National Law School Business Law Review

Volume 10 | Issue 1 Article 8

2024

Political Economy of Takeover Regulation in India: How Good is India’s Mandatory Bid Rule?

Nemika Jha Prof. Dr.
Jindal Global Law School, njha@jgu.edu.in

NLS Business Law Review
Vol. 10, No. 1 (2023)
doi: 10.55496/SMEE8415

ARTICLE

Political Economy of Takeover Regulation in India: How Good is India's Mandatory Bid Rule?

*Nemika Jha**

I. Introduction

Globalisation, internationalisation of capital markets, and increased takeover activity have resulted in extensive takeover law reforms across the globe over the last few decades. These reforms have, in turn, spurred vigorous debates regarding the similarities and dissimilarities of national takeover laws, pressures for convergence, the methods by which convergence may occur, and the barriers to convergence. Drawing from the larger corporate governance debate, one of the key questions is whether national takeover laws across different jurisdictions will ultimately converge toward a system of global best practices.[1]

Those in favor of the convergence theory argue that takeover laws are converging (and to a great extent, have already converged) toward a relatively superior and efficient shareholder-oriented Anglo-American model.[2] Others

---

* Professor, Jindal Global Law School (O.P. Jindal Global University). S.J.D. Fordham University School of Law; LL.M. Harvard Law School; B.A., LL.B (Hons.) The W.B. National University of Juridical Sciences. I am grateful to Prof. Martin Gelter, Prof. Umakanth Varottil and Prof. Sean J. Griffith for supervising my S.J.D. thesis on this topic. This article is an extract from the said S.J.D. thesis. Errors and/or omissions are mine alone. This article also refers to the views of the members of the various committees constituted to review India's regulatory framework, SEBI senior officials and other practitioners who agreed to share their views during the course of several interviews subject to their names being kept anonymous.

1 Jeffrey N Gordon and Mark J Roe, *Convergence and Persistence in Corporate Governance* (CUP 2004); Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' (2001) 89 *Georgetown Law Journal* 439; Lucian Arye Bebchuk and Mark J Roe, 'A Theory of Path Dependence in Corporate Ownership and Governance' (1999) 52 *Stanford Law Review* 127; Douglas M Branson, 'The Very Uncertain Prospect of "Global" Convergence in Corporate Governance' (2001) 34 *Cornell International Law Journal* 321; William W Bratton and Joseph A McCahery, 'Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross-Reference' (1999) 38 *Columbia Journal of Transnational Law* 213; John C Coffee Jr, 'The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications' (1999) 93 *Northwestern University Law Review* 641.

2 Proponents of this view argue that we are likely to see more convergence around the

argue that differences in takeover laws are likely to persist due to reasons of path dependence.[3] Probing further into the causes of divergences in takeover regulation, Armour and Skeel[4] have demonstrated how differences in the process of rulemaking have caused the United States ('**U.S.**') and United Kingdom ('**U.K.**') to adopt vastly different methods to regulate hostile takeovers even though public corporations in both jurisdictions are characterised by widespread ownership. The most important aspect of this article is the authors' discussion on how the mode of rule-making (i.e. identity of the regulators and the historical context in which regulation occurs) determines the substantive content of the law. In answering why Delaware's takeover jurisprudence is friendlier to managers than U.K.'s City Code on Takeovers and Mergers ('**the City Code**'), the authors reject the theory of competitive federalism and the proposition that managers of listed corporations in the U.S. have a significant influence on the choice of corporate law. Instead, they root their argument in the differing modes of regulation and argue that while a self-regulatory regime and aggressive lobbying by a well-organised group of institutional investors have facilitated a shareholder-driven takeover law in the U.K., judicial law-making and absence of aggressive lobbying by institutional investors in the U.S. have resulted in making U.S. takeover law more manager-friendly. In other words, they argue that divergences in substantive rules can be better explained by understanding the reasons that prompted the U.S. and U.K. to adopt differing modes of regulation in the first place.[5]

At the same time, the convergence theory has been reinforced to a large extent by several common and civil law countries (including Japan, Singapore, India, China, and the Member States of the European Union) borrowing U.K. and/or U.S. style takeover law concepts into their domestic takeover laws.[6]

---

shareholder-centered model not only because the pressures for convergence are burgeoning rapidly, but also because there has been a growing consensus on the ideology that corporate managers should maximize long-term shareholder value; Hansmann & Kraakman (n 1).

3 Proponents of this view argue that even if there is a growing consensus around the shareholder-oriented model of governance, differences in takeover laws are likely to remain due to differences in the corporate ownership, political, legal and institutional structures that are likely to persist despite the availability of efficient alternatives. Bebchuk & Roe (n 1); Mark Roe, 'Path Dependence, Political Options, and Governance Systems' in Klaus Hopt and Eddy Wymeersch (eds), *Comparative Corporate Governance: Essays and Materials* (OUP 1997) 165; Curtis J Milhaupt, 'Property Rights in Firms' in Jeffrey N Gordon and Mark J Roe (eds), *Convergence and Persistence in Corporate Governance* (CUP 2004) 210, 213 arguing that despite homogenizing pressures, "the convergence of national corporate governance systems will be slow, sporadic, and uncertain"; Karl Moore and David Lewis, *Foundations of Corporate Empire: Is History Repeating Itself?* (Pearson Education 2000) 291 stating that "the lesson of history…is that while markets have always been there, they have always operated in the context of geography, religion, language, folkways, families, armies, and governments, never in vacuum".

4 John Armour & David A. Skeel, Jr, 'Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of U.S. and U.K. Takeover Regulation' (2007) 95 Geo. L.J. 1727.

5 ibid.

6 See Hui Huang, 'China's Takeover Law: A Comparative Analysis and Proposals for Reform' (2005) 30 Delaware Journal of Corporate Law 145; Wei Cai, 'The Mandatory Bid Rule in

The increased use of legal transplants has, in turn, led scholars to debate the efficacy of legal transplants, with several scholars warning against the dangers of direct transplants from one jurisdiction to another.[7] Accordingly, it is argued that a transplant of takeover laws may not function as intended if the transplant is a consequence of a mechanical borrowing by a naïve regulator without a careful evaluation of how such laws would function in a host country with a different legal, political, and economic landscape. Yet others argue that the process of transplantation may not be as straightforward as a mere borrowing of arguably superior takeover laws from another jurisdiction.

China: Is it a Necessity?' (2011) 12 European Business Organization Law Review 653; Chao Xi, 'The Political Economy of Takeover Regulation: What Does the Mandatory Bid Rule in China Tell Us' (2015) 58 The Journal of Business Law 142; Curtis J. Milhaupt, In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan, 105 Colum. L. Rev. 2171; Michael Cody, 'Hostile Takeover Bids in Japan? Understanding Convergence Using the Layered Approach', (2010) 9 Rich. J. Global L. & Bus. 1; Jack B. Jacobs, 'Implementing Japan's New Anti-Takeover Defense Guidelines – Part 1: Some Lessons from Delaware's Experience in Crafting Fair Takeover Rules', (2006) 2 N.Y.U. J.L. & Bus. 323; Ronald J. Gilson, 'The Poison Pill in Japan: The Missing Infrastructure', (2004) 2004 Colum. Bus. L. Rev. 21; Sang Yop Kang, 'Transplanting A Poison Pill To Controlling Shareholder Regimes - Why Is It So Difficult?' (2013) 33 Nw. J. Int'l L. & Bus. 619; Lan Luh Luh, Ho Yew Kee & Ng See Leng, 'Mandatory Bid Rule: Impact of Control Threshold on Take-over Premiums' (2001) Singapore Journal of Legal Studies 433; Umakanth Varottil, 'The Nature of the Market for Corporate Control in India' in Umakanth Varottil & Wai Yee Wan (eds) *Comparative Takeover Regulation: Global and Asian Perspectives* (CUP 2018) 344; Johannes W. Fedderke & Marco Ventoruzzo, 'The Biases of an 'Unbiased' Optional Takeovers Regime: The Mandatory Bid Threshold as a Reverse Drawbridge' in Umakanth Varottil & Wai Yee Wan (eds) *Comparative Takeover Regulation: Global and Asian Perspectives* (CUP 2018) 163; Marco Ventoruzzo, 'Takeover Regulation As A Wolf In Sheep's Clothing: Taking U.K. Rules To Continental Europe' (2008) 11 U. Of Pennsylvania Journal of Business Law 135.

7 Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993); Pierre Legrand, 'The Impossibility of Legal Transplant' (1997) 4 *Maastricht Journal of European and Comparative Law* 111; Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1; Edward Rock, 'America's Shifting Fascination with Comparative Corporate Governance' (1996) 74 *Washington University Law Quarterly* 367, 368 arguing that the attraction of comparativism stems from the fact that "one can fruitfully transplant legal rules or institutions from one system to another… The temptation is to try to get something for nothing, or at least at a discount"; Amir Licht, 'Legal Plug-Ins: Cultural Distance, Cross-Listing, and Corporate Governance Reform' (2004) 22 *Berkeley Journal of International Law* 195, 196 arguing that "… direct transplantation efforts were largely futile in generating Western-like economic growth and have caused considerable political strife"; Troy A Paredes, 'A Systems Approach to Corporate Governance Reforms: Why Importing US Corporate Law Isn't The Answer' (2004) 45 *William and Mary Law Review* 1055; Cally Jordan, 'The Conundrum of Corporate Governance' (2005) 30 *Brooklyn Journal of International Law* 983arguing that "the popularity and proliferation of international standards, among other factors, have resulted in massive transfers of legal information, but often the relative ineffectiveness of transplanted legal rules has proved a conundrum… Indiscriminate mixing and matching of legal rules, such as that occurring in the aftermath of mass privatizations that marked the 1990s, can easily go awry. The result may be dysfunctional or unbalanced systems with unpredictable, and certainly unintended, consequences. At worst, perversities may occur, for example, where a deliberately ineffective rule is introduced domestically, seemingly in furtherance of the implementation of internationally recognized standards"; Daniel Berkowitz, Katharina Pistor and Jean-François Richard, 'The Transplant Effect' (2003) 51 *American Journal of Comparative Law* 163, 168.

Regulators may be transplanting takeover laws in the name of protecting minority shareholders knowing fully well that such laws can be turned on their head in order to protect the incumbent directors, managers, and controlling shareholders when imported into a host country with a corporate governance system that is altogether different from that of the country of origin.[8]

While Armour and Skeel's interest group theory has provided a powerful framework for understanding the evolution of takeover regulation in advanced economies, literature on whether such theory can also explain their transplants in emerging economies is fairly limited.[9] This article contributes to the discourse by examining whether Armour and Skeel's interest group theory can sufficiently explain the transplant of U.K.'s takeover law principles into India's takeover law regime. In doing so, it focuses on the importation of the mandatory bid rule ('**the MBR**')[10], one of the key pillars of U.K. takeover regulation, that has also gone on to become the cornerstone of India's takeover regulations.

Simply put, the MBR aims to prevent value-destroying takeovers in which opportunistic acquirers are looking to expropriate the target's minority shareholders. The MBR generally requires a bidder, upon acquiring effective control over the target, to make an open offer to buy-out all remaining shareholders of the target. Further, the acquirer must offer to all remaining shareholders a price that is at least equal to the highest price paid by the acquirer for the shares of the target during a specified period before acquiring effective control over the target. With a handful of exceptions,[11] most common

8 Ventoruzzo (n 6); Marc Goergen, Marina Martynova & Luc Renneboog, 'Corporate Governance Convergence: Evidence from Takeover Regulation Reforms' (2005) European Corporate Governance Institute Working Paper No. 33/2005 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=709023>.

