōtō Saibansho] Mar. 23, 2005, 1173 Hanrei Taimuzu [Hanta] 125 and Supreme Ct. [Saikō Saibansho] Aug. 7, 2007, 61 Saikō Saibansho Minji Hanreishū [Minshū] 2215. *See also supra* note 78.

[100] Alan K. Koh, Masafumi Nakahigashi & Dan W. Puchniak, *Land of the Falling “Poison” Pill: Understanding Defensive Measures in Japan on Their Own Terms*, 41 U. Pa. J. Int’l L. _____ (forthcoming) (Part III)

[101] *Id.*

[102] Activism by foreign and domestic hedge funds against Japanese firms is well-documented. *See generally* John Buchanan, Dominic Heesang Chai & Simon Deakin, Hedge Fund Activism in Japan: The Limits of Shareholder Primacy (Cambridge University Press 2012). The effect of such activism on Japanese firms is disputed. *See e.g.* John Buchanan, Dominic H. Chai & Simon Deakin, *Unexpected Corporate Outcomes from Hedge Fund Activism in Japan*, Socio-Econ. Rev. tbl. 4 (forthcoming) https://doi.org/10.1093/ser/mwy007 and Tanaka Wataru & Gotō Gen, *Nihon ni okeru Akuthibizumu no Chōkiteki Eikyō* (日本におけるアクティビズムの長期的影響) [*The Long-term Effects of Hedge Fund Activism in Japan*] (2018, available at http://www.jsda.or.jp/about/kaigi/chousa/JCMF/gototanakaronbun.pdf).

given that other uses (e.g., investment) are unprofitable. If managers perceive that Japan's economic recovery is unlikely to be long-lasting, they may also be reluctant to invest their company's cash reserves.[103] Two, and potentially most importantly, Japanese companies may have accumulated large cash reserves as a hedge against ruinous insolvency proceedings.[104] Where a company enters insolvency proceedings, senior managers and ordinary employees alike potentially face extremely unpalatable consequences, as they both face a higher risk of losing their jobs. Regulations against unfair dismissal for permanent "lifetime" employees[105] – the core of the Japanese "company community"[106] – are significantly relaxed when insolvency proceedings are launched.[107] To avoid frustrating the fundamental expectations of key lifetime employees (i.e., lifetime employment itself in the historic absence of an external labor market),[108] companies have ample incentives to maintain cash reserves defensively.

Corporate Japan's conservatism and mediocre performance would, whether justly or unjustly, come to be attributed to its employee-centric corporate governance system supported by dependable stable shareholder allies. This cozy arrangement would find itself in the gunsights of the Liberal Democratic Party (LDP)-led national government headed by Prime Minister Abe Shinzo.

[103] Chie Aoyagi & Giovanni Ganelli, Unstash the Cash! Corporate Governance Reform in Japan, Int'l. Monetary Fund Working Paper WP/14/140 (Aug. 2014), 6 at https://www.imf.org/external/pubs/ft/wp/2014/wp14140.pdf (last visited Aug. 11, 2019) ("… entrenched deflationary expectations are likely to be an important determinant of large cash holdings in Japan. A deflationary environment lowers the opportunity cost of holding cash for both managers and shareholders. As stressed by Bank of Japan (BoJ) Governor Kuroda in a recent speech, deflation encourages holding cash over alternative more productive uses of resources. Even though recent developments suggest that Japan has made progress towards reviving growth and exiting deflation, if firms do not believe that the recovery is long-lasting and that there are profitable investment opportunities, they can be reluctant to reduce their cash holdings.") (footnote omitted).

[104] Nobuyuki Kinoshita, *Legal Background to the Low Profitability of Japanese Enterprises*, Center on Japanese Economy and Business Working Paper Series No. 316 (Apr. 2013), 22 https://academiccommons.columbia.edu/doi/10.7916/D8RB7D0X ("The most plausible measure for an enterprise to avoid business reorganization is building a strong cash reserve. In other words, cash reserves and bankruptcy protection are two alternatives for a distressed enterprise. As the management body of an enterprise counts backward from this substitution, as they do in everyday business, a rigorous bankruptcy mechanism presses them to dig a deeper trench by having greater cash reserves."). Kinoshita was at the time of writing an Executive Director of the Bank of Japan.

[105] On lifetime employment, see generally Časlav Pejović, *Changes in Long-term Employment and Their Impact on the Japanese Economic Model: Challenges and Dilemmas*, No. 37 J.JAPAN.L. 51 (2014).

[106] On this concept, see Zenichi Shishido, *Japanese Corporate Governance: The Hidden Problems of Corporate Law and their Solutions*, 25 DEL. J. CORP. L. 189 (2000).

[107] Kinoshita, *supra* note 104, at 26.

[108] On the lack of external labor markets as the "dark side" of lifetime employment, see Ronald J. Gilson & Mark J. Roe, *Lifetime Employment: Labor Peace and the Evolution of Japanese Corporate Governance*, 99 COLUM. L. REV. 508 (1999). More recently, however, lateral hiring has increased. *See e.g.* Megumi Fujikawa, *Japanese Workers Call It Quits on a Firm Tradition: The Job for Life*, Wall St. J., Apr. 11, 2018, at https://www.wsj.com/articles/japanese-workers-call-it-quits-on-a-firm-tradition-the-job-for-life-1523439004 (last visited Aug. 11, 2019).

2. *The Liberal Democratic Party Administration's Grand Design*

Towards the end of Abe's second term as Prime Minister, the Abe administration introduced its "Japan Revitalization Strategy" in June 2013 to snap Japan out of its decades of deflation, and to achieve a vibrant economy that will register over 2% labor productivity improvement in the medium- to long-term, and around 3% nominal gross domestic product (GDP) growth and around 2% real GDP growth, on average, over the next ten years.[109] The Japan Revitalization Strategy is designed to be one of the three policy "arrows" of "Abenomics", and takes the form of major structural reforms to Japan's economy.[110] The Abe administration's expectations for managers of Japanese firms is set out in the 2014 version of the Revitalization Strategy document:

> "What should be done to increase Japanese companies' earning power, in other words, medium to long-term profitability and productivity and to pass the fruits of such increase on to the people (households) evenly? First, it is important to strengthen the mechanism to enhance corporate governance and reform corporate managers' mindset so that they will make proactive business decisions to win in global competition for the purpose of attaining targets including globally-compatible level in return on equity. Particularly, companies that have achieved the highest earnings in several years should be encouraged to proactively use their earnings for new capital investment, bold business realignment, mergers and acquisitions, and other deals, instead of accumulating internal reserves."[111]

Although not expressly stated, it is implicit but widely acknowledged that the employee-centric form of corporate governance prevalent in Japanese firms is blamed for corporate Japan's perceived malaise.[112] It is in a bid to change this status quo that the Abe administration sought to enlist the aid of institutional shareholders:

> "At the same time, banks, institutional investors and other financial players must maintain healthy tension with companies and play positive roles in creating values in the long term and improving their "earning power." Among them, banks and trading houses must promote return-oriented risk money provision, including contributions to private-sector equity and mezzanine finance investment through funds, and offer good judgments and advice with a view to supporting companies' business restructuring. Institutional investors, including those managing public and quasi-public funds, are called on to appropriately manage their investment portfolios and proactively perform their governance functions as investors."[113]

[109] PRIME MINISTER OF JAPAN AND HIS CABINET, JAPAN REVITALIZATION STRATEGY – JAPAN IS BACK – 2 (Jun. 14, 2013) (available at https://www.kantei.go.jp/jp/singi/keizaisaisei/pdf/en_saikou_jpn_hon.pdf.

[110] JAPAN REVITALIZATION STRATEGY, *supra* note 109 at 1.

[111] PRIME MINISTER OF JAPAN AND HIS CABINET, JAPAN REVITALIZATION STRATEGY– REVISED IN 2014 – JAPAN'S CHALLENGE FOR THE FUTURE – 5 (Jun. 24, 2014) (available at https://www.kantei.go.jp/jp/singi/keizaisaisei/pdf/honbunEN.pdf).

[112] *See e.g.* Toyama, *supra* note 89, at 25–28.

[113] JAPAN REVITALIZATION STRATEGY– REVISED IN 2014 –, supra note 113 at 6.

The ultimate goal is to "allow corporate earnings to expand further, bringing about a true virtuous cycle where the fruits of the breakaway from deflation will be returned finally to the people through various channels including increases in employment opportunities, wages and dividends."[114] In sum, corporate governance reforms – including the Japanese Code – that were subsequently initiated should be understood as a state-led attempt at promoting shareholder-oriented corporate governance for the purpose of changing the traditional stakeholder-oriented governance system of Japanese companies so as to improve productivity and corporate value.[115] Now that the context has been set out, we move onto the details of the Japanese Code in the next subpart.

3. *Japanese Stewardship Code*

The Japanese Code was first drafted by the Council of Experts on the Stewardship Code (Council of Experts)[116] organized by the Financial Services Agency of Japan (FSA). A government agency that regulates the banking, securities, investment, and insurance sectors,[117] the FSA keeps track of the implementation of the Japanese Code by institutional investors and maintains an updated list of signatories on its website.[118] Against a backdrop of complex, interconnected, and simultaneous activities by various interest groups,[119] the first version of the Japanese Code was introduced in 2014. The Council of Experts Concerning Follow-up of Japan's Stewardship Code and Japan's Corporate Governance Code,[120] also organized by FSA jointly with the Tokyo Stock Exchange, reviewed the state of implementation of the two codes, and subsequently recommended that the Japanese Code be revised. A second version of the Japanese Code was introduced following revisions by the Council of Experts on May 29, 2017.

The Japanese Code was introduced to apparently encourage institutional shareholders to act as good stewards to prioritize the enhancement of "the medium- to long-term investment return for their clients and beneficiaries (including ultimate beneficiaries) by improving and fostering the investee companies corporate value and sustainable growth

[114] *Id.*

[115] Gen Goto, *The Logic and Limits of Stewardship Codes: The Case of Japan*, 15 BERKELEY BUS. L.J. 365, 390, 396–97 (2019); Sadakazu Osaki, *The New Stewardship Code in Japan: Comparison with the UK Code and its Implementation*, *in* COMPARATIVE CORPORATE GOVERNANCE: THE CASE OF JAPAN 101, 110 (J.Japan.L. Special Issue 12, Hiroshi Oda ed., Carl Heymanns 2018) ("The Japanese Stewardship Code was introduced by the government in order to promote economic recovery through increased corporate profitability, the latter to be achieved by enhancing effective corporate governance.").

[116] https://www.fsa.go.jp/en/refer/councils/stewardship/index.html

[117] See e.g. Kin'yū-chō Secchi Hō (金融庁設置法) [Act for Establishment of the Financial Services Agency], Act No. 130 of 1998, arts. 3, 4.

[118] Financial Services Agency, *Stewardship Code: 256 institutional investors have signed up to the Principles for Responsible Institutional Investors as of August 1, 2019* (2019) at https://www.fsa.go.jp/en/refer/councils/stewardship/20160315.html (last visited Aug. 26, 2019).

[119] For an account in English, see Goto, *supra* note 115, at 387–92.

[120] https://www.fsa.go.jp/en/refer/councils/follow-up/index.html

through constructive engagement, or purposeful dialogue based on in depth knowledge of the companies and their business environment".[121] In emphasizing the importance of long-term profit and the interests of ultimate beneficiaries, the purpose of the Japanese Code seems, at first blush, to be consistent with the UK Code.

However, the purpose of Japan's Code is rather less prosaic when considered in light of Japan's corporate governance and economic context: its goal no less than the fundamental alteration of the relationship between domestic institutional investors and company management. Domestic institutional investors have been criticized for enjoying a cozy relationship with lifetime-employee managers,[122] such that institutional investors were content to receive lower returns on their investments, even though doing so arguably came at the expense of the ultimate beneficiaries. The Japanese Code is thus intended to encourage domestic institutional investors to pursue higher returns for their beneficiaries by exerting more pressure on management through "constructive engagement".[123] In addition, the Code requires that passive funds actively engage with investee companies and exercise their voting rights (2017 Revision, Guidance 4-2). As this is arguably not in the interests of beneficiaries of passive funds, the better explanation is that it is part of the Abe Administration's policy design to transform the orientation of the Japanese corporate governance system.[124]

To be clear, the Japanese Code does not – expressly or implicitly – contemplate US-style hedge fund activism from Japan's institutional investors, and in fact does not require institutional investors to make any specific demands of management. However, given the existing political and economic context, one might reasonably conclude that domestic institutional investors would be expected to exert pressure on management to use existing cash reserves more effectively to boost corporate earnings and productivity. This would be consistent with the prevailing criticism of Japanese companies, and with the Abe administration's stated economic goals.

At present, the Japanese Code – or at least part of it – appears to have had a limited, but nonetheless significant, impact on institutional investor behavior. Since it was revised in 2017, the Japanese Code has required institutional investors that have signed up to the Code to disclose their voting records by individual agenda item, and where the investor declines to disclose their voting reasons, to "proactively explain" and give reasons for doing so (2017 Revision Guidance 5-3).[125] This disclosure requirement was initially rejected by the Council of Experts when the original 2014 Code was drafted, but was ultimately introduced over the objections of various listed companies and institutional investors.[126] Despite this, since the new disclosure requirement went into effect, almost

[121] Japanese Code, 'Aims of the Code', paragraph 4; Goto, *supra* note 115, at 386–87.

[122] Goto, *supra* note 115, at 395.

[123] Japanese Code, 'Aims of the Code', paragraph 4; Goto, *supra* note 115115, at 386–87.

[124] Goto, *supra* note 115, at 403–04.

[125] Discussed at Goto, *supra* note 115, at 401–03.

[126] Goto, *supra* note 115, at 393 n.131, 402.

all major trust banks, insurance companies and investment advisors have since complied with the disclosure requirement – with few, if any, opting against disclosure – apparently under strong pressure from the FSA.[127] The stated rationale for the disclosure requirement was to "enhanc[e] visibility for institutional investors";[128] presumably to increase transparency for ultimate beneficiaries, and to ensure that asset managers took appropriate actions to manage conflicts of interest.[129]

The disclosure requirement appears to have had some tangible effect on institutional investor behavior on at least one corporate governance issue: there is some evidence that the disclosure requirement has substantially reduced support for the Japanese "poison pill".[130] Given the practical absence of hostile takeovers in Japan, the Japanese "poison pill" was of questionable utility and effectiveness.[131] Insofar as the disclosure requirement appears to have effectively discouraged institutional investors from making voting decisions that were not at least defensible from a commercial perspective, the Japanese Code arguably represents a step towards greater accountability from institutional investors. Yet, perhaps paradoxically from the UK's perspective, the Japanese Code seems to promote, or at least incentivize, a more arguably short-termist orientation among institutional investors that emphasizes short-term share prices – a feature that places it in stark contrast to the UK Code's image of the long-term-oriented enlightened shareholder.[132]

[127] *See* Nihon Keizai Shimbun (日本経済新聞), *Nihon Seimei to Kinyūchō, Giketsuken Kōshi no Kaiji de Niramiau* (日本生命と金融庁、議決権行使の開示でにらみ合う) [*Nippon Life Insurance at Odds with Financial Services Agency on Disclosure of Voting Results*], Jan. 31, 2018, 6:30AM (JST), https://www.nikkei.com/article/DGXMZO26191040W8A120C1X12000/; Nihon Keizai Shimbun (日本経済新聞), *Nissei, Giketsuken Kōshi wo Kobetsu Kaiji* (日生、議決権行使を個別開示) [*Nippon Life Insurance To Disclose Its Individual Voting Records*], Jan. 21, 2019, 20:00 (JST), https://www.nikkei.com/article/DGXMZO40269240R20C19A1EE9000/.

[128] Provision 5-3.

[129] "The revised code, however, decided to override such objections and to introduce this requirement in order to enhance the transparency of the stewardship activities of asset managers and to eliminate concerns on conflicts of interest of asset managers who belong to financial conglomerates." Goto, *supra* note 115, at 393.n131, citing 2017 Revised Japanese Stewardship Code, 15.n15 ("Some concern has been expressed that company-specific voting disclosure on an individual agenda item basis may result in attracting excessive attention solely to the results of "for" or "against", and it may prompt mechanical voting by institutional investors. However, it is important that asset managers enhance the transparency of their activities to their ultimate beneficiaries of the assets they manage. Furthermore, it is important that asset managers, who often belong to financial groups, disclose company-specific voting records on an individual agenda item basis in order to eliminate concerns that they may not take appropriate actions to manage conflicts of interest.").

[130] Alan K. Koh, Masafumi Nakahigashi & Dan W. Puchniak, *Land of the Falling "Poison" Pill: Understanding Defensive Measures in Japan on Their Own Terms*, 41 U. PA. J. INT'L L. _____ (forthcoming) (Part IV.B.3).

[131] *See id.* at Part III.

[132] On the connection between the UK Code and enlightened shareholder value, see Iris H.-Y. Chiu, *Institutional Shareholders as Stewards: Toward a New Conception of Corporate Governance*, 6 BROOK. J. CORP. FIN. & COM. L. 387, 398 (2012) ("It is arguable that the Stewardship Code's preference for the 'long-term horizon' of institutional shareholders is consistent with the 'enlightened shareholder value' rhetoric championed by policy-makers in the reforms leading up to the Companies Act.").

One might reasonably question why the Abe Administration elected to use the medium of a 'stewardship code' to implement its desired corporate governance changes. Japan is a civil law jurisdiction, whereas the concept of a 'stewardship code' was introduced by the UK, a common law jurisdiction. The answer may lie with the mutable nature of 'stewardship', which enabled Japan to introduce the idea that institutional investors should be loyal to the interests of beneficiaries, without triggering technical discussions on the precise elements of fiduciary duties and the legal consequences of their breach.[133] Further, the idea of a soft law 'code' may also have been appealing to Japanese policymakers, as soft law codes need not be put through the full legislative process in order to be implemented. On this point, soft law codes to some extent resemble *gyōsei shidō* (administrative guidance[134])[135] that was once prevalent, but have gone out of favor after repeated scandals[136] and the bursting of the bubble economy.

B. THE SINGAPORE CASE STUDY: SIMILAR NAME, DIVERGENT FUNCTIONS[137]

1. *Stewardship as a Mechanism for Signaling and Maintaining the Status Quo*

In contrast with the UK or Japan, the Singapore Stewardship Code – released in November 2016 – was not adopted in response to any systemic economic problem. Rather, the point of departure is that Singapore already had in place a successful corporate governance system built on two types of controlling blockholders: family controlling

[133] *See* Goto, *supra* note 115, at 370 nn.13–14 and accompanying text,

[134] A classic scholarly definition of administrative guidance is "[a]dministrative activities which administrative organs provide to other parties without legal binding force but in expectation of specific actions (either feasance or non-feasance) in order to realize an administrative aim". Hiroshi Shiono, *Administrative Guidance in Japan (Gyosei-Shido)*, 48 Int'l Rev. Admin. Sci. 239, 239–40 (1982). *Cf.* the legal definition as provided in the Administrative Procedure Act: "guidance, recommendations, advice, or other acts by which an Administrative Organ may seek, within the scope of its duties or processes under its jurisdiction, certain action or inaction on the part of specified persons in order to realize administrative aims, where the acts are not Dispositions". Gyōsei tetsuduki-hō (行政手続法) [Administrative Procedure Act], Law No. 88 of 1993, art. 2(vi) (translation from Japanese Law Translation).

[135] Milhaupt made a similar observation. *See* Curtis J. Milhaupt, *Evaluating Abe's Third Arrow: How Significant are Japan's Recent Corporate Governance Reforms?*, *in* COMPARATIVE CORPORATE GOVERNANCE: THE CASE OF JAPAN 65, 73 (J.Japan.L. Special Issue 12, Hiroshi Oda ed., Carl Heymanns 2018) ("… Perhaps "soft law" is expanding as an approach to corporate governance reform because it is in the DNA of Japanese regulators and policy makers… Has 'administrative guidance' been resurrected in the twenty-first century Japan as 'soft law'?").

[136] *See e.g.* HIROSHI ODA, JAPANESE LAW 48–49 (3d. ed. 2009) (attributing scandals in the financial sector to "excessive use of administrative guidance by the Ministry of Finance" and the decline of the practice thereafter).

[137] *See generally* Dan W. Puchniak & Samantha S. Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship: Similar Name, Divergent Forms, and Unrecognizable Functions*, VAND. J. TRANSNAT'L L. ____ (forthcoming).

shareholders, and the state's investment arm Temasek Holdings ("Temasek").[138] The problem of rationally passive institutional investors holding substantial equity stakes in listed companies and failing to rein in managerial risk-taking and short-termism – which gave rise to the UK Code in 2010[139] – has never existed in Singapore. To the contrary, in Singapore's successful state-controlled and family-controlled system of corporate governance almost all listed companies have had, and continue to have, an engaged "shareholder steward" in the form of a controlling shareholder.[140] Contrary to the conventional (Anglo-American) wisdom, as Singapore has transformed from a developing, to developed, and now to a world leading economy, its shareholder landscape has become even more concentrated, with institutional investors having minimal influence in its corporate governance system.[141]

In this context, it would seem that the UK Code would be entirely unsuitable for transplant into Singapore. With a successful corporate governance system designed to have the state indirectly act as a long-term engaged shareholder steward in state-controlled companies, and family-owners acting as long-term engaged stewards in family firms, it would seem that Singapore had little need for a mechanism to create long-term engaged shareholder stewards – which is precisely what the original UK Code was designed to do.[142] Further, the idea at the core of the UK Code is that institutional shareholders have the potential to become effective shareholder stewards because collectively they have control over a majority of the voting rights in most of the UK's listed companies. Therefore, as the theory goes, if the UK Code could harness market forces to incentivize them to act as "good stewards", institutional investors would have the legal voting rights to carry out this laudable objective.[143]

Singapore's shareholder landscape stands in stark contrast to the UK's: institutional investors only constitute a small minority of shareholders in most listed companies, and therefore lack any real power in the face of large dominant state or family controlling shareholders.[144] Research by leading corporate governance experts – including some

[138] *Id.* at Part III.A. For a rich description of family controlling shareholders and Temasek in Singapore's corporate governance environment, see *id.* at Parts IV and II.B respectively.

[139] Discussed above at Part II.

[140] *See* Adriana De La Cruz et. al. OWNERS OF THE WORLD'S LISTED COMPANIES 12, 36, 37 (2019) http://www.oecd.org/corporate/owners-of-the-worlds-listed-companies.htm (based on an analysis of 195 listed companies representing 83% of total market capitalisation in Singapore, finding that institutional investors held 12% of market capitalisation weighted ownership); Luh Luh Lan & Umakanth Varottil, *Shareholder Empowerment in Controlled Companies: The Case of Singapore, in* RESEARCH HANDBOOK OF SHAREHOLDER POWER 573, 575–578 (Jennifer G. Hill & Randall S. Thomas eds., Elgar Publishing 2015); Tan Cheng Han et al, *State-Owned Enterprises and the Singapore Model*, 28 COLUM. J. ASIAN L. 61, 91 (2015).

[141] *Id.*

[142] Discussed above at Part II.

[143] *Id.*

[144] Luh Luh Lan & Umakanth Varottil, *Shareholder Empowerment in Controlled Companies: The Case of Singapore, in* RESEARCH HANDBOOK OF SHAREHOLDER POWER 572, 579–580 (Jennifer G. Hill &

from Singapore – confirms this fact, as institutional shareholders are seen to play a negligible role in Singapore corporate governance, especially when contrasted with the dominant role of state and family corporate controllers.[145] In this light, the striking similarity between the texts of the seven core principles in the UK Code and Singapore Stewardship Code is puzzling.[146] Why has a UK corporate governance mechanism, designed for a problem that does not exist in Singapore, which provides for a solution that is unavailable in Singapore, been implemented in Singapore?[147]

Puchniak and Tang's recent in-depth analysis of stewardship in Singapore provides an answer to this puzzle.[148] They demonstrate that the adoption of a UK-style Code in Singapore is a product of regulatory design for the purpose of signaling.[149] Consistent with other recent corporate governance reforms, the adoption of a stewardship code which superficially mirrors the text of the UK Code is driven by Singapore's desire to send a signal that it is part of the global shareholder stewardship movement – which has become an important indicia of good corporate governance.[150] From this perspective, Singapore's superficial adoption of a UK-style stewardship code makes perfect sense. This regulatory strategy is consistent with Singapore's history of signaling compliance with global norms of good corporate governance, while functionally maintaining the uniqueness of its successful corporate governance system.[151]

However, if one drills down beyond a superficial textual analysis of the seven principles in the Singapore Stewardship Code, its unique local characteristics become clear. An important feature that distinguishes the Singapore Stewardship Code from the UK Code is that it was not launched or promoted by a government regulatory body, but rather by an ostensibly private entity called "Stewardship Asia".[152] At first blush, the fact that a non-government entity launched and promotes the Singapore Stewardship Code may appear to make Singapore similar to jurisdictions like the US where institutional

Randall S. Thomas eds., Elgar Publishing 2015) (explaining that Singapore's corporate governance challenges generally arise from Singapore's concentrated shareholding landscape).

[145] *See supra* note 140 above and accompanying text.

[146] Dionysia Katelouzou & Mathias Siems, *Textual Analysis & Networks* (forthcoming).

[147] The authors are unable to identify any statement from Stewardship Asia or in the Singapore Stewardship Code describing the relationship between the UK Code and the Singapore Stewardship Code. Some scholars have observed that the Singapore Stewardship Code may be characterised as being "inspired" by the UK Code: *see e.g.* ERNEST LIM, A CASE FOR SHAREHOLDERS' FIDUCIARY DUTIES IN COMMON LAW ASIA 280 (Cambridge University Press 2019).

[148] *See generally* Dan W. Puchniak & Samantha S. Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship: Similar Name, Divergent Forms, and Unrecognizable Functions*, VAND. J. TRANSNAT'L L. ____ (forthcoming).

[149] *Id.* at II.C & III.B.

[150] *Id.*

[151] Dan W. Puchniak & Luh Luh Lan, *Independent Directors in Singapore: Puzzling Compliance Requiring Explanation*, 65 AM. J. COMP. L. 265, 288–89, 332 (2017).

[152] For a detailed description of the relationship between Stewardship Asia and Temasek, *see* Dan W. Puchniak & Samantha S. Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship: Similar Name, Divergent Forms, and Unrecognizable Functions*, VAND. J. TRANSNAT'L L. ____ (forthcoming), II.C.

investors have established a private entity to launch and promote market-based, ground-up, stewardship principles.[153] However, Puchniak and Tang's detailed analysis of public company records, press statements, and business journalism reveals that although Stewardship Asia is a private entity, it is far from a market-based initiative without government involvement.[154] To the contrary, their research demonstrates that Stewardship Asia is intimately connected to the Singapore government through Temasek:

> Temasek funds Stewardship Asia and it is part of the Temasek group, and had a hand in Stewardship Asia's early efforts at drafting and promoting the Singapore Stewardship Code. Temasek also indirectly funds Stewardship Asia through the Temasek Trust, Temasek's philanthropic arm. The Temasek Trust 'manages 19 philanthropic endowments and gifts from Temasek and other donors', and provides a 'sustainable 4% endowment funding rate' for entities that it supports, which includes Stewardship Asia.[155]

The fact that Stewardship Asia is a *de facto* arm of Temasek is significant. Temasek is the controlling shareholder of most of Singapore's largest listed companies.[156] As such, the entity that designed and promotes the Singapore Stewardship Code (i.e., Stewardship Asia), is an "arm of Singapore's most powerful controlling shareholder: the Singapore government through its wholly-owned holding company Temasek".[157] When viewed in this light, one would expect that the Singapore Stewardship Code would be designed to maintain the status quo for Singapore's successful state controlled and family controlled system of corporate governance. Similarly, one would also expect that the seven principles in the Singapore Stewardship Code would not be enforced in a way to bring about intense market pressure by institutional investors with the hope of challenging incumbent management or the existing controllers – which is the goal of the UK Code.

Indeed, Puchniak and Tang's detailed analysis of how the Singapore Stewardship Code has been designed to function reveals that it is clearly not intended to disrupt the

[153] *Id*. *See also* Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE UNIV. L. REV. 497, 506–513 (2018).

[154] Dan W. Puchniak & Samantha S. Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship: Similar Name, Divergent Forms, and Unrecognizable Functions*, VAND. J. TRANSNAT'L L. ____ (forthcoming), II.C.

[155] *Id.* Stewardship Asia was founded in 2011 as the Stewardship and Corporate Governance Centre, which was a Temasek-led initiative. *See* Ho Ching, *Transcript: Luncheon Remarks by Ho Ching at Stewardship Asia 2018 Roundtable*, TEMASEK (Jun. 4, 2018) https://www.temasek.com.sg/en/news-and-views/news-room/speeches/2018/luncheon-remarks-by-ho-ching-stewardship-asia-2018.html; Ravi Menon, *Corporate Governance – going beyond the rules*, BANK OF INTERNATIONAL SETTLEMENTS (Oct. 1, 2012) https://www.bis.org/review/r121002a.pdf.

[156] Isabel Sim et al, THE STATE AS SHAREHOLDER: THE CASE OF SINGAPORE, CENTRE FOR GOVERNANCE, INSTITUTIONS & ORGANISATIONS, NUS BUSINESS SCHOOL 6, 23–24 (2014) https://bschool.nus.edu.sg/cgio/wp-content/uploads/sites/7/2018/10/SOE-The-State-as-Shareholder-2014.pdf.

[157] TEMASEK REVIEW, TEMASEK OVERVIEW 2019 42–43 (2019) https://www.temasekreview.com.sg/downloads/Temasek-Review-2019-Overview.pdf.

status quo.[158] Rather, a granular analysis of the Singapore Stewardship Code reveals that it has been designed to be a mechanism for entrenching Singapore's "successful state-controlled and family-controlled system of corporate governance"[159] – something which "would be beyond the wildest imaginations of the original architects of the UK Code".[160]

There are three features in the design of the Singapore Stewardship Code which render it "toothless" and distinguish it from the UK Code and other similar codes. First, the Singapore Code does not provide any mechanism for determining which institutional investors have agreed to follow the Code or not.[161] In stark contrast to the UK Code and many other codes, the Singapore Code has no mechanism whatsoever to monitor whether its "supporters" (the term used by Stewardship Asia to describe institutional investors that have agreed to adopt it[162]) have actually complied with it.[163] Without this basic disclosure requirement, the role of market forces in placing pressure on institutional investors to play an active role as good stewardship is severely stunted.

Second, the Singapore Code fails to articulate a singular model of stewardship with which investors should comply. The idea behind the UK Code and other codes it has inspired is that the codes set out distinct expectations that serve as a common yardstick or measure of "good stewardship". This yardstick is essential for the market to apply pressure to institutional investors to move towards an agreed standard of good stewardship. In stark contrast, the Guidance to the Singapore Code states that investors can "satisfy *themselves* that they adhere to their own stewardship approach in carrying

[158] Dan W. Puchniak & Samantha S. Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship: Similar Name, Divergent Forms, and Unrecognizable Functions*, VAND. J. TRANSNAT'L L. ____ (forthcoming), at Part II.C.

[159] Dan W. Puchniak & Samantha S. Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship: Similar Name, Divergent Forms, and Unrecognizable Functions*, VAND. J. TRANSNAT'L L. ____ (forthcoming), at Part V.

[160] *Id.*

[161] Dan W. Puchniak & Samantha S. Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship: Similar Name, Divergent Forms, and Unrecognizable Functions*, VAND. J. TRANSNAT'L L. ____ (forthcoming), at Part II.A..

[162] *See* Stewardship Asia, *FAQs*, https://web.archive.org/web/20191119132047/https://www.stewardshipasia.com.sg/intent. A list of supporters is available at Stewardship Asia, *SSP Expressions of Support*, at https://web.archive.org/web/20191119132440/https://www.stewardshipasia.com.sg/sites/default/files/SSP%20Expressions%20of%20Support_16%20May%202019.pdf (as of May 16, 2019). The Investor Management Association of Singapore also maintains a list of members who have expressed support for the Singapore Code. As of September 3, 2019, 54 Singapore organizations have expressed their support for the Singapore Code. *See* Investor Management Association of Singapore, *Singapore Stewardship Principles (SSP)*, at http://www.imas.org.sg/Articles/267-singapore-stewardship-principles-ssp-.html.

[163] *See generally* STEWARDSHIP ASIA CENTRE, STEWARDSHIP ASIA CENTRE, SINGAPORE STEWARDSHIP PRINCIPLES FOR RESPONSIBLE INVESTORS (2016). Stewardship Asia has also explicitly stated that "The SSP is not enforced or audited." Stewardship Asia, *FAQs*, https://web.archive.org/web/20191119132047/https://www.stewardshipasia.com.sg/intent.

out investment activities"[emphasis added].[164] Stated differently, each institutional investor can adopt their own vision of shareholder stewardship and still claim compliance with the Singapore Stewardship Code.[165]

Third, as a natural corollary of the fact that there is no single model, the Singapore Code does not employ a "comply or explain" approach. There is no forum to provide any explanation. As explained above, there are no signatories and, therefore, no one would even know who should be complying or explaining even if there were an obligation to do so. The preamble makes it clear that the Singapore Stewardship Code is not based on a comply or explain model, as the Code states that the "level of commitment [to the principles] are matters that are left to each individual investor to adopt, on a wholly voluntary basis".[166]

Viewed through a UK lens, the fact that the Singapore Stewardship Code lacks almost any "bite" as a tool for disrupting the status quo, and is primarily a signaling device, may be seen at best as a failure or at worst a corporate governance sham. Puchniak and Tang argue that this misses the point.[167] Singapore has an institutional architecture that has ensured that state and family controllers' normally function as good stewards – vitiating the need for institutional shareholders to act as good stewards and suggesting that the status quo should be maintained (not disrupted). As such, by introducing a stewardship code that does not effectively encourage institutional investor activism, and maintains the status quo for controlling shareholders, the Singapore Stewardship Code has reinforced Singapore's successful corporate governance system – while at the same time signaling its compliance with the global shareholder stewardship movement.[168]

2. *The Curious Case of the Singapore Family "Stewardship" Code*

Singapore's stewardship story would take a curious turn.[169] Almost two years after Stewardship Asia released the Singapore Stewardship Code, a second "stewardship code" would see the light of day in October 2018. The "Stewardship Principles for Family Businesses" (Family Code) is, as of October 2019 and to the best of our knowledge, the

[164] STEWARDSHIP ASIA CENTRE, STEWARDSHIP ASIA CENTRE, SINGAPORE STEWARDSHIP PRINCIPLES FOR RESPONSIBLE INVESTORS 6 (2016).

[165] Dan W. Puchniak & Samantha S. Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship: Similar Name, Divergent Forms, and Unrecognizable Functions*, VAND. J. TRANSNAT'L L. ____ (forthcoming), at Part II.A.

[166] STEWARDSHIP ASIA CENTRE, SINGAPORE STEWARDSHIP PRINCIPLES FOR RESPONSIBLE INVESTORS 3 (2016).

[167] Dan W. Puchniak & Samantha S. Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship: Similar Name, Divergent Forms, and Unrecognizable Functions*, VAND. J. TRANSNAT'L L. ____ (forthcoming), Part II.B and II.C.

[168] *Id.*

[169] Most of this Subpart IV.B.3 draws on Dan W. Puchniak & Samantha S. Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship: Similar Name, Divergent Forms, and Unrecognizable Functions*, VAND. J. TRANSNAT'L L. ____ (forthcoming), at Part IV.A.

only example of its kind anywhere in the world. At first blush, Singapore's Family Code appears to bear some broad textual similarities to the 2012 version of the UK Code: it employs the word "stewardship", and has seven principles.[170] But any resemblance to the UK Code ends there. Puchniak and Tang's analysis reveals three significant functional differences between Singapore's Family Code and the UK Code that make the Family Code truly *sui generis*.

First, the Family Code does not contemplate any collective action or intervention by institutional investors; in fact, there is not a single mention of institutional investors at all. The only "external" intervention mentioned in the Family Code is by professional advisers or management – who are, by definition, in a position subordinate to the family owners.[171] Rather, Singapore's Family Code is addressed to "family businesses".[172] While it is far from clear who precisely *in* a family business is the Family Code's intended addressee,[173] the context of the Code suggests that it is addressed to family shareholders and managers of family companies. The fact that institutional investors are not within the scope of the Family Code sets it apart from every other stewardship code – which are expressly directed towards, and contemplate action by, institutional investors.[174] It is worth reiterating that the UK Code is addressed to institutional investors, and that collective action and intervention by institutional investors in relation to the management of investee companies is a core feature of the UK Code.[175] The complete absence of institutional investors – and of any "external" intervention that would disrupt the family-controller status quo – from the Family Code demonstrates that it is functionally different from the UK Code and existing stewardship codes generally.

[170] The 2012 version of the UK Code that was in force at the time the Singapore Family Code was developed had only seven principles; *see* Financial Reporting Council, *The UK Stewardship Code* (Sept. 2012) https://www.frc.org.uk/getattachment/d67933f9-ca38-4233-b603-3d24b2f62c5f/UK-Stewardship-Code-(September-2012).pdf.

[171] Analyzed in Dan W. Puchniak & Samantha S. Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship: Similar Name, Divergent Forms, and Unrecognizable Functions*, VAND. J. TRANSNAT'L L. ____ (forthcoming), at Part IV.A.

[172] Stewardship Asia Centre, STEWARDSHIP PRINCIPLES FOR FAMILY BUSINESSES: FOSTERING SUCCESS, SIGNIFICANCE AND SUSTAINABILITY 1 (Oct. 2018) ("Stewardship is particularly pertinent to family businesses (FBs), which form a key component of economic activity around the world … For our purpose here, we broadly define FBs to include companies with the presence of family members as shareholders as well as board members and managers who are able to influence strategic decisions. We use the term FBs to include family companies, family firms and organisations.").

[173] The closest may be "owners and employees". *See id.* at 4 (at Principle 2 ("Cultivate an ownership mentality"): "Successful and enduring FBs [family businesses] build a culture that instils the ownership mentality. **Owners and employees** take responsibility and action as well as develop a sense of collective pride to forge proactive and integrative solutions to complex problems and dynamic situations.") (emphasis added in bold).

[174] *Cf.* Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE UNIV. L. REV. 497, 506 (2018)

[175] Financial Reporting Council, *UK Stewardship Code 2020*, FINANCIAL REPORTING COUNCIL, at https://www.frc.org.uk/investors/uk-stewardship-code (last visited Oct. 31, 2019) ("Principle 9: Signatories engage with issuers to maintain or enhance the value of assets." and "Principle 10: Signatories, where necessary, participate in collaborative engagement to influence issuers.")

Second, Singapore's Family Code seeks to maintain the corporate governance status quo for family companies by entrenching control by existing family shareholders and management. The Family Code does not envision any change from family control to outsider, non-family control; rather, the framing is that bringing in outsiders perpetuates and sustains the family business – which all but expressly endorses the continuation of the status quo of family ownership. This is particularly evident from Principle 7 of the Family Code, which states: "Be mindful of succession".[176] In family businesses, a succession plan is "crucial" because "succession frequently affects the family dynamics and survivability of the business".[177] The elaborations reveal the Family Code's recognition of the importance of not only grooming internal successors from within the family,[178] but also the value of merit,[179] external expertise,[180] and intergenerational cooperation.[181] Principle 7 clearly conveys the overarching premise of the Family Code: promoting the long-term success of business by – and while – entrenching existing control by family shareholders. In contrast, while the UK Code was also intended to promote a long-term orientation to investment and stakeholder interests, the UK Code aimed to achieve this by fundamentally disrupting the prevailing corporate governance status quo in transforming passive institutional investors into shareholders that would actively monitor management.[182] Thus, the concept of "stewardship" undergirding the Family Code has a substantially different orientation from other stewardship codes because the Family Code was designed to maintain the status quo – control by family shareholders and management – rather than to disrupt it.

Finally, the Family Code was designed not only for Singapore family companies, but as a model for corporate governance in family companies in Asia. This is evident from Stewardship Asia's efforts to promote the Family Code in countries such as China, Indonesia, Japan, the Philippines, and Thailand, as well as the involvement of businesses from a range of Asian jurisdictions.[183] The very fact that the Singapore entity promoting the Family Code was named "Stewardship *Asia*" rather than "Stewardship *Singapore*" also demonstrates that Singapore's stewardship codes were not merely developed for

[176] Stewardship Asia Centre, STEWARDSHIP PRINCIPLES FOR FAMILY BUSINESSES: FOSTERING SUCCESS, SIGNIFICANCE AND SUSTAINABILITY 7 (Oct. 2018)

[177] *Id.*

[178] *Id.* ("Assess the capabilities and character of potential family successors … Adopt a more holistic view of succession, which encompasses household and family succession …").

[179] *Id.* ("honouring meritocracy").

[180] *Id.* ("Keep an open mind towards including external expertise in both the aspects of successors and succession. External successors can bring new perspectives, competencies and networks. External professional help such as consultants can help FBs put together a more robust succession plan.").

[181] *Id.* ("Create a healthy environment where the older and younger generations can exchange views with veracity. Gradually, the younger generation should be given more opportunities to make strategic decisions as they acquire more competencies.").

[182] Discussed above at Part II.

[183] Stewardship Asia Centre, *Stewardship Principles for Family Businesses* (2018) https://www.stewardshipasia.com.sg/stewardship-principles-family-businesses.

domestic consumption, but rather to be "exported" to function as a corporate governance model for the region. In contrast, there is no suggestion that the UK Code was initially developed for any purpose other than solving what regulators perceived to be a domestic corporate governance challenge.[184] The UK Code was therefore most likely never intended nor designed to be exported as a corporate governance model for jurisdictions around the world. By creating the world's first stewardship code targeted at family businesses for "export" to Asia, Singapore has not only seized the initiative in establishing itself as a leader in this space in Asia and perhaps also the world, but also functionally diverged from the (at least initially) domestic orientation of the UK Code.

C. STEWARDSHIP CODES IN ASIA AS A CHALLENGE TO UK-DEFINED "GLOBAL" STEWARDSHIP

A superficial textual analysis of the Japanese Code would likely lead to the reasonable conclusion that Japan has broadly adopted the UK-stewardship model. However, an in-depth analysis of Japan's political-economy, corporate governance system, and business culture reveals the reasons why the intended and actual function of stewardship in Japan dramatically departs from the UK model. In fact, functionally, the version of 'stewardship' implemented in the Japanese Code turns the long-termist, managerial risk-moderating concept of 'stewardship' employed in the UK Code on its head. In so doing, the Japanese Code demonstrates the vulnerability – or flexibility – of UK-style "stewardship" to being subverted – or at least used – for completely different ends.[185]

Thus, while the Japanese Code bears superficial similarities to the UK Code in terms of form, it is in function a very different animal. It is also notable that the Japanese Code seems to have achieved a small level of practical success whereby requiring institutional investors to disclose their voting records has led at least some of them to exert pressure on a few investee companies to remove their Japanese "poison pills".[186] While the full extent of the functional impact of the Japanese Code is still to be determined, there is the

[184] *See* Arad Reisberg, *The UK Stewardship Code: On the Road to Nowhere?*, 15 J. CORP. L. STUD. 217, 220–223 (2015) (discussing the history of the UK Code in the context of the corporate governance challenges thrown up by the Global Financial Crisis in the UK, observing that "Against the bedrock provided by the [Corporate Governance Code], it is no surprise that the introduction of the [Stewardship Code] in the UK in July 2010 was *closely followed around the world*" (at 222, emphasis added), but not stating that the UK Code was developed to be "exported" around the world); Brian R. Cheffins, *The Stewardship Code's Achilles' Heel*, 73 MOD. L. REV. 1004, 1009–1013 (explaining the development of the UK Code in light of domestic developments).

[185] Note also that the UK Code itself was based on an older document premised on a pro-beneficiary philosophy. *See* Goto, *supra* note 115, at 376–78. In subverting the UK Code, the Japanese Code may perhaps be characterized as a case of poetic justice.

[186] Alan K. Koh, Masafumi Nakahigashi & Dan W. Puchniak, *Land of the Falling "Poison" Pill: Understanding Defensive Measures in Japan on Their Own Terms*, 41 U. PA. J. INT'L L. _____ (forthcoming) (Part IV.B.3).

prospect that corporate Japan, absent the "poison pill" and in the wake of rapidly changing circumstances, has perhaps become a more friendly environment for US-style shareholder activism.[187]

In contrast with malaise-stricken Japan, Singapore entered the stewardship era with a well-oiled corporate governance system built upon state and family shareholder control in listed companies. Singapore's two stewardship codes as a package of solutions to *forestall* – and pre-empt – any chance of ill-informed *outsiders creating problems* in its listed companies, and to promote the success of family businesses. Neither the Singapore Stewardship Code nor Family Code imposes any pressure or obligation on existing controllers – state and family shareholders – to undertake any reform. Neither Code bows to nor adds to the global market's clamor for more, and where necessary stronger, engagement by institutional investors. Instead, Singapore's response is that of containment, by giving its implicit blessing to institutional shareholder passivity and withholding any explicit encouragement of shareholder activism. Moreover, both Codes go even further by designing corporate governance mechanisms that support the entrenchment of these controllers and management – which is diametrically opposed to the UK stewardship model of disrupting a risky status quo by creating incentives for institutional investor driven change.

Finally, the *function* of the two Singapore Codes is that of "halo signaling" compliance with the international, Anglo-American, norm of shareholder stewardship equating to good corporate governance – while simultaneously maintaining Singapore's existing successful system of corporate governance built upon continued control by state and family controlling shareholders. Singapore's focus on continuity rather than change stands in stark contrast to the aim of the UK Code, which was to transform passive institutional investors into shareholders that would actively campaign for the company's long-term interests. By implicitly allowing institutional investors to remain passive, Singapore's Stewardship Code and Family Code place the burden of securing the company's long-term interests on the incumbent, entrenched shareholder controllers. The fact that the Singapore Codes are designed to preserve the corporate governance status quo also sets it apart from Japan's Stewardship Code, which was introduced as part of a set of political reforms aimed at transforming the corporate governance system. In addition, the aim of Singapore's Family Code to be exported to Asia, and thus perhaps make Singapore the standard bearer for a new Asian model of good corporate governance, sets it apart from any other stewardship code which we are aware of.

Despite substantial differences as between themselves, the Singapore Codes and the Japan Stewardship Code share a single striking similarity: these Codes all depart from the UK paradigm of stewardship. As the analysis in this Part has established, these departures are not by accident or coincidence, but rather are the product of deliberate and multifaceted policy choices. That two developed yet different Asian jurisdictions

[187] *See id.* (Part IV.C).

independently and spontaneously "hopped onto the stewardship bandwagon" while heading off in diverging policy directions should be recognized for what they are: bold – if implicit – symbols of resistance against and ambivalence in the face of the UK stewardship model.

Finally, notwithstanding the superficial convergence in the "form" of adopting a "stewardship code" and the lingo of "stewardship", the *divergence* in the *functions* that these codes were designed to achieve in reality prompts a further, more fundamental question in corporate governance: what do we really mean by "convergence" and "divergence"?

V. "FAUX CONVERGENCE": EXPANDING THE COMPARATIVE TAXONOMY

The days of leaders in the field predicting the "end of history" in the evolution of corporate governance,[188] or that the world will converge on an Anglo-American inspired dispersed shareholder model,[189] are long gone. Rather, as Asia has become the world's engine of economic growth, the rise of state-owned-enterprises and family-controlled firms has defined corporate governance in the new millennium.[190] Concomitantly, the UK and US have witnessed the precipitous decline of the archetypical dispersedly held Berle-Means corporation, with the re-concentration of shareholdings in the hands of institutional investors.[191] As a result, rather than jurisdictions converging on a common Anglo-American inspired dispersed shareholder model, a persistent diversity and continuous evolution in shareholder structure appears to be the order of the day.

In a similar vein, within many other important areas of potential corporate governance convergence (e.g., board structure, co-determination, takeover regulation, and enforcement of minority shareholders' rights) significant divergence continues to persist. Even in the EU, which has made a concerted effort for decades to promote corporate law harmonization in its single market, there remains many important areas of corporate law

[188] A phrase made infamous by Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001).

[189] *See* Dan W. Puchniak, *The Japanization of American Corporate Governance? Evidence of the Never-Ending History for Corporate Law*, 9 ASIAN-PAC. L. & POL'Y J. 7, 22–24 (2007) (showing that the convergence debate assumed that the endpoint of convergence is dispersed shareholding).

[190] *See e.g.* Dan W. Puchniak & Samantha S. Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship: Similar Name, Divergent Forms, and Unrecognizable Functions*, VAND. J. TRANSNAT'L L. ____ (forthcoming), IV.B.; Alan K. Koh & Samantha S. Tang, *The Future of* The Anatomy of Corporate Law *for Asia: A Forward Looking Critique*, 12 ASIAN J. COMP. L. 197, 198–99 (2017).

[191] *See supra* note 1 and accompanying text; Ronald J. Gilson & Jeffery N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 863–65 (2013).

and governance upon which jurisdictions diverge.[192] There is little reason to think that the next few decades will be any different, suggesting that significant jurisdiction-specific variations in important areas of comparative corporate law and governance will remain.

However, as insightfully observed by Jeffrey Gordon, a "global governance" movement has brought about a remarkable level of formal convergence in certain areas.[193] Various initiatives, led primarily by the IMF, OECD, and World Bank, have created various "tools" of features that are required for jurisdictions to be considered to have "good" corporate governance.[194] The promotion of these "tools" in various ways has resulted in the widespread adoption of certain features deemed to be indicia of "good" corporate governance around the world.[195]

Arguably, the most prominent examples of this have been the adoption of independent directors and codes of corporate governance.[196] Based on a simple box-ticking exercise, their global proliferation as legal transplants is staggering. According to hand-collected data by Puchniak and Lan, as of 2017, codes of corporate governance have been adopted in at least 87 jurisdictions and every code of corporate governance ever written – which number at least 245 as many jurisdictions have released several updated versions – mentions "independent directors".[197] Indeed, we are unaware of any major jurisdiction which has not claimed to adopt "independent directors" in its corporate governance regime.

However, upon closer examination, this impressive level of corporate governance convergence is not what it appears at first sight. As Puchniak and Kim explain, despite boards around the world increasingly *labelling* their directors as "independent", the functions that they perform (e.g., monitoring management; monitoring controlling shareholders; acting as government lobbyists; or, acting as a conduit for government influence in SOEs) differ significantly among jurisdictions, which makes comparing them

[192] *See* Jeffrey N. Gordon, *Convergence and Persistence in Corporate Law and Governance*, *in* OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 28, 51–53 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., Oxford University Press 2018) (showing how European Union-led convergence efforts failed in the face of entrenched national identities).

[193] Jeffrey N. Gordon, *Convergence and Persistence in Corporate Law and Governance*, *in* OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 28, 44 – 45 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., Oxford University Press 2018) ("Rather, this widespread adoption of corporate governance reforms has been stimulated through what might be thought of as global governance, in which the main actors have been the IMF, the World Bank, and the OECD.").

[194] *Id.* at 47–49.

[195] *Id*.

[196] *See generally* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, COMPARATIVE AND CONTEXTUAL APPROACH (Dan W. Puchniak et. al. eds., Cambridge University Press 2017); Dan W. Puchniak & Luh Luh Lan, *Independent Directors in Singapore: Puzzling Compliance Requiring Explanation*, 65 AM. J. COMP. L. 265 (2017); Umakanth Varottil, *Proliferation of Corporate Governance Codes in the Backdrop of Divergent Ownership Structures*, COMPETITION & CHANGE ____ (published online), available at https://journals.sagepub.com/doi/10.1177/1024529418813832.

[197] Dan W. Puchniak & Luh Luh Lan, *Independent Directors in Singapore: Puzzling Compliance Requiring Explanation*, 65 AM. J. COMP. L. 265, 266–272 (2017).

tantamount to comparing apples and oranges.[198] How can one compare an "independent director" in a Korean chaebol whose main function is to be a government lobbyist to subvert the Korean anti-corruption rules, with one in an archetypical Berle-Means company in the US who is expected to mitigate the collective action problems of dispersed shareholders? The answer is: you cannot.[199]

This type of superficial convergence, in which convergence occurs in name only, is "faux convergence". It is "faux" because what appears to be convergence based on the adoption of a tool of "good" corporate governance in name only may, upon closer examination, have been the adoption of a different tool with different functions – resulting in divergence rather than convergence. Although the global rise of stewardship is still in its relatively early stages, the evidence in this article suggests that it may be the next significant example of faux convergence.

As we have demonstrated in this article, merely knowing that Japan and Singapore have a stewardship code tells us little about the impact that it is intended to have, or actually has, on each country's corporate governance. Indeed, assuming that Japan and Singapore have converged on the UK model of corporate governance merely because they have both adopted stewardship codes would clearly be erroneous. Similarly, assuming that the adoption of stewardship codes by Japan and Singapore make them more similar to each other is also misleading. The fact is that in the UK, Japan, and Singapore the intended and actual function of their Stewardship Codes differ significantly – with differences that often run counter to each other.

The increasing presence of "faux convergence" has several practical and theoretical implications for comparative corporate governance. From a practical perspective, it suggests that efforts by the IMF, OECD, World Bank and others to promote a common "toolbox" of mechanisms for good corporate governance may have deleterious consequences. Such efforts may cause governments to waste valuable resources on the superficial adoption of tools for "good" corporate governance, rather than allocating them to directly addressing their actual jurisdiction-specific corporate governance problems. This is because "faux convergence" increases the pressure on jurisdictions to formally converge on established norms of "good" corporate governance. As these areas of "faux convergence" develop they may also result in the misallocation of capital as investors (surprisingly) appear to rely on evidence of the adoption of certified tools of "good" corporate governance as an important metric in their allocation of capital. Not having independent directors, a code of corporate governance, or stewardship code in name may perversely make a jurisdiction a less attractive place to invest because they are seen to not be part of the "good" corporate governance club. Further, the existence of "faux

[198] Dan W. Puchniak & Kon Sik Kim, *Varieties of Independent Directors in Asia: A Taxonomy, in* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, COMPARATIVE AND CONTEXTUAL APPROACH 131–132 (Dan W. Puchniak et. al. eds., Cambridge University Press 2017).

[199] *Id.*

convergence" presents a significant hurdle for comparative corporate law researchers who may assume that the widespread adoption of common tools of "good" corporate governance suggests a global trend in how corporate governance functions – when in fact it does not. This can happen to even the most seasoned experts, who are aware of the pitfalls of such assumptions. This seems, ironically, to have been the case in Jeffrey Gordon's insightful article on convergence and persistence in which he appears to assume that the jurisdiction's which have adopted stewardship codes aim to enhance the voice of long-term, stable, institutional investors – congruent with the aim of the UK Code.[200] As we have demonstrated in this article, this assumption is erroneous.

From a theoretical perspective, the ramifications of "faux convergence" challenge some widely accepted ideas about convergence theory. It is often assumed that "national elites may defend [their] domestic corporate governance regime"[201] as they may extract rents from it. However, it appears that with "faux convergence" the opposite may be true. In the case of "faux convergence", elites can maintain or reinforce their jurisdiction's existing corporate governance system or use the superficially adopted corporate governance tool for a function that serves their own purpose – while, at the same time, signaling their adoption of "good" corporate governance. As we explained in the case of Singapore the government adopted toothless stewardship codes which reinforced the dominance of a highly successful state-controlled and family-controlled system of corporate governance, while sending a signal of good corporate governance to the market. In Japan, the LDP was able to use stewardship to execute its political agenda to serve as one of Prime Minister Abe's famous three arrows, while sending a signal of good corporate governance reform to the market.[202] The manner in which "faux convergence" can serve the interests of entrenched elites may help explain why some of these tools of "good" corporate governance have proliferated so widely. It should also be noted that these entrenched elites may be maintaining a successful system (e.g., Singapore) or attempting to fix a broken one (e.g., Japan). The point is not to make a normative claim that "faux convergence" will necessarily have deleterious consequences. To the contrary, in Singapore the early evidence is of success and in Japan there also seems to be indications of its positive impact.[203] Rather, this helps explain a potential motivation for – and channel through which – globally certified mechanisms of "good" corporate governance are adopted on a superficial formal level, with extremely different intended

[200] *See supra* note 54 above and accompanying text.

[201] Jeffrey N. Gordon, *Convergence and Persistence in Corporate Law and Governance*, *in* OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 28, 29 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., Oxford University Press 2018).

[202] It is worth noting that Japanese policy makers may have misunderstood the intention of their UK counterparts and thought that shareholder-oriented corporate governance, which Japan was trying to promote by its stewardship code, was the "good" corporate governance championed by the UK Code. *See* Goto, *supra* note 115, at 390. If this was the case, it means that there was no divergence between the LDP's political agenda and the signal it was sending to the market.

[203] *See supra* discussion in Part IV.C.

and actual functions in practice.

At first blush, "faux convergence" also presents a challenge to Ronald Gilson's observation that functional convergence – rather than formal convergence – is "likely the first response to competitive pressure because changing the form of existing institutions is costly".[204] An example that Gilson[205] used to illustrate his point was the functional convergence in Germany, Japan, and the US in terms of the time it takes for companies to replace underperforming senior management. Although for path dependent reasons the three countries have formally maintained their unique systems of corporate governance, to succeed all three countries needed to find ways within their existing systems to solve the problem of managerial underperformance.

There is little doubt that Gilson's observation is correct when formal convergence requires making substantive changes to existing institutions. However, in the case of "faux convergence" existing institutions can be maintained or reinforced because the superficial level of convergence may occur in name only. As such, "faux convergence" may occur even when a jurisdictions system of corporate governance is already functionally competitive because the jurisdiction can maintain its effectively functioning system while still superficially altering its form. One can imagine smaller jurisdictions – or even larger jurisdictions that cannot create global corporate governance norms – do this to merely be part of the "good" corporate governance club. Alternatively, countries may opt for "faux convergence" if they are not functionally competitive as it is a way to feign being part of the "good" corporate governance club without actually making functional changes, which may dislodge elites or rent seekers. Much more empirical work must be done to determine the result of such strategies. Regardless of this, however, we suggest that "faux convergence" is a real phenomenon that does not fit into Gilson's formal versus functional taxonomy and should be added as another type of convergence (see Figure 1 below for a visual summary of the expanded convergence taxonomy).

Finally, the idea of "faux convergence" fits well with Gordon's recent observation of a rise in "divergence within convergence".[206] The nature of "faux convergence" lends

[204] Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329, 338 (2001)

[205] *Id.* at 337.

[206] Jeffrey N. Gordon, *Convergence and Persistence in Corporate Law and Governance*, *in* OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 28, 29 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., Oxford University Press 2018) ("There has been convergence in many of the formal governance rules but local applications reveal considerable divergence."); *id.* at 30 ("In 2017, it would also be right to add the role of 'global governance,' the effort to set standards flowing from supranational public institutions [in promoting convergence]."); *id.* at 32 ("Section 4 looks at evidence of divergence, particularly 'divergence within convergence,' which seems to describe the general state of play."); *id.* at 41 ("Divergence takes two forms: The first is a non-following of the convergent norm—for example, not requiring independent directors. The second, far more common, is divergence within the convergent norm: "divergent convergence." Evidence of both forms of divergence is found in the OECD Corporate Governance Factbook (2017), a readily accessible current guide to worldwide corporate law and governance."); *id.* at 43 ("Do these divergent elements within a convergent practice matter? The evidence is 'yes, they should.' First, the particulars of a reform can determine whether it is "high impact"

itself to "divergence within convergence" as the convergence that occurs is merely at a superficial level. Therefore, by definition, "faux convergence" begets divergence in practice.

Figure 1: Varieties of Convergence in Corporate Law

		Convergence on Legal Form	
		Yes	No
Convergence on Function	Yes	Formal Convergence (Gilson)	Functional Convergence (Gilson)
	No	**Faux Convergence** **(form at a superficial level)**	No Convergence

VI. Conclusion

It is a historical fact that the first stewardship code was created in the UK in 2010. Since then, a litany of jurisdictions across Asia have claimed to have adopted UK-inspired stewardship codes. At first blush, these codes appear to normally contain the same seven principles as the UK Code. Thus, it makes perfect sense that corporate governance scholars, experts, and pundits would assume that the UK stewardship model has been transplanted to Asia.

However, as our Japan and Singapore case studies reveal, the reality is much more complex. Jurisdictions appear to have seized upon the malleable concept of stewardship as a cost-effective way to achieve their own local goals, while simultaneously sending a signal of good corporate governance through the act of adopting a stewardship code. From a practical perspective, this makes it impossible to drawn normative conclusions (based on Anglo-American values) about a country's corporate governance by merely knowing

or not."); *id.* at 44 ("A more radical version of 'divergence within convergence' is advanced in a recent volume on independent directors in Asia, which argues both that (1) independent directors are 'ubiquitous' in Asia, found in higher proportion across more firms than in the 'West,' and that (2), functionally, there are 'varieties' of independent directors in Asia, differing substantially from the US variant and differing even within Asia. Adoption of a transplant, particularly under pressure of foreign investors or global governance institutions, does not determine how the new institution will function. That emerges over time, as the transplant is contextualized within the local ecology, and can lead to significant divergence in practice.").

whether or not they have adopted a code – local knowledge and context is key.

From a broader theoretical perspective, stewardship is just the latest example of an intriguing emerging phenomenon in global corporate governance: developments that appear at first glance to be convergence but which reveal themselves upon deeper analysis to be "faux convergence" – superficial convergence in form but divergence in function. We hope that this article lays the foundation for further research on the cause and implications of this phenomenon, and that it is a reminder that to achieve true understanding in comparative corporate governance there is always a need for local knowledge, context, and expertise.