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An Asian Solution for a Global Problem? Corporate Governance and the Environment in a Non-Anglo-American World

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The need to protect the environment has taken center stage globally. Climate change is recognized as a threat in the West, East, North, and South. There is also a consensus globally that changing the behavior of companies is central to environmental success. Stated simply: good corporate governance appears to be key to the world's hope for a sustainable green future.

Historically, when it comes to determining what counts as "good" corporate governance globally, the United Kingdom and United States have set the rules of the game. This has resulted in ill-fitting Anglo-American corporate governance solutions being transplanted to Asia with unforeseen consequences.[1] Will Asia repeat this history by adopting Anglo-American corporate governance solutions to solve its environmental problems?

Eight major Asian economies (India, Hong Kong, Japan, Malaysia, Taiwan, Thailand, Singapore, and South Korea) have adopted stewardship codes.[2] All of Asia's inaugural stewardship codes were modelled on the UK's 2010 stewardship code (UK Code 2010) – the first of its kind in the world.[3] The original goal of the UK Code 2010 was to solve the UK's systemic corporate governance problems by incentivizing passive institutional investors to become actively engaged shareholder stewards. In 2020, the UK issued a new stewardship code (UK Code 2020), which expanded the role for actively engaged shareholder stewards from solving the UK's systemic corporate governance problems to addressing its ESG problems, particularly climate change.[4] Given this context, if the past is any predictor of the future, it seems likely that the eight Asian jurisdictions that modelled their original stewardship codes on the UK will follow in the UK's footsteps by reorienting their stewardship codes to focus on ESG. Recent evidence from Singapore and Taiwan suggests that this is already occurring.[5]

In the UK, the focus on institutional investors as a solution for its systemic corporate governance and ESG problems makes sense. Institutional investors collectively own 68% of the shares of UK listed companies.[6] Therefore, *if* a stewardship code can motivate institutional investors to be actively engaged promoters of ESG, it will result in significant changes in UK listed companies – as institutional investors collectively have the voting rights to legally control the companies. The rationale for viewing institutional investors as the key to getting companies to focus more on ESG is even stronger in the United States, where institutional investors collectively own 80% of the shares of listed companies.[7]

However, in non-UK/US jurisdictions the situation is entirely different. Putting the UK/US aside, there is no other major economy in the world where institutional investors collectively own a majority of shares in listed companies.[8] As I explain in detail elsewhere, the focus on institutional investors as a potential solution for environmental shortcomings (or any other corporate governance problem) is particularly misplaced in Asia, where on average institutional investors collectively own a paltry 11% of shares in listed companies. In some major Asian economies, their collective ownership stakes languish in the small single digits.[9]

To be clear, this does not mean that institutional investors cannot have some impact on ESG in Asia by acting collectively as *minority* shareholders – especially in Japan where, as an outlier in Asia, institutional investors collectively own 36% of shares in listed companies.[10] However, in almost every listed company in Asia, institutional investors – even if they act collectively – lack the voting rights to control the company. Moreover, in Asian jurisdictions like Singapore, where institutional investors collectively own 6% of the shares in listed companies, a focus on them as either the problem or solution for ESG (or any other corporate governance malady) is misplaced.[11] In its 2020 Investment Stewardship Annual Report, BlackRock acknowledges this Asian reality.[12] However, some of the most prominent UK/US research on institutional investors and stewardship overlooks this point.[13] This fact also seems to have escaped the attention of regulators in the eight Asian jurisdictions that adopted UK-style stewardship codes, which are designed on the assumption that institutional investors have the voting rights to collectively control most listed companies.[14]

The question then becomes: How can corporate governance strengthen ESG performance in Asia? Again, the answer to this question is entirely different in Asia than in the UK/US. As I explain in detail elsewhere, only 12% of listed companies in the UK and a mere 4% in the US have a dominant controlling shareholder – compared with, on average, 66% of listed companies in Asia.[15] Therefore, any chance of succeeding in changing the behavior of companies to benefit the environment will need to focus on changing the behavior of controlling shareholders in almost every Asian economy. One notable exception is Japan, which (again) is an extreme outlier in Asia (and the world) due to the low level of controlling shareholders in its listed companies.[16]

It is possible that reorienting stewardship codes in Asia to focus on controlling shareholders (as Singapore has already done)[17] may provide a nudge towards ESG. However, it appears that reforms to hard law will likely be necessary to effectively incentivize controlling shareholders to steward Asian companies towards ESG.[18] The entrenched interests of controlling shareholders will have to be challenged – something that powerful corporations, families, and governments, who themselves are the dominant controlling shareholders in Asia, seem well placed to thwart.[19]

However, if Asia can create corporate governance solutions to solve this problem, it will likely benefit the world – which has much more in common with Asia than Anglo-America. Perhaps then Asia will provide corporate governance solutions needed for global environmental problems – and, hopefully, ill-fitting Anglo-American corporate governance transplants will be a relic of the past.

Notes

[1] See for example, Dan W. Puchniak & Umakanth Varottil, *Related Party Transactions in Commonwealth Asia: Complicating the Comparative Paradigm*, 16 Berkeley Business Law Journal 1 (2020); Dan W. Puchniak & Kon Sik Kim, *Varieties of Independent Directors in Asia: A Taxonomy* in, Independent Directors in Asia: A Historical, Contextual and Comparative Approach 89 (Dan W. Puchniak et al. eds., Cambridge University Press, 2017); Dan W. Puchniak, *Multiple Faces of Shareholder Power in Asia: Complexity Revealed* in, The Research Handbook on Shareholder Power 511 (Randall Thomas & Jennifer Hill eds., Edward Elgar, 2015); Dan W. Puchniak, *The Derivative Action in Asia: A Complex Reality*, 9 Berkeley Business Law Journal, 1 (2012).

[2] For an overview of stewardship codes in Asia see, Gen Goto et al., *Diversity of Shareholder Stewardship in Asia: Faux Convergence*, 53 Vand. J. Transnat'l L. 829 (2020). *See* also, Alan K. Koh et al., *Shareholder Stewardship in Asia* in: Global Shareholder Stewardship (Dionysia Katelouzou & Dan W. Puchniak eds., forthcoming 2022).

[3] It should be noted that Singapore's second stewardship code – Singapore Stewardship Principles for Family Businesses – is focused on stewardship by family controllers rather than

stewardship by institutional investors. This is the only stewardship code in the world that does not focus on institutional investors. See Dan W. Puchniak, *The False Hope of Stewardship in the Context of Controlling Shareholders: Making Sense Out of the Global Transplant of a Legal Misfit*, Am. J. Comp. L. (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3858339 [hereinafter "False Hope of Stewardship"]

[4] Paul Davies, *The UK Stewardship Code 2010-2020: From Saving the Company to Saving the Planet?* in: Global Shareholder Stewardship (Dionysia Katelouzou & Dan W. Puchniak eds., forthcoming 2022).

[5] The 2021 consultation draft of the Singapore Stewardship Principles suggests that the amended second edition of the code will focus more on ESG. *Singapore Stewardship Principles for Responsible Investors 2.0: 2021 Revision Consultation Draft*, available at https://cfasocietysingapore.org/wp-content/uploads/2021/11/SSP-2.0-consultation-document.pdf. The second version of Taiwan's stewardship code, which was released in late 2020, added a section expressly focused on ESG. Andrew Jen-Guang Lin, *The Assessment of Taiwan's Shareholder Stewardship Codes: from International Stewardship Principle to Alternative Good Stewardship* in: Global Shareholder Stewardship (Dionysia Katelouzou & Dan W. Puchniak eds., forthcoming 2022).

[6] Puchniak, *False Hope of Stewardship, supra* note 3.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] BlackRock in its 2020 Investment Stewardship Annual Report notes several times that the ability of institutional investors to effect change on insider dominated boards in Asia is undermined by controlling state or private shareholders – and describes one striking case study to emphasize this point. BlackRock, Investment Stewardship Annual Report (September 2020), 10, 27, 29, 30, https://www.blackrock.com/corporate/literature/publication/blk-annual-stewardship-report-2020.pdf.

[13] For example, Bebchuk, Cohen, and Hirst's insightful research identifies the importance of the agency problems of institutional investors in corporate governance. However, it fails to note that the UK/US are outliers globally with respect to the percentage of their stock markets owned by institutional investors and, in turn, that these agency problems are likely to be far less significant in non-UK/US jurisdictions. Lucian A. Bebchuk et al., *The Agency Problems of Institutional Investors*, 31 J. Econ. Persp. 89, 920, 108. See also, Goto et al., *supra* note 2, at 833.

[14] Puchniak, *False Hope of Stewardship, supra* note 3; Koh et al., *supra* note 2.

[15] *Id.*

[16] *Id.*

[17] Dan W. Puchniak & Samantha S. Tang, *S Singapore's Puzzling Embrace of Shareholder Stewardship: A Successful*

Secret, 53 Vand. J. Transnat'l L. 989 (2020).

[18] Ernest Lim & Dan W. Puchniak, *Can a Global Legal Misfit be Fixed? Shareholder Stewardship in a Controlling Shareholder and ESG World* in: Global Shareholder Stewardship (Dionysia Katelouzou & Dan W. Puchniak eds., forthcoming 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3898281.

[19] *Id.*

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