9 Following Armour and Skeel's analysis, several comparative law scholars have attempted to extend the political economy analysis to jurisdictions outside the U.S. and U.K. For instance, extending the Armour and Skeel analysis to Japan (and very briefly, to China, India and Brazil), Armour, Jacobs and Milhaupt argue that differences in takeover laws are largely a product of interaction between the constituencies that demand corporate law reforms (i.e. firms, interest groups and public) and the institutions responsible for supplying such reforms (i.e. legislature, courts and regulator). See John Armour, Jack B. Jacobs & Curtis J. Milhaupt, 'The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework' (2011) 52 Harvard International Law Journal 219; For an analysis of takeover regulation in the European Union, see Guido Ferrarini & Geoffrey P. Miller, 'A Simple Theory Of Takeover Regulation In The United States And Europe' (2009) 42 Cornell Int'l L.J. 301.

10 MBR is also called as the 'compulsory tender offer rule', 'mandatory public offer rule' or 'mandatory open offer rule'.

11 A notable exception is the U.S. that has not adopted the MBR and relies on the market rule (although certain States have enacted laws that have a similar effect). See Edmund-Philipp Schuster, 'The Mandatory Bid Rule: Efficient, After All?' (2013) 76 (3) The Modern Law Review 529, 535-539; Marco Ventoruzzo, 'Europe's Thirteenth Directive and U.S. Takeover Regulation: Regulatory Means and Political and Economic Ends' (2006) 41 Tex. Int'l L.J. 171, 187-189. Another jurisdiction that does not utilize the MBR in its takeover regulation is Bermuda. See Umakanth Varottil, 'Corporate Takeover Regulation and The Concept Of

and civil law jurisdictions have adopted the concept of the MBR in their takeover regulations.[12] Extensive legal and economic literature exists on the justifications for,[13] and objections to[14] the MBR. While efficiency of the MBR remains controversial, most jurisdictions have adopted the MBR primarily as a technique to protect minority shareholders and prevent inefficient transfers.

India presents an interesting case study particularly because the countries involved in the transplant are strikingly different. *First*, unlike the U.K. where listed corporations typically have dispersed ownership, Indian public corporations are characterised by concentrated ownership.[15] *Second*, unlike the U.K., while shareholder activism and proxy advisory firms are slowly gaining a presence in India, institutional and non-institutional investors have not historically engaged in active lobbying as an organised class on corporate governance matters.[16] Instead, corporate groups and industry associations

---

Control' [2015] Singapore Journal of Legal Studies 208, 231; Similarly, Korea has repealed the MBR from its regulatory framework in early 1998. See Hyeok-Joon Rho, 'M&A in Korea: Continuing Concern for Minority Shareholders' in Umakanth Varottil & Wai Yee Wan (eds) *Comparative Takeover Regulation: Global and Asian Perspectives* (CUP 2018) 279, 293.

12 Varottil (n 11); Ventoruzzo (n 11) 176.

13 One of the main justifications for the MBR is that it allows minority shareholders to exit the target corporation at a fair price and ensures that the control premium is shared equally among all shareholders. See P. L. Davies, 'The Notion of Equality in Corporate Takeovers' in J Payne (eds) *Takeovers in English and German Law* (Bloomsberry 2002) 9; see *also* L. Enriques, 'The Mandatory Bid Rule in the Proposed EC Takeover Directive: Harmonization as Rent-Seeking?' in G. Ferrarini, J. Winter & K.J. Hopt (eds), *Reforming Company and Takeover Laws in Europe* (OUP 2004) 785.

14 The MBR is also seen to have a chilling effect on the market for corporate control by preventing desirable takeovers from occurring as it not only compels the acquirer to buy more shares than required to obtain control over the target but also increases the cost of acquisition. See Erik Berglöf & Mike Burkart, 'European Takeover Regulation' (2003) 18(36) Economic Policy 171, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=405660>; Mike Burkart & Fausto Panunzi, 'Mandatory Bids, Squeeze-out, Sell-out and the Dynamics of the Tender Offer Process' (June 2003) European Corporate Governance Institute Working Paper No. 10/2003 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=420940>.

15 See Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, 'Law and Finance' (1998) 106 J. POL. ECON 1113; Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, 'Corporate Ownership Around the World' (1999) 54 Journal of Finance 471; Jayati Sarkar & Subrata Sarkar, *Corporate Governance in India* (2012); Tarun Khanna & Krishna G. Palepu, 'The Evolution of Concentrated Ownership in India' in Randall Morck (ed) *A History of Corporate Governance Around the World* (2005) 283-89; Shaun J Mathew, 'Hostile Takeovers in India: New Prospects, Challenges and Regulatory Opportunities' (2007) 3 Columbia Business Law Review 800, 832-833; Nahila Nazir and Amarjeet Kaur Malhotra, 'Ownership Trends in BSE 100-Index Companies from 2000-2014: Evidence and Implications' (2016) 16 *Global Journal of Human-Social Science* 65 <https://globaljournals.org/GJHSS_Volume16/6-Ownership-Trends-in-BSE.pdf>; N Balasubramanian and RV Anand, 'Ownership Trends in Corporate India 2001-2011: Evidence and Implications' (Indian Institute of Management (Bangalore) Working Paper No 419, July 2013) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2303684>; Varottil (n 6).

16 See Sarkar and Sarkar (n 15); Sunil B.S, 'Indian Mutual Funds Remain Passive Shareholders: Study' (*Livemint,* 12 August 2013) <http://www.livemint.com/Money/NblnaaLIL2BzAM1qYIoJFM/Indian-mutual-funds-remain-passive-shareholders-study.

form the most influential lobby. The question, then, is that if coordinated efforts by institutional investors led to the adoption of the MBR in the U.K., what led the Securities and Exchange Board of India ('**SEBI**'), the Indian securities regulator) to borrow the MBR from the U.K. especially when the key factors that gave rise to the adoption of the MBR in the U.K. (including aggressive lobbying by institutional investors) were absent in India? Further, if the MBR is designed to protect the minority, then why has the rule remained largely unquestioned by the Indian promoters or controlling shareholders?[17] More generally, has the transplant been successful in facilitating a market for corporate control?

In concluding that the Armour and Skeel analysis is insufficient to explain the Indian transplant experiment, this article argues that while the adoption of the MBR has led the Indian takeover law to formally converge with the international norm, political economy and interest group considerations have caused the Indian version of the MBR to diverge from its U.K. counterpart in significant ways, leading to a lack of functional convergence. In demonstrating why and how the Indian version of the MBR has resulted in the reverse outcome of entrenching incumbents and shielding them from the disciplining effect of the market for corporate control, this article moots a range of proposals for reform (including some proposals briefly mentioned here) that could be considered by the SEBI to redesign the existing regulatory framework: *First*, in connection with the quantitative trigger, this thesis proposes that SEBI establish a sliding scale of numerical thresholds that would vary from company to company depending on the shareholding of the existing promoter or the largest controlling shareholder. With respect to the qualitative trigger, this thesis proposes either amending the definition of 'control' to include an illustrative list of rights that would or would not constitute 'control', or providing for certain rebuttable presumptions that would indicate a lack of effective control. *Second*, it proposes abolition of partial bids subject to SEBI conducting a thorough empirical study of how partial offers have operated historically in the Indian context. *Third*, it suggests redefining voluntary bids to mean an offer that is made voluntarily by an acquirer for the purposes of acquiring all the shares of the target. This thesis also suggests considering the possibility of making voluntary offers subject to a fifty-plus-one acceptance condition. *Fourth*, it proposes that the design of creeping acquisitions be reformulated to lower the creeping acquisition limit from 5% per annum to anywhere between 1-3%. It also proposes that any acquisition of shares beyond 50% should trigger a mandatory bid for all the shares of the target.

html>. However, in recent years, there has been a gradual increase in shareholder participation on account of the influence of proxy advisory firms; Umakanth Varottil, 'The Advent of Shareholder Activism in India' (2012) 1 Journal on Governance 582.

[17] In this article, that term 'promoters', 'controlling shareholders' and 'controllers' are being used interchangeably.

Section 2 discusses the circumstances under which MBR evolved in the U.K. and the key features of the MBR. Section 3 focuses on the transplant and analyzes why the MBR evolved in the manner that it did in India. In constructing a theoretical framework to explain the divergences, this section gives a historical account of the economic and political forces that shaped the transplant. It also investigates whether Armour and Skeel's political economy or interest group theory used to explain the differences between takeover regulation in the U.S. and U.K. can be extended to explain India's transplant of the MBR and, if not, does the Indian experiment then inform the existing theories in any meaningful way? Section 4 then proceeds to discuss whether, in light of the outcomes, India is better off without the MBR. Or, can India draw on the international experience to yield better results? Section 5 concludes.

II. Brief Overview of U.K.'s Regulatory Framework

The U.K. primarily introduced the MBR as a tool to address the inequities arising from hostile takeovers in the 1950s and 60s.[18] The MBR is now incorporated in Rule 9 of the U.K.'s City Code and is applicable regardless of whether control is acquired through selective purchases from existing shareholders or through purchases on the market. According to Rule 9, the full rigours of the MBR are triggered in two circumstances: *one*, when any person (together with persons acting in concert with such person) acquires 30% or more of the voting rights of a target company,[19] and *second,* when any person already owning voting rights in excess of 30% but less than 50% consolidates control by acquiring additional shares in the target.[20] In both these situations, the acquirer must make a mandatory offer for 100% of the outstanding shares of the target at the highest price paid by such acquirer for shares of the same class during twelve months preceding the mandatory offer.[21] This prevents the acquirer from rendering the offer unattractive by offering a low price to the remaining shareholders. The mandatory offer must also be made to the holders of any class of equity share capital (whether voting and non-voting) of the target company and also to the holders of any securities carrying voting rights.[22] This ensures that an acquirer does not gain *de facto* or *de jure* control in the target without allowing all the remaining shareholders an equal opportunity to exit the target by selling their shares to the acquirer on equal terms and at the highest price.

In other words, the MBR in the U.K. is an onerous obligation imposed on acquirers to ensure that control of a target is not obtained without providing all the remaining shareholders an equal opportunity to exit the target by selling

---

18 See Paul L. Davies, *Gower and Davies' Principles of Modern Company Law* (Sweet and Maxwell 2008) 964.

19 The City Code on Takeover and Mergers 2016, Rule 9.1(a).

20 ibid Rule 9.1(b).

21 ibid Rules 9.1, 9.5(a).

22 ibid Rule 9.1.

their shares on equal terms and at the highest price at which such control was acquired. Accordingly, once the numerical threshold is crossed and the MBR is triggered, the City Code subjects an acquirer to the highest price rule and requires that the acquirer offer the same price to all the remaining shareholders of the target.

III. Legal Transplant of the MBR in India

This section traces the transplant of the UK's MBR into India. It explores the possible reasons for this transplant. Takeover regulations in India have undergone several changes since they were first enacted in 1994 as SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 ('**the 1994 Takeover Regulations**').[23] Difficulties in the interpretation and implementation of the 1994 Takeover Regulations prompted SEBI to constitute a committee under the chairmanship of Justice P.N. Bhagwati (former Chief Justice of India) to review and suggest amendments to the 1994 Takeover Regulations as Justice Bhagwati Committee on Substantial Acquisition of Shares and Takeovers ('**the 1997 Bhagwati Committee**').[24] On the basis of its recommendations, SEBI replaced the 1994 Takeover Regulations in its entirety by enacting a new set of regulations in 1997 as Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 ('**the 1997 Takeover Regulations**').[25] Rapid developments in the takeover market and judicial rulings caused the 1997 Takeover Regulations to be amended as many as twenty-three times between 1997 and 2010 (including a major set of amendments that were carried out in 2002 pursuant to the recommendations of the Reconvened Committee on Substantial Acquisitions of Shares and Takeovers under the Chairmanship of Justice P. N. Bhagwati, ('**the 2002 Bhagwati Committee**').[26] Changing global practices and a steady surge in the number of takeovers once again led to a review of the 1997 Takeover Regulations by a committee appointed under the chairmanship of Mr. C. Achuthan as Takeover Regulations Advisory Committee ('**the TRAC**').[27] Based on its recommendations, SEBI repealed the 1997 Takeover Regulations and replaced it with a fresh set of regulations in 2011 as Securities and Exchange Board of India (Substantial Acquisition of

23 See The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 1994.

24 See SEBI, *Justice P.N. Bhagwati Committee Report on Takeovers* (18 January 1997) <http://www.sebi.gov.in/commreport/bagawati-report.html#PREFACE>.

25 See The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 1997.

26 See SEBI, *Report of the Reconvened Committee on Substantial Acquisition of Shares and Takeovers Under the Chairmanship of Justice P.N. Bhagwati* (May 2002) <http://www.sebi.gov.in/takeover/takeoverreport.pdf>.

27 See SEBI, *Report of the Takeover Regulations Advisory Committee Under the Chairmanship of Mr. C. Achuthan* (19 July 2010) <http://www.sebi.gov.in/commreport/tracreport.pdf>.

Shares and Takeovers) Regulations, 2011 ('**the 2011 Takeover Regulations**').[28] Currently, it is the 2011 Takeover Regulations that form the regulatory framework for takeovers in India.

A. On the Why and How of the Transplant: Key Questions and Explanations

As discussed above, fundamental differences between the two jurisdictions involved in the transplant (both in terms of corporate ownership structures and role of institutional investors in enhancing corporate governance mechanisms) raise important questions. To begin with, if coordinated efforts by institutional investors led to the MBR's adoption in the U.K., what led India to borrow the MBR especially when the key factors giving rise to its adoption in the U.K. were absent in India? One possible explanation could be convergence.[29] This is especially so because, during the 1990s, takeover regulation of some Asian jurisdictions[30] had already converged at one level by the formal adoption of the MBR. Similarly, some E.U. Member States had either adopted or were in the process of adopting some form of the MBR either through legislation or self-regulation.[31] However, what is not clear is why the MBR was adopted as early as 1994 when other minority protection and corporate governance measures came to be adopted much later. Further, given that India did not replicate the U.K-style MBR shows that the transplant was not a product of a mechanical borrowing, and some other interests were at play in shaping its contours. Another possible explanation could be that the SEBI was primarily motivated to adopt the MBR in an effort to carry out its statutory duty of safeguarding the interests of the investors.[32] But therein lies the problem. If the MBR is designed to protect the minority, then why has the rule remained largely unquestioned by the Indian promoters or controlling shareholders?

---

28 See The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 2011.

29 The fact that SEBI looked toward international regulatory practices is evident from the very first annual report of SEBI where it is stated that "SEBI maintains close co-ordination with Regulatory Bodies in other countries through IOSCO and also directly to keep abreast of the international developments. The regulatory standards and the principles of IOSCO have been enshrined in the policies of SEBI and its Regulations thereby ensuring harmonization of regulation which is very essential in the context of India's opening up to the global markets". See SEBI, *Annual Report 1992-93* (1993) 36 <https://www.sebi.gov.in/reports/annual-reports/mar-1993/annual-report-1992-1993_21050.html>. Further, a reading of the various SEBI committee reports that reviewed India's takeover regulations from time to time make several references to the regulatory practices adopted in various jurisdictions.

30 These jurisdictions include Singapore, Hong Kong and China.

31 See Berglöf & Burkart (n 14) 186-187.

32 The Securities and Exchange Board of India Act 1992, s.11(1) provides that "Subject to the provisions of this Act, it shall be the duty of the Board to protect the interests of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit".

The answer to this puzzle lies in an interesting interplay of seemingly independent socio-political, legal, and economic events in the 1990s (namely, lack of legislative intervention, delegation of rule-making powers to subordinate law-makers, absence of courts in adjudicating takeover law disputes, and backlash against liberalisation and rise of economic nationalism) that resulted in the transplant essentially becoming a product of interaction between the regulator and the Indian corporate lobby. If we step back, we see that although the decision of the Government to liberalise the Indian economy in 1991 was initially welcomed by the Indian industry,[33] the actual opening up of the economy soon made Indian businesses realize that economic reforms were not just about liberalising Indian firms from State control, it was also about bringing down barriers that prevented the economy from accessing foreign capital and technology.[34] This, in turn, heightened the fear of Indian firms being engulfed by foreign corporations and gave rise to a rather strong and early backlash against the entry of foreign corporations.[35] Although this backlash initially began as a reaction against foreign direct investment (**'FDI'**), acquisition of successful Indian brands (like the Parle-Coca Cola saga)[36] and the attempted takeover of Asian Paints Limited (an Indian multinational company) by Imperial Chemical Industries (a British Corporation),[37] soon brought takeovers within its fold. These incidents coupled with previously existing controversies with foreign joint venture partners[38] intensified lobbying efforts because of which Indian corporate lobbies pressurised the Government

---

33 See Baldev Raj Nayar, 'Business and India's Economic Policy Reforms' (1998) 33 Economic and Political Weekly 2453, 2453-54.

34 ibid 2454; see *also* Min Ye, *Diasporas and Foreign Direct Investment in China and India* (CUP 2014) 128.

35 See Bhupesh Bhandari, 'Once there was the Bombay Club' (*Business Standard,* 20 January 2013) <https://www.business-standard.com/article/opinion/bhupesh-bhandari-once-there-was-the-bombay-club-111070800048_1.*html*>; Pragya Singh, 'The Home Alone Boys' (*Outlook India,* 10 January 2011) <https://www.outlookindia.com/magazine/story/the-home-alone-boys/269748>; Hari Shankar Singhania, 'A Milestone Reached: An Agenda Unfinished' (*Business Standard,* 24 April 2011) <https://www.business-standard.com/article/opinion/hari-shankar-singhania-a-milestone-reached-an-agenda-unfinished-111042400042_1.html>; Ye (n 34) 128-129.

36 See Nayar (n 33) 2459.

37 ibid 2462-64; Mathew (n 15) 812-13; Robin Abreu, 'British major ICI's acquisition of 9.1% in Asian Paints raises specter of takeover' (*India Today,* 8 September 1997) <https://www.indiatoday.in/magazine/economy/story/19970908-british-major-icis-acquisition-of-9.1percent-stake-in-asian-paints-raises-spectre-of-takeover-830509-1997-09-08>

38 For a general discussion, see Arun Subramaniam, 'Procter & Gamble - Godrej split turns spotlight on troubles faced by any alliances' (*India Today,* 15 August 1996) <https://www.indiatoday.in/magazine/economy/story/19960815-procter-gamble-godrej-split-turns-spotlight-on-troubles-faced-by-many-alliances-833701-1996-08-15>; Nayar (n 33) 2457; Tarun Das, 'MNCs: India Strategy Needs Rethink, New Delhi, Confederation of Indian Industries 3-5 (1996)' in Min Ye (ed), Diasporas And Foreign Direct Investment in China and India (CUP 2014) 130; see also Arindam Mukherjee, Shekhar Ghosh & Oswald Pereira, 'The Ghost of the Bombay Club' (*Outlook,* 10 April 1996) <https://www.outlookindia.com/magazine/story/the-ghost-of-the-bombay-club/201149>; Amit Mitra, 'Should 'Press Note 18' be scrapped?' (*Rediff Business,* 9 April 2013) <http://getahead.rediff.com/money/2003/apr/09debate.htm>.

to implement protectionist measures in order to protect the Indian industry from foreign onslaught. This created a 'level playing field' and provided the Indian industry with avenues to grow in order to compete with foreign giants. Needless to say, protecting Indian corporations from hostile acquisitions was a key issue in the lobbying agenda.

Interestingly, this coincided with the swift elevation of SEBI (an interim administrative body under the Finance Ministry) to the position of the securities market regulator in 1992 in the wake of one of the biggest stock market scams in India.[39] The distinct absence of the Indian legislature[40] and courts[41] from the purview of takeovers naturally led the Indian corporate sector to focus its lobbying efforts on SEBI which was in a unique position in 1994 when it enacted the first set of takeover regulations. While on the one hand, it was faced with the task of developing takeover laws that protected investors and reflected international 'best practices', on the other, it also had the

---

[39] The Harshad Mehta scam exposed severe lapses in the regulation of the Indian securities market and led to widespread calls for a powerful securities market regulator. It was only pursuant to this scam that the SEBI (initially constituted in 1988 as an interim administrative body under the Finance Ministry) was elevated to the position of the 'securities market regulator' and delegated the complex task of rule-making in the securities law domain (including takeovers). *See* A.C. Fernando, *Business Ethics And Corporate Governance* (Pearson 2010) 21.6; Ashmit Kumar, 'SEBI@25: Greater powers after the Harshad Mehta scam' (*Moneycontrol,* 21 May 2013) <http://www.moneycontrol.com/news/market-news/sebi@25-greater-powers-afterharshad-mehta-scam_877447.html>; Shaji Vikraman, 'Explained: How India's new securities market regulator found its feet' (*The Indian Express,* 5 April 2017) <https://indianexpress.com/article/explained/explained-how-indias-new-securities-market-regulator-found-its-feet/>.

[40] Owing to a host of socio-political issues (including political stability, separatist violence etc.) in the early 1990s, and the pressure to resurrect a dilapidated economy, regulation of takeovers was less of a priority for the Indian legislature that had more pressing concerns to deal with. Even otherwise, as has been the case in developed economies, politicians tend to prioritize issues that most affect their chances of being re-elected. Given that takeover law reforms are complex and have never generally been a matter of high-priority for an average voter, the legislature tends to conserve its legislative energy by focusing on matters of prime importance and delegating complicated business law reforms to subordinate lawmaking agencies (like SEBI, in the case of India). See Armour, Jacobs & Milhaupt (n 9) 226. Lack of legislative intervention could also be attributed to the fact that, prior to the 1991 reforms, there were simply not that many hostile takeovers to make regulation thereof politically significant, and the few bids that made the headlines (like Swaraj Paul's bid for Escorts Limited and Delhi Cloth Mills) were thwarted successfully. See Jayanta Roy Chowdhury, 'Paul hostile to takeovers' (*The Telegraph,* 21 April 2015) <https://www.telegraphindia.com/business/paul-hostile-to-takeovers/cid/1451551>; Vijay Kumar Kaushal, *Corporate Takeovers in India* (1995) 117-133; Kamal Ghosh Ray, *Mergers and Acquisitions: Strategy, Valuation and Integration* (Prentice Hall 2010) 699; A.P. Dash, *Mergers and Acquisitions* 88 (2010).

