WHITE PAPER ON

CORPORATE GOVERNANCE IN ASIA

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ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Pursuant to Article 1 of the Convention signed in Paris on 14th December 1960, and which came into force on 30th September 1961, the Organisation for Economic Co-operation and Development (OECD) shall promote policies designed:

– to achieve the highest sustainable economic growth and employment and a rising standard of living in member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
– to contribute to sound economic expansion in member as well as non-member countries in the process of economic development; and
– to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

The original member countries of the OECD are Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The following countries became members subsequently through accession at the dates indicated hereafter: Japan (28th April 1964), Finland (28th January 1969), Australia (7th June 1971), New Zealand (29th May 1973), Mexico (18th May 1994), the Czech Republic (21st December 1995), Hungary (7th May 1996), Poland (22nd November 1996), Korea (12th December 1996) and the Slovak Republic (14th December 2000). The Commission of the European Communities takes part in the work of the OECD (Article 13 of the OECD Convention).

OECD CENTRE FOR CO-OPERATION WITH NON-MEMBERS

The OECD Centre for Co-operation with Non-members (CCNM) promotes and co-ordinates OECD's policy dialogue and co-operation with economies outside the OECD area. The OECD currently maintains policy co-operation with approximately 70 non-member economies.

The essence of CCNM co-operative programmes with non-members is to make the rich and varied assets of the OECD available beyond its current membership to interested non-members. For example, the OECD's unique co-operative working methods that have been developed over many years; a stock of best practices across all areas of public policy experiences among members; on-going policy dialogue among senior representatives from capitals, reinforced by reciprocal peer pressure; and the capacity to address interdisciplinary issues. All of this is supported by a rich historical database and strong analytical capacity within the Secretariat. Likewise, member countries benefit from the exchange of experience with experts and officials from non-member economies.

The CCNM's programmes cover the major policy areas of OECD expertise that are of mutual interest to non-members. These include: economic monitoring, statistics, structural adjustment through sectoral policies, trade policy, international investment, financial sector reform, international taxation, environment, agriculture, labour market, education and social policy, as well as innovation and technological policy development.

Foreword

Good corporate governance is now widely recognised as essential for establishing an attractive investment climate characterised by competitive companies and efficient financial markets. Good corporate governance is also critical to economies with extensive family-business ownership because of its role in facilitating management succession and promoting entrepreneurship.

The OECD and the World Bank Group have combined their efforts to promote policy dialogue on corporate governance and have established Regional Corporate Governance Roundtables in close partnership with national policy-makers, regulators and market participants. Today, Corporate Governance Roundtables meet in Asia, Russia, Latin America, South-East Europe and Eurasia.

The Roundtables address both general corporate governance issues, as well as matters of specific concern to their respective regions. Each Roundtable employs the OECD Principles of Corporate Governance as a framework for developing a regional white paper or comparative paper on corporate governance.

The present White Paper on Corporate Governance in Asia has been prepared by the Asian Roundtable on Corporate Governance, with the OECD's Corporate Affairs Division serving as the secretariat, within the framework of the Asia Programme of the OECD Centre for Co-operation with Non-Members. The White Paper represents a collective effort by Asian policy makers, regulators, business leaders and regional and international experts. It draws lessons from the 1997 Asian financial crisis, assesses progress and remaining challenges, and formulates common policy objectives and a practical reform agenda for improving corporate governance in Asia. This agenda will provide guidance to national initiatives, as well as inform the future work of the Roundtable, which will focus on the key step of implementation.

The White Paper is an ambitious undertaking, since Asia constitutes such a diverse region in areas such as legal tradition, regulatory infrastructure, and economic development. To the Asian Roundtable's great credit, it has harnessed this diversity to drive home the essential point that different jurisidictions may adopt different approaches to the same concerns based on their understanding of national conditions. But, while national conditions may determine *how* corporate governance aspirations should be fulfilled, these conditions do not *excuse* jurisdictions from having to fulfill them. That the present White Paper is able to convey the sweep of corporate-governance developments and challenges in Asia, while at the same time distilling common policy recommendations for this vast and varied region, reflects well on both the work of Asian Roundtable participants and on the structure and usefulness of the OECD Principles.

The Asian Roundtable on Corporate Governance and this White Paper have benefited from the contributions of numerous organisations and individuals. I would like to express my sincere gratitude to the World Bank Group, the Asian Development Bank and to all Asian institutions supporting the Roundtable's work, particularly national securities commissions in Asia and the numerous organisations that hosted Roundtable meetings. I would also like to thank all private sector participants, representatives of labour unions and of civil society, professional associations and other interested parties from across Asia. I also thank our partners, the Government of Japan and the Global Corporate Governance Forum, for their financial support for this important work.

Donald J. Johnston
Secretary-General

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EXECUTIVE SUMMARY

The Asian Roundtable and the White Paper on Corporate Governance in Asia

1. Pursuant to a G-7 mandate to the OECD and World Bank, the OECD organised five meetings of the Asian Roundtable on Corporate Governance to discuss improving corporate governance in non-OECD member countries of the Asian region. The Roundtable comprised Asian policy-makers, regulators and business leaders, as well as regional and international experts.

2. This White Paper reflects the discussions and recommendations of those meetings, which took place from 1999-2003 and were sponsored by the World Bank and the Asian Development Bank, in partnership with the Government of Japan and the Global Corporate Governance Forum. The next phase of the Roundtable will focus on implementation and enforcement issues and culminate in two years' time with a stock-taking of developments and progress.

Priorities for Reform

3. <u>Priority 1:</u> Public- and private-sector institutions should continue to raise awareness among companies, directors, shareholders and other interested parties of the value of good corporate governance.

4. Since the 1997 financial crisis, Asian regimes have made considerable progress in raising awareness of the value of good corporate governance, which challenges many Asian business leaders and controlling shareholders to re-think their relationships with their companies and with the minority shareholders who lay claim to partial ownership in them. Achieving this re-orientation in thinking requires not only a strong national commitment to corporate governance, but one that is also broad-based.

5. <u>Priority 2</u>: All jurisdictions should strive for effective implementation and enforcement of corporate-governance laws and regulations.

6. Over the past several years, most Asian jurisdictions have substantially revamped their laws, regulations and other formal corporate-governance norms. Such advances in rules must now be matched by advances in their implementation and enforcement, since the credibility — and utility — of a corporate-governance framework rest on its enforceability. Leadership from the uppermost reaches of government is necessary to promote public confidence in the state's commitment to the rule of law.

7. ***<u>Priority 3</u>: Asian Roundtable Countries should work towards full convergence with international standards and practices for accounting, audit and non-financial disclosure. Where, for the time being, full convergence is not possible, divergences from international standards and***

practices (and the reasons for these divergences) should be disclosed by standards setters; company financial statements should repeat or reference these disclosures where relevant to specific items.

8. Full adoption of international accounting, audit and financial disclosure standards and practices will facilitate transparency, as well as comparability, of information across different jurisdictions. Such features, in turn, strengthen market discipline as a means for improving corporate-governance practices.

9. From country to country, of course, local conditions may require the adoption of a set of standards, such as IAS,[1] individually (rather than all at once) and/or at differing speeds. Until full convergence is achieved, standards setters should disclose where local standards and practices diverge from IAS (and the reasons for these divergences); company financial statements should reference specific disclosures where they apply to specific items and yield materially different results.

10. <u>Priority 4:</u> Boards of directors must improve their participation in strategic planning, monitoring of internal control systems and independent review of transactions involving managers, controlling shareholders and other insiders.

11. Persistant problems with minority shareholder exploitation in Asia have called into question the independence and diligence of the region's boards. Recent scandals in developed markets have raised doubts in the public's mind on a global level with regard to directors' ability and willingness to discharge their fiduciary duties to the company and all of its shareholders.

12. In addressing these challenges, Roundtable recommendations comprise three basic categories. The first focuses on director training, voluntary codes of conduct, expectations for professional behaviour and directors' resources and authority *vis-à-vis* management. A second set of recommendations seeks to reduce or eliminate loopholes by tightening standards for director "independence", by making "shadow" directors liable for their actions, by increasing sanctions for violations of duties of loyalty and care and by advocating delineation of a core set of related-party transactions (such as company loans to directors and officers) that should be prohibited outright. Finally, Roundtable participants recommend adequately empowering shareholders to seek redress for violations of their rights and to ensure director accountability. Mechanisms to discourage excessive or frivolous litigation should not prevent or frustrate collective action by shareholders with meritorious claims.

13. <u>Priority 5</u>: The legal and regulatory framework should ensure that non-controlling shareholders are protected from exploitation by insiders and controlling shareholders.

14. All Asian governments should introduce measures, or enhance existing measures, to provide non-controlling shareholders with adequate protection from exploitation by controlling shareholders. These measures should include, among other things: (i) strengthening disclosure requirements (particularly of self-dealing/related-party transactions and insider trading); (ii) ensuring that regulators have the capacity to monitor companies for compliance with these requirements and to impose

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1 . Following the restructuring of the international accounting standard-setting body in 2001, now called the International Accounting Standard Board (IASB), the new international accounting standards developed and published by IASB are known as International Financial Reporting Standards (IFRS). Nevertheless, IAS (approved and issued under the previous Constitution) continue to be applicable and of equal standing with IFRS unless and until they are amended or withdrawn. Therefore, when the term "IAS" is used in this document, it should be read to include IFRS, which are standards approved and issued by IASB.

substantial sanctions for wrongdoing; (iii) clarifying and strengthening the fiduciary duty of directors to act in the interest of the company and all of its shareholders; (iv) prohibiting indemnification of directors by companies for breaches of fiduciary duty; and (v) providing shareholders who suffer financial losses with private and collective rights of action against controlling shareholders and directors.

15. Priority 6: Governments should intensify their efforts to improve the regulation and corporate governance of banks.

16. Asian banks play a dominant role in regional finance. Shortcomings in the governance of banks not only lower returns to the bank's shareholders, but, if widespread, can destabilise the financial system. To restore confidence to both debt and equity markets, policy-makers and regulators need, in addition to ensuring adequate banking laws and regulations and supervision of banks' operations, to promote sound corporate-governance practices in the banking sector. Ownership and financial relationships should be disclosed. Self-dealing/related-party transactions should be subject to both banking and corporate-governance restrictions. Bank directors should be able to pass "fit and proper" tests for service. These directors should also assume responsibility for bank systems and procedures that ensure sound lending and monitoring practices, as well as the capacity to handle distressed debt. Lastly, local insolvency systems must protect and enforce creditors' rights and provide efficient liquidation of debtors which cannot be expeditiously restructured into commercially viable enterprises.

BACKGROUND

The Asian Roundtable and the White Paper on Corporate Governance in Asia

17. The Asian Roundtable on Corporate Governance ("Roundtable") serves as a regional forum for structured policy dialogue on corporate governance. Established in response to a G-7 mandate to the Organisation for Economic Co-operation and Development (OECD) and the World Bank to encourage the implementation of the OECD Principles of Corporate Governance (the "OECD Principles"), the Roundtable comprises senior policy-makers, regulators, and representatives from stock exchanges, private-sector bodies, multilateral organisations, and non-governmental institutions.

18. Between March 1999 and March 2003, the OECD and the World Bank Group, in partnership with the government of Japan, the Global Corporate Governance Forum and the Asian Development Bank, and in co-operation with regional and local partners, organised five Roundtable meetings to discuss improving corporate governance in the Asian region.[2] Using the OECD Principles as a conceptual framework, the Roundtables examined a range of subjects, from boards of directors to minority-shareholder protection to disclosure and transparency issues. In the May 2000 Roundtable meeting in Hong Kong China, participants decided to develop a region-specific corporate-governance white paper ("White Paper") that would identify common policy objectives and formulate a practical reform agenda to improve corporate governance in Asia.

19. The White Paper is a non-binding, consultative document reflecting the discussions and recommendations of Roundtable meetings. Without assessing or ranking individual Asian countries, the White Paper provides region-specific guidance and suggestions to assist policymakers, regulators (including stock exchanges), and other standards-setting bodies in non-OECD-member countries of the Asian region ("Asian Roundtable Countries").[3] The White Paper also targets companies, investors

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2 . The First Asian Roundtable on *Corporate Governance in Asia: A Comparative Perspective* was hosted by the Korea Development Institute. The Second Roundtable on the *Role of Disclosure in Strengthening Corporate Governance and Accountability* was hosted by the Hong Kong Society of Accountants, the Hong Kong Securities and Futures Commission, and the Stock Exchange of Hong Kong. The Third Roundtable on the *Role of Boards and Stakeholders in Corporate Governance* was hosted by the Monetary Authority of Singapore in collaboration with the Singapore Institute of Directors and the Singapore Exchange. The Fourth Roundtable, on *Shareholder Rights and the Equitable Treatment of Shareholders*, was hosted by the Ministry of Law, Justice & Company Affairs of the Government of India and the Securities and Exchange Board of India in collaboration with the Confederation of Indian Industry. The Fifth Roundtable, which included White Paper drafting sessions and a half-day workshop on enforcement issues, was hosted by the Malaysian Securities Commission in collaboration with the Kuala Lumpur Stock Exchange and the Malaysian Institute for Corporate Governance.

3 . Participants from OECD-member countries Australia, Japan and Korea took part in Roundtable discussions and in the White Paper drafting process. At the request of the Korean delegation to the

and other parties that have a role or interest in promoting good corporate-governance practices. The White Paper focuses primarily on publicly-traded companies although some may also find the document useful for the governance of privately-held firms and state enterprises.

20. While the White Paper represents a home-grown response to the corporate-governance issues faced in Asia, the White Paper utilises the general structure of the OECD Principles. In so doing, the White Paper builds upon the OECD Principles, reflecting the importance of both coherence and convergence in international corporate-governance standards.

21. The substantive chapters of the White Paper match the five key elements of a strong corporate-governance framework described in the OECD Principles: (i) the rights of shareholders; (ii) the equitable treatment of shareholders; (iii) the role of stakeholders in corporate governance; (iv) disclosure and transparency; and (v) the responsibilities of the board.

22. The White Paper was written, debated, and endorsed on a consensus basis by an informal but highly influential group of policy-makers, regulators, stock exchange officials, private-sector participants, investors, and other interested groups.[4] The Roundtable's inclusive approach recognises that the OECD Principles are drafted as aspirations and that different jurisidictions may adopt different approaches to the same concerns based on their understanding of local conditions. Of course, while local conditions may determine *how* corporate-governance aspirations should be fulfilled, these conditions do not *excuse* jurisdictions from fulfilling them.

23. Upon completion, the White Paper will be distributed to key national policy-makers, securities regulators and representatives of stock exchanges, standards-setting bodies and relevant private-sector institutions in the Asian region. The White Paper will also be submitted to multilateral institutions for consideration. Finally, the White Paper will be disseminated to the general public.

24. The Roundtable plans to conduct a stock-taking of developments in Asia two years after issuance of the White Paper. This stock-taking will enable Roundtable participants and the public to assess progress and to identify remaining challenges.

The OECD Principles of Corporate Governance and Regional Roundtables

25. Today, the OECD Principles of Corporate Governance constitute the only internationally accepted body of governance principles that address the entire corporate-governance framework: the legal, institutional, and regulatory structures and practices that create the context within which firms operate. The OECD Principles resulted from broad consultation among OECD-member countries and key non-member countries, including many from Asia. The Financial Stability Forum has identified the OECD Principles as one of 12 core standards for sound financial systems. The OECD Principles have also been endorsed by the International Organisation of Securities Commissions (IOSCO), as well as by private-sector bodies, such as the International Corporate Governance Network. The OECD Principles have served as a reference point in the development of national codes of corporate governance. In Asia, the OECD Principles have been cited extensively in public- and private-sector initiatives to improve corporate governance.

OECD, discussions and drafting sessions have taken into account corporate-governance rules and practices in that OECD-member country.

4 . While all Roundtable members occupy senior positions in their respective institutions, members participated in their personal capacities. Accordingly, the findings and opinions expressed in the White Paper do not necessarily reflect the views of the institutions they serve.

26. The OECD Ministers formally endorsed the OECD Principles in May 1999, after which the OECD entered into an agreement with the World Bank to advocate jointly for better corporate governance worldwide. As part of this collaboration, the OECD has taken the lead in establishing regional roundtables to promote corporate-governance policy dialogue and reform. A total of five regional roundtables – in Asia, Eurasia, Latin America, Russia and Southeast Europe – have been established, each of which has completed or will complete a regional white paper or a comparative paper.

27. In addition to the involvement of the OECD and the World Bank, each of the regional roundtables has benefited from the support of regional partners, whose active participation and support have been crucial. In Asia, the Roundtable has enjoyed the invaluable assistance of local hosts, including securities commissions, stock exchanges and private-sector institutions. Other organisations, including the Asia-Pacific Economic Cooperation forum (APEC), have also expressed their support for the objectives of the Asian Roundtable.

THE ASIAN BUSINESS LANDSCAPE AND PRIORITIES FOR REFORM

The Asian Business Landscape

28. Prominent features of the Asian business landscape include the predominance of family-run firms, the informal nature of stakeholder relations and the legal and economic diversity of the region.[5]

29. In Asia, approximately two-thirds of listed companies, and substantially all private companies, are family-run.[6] Over the last several decades, the collective talents and efforts of these family-business owners have resulted in strong economic growth and substantial increases in living standards.

30. A particular characteristic of the Asian corporate landscape, however, is a tendency for such individuals (and their families) to establish large interlocking networks of subsidiaries and sister companies that include partially-owned, publicly-listed companies. On the one hand, the use of such subsidiaries and sister companies permits investors not only to place their money with the management team of their choice, but to direct this money to the markets and industries in which particular subsidiaries specialise and which investors believe hold the greatest potential for profits. On the other hand, such pyramidal structures can lead to severely inequitable treatment of shareholders. By conducting operations through a complex network of subsidiaries, controlling shareholders acquire control of operations and/or cash flows disproportionate to their equity stake in individual companies. The extent of this disproportionate control is frequently opaque to outsiders and undisclosed by insiders. A particular challenge for corporate-governance reform in Asia is, therefore, to encourage the dynamism and growth of family businesses while channelling their energies and operations into structures that are more transparent and, consequently, more clearly equitable for non-family investors.

31. A second prominent feature of the Asian business landscape is the strength of informal stakeholder relationships. As noted above, the principal investors in even the largest enterprises are often family members or close friends.[7]

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5 . See, Par. 153 for examples of different types of "stakeholder".

6 . See, Stijn Claessens, Simeon Djankov and Larry H.P. Lang, "Who Controls East Asian Corporations?" World Bank Working Paper (1999). The paper uses a 20% ownership threshold for control. The fact that the survey excludes companies the ownership of which cannot be traced because of nominee holdings suggests the actual degree of family control may be substantially higher than two-thirds. Surveyed countries include: Hong Kong China, Indonesia, Korea, Malaysia, Philippines, Singapore, Chinese Taipei and Thailand.

7 . Where the state is a major or controlling shareholder, as is often the case in Asia, stakeholder interests are often given considerable weight although enforcement can also be complicated by the state having, in effect, to police itself.

32. The informal nature of Asian stakeholder/company interaction can produce real and lasting benefits for stakeholders that equal or exceed those offered through more formalistic approaches based on "rights". At the same time, trends towards more globalised markets and greater minority-shareholder activism are leading to evolutionary changes in business relationships, as well as to debate about recasting informal interests as formal rights enjoying formal protection mechanisms.