[41] Traditional courts have been conspicuously absent from adjudicating matters pertaining to change of corporate control in public corporations. Difficulties in bringing class actions, absence of contingent fees, and the existence of the English 'loser pays' principle may have dissuaded shareholders (especially minority shareholders) from bringing matters before courts. Lack of judicial law-making may also be linked to the rarity of hostile activity in India and the fact that civil courts are barred from dealing with matters that fall within the purview of SEBI. *See* The SEBI Act (n 32), s.15Y, 20A.

responsibility of making sure that whatever laws it crafted allowed the Indian industry to consolidate and grow. The need to balance these twin objectives is abundantly clear from the report of the 1997 Bhagwati Committee which stated that "*the process of substantial acquisition of shares and takeovers is so intertwined with the warp and weft of the industry, especially in the wake of the economic reforms, that it would be unrealistic to make Regulations in this area without taking into account the ground realities of the Indian industry*".[42] In other words, SEBI was not unmindful of, or immune to, the ongoing demands for protecting the Indian industry from foreign onslaught, including by way of hostile takeovers. Moreover, in recommending changes to the regulatory framework, SEBI and its committees were well aware that because framing of any takeover regulation depended on a host of factors like shareholding pattern, regulatory environment, and the corporate culture prevailing in the relevant jurisdiction, a direct transplant of the provisions (including provisions pertaining to the MBR) would be meaningless.[43] A crucial way in which the demands of the Indian industry were reflected in India's regulatory framework was through the predominance of the Indian corporate lobby in the consultative process that led to the drafting of the regulatory framework.[44]

While the above discussion explains how seemingly unrelated events interacted with each other to make the process of transplantation come to be driven by the corporate lobby, it does not explain why the corporate lobby did not object to the introduction (and later, the retention) of the MBR. The answer to this question lies partly in the fact that in an economy

---

42 See 1997 Bhagwati Report (n 24), 5 [1.1].

43 ibid. The fact that SEBI was amenable to experimenting with the regulatory framework is evident from the following extract from the 1997 Bhagwati Committee Report which states that, "…The Committee noted that the regulatory framework in these countries had evolved over a period of time drawing extensively upon the corporate culture and practice in these countries. Without an appreciation of these factors, a mere comparison of the procedures, regulatory requirements and various quantitative limits in these countries would be meaningless and would be an exercise in pedantry. It is important to go behind these regulatory requirements and quantitative limits to discover their raison d'être and understand the fundamental principles on which these regulations are predicated…It would therefore be far more rewarding to devote attention to these principles and concerns rather than to attempt a simplistic adaptation of the practices and procedures prevailing in other countries where the corporate culture is different. The latter exercise may prove to be neither useful nor appropriate; the former would be more satisfactory". Committee members being interviewed further confirmed that, while drafting the regulations, 'local conditions and restrictions on domestic players were taken into account' and that care was taken to frame the regulations in a way that encouraged a 'level playing field' so that 'giants with larger financial resources could not come over and takeover well-run Indian companies'.

44 A look at the composition of the committees (for e.g., the 1997 Bhagwati Committee and the 2002 Bhagwati Committee) indicate a skewed representation with a majority representing the Indian industry. 1997 Bhagwati Report (n 24); 2002 Bhagwati Report (n 26). Further interviews with members of the committees confirmed that there was undeniably a stronger representation of the corporate sector (which included power corporate lobbies like CII, FICCI and ASSOCHAM that have historically worked closely with SEBI on various policy matters).

where public corporations are characterised by concentrated ownership, the MBR unwittingly tends to work in favor of the incumbents.[45] In order to understand how the same rule may work differently depending on the ownership structure, let us take a hypothetical public corporation A in a jurisdiction with dispersed ownership in which no individual investor holds more than 15% of the voting rights and assume that the *de facto* control can be exercised at say 25%. Now if the MBR in such a jurisdiction is triggered at 30%, then an acquirer may succeed in a hostile acquisition and acquire *de facto* control rather easily by acquiring voting rights up to say 26%. The acquirer can do so relatively easily by buying shares on the market or by making selective purchases. Given that the ownership is dispersed, and no other shareholder holds similar voting rights, the acquirer can stay below the 30% threshold, avoid the cost of acquiring all the outstanding shares by triggering the mandatory bid and still exercise effective control over the corporation. The consequence is that hostile changes of control can occur relatively easily without triggering the mandatory bid and acquisition of somewhat smaller blocks (i.e. below the mandatory bid threshold) tends to keep the ownership pattern relatively dispersed. Therefore, in economies with dispersed ownership, the purpose of the MBR is not to prevent hostile change of control transactions. Rather, it serves as a mechanism that provides fair exit to the minority only when a new controller acquires sufficient voting rights so as to influence managerial decisions and interfere with the disciplining function of the market for corporate control. In other words, in jurisdictions marked by dispersed ownership, MBR is attracted when, due to an acquisition crossing the relevant threshold, the nature of the shareholding of the target appears to change from being dispersed in the hands of a relatively larger number of shareholders to being concentrated in the hands of the acquirer making such acquisition.[46]

Now let us take the case of India where the ownership structure is largely concentrated. Currently, the numerical threshold for triggering the MBR is 25%.[47] However, given that the average promoter holding in a significant percentage of companies is more than 50%, any hostile acquirer aiming to obtain *de jure* control can only do so with the consent of the promoters and must be prepared to buy practically all of the outstanding shares (or, at least a shareholding in excess of 50.1%). Even in the relatively smaller percentage of companies where the average promoter holding is below 50% (say anywhere in the range of 25-50%), it is very difficult to dislodge the promoter and acquire *de jure* control due to several reasons. *Firstly*, promoters or controlling shareholders maintain control in excess of their equity stakes by a variety

45 See Goergen, Martynova & Renneboog (n 8); see also Ventoruzzo (n 6).

46 *See* Paul Davies, 'The Transactional Scope of Takeover Law in Comparative Perspective' in Umakanth Varottil & Wai Yee Wan (eds) *Comparative Takeover Regulation: Global and Asian Perspectives* (CUP 2018) 69, 79-80.

47 SAST Regulations (n 28), Regulation 3(1).

of ways including cross holdings, pyramids, and family or private trusts.[48] *Secondly*, the historical loyalty of domestic financial institutions to the Indian promoters and pooling agreements[49] between them make acquisition of control an uphill task. It is also quite common for trusted "friends of the promoters" (who are not considered to be a part of the promoter group) to hold significant shares in public corporations as non-institutional investors.[50] Therefore, a potential hostile acquirer is likely to come up against several shareholders who would be unwilling to tender their shares on account of their ties with the promoters or controlling shareholders. *Thirdly*, even with a relatively low shareholding of 25%, promoters can severely limit the ability of an acquirer (who has say acquired a stake as high as 50.1%) to undertake several important decisions which can only be undertaken pursuant to a special resolution, which require a 75% vote.[51] In other words, in jurisdictions with concentrated ownership where the presence of large shareholders necessarily turns any acquisition aimed at acquiring control into a negotiated one, the applicability of the MBR differs in as much as it is attracted when there is a change of control from an existing controlling shareholder to another (in this case, the acquirer acquiring control of the target by purchasing the controlling block from the promoters or existing controlling shareholder).[52]

Therefore, unlike the hypothetical above where economic considerations in a dispersed economy would motivate an acquirer to pay for only 26% of the shares in public corporation A and still be in effective control of the corporation, acquisition of a stake below 25% would not make much economic sense. This is because, it is only with an acquisition of 25% voting rights that the acquirer can obtain the minimal *de facto* control rights to block special resolutions. However, an acquisition of 25% would also trigger the mandatory bid. Consequently, an acquirer seeking to be in control must necessarily acquire at least a 50.1% in the target and make sure that the promoter's shareholding is diluted below 25%. This, in turn, would raise the cost of acquisition and deter the acquirer from making a hostile bid. In other words, in a jurisdiction with concentrated ownership, the same regulatory tool has a different impact. The MBR inadvertently operates as a takeover

48 *See* K.S.C. Rao & A. Guha, 'Ownership Pattern of the Indian Corporate Sector: Implications for Corporate Governance' (September 2006) ISID Working Paper No. 2006/09 <http://isid.org.in/pdf/wp0609.pdf>.

49 Pooling agreements entered into between shareholders to vote in a particular manner have been held to be enforceable in India. See *Rolta India Ltd. v Venire Industries Ltd.*, (2000) 100 Comp Cas. 19.

50 *See* Abhinav Chandrachud, 'The Emerging Market for Corporate Control in India: Assessing (and Devising) Shark Repellents for India's Regulatory Environment' (2011) 10 Wash. U. Global Stud. L. Rev. 187, 200.

51 Matters requiring special resolution under the Companies Act, 2013 include amendment of articles of association, alteration of memorandum, variation of shareholders' rights attached to different classes of shares, further issue of shares, reduction of share capital, buyback of shares, approval of related party transactions and voluntary winding up. See The Companies Act 2013, ss. 5(4), 13(1), 13(8), 48(1), 62(1)(c), 66(1), 68(2)(b).

52 Davies (n 46) 79.

defence, assists the incumbents[53] in keeping unwanted suitors at bay and perpetuates concentration of shareholding.[54]

Further, given that the MBR acts as an *ex ante* device to protect the incumbents from hostile acquisitions also addressed the Indian industry's fear of being taken over by foreign firms. During the 1990s (when calls for protectionist measures had intensified), transplanting the MBR in India's takeover regulations not only led India's regulations to formally converge with the international norm, it also acted as a formidable defence to hostile acquisitions by default.

B. How Does Interest Group Theory Explain the MBR Transplant Experiment?

The role of interest group politics in India's transplant experiment can be viewed in the following ways: *first*, instances where measures introduced by SEBI have not been opposed by the promoters or controlling shareholders because those inadvertently protect the incumbents (for e,g, imposition of the MBR and the use of a relatively low numerical threshold together with a broad definition of 'control'), and *second*, instances where aggressive lobbying by promoters or controlling shareholders has succeeded in obtaining several concessions in favor of the incumbents (including by way of creeping acquisitions, voluntary offers, and partial offers[55]).

1. Measures That Inadvertently Protect Incumbents

An apt example of this category is the introduction of the MBR itself. Another example of this category is the circumstances in which the MBR is triggered. Most jurisdictions[56] fix a numerical percentage, and 'effective control' is presumed to pass to the acquirer once it obtains voting rights in excess of such threshold. A relatively smaller number of jurisdictions[57] require a subjective determination of whether 'effective control' has *actually* passed to the acquirer *irrespective* of the percentage of voting rights held by it.

---

53 In the Indian context, the term "incumbents" refers to the promoters and the controlling shareholders.

54 See Ruth Luttmann, 'Changes of Corporate Control and Mandatory Bids' (1992) 12 Int'l Rev L & Econ 497; Rolf Skog, 'Does Sweden Need a Mandatory Bid Rule? A Critical Analysis' (1997) Société Universitaire Européenne de Recherches Financières <http://www.suerf.org/docx/o_21be9a4bd4f81549a9d1d241981cec3c_1771_suerf.pdf>.

55 Note that a discussion on the desirability and scope of exemptions (particularly inter se transfers) provided in the 2011 Takeover Regulations is not within the purview of this article.

56 These jurisdictions include U.K., Austria, Belgium, Finland, Ireland, Netherlands, Sweden, Italy, Switzerland, France, Germany, Greece, Hungary, Luxembourg, Poland and Portugal, Canada, Australia, New Zealand, Singapore, South Africa and Hong Kong.

57 These jurisdictions include Brazil, Estonia, Spain, China, Ghana, Norway, Nigeria and Indonesia.

India combines these two approaches. SEBI's use of a numerical or quantitative and a subjective or qualitative threshold for triggering the mandatory bid is a significant divergence from U.K. law that, although a measure undertaken to protect the minority, indirectly favors the incumbents. Currently, a mandatory bid may be triggered either when an acquirer acquires voting rights in excess of 25%[58] or if an acquirer is held to satisfy the rather broad and subjective definition of 'control'[59] regardless of the acquisition of any voting rights. While this combination benefits the minority, it also indirectly assists promoters or controlling shareholders by inhibiting the market for corporate control in a concentrated market like India's. Due to a low numerical threshold, mandatory bid threshold is triggered, which in turn makes hostile acquisitions more expensive and deters hostile bids. Further, the circumstances under which an acquisition of shares or voting rights below the numerical threshold may nonetheless be interpreted as 'control' continues to remain open.[60] Apart from giving rise to uncertainty, the subjective definition discourages acquirers from acquiring stakes in Indian companies without negotiating the deal structure with the promoters.

[58] See SAST Regulations (n 28) Regulation 3(1); The 1994 Takeover Regulations pegged the numerical threshold at 10%. The 1997 Takeover Regulations initially retained the 10% threshold but later increased it to 15% in 1998. It was only pursuant to the recommendations of the TRAC that SEBI increased the triggering threshold to 25% in the 2011 Regulations. The increase in the triggering threshold to 25% is arguably inadequate in several ways. Unlike the U.K. where listed corporations typically have dispersed ownership, Indian listed corporations are characterized by concentrated ownership with the average promoter holding in a significant percentage of companies being more than 50%. When viewed in this context, SEBI's decision of increasing the trigger threshold from 10% to 25% (although a step in the right direction) is still inadequate. This is because, unlike widely held companies where a change of control is likely to occur with the acquisition of a lower number of shares, change of control in companies with concentrated shareholding can realistically occur only when the acquirer acquires at least a share more than the shareholding of the largest shareholder. This, in turn, deters acquirers from making hostile bids and explains why the triggering threshold, despite the increase from 10% to 25%, tends to work in favor of the incumbents.

[59] Control is defined to include "the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner". See SAST Regulations (n 28) Regulation 2(e).

[60] Given that the definition covers both board and operational control, the manner in which the Indian regulator has interpreted 'control' has been a subject matter of great controversy and litigation. While SAT's decision in *Subhkam* attempted to define how 'control' should be interpreted (particularly in cases where financial investors negotiate for protective contractual rights like board representation, veto and quorum rights), the Supreme Court missed a golden opportunity to decide the issue on merits thereby leaving the vexed question open to further interpretation. See *Subhkam Ventures (I) Private Limited v Securities and Exchange Board of India*, Appeal No. 8 of 2009, January 15, 2010 <http://www.sebi.gov.in/satorders/subhkamventures.pdf>; *Securities & Exch. Board of India v Subhkam Ventures (I) P. Ltd., 2011 SCC OnLine SC 37*; see SEBI's order in the matter of *NDTV Ltd. in respect of Vishvapradhan Commercial Private Limited (VCPL)*, June 26, 2018, [23-24] <https://www.sebi.gov.in/enforcement/orders/jun-2018/order-against-vishvapradhan-commercial-private-ltd-vcpl-in-the-matter-of-ndtv_39359.html> Here SEBI concluded that there was an acquisition of 'control' even though purchase and call option rights were never actually exercised.

2. *Lobbying and Grant of Concessions*

A combination of the following divergences from U.K. takeover law further undermines the efficacy of the MBR in India. The first of such concessions is in the form of a generous creeping acquisitions[61] that allow incumbents to consolidate their stakes to impregnable levels which in turn deters hostile bids. This is bolstered by an early disclosure mechanism[62] that promptly notifies the promoters or controlling shareholders about a potential acquirer's strategy and allows them to take steps to thwart hostile bids including by way of creeping acquisitions or voluntary offers[63] that are an additional means of consolidating corporate control. Partial offers[64] further mitigate the purpose of the MBR by preventing minority from obtaining a full exit.

To sum up, India's transplant of the MBR cannot be fully explained by Armour and Skeel's theory. This is because the role of institutional investors becomes secondary in an economy like India where public shareholding is concentrated and their activity is relatively weak. However, the Indian experiment largely agrees with Armour and Skeel's public choice account in as much as the process of rule-making has significantly been influenced by the Indian corporate lobby (in particular, the promoters or controlling

---

61 Creeping acquisition usually refers to the acquisition of the target company's shares through a series of open market purchases. Existing shareholders or controllers usually use creeping acquisitions to increase their stake in the target in order to circumvent the open offer process. The acquirer usually purchases the target's shares when they are trading at a lower price and since these purchases are on the market, no premium is offered to the selling shareholder. These acquisitions are also conducted deliberately over a period of time so as not to inflate the share prices. Thus, creeping acquisitions allow acquirers to increase their stakes (up to the maximum amount permitted under the securities regulation to which the target is subject) in a relatively cheap manner since it does not require the acquirer to make an equal offer to all the target shareholders and does not require extensive disclosures. For a discussion on creeping acquisitions, see Luca Enriques & Matteo Gatti, 'Creeping Acquisitions In Europe: Enabling Companies To Be Safe Than Sorry' (2015) 15 Journal of Corporate Law Studies 55. The 2011 Takeover Regulations provide that anyone holding 25% or more (but less than 75%) of the voting rights in the target may continue to acquire up to 5% of the voting rights within each financial year without making a mandatory bid. See SAST Regulations (n 28) Regulation 29(3).

62 The 2011 Takeover Regulations require an acquirer to disclose the acquisition of 5% or more of the targets voting rights within 2 working days of such acquisition. See Regulation 29(3), 2011 Takeover Regulations. Similarly, a shareholder who is already holding 5% of the shares must disclose acquisitions or disposals representing 2% or more of the shares or voting rights since the last disclosure. See SAST Regulations (n 28) Regulation 29(2).

63 The 2011 Takeover Regulations provide that shareholders holding a stake of 25% or more but less than 75% may make a voluntary open offer for a minimum of 10% of the total shares of the target. See SAST Regulations (n 28) Regulations 6(1), 7(2),

64 A partial offer is an offer by an acquirer to the shareholders of a target to buy only a portion of the target's shares (as opposed to a full tender offer for 100% of the shares of the target). Partial offers can either be used to increase an existing stake or to acquire a controlling stake in the target. Unlike the U.K., India specifically permits acquirers to make a mandatory bid for less than 100% of the outstanding shares of the target. Accordingly, the 2011 Takeover Regulations require an acquirer to make a mandatory bid for a minimum of 26% (as opposed to 100%). See SAST Regulations (n 28) Regulation 7(1).

shareholders) which is one of the most influential groups in the country. Therefore, while the Armour and Skeel theory is only partially applicable, the Indian experience does highlight a number of factors specific to the host country (in particular, the role that promoters or controlling shareholders tend to play in economies and their interest in the initial choice of law) that need to be taken into account while developing a theory to explain transplants of the U.K. and/or U.S. model in economies that are fundamentally different. Now that we have seen how Armour and Skeel's theory is not entirely tailored to the Indian context, this article proposes recommendations in the takeover regime to prevent the entrenching of incumbents.

IV. Evaluation and Recommendations

From the discussion above, we see that not only does the Indian version of the MBR primarily work in favour of the incumbents, it also does not facilitate a market for corporate control as such a term is understood internationally. The question then is whether India should abolish the MBR? If the MBR were to be abolished, then general corporate law must adequately protect the minority in change of control situations. However, we see that the Indian context warrants the continuation of the MBR. This is because general corporate law in India is not adequate. This is primarily because while directors and controlling shareholders, both have the power to direct corporate action, and in turn, bind minority shareholders with their decisions, Indian corporate law jurisprudence (unlike jurisdictions like the U.S.) imposes no fiduciary duties on controlling shareholders (much less in the context of takeovers).[65] In other words, while the current corporate law jurisprudence imposes strict fiduciary duties on directors of a corporation (which would oblige them to act in the best interests of the corporation, including a takeover situation),[66] it does not impose similar fiduciary duties on shareholders (whether controlling or otherwise).[67] It is also interesting to note that no cases have been brought before courts to develop even the scope of directors' duties in takeover law matters where a fiduciary duty exists.[68] Further, because 'control' is not

[65] See Ernest Lim, 'Controlling Shareholders and Fiduciary Duties in Asia', (2018) 18 Journal of Corporate Law Studies 113.

[66] Companies Act (n 51), s.166.

[67] This reluctance to interfere with the decisions of the majority (except in a limited set of circumstances) is based on the old common law principle laid down in the historic case of *Foss v Harbottle*. (1843) 2 Hare 461. See also KW Wedderburn, 'Shareholders' Rights and the Rule in Foss v Harbottle' (1957) 15 The Cambridge Law Journal, 194, 196. It must be noted that while SEBI seems to have acknowledged the idea (although not in the context of takeovers) that promoters or controlling shareholders owe a fiduciary duty to minority shareholders, it is currently not a part of India's corporate law jurisprudence. See SEBI, 'Consultative Paper on review of Corporate Governance Norms in India' (4 January 2013) <https://www.sebi.gov.in/sebi_data/attachdocs/1357290354602.pdf>.

[68] This may be a by-product of the fact that courts have been kept out of the process of resolving takeover law disputes which is within the jurisdiction of SEBI. See SEBI Act (n 32) ss. 15Y, 20A.

considered to be an asset of the company, in the absence of the imposition of fiduciary duties on controlling shareholders, the minority can neither prevent controlling shareholders from selling their shares to a third party, nor can they insist on sharing the control premium.[69] Minority shareholders are rarely in a position to bargain for tag-along rights in the event the majority chooses to exit the company, and even in cases where such an exit right is provided for in a shareholders' agreement, a full exit is generally not available since tag-along rights typically work on a *pro-rata* basis. If the minority shareholders are not provided an exit in terms of the relevant shareholders' agreement, the only remedy for the minority is to approach the courts for a breach of contract which is a long-drawn process.[70] Therefore, the MBR plays an important role in protecting the interests of the minority when promoters or majority shareholders decide to sell their controlling shares to an acquirer (often for a significant control premium).

Given that dispensing with the MBR may not be in the best interests of the minority, let us examine if we can draw on international experience to improve its current formulation.

A. Triggering Threshold

In light of the confusion surrounding the concept of 'control', SEBI issued a discussion paper that mooted the idea of bright lining 'control'.[71] However, after a long-drawn consultation, it decided not to rely exclusively on a numerical trigger.[72] Had the regulator decided to transition to solely a numerical MBR trigger, it would have made way for a classic problem that is

---

69 See Jesper Lau Hansen, 'The Mandatory Bid Rule: The Rise to Prominence of a Misconception' (2003) 45 Scandinavian Studies in Law 173, 181.

70 See Puneet Rathsharma & Kunal Mehta, 'Challenges In Protecting The Rights Of Minority Shareholders' (*Business World,* 3 January 2018) <https://www.khaitanco.com/PublicationsDocs/BWBusinessworld-KCOCoverage2Jan18Kunal.pdf>; Further, it is important to note that while the Companies Act, 2013 provides for certain remedies to protect the minority, those remedies and exit options (like appraisal rights, suit for oppression and mismanagement, derivative action and class action) would not apply to a case where the majority chooses to exit the corporation by selling its shares to a third party at a premium. Further, even if one were to argue that one or more of these remedies were applicable in such a case (i.e. where the majority refuses to share the premium with the minority in the absence of a MBR), it is doubtful whether they would sufficiently protect the interests of the minority especially in light of institutional challenges that these remedies face in the Indian context.

71 See SEBI, *Discussion Paper on Brightline Tests for Acquisition of 'Control' under SEBI Takeover Regulations*, (14 March 2016) <https://www.sebi.gov.in/sebi_data/attachdocs/1457945258522.pdf>.

72 See SEBI, 'Acquisition of "Control" under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011' (Press Release No 56/2017, 8 September 2017) <https://www.sebi.gov.in/media/press-releases/sep-2017/acquisition-of-control-under-the-sebi-substantial-acquisition-of-shares-and-takeovers-regulations-2011_35891.html>; See also Samie Modak, 'SEBI scraps 'bright-line' control test proposal' (*Business Standard,* 8 September 2017) <https://www.business-standard.com/article/economy-policy/sebi-scarps-bright-line-control-test-proposal-117090801010_1.html>.

faced by other jurisdictions that rely on a numerical threshold. A numerical trigger presumes that once a certain shareholding percentage is crossed, the acquirer has acquired *de facto* control over the target (irrespective of whether such shareholding percentage actually confers *de facto* control or not). Given that using a shareholding percentage as the trigger effectively de couples it from *de facto* control, it urges acquirers to exercise control without triggering the MBR by staying just below the numerical threshold.[73] It may be argued that in the Indian context, remaining below 25% may not result in *de facto* control given that the ownership is mostly concentrated. While this argument has some merit, it may not be entirely true. This is because whether such an acquirer would have the ability to exercise *de facto* control would largely depend on the shareholding pattern of the target. If there is no other shareholder with similar voting rights, then the acquirer may be able to exercise control over the target and influence its management and policy decisions while staying below the numerical threshold. Further, while in a vast majority of Indian companies, promoters hold a majority of the shares,[74] it is fairly common for promoters and controllers with relatively lower shareholdings to exercise *de facto* control through other means (including pyramids and cross holdings). The problem of exercising *de facto* control with relatively lower shareholdings is further compounded by the emergence of new structures like dual class shares[75] and shares with differential voting rights.[76] Therefore, from a policy standpoint, it may not be very prudent to rely solely on a numerical threshold and sacrifice the rights of the minority on the grounds of convergence or simply on account of certainty.

The question then is whether the existing numerical threshold of 25% is appropriate? In economies like India where promoters typically own substantial stakes in the target, only an acquisition of a relatively higher percentage of shares is likely to result in a change of control. Hence, the current limit of 25% appears to be arguably low.[77] It must also be remembered that a numerical threshold fixed by any jurisdiction applies to all corporations in the said jurisdiction irrespective of the shareholding patterns that individual corporations may display. In other words, the same numerical threshold may not work well for individual targets whose shareholding pattern may be different from the general shareholding pattern of a vast majority of corporations in the said jurisdiction.[78] In such cases, it might become

[73] For instance, in the U.K., empirical studies show that most acquirers tend to acquire shares below the 30% threshold. See Paul L. Davies & Sarah Worthington, *Gower and Davies Principles of Modern Company Law* (Sweet & Maxwell 2012) 1061.

[74] See (n 15).

[75] Umakanth Varottil, '*Dual-class share structures*' (*IndiaCorpLaw,* 24 September 2014) <https://indiacorplaw.in/2014/09/dual-class-share-structures.html>.

[76] For instance, India recognizes shares with differential rights. See Companies Act (n 51) s.43(a)(ii).

[77] See (n 58).

[78] This would be particularly relevant for the relatively smaller percentage of companies that display dispersion of shareholdings. Mathew (n 15); Nazir & Malhotra (n 15)*;*

necessary to have varying numerical thresholds that could cater to differing shareholding patterns.[79] One option could be to establish a sliding scale of numerical thresholds that would depend on the shareholding of the promoter or largest controlling shareholder. For e.g., the MBR triggering threshold would be higher in corporations with higher promoter or controlling shareholding and vice versa. However, in order to establish such sliding scale and determine the appropriate numerical triggers, SEBI would have to conduct a thorough study of the shareholding patterns of public corporations in India together with the shareholding of existing promoters and controlling shareholders. The other option could be to allow SEBI to grant exemptions in relevant cases. For e.g., if the numerical trigger is too low for a target with concentrated shareholding, then SEBI could grant an exemption to an acquirer from making a mandatory bid if its acquisition is in excess of the numerical threshold but is lesser than the shareholding percentage held by the controlling shareholder.[80] Conversely, if the numerical trigger is too high for a target with diffused shareholding, SEBI could impose a mandatory bid. However, given that this will include an element of subjectivity, such power would have to be exercised sparingly. Another option could be to require a vote by a majority of minority shareholders (i.e. if the triggering threshold is too low for an individual target, an acquirer crossing such threshold would not be required to make a mandatory bid if independent shareholders or a majority of minority shareholders vote in favor of waiving the offer).[81]

Given that utilising only a numerical threshold has its own pitfalls, SEBI's decision to retain the existing definition of 'control', although in the best interests of the minority, may continue to cause confusion. Amending the definition to include an illustrative list of rights that would or would not constitute 'control' would lend clarity and pre-empt litigation.[82] Another

---

Balasubramanian & Anand (n 8); Varottil (n 15); Varottil Corporate Takeover (n 15).

79 Although vastly different from what is being suggested in this article, certain jurisdictions like Italy have permitted 'small or medium listed corporations' the option of having varying numerical thresholds. For a detailed discussion on Italian law and the impact of the recent amendments on the market for corporate control, see Fedderke & Ventoruzzo (n 6) 163, 170-175.

80 The suggestion is broadly akin to a whitewash mechanism that allows shareholders and/or the regulator in several jurisdictions (including the U.K., Finland, Ireland, Belgium, Denmark, Italy, Sweden, Ireland, Netherlands, Spain, China and Hong Kong) to waive the obligation to make a mandatory bid in certain circumstances. See Marccus Partners & Centre for European Policy Studies (CEPS), *The Takeover Bids Directive Assessment Report* (2011) 152-155 <https://publications.europa.eu/en/publication-detail/-/publication/67501b75-7583-4b0d-a551-33051d8e27c1>.

81 For jurisdictions (like Netherlands, China, Hong Kong and Switzerland) that provide for shareholder voting to waive the obligation to launch a mandatory bid, see Alexander Johnston, *The City Takeover Code* (OUP 1980) 166-168.

82 For example, the Insurance Regulatory and Development Authority Guidelines provide a list of circumstances on when an insurance company will be deemed to be under Indian 'control'. See CUTS International, *Comments on Discussion Paper on "Brightline Tests for Acquisition of Control under SEBI Takeover Regulations"* (14 April 2016)<https://www.cuts-ccier.org/pdf/Comments_on_Discussion_Paper_on_Brightline_Tests_for_Acquisition_of_Control_

option could be to provide for rebuttable presumptions that would indicate a lack of *de facto* control. For e.g., the presence of another shareholder that would prevent the acquirer from becoming the single largest shareholder.[83] Lastly, a whitewash mechanism[84] by including exemptions in favour of acquirers could also be considered. This would pre-empt litigation since shareholders (either by a majority of minority vote or by a vote of independent shareholders) would get to opine on whether they view the acquisition in question to be beneficial or not. Needless to say, for the whitewash mechanism to work effectively, the law would have to provide a corresponding obligation to provide all necessary and relevant information to the shareholders so that they can make an informed decision.[85]

B. Voluntary Offers

Voluntary offers are typically understood as *unsolicited* offers in which an acquirer makes an offer for *all* the shares of the target *without* crossing the mandatory bid threshold. Hence, most jurisdictions exempt voluntary offers from the mandatory bid requirements[86] and/or subject them to a different set of conditions[87] with a view to encourage hostile control shifts and facilitate a market for corporate control.

However, in India, voluntary offers signify a very different meaning and were introduced specifically for the purposes of consolidating corporate control. The 2011 Takeover Regulations currently provide that shareholders holding

under_SEBI_Takeover_Regulations.pdf >.

83 This is akin to the large shareholder exemption to the MBR in several jurisdictions (like Finland, France, Germany, Ireland, Belgium, Italy, and Spain). For a detailed discussion on the conditions that the large shareholder exemption is subject to, see CEPS (n 80) 143.

84 A whitewash mechanism is a set of conditions and procedures that must be followed before the obligation to make a mandatory bid can be waived (for example, approval of change of control by independent shareholders).

85 For instance, U.K.'s City Code provides for detailed guidance on the procedure to be followed in order to avail the whitewash mechanism. See City Code (n 19) Appendix 1, Whitewash Guidance Note.

86 For instance, in the U.K. and several other European Member States like Belgium, Finland, Netherlands, Ireland, Slovakia, Portugal and Czech Republic, a voluntary bid for all the shares of the target is exempt from mandatory bid requirements. See Clerc and ors, *A Legal and Economic Assessment of European Takeover Regulation* (CEPS 2012) 61.

87 For instance, in the U.K., the look back period for determination of the offer price in the case of voluntary bids is three months as opposed to twelve months for mandatory bids. However, the U.K. also imposes a minimum acceptance condition to ensure that a voluntary bid is accepted by at least 50% of the shareholders of the target and results in conferring *de jure* control. In Italy, MBR is not triggered if the 30% threshold is either crossed as a result of a voluntary bid for 100% of the shares of the target or if a voluntary bid for 60% of the shares of the target satisfies certain conditions (including a whitewash procedure) that are intended to protect the minority. In jurisdictions like Germany, Romania and Greece, voluntary bids are subject to equitable price rules, and in Spain, an equitable price has to be offered or the voluntary bid must be accepted by shareholders (other than the acquirer) representing at least 50% of the voting rights of the target. See Clerc (n 86); see also Fedderke & Ventoruzzo (n 6) 170-171.

a stake of 25% or more but less than 75% may make a voluntary open offer[88] for a minimum of 10% of the total shares of the target.[89] Voluntary offers are also subject to several restrictions that operate at different times in the course of an offer. To begin with, an acquirer who has made any purchase of shares (including by way of creeping acquisitions) without attracting the mandatory bid in fifty-two weeks preceding a voluntary offer is prohibited from making a voluntary offer.[90] Further, once an acquirer has made a voluntary offer, it cannot acquire any further shares in the target other than by way of the voluntary offer.[91] The acquirer is also prohibited from acquiring any shares for a period of six months after the completion of a voluntary offer, except pursuant to another voluntary offer or through a competing offer.[92]

Unlike other jurisdictions where the purpose of voluntary offers is to allow rank outsiders to acquire control over target corporations relatively easily, voluntary bids are not a feasible option to be used by rank outsiders looking to take over an Indian target. This is primarily on account of the way the current regulations operate in an economy where public corporations are marked by concentrated ownership. To understand how voluntary offers tend to function in the Indian context, let us take the example of an outsider looking to acquire control over an Indian target. Let us also assume that the acquirer does not have the approval of the management for the said acquisition. In such a case, the acquirer would like to acquire the maximum number of shares (but a number that is below the threshold of 25% that would trigger the mandatory bid) before making a voluntary offer. However, the acquirer would be prohibited from launching a voluntary offer as one cannot launch a voluntary bid if acquisitions have been made within fifty-two weeks preceding the bid. Similarly, after having made a voluntary offer, the acquirer would ideally want to consolidate its position by acquiring further shares in the target. However, this too would not be possible since the current regulations prohibit acquisition of shares by the acquirer during the bid and six months after the bid (unless the acquisition is made pursuant to another voluntary or competitive bid). Therefore, the restrictions operating in connection with voluntary bids disincentivise hostile acquirers from making voluntary bids. Further, even if the acquirer is successful in acquiring 25% of the voting rights of the target by buying shares on the market or by making selective purchases, such an acquisition would also trigger the mandatory bid. Therefore, the only feasible option that such an acquirer is left with is to acquire shares just below the triggering threshold of 25% and then make a mandatory offer for at least 26% in order to acquire *de jure* control over the

88 SAST Regulations (n 28) Regulation 6(1).

89 SAST Regulations (n 28) Regulation 7(2). The TRAC pegged the voluntary open offer size to a minimum of 10% in order to "discourage non-serious" consolidation offers. *See* TRAC Report (n 27) [2.19].

90 *See* 1997 Takeover Regulations (n 25) proviso to Regulation 6(1).

91 *ibid*.

92 ibid Regulation 6(2).

target. In other words, any acquirer intending to make a hostile acquisition by using the voluntary offer route cannot realistically do so because reaching the 25% threshold would necessarily trigger the mandatory bid. A combination of these factors, therefore, make voluntary bids a tool best used for the purposes of consolidation in the hands of promoters or controlling shareholders who already hold more than 25% of the shares of the target.

Given that the 2011 Takeover Regulations provide that the option of voluntary offers is available to shareholders who hold 25% or more (but less than 75%) of the voting rights of the target, there was a discussion in corporate circles whether voluntary offers could be made by shareholders holding less than 25% and whether the same restrictions would apply to the offers made by such shareholders.[93] SEBI clarified the discourse by stating that even shareholders holding less than 25% could increase their shareholding by making a voluntary offer. However, in such case, the offeror would have to make a voluntary offer for a minimum of 26% of the share capital of the target (as opposed to a minimum of 10% that is applicable in the case of an offeror holding 25% or more of the voting rights of the target). Further, such offers would not be subject to any restrictions that a regular voluntary offer made by acquirers holding 25% or more of the voting rights of the target would be subject to. In other words, although a voluntary offer by an acquirer holding less than 25% of the voting shares of the target would be subject to a higher offer size of 26%, it would not be subject to the restrictions that operate before, during and after the offer is made.[94] While this may raise the cost of acquisition for an acquirer seeking to acquire control over a target since an acquirer would have to make an offer for at least 26% of the outstanding shares of the target (as opposed a minimum of 10%), it would also appear to make hostile acquisitions easier since the restrictions on acquiring shares fifty-two weeks prior to the offer, during the offer and six months after the offer would not apply. However, despite SEBI's clarification, the making of hostile acquisitions using voluntary offers would most likely remain a mere theoretical possibility. This is because in an economy like India where the average promoter holding in a significant percentage of companies is more than 50%, any hostile acquirer intending to obtain *de jure* control over a target can only do so with the consent of the promoters and must be prepared to buy practically all the outstanding shares of the target. Even in the smaller percentage of companies where the average promoter shareholding is less than 50% (for e.g. anywhere between 25% and 50%), it is extremely difficult to dislodge the promoter and acquire *de jure* control due to several reasons (including promoter control through cross holdings, pyramids, and the loyalty

---

93 See N. Sundaresha Subramanian, 'New Takeover Code will keep raiders away' (*Business Standard,* 30 September 2011) <https://www.business-standard.com/article/companies/new-takeover-code-will-keep-raiders-away-111093000073_1.html>.

94 See SEBI, 'Frequently Asked Questions on SEBI (Substantial Acquisition of Shares and Takeovers) Regulations' (*SEBI,* 2011) 5 <http://www.sebi.gov.in/cms/sebi_data/attachdocs/1399625542441.pdf>.

of domestic financial investors who tend to vote along with the promoters). Therefore, in the Indian context, it is highly unlikely for such voluntary offers to be a means to encourage hostile acquisitions as the presence of strong controlling shareholders would necessarily convert any attempt at a hostile acquisition into a negotiated one.

To assess whether the existing policy on voluntary offers requires a re-examination, it is important to understand how voluntary offers came to be introduced in its existing format in India's regulatory framework. The reason for the introduction of voluntary offers in the existing format is closely linked to TRAC's recommendation of abolishing partial offers and raising the offer size to 100% of the outstanding shares of the target. To mitigate the hardship that the recommendation for abolition of partial offers would have on domestic acquirers, TRAC recommended that voluntary offers be introduced as an additional means to consolidate corporate control. Therefore, voluntary offers were recommended in the present format primarily as an 'exception to the general rule on offer size'.[95] However, what ultimately happened was that while the suggestion of abolishing partial offers was rejected, voluntary offers were retained as an additional means for consolidation of corporate control.

Since partial bids are very much a part of India's takeover regulations, there is very little reason to retain voluntary offers in the format that it exists today. This is especially because in an economy that naturally makes the occurrence of hostile activity difficult, providing voluntary offers as an additional means for consolidation over and above existing means like creeping acquisitions only goes to restrict the market for corporate control even further. It may, therefore, be prudent to redesign the concept of voluntary offers in a way that is more in line with the international understanding. Accordingly, SEBI may consider redefining voluntary offers to mean an offer that is made voluntarily by an acquirer for the purpose of acquiring all the shares of the target. Since voluntary offers are already subject to the pricing formula applicable to mandatory bids,[96] both the interests of the minority and the acquirers would be protected. Should an unsolicited voluntary bid turn into a negotiated acquisition (which is what is more likely in the Indian context given the presence of promoters or controlling shareholders), the pricing formula under the extant regulations would ensure that the negotiated price (in case it is the highest offer price according to the pricing methodology) is offered to all minority shareholders. As for acquirer, the fact that the pricing norms do not require the acquirer to pay only the highest price paid for the shares in a given time frame but also take into account weighted market prices allows for a partial diffusion of the control premium and reduces the financial burden on the acquirer. Further, to ensure that voluntary offers necessarily result in a change of control, the regulator could consider making voluntary bids subject to the fifty-plus-one acceptance condition. This would not only

[95] See TRAC Report (n 27) [2.20].

[96] SAST Regulations (n 28) Regulation 8.

ensure that frivolous bids are not made, but also ensure that the acquirer making a voluntary offer acquires *de jure* control of the corporation. One could argue that redefining voluntary bids may not facilitate a market for corporate control in a jurisdiction like India where most unsolicited offers would eventually have to be negotiated in order to be successful. While it may be true that redefining the concept may not change the fate of unsolicited offers in the case of most public corporations in India, it may go a long way in facilitating a market for corporate control for a smaller percentage of companies that show a dispersion of shareholding.

C. Creeping Acquisitions

In addition to voluntary offers, Indian takeover regulations provide another significant avenue for consolidation of holdings, namely, creeping acquisitions. While creeping acquisition limits have been amended several times in the past, the 2011 Takeover Regulations permit an acquirer holding voting rights between 25% and 75% of the target to acquire an additional 5% of the voting rights within any financial year.[97]

Creeping acquisitions were specifically allowed by SEBI in order to facilitate consolidation of control by persons already in control of the target. While this applies to promoters and acquirers alike, creeping acquisitions tend to tilt the balance in favor of promoters or controlling shareholders. This is because in the Indian context, a shareholder can only undertake creeping acquisitions after having acquired 25% of the voting rights in the target. However, once the 25% threshold is reached, the mandatory bid is also triggered. As we have seen previously, remaining below the 25% threshold does not make much economic sense for a rank outsider as it is only with the acquisition of 25% that the acquirer obtains an ability to block special resolutions. Therefore, to be eligible to use the creeping acquisitions, an acquirer has to first acquire a stake of 25% and launch a mandatory bid simultaneously. It is only after doing so that the acquirer can take advantage of the creeping acquisition mechanism. However, promoters or controlling shareholders who already maintain significant stakes in public corporations do not have to first launch a mandatory bid to shore up their holdings. The requirement that outside acquirers must first cross the initial threshold and trigger the mandatory bid as opposed to promoters who can use the mechanism as a takeover defence further stymies the market for corporate control.

India stands out from the international norm by providing a rather generous creep-up. Abolition of creeping acquisitions (while ideal) may not be possible in the near future since creeping acquisitions have been lobbied for aggressively and are seen as an important defence mechanism against hostile bids.[98] However, a feasible option could be to allow an acquirer holding

---

[97] See SAST Regulations (n 28) Regulation 3(2).

[98] See Jairus Banaji, 'Thwarting the market for corporate control: takeover regulation in India'

shares or voting rights in excess of the mandatory bid threshold (i.e. 25%) but less than 50% to acquire additional shares or voting rights anywhere in the reduced range of 1%-3% within a specified time period of 6 or 12 months.[99] In addition to reducing the percentage of shares that can be acquired by way of creeping acquisitions without attracting the mandatory bid, SEBI should ensure that no creeping acquisitions are allowed once an acquirer obtains *de jure* control. In other words, once an acquirer obtains *de jure* control, any further acquisition by such acquirer should trigger a mandatory bid for all the outstanding shares of the target. The current formulation of allowing promoters or controlling shareholders (already in control of the target) to consolidate up to 75% encourages concentration of ownership, which in turn, chills the market for corporate control.

D. Partial Offers

Another critical way in which the Indian MBR differs from its U.K. counterpart is that it does not require an acquirer to make a mandatory bid for all the outstanding shares of the target. Instead, once an acquirer crosses the triggering threshold (i.e. 25%), such acquirer is only required to make a bid for at least 26% of the remaining shares of the target, leading to a total of 51%.[100] Given that the legal requirement to make a public offer for only 26% of the outstanding shares deprives the minority of an opportunity for a full exit from the target, the question is whether it is time for India to rethink its extant policy on partial offers.

However, before examining whether India is able to abandon its current policy on partial bids, it is important to note that India is not the only jurisdiction using partial bids. We see that much like India, certain other jurisdictions (like China, Japan, Taiwan and South Korea) have adopted partial bids in one form or another as a method to encourage control shifts by reducing the cost of

(2005) 5 <http://eprints.soas.ac.uk/10920/1/QEH_banaji.pdf>; See also BS Markets Bureau, 'Creeping Acquisition Cap Must Go: Panel' (*Business Standard,* 24 March 2001) <http://www.rediff.com/money/2001/mar/24panel.htm>.

99 Examples of such jurisdictions include Singapore, China, Malaysia, Hong Kong, Australia, France, Austria, Poland and Greece. While Italy and Spain permit a higher creeping acquisition limit of 5%, only shareholders holding a stake between 30% to 50% are permitted to creep-up. See Clerc (n 86) 56-58. *See also* Umakanth Varottil and Wai Yee Wan, 'Concluding Observations and the Future of Comparative Takeover Regulation' in Umakanth Varottil and Wai Yee Wan (eds), *Comparative Takeover Regulation: Global and Asian Perspectives* (CUP 2018) 476. For an individual discussion on each of the Asian economies, see Wai Yee Wan, 'Legal Transplantation of UK-Style Takeover Regulation in Singapore' in Umakanth Varottil & Wai Yee Wan (eds) *Global and Asian Perspectives* (CUP 2018) 406, 416; Robin Hui Huang & Juan Chen, 'Takeover Regulation in China: Striking a Balance between Takeover Contestability and Shareholder Protection' in Umakanth Varottil & Wai Yee Wan (eds) *Comparative Takeover Regulation: Global and Asian Perspectives* (CUP 2018) 211, 222.

100 SAST Regulations (n 28) Regulation 7(1).

acquisition that a U.K.-style MBR would ordinarily impose.[101] Similarly, for jurisdictions in the E.U. (like Italy) where the MBR has come more in line with the U.K.-style MBR after the imposition of the European Takeover Directive (particularly because of the adoption of the highest price rule[102]), scholars are debating whether adoption of partial bids (subject to certain conditions) may be a middle ground between having a full-blown MBR (that certainly affords full exit rights to minority shareholders but also deters frequent control shifts) and an optional regime that has recently been proposed by some scholars[103] in the context of the E.U. (which is arguably inefficient and lacking in several respects).[104] At this juncture, it is important to note that despite the adoption of partial bids by select economies and the recent discussions pertaining to the potential utility of partial bids, partial bids have not become the new norm in international takeover regulation. Therefore, most jurisdictions (including European jurisdictions subject to certain exceptions) typically require an acquirer, upon crossing the relevant triggering threshold, to make a bid for all the outstanding shares of the target.[105] Further, from a theoretical standpoint, while partial bids are being mooted as a method to liberalise the MBR regime, academicians and regulators (including the proponents of partial bids) are in agreement that such bids are not ideal from a policy standpoint as they necessarily deprive shareholders (in particular, minority shareholders) from

101 For a detailed discussion on the efficiency of partial bids (both on a theoretical and practical level) as a middle ground between the market rule and the mandatory offer rule, see Yueh-Ping Yang & Pin-Hsien Lee, 'Is Moderation the Highest Virtue? A Comparative Study of a Middle Way of Control Transaction Regime' (2017) 41 Del. J. Corp. L. 393.

102 A crucial issue in takeover regulation is the methodology used to determine the price at which the MBR must be launched, and the effect such methodology has on the amount of control premium received by the minority shareholders. One of the key concerns in the calculation of the offer price is whether, and to what extent, should the offer price be linked to the market price and/or the price paid by the acquirer to acquire shares directly from significant shareholders of the target (which is usually higher than the market price). Here, we see that some jurisdictions offer the entire control premium to the minority shareholders by providing that the mandatory bid would have to be made at the highest price paid for the shares within a specified time frame immediately preceding the acquisition of voting rights that triggered the mandatory bid. These jurisdictions include the U.K., France and Singapore. See City Code (n 19) Rules 9.1, 9.5(a); Ventoruzzo (n 11) 197-198; see Wan Legal Transplantation (n 99). However, since the highest price rule raises the cost of acquisition significantly and may have a chilling effect on the market for corporate control, a relatively larger number of jurisdictions provide for a diffusion of control premium by using different formulations that provide for price adjustments by using additional parameters like average stock price and/or the weighted average market price. These jurisdictions include China, Italy, Austria, Belgium, Germany, Greece, Spain, Portugal and Romania. See Fedderke & Ventoruzzo (n 6) 166-169. See also Ventoruzzo (n 11) 198.

103 See Luca Enriques, Ronald J. Gilson & Alessio M. Pacces, 'The Case For An Unbiased Takeover Law (With An Application To The European Union)' (2014) 4 Harvard Business Law Review 85.

104 See Fedderke & Ventoruzzo (n 6).

105 See Marco Ventoruzzo (n 11) 196.

obtaining a full exit in the event of a bid[106] and need to be implemented carefully subject to a meticulously designed set of restrictions.[107]

The situation in India is no different. Both the 1997 Bhagwati Committee and the TRAC constituted in 2010 note that partial bids are not only not the international norm, but that they also prevent shareholders from obtaining a full exit.[108] The question of whether India should do away with partial offers is not new and has been hotly debated in the past. In fact, TRAC's recommendation in 2010 of abolishing partial bids and requiring acquirers to make an offer for 100% of the outstanding shares of the target was met with scathing criticism from the Indian corporate lobby.[109] The Indian corporate lobby has aggressively bargained for partial offers as a method to 'level the playing field' between cash-rich foreign acquirers and Indian acquirers that had limited access to acquisition finance. Admittedly, bank finance for domestic acquisitions is not available to Indian acquirers. However, practitioners are divided on the whether lack of credit finance presents an insurmountable hurdle in conducting domestic acquisitions. An increasing number of practitioners appear to be of the view that while lack of acquisition finance was a valid argument way back in the early 1990s when the Indian economy was still in the process of liberalizing and welcoming foreign investment, the said argument does not hold much ground in today's economic times when Indian companies have become more competitive and have witnessed significant growth so as to be in a position to conduct large scale acquisitions abroad.[110] This view is also supported by a preliminary analysis of the Indian takeover market conducted by SEBI in 2004 which notes that non-availability of credit finance has not prevented domestic acquisitions from occurring and that 'companies with good and credible record have access to large resources'.[111]

Although India has retained partial offers on the pretext of lack of credit-finance, one could argue that abolishing partial bids would increase the cost of acquisition and deter hostile bids. While it is true that abolishing partial bids may bring about an increase in the cost of acquisition, there are at least two

106 See Juan Chen, *Regulating the Takeover of Chinese Listed Companies: Divergence from the West* (Springer 2014) 67–97; Charlie Xiao-Chuan Weng, 'Lifting the Veil of Words: An Analysis of the Efficacy of Chinese Takeover Laws and the Road to a "Harmonious Society"' (2012) 25 *Columbia Journal of Asian Law* 180; Cai (n 6) 665-80; Huang (n 6) 167-75; Tomotaka Fujita, 'The Takeover Regulation in Japan: Peculiar Developments in the Mandatory Offer Rule' (2011) 3 UT Soft L. Rev. 24, 40-43.

107 Even academicians favoring the adoption of partial bids warn that partial bids must be allowed only in specific situations. Fedderke & Ventoruzzo (n 6); see also Yang & Lee (n 101).

108 See 1997 Bhagwati Report (n 24) 24-25. See also TRAC Report (n 27) 18-20.

109 Interview with TRAC members reviewing the working of the 1997 Takeover Regulations.

110 Interview with practitioners and TRAC members.

111 See M.T. Raju & Deepthi L.S., 'Market for Corporate Control and Takeover Regulations: Trends and Analysis' (September 2004) SEBI Working Paper Series No. 9-10, 14-15 <https://www.sebi.gov.in/reports/working-papers/sep-2004/working-paper-series-no-10-market-for-corporate-control-and-takeover-regulations-trends-and-analysis-pdf_13148.html>.

other mechanisms in the extant regulations that would provide the necessary cushion, namely, the pricing methodology and the mode of payment. Like most other jurisdictions,[112] India does not follow the highest price rule as mandated by U.K.'s MBR. Instead, it follows a pricing formula that allows for partial diffusion of the control premium in order to bring down the cost of acquisition to encourage frequent control shifts.[113] Further, in order to facilitate takeovers and address the issue of financing, the extant regulations facilitate non-cash takeovers by permitting the consideration to be in the form of cash and other securities (of course subject to certain restrictions in order to ensure that the interests of the minority are protected in the event a non-cash consideration is offered).[114] As to the fear that abolition of partial offers would deter hostile bids, the situation would be no different than what it is today (where substantial holdings effectively deter hostile bids in the first place).

While these arguments may have some theoretical force, what is really needed in the Indian context is that any alteration of the policy on partial offers[115] be based on a thorough empirical analysis of how partial offers have operated so far instead of being based solely on protectionist concerns. For instance, in order to assess whether lack of credit finance is really a constraint in the Indian context so as to merit retention of partial bids, such studies must among other things assess whether offer amounts involved are relatively smaller than the size of the relevant companies and their market capitalization. While SEBI has taken some initiative on its own to assess the state of the market for corporate control in two prior studies,[116] it needs to

---

112 These jurisdictions include China, Italy, Austria, Belgium, Germany, Greece, Spain, Portugal and Romania. For a discussion on why the highest price rule is not followed, see Ventoruzzo, (n 11) 198. See also Davies (n 46) 83-84.

113 See SAST Regulations (n 28) Regulation 8(2).

114 ibid Regulation 9(1). The regulations prescribe other conditions (including pricing of shares that are being issued towards payment of the offer price) that a non-cash consideration needs to satisfy in order to ensure that the minority shareholders accepting such non-cash consideration are not 'stuck with illiquid paper'. *See* TRAC Report (n 27) [11.2]. For a detailed description of the conditions that a non-cash payment needs to satisfy, see SAST Regulations (n 28) Regulation 9(3)-(5).

115 As discussed above, if partial offers are to be permitted (and not entirely abolished), then it would be ideal to tailor the law in such a way that partial offers are not resorted to easily. For instance, taking a cue from the Italian example, one option could be to permit partial bids only in the context of a voluntary bid that is made for at least 50% of the voting rights of the target and satisfies certain other conditions that are sufficiently protective of the minority. For a discussion on Italian law that provides for making a voluntary bid for 60% of the shares of the target provided certain conditions (including approval by a majority of minority tendering their shares) are met, *see* Fedderke & Ventoruzzo (n 6) 170-171. Similarly, like the U.K., another option could be to make partial offers subject to the approval by independent shareholders (not including the acquirer and persons acting in concert with the acquirer). See City Code (n 18) Rule 36.5. While these are simply examples of the ways in which partial offers, if permitted, could be made unattractive, any option before being adopted would have to be analyzed more carefully.

116 See M.T. Raju, Neelam Bhardwaj, Kiran Karande & Shikha Taneja, 'Impact of Takeover Regulations on Corporate Sector in India - A Critical Appraisal' (June 2001) SEBI Working

conduct further in-depth studies on specific aspects of the takeover regulations (like partial bids) to make an informed policy choice. Further, while prior suggestions to make bank finance available to fund domestic acquisitions have not been accepted by the RBI (the central bank of India), it may finally be time for the Government and the regulatory authorities to revisit the discussion on relaxing the rules for funding domestic takeovers. Although allowing banks to fund domestic acquisitions by itself may not be sufficient to create a vibrant market for corporate control, it would bring a fundamental change in the funding options available to domestic acquirers and obviate the need for advocating the retention of partial offers.[117]

V. CONCLUSION

One of the key functions of takeover regulation is to facilitate a market for corporate control, which is a crucial corporate governance mechanism. As this article demonstrates, transplanting the MBR (a key regulatory tool in takeover regulation) from the U.K. (a jurisdiction with dispersed shareholdings) to India (a jurisdiction with concentrated ownership) can result in a wholly different outcome. Unlike the U.K. where on account of dispersed ownership, the MBR facilitates a market for corporate control, in a jurisdiction like India where promoters or controlling shareholders tend to hold substantial stakes in public corporations, the same MBR operates as a formidable defence against hostile activity and chills the market for corporate control. Additionally, aggressive lobbying by the Indian industry and the grant of several concessions (in the form of partial bids, creeping acquisitions, and voluntary offers) has further whittled down the rigours of the MBR as a result of which the Indian version of the MBR is not only vastly different from its counterpart in the U.K. but has also led to the reverse outcome of entrenching the incumbents and shielding them from the disciplining effect of the market for corporate control.

However, as this article shows, the MBR is not wholly irrelevant even in a jurisdiction like India. This is because if we analyse India's MBR against the backdrop of the nature of the agency problem economies with concentrated

Paper Series No. 5, 19 <https://www.sebi.gov.in/reports/working-papers/jun-2001/working-paper-series-no-5-impact-of-takeover-regulations-on-corporate-sector-in-india-a-critical-appraisal_21105.html>; See also Raju & Deepthi (n 111).

117 While a detailed discussion on the lack of bank finance to fund domestic acquisitions is outside the purview of this Article, for a brief outline of the issues involved, see Sidhartha, 'Govt wants banks to fund local M&As' (*The Times of India,* 2 June 2014) https://timesofindia.indiatimes.com/business/india-business/Govt-wants-banks-to-fund-local-MAs/articleshow/35920319.cms; TRAC Report (n 27) 19-20; Umakanth Varottil, 'Financing Domestic M&A' (*Indiacorplaw,* 2 June 2014) <https://indiacorplaw.in/2014/06/financing-domestic.html>; Sonali Sharma & Anahita Irani, 'Acquisition Financing in India' (2008) http://www.globalsecuritisation.com/08_GBP/GBP_GSSF08_105_108_India.pdf; Manish Kapur, 'Borrowing to buy still a tough act for India Inc' (*Business Line,* 19 May 2013) <https://www.thehindubusinessline.com/news/education/borrowing-to-buy-still-a-tough-act-for-india-inc/article20615811.ece1.f>

ownership encounter coupled with the fact that general corporate law does not offer significant *ex ante* or *ex post* protection to the minority in the event of a change of control, we see that although the MBR benefits the incumbents, it also ensures (if not fully, then at least partially) that interests of the minority are not entirely overlooked in control shifts which necessarily tend to be negotiated between the controller and the acquirer. That said, the Indian version of the MBR can be significantly improved by learning from the experience of other jurisdictions that have similarly experimented with the concept.