33. Finally, the Asian business landscape comprises considerable legal and economic diversity. With respect to legal traditions, Hong Kong China, India, Pakistan and Malaysia, for example, have common law frameworks. Thailand and the Philippines have frameworks based on French civil law, while China, Chinese Taipei and South Korea draw upon German civil law traditions. State ownership of enterprises remains strong, particularly in China and India, where aspects of stakeholder relations may draw upon or reflect elements of socialist law. Overlaying these legal traditions in many countries are behavioural norms arising from various cultural and religious traditions.

34. Economically, the sweep of Asian economies includes a few with relatively high per capita income, as well as several that continue to face all the challenges of development. Similarly, there is a broad spectrum of infrastructural development: capital, human and social. But, change and improvement have been rapid, and it is not uncommon to find some countries that only a few years ago suffered from significant infrastrucutral constraints now assembling or producing some of the world's most technically advanced goods.

Priorities for Reform

35. <u>Priority 1:</u> Public- and private-sector institutions should continue to raise awareness among companies, directors, shareholders and other interested parties of the value of good corporate governance.

36. Since the 1997 financial crisis, Asian regimes have made considerable progress in raising awareness of the value of good corporate governance. More work remains. Public-sector institutions (including governments) need to understand the role good corporate governance plays in promoting national competitiveness, economic/financial stability, growth, job creation, poverty alleviation and higher living standards. Private-sector institutions need to understand how good corporate governance facilitates better corporate performance, management succession (particularly intergenerational succession within family-run firms), access to (and lower cost of) capital, diversification of wealth and informed entrepreneurial risk-taking.

37. To a large degree, raising awareness means convincing people that corporate governance is in their self-interest. Many Asian business leaders and controlling shareholders are thus being challenged to re-think their relationships with their companies and with the minority shareholders who lay claim to partial ownership in them. Such re-orientation in thinking requires not only a strong national commitment to corporate governance, but one that is also broad-based.

38. Development and maintenance of a robust corporate-governance framework therefore calls for the commitment of numerous persons and institutions throughout society. Legislatures, regulatory bodies, courts and self-regulating professional organisations must establish, monitor and enforce legal norms actively and even-handedly. Private associations and institutes must develop and promulgate codes of conduct, particularly with respect to corporate directors, that raise expectations for behaviour and generate formal and informal sanctions for failure to meet these expectations. Educational institutions should promote research on, and the teaching of, professional and managerial ethics.

Institutions throughout government and society must educate and train persons ranging from judges to regulators to managers to retail investors. Investment advisors and business media must constantly weigh information provided by companies and probe for additional information of interest to investors.

39. Priority 2: All jurisdictions should strive for effective implementation and enforcement of corporate-governance laws and regulations.

40. Over the past several years, most Asian jurisdictions have substantially revamped their laws, regulations and other formal corporate-governance norms. In many cases, Asian rules now reflect the most developed thinking of established corporate-governance systems. Such advances in rules must now be matched by advances in their implementation and enforcement.

41. The credibility — and utility — of a corporate-governance framework rest on its enforceability. Securities commissions, stock exchanges and self-regulatory organisations with oversight responsibilities should therefore continue to devote their energies to implementation and enforcement of laws and regulations. Court systems should further strengthen their expertise and capacity to adjudicate corporate-governance disputes efficiently and impartially, including through establishment of specialised commercial courts and promotion of alternative dispute resolution. Both agencies and courts should develop procedures that are objective, understandable, open and fair. In addition to enforcing the law, public decision-making should inform the future behaviour of market participants and enforcement agents as well as generate public confidence in the state's commitment to the rule of law. In this regard, it is important to stress the interaction between effective market discipline and self-discipline. The role of policy-makers is not only to enforce current laws but to promote institutions that facilitate market discipline.

42. Implementation and enforcement require increased commitment of human and monetary resources. In this regard, Asian policy-makers also need to balance the sophistication of rules and procedures with their ease and cost of implementation. Finally, and even more basic to progress, is leadership from the uppermost reaches of government that exemplifies and demands integrity, professionalism and even-handedness in public service.

43. ***Priority 3: Asian Roundtable Countries should work towards full convergence with international standards and practices for accounting, audit and non-financial disclosure. Where, for the time being, full convergence is not possible, divergences from international standards and practices (and the reasons for these divergences) should be disclosed by standards setters; company financial statements should repeat or reference these disclosures where relevant to specific items.***

44. The quality of information disclosure depends on the standards and practices under which it is prepared and presented. Full adoption of international accounting, audit and financial disclosure standards and practices will facilitate transparency, as well as comparability, of information across different jurisdictions. Such features, in turn, strengthen market discipline as a means for improving corporate-governance practices.

45. From country to country, of course, local conditions may require adoption of a set of standards, such as IAS, individually (rather than all at once) and/or at differing speeds. However, such local conditions should neither be used to politicise the standards-setting process nor to encourage the adoption of standards that diverge from internationally recognised benchmarks. For these reasons, it is important that standards-setting bodies should be subject to oversight by a body that acts, and is seen to act, in the public interest. (See, e.g. Par. 241.) In addition, standards setters should disclose where local standards and practices diverge from IAS (and the reasons for these divergences); company

financial statements should reference specific disclosures where they apply to specific items and yield materially different results.

46. In recommending full convergence as a goal to be achieved over time, Roundtable participants therefore recognise the practical challenges imposed by local conditions. At the same time, however, Roundtable participants encourage regional standards setters to address analytical and policy concerns connected with standards through active participation in the international standards-setting process. In this respect, the Roundtable believes that regional standards setters should focus on influencing international standards while they are being formulated, rather than justifying deviation from such standards after they have been issued. To this end, Asian countries, individually and as a group, need to ensure their full involvement with international standards-setting bodies, such as IASB, as well as with international organisations that contribute data and policy analysis to the international standards-setting process.

47. In many cases, the move to full compliance with international standards and practices will be far from easy. While some Asian jurisdictions already employ standards and practices that closely reflect recognised international standards and practices, for several Asian countries transitioning to full compliance will require substantial changes to national legal and regulatory norms. Transitioning will also involve significant training, as well as financial and human resource commitments at the company, professional firm, standards-setting and regulatory levels. In such cases, the support and involvement of international technical-assistance bodies may be particularly important to successful convergence.

48. <u>Priority 4:</u> Boards of directors must improve their participation in strategic planning, monitoring of internal control systems and independent review of transactions involving managers, controlling shareholders and other insiders.

49. The board of directors serves as a fulcrum balancing the ownership rights enjoyed by shareholders with the discretion granted to managers to run the business. Persistant problems with minority-shareholder exploitation in Asia, however, have called into question the independence and diligence of the region's boards. Recent scandals in developed markets have raised doubts in the public's mind on a global level with regard to directors' ability and willingness to discharge their fiduciary duties to the company and all of its shareholders.

50. Criticism of boards centres not so much on theory as on practice. In many Asian jurisdictions, the formal norms for director behavior reflect the most advanced rules of developed systems. Yet in Asia, as elsewhere, problems persist.

51. In addressing these challenges, Roundtable recommendations comprise three basic categories. The first focuses on director training, voluntary codes of conduct, expectations for professional behavior and directors' resources and authority *vis-à-vis* management. These recommendations aim to increase the pool of candidates who are willing and able to peform the tasks entrusted to directors and to give them the skills and authority to do their jobs. A second set of recommendations seeks to reduce or eliminate loopholes by tightening standards for director "independence", by making "shadow" directors liable for their actions, by increasing sanctions for violations of duties of loyalty and care and by advocating delineation of a core set of related-party transactions (such as company loans to directors and officers) that should be prohibited outright. Finally, Roundtable participants recommend adequately empowering shareholders to seek redress for violations of their rights and to ensure director accountability. Policy options in this area (taking into account the conceptual and practical concerns discussed in the annotations) include: incorporating

shareholder derivative or class-action suits into national jurisprudence, permitting shareholders directly to nominate candidates for the board and cumulative voting for directors for listed companies.

52. Priority 5: The legal and regulatory framework should ensure that non-controlling shareholders are protected from exploitation by insiders and controlling shareholders.

53. The corporate landscape in most Asian countries is characterised by concentrated ownership. In many Asian jurisdictions, there have been instances where controlling shareholders of family-dominated, publicly-listed companies and other enterprises with concentrated ownership have abused their control to exploit other shareholders. Regionally, exploitation of non-controlling shareholders has been identified as the most serious corporate-governance challenge.

54. All Asian governments should introduce measures, or enhance existing measures, to provide non-controlling shareholders with adequate protection from exploitation by controlling shareholders. These measures should include, among other things: (i) strengthening disclosure requirements (particularly of self-dealing/related-party transactions and insider trading); (ii) ensuring that regulators have the capacity to monitor companies for compliance with these requirements and to impose substantial sanctions for wrongdoing; (iii) clarifying and strengthening the fiduciary duty of directors to act in the interest of the company and all of its shareholders; (iv) prohibiting indemnification of directors by companies for breaches of fiduciary duty;[8] and (v) providing shareholders who suffer financial losses with private and collective rights of action against controlling shareholders and directors.

55. With respect to self-dealing/related-party transactions, insiders (and other interested persons, including "controlling" and "significant" shareholders) and the company should at least be required to disclose these transactions and to seek the approval of a majority of disinterested directors or approval or ratification by an appropriate majority of disinterested shareholders.[9] Furthermore, in some cases, it may be appropriate for companies to be prohibited from engaging in certain kinds of related-party transactions altogether.[10]

56. Priority 6: Governments should intensify their efforts to improve the regulation and corporate governance of banks.

57. Asian banks play a dominant role in regional finance. Shortcomings in the governance of banks not only lower returns to banks' shareholders, but, if widespread, can destabilise the financial system.

58. The 1997 crisis brought to light major challenges in the governance of banks. In many cases, the controlling shareholders of industrial groups "captured" banks and used them to provide

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8 . For example, a director should not be entitled to indemnification if the director cannot show that he or she acted in good faith and in a manner he or she reasonably believed to be in, or not opposed to, the best interests of the corporation.

9 . Typically, approval or ratification is only required for a transaction (or series of related or connected transactions) of a material size.

10 . Some Roundtable participants have expressed reservations over categorically prohibiting the company from executing transactions notwithstanding the approval of disinterested directors and/or disinterested shareholders. Such prohibitions, however, enjoy limited but growing application in OECD member countries as well as support in academic literature. For a fuller discussion of this issue, see, footnote 15, *infra*, and Pars. 109, 117-134.

capital and guarantees to group members on less than arm's-length terms. In other cases, bank managers relaxed lending practices and standards because of personal ties with the borrowers' owners and managers. In still other cases, governmental officials pursuing industrial policy, or their own interests, pressured banks to enter into harmful transactions or to forebear from asserting their creditors' rights.

59. To restore confidence to both debt and equity markets, policy-makers and regulators need, in addition to ensuring adequate banking laws and regulations and supervision of banks' operations, to promote sound corporate-governance practices in the banking sector. Ownership and financial relationships should be disclosed. Self-dealing/related-party transactions should be subject to both banking and corporate-governance restrictions. Bank directors should be able to pass "fit and proper" tests for service. These directors should also assume responsibility for bank systems and procedures that ensure sound lending and monitoring practices, as well as the capacity to handle distressed debt. Lastly, local insolvency systems must protect and enforce creditors' rights and provide efficient liquidation of debtors which cannot be expeditiously restructured into commercially viable enterprises.

REVIEW OF DEVELOPMENTS IN CORPORATE GOVERNANCE AND KEY ISSUES

I./II. Shareholders' rights and the equitable treatment of shareholders

Introduction

60. By separating ownership and management, the corporate form permits capital to be collected from numerous geographically dispersed shareholders and used to launch and sustain large enterprises.

61. The rights of these shareholders comprise two main categories. The first category makes up the bundle of rights that constitute "ownership". Generally speaking, this bundle includes: (i) the right to information on basic company performance; (ii) the right to *pro rata* distribution of dividends; (iii) the right to *pro rata* distribution of company property upon liquidation; (iv) the right to participate in decision-making by the shareholder meeting *pro rata* with shareholders of the same class; and (v) the right to alienate shares, with automatic transfer of all attendant ((i)-(iv)) rights.

62. The second category of shareholders' rights delineates the separation between ownership and management. While no longer having the responsibility, or the right, to oversee day-to-day operations of the company, shareholders must have some means of reconciling their differing interests, goals and investment horizons into basic strategic decisions. Here, shareholders' rights treat with the essentials of shareholder participation in decision-making (procedures for shareholder meetings, election of directors, approval of fundamental corporate changes, etc.) and limit mechanisms (and their consequences) that hinder or undermine shareholder decision-making, such as undisclosed control arrangements, non-transparent corporate-control transactions and management entrenchment.

63. Differences among shareholders' interests, goals and investment horizons represent an inevitable feature of investing. Differences of another sort, however, can arise where a single family or group enjoys effective control of an enterprise or where the state owns a significant stake in the company. In such cases, which occur frequently in Asia and other emerging regions, shareholders ask themselves not what basic strategic decisions will best guide the company, but whether company returns and/or cash flows are being: (i) diverted by managers or by controlling insiders for their own benefit; or (ii) sacrificed by the state shareholder for its own social or political objectives. Inherent in these diversions and sacrifices is the inequitable treatment of shareholders through insider trading, abusive self-dealing or waste.

64. The principles dealing with the equitable treatment of shareholders differ qualitatively from those that define and delineate shareholders' rights. With a few exceptions, shareholders' rights can be defined in clear-cut language that does not require interpretation of a standard or weighing of various facts and circumstances. Principles governing equitable treatment, on the other hand, often employ terms such as "equitable", "effective", "material" or "independent", which are more difficult to articulate.

65. By their nature, the standards underpinning the equitable treatment of shareholders also require greater resources to investigate and wider discretion to enforce than the bright-line rules by which shareholders' rights are implemented. In Asia, difficulties for regulators and courts can be magnified by the use of complex, interlocking ownership structures that often cut across national boundaries, as well as by the prevalence of informal agreements and relationships that leave no paper trail for investigators or litigants to follow.

66. Policy-makers should bear in mind that the credibility of a corporate-governance framework rests on its enforceability. To build this credibility, two distinct but parallel courses should be pursued. The first is to help regulators and courts develop the doctrinal and investigative tools and resources to articulate and enforce standards. The second course is to determine in what situations categorical rules (i.e. norms that apply uniformly, without permitting many excuses or exceptions based on "relevant facts and circumstances" yet are fairly precise and objective) more effectively protect shareholders' rights and better promote equitable treatment.[11]

Overview of Legal Frameworks

67. The difference between the norms governing shareholders' rights and those governing equitable treatment explains much of the progress, and much of the remaining challenge, experienced by Asian corporate-governance frameworks. Over the last several years, Asian legal regimes have made marked progress in revising and refining the formal legal rules that govern shareholders' rights. At the same time, developments in the equitable treatment of shareholders present a more varied picture. So, for example, while some regimes have elaborate norms regulating insider trading and self-dealing/related-party transactions, others have only rudimentary ones. Some regimes have liberalised shareholder redress mechanisms, particularly derivative or class-action lawsuits, while others continue to prohibit or impede them. Some regimes have doctrines and mechanisms for re-characterising fictive or sham transactions or relationships, while others hesitate to empower either regulators or courts to challenge transactions or relationships that nominally satisfy the requirements of law.

11 . For example, in some corporate-governance frameworks, if a related-party transaction is not approved by a majority of disinterested directors, the burden is on the related party to prove that the transaction was fair to the company. Approval (or ratification) by a majority of independent directors shifts the burden of proof to the party claiming that the transaction was unfair. A categorical rule might simply prohibit certain kinds of related-party transactions (such as loans to officers and directors) on the assumption that across substantially all companies, the risks of abusive self-dealing or costly litigation outweigh the potential benefits from the proscribed activity. This rule is less sophisticated (since it does not involve disinterested-director votes and shifting burdens of proof) but is easier to enforce. In considering the potential benefits of categorical rules, Roundtable participants have limited their analysis to listed companies. Both participants and commentators have noted that privately-held companies present a decidedly different situation. <u>See,</u> e.g. Robert C. Clark, <u>Corporate Law</u>, Little, Brown and Company (Boston: 1986), pp. 29.

A. Basic Ownership Rights

68. *Registration of Ownership*. Registrars of shares range from state bodies to centralised, state-owned companies to licensed, privately-owned companies, to any private entity, to the companies themselves. In some cases, large, listed enterprises are required to engage an independent registrar of shares, governmental or otherwise. There appears to be a trend in Asia away from bearer shares, at least for listed companies.

69. Several countries have implemented electronic transfers executed by way of book entries. However, several countries have not and do not provide mandatory maximum periods in which registrars must effect transfer of shares. Delays in transfer can have a substantial effect on rights to participate in shareholder meetings and in the distribution of dividends.

70. *Transfer of Shares*. There are few restrictions on the transfer of shares in listed or "open" joint-stock companies, a form of legal entity which contemplates more than a few dozen shareholders. Exceptions to free transferability typically involve prohibitions on foreign ownership (whether absolute or above a certain percentage) of strategically important companies, such as in China and India. But, even in these jurisdictions, restrictions are loosening.

71. *Reporting Requirements*. Asian regimes generally require listed companies to provide their shareholders with audited annual reports and, in some cases, with semi-annual or quarterly statements, which, depending on the requirements of the jurisdiction concerned, may be audited or unaudited. Such periodic reports must contain basic information on the company's legal address, the identities of directors and senior officers and basic operating and performance data. (See, Chapter IV "Disclosure and Transparency" for a fuller discussion of reporting requirements.)

72. *Voting Rights*. Asian regimes generally provide that each common share carries with it one vote. Super voting common or founders' shares with special voting rights are permitted in Vietnam and Bangladesh. Asian company laws also provide for the issuance of preferred (or privileged) shares, with or without voting rights. Finally, in some privatised enterprises, the state retains a "golden share" giving veto (and thus super voting) power over certain corporate actions and transactions.

73. The transfer of shares near the time of a shareholder meeting also affects voting rights. Typically, there is a time lag between the cut-off date for fixing the shareholders list for participating in shareholder meetings and the actual date of the meeting. Where would-be purchasers are aware of this cut-off date, they acquire shares in full knowledge of their inability to vote them at the upcoming meeting.

74. *Election of Directors*. Across Asia, shareholders have the right to elect directors. Two considerations, one legal and one practical, temper this right. First, in some jurisdictions, candidates for director must be nominated by the Board of Directors, which means that minority shareholders have no direct say in filling the slate of candidates from which directors are chosen. Second, the prevalence of controlling shareholders and the absence of mandatory cumulative voting mean that the controlling shareholder(s) effectively select(s) all of the directors, including those considered non-executive or "independent".

75. *Sharing in the Profits of the Company*. Common shares of the same class carry a right to *pro rata* portion of dividends. As a legal matter, Asian countries differ as to whether dividends may only be paid out of net profits of the company.

B. Participation in Decision-making

76. *Fundamental Corporate Changes*. On the whole, Asian legal regimes require shareholder approval of the following: (i) amending the company's founding documents (e.g. statutes, articles of incorporation, etc.); (ii) changing the terms, conditions or relative rights of the company's shares; (iii) electing directors; and (iv) major transactions, such as merger, sale of substantially all of the company's assets outside of the ordinary course of business, or an acquisition of assets outside of the ordinary course of business that represents a significant increase in the company's overall assets. Some jurisdictions also require shareholder approval of dividends.

77. Typically, the majority required for approval of fundamental changes ranges from two-thirds (in Vietnam and Chinese Taipei) to three-fourths (in Bangladesh, Malaysia, Pakistan and Singapore).

78. *Participation in Shareholder Meetings*. There is considerable range in the minimum prior notice required for shareholder meetings. Such notice varies from seven days in Vietnam to 30 days in China and Chinese Taipei. In addition, certain jurisdictions, such as India, Korea, Philippines and Thailand, prohibit voting in absentia, while Singapore limits the number of proxy cards provided to nominees to two per nominee. Some jurisdictions also prohibit split or partial voting by nominees, thereby making it impossible for nominees to cast votes in accordance with the instructions of their principals.

79. It is not uncommon for jurisdictions to permit only shareholders of the company to serve as proxies for other shareholders. Moreover, some jurisdictions permit the chairman of the meeting, who is usually closely aligned with management or insider shareholders, to determine the outcome of a vote by asking for a show of hands. Laws and listing requirements also frequently fail to require companies to provide verifiable confirmation that votes were properly tabulated and recorded.

C. Limits on Disproportionate Control Mechanisms

80. *Disclosure of "disproportionate" control structures*. A number of Asian corporate-governance frameworks require disclosure by shareholders whose ownership exceeds certain thresholds, typically five percent. Less widespread, however, is the application of attribution rules to take into ultimate or beneficial ownership or to require disclosure of voting agreements that have the effect of raising voting control above the disclosure threshold provided for by law, regulation or listing requirement.

81. *Market for Corporate Control*. As described above, legal regimes in the region typically provide rules for the approval of extraordinary transactions. Real problems exist, however, in disclosing the terms of the transactions and insider-shareholders' interest in them. In some cases, insider shareholders (and those allied to them) are not disqualified from voting to approve transactions where they have an interest on both sides.

82. *Prohibition on Management Entrenchment*. Because shareholder groups frequently control management, Asian companies rarely employ management entrenchment devices such as shareholders' rights plans (poison pills).

D. Equitable Treatment Issues

83. *Insider Trading*. Asian legal systems have generally instituted laws and rules to prohibit insider trading. Sanctions, though, are often insufficient to deter wrongdoing. While jurisdictions generally appear to track trading electronically, enforcement in this area remains problematic due to capacity constraints and difficulties in identifying and proving wrongdoing.

84. *Limits on Redress Mechanisms*. On the whole, Asian legal regimes favour regulatory over judicial redress. Until recently, Asian jurisdictions have generally lacked the legal infrastructure to permit class-action or (apart from common law jurisdictions) derivative suits. In addition, where infrastructure for class-action or derivative-action suits does exist, instigation of these suits can be hampered by high minimum share requirements, high court filing fees and other mechanisms that hinder litigation irrespective of the merits of the underlying claim. However, there appears to be an accelerating trend favouring greater availability and use of class-action or derivative-action suits. For example, Chinese Taipei recently enacted norms permitting shareholder class-action lawsuits and Korea has liberalised its derivative-action rules and has seen a concomitant increase in litigation. A court in China recently permitted that country's first common action by shareholder plaintiffs. The Malaysian Securities Commission is undertaking steps to implement recommendations by the High Level Finance Committee on Corporate Governance of the Malaysian Ministry of Finance to make derivative actions more "user friendly" in terms of process and cost. The Malaysia Securities Commission is also undertaking a study of class-action suits for the purposes of possible inclusion among the tools available to shareholders to enforce their rights.

Recommendations

85. Legislators and securities and exchange regulators should promote effective shareholder participation in shareholder meetings. In particular, rules on proxy and in absentia voting should be liberalised, and the integrity of the voting process should be strengthened.

86. There are a number of practices across Asia that prevent or impede effective shareholder participation in shareholder meetings. These practices include: (i) numerous companies scheduling shareholder meetings on the same day; (ii) meetings being held in inadequate or inconveniently located facilities; (iii) untimely or ineffective notice of meetings;[12] (iv) inadequate information concerning agenda items;[13] (v) fixing a record date that precedes the date the meeting is announced;[14]

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12 . Notice and proxy materials should be sent out sufficiently far in advance that recipients have time to digest the information, to send documents to proxy holders and to solicit proxies from other shareholders.

13 . Information should include full details of the proposed meeting, text of agenda items and proposed resolutions, and a discussion of the pros and cons of items and resolutions sufficient for shareholders to make an informed decision.

14 . Ideally, the meeting date and the record date should be announced at the same time, and the record date should be sufficiently in advance of the meeting to permit information to be sent to shareholders regarding the meeting and proxies and voting instructions to be obtained from beneficial owners. Setting a record date in advance of a meeting is a desirable practice that should be encouraged as long as the record date is not too early (e.g. before the announcement date of the meeting) or too late. (See, footnote 12, *supra*.) Under Delaware law, for example, the record date may be set no less than 10 days and no more than 60 days before the meeting. Realistically, however, 30-45 days advance is usually necessary to obtain voting instructions from beneficial owners of a public corporation.

(vi) unreasonable restrictions on persons who may serve as proxies; (vii) prohibitions on voting in absentia; (viii) unreasonable restrictions on the ability of shareholders to place issues or initiatives on the agenda and to ask questions of the board; (ix) vote by voice or show of hands; (x) failure to record the conducting and outcome of meetings in ways that are verifiable.

87. Where the above practices can be corrected through simple changes in laws, regulations or listing requirements, Asian policy-makers and regulators should effect these changes without delay. In addition, company officers and directors should be directly responsible to shareholders for full and faithful compliance with the rules governing meetings. Regulators (whether governmental or stock exchange) should be authorised (but not obliged) to oversee company compliance, including attending shareholder meetings as observers (at company expense, if appropriate), with the power to sanction conduct that either violates the letter of norms or abuses their spirit. Finally, shareholders should be permitted to record shareholder meetings with handheld electronic devices.

88. Liberalising proxy voting and voting in absentia should receive priority attention. The provision of formal instructions by shareholders on the use of proxies should be facilitated. Listed companies should be encouraged, at their expense, to hire independent and reputable professionals to collect proxies and organise proxy procedures in a predictable manner. Moreover, shareholder protection groups should be allowed to assist minority shareholders in consolidating their votes at general shareholder meetings, including by way of proxy. Custodians and nominees should be able to split or apportion their votes to carry out the instructions of the beneficial owners for whom they act.

89. Regulators and shareholder protection groups should together develop a set of rules and practices to ensure integrity and transparency in the proxy process. Such rules should assign clear responsibilities for reaching beneficial owners in the dissemination of information and in facilitating their participation in the corporate decision-making process.

90. With respect to American Depository Receipts (ADR) and Global Depository Receipts (GDR), voting rights should be used in the best interest of holders instead of being automatically transferred to management. Regional regulators should, to the extent it is within their jurisdiction, see that depositories and custodians notify beneficial owners and exercise voting rights in accordance with these owners' instructions. Listed companies should cooperate with custodians and depositaries to facilitate timely receipt of voting instructions from beneficial owners of their shares, including holders of depositary receipts. Subject to reimbursement, regional custodians or depositaries should be required to contract with reputable agents in relevant countries to distribute information and to collect proxies or ballots.

91. The OECD Principles provide that "institutional investors and nominee shareholders should consider the costs and benefits of exercising their voting rights." Roundtable participants have emphasised that in applying this provision, institutional investors' and nominee shareholders' fiduciary obligations should militate in favour of exercise of voting and other rights. Participants noted that assertion of rights by institutional investors and nominees encourages other shareholders to assert their own rights and fosters a culture of shareholder activism that benefits equity markets generally. The Roundtable has therefore concluded that regulators, shareholder associations, institutes of directors and other public- and private-sector bodies should encourage all shareholders to exercise their rights *vis-à-vis* shareholder meetings.

92. Lastly, Roundtable participants identified practices such as fixing the record date before the announcement of the shareholder meeting, and inadequate notice of meetings as practices that can vitiate shareholders' rights.

93. The state should exercise its rights as a shareholder actively and in the best interests of the company.

94. Over the last 15 years, corporatisation and privatisation of state-owned assets have occurred on a mass scale throughout various regions of the world. Assets transferred from the public to the private sector in former socialist countries account for a predominant portion of their gross domestic product. In OECD-member countries, significant privatisation of state-owned assets has also taken place. Though not constituting nearly as large a percentage of the overall economy as in the former socialist bloc, privatised assets and concerns in OECD countries represent tens of billions of dollars worth of market capitalisation.

95. OECD-member countries have amassed considerable experience, not only in privatising assets, but in acting as a shareholder in partially privatised firms. Based on this experience, certain key elements for success stand out: (i) choosing as shareholder representatives, electing as directors and appointing as officers only persons having sufficient authority, knowledge and experience to make informed commercial decisions; (ii) insulating these representatives, directors and officers from political pressures; and (iii) establishing evaluation criteria for these persons in ways that motivate them to assess and take appropriate business risks.

96. While Asia has also experienced several waves of privatisation (or disinvestment), a significant percentage of Asian economies remain under state control. The degree to which specific assets and concerns should be privatised is of course a matter for each country to decide. But, to the extent that private persons have been permitted to invest in concerns and companies, the national corporate-governance framework should protect these persons' rights and equitable treatment.

97. Typical concerns with respect to partially-privatised companies arise when the state chooses, elects or appoints as directors and officers civil servants (or other persons) who lack the authority, background or interest to perform their roles. For example, decisions on how to exercise shareholders' voting rights are often left to civil servants having no clear mandate, business training or incentive to evaluate and take business risks. These civil servants, wishing to avoid mistakes for which they may be held accountable, decline to vote the state's shares, thereby permitting management or other groups to entrench themselves. In other cases, state-shareholder representatives delay or vote against major transactions in order to avoid drawing attention to themselves. Finally, cases of the state's failure to exercise its shareholders' rights properly include electing or appointing unqualified senior civil servants to board or executive positions either as perks or as a form of early retirement.

98. Civil servants or persons closely aligned with the government can be pressured to use their positions to pursue political or social objectives of the government at the expense of the company. Such civil servants may also cause the company to enter into transactions for the private benefit of themselves or persons connected with them. These behaviours constitute abusive self-dealing, and rules regarding definition, disclosure and approval of "related-party transactions" should take into account the particular challenges presented by state ownership in listed companies.

99. A final issue connected with state ownership is the lack of resources and capacity to monitor and regulate companies at arm's length. The "golden share" the state retains in many privatised companies can serve as a necessary surrogate for arm's-length regulation. To what extent the golden share represents a moral hazard that retards both the development of professional management and of appropriate arm's-length regulatory capacity is an open question that each Asian country must consider. At a minimum, the golden share should be treated as a transitional device. In each case, the state shareholder should commit itself to a specific period after which the golden share will expire or be sold without its "golden" rights.

100. Governments should intensify their efforts to improve financial-institution regulation, supervision and corporate governance.

101. The regulation and governance of financial institutions play a three-fold role in corporate governance. The continuing need for equity capital often drives good corporate governance, since a company's track record with equity investors greatly determines its ability to raise funds through secondary issuances. Where this need for equity is reduced by soft lending practices, companies have less need to return to the equity market for additional capital and therefore less reason to care about how the equity market views their governance. Second, effective monitoring by lenders can help prevent or catch borrower problems or abuses that might otherwise go undetected by the debtor's shareholders. Finally, good financial-institution governance promotes returns to the institution's own investors, which, in turn, promotes financial-system stability.

102. To varying degrees across Asian jurisdictions, the governance of financial institutions (particularly banks) may have fallen short in one or more of the above categories: loan appraisal, loan monitoring and returns to shareholders. In some countries, there have been instances where the majority of private banks have been controlled by the same families that enjoyed controlling interests in companies to which these banks extended substantial credit. Common ownership has led to abusive self-dealing and slack lending practices. Even in cases that did not technically involve self dealing, lending decisions in some jurisidictions have at times been based on the personal relationships between lender and borrower management, rather than on the debtor-company's ability to meet its obligations. Needless to say, such conditions also led to poor monitoring of debtor companies and failure to insist upon proper financial reporting.

103. Nor were such failures always the result of private self-dealing or personal favouritism. In Asian countries where the government intervened extensively in lending decisions, there have been cases where lenders displayed insufficient interest in obtaining good disclosure from debtor companies. Governmental industrial policies may also have exacerbated this situation in several Asian countries, where banks enjoyed implicit understandings with governments that the latter would act as a *de facto* guarantor for loans extended to companies in targeted industries or sectors.

104. While an important place obviously exists in business for interpersonal trust and goodwill, these elements should buttress, not replace, sound appraisal and monitoring. Financial-institution managers and directors must institute systems that ensure sound risk assessment, lending practices and an effective credit culture. Managers and directors must also clearly establish the financial institution's appetite for risk and put in place systems that compare the actual risk of lending practices with regulatory requirements and the institution's strategic plan. In addition, managers and directors must ensure disclosure and transparency in financial reporting (including cross-border operations) as a goad to prompt corrective action, rather than conceal poor performance in the hope that things will get better.

105. Proper governance of financial institutions also requires external governance pursuant to banking regulations and implementation and enforcement of creditors' rights. These requirements are discussed in greater detail in Chapter III below.

106. Asian jurisdictions should develop or enhance rules that prohibit officers, directors, controlling shareholders and other insiders from taking business opportunities that might otherwise be available to the company. At a minimum, prior to taking such an opportunity, such persons should disclose to, and receive approval from, the company's board or shareholder meeting.

107. In the course of their work, managers gather and evaluate various pieces of information used to make business decisions. Where there is a controlling or significant shareholder, this shareholder may also have access to such information and influence (officially or unofficially) the decision-making process.

108. Developed corporate-governance frameworks have established doctrines that prohibit company directors and officers, as well as other insiders, from taking business opportunities that might otherwise benefit the corporation (and all of its shareholders). The breadth of this doctrine varies across jurisidictions. In some cases, fiduciaries and insiders may not take for themselves opportunities where the company has an interest or expectancy.[15] In other cases, fiduciaries and insiders are more broadly prohibited from taking opportunities that fall within the company's line of business or that are "unfair" to the company.

109. The corporate-opportunities doctrine exists to prevent managers and insiders from using for their own benefit information, insights or contacts developed through their relationship with the company. Broader formulations of the doctrine also discourage these persons from competing with the company or putting themselves in postions where their loyalty might be questioned or tested. In some jurisdictions, the prohibition on the taking of opportunities may be waived by the company in much the same manner as related-party transactions are approved. Other jurisdictions, it should be noted, apply strict categorical proscriptions.

110. As discussed previously, a particular feature of the Asian corporate landscape is a relatively high concentration of family-run firms. Quite frequently, ownership control is effected through extensive, interlocking networks of subsidiaries and sister companies that include partially-owned, publicly-listed firms.

111. On the one hand, the use of such subsidiaries and sister companies permits investors not only to place their money with the management team of their choice, but to direct this money to the markets and industries in which particular subsidiaries specialise and which investors believe hold the greatest potential for profits. On the other hand, by spreading operations across companies that have different pools of minority shareholders, controlling insiders invariably create tensions and conflicts when deciding how to allocate capital and business opportunities among these companies. The risks such arrangements create for abusive self-dealing are discussed below. But, at a minimum, Asian jurisdictions should develop or enhance doctrines prohibiting the taking of corporate opportunities so that minority shareholders can enjoy greater protection from inequitable treatment caused by controlling insiders shifting business opportunities to those companies in which they enjoy greater cash-flow rights.

112. Asian legal frameworks should employ measures – particularly ownership attribution rules – to improve identification of beneficial owners. Improved identification will also require better international co-operation among regulators.

113. Rules governing the market for corporate control, insider trading and related-party transactions cannot work without timely and accurate disclosure of beneficial owners. Abuses in such

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15 . The "interest" component of this approach usually refers to projects over which the company has an existing contractual right. The "expectancy" component includes projects that, while not already secured through an express contract, are likely, given current rights, to mature into contractual rights at some future date. See, Prof. Eric Talley, "Complexity in Corporate Governance: The Case of Corporate Opportunities," presented at the Fourth Asian Roundtable on Corporate Governance, Mumbai, India, 11-12 November 2002, available at: www.oecd.org/daf/corporate-affairs/.

areas quite frequently involve the use of offshore corporate vehicles or holding structures controlled by management or insiders.

114. In order to be effective, legal requirements for ownership disclosure should explicitly address the case of parties acting in concert or controlled *de facto* or *de jure* by other interested parties. To this end, courts and regulators should have sufficient investigatory and doctrinal powers to construe ownership via attribution rules and to "look through" fictitious, sham or shadow arrangements to identify beneficial owners.[16] Disclosure requirements should be backed by substantial sanctions.

115. The duty to disclose one's beneficial ownership should also hold for ownership through nominee accounts. Financial institutions entrusted with these nominee accounts, as well as registrars, should have reporting obligations *vis-à-vis* issuing companies.[17] To the extent not already prohibited, the use of bearer shares, common in Asia, should be phased out for listed companies.

116. Tracing of beneficial ownership also requires regional and international co-operation since offshore companies and foreign agents are often used to mask the identity of the principals for whom they act. Norms and practices developed in the tax, anti-money laundering and anti-terrorism fields can serve as useful points of reference for international co-operation in the company law sphere.[18]

117. Asian policy-makers should consider prohibiting listed companies from engaging in certain types of related-party transactions, such as personal loans to directors, officers, controlling shareholders and other insiders.

118. Individual (or at least aggregate) director- and senior-executive-compensation arrangements should be fully and accurately disclosed. Accounting for executive compensation should reflect the economic impact of the compensation on the income statement and balance sheet, as well as the fact such compensation is incurred for the performance of services.

119. Abusive self-dealing represents the most pervasive problem of corporate governance. "Basic" abusive self-dealing involves insiders buying from or selling to the company at prices that are unfair to the company in relation to an arm's-length standard. Abusive self-dealing also includes insiders paying themselves excessive compensation or taking or using property that belongs to the company or its shareholders. Finally, abusive self-dealing comprises insiders taking corporate actions with mixed motives, such as where managers cause the company to pay a premium for the shares of a would-be acquirer in order to forestall the loss of their managerial compensation and perks.

120. As in other regions, Asian legal regimes uniformly prohibit abusive self-dealing. But, two challenges persist. The first is effective disclosure that an insider is a party to the transaction. The

16 . A "sham" arrangement is one in which the form of the arrangement is intended to disguise its real purpose or which is at variance with its real economic substance or business purpose. In common law countries, this is an equitable doctrine applied by courts, although statutes can also provide rules for attributing ownership. Civil law equivalents to such statutes include Sections 21-22 of the German *Gesetz über den Wertpapierhandel*, and Arts. 233-9 of the French *Code du Commerce*.

17 . At least one Asian jurisdiction permits company management to disenfranchise shares with undisclosed beneficial ownership.

18 . See, Options for Obtaining Beneficial Ownership and Control Information: A Template, OECD Publications (Paris 2002), and Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes, OECD Publications, (Paris: 2001).

second is ensuring that self-dealing/related-party transactions take place only when they are fair to the company.

121. The fact that insiders fail to disclose their involvement is in some sense a sign of progress: self-dealing transactions typically go underground when they cannot take place openly. As discussed in Pars. 112-116 above, what is required in these cases are greater investigative resources and tools to expose and punish wrongdoing.

122. With regard to self-dealing/related-party transactions involving the properly disclosed participation of an insider, it is important to remember that not all self-dealing/related-party transactions are abusive, and that some – e.g. executive-compensation arrangements – are unavoidable.

123. A transaction between the company and its insider(s) is only considered abusive when the price is unfair to the company by reference to the price the company would have received from an unrelated party dealing at arm's length. This arm's-length standard, however, can be exceedingly difficult to apply. Often, the pricing of transactions (including compensation arrangements) is complex and requires the exercise of business judgment, which regulators and courts are reluctant to second-guess. As a consequence, corporate-governance frameworks typically first seek to apply procedural safeguards. So, for example, a self-dealing/related-party transaction will become very difficult to invalidate if: (i) it has been disclosed to the board and approved by a majority of non-executive directors who are not parties to the transaction and who are presumed, *prima facia*, to exercise independent judgement;[19] or (ii) disclosed to and ratified by the general meeting of shareholders.[20]

124. While the theory of independent, non-executive approval may hold some appeal, real-life experience in Asia reveals shortcomings not unlike those in other regions. High ownership concentration among Asian listed companies means that controlling shareholders usually select the entire board of directors. In these and similar cases, non-executive directors can fail to demonstrate in practice the independent judgment required to make their consent an effective safeguard against abuse. In other cases, non-executive directors assume their duties with an independent mindset but cease to maintain it over time as their sympathies, or their interests, become too closely aligned with insiders. Finally, passive or unknowledgeable non-executive directors can fail to scrutinise transactions closely enough to apply informed, independent judgment, even if their level of activity may be sufficient to shield them from liability for negligence.

125. Common responses outside of Asia to the failure of non-executive directors to perform as desired include requiring that non-executive directors constitute a majority of the board, splitting the

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19 . In some jurisdictions courts or regulators may reserve the right to challenge transactions on the grounds of unfairness even if such transactions have been disclosed to and approved by disinterested directors. In practice, however, authorities are unlikely to attack such transactions absent evidence of corruption in the process, such as incomplete disclosure, demonstrable bias on the part of disinterested directors, or failure by disinterested directors to engage in even the rudimentary aspects of deliberation.

20 . In light of these difficulties, one respected commentator has suggested that because of the inherent unfairness risks attending transactions between commonly controlled (but not wholly-owned) affiliates, a transaction should not be approved unless it is *clearly advantageous* (i.e. better than what could be expected from an arm's-length bargain) to the subsidiary company. In Asia, the subsidiary company would be the party to the transaction in which the controlling shareholders have the *lesser* interest. See, Clark, *op. cit*. 11, pp. 180-89.

position of chairman and CEO, more training of non-executive directors and more exacting definitions of "independence".[21] In addition, many voices call for a return to, or development of, a "corporate-governance culture" that takes the charge laid upon non-executive directors more seriously.

126. The concept and use of non-executive/independent directors is relatively new in some Asian jurisdictions, and there is a range of opinion among Roundtable discussants whether the responses described above will improve matters. Increasing the number of non-executive directors is intended to stimulate more independent behaviour by the board, but might instead reduce the individual accountability felt by any one non-executive director. Similarly, making non-executive directors a majority of the board, like splitting the Chairman/CEO role, might improve independence, but might also seriously erode the board's knowledge of the business of the company, as well as the authority and accountability of executive management. Stepping back, the basic question before the Roundtable has been whether a "more is better" approach to non-executive directors necessarily attacks the root causes of bias and inaction. To use an analogy, if medicine has not been effective, will doubling the dosage make it so?

127. The need for greater training of, and higher expectations for, directors, on the other hand, does find uniform support among Roundtable participants. Training, education and code-of-conduct efforts (described in Chapter V) are viewed as more clearly striking at some of the root causes of bias and inaction.

128. Given the extent and potential intractability of problems with non-executive directors, Roundtable discussions have included policy supplements and alternatives to disinterested, non-executive-director approval of self-dealing/related-party transactions that exist for listed companies.

129. A second safeguard against abusive self-dealing employed by some jurisidictions involves approval or ratification of the related-party transaction by shareholders. Shareholder ratification introduces an element of democratic "legitimacy". Legal questions that arise in such cases are: (i) the legal effect of ratification (i.e. absolute immunity from challenge or a shifting of the burden of proof onto the party seeking invalidation of the transaction); (ii) whether the effect of ratification varies with the kind of self-dealing/related-party transaction under attack; and (iii) whether interested shareholders may participate in the ratification process.

130. Shareholder approval or ratification may be time-consuming and expensive, since it requires distribution of proxy materials and convening of a shareholder meeting. In the view of some commentators, collective-action problems may also raise practical concerns about the suitability of the shareholder meeting as a forum for reviewing and approving/ratifying self-dealing/related-party transactions.[22]

131. In sum, Roundtable participants have identified both disinterested director approval and shareholder ratification as legitimate policy options in dealing with related-party transactions. Opinions among participants have differed as to the superiority of one over the other, and as to whether they should be viewed as alternatives, or be used in combination depending on the circumstances.

132. A plausible alternative to relying upon independent directors or the shareholder meeting to approve/ratify self-dealing/related-party transactions may be to prohibit the company from engaging in

21 . For a fuller discussion of director "independence," See, Pars. 318-321.

22 . See, e.g. Clark, *op. cit.* 11, pp. 180-89.

certain kinds of self-dealing/related-party transactions altogether. For example, a number of OECD-member countries prohibit, or severely limit, loans from a listed company to its directors or senior officers. Asian countries should consider the extent to which this "core" of prohibited transactions should be expanded to include transactions such as: (i) purchases/sales of assets outside of the ordinary course of business to insiders and their relatives; (ii) waiver of conflicts for senior officers to do business with the company, etc. Such prohibitions would represent a hybrid approach, where certain core self-dealing/related-party transactions would be prohibited outright, with disinterested, non-executive-director approval, or shareholder ratification, applicable to other transactions.

133. Of course, one type of self-dealing/related-party transaction that cannot be prohibited are executive compensation arrangements. Here, using independent, non-executive directors may continue to represent the most effective policy option. But, it should be augmented. First, to deter "sweetheart deals", all executive compensation arrangements should be fully and accurately disclosed. In this regard, Roundtable participants favour disclosure of individual compensation, but where such disclosure is onerous, or dangerous to directors and senior officers, aggregate compensation may be disclosed. In either event, to enhance comparability and transparency, these persons' performance-based and non-performance-based compensation should be reported separately.

134. Additionally, accounting for executive compensation should reflect the economic impact of the compensation on the company's income statement and balance sheet, as well as the fact that such compensation has been incurred for the performance of services. Treating the value of stock options as current expenses is one way to reflect such impact. To aid directors in determining appropriate compensation levels, regulators and shareholder-protection groups should disseminate information on executive compensation across companies and sectors. Shareholder and other private-sector groups should also publish current data on compensation for business professionals (such as consultants and attorneys) that can serve as rough benchmarks of market rates for professional business services.

135. Asian legal systems should continue to improve regulatory and judicial enforcement capacity and even-handedness.

136. Enforcement problems often arise because regulators and courts face monetary and human resource constraints, or lack the requisite legal authority to investigate wrongdoing or to fashion a suitable remedy or deterrent. Improving regulatory enforcement also depends on leadership from the upper reaches of government in support of integrity, independence and professionalism.

137. In Asia, much progress has been made in each of these areas. Much opportunity for further progress remains. Implementing and enforcing shareholders' rights and equitable treatment remain a continuing challenge, as evidenced by extensive anecdotal evidence provided by Roundtable participants of inaction or bias connected with capacity constraints, political influence and corruption. Foreign investors feel themselves particularly vulnerable to these abuses.

138. Areas for active experimentation should include specialised company law courts and investigatory and prosecutorial teams. Many emerging markets have found that such specialisation permits more expert and expeditious handling of company law issues, as well as more sophisticated and thorough investigation and sanctioning of wrongdoing.

139. Local law should permit shareholders to initiate class-action or derivative suits against directors and other fiduciaries of the company for breach of fiduciary duty, for failure to comply with disclosure requirements or for securities fraud. Mechanisms to discourage excessive or frivolous litigation should not prevent or frustrate collective action by shareholders with meritorious claims.

140. Experience has shown that shareholders' rights and equitable treatment depend upon effective methods for shareholders to obtain redress for grievances at reasonable cost and without excessive delay. Would-be minority shareholders become more willing to invest where they can initiate judicial or administrative proceedings should they reasonably believe their rights have been violated or that they have been treated inequitably.

141. With regard to shareholder-initiated enforcement, the shareholder suit enjoys long and extensive development in global practice. Where such suits are prevalent, they greatly augment regulatory resources, placing the burden and responsibility of investigation and enforcement on the shareholders themselves. There are two basic kinds of shareholder suit. In a derivative lawsuit, one or more shareholders files suit on behalf of the company against the directors to recover losses suffered by the company. In a shareholder class-action lawsuit, a group of shareholders file suit directly against the directors or others for damages suffered by the shareholders. In common law jurisdictions, there may also be remedies such as "unfair prejudice remedies", with the underlying premise being a shareholder's personal right to be treated fairly.

142. The mechanism of shareholder suits, like any mechanism, has drawbacks. Critics point in particular to shareholder suits' potential for excessive or frivolous litigation. Consequently, many legal systems have introduced provisions to protect management and board members against litigation abuse. Protections include tests for the sufficiency of shareholder complaints, so-called "safe harbours" for management and board-member actions (such as the business judgement rule (See, Par. 285), as well as safe harbours for the disclosure of information. Some regimes require the losing party to reimburse the legal expenses of the prevailing party. Legal reforms in the United States over the last few years have also tightened the rules for shareholder suits to combat "professional plaintiffs", who stir up litigation in the hope of extorting a settlement from the company.

143. In the end, each legal system must try to strike a balance between allowing investors to seek remedies for infringement of their rights and avoiding excessive litigation. Many countries have found that alternative adjudication procedures, such as administrative hearings, mediation or arbitration procedures organised by the securities regulators or other regulatory bodies, are an efficient method for dispute settlement, at least at the level of first instance.

144. Roundtable discussants have noted that Asian business cultures often prefer quiet, informal dispute resolution as a way for all parties involved to "save face" and to keep their business affairs out of the public eye. In addition, some Asian legal traditions and political systems prefer to provide shareholder redress through agency enforcement rather than through shareholder-initiated administrative proceedings or private litigation. In fact, a few Asian regimes currently fail to provide for shareholder derivative or class-action suits while other Asian jurisdictions have in place rules or practices that substantially lessen collective-action suits' usefulness as a means of shareholder redress. Such rules include requiring plaintiff shareholders to own a significant percentage of outstanding shares, imposing high court filing fees, and other mechanisms that discourage litigation without reference to the merit of the underlying claim.

145. The OECD Principles do not insist upon the availability of derivative or class-action suits, but rather call for shareholders to enjoy "opportunities for effective redress for violation of their rights" and for the corporate-governance framework to "ensure … the board's accountability to the company and the shareholders." Local jurisidictions therefore have flexibility in providing redress and ensuring accountability through administrative action or informal dispute resolution. But, if agency enforcement or informal dispute resolution prove insufficient to give shareholders opportunities for effective redress (or to ensure the board's accountability), a legal regime is obliged to pursue other, less-preferred policy options, including private litigation.

146. There is a clear trend in Asia favouring broader use of collective action. It is unclear whether this trend has in fact been driven by dissatisfaction with administrative or informal mechanisms, by reappraisal of the relative merits of collective action (or relative risks of excessive litigation), or by other factors. Whatever the cause(s), Roundtable participants view shareholder collective-action lawsuits as a tested and useful means for providing redress and ensuring accountability that should be available to shareholders in all Asian jurisdictions.

147. Expanded use of collective-action lawsuits rasies the questions of: (i) whether derivative actions should be preferred over class actions (or vice versa); (ii) and how jurisdictions should think about the balance between promoting collective action and discouraging frivolous liltigation.

148. No consensus has emerged from the Roundtable on the derivative versus class-action issue.[23] Much depends on local circumstances and local experience. One Roundtable expert from Korea has noted that derivative suits, to be successful, ultimately require the management of the company to take action against directors.[24] This managers have sometimes refused to do. There have also been cases in Korea where shareholder plaintiffs prevailed in their derivative suit only to have company management refuse to collect the award from the director-defendant. In other cases, company management has refused to reimburse prevailing shareholder plaintiffs for their legal costs, necessitating further litigation

149. . Consequently, in the view of this expert, such difficulties, where they exist, mitigate in favour of class-action suits.

150. At the same time, participants from other jurisdictions have expressed the view that derivative actions either better suit their own local conditions or currently provide the redress and accountabiltiy called for by the OECD Principles.

151. As noted above, where collective-action rights exist, the issue of excessive or frivolous litigation invariably arises. Par. 142 briefly mentions several mechanisms intended to curtail such litigation. Where mechanisms have the practical effect of hindering litigation, rather than litigants, Roundtable discussions have sought to distinguish between mechanisms that take into account the merits of underlying clams and those that do not.[25] The Roundtable's view is that mechanisms to

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23 . An additional policy option involves use of a public ombudsman having power to sue on behalf of the company or its shareholders without demand, or that demand should not be a requirement where, for example, it would be futile.

24 . See¸ Prof. Jang Hasung, "Empowering Shareholders Rights: Derivative and Class-Action Lawsuits," presented at the Fourth Asian Roundtable on Corporate Governance, Mumbai, India, 11-12 November 2002, available at: www.oecd.org/daf/corporate-affairs/.

25 . For example, under the US Private Securities Litigation Reform Act of 1995, only the "most representative lead plaintiff" may serve as lead plaintiff. In addition a litigant may not serve as a lead plaintiff more than five times in three years. These rules are intended to prevent a "race to the courthouse" to file suit and to deter "professional plaintiffs," who stir up litigation in the hope of extorting a settlement from the company. While these rules impede individual litigants, they do not impede litigation on the underlying claim. Compare these rules to a requirement that the losing party pay the prevailing party's legal costs or that the plaintiff file a court fee equal to 5% of the damages claimed. The payment-of-expenses rule deters litigation but takes into account the underlying merit of the claim, since someone with a highly meritorious claim will have a low probability of paying the other side's legal costs. The 5% filing fee, by contrast, deters all litigation, irrespective of the merits of the underlying claim.

discourage excessive or frivolous litigation should have the effect of preventing or frustrating collective action by shareholders with meritorious claims.

152. Instituting, or broadening, class-action and other collective-action remedies will require time, effort and resources. “Complex litigation” is aptly named. In addition to changes in substantive and procedural law, judges, lawyers and court administrators will require training. Here, use of specialised courts, at least in the early phases of implementation or expansion, may offer particular advantages. In addition, technical-assistance organisations can greatly facilitate knowledge transfer and exchange of experience.

III. The role of stakeholders in corporate governance

Introduction

153. An essential part of corporate governance concerns persons and groups considered “stakeholders”. Stakeholders include resources providers to the company, such as investors, employees, creditors and suppliers. In addition, companies face the expectations of outside groups like civil society and communities in which the company operates.

154. The formal role and rights of stakeholders arise from various sources: company law, labour law, contract law, insolvency law, etc. Respecting these rights therefore represents an obligation on the part of the company and its management rather than an act of grace or goodwill. Here, managers and directors have affirmative duties to ensure the company’s compliance.

155. In Asia, however, the legal aspects of stakeholders’ rights often have less impact than cultural norms based on respect for seniority, reciprocal duties and informal/private dispute resolution. Where control rests in private hands, a patriarch-dominated family or alliance of relatives, in-laws and long-time friends usually controls even the largest companies. In these circumstances, duties of reciprocity based on cultural norms can give rise to expectations of secure employment. Similarly, customer and supplier interactions are understood as long-term relationships built on mutual trust, with an obligation to resolve disputes quietly and informally. Where the state is a major or controlling shareholder, as is often the case in Asia, stakeholder interests are often given considerable weight although enforcement can also be complicated by the state having, in effect, to police itself.

156. The informal nature of Asian stakeholder/company interaction can produce real and lasting benefits for stakeholders that equal or exceed those offered through more formalistic approaches based on “rights”. Legalising a stakeholder claim, in the sense of recasting that claim as a right, involves both costs and benefits. Companies may be less generous when extending formal benefits than when acting informally. Flexibility and capacity for organic growth can also be hindered. At the same time, formalising the stakeholders’ claim as a right can offer greater clarity, both with respect to what the claim is and to how much it costs the parties and society. Formalised rights can also bring into play social institutions and international norms concerned with the vindication of rights.

157. In implementing stakeholder objectives, therefore, a place exists for both informal claims and formal rights, the balance between the two shifting with time and circumstance. In this regard, current trends in the Asian business climate may increase the role of formal legal rules in realising and enforcing stakeholders’ objectives. These trends include: (i) diminishing sources of cheap capital that can be lent or invested on less-than-arm’s-length terms to friends and family; (ii) increasing foreign competition that requires businesses to become more efficient and threatens both job security and settled customer/supplier relationships; (iii) increasing global trade opportunities that, to be exploited,

require dealing with strangers; and (iv) increasing demands of foreign investors for a say in management and oversight, and for more transparent internal controls.

Recommendations

158. Company, commercial and insolvency laws and the judicial system should help creditors enforce their claims in an equitable manner, in accordance with principles of effective insolvency and creditor rights systems.[26]

159. Creditors represent a crucial class of stakeholder, particularly in emerging economies that lack robust sources of equity finance. Of course, legitimate differences of opinion can arise among a country's policy-makers regarding the balance to be struck between debtors' and creditors' rights. Once struck, however, this balance must be enforced consistently and reliably for a country to represent a credible and desirable destination for debt capital.

160. Since the Asian financial crisis of 1997, most Asian countries have reformed their insolvency laws and procedures. In large part, the focus has been on: (i) establishing limited life, specialised bodies to deal with non-performing loans; (ii) introducing new rescue procedures to generally out-dated, insolvency regimes; and (iii) developing informal workout practices.

161. Progress to date has been real and has been substantial. The effort, ingenuity and, in some cases, personal bravery of the many people responsible for this progress deserve recognition. At the same time, a significant gap has opened between theory and practice, between rules and their implementation. In part, this gap arises from the inescapable growing pains of assimilating in a few short years rules, practices and attitudes that took decades to evolve in developed markets. On the other hand, by focusing on and adopting some of the more advanced aspects of developed-market insolvency regimes, many Asian economies have failed to put in place the fundamentals that make these advanced aspects work.

162. The main task of public officials in protecting creditors' rights is straightforward: enforce the law. Improved enforcement requires strengthened institutional capabilities, which in turn require training, knowledge transfer, and leadership to eradicate corruption. The public must develop confidence that the skill and resolve exist within the government to improve judicial and regulatory enforcement.

163. To deal meaningfully with creditors' rights now and in the future, Asian regimes should also continue to work on the fundamentals of security interests, insolvency laws and insolvency procedures. A few of the most important are:

- Instituting insolvent-trading laws that make directors liable to creditors for company debts incurred while the company was insolvent or entering the "zone of insolvency".

- Instituting fraudulent-conveyance laws that permit recapture of company assets (including cash) that are transferred without fair and full consideration and that leave the company insolvent shortly after the transfer.

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26 . The World Bank has developed draft Principles and Guidelines for Effective Insolvency and Creditor Rights Systems that can serve as an internationally recognised framework for national insolvency and creditor rights systems.

- Putting in place credible liquidation procedures and efficient secured-transaction processes. These procedures and processes form the backbone of an insolvency regime. They permit prompt disposal of moribund businesses and force the managers of potentially viable businesses to negotiate real and rapid restructuring. Failed attempts to restructure in a timely fashion should lead to automatic and efficient liquidation, so as to protect creditors and to reallocate resources to more productive uses.

- Creating the right dynamics for restructuring. For a troubled debtor, "insolvency" must come early enough in the debtor's decline that the debtor still has the prospect of being restructured into a viable business. In this regard, cash-flow tests for insolvency (rather than balance-sheet tests) should become the norm.[27] In addition, restructuring procedures, even where the debtor remains in possession, must provide creditors an independent review by qualified experts of the debtor's business, its prospects and options for restructuring. Restructuring works best when the debtor is co-operative and independent and expert advisers are engaged to review the business and to devise restructuring plans. Triggers and incentives are also needed to push or entice parties into restructuring – often these take the form of insolvent trading laws (mentioned above) or central-bank provisioning and loan-classification rules;

- Requiring that restructuring "fix the business". Many distressed Asian businesses need substantial operational and managerial restructuring to become viable. Because of the large number of family owner-managed businesses in Asia, replacing management can be particularly difficult. But, it must be possible. The threat of replacement is often sufficient to produce an informal workout; but, the fact of replacement is sometimes necessary to save the business.

- Reforming lending practices. Bulk sale of non-performing loans to asset-management companies (AMCs) has retarded the development within banks of expertise in handling distressed debt. Nor have many banks, with notable exceptions, sufficiently improved risk analysis and credit-quality control so that the mistakes of the past will not recur. From a long-term perspective, failure to reform lending practices may prove to be the greatest missed opportunity of the emergency steps taken to deal with the 1997 financial crisis.

164. Companies should develop policies and procedures that promote awareness and observance of stakeholders' rights. To this end, governments should also introduce protections against retaliation for employees who report problems and abuses (i.e. "whistleblowers").

165. The OECD Principles provide that "[t]he corporate-governance framework should assure that the rights of stakeholders that are protected by law are respected."

166. Companies should raise awareness of stakeholders' legally protected rights and should translate this awareness into everyday compliance. For example, companies should develop and provide employee and shareholder handbooks that specify rights, entitlements and avenues for redress. Employee handbooks should describe company policies and procedures on matters such as benefits, reporting unsafe working conditions, discrimination or harassment, etc. Companies should also put in place procedures to investigate complaints and information on wrongdoing coming from employees

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27 . A company is cash-flow insolvent when it is unable to pay its debts as they come due. The company is balance-sheet insolvent when its liabilities exceed its assets (and its equity is therefore negative).

and other stakeholders. Such procedures should be backed by legal protections against retaliation for employees who report problems and abuses.

167. Developing and publishing such procedures enable the company to improve compliance, to professionalise behaviour and to insulate the company from the unauthorised and illegal behaviour of rogue employees and supervisors. These policies can also have the collateral benefit of attracting and retaining talented employees.

168. Policy-makers and private-sector organisations can assist in this effort by producing easy-to-understand pamphlets that can be incorporated into company handbooks and distributed to employees and other stakeholders. Technical-assistance organisations should support the development of such materials, as appropriate.

169. To preserve and promote reputational goodwill, directors (and policy-makers) should not only take into account the interests of stakeholders but communicate to the public how these interests are being taken into account.

170. Reputational goodwill constitutes a company's capacity to generate additional returns due to the positive associations the public has for the company and its products. Companies annually spend tens of billions of dollars to establish these associations in the public mind, whether with regard to the high quality or cutting-edge design of company products, the friendliness or dedication of company staff, or the company's good corporate citizenship.

171. Recently, the relevance of reputational goodwill to company profits in Asia has manifested itself through consumer boycotts and protests arising from working conditions and pay in Asian factories, where labour has been perceived as vulnerable. Over the last several decades, Asian companies have attracted investment and manufacturing orders by offering an environment of lower-cost labour and less burdensome regulation. Wealthier markets have begun to scrutinise this environment of late and to punish companies that are perceived as straying too far from home-country labour, environmental, competition and anti-bribery norms, even if such companies fully comply with laws in the country of manufacture. To assist directors and managers of companies operating in these environments, internationally recognised standards, such as the OECD Guidelines for Multinational Enterprises, have been promulgated.

172. Companies should establish internal redress procedures for violation of employees' rights. Governments and private-sector bodies should also promote the use of mediation and arbitration in providing redress.

173. The OECD Principles state that "[w]here stakeholder interests are protected by law, stakeholders should have the opportunity to obtain effective redress for violation of their rights."

174. External redress for violations of stakeholders' rights is the preserve of state bodies, including agencies and courts. However, corporate-governance frameworks have an interest in developing non-governmental redress mechanisms as well. In the employment area, where companies have developed internal redress mechanisms, stakeholders' rights can often be protected and satisfied at lower cost to all concerned. Early intervention by the company can build confidence and goodwill among employees and avoid lawsuits that can damage the company's finances and reputation. While institutionalised consultation mechanisms represent a useful means for enhancing employee relations, such mechanisms have remained rare in Asia. However, they may play a larger role should more flexible labour arrangements begin to supplant a cultural norm of lifetime employment in exchange for total allegiance to management.

175. Outside of the employment area, the company's use of non-governmental redress mechanisms, such as mediation and arbitration, can vindicate stakeholders' rights while furthering the company's interests. Such mechanisms can also offer the advantages of privacy and confidentiality so highly valued by Asian business culture.

176. The public and private sectors should continue to develop performance-enhancing mechanisms that encourage active co-operation between companies and employees.

177. The OECD Principles provide that "[t]he corporate-governance framework should permit performance-enhancing mechanisms for stakeholder participation."

178. There are numerous types of performance-enhancing mechanisms. A common one in OECD countries is works councils, which under certain conditions must be consulted on major corporate actions. Other mechanisms provide incentive compensation for individual or collective performance. Among the most popular of these are cash bonuses and equity bonuses, either in the form of options or shares. Equity-participation mechanisms can include employee stock ownership plans and contributions to individual pension plans. The motivation for such plans is to encourage employees to think and to act like owners by giving them stock in the company. Recent business failures in the United States have underscored, however, the importance of risk allocation in company-sponsored schemes, as well as problems that arise from restrictions placed on the ability of individuals to sell shares held by their plans as and when they desire.

179. Employee stock ownership plans have also been used as vehicles for management entrenchment. To the extent such plans are permitted by local law, voting rights of shares in the plan should be used solely to further the interests of plan members and should therefore be under the control of parties independent from management. Plan officers and directors should be accountable as fiduciaries for the discharge of their duties.

IV. Disclosure and transparency

Introduction

180. Disclosure and transparency affect both a company's operations and its performance as an investment. Operationally, rigorous disclosure and transparency systems enable management and the board of directors to allocate resources rationally and to run the business in accordance with strategic plans. In this respect, disclosure and transparency to managers and directors influence the company's ability to generate cash flows, its *intrinsic* value.

181. From an investment perspective, full, accurate and timely disclosure of information permits the market to determine what this intrinsic value is. Effective disclosure and transparency also help set investors' level of confidence that intrinsic value is not being siphoned off or wasted by managers or insiders.

182. The intrinsic value of cash flows, combined with investors' confidence in their ability to enjoy these cash flows, determines a company's *extrinsic*, or market value. A similar relationship obtains at the macroeconomic level. Good systemic disclosure generates confidence in market integrity. As a result, capital flowing to equity and debt markets will fully and fairly reflect the underlying value of the national economy. Consequently, disclosure and transparency not only affect

individual companies' performance and market valuation, but greatly influence a national economy's ability to attract domestic and foreign investment.

Overview of Legal Frameworks and Disclosure Practices in Asia

183. The watershed event for disclosure and transparency in Asia was the 1997 Asian financial crisis. The crisis made obvious and urgent the remaining challenges that Asian regimes faced in strengthening disclosure rules and enforcement.[28]

184. Most Asian countries have responded to these challenges by undertaking significant reforms. Many countries, such as China, Hong Kong China, Malaysia, Singapore, Chinese Taipei and Thailand, have introduced more rigorous disclosure rules. In addition, some, including Thailand, now also display greater assertiveness in monitoring and enforcing rules and regulations.

185. Within the corporate sector, broader (but by no means universal) recognition is developing that more extensive disclosure, including disclosure made on a continuous basis, is both necessary and desirable. This trend is matched by higher local demand for information and business news, spurred in part by increasing levels of domestic retail ownership, as well as the financial burdens assumed by taxpayers as a result of the crisis. Where observed, a new consciousness in the boardroom for better disclosure can be traced, at least in part, to the increasing sensitivity of directors to media criticism.

A <u>Disclosure of material information</u>

186. *Financial Information*. Financial information constitutes the bedrock of disclosure. For many investors, the quality of financial disclosure is central to their investment decisions. In the years leading up to the 1997 crisis, disclosure was too frequently inadequate; financial statements not only failed to present the company's true financial condition but were often highly misleading.

187. There is now broad agreement for more rigorous and thorough disclosure of the financial and operating results of companies. In recent years, some Asian countries have taken significant steps to improve financial disclosure, including the adoption of international accounting standards ("IAS").

188. *Consolidated Reporting*. One particularly significant reform in some jurisdictions has been the introduction or enhancement of consolidated financial reporting for corporate groups. Conglomerates dominate the corporate landscape in many Asian countries. These conglomerates are largely family-controlled and can hide the weak financial condition of holding companies by shifting losses to subsidiaries. By, in effect, zeroing out intra-group transactions, proper consolidated reporting helps to nullify intra-group loss-shifting and other "paper" transactions that obscure underlying economic performance. There has been much attention and progress on implementing consolidated reporting in recent years. Further progress will require the incorporation and application of flexible attribution rules that take into account beneficial ownership disguised through nominees and other intermediaries.

189. *Non-Finanical Information*. Since financial statements do not present all information that is material to investors, comprehensive disclosure also includes non-financial information. Such non-

28 . The severity of the crisis varied among Asian countries. Hong Kong China and Singapore, which had comparatively better-established corporate-governance and banking-regulation systems, were less affected than other Asian countries.

financial information often proves fundamental to understanding the opportunities and risks of investing in an enterprise.

190. Recent reforms in many Asian countries have improved non-financial disclosure. For example, certain jurisdictions now require disclosure of corporate-governance structures and practices and directors' remuneration. The stock exchanges in some Asian markets, such as China, Hong Kong China, Malaysia, Singapore and Chinese Taipei require disclosure of deviations from a code of conduct while some stock exchanges, such as in Pakistan, additionally require an external auditor's report on a company's disclosure of code compliance. Correspondingly, investors in Asia increasingly voice a desire for better non-financial disclosure.

191. *Self-Dealing/Related-Party Transactions.* Disclosure of self-dealing/related-party transactions (between affiliated companies or between the company and controlling shareholder(s) or manager(s)) is strong in some Asian countries and weak in others. In Malaysia, the Kuala Lumpur Stock Exchange has recently broadened the definition of related-party transactions to capture a wider range of self-dealing activities. In Pakistan, recent steps include disclosure of accounting policies for related-party transactions in annual accounts, along with enhanced disclosure in directors' reports to shareholders on the company's transfer-pricing policy. Regionally, less progress has taken place in applying attribution rules and investigatory techniques to identify levels of beneficial ownership that should trigger protections against inequitable treatment.

192. *Information on Directors and Key Executives (Executive Officers).* With certain exceptions, companies in Asia generally provide scant information on the backgrounds and remuneration of directors and key executives.

193. *Management Discussion & Analysis.* For many Asian companies, management discussion and analysis (MD&A) of results of operations, financial condition and significant risk factors lack substance. MD&A should complement the financial statements and provide a deeper insight into the company than is possible solely by examining financial statements.[29]

194. *Forward-Looking Statements.* Asian companies often provide little guidance on future trends and uncertainties affecting the company. These forward-looking statements, if well-grounded and properly qualified, provide insights into material issues facing a company not otherwise captured in financial statements and disclosures.

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29 . See, IOSCO Public Document No. 141, "General Principles Regarding Disclosure of Management's Discussion and Analysis of Financial Condition and Results of Operations," IOSCO Technical Committee (February 2003).

B. Standards of accounting, financial and non-financial disclosure, and audit

195. *Accounting Standards*. Accounting standards are generally set on a country-by-country basis. National law typically mandates that listed companies comply with accepted accounting standards. Such standards are usually developed through close collaboration among relevant governmental agencies, private-sector experts and the self-regulatory organisations of the accounting and audit professions. Generally, the process for developing or refining standards involves submitting proposed innovations and changes for extensive public comment before they come into force.

196. Disclosure rules and requirements for non-financial disclosure, meanwhile, generally originate from securities regulators and stock exchanges.

197. *Audit Standards*. While audited financial statements are often mandated by securities regulation or stock exchange requirements, what constitutes compliance with audit standards is rarely legislated, although the right to practice as an auditor may be subject to state regulation, with focus on ensuring auditor independence.

198. Asian laws generally require compliance with national standards, which increasingly reflect international norms, such as IAS and ISA, as standards setters have recognised the practical and reputational benefits that accrue from using benchmarks which enjoy widespread acceptance.[30] The current degree of convergence should not be overstated, though. While most Asian countries have stated that their standards broadly align with IAS, national variances and exceptions from "full IAS" exist in light of differing conditions that obtain in individual jurisdictions.

C. Annual audit by an independent auditor

199. Laws across Asia require publicly-traded companies to have their financial statements audited by an independent auditor. There is a great range across Asian jurisdictions, however, in the capabilities, experience, standards, and practices of external auditors. In some instances, the quality and independence of audits have fallen short. With degrees of frequency that vary by jurisidiction, auditors have approved financial statements that vary greatly from existing accounting standards, even after allowing for wide discretion in characterising specific events and treatments. As in other regions, shortcomings arise from a combination of factors, which may include bias, inexperience, ignorance and negligence.

30 . International Accounting Standards (IAS) are increasingly becoming the benchmarks for accounting and have been endorsed for multinational securities offerings and cross-border listings by the International Organisation of Securities Commissions (IOSCO) and the Bank for International Settlements. IAS and International Standards of Audit (ISA) were also identified as the key standards to follow by the Task Force on the Implementation of Standards of the Financial Stability Forum (FSF). The world's largest accounting firms and the International Federation of Accountants (IFAC), which represents the accounting and audit profession on the international level, support the use of both IAS and ISA. The FSF also identified the IOSCO Objectives and Principles of Securities Regulation as a key standard to follow and the IOSCO International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers provide specific guidance on the content of non-financial disclosure.

D. Fair, timely and cost-efficient access to information

200. *Periodic Reporting*. In Asia, the majority of stock exchanges require quarterly or at least semi-annual reporting to the authorities. China requires listed companies to submit audited annual reports within four months after the company's year end; from 2002, all Chinese listed companies must also provide unaudited quarterly reports. Singapore has recently shortened the deadline for distributing annual reports from six months after a company's year-end to five months. Pakistan has shortened the deadline from six months to four, and Hong Kong China has shortened the deadline from five months to four. In Malaysia, the Kuala Lumpur Stock Exchange (KLSE) requires quarterly reporting of unaudited accounts and issuance of annual audited accounts and reports within four months and six months, respectively, of a company's year-end. Chinese Taipei requires listed companies to disclose quarterly reports reviewed by a certified public accountant within one month after the end of the first and third quarters, with the audited annual report due four months after the year-end. All public companies are required to disclose the previous month's relevant reports before the 10th of each month, audited annual financial reports within four months after the end of the fiscal year and audited semi-annual financial reports within two months after the end of every half fiscal year. Elsewhere in the region, many stock exchanges have recently strengthened the requirements for immediate reporting of price-sensitive information. Notwithstanding stronger enforcement in some Asian countries, in others, companies have routinely submitted disclosure documents to the authorities after the prescribed deadlines without penalty.

201. *Electronic Reporting*. Like countries in other regions, Asian jurisdictions have moved to integrate new technological developments into their existing disclosure regimes. In Thailand and Chinese Taipei, for example, the securities commission has introduced electronic filing of disclosure reports.

Recommendations

202. Asian Roundtable countries should work towards full convergence with international standards and practices for accounting, audit and non-financial disclosure. Where, for the time being, full convergence is not possible, divergences from international standards and practices (and the reasons for these divergences) should be disclosed by standards setters; company financial statements should repeat or reference these disclosures where relevant.

203. The quality of information disclosure depends on the standards under which it is prepared and presented. The OECD Principles identify three types of standards that underpin a strong disclosure regime: accounting, audit and non-financial disclosure.

204. With regard to accounting standards, Roundtable experts and business leaders have described how international standards facilitate comparability of information across different jurisdictions. As a result, even if a proposed national standard is "better" than its international counterpart, the value of comparability may militate in favour of adopting the international standard. This situation may be particularly true for smaller jurisdictions, where cross-jurisdictional comparability may yield greater relative benefits. Adoption of established and tested international standards also permits greater devotion of local resources to implementation and enforcement and helps to insulate standards setters from external pressures (See, Pars. 249-254).

205. At present, jurisidictions in Asia diverge widely in the degree to which they have adopted international standards and practices such as IAS. For some jurisdictions, full convergence represents a relatively short and easy step. For others, full convergence can involve a long and difficult journey.

As regional regulators and practitioners know, international standards can be complex and hard to introduce; a move to full compliance with IAS can also impose substantial costs, requiring additional training and financial and human resource commitments at the company, professional firm and standards-setter levels. Moreover, under certain market conditions, a shift in accounting standards can sharply cut property values and reported earnings, potentially destabilising markets and financial systems. For these and similar reasons, local conditions from country to country may require adoption of standards, such as IAS, individually (rather than all at once) and/or at differing speeds. But, such local conditions should neither be used to politicise the standards-setting process nor to encourage the adoption of standards that diverge from internationally-recognised benchmarks. During the transition to full convergence, standards setters should disclose where local standards and practices diverge from IAS (and the reasons for these divergences); company financial statements should reference specific disclosures where they apply to specific items and yield materially different results.

206. In recommending full convergence as a goal to be achieved over time, Roundtable participants have therefore recognised the practical challenges imposed by local conditions. At the same time, however, Roundtable participants encourage regional standards setters to address analytical and policy concerns connected with standards through active participation in the international-standards-setting process. In this respect, the Roundtable believes that regional standards setters should focus on influencing international standards while they are being formulated, rather than justifying deviation from such standards after they have been issued. To this end, Asian countries, individually and as a group, need to ensure their full involvement with international standards-setting bodies, such as IASB and IFAC, as well as with international organisations that contribute data and policy analysis to the international standards-setting process.

207. In sum, the Roundtable's view is that while full convergence with international standards and practices may be challenging Asian regimes should nonetheless establish it as a goal to be achieved over time. As a transitional measure, international standards might be applied initially to listed companies (or at least the largest thereof) and the consolidated financial statements of corporate groups. In addition, jurisidictions that wish to establish standards that go beyond IAS and ISA should do so via supplementary disclosures.

208. All Asian countries should continue to strengthen regulatory institutions that: (i) establish high standards for disclosure and transparency; (ii) have the capacity, authority and integrity to enforce these standards actively and even-handedly; and (iii) oversee the effectiveness of self-regulatory organisations.

209. To be effective, regulators must have a sufficient number of highly-trained personnel to monitor company compliance and to ensure that accounting and auditing self-regulatory organisations carry out their responsibilities. In addition, regulators and shareholders must also have at their disposal a range of options for sanctioning wrongdoing by accountants, auditors, company officers, directors and insiders and/or for seeking redress. Finally, underlying these requirements, must be leadership from the upper reaches of government that establishes a mandate for active and even-handed enforcement and that sets an example of integrity and professionalism.

210. The 1997 crisis exposed severe and urgent capacity-building and enforcement challenges for securities regulators and stock exchanges across the Asian region. With a few exceptions, Asian regulatory regimes lacked the institutional capacity and authority necessary to ensure company compliance. As in some other regions, regulators may also have lacked the institutional capacity or authority to ensure proper performance by self-regulatory organisations in the accounting and auditing professions. In some cases, adoption of disclosure-based regulation also added substantially to

monitoring and enforcement burdens. Lastly, in more than a few cases where regulators had evidence of law-breaking, bias, political influence and corruption permitted wrongdoers to escape punishment.

211. Challenges in Asia are heightened by the prevalence of family control among many of the largest publicly-traded companies. Such companies may hesitate to disclose problems and setbacks because managers and controlling shareholders have much of their personal wealth tied up in shares and also because they fear reputational harm and loss of face from disclosure of poor results.

212. Roundtable participants have recognised that much progess has been made in these areas over the last few years and that more progress is needed. Priorities include further developing the human and monetary resources of regulatory institutions, as well as training and exposure to effective policies and practices from other countries. The range of sanctions available for deterring and punishing wrongdoing should be broadened, as should mechanisms that augment investigatory resources, such as legal protections for whistleblowers. Finally, Asian regimes must further strengthen cultures of integrity, professionalism and even-handedness.

213. Securities regulators, stock exchanges, self-regulatory organisations and investor groups should continue to educate companies and the public regarding the value and uses of full, accurate and timely disclosure of material information. Asian regimes and all stakeholders within them should strive for a corporate culture in which managers and directors internalise the need for good disclosure practices.

214. Good disclosure requires the provision of material information. Material information is information the omission or misstatement of which could influence the economic decisions made by the users of information. In this area, companies often express concern about the costs of complying with disclosure requirements while regulators wish to ensure that the information demanded genuinely furthers regulatory objectives.

215. Applying the concept of materiality in developing disclosure requirements helps companies and regulators to decide what information is truly relevant. The general definition of materiality, however, may lend itself to differing interpretations. In Asia, where interpretation in practice has been rather liberal, a number of companies have fallen significantly short of national and international standards.

216. Disclosure shortcomings identified by Roundtable participants in some jurisdictions have included:

- Insufficient disclosure of related-party transactions;
- Hiding of large enterprise debts through related-party transactions and off-balance sheet financing, such as cross-guarantees within corporate groups;
- Insufficient reporting of contingent liabilities, particularly loan guarantees granted to related and unrelated parties;
- Insufficient segment information that would have revealed the risks related to specific sectors such as real estate; and
- Failure to use mark-to-market accounting where appropriate.

217. Where necessary, Asian regulators should revise their disclosure rules to eliminate these shortcomings.

218. In addition, Roundtable participants have reiterated the need to raise awareness of shareholders' and the public's right to corporate transparency. Regulators, shareholder associations, chambers of commerce, business groups, institutes of directors, and self-regulatory, academic and professional organisations must take part in this effort. Multilateral financial institutions should set an example by requiring good disclosure practices from entities in which they have invested. Technical-assistance agencies should provide resources and know-how to educate the public, as well as company managers and directors. The overall goal of these efforts should be a corporate culture in which managers and directors treat proper company disclosure as a benefit to the company and internalise the need for good corporate disclosure practices.

219. To promote free and vigorous investigation and reporting by news organisations, local defamation and libel laws should be narrowly tailored.

220. Roundtable participants have particularly stressed the role played by a free and vigorous press in promoting disclosure and transparency. On a day-to-day level, the press gathers and disseminates information of interest to the investing public. More broadly, the press helps establish behavioural norms among managers, shareholders, regulators and other public officials. Finally, Roundtable participants have noted that a significant percentage of enforcement actions have begun with press reports of wrongdoing and that close press coverage promotes vigorous and even-handed enforcement of the law.

221. In some Asian jurisdictions, liberally enforced defamation and libel laws have been used to stifle reporting on corporate or state-enterprise wrongdoing. Highly reputable news organisations have been required to retract stories and to pay large settlements rather than risk regulatory shut-down of their operations or imposition of substantial damages in a national court possibly subject to local politcal pressures.

222. In light of the essential functions of the press in promoting disclosure and transparency, the Roundtable encourages Asian jurisdictions to enact defamation and libel laws that are narrowly tailored to avoid threatening or censoring of responsible news organisations.

223. Managers and insiders (including directors and substantial shareholders) should have obligations to disclose structures that give insiders control disproportionate to their equity ownership. Similar disclosure obligations should apply to material self-dealing/related-party transactions.

224. In some countries, cross-shareholding is frequently used to obtain control of companies without having to acquire significant equity stakes. While cross-shareholding may strengthen ties between companies that conduct extensive transactions with one another, it also protects groups of affiliated companies from hostile takeover and may therefore constitute a device used to shield management from accountability. At the least, such cross-shareholding should be disclosed.

225. Off-balance sheet items such as cross-guarantees, which have been extensively used among Asian conglomerates to secure loans for companies from the same group, and financial derivatives contracts should also be disclosed.[31] These instruments can drive entire groups of companies into

31 . Although these instruments may be captured in the financial statements, they may need to be further discussed as key risks in the non-financial disclosure section.

bankruptcy with little warning to the general public. At a broader level, undisclosed off-balance-sheet financing also increases systemic risk to the economy where such financing is widespread.

226. Most Asian jurisidictions already impose disclosure obligations of the type recommended; for these jurisidictions, this issue largely involves clarifying and strengthening the obligations and improving implementation and enforcement. In this regard, Roundtable participants have noted that disclosure of control structures, cross-shareholdings and self-dealing/related-party transactions remain especially germane to Asia. As discussed in Pars. 117-134, there have been instances where controlling shareholders have exploited their positions to engage in abusive self-dealing.

227. All Asian jurisdictions should strive to develop disclosure regimes in which companies disclose material information on a continuous, timely and equitable basis.

228. As noted above, timeliness in disclosure requires information to be provided when it is still relevant to the market. Companies should therefore disclose: (i) routine company information on a periodic basis (quarterly, semi-annually or annually); and (ii) price-sensitive information on a continuous basis.[32]

229. Price-sensitive information includes key management changes, major transactions, losses of major customers, significant changes in the company's economic environment, major litigation, insider trading, default on debt, insolvency filing, etc. With respect to quarterly, semi-annual and annual disclosures, excessive time lag between the date of the disclosure document (i.e. the date of the balance sheet or the time period of a cash flow statement) and the date it is released to the public may make such disclosure useless.

230. To ensure that information released to the public remains relevant and useful, periodic reports should be filed with the authorities as soon as practicable after the end of the relevant reporting period. To realise these objectives, regulators and stock exchanges should establish mechanisms to monitor companies for compliance.

231. Of course, for proper disclosure, timeliness is necessary but not sufficient. Disclosure will fail to achieve its purpose unless it is also equitable, i.e. unless it promotes a "level playing field" for all investors. This goal requires all market participants to have access to material information at the same time and with equal ease. Information does not strengthen financial markets if it is available to only a select few participants or provided so late that it is no longer relevant.

232. At present, some countries allow major shareholders to have privileged access to information. Roundtable experts have discussed how such "privileges" exacerbate informational-asymmetry and insider-trading problems that undermine market integrity.

233. Several jurisdictions have taken steps to address these problems, and others should follow their example by, for example, prohibiting asymmetrical disclosure and trading on material, non-public information. To ensure wide dissemination of information, companies should concurrently release information to the public through various channels, such as press releases, filings with the authorities and posting information on company websites.

32 . See, IOSCO Public Document, "Principles for Ongoing Disclosure and Material Reporting by Listed Entities," IOSCO Technical Committee (October 2002).

234. Regulators should explore the opportunites created by new technologies to enhance the fairness and efficiency of the disclosure process, including submission and dissemination of financial and non-financial information by electronic means.

235. The internet promises to be a powerful tool for better governance by offering widespread access to information at low cost. New technologies, including electronic filing of disclosure documents to regulators, real-time reporting of company performance, webcasting of analysts' meetings, and rapid and widespread dissemination of company goals and policies should be expeditiously adopted and integrated into reporting and disclosure systems. Where necessary, jurisdictions should amend company laws and stock exchange rules to facilitate the use of new technologies. Finally, standards and procedures for release of information should evolve in light of the increased capabilities and expectations generated by technological innovation.

236. Companies should be encouraged to disclose information that goes beyond the requirements of law or regulation. Where stock exchanges require listed companies to comply with corporate-governance practices or codes, annual reports should state whether or not the company (and its management) have complied and, if not, the extent of, and reasons for, non-compliance.

237. Recent reforms in many Asian countries have improved non-financial disclosure. For example, certain jurisdictions now require disclosure of corporate-governance structures and practices, directors' remuneration and audit and non-audit fees paid to independent auditors. The stock exchanges in some Asian markets, such as Hong Kong China, Malaysia, Singapore and Chinese Taipei, require disclosure of whether a listed company has complied with a code of conduct. In Pakistan, there is an additional requirement that such disclosure be reviewed by an external auditor, whose report is included in the annual report. Practices such as the above should enjoy more widespread adoption.

238. Securities commissions, stock exchanges and professional organisations should exercise oversight and enforcement of standards for accounting, audit, and non-financial disclosure. These bodies should have authority to impose appropriate sanctions for non-compliance.

239. Although standards of accounting and auditing are high in several Asian jurisdictions, the level of implementation can be unsatisfactory, even among the largest corporations and most reputable auditing firms. Prior to the Asian crisis, many companies in the region failed to follow the prescribed national or international accounting standards when preparing their financial statements.

240. Levels of compliance depend in part on the strength of the monitoring and enforcement capacity enjoyed by self-regulatory accounting and auditing bodies over their members. How effectively these bodies make use of this capacity can, in turn, depend in part on the degree to which they are subject to monitoring and supervision by governmental regulators.

241. A properly functioning audit profession relies heavily upon professional organisations to address shortcomings in performance and ethics through a combination of education, oversight and discipline. In the view of Roundtable participants, areas that require attention in Asia include training, enhancement of local audit standards, and the development of standards on independence and ethics that incorporate international benchmarks. In addition, professional organisations must introduce clear and credible sanctions for auditors who fail in their duties. Until recently, many such professional organisations were self-regulatory. A view current among some influential policy-makers, however, recommends that within each jurisdiction, auditors (and by extension professional auditor

organisations) should be subject to oversight by a body that acts, and is seen to act, in the public interest.[33]

242. International accounting and auditing firms should apply the same high professional and ethical standards across different markets.

243. Accounting, like other professions, requires the exercise of judgement in interpreting and applying rules and standards to complex or novel factual situations. The discretion inherent in such judgement, of course, creates the potential for manipulation. All too often, professionals within the company, and outside professionals whose income depends upon the company's favour, yield to pressure from management to present the company's operating results and financial condition in a manner that is other than unqualifiedly fair and accurate.

244. In Asia and other regions, companies often employ strained reasoning, or even subterfuges, to "manage" their reported earnings. The auditor's role is to ensure that the financial statements produced by management and its internal accountants accord fully with applicable accounting principles. Recent debacles in the United States and other developed jurisdictions underscore that disclosure and transparency cannot exist without thorough, independent and scrupulous performance of the audit function.

245. A spirited international debate is now underway over the quality of standards for auditor independence and auditing practices.[34] Reform efforts and proposals include: (i) placing the company's auditor under the control of an audit committee of the board of directors made up entirely of non-executive directors, one of whom must have financial expertise; (ii) restricting the fees auditors may generate from non-audit work (and disclosing the nature of this work); (iii) requiring periodic rotation of audit partners or even of audit firms; (iv) requiring notice of the withdrawal or replacement of the auditor or an audit-committee member (with disclosure of the reasons therefore); and (v) reform of quality assurance procedures. Finally, the extent to which consolidation of the accounting and audit industries has affected ethics and professionalism is under review.

246. In some Asian countries, professional auditor organisations tolerated wide variances in interpretation of applicable accounting or auditing standards, resulting in audits of dubious quality. Consequently, investors were assuming significant risks of which they were not fully aware.

247. Finally, some Asian jurisdictions suffer from a shortage of qualified accountants. In some cases, a company's accountants may not be sufficiently familiar with the applicable accounting standards and thus, are unable to apply those standards properly when preparing the company's financial statements.

248. Continuous application of high professional standards by international accounting and auditing firms should help individual Asian jurisdictions to improve local expectations and practices for accounting and auditing.

249. Governments in each country should adopt measures to ensure the independence of standards setters and the transparency of their activities.

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33. See, IOSCO Public Document No. 134, "Principles of Auditor Oversight," IOSCO Technical Committee (October 2002).

34. ISA have yet to receive the acceptance enjoyed by IAS in the accounting sphere.

250. In addition to technical competence, the independence of any standards-setting body is critical to protecting market and corporate integrity. Powerful interest groups can influence the drafting of regulations and standards, and may also influence subsequent enforcement.

251. Roundtable participants have commented how, in some Asian countries, poorly paid public-sector officials are particularly vulnerable to outside influence. In Asia, as in some other regions, intensive lobbying may also prevent the adoption of rigorous standards and standards setters experience heavy pressure to decrease or weaken disclosure requirements contrary to the public interest.

252. All Asian regimes should have, or put in place, measures to insulate standards setters from undue external pressures. One measure that circumvents pressure is the adoption of international standards without any modifications for local conditions (See, Pars. 202-207).

253. Securities commissions and stock exchanges should require listed companies to disclose any changes of auditors and to explain the reasons for the change.

254. While auditors acknowledge that they work for shareholders, in practice, as described by several Roundtable presenters, auditors are hired by, deal directly with, and are paid by company management and the board. Disclosure of the reasons for changes of auditors by listed companies will help to protect the independence of auditors by deterring management from changing auditors merely because they disagree with the auditor's findings or opinion.[35]

V. The responsibilities of the board

Introduction

255. The board of directors serves as a fulcrum balancing the ownership rights enjoyed by shareholders with the discretion granted to managers to run the business. In this regard, the board of directors should exercise strategic oversight of business operations while directly monitoring, measuring and rewarding management's performance. The board should also ensure the integrity of accounting and financial-reporting systems and oversee the process of disclosure and communications.

256. The board's responsibilities inherently demand the exercise of judgement. Guiding business strategy, determining an appropriate corporate appetite for risk or selecting a chief executive from a pool of candidates involves decision-making that cannot be reduced to a mechanical series of steps. Monitoring and supervisory functions may comprise a range of reasonable approaches. In the end, healthy corporate profits do not guarantee that directors performed well, nor losses prove that directors were careless or incompetent.

257. While corporate-governance frameworks encompass both legal and behavioural norms, the wide discretion generally granted to directors means that behavioural norms play a particularly significant role in guiding director behaviour. No legal norms, however refined, can contemplate every situation in which a director might find himself. Moreover, a director wishing to abuse his position, either for his own benefit or that of a manager or shareholder, can often mask his own misbehaviour by going through the motions of proper deliberation prescribed by legal norms. As a

35 . Malaysia, for example, is considering statutory changes to require disclosure to regulators of reasons for removal of an auditor, or for an auditor's resignation or refusal to stand for re-appointment.

consequence, while Roundtable participants have pointed out numerous opportunities for bettering Asian legal norms, participants have also uniformly identified the nurturing of appropriate behavioural norms as a key to improved board performance.

258. Essential behavioural norms for directors include: informed and deliberative decision-making, division of authority, monitoring of management, and even-handed performance of duties owed to the company and to shareholders as a class. Roundtable participants have emphasised that these norms apply universally, while allowing for local and regional cultural differences in how they are implemented and enforced. Moreover, firms aspiring to global competitiveness must increasingly demonstrate their directors' faithfulness to these standards.

259. The above norms stand in contrast to business practices that often prevail in family or closely-run firms, where a single family or group appoints the entire board of directors. The governance of such firms often relies upon private, informal decision-making, deference to authority and loyalty based on long-term personal relationships; in such cases, even if legal norms clearly fix directors' duties, human nature and cultural patterns can lead to divided loyalties. The relatively large number of listed, family-run firms in emerging markets makes the transition to internationalised behavioural norms particularly important and challenging.

260. Behavioural norms also affect shareholders and regulators. For both cultural and practical reasons, Asian shareholders often prove reluctant to litigate or to assert formally their legal rights. This reluctance places greater pressure on regulators and prosecutors and raises capacity and infrastructural challenges for Asian corporate-governance frameworks.

Overview of Legal Frameworks and Key Board Practices

261. Legal frameworks for board operations reflect the diversity in history and development among Asian states. Hong Kong China, India, Pakistan and Malaysia, for example, have common law frameworks. Thailand and the Philippines have frameworks based on French civil law, while China, Chinese Taipei and South Korea draw upon German civil law traditions. State ownership of enterprises remains strong, particularly in China and India. With respect to companies in private hands, the insider model is widespread; family control predominates, not only among privately-held firms but also among listed companies.

262. The last few years have seen dramatic changes in Asian corporate-governance frameworks. Reform trends include smaller boards operating increasingly in committee structures, greater use of independent directors, and greater specificity as to what constitutes "independence". Stock options for directors have also become more popular (though no clear pattern has emerged with regard to their disclosure or accounting treatment). Based on activity in China, Korea, Malaysia and Chinese Taipei, there appears to be a nascent trend favouring greater use of collective action by shareholders in ensuring the board's accountability. Finally, while there has been considerable interest and activity within Asian legislatures in improving corporate governance, private-sector actors, particularly stock exchanges and institutes of directors, play an increasingly important role.

263. *Board Structure*. All Asian countries require listed companies to have a board of directors. Unitary board structures predominate, with China and Indonesia having dual board structures and Chinese Taipei requiring representatives of unions of company workers to make up at least one-fifth of the board of state-owned enterprises.

264. *Responsibilities*. Asian frameworks typically grant the board general supervisory power over management and the business operations of the company. In addition, boards usually oversee certain business-monitoring functions and approve extraordinary transactions. These functions and transactions include: appointment and compensation of senior managers, remuneration of the board members themselves, review and approval of budgets and strategic plans, major transactions outside the ordinary course of business, significant changes to the company's capital structure, organisation and running of shareholder meetings, etc. Some of these items, such as major transactions and changes to capital structure, additionally require shareholder approval. The board's authority is generally limited only by those matters reserved exclusively for decision by the general meeting of shareholders.

265. While the board as a whole may act on almost all matters, it usually may also delegate its work to committees. There is a general trend favouring establishment of board committees (particularly audit committees), but Asian countries diverge on the extent and source of rules in this area. For example, audit committees are required by law in Singapore, and by listing requirements in India, Malaysia, Pakistan and Thailand. In Hong Kong China, audit committees are currently required for Growth Enterprise Market (GEM) companies and are expected shortly to be made mandatory for listed companies under the listing rules of the Main Board. In the case of the other committees, they are generally only recommended, with exceptions such as the remuneration committee for Indian listed companies, and certain requirements imposed on specific types of companies (such as large companies in Korea and banks in Singapore).

266. *Director Qualifications*. Asian jurisdictions differ as to whether legal entities may serve as directors, with a minority of Asian countries permitting such service. With respect to service by natural persons, several Asian countries have established minimum age requirements for directors, with Malaysia establishing a maximum age limit (70 years) that may be waived by a three-quarters vote of the shareholder meeting. Several countries further limit directorships to persons of good character. Typically, there are bright-line disqualifiers such as a conviction for fraud or a declaration of bankruptcy. In some cases where the statutory restriction is vaguely worded (e.g. "moral turpitude"), regulations or listing rules provide more concrete guidance. Finally, there appear to be very few requirements for substantive knowledge or experience, with a Philippine rule requiring bank directors to have minimum educational or practical experience representing a rare example.

267. *Number of Directors/Number of Independent Directors*. The number of directors serving on the board of listed companies may range from as few as two to an unlimited number. In practice, some Asian boards have numbered 20 or more directors, a size that probably inhibits, rather than promotes, group cohesion and monitoring.[36] There is a clear trend towards smaller boards, but this trend appears driven by recent requirements that independent directors constitute a percentage of the board, rather than by a desire to pare the board to a workable size.

268. With respect to independent directors, pre-financial-crisis rules typically did not require non-executive/independent directors, or at most mandated that one or two such independent directors serve on the board. Norms established since the crisis, mainly through regulations or listing requirements, now provide for at least one or two independent directors and, increasingly, for a minimum *percentage* of independent-director participation on the board, generally from 25% to 50%. As noted above, minimum percentage requirements are a likely cause of shrinking board sizes, since a smaller board requires fewer independent directors.

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36 . Boards of this size often include executives near the end of their careers who have been relieved of significant line or staff responsibilities, suggesting that the board is not viewed as an important decision-making body.

269. *Definition of Independence*. The mandate for independent directors means little without an effective definition of "independence". Asian rules typically exclude persons related by blood or marriage to management, as well as employees of affiliated companies. More refined definitions require independence both from management and from major or controlling shareholders. Some jurisdictions also exclude representatives of companies having significant dealings with the company in question.

270. The issue of "independence" remains problematic, though. Roundtable participants have noted that however precise the definition of "independence", or rigorous its enforcement, legal norms by themselves cannot ensure that "independent" directors will act independently. This is a challenge Asia shares with the rest of the world.

271. *Director Liability*. Directors are generally charged with carrying out their duties diligently and in good faith, although Asian frameworks differ in the extent to which they articulate these duties or elaborate them with case law. There is also a diversity of approach in establishing collective and individual liability. Typically, cases of collective liability arise only in situations where the act undertaken was so clearly improper (e.g. violation of law, abusive self-dealing) that no director acting in good faith would have condoned it.

272. A breach of duty can generate civil, administrative and/or criminal liability. Civil liability for directors varies within the region, particularly in the extent to which shareholders may initiate actions against directors. A few jurisdictions, notably Korea and Chinese Taipei, have recently made it much easier for shareholders to file suit; most countries, on the other hand, permit shareholder suits but put in their way procedural hurdles that render collective actions impractical. In addition, many Asian regimes currently lack mechanisms for collective shareholder action, such as a class-action suit or an ombudsman seeking damages on behalf of shareholders. A trend in favour of collective action is developing, however. The common law systems of Hong Kong China and Malaysia have established experience with derivative-action suits. In 2003, a Chinese court of first instance agreed to consolidate the individual suits of a company's aggrieved shareholders into a common action. Also in 2003, a new Chinese Taipei investor-protection law legalised class actions (with assignment from at least 20 claimants). Chinese Taipei also amended its Code of Civil Procedure to allow general forms of class actions. Hong Kong China is in the process of drafting amendments to the Companies Ordinance to permit statutory derivative actions which are expected to be introduced into the Legislative Council in mid-2003. Legislation permitting derivative or class actions is currently under consideration in Korea and Thailand.

273. The generally weak, though improving, position of Asian shareholders to pursue civil actions leaves state-initiated administrative or criminal proceedings as the principal avenues for director accountability. Here, as a general matter, administrative penalties, though perhaps large in relation to national per capita income, are insufficient to deter lawbreaking at the listed-company level, while criminal sanctions are rarely sought and even more rarely imposed.

274. *Board Remuneration*. Several Asian jurisdictions, such as India and Korea, place limits on the cash compensation awarded to directors, either as a flat amount or a percentage of profits. Stock options, though rarely used previously, are becoming increasingly popular. As in other regions, there appears to be no settled practice in Asia on shareholder approval of director compensation, of disclosure of such compensation, or of requirements that directors take a portion of their remuneration in company shares.

Recommendations

275. Efforts by private-sector institutes, organisations and associations to train directors should be encouraged. Such training should focus on both discharge of fiduciary duties and value-enhancing board activities. International technical-assistance organisations should facilitate these efforts as appropriate.

276. The OECD Principles provide that "[b]oard members should act on a fully-informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders."[37] This formulation lays out the basic elements of a director's fiduciary duty.

277. The need to act on a "fully informed" basis demands a base level of experience and competence on the director's part. Qualifications required of an effective director include financial literacy, an understanding of the strategic planning process, an understanding of human resource development and an ability to understand and execute the specific responsibilities imposed on the board. At the end of the day, to be fully informed, the director must be aware of what he needs to know and must either have, or be able to acquire, this knowledge.

278. A number of private Asian organisations and associations have or are developing voluntary director-education and training programmes. Regional institutes of directors and national stock exchanges have played a prominent role in these efforts. Important roles also exist for chambers of commerce, trade associations, professional associations and societies, business roundtables, business, law and accounting schools at universities and similar organisations at the international, regional, national, state/provincial and municipal/local levels. International technical-assistance organisations can assist in funding and developing programmes and materials.

279. The above programmes aim not only to improve the qualifications and performance of current directors but to expand the pool of candidates from which directors can be selected. For this reason, certification and training programmes should not lead to creation of a closed "guild of directors" in which only those who have completed certain training or received specific credentials may serve.[38]

280. Education and training efforts should not only cover directors' basic legal and governance duties but also substantive areas such as financial literacy, understanding and monitoring internal-control systems, developing business strategies, risk policies, budgets, and the like. Materials should also provide concrete analytical frameworks on subjects such as the metrics to be used in assessing performance of senior management and the board, valuing alternative business strategies, etc.

281. Director organisations can further the above efforts by promulgating codes of ethics for directors and by establishing disciplinary procedures for organisation members found to have violated fiduciary duties or ethical strictures.

282. Though not expressly prohibited by the OECD Principles, the concept of legal entities serving as directors is problematic. Such service permits different persons to attend different board

37 . OECD Principles, Section V.A.

38 . In light of this concern, Malaysia mandates training, but only after a person has been selected as a director. Assuming that training classes remain open to all and that training is straightforward, of reasonable scope, complexity and duration, the Malaysian approach might serve as a guide to other countries.

meetings, detracts from accountability to shareholders and from meaningful exercise of an informed franchise to select specific individuals as directors based upon expectations that such persons are experienced, competent and will discharge their fiduciary duties. Where still permitted, the practice of legal entities serving as directors should therefore be eliminated as soon as possible.

283. Voluntary or "comply or explain" codes of conduct for directors should be developed and disseminated by private-sector organisations, with appropriate support from international technical-assistance providers.

284. The OECD Principles require directors to act "with due diligence and care". This standard, like others, is contextual; it arises from a blend of law, regulation and appropriate private-sector practices.

285. Effective practices typically grant directors wide latitude in deciding the business affairs of the company. This latitude means that directors should not be held liable for the consequences of their exercise of business judgement – even for judgements that appear to have been clear mistakes – unless certain exceptions apply. These exceptions include fraud, conflicts of interest and failure to engage in the basic activities of the director's role (such as attending meetings, seeking to inform oneself and deliberating meaningfully before making important decisions). The rationale for this relatively "hands-off" policy is that courts and agencies are ill-suited to second-guess the business judgement of directors and that if these state bodies began to do so there would be no end to the litigation and administrative actions that would result.

286. Roundtable participants have identified poor director attendance, preparation, and participation, as well as lack of a "healthy scepticism" on the part of directors, as features of the Asian context requiring change. In this regard, the Roundtable process and this White Paper seek to change this context by widening it, by bringing into view a global perspective on what constitutes "due diligence and care".

287. Codes of conduct can further director performance by publicly detailing the minimum procedures and effort that make up "due diligence and care". These codes serve to educate both directors and the investing public. A number of Asian countries have promulgated codes, either through private-sectors organisations (including stock exchanges) or regulatory bodies. In some cases, these codes adopt a phased approach, either toughening the rules for all companies' directors over time or placing higher demands on the directors of larger companies. Further refinement and adoption of codes of conduct should be encouraged, with international technical-assistance providers supporting this work, as appropriate.

288. Because reputable "expert" sources often disagree as to what constitutes effective practices and because these practices change over time, codes of conduct should remain voluntary. This said, imposing "comply or disclose" requirements on listed companies might represent a useful middle ground between voluntary and mandatory codes. Asian companies wishing to commit legally to heightened good governance practices can incorporate code provisions into their constituent and governing documents. At a minimum, all companies should issue an annual corporate-governance report detailing establishment and actions of key committees, involvement of independent directors, related-party transactions considered by the board, etc. For this system to be credible, however, both shareholders and regulators must have means of verifying compliance and disclosure.

289. Much work remains to be done educating and evaluating directors and would-be directors with regard to due diligence and care, but it should also be recognised that a number of Asian

countries have already brought formal expectations for director performance in line with the most developed global practice.

290. Attribution rules should impose fiduciary duties and liabilities on "shadow" directors as a way to discourage their existence.

291. In Asia, board appointees frequently include persons who clearly lack the experience or capacity to inform themselves fully. In some cases, low-level employees or inexperienced relatives of controlling shareholders find their way onto boards as straw men meant to cover for "shadow" directors. Such shadow directors do not occupy board seats themselves but are the real decision-makers. In other cases, a simple dearth of suitable candidates leads to the appointment of the clearly unqualified.

292. At least two OECD-member countries in the Asia/Pacific area, Australia and Korea, have developed attribution rules to impose liability upon shadow directors. Among non-OECD-member countries in Asia, Malaysia has also instituted such rules, while the Hong Kong China Companies Ordinance applies to any officer of the company and any person in accordance with whose directions or instructions the directors of the company are accustomed to act. Other Asian jurisidictions should follow suit.

293. One simple way to promote appointment of substantively qualified directors is to require disclosure of directors' backgrounds, education, training and qualifications, as well as relationships (if any) with managers and shareholders. Companies should also disclose their nomination and selection processes for directors. Such disclosure requirements might not only deter companies from appointing clearly incapable directors, but might also indicate, where such directors have in fact been appointed, that a shadow director is pulling the strings.

294. Sanctions for violations of fiduciary duty should be sufficiently severe and likely to deter wrongdoing.

295. The good faith requirement imposed on directors obliges them to honour the substance as well as the form of their duties. In Asia, as in other regions, procedures to monitor management, such as reviewing related-party transactions, become meaningless where directors do not try to exercise informed independent judgement or take to heart the interests of the company and all of its shareholders.

296. Some commentators have suggested that a strong deference to superiors prevalent in many Asian companies impairs the ability of well-meaning directors to assert themselves against authority. Of course, it is possible that some directors are so uninformed of their duties as to be ignorant of the person(s) to whom their loyalty is owed. It is also possible that directors might in good faith display extreme deference to business decisions of family patriarchs and CEOs. However, in cases where directors have actively colluded to strip the company's assets, such efforts to disguise malfeasance evidence that directors have both known, and wilfully violated, their fiduciary duties.

297. Asian legal systems establish varying degrees of liability for directors' misdeeds. In some cases this liability is collective, in some cases individual. However structured, liability should take into account the severity of the offence (e.g. breach of duty of care versus breach of duty of loyalty), as well as the degree to which the company should answer for the misdeeds of its directors. Finally, as noted above, liability should also attach to shadow directors, who effectively exercise the authority of directors through straw-man directors.

298. Where the law does provide for fines, however, the maximum penalty provided for by law, though large in relation to national per capita income, is sometimes inadequate to deter wrongdoing at the listed-company level. Also, the deterrence value of a sanction is measured not only by its severity, but by the likelihood that it will be imposed. Policy-makers should therefore bear in mind that at times a criminal penalty requiring a high burden of proof can be less effective than a milder administrative or civil penalty that is easier to impose.

299. An additional type of sanction involves disqualification from serving as a director. Typically, this penalty is imposed after a director has been found to have committed fraud or knowingly to have breached fiduciary duties resulting in damages to shareholders or a company and has been deemed by a court or agency to be unsuitable to serve as an officer or director of a public company.

300. Disqualification can be a severe penalty for an executive director, particularly one having a substantial equity stake in the company. The potential for expropriation of such an individual's wealth through administrative or judicial abuse is great. Consequently, while disqualification from service as an independent or non-executive director may be an appropriate penalty, its use with respect to executive directors should be carefully considered.

301. Boards should put in place procedures that will regularise and professionalise the performance of board functions and clarify decision-making. Such procedures should include evaluation of individual director performance based on criteria established at the beginning of the evaluation period.

302. The OECD Principles identify the following key functions of the board:

1. Reviewing and guiding corporate strategy, major plans of action, risk policy, annual budgets and business plans; setting performance objectives; monitoring implementation and corporate performance; and overseeing major capital expenditures, acquisitions and divestitures.

2. Selecting, compensating, monitoring and, when necessary, replacing key executives and overseeing succession planning.

3. Reviewing key executive and board remuneration and ensuring a formal and transparent board nomination process.

4. Monitoring and managing potential conflicts of interest of management, board members and shareholders, including misuse of corporate assets and abuse in related-party transactions.

5. Ensuring the integrity of the corporation's accounting and financial reporting systems, including the independent audit, and that appropriate systems of control are in place, in particular, systems for monitoring risk, financial control and compliance with the law.

6. Monitoring the effectiveness of the governance practices under which it operates and making changes as needed.

7. Overseeing the process of disclosure and communications.

303. Board Function (1) relates to business operations that generate cash flows and often receive less attention than the remaining functions, which focus more on preventing waste or diversion of these cash flows. Whereas these latter functions place directors in an arm's-length role *vis-à-vis* management, Function (1) should be essentially collaborative. The tensions between oversight and collaboration mean that proper board functioning must take into account the human dimension of board/management interaction. A board that fears to question or confront management will fail to provide the guidance and oversight required for good governance. On the other hand, a board that involves itself too much in operational detail or that performs its role as a check and evaluator of management in too adversarial a manner may discourage management from confiding in the board or from using it as a resource and sounding board for problems and opportunities. Developing a relationship of mutual trust, respect, communication and confidence between management and the board therefore represents a key component of successful corporate governance, even if it cannot be mandated or implemented through a definite set of rules.

304. Given the high level of ownership concentration in Asia, imbalances between the board and the management typically involve a relatively permissive board, since, in practice, management and the board are appointed by and answerable to a controlling shareholder group. Even in this context, however, Roundtable discussants have noted that the board can and must play a role in Function (1) by developing review-and-guidance processes that require management to organise and present strategies, plans and policies in a systematic and substantiated manner. Similarly, the development of procedures in the board's monitoring and supervising work can improve the quality of decision-making by requiring that "gut instinct" be augmented by data and analysis. Board deliberations and the documentation prepared for the board should be properly recorded as a way of fixing responsibility, encouraging professionalism and developing institutional memory. In this area, general counsel, outside general counsel and corporate secretaries can play productive roles.

305. With regard to corporate secretaries, Roundtable participants highlighted two main points. First, every listed company board should include a capable corporate secretary, whether he is state-certified, a board member who has undertaken specific training or an outside professional. Secondly, directors should bear in mind that while a corporate secretary should help sharpen their understanding of procedures and legal requirements, board members can neither delegate nor abdicate their oversight and decision-making responsibilities.

306. Increasing professionalism should also embrace how the board selects and evaluates its own members. Effective practices establish, *ex ante*, the appropriate metrics that will be used to evaluate board members.

307. While directors can and should be expected to perform professionally and effectively, common sense and fairness entitle them to compensation that reflects the difficulty, scope and risk associated with their work. This is particularly true as new rules and behavioural norms expand the scope, complexity and potential liabilities of director service. A jurisdiction that imposes substantial liability while also placing arbitrary and low limits on director remuneration will either discourage responsible professionals from serving as directors or encourage them to seek unlawful side remuneration. As a consequence, arbitrary limitations on director remuneration should be removed, but shareholders and regulators should require that companies establish board remuneration with reference to external, market-driven benchmarks for director compensation.

308. Directors should enjoy direct access to company employees and to professionals advising the company in accordance with procedures established by the board or its committees.

309. In practical terms, much of the board's duty to monitor management and operations manifests itself as a responsibility to create and monitor compliance systems. These systems cannot function without the participation of employees at all levels of the company. Directors should ensure that every employee of the company knows the duty that he or she owes to the company. Directors should also ensure that employees at all levels have a means of reporting suspected wrongdoing by supervisors and peers. Finally, directors should have, and take advantage of, direct access to employees at all levels as an independent check on information reported to the board by senior management.[39]

310. Of course, a company's corporate-governance effort involves more than just its formal staff. Traditionally, in Asia, as elsewhere, the company engages outside professionals, at the company's expense, to interpret applicable law, to assess the company's state of compliance and to recommend action. A recent spectacular case of auditor corruption in the United States has highlighted the corporate-governance system's dependence on outside professionals, such as the independent auditor. The recommendation in Chapter IV with respect to establishment and maintenance of high professional standards in the accounting and audit profession must to apply to other professions (law, engineering, etc.) as well.

311. In addition, where the advice of professionals is presented to the board, the board should have direct access to these professionals, be informed of any restrictions imposed by management on the scope of the professionals' inquiry, be informed by the professionals of major considerations and judgements underpinning their conclusions and of any areas warranting further investigation. Board members should also remember that they should not rely on professional advice until they have evaluated it in light of their own experience, judgement and common sense.

312. To raise professional standards, governments, private-sector and international organisations should promote the creation and work of professional associations that will educate and regulate their members. These professional associations should establish contacts with each other and their counterparts outside the Asian region to promote knowledge sharing and adoption of effective practices.

313. Boards should be of a size that permits effective deliberation and collaboration and have adequate resources to perform their work. Directors should devote sufficient time and energy to their duties.

314. Fulfilling aspirations that directors devote sufficient time to their responsibilities involves both time spent in formal meetings and in preparation for such meetings. Across Asia, requirements vary as to the number of board meetings that should take place every year. There is, on the other hand, a clear trend towards smaller boards, although as previously noted, this trend appears driven more by a desire to limit the number of independent directors than to achieve a workable size.

315. Legal and behavioural norms should specify a minimum number of meetings consistent with performance of all board duties. Directors' contracts should specify minimum commitments that should take into account thorough preparation for committee and full-board meetings, as well as interaction with employees and professionals involved with monitoring systems.

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39 . Access to employees should take place pursuant to procedures established by the board or its committees. Such procedures are intended to alleviate concerns that board members will undermine management's authority or erode employee moral. This said, neither should such procedures have the effect (intended or otherwise) of impeding directors' ability to obtain direct and unvarnished information from employees.

316. To encourage directors to devote sufficient time and energy to their work, some jurisdictions establish caps on the number of directorships any one person can hold. In Malaysia, for example, an individual may hold no more than 10 directorships in public companies, and 15 directorships in non-public (or group-subsidiary companies). Individuals in China are limited to five independent directorships in listed companies. In Chinese Taipei, individual directors and supervisors of listed companies are not allowed to hold positions in more than five companies concurrently. Effective practices do not universally incorporate such caps although they can be a useful, though imperfect, means to an end.

317. To make the most of directors' time, board members, particularly non-exective board members, should have allowances for, or access to, staff support.

318. Asian countries should continue to refine the norms and practices of "independent" directors.

319. Potential refinements to effective practices should not distract policy-makers from the fundamental importance, and the fundamental difficulty, of board objectivity and independence. Many Asian corporate-governance frameworks already provide for the appointment of independent directors. However, because controlling shareholders often choose the entire board, the real objectivity and independence, and therefore the real value, of nominally independent directors can be undermined.

320. Roundtable discussants have noted that directors selected by controlling shareholders will likely be under their influence even though such directors may fulfil all formal conditions to be considered "independent directors". Of course, as noted in the Overview of Legal Frameworks and Key Board Practices section of this chapter, finding independent directors who are willing to think and act independently represents an ongoing challenge for corporate-governance systems worldwide. But, the fact that no legal norm for independence will be perfect should not deter the public and private sectors from improving such norms as currently exist. Improvements will not only include more precise definitions of independence, but better disclosure of relationships that candidates have with management and shareholders. In this respect, the obligation to disclose relationships, and the attendant liability for false or misleading disclosure, should be imposed on both the company and the director.

321. On a practical level, companies can appoint persons who are so wholly unrelated to management and controlling shareholders as to be clearly independent, at least at the time of their appointment. Such persons should also, of course, bring considerable knowledge, experience and contacts so that they can contribute to all aspects of the board's activities. It is important to expand the applicable pool of directors, both through education and training, as well as by looking beyond traditional geographic and demographic categories.

322. Independent directors should control matters likely to involve conflicts of interest. Committees are a common mechanism for delegating such control.

323. The OECD Principles state that:

> The board should be able to exercise objective judgement on corporate affairs independent, in particular, from management.
>
> 1. Boards should consider assigning a sufficient number of non-executive board members capable of exercising independent judgement to tasks where there is a

potential for conflict of interest. Examples of such key responsibilities are financial reporting, nomination and executive and board remuneration.

324. Previous sections of this chapter have discussed in some detail what is required for directors to act objectively and independently, not only from management but from controlling shareholder groups. To promote such actions, the OECD Principles recommend the appointment of directors capable of exercising independent judgement. These directors are expected to enhance, in particular, the board's management-monitoring functions. Effective practices on this subject include setting up special committees of the board for matters where management or controlling shareholder groups are likely to have conflicts of interest (e.g. audit, remuneration and board-nomination). In such cases, independent directors should control these committees.[40] Effective practices also frequently vest in independent directors the power to approve related-party transactions involving management or controlling shareholders, as well as other areas of potential conflicts of interest.[41] To foster cohesion and collective responsibility, independent directors should meet regularly by themselves in the absence of management. Where the chairman of the board is an executive or substantial shareholder, the independent/non-executive directors should select a lead independent/non-executive director to chair their meetings.

325. The establishment of board committees can be particularly meaningful where the board is dominated by executive directors, where the chairman of the board is also the CEO, or where the number of directors is large. In Asia, the audit committee is already quite common and is typically mandated for listed companies by law, regulation or listing rules. In contrast, other committees are generally only recommended, with a few exceptions that predominantly involve large companies or banks. In all cases where the board establishes committees, however, such committees should enjoy a formal, written mandate from the full board outlining their responsibilities, authority and resources.

326. Some commentators suggest further augmenting board objectivity and independence by separating the positions of chairman and CEO on the theory that the roles of supervisor (chairman) and supervised (CEO) ought not be combined.[42] Additional suggestions include having non-

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40 . While the general authority to nominate candidates for the board of directors might reside in a nominating committee controlled by independent directors, shareholders representing a reasonable equity interest in the company should also be entitled to propose candidates directly to the shareholder meeting.

41 . For a fuller discussion of related-party transactions, <u>See</u>, Pars. 117-134.

42 . Separating the Chairman and CEO roles has gained popularity in the United Kingdom since it was recommended by the Cadbury Report in 1992. In 2003, the Conference Board, a prominent private-sector group in the United States, recommended that companies choose from among three alternative board structures, all of them a break from the tradition that most American corporations follow:

Alternative 1: The Commission urged companies carefully to consider separating the offices of Chairman on the Board and CEO.

Alternative 2: The roles of Chairman and CEO should be performed by two separate individuals. If the chairman is not independent according to strict stock exchange definitions, a " Lead Independent Director" should be appointed. Non-CEO chairmen should not have any relationships with the CEO or management that compromises the non-CEO chairman's ability to act independently.

Alternative 3: Where the board does not choose to separate the Chairman and CEO positions, or where they are in transition to such separation, a "Presiding Director" position should be established.

Under the above alternatives, the independent chairman, Lead Independent Director or Presiding Director should have ultimate approval over the information flow that goes to the board, board-meeting agendas and board-meeting schedules executive/independent directors constitute a majority of the board and continuously revising the membership of the board. These proposals may achieve greater board independence but possibly at the expense of board insight into, and experience with, the company. Experience with the costs and benefits of the above such proposals where they have been implemented deserve study.

327. Finally, Roundtable experts have noted the particular duties that devolve on non-executive independent directors when control of the company is at stake.[43] Here, since all directors face loss of positions and perks in the event of a successful shift in control, independent directors can find themselves under particular scrutiny to act in the best interests of the company and all its shareholders.

328. The process of electing directors should facilitate a board that represents the interests of all shareholders. The process for achieving such representation may include, *inter alia*, the ability of shareholders to requisition a vote for directors by way of cumulative voting. Where cumulative voting has been selected as the method for electing directors, staggered board terms, and other mechanisms that frustrate cumulative voting, should be prohibited.

329. The simplest promoter of board independence is a balance of interests among directors. This balance can only arise, however, where two or more unrelated groups of shareholders appoint directors, and an accepted method for seeking this balance is cumulative voting for directors.

330. To be effective, cumulative voting requires that a sufficient number of minority votes coalesce around a candidate. In any particular case, the actual distribution of shareholdings, or relations among shareholders, may make this impossible. In addition, minority shareholders must be able to identify jointly acceptable candidates; to do so, they must have sufficient time to cumulate their votes and sufficient freedom to caucus without having their shares aggregated under applicable control tests. Finally, the purpose of cumulative voting can be frustrated through restrictive nomination procedures or staggered board terms (which reduce the number of directors to be elected at any one time).

331. While cumulative voting holds out the promise of greater diversity of opinion and outlook at the board level, with this promise comes greater risk of board deadlock or antagonistic relations between the board and management. Consequently, in identifying the potential benefits of cumulative voting, Roundtable participants have stressed that cumulative voting not be confused with "parliamentary politics" insofar as a representative elected by a particular constituency feels an obligation primarily to represent the interests of that constituency. Rather, Roundtable participants have reiterated that a company director, irrespective of what party or parties nominated or elected him, has a responsibility to serve the interests of the company as a whole and the interests of the shareholders as a class.

332. Legitimate concerns regarding cumulative voting have led to variance in the degree to which individual corporate-governance frameworks have embraced the procedure. Some frameworks mandate such voting for all companies. Others make it optional for the company, while still others

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The ultimate impact of the Conference Board's recommendation remains to be seen. Concerns remain in the US, as well as in other OECD-member countries like France, that mandatorily separating the Chairman/CEO positions risks undermining companies' strategic leadership and accountability and triggering damaging power struggles in companies' uppermost ranks.

43 . Bernard Black, "The Core Fiduciary Duties of Outside Directors," John M. Olin Program in Law and Economics, Working Paper No. 219, presented at the 3rd Asian Roundtable on Corporate Governance, Singapore, available at: www.oecd.org/daf/corporate-affairs/.

mandate it only for companies that have reached a certain size or have publicly listed. Recent Korean experience with cumulative voting suggests that few companies will voluntarily adopt the practice.

333. Corporate-governance frameworks employ a number of different enforcement mechanisms to hold directors accountable and to give shareholders redress for violations of their rights. Some mechanisms (administrative fines, sanctions and orders) require action by regulatory bodies; other mechanisms (civil and criminal penalties, injunctive relief) require a determination of wrongdoing by courts. A few mechanisms, however, such as appraisal rights and cumulative voting, are shareholder-triggered, in the sense that the shareholder may invoke them without a prior finding by a state body (regulatory or judicial).

334. Thoughtful development of a corporate-governance framework will take into account the capabilities of a particular legal system. In one case, a system with highly effective administrative enforcement may rely less on judicial and shareholder-triggered mechanisms. In another case, a system with strong courts may place less emphasis on regulatory and shareholder-triggered mechanisms. Where, in a third case, however, a system is still developing the effectiveness and capacity of its regulators and courts, shareholder-triggered mechanisms can become essential. As a consequence, where this third case obtains, local law or listing requirements should encourage cumulative voting for listed companies by making it the default rule, with individual opt out by supermajority vote of the shareholders. Both Pakistan and another non-OECD-member country, Russia, *mandate* cumulative voting. According to one Asian Roundtable expert with experience in Russia, the result in that country has been considerable diversification of board representation, as well as creation of a focal point for institutional-investor activism. China's Code of Corporate Governance lays out a middle ground by requiring cumulative voting for listed companies that are more than 30% owned by controlling shareholders. The Code further stipulates that this requirement be reflected in the company's articles of association.

335. Of course, where a family or group controls a high percentage of the voting shares, not even cumulative voting can ensure a balance of interests at the board level. One OECD-member country in Asia, Korea, has addressed this situation by partially restricting the voting rights of certain major shareholders in large corporations. Where a Korean company has more than 2 trillion won (US$ 1.54 billion) in assets, shareholders with more than three percent of all voting shares cannot exercise the voting rights of those shares that exceed three percent when voting for non-executive directors who will serve on the audit committee. The practical effects of this rule, which is neither mandated by the OECD Principles nor widely practiced, deserve study.

336. Local law should give directors power to obtain accurate, relevant and timely information from the company.

337. The OECD Principles provide that "board members should have access to accurate, relevant and timely information."

338. Logic suggests that delegation of a duty should confer with it sufficient authority to carry out that duty. In the case of directors, since they are responsible for supervising management, the directors themselves, and not the managers, should determine what information is necessary for such supervision.

339. In Asia, management, sometimes at the behest of controlling shareholders, not infrequently denies directors full and timely access to the information they require to perform their duties. This particularly occurs on board committees involving non-executive directors and prevents them from fulfilling their role. Consequently, boards and members of board committees should have clear and

broad authority to gather information which directors believe is relevant to their work.[44] Board and management procedures should also ensure that such information be supplied well in advance of board and board committee meetings.

44 . The Malaysian KLSE has instituted specific rules stipulating the right of directors to have access to information that is necessary and reasonable for performance of their duties. So long as the determination of “necessary and reasonable” rests with directors or is very liberally interpreted by courts and regulators, such a provision should help provide the kind of information access required for effective board performance.

APPENDIX A: QUICK-REFERENCE TABLES ON CORPORATE-GOVERNANCE FRAMEWORKS IN ASIA

I. / II. Shareholders' rights and equitable treatment[45]

	Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
1. Shareholders' Information													
1.1. What periodic information are listed companies required to provide?													
Annual reports	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Unaudited semi-annual reports	Yes	Yes	Yes	Yes	Yes	Yes	Yes (subject to limited audit)	Yes (cumulative quarterly statements)	Yes	NP	Yes (Audited financial reports)	Yes (for financial institutions)	Yes
Quarterly financial statements	No	Yes	Y/N; yes for Growth Enterprise Market; no for Main Board listed companies	Yes	Yes (for listed companies)	Yes	Yes (for listed companies)	Yes	Yes (if market capitalisation > S$75 million)	Yes	Yes	Yes (audited statements for listed companies)	Yes
Yes 1.2. What information must be contained in the company's annual report? Yes													
General information on the company	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Audited annual accounts	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

[45] Based on information provided to the OECD Secretariat by Roundtable participants.

		Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
	Personal details of company's directors	Yes	Simple introduction	Yes	Yes	Yes	Yes	Names and meetings attended	Yes	Yes	Yes	Yes	Yes	No
	Directors' report on past and future operations	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes, submitted by manageme nt with board approval	Yes	Yes	Yes	Yes	Yes
	Financial status of the company	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	Consolidated financial reports	Non-compliance with existing provisions	Yes (if company is up to disclosure standards)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No, but MinFin regulations are expected
	Information on Corporate Governance	No	Yes	Yes	Yes	NP	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
2. Shareholders' Participation														
2.1. Convening of shareholder meetings														
	Time of notice (days before meeting)	- AGM: 14 days - EGM: 21 days	30 days	- AGM: 21 days - EGM: 14/21 days	21 days for AGM, EGM	28 days for announcem ent, 14 days for invitations	- AGM: 21 days - EGM: 14 /21 days.	21 days for AGM, EGM	15 business days for AGM, EGM	14 / 21 days	14 days	- AGM: 20/30 days - EGM: 10/15 days	7 days, 14 days for certain EGM matters	7 days
	Information contained in the notice	Agenda items, audited accounts for AGM, intentions to propose extraordina ry and special resolutions	Agenda, relevant company documents, accounts, details on auditors, directors	Agenda items, reports and audited accounts, statement explaining rationale of proposed resolutions	Agenda. Reports and accounts, draft resolutions, proxy form, explanatory note on special business	Agenda items, substance/ need for EGM	Agenda, material facts, statements regarding effect of proposed resolutions	Agenda items, statement of material facts in case of special business	Agenda, financial statements, major transaction s, plan of operation, details on officers, directors, auditors	Agenda items, details of proposed resolutions or other business	Agenda, details on directors, candidates for the board and auditors	Agenda items, proxy form	Agenda items, background information, opinions of the board	Agenda, discussion documents for proposed resolutions

		Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
	Thresholds for requesting or convening an extraordinary shareholder meeting	10% to request directors to convene EGM	10% of voting rights to request directors to convene EGM	5% to request directors to convene EGM; if directors refuse, then >½ of the aggregate voting rights of all the requisitionists	10 % of the paid-off share capital carrying voting rights to request EGM	10 % to request EGM	10 % of voting rights or issued and paid up capital	10% of voting rights	None, unless otherwise provided in by-laws approved by shareholders	10 % of paid up capital	3% of voting rights to request directors to convene an EGMNP	3% of outstanding shares	20% of issued shares or 25 shareholders holding 10%	10% of ordinary shares hold for more then 6 month (default-rule)
	Legal minimum quorum requirements	5 persons for public companies (default rule)	None	2 persons	2 persons	50% of voting shares (67% for special resolution)	2 persons	For listed companies, 10 persons representing 25% of voting rights; (proxies possible)	>50 % of outstanding capital stock	2 members	50% of voting shares	50% of voting shares (67% for special resolution)	1st call: 25 persons or 50% of shareholders holding 33 %; 2nd call: none	1st call: 51 % of voting shares, 2nd: 30 %, 3rd none
2.2. What kinds of voting rights may shares have?														
	Non-voting common	Yes	No	No	No	No	No	No	No	No	Yes	No	No (non-voting depositary receipts possible)	No
	Multiple voting rights	Yes	No	No, except for existing companies qualifying under limited grandfathering provisions in the listing rules	No	No	No	No	No	Not for publicly listed companies	No	No	Not for common shares	Yes

		Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
	Removable voting rights	Yes	No	No	No		No	No, but subscribed but unpaid shares may lose right to vote	No	No	Yes	No	No	NP
2.3. Can shareholders vote Yes														
	by proxy	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	by mail	No	No	Yes	Yes	No	No	No	No	Yes	Yes	No	No	Yes
	by telephone / videoconference	No	No	No	No	No	No	No	No	Yes	No	No	No	Yes, if charter provides
	by other means?	No	No	No	No	No	No	No	No	Yes	No	No	No	Yes, if charter provides
2.4. Do shareholders have the right to vote on: Yes, if charter provides														
	Appointment of directors	Yes Ordinary resolution (>50%)	Yes Ordinary resolution (>50%)	Yes Ordinary resolution (>50%)	Yes Ordinary resolution (>50%)	Yes	Yes Ordinary resolution (>50%)	Yes	Yes Ordinary resolution (>50%)	Yes Ordinary resolution (>50%)	Yes Ordinary resolution (>50%)	Yes	Yes	Yes Ordinary resolution (51% majority)
	Removal of directors	Yes Special resolution (75% majority)	Yes	Yes Special resolution (75% majority), to be amended to ordinary resolution	Yes Ordinary resolution (>50%)	Yes	Yes Ordinary resolution (>50%)	Yes	Yes, ≥2/3 of outstanding capital stock entitled to vote	Yes Ordinary resolution (>50%)	Yes Special resolution (67% majority)	Yes (67 % of attending shares for public companies)	Yes Special resolution (75% majority)	Yes Ordinary resolution (51% majority)

		Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
				by >50%										
	Appointment and removal of auditors	Yes Ordinary resolution (>50%)	Yes	Yes Ordinary resolution (>50%)	Yes Ordinary resolution; Special resolution for state-controlled companies	Yes	Yes (>50%; 75% if not proposed in notice)	Yes	Appointment ratified at AGM. Removal: 2/3 of outstanding capital stock	Yes Ordinary resolution (>50%)	Yes Ordinary resolution (>50%)	Yes	Yes Ordinary resolution (>50%)	No (Unless prescribed by company's charter)
	Authorising share capital	Yes Special resolution (amendment of articles)	Yes	Yes Ordinary resolution (>50%)	Yes Special resolution (75% majority)	Yes	Yes Ordinary resolution (>50%)	Yes Ordinary resolution (75% majority)	Yes, 2/3 of outstanding capital stock entitled to vote	Yes Special resolution (75% majority)	Yes Ordinary resolution (>50%)	Yes (67 % of attending shares for public companies)	Yes Special resolution (75% majority)	Yes Special resolution (65% majority)
	Issuing share capital	No (if issuance within authorised capital)	Yes	Yes Ordinary resolution (>50%)	Yes Special resolution (75% majority)	Yes	Yes Ordinary resolution (>50%)	Yes	Yes, 2/3 of outstanding capital stock entitled to vote, where pre-emptive rights are not denied and where there is declaration of a stock dividend	Yes Ordinary resolution (>50%)	Yes Ordinary resolution (>50%)	No	Yes Special resolution (75% majority)	Yes Special resolution (65% majority)
	Dissapplication of pre-emption rights	Yes Special resolution	Yes	Yes, under the listing rules.	Yes Special resolution (75% majority)		NP	Yes Special resolution	Yes, by >50% vote of the board and ≥2/3 of outstanding capital stock entitled to vote	No pre-emption rights for public listed companies	NP	No (pre-emptive rights not always applicable, cf. 4.3)	No pre-emptive rights	No (unless prescribed by company's charter)
	Amendments to company articles or statute	Yes Special resolution (75%)	Yes Special resolution (66%)	Yes Special resolution (75%)	Yes Special resolution (75%	Yes	Yes Special resolution (75%)	Yes Special resolution	Yes, by >50% vote of the board and	Yes Special resolution (75%	Yes Special resolution (67%	Yes (67% of attending shares for public	Yes Special resolution (75%	Yes Special resolution (65%

		Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
					majority)				≥2/3 of outstanding capital stock entitled to vote	majority)	majority)	companies)	majority)	majority)
	Remuneration of board members	Yes Ordinary resolution at AGM	Yes	Yes Ordinary resolution (>50%) at AGM	Yes Ordinary resolution (>50%)		No	Yes, unless articles empower directors	Yes, by >50% vote of the board and ≥2/3 of outstanding capital stock entitled to vote	Yes Ordinary Resolution (>50%)	Yes Ordinary Resolution (>50%)	Yes (>50%)	Yes Ordinary resolution (>50%)	Yes
	Major corporate transactions (acquisitions, disposals, mergers, takeovers)	Yes For sale or disposal of undertaking remitting debt due to a director (Ordinary resolution)	Special resolution (>66%)	Yes, ordinary resolution	Yes Special resolution (75% majority)	Yes	Yes, if transaction > 25% of net tangible assets (Ordinary resolution)	Yes Special resolution	Yes, by >50% vote of the board and ≥2/3 of outstanding capital stock entitled to vote	Yes	Yes Special resolution (67% majority)	Yes (67 % of attending shares for public companies)	Yes, if transaction > 50% of net tangible assets Special resolution (75% majority)	Yes Special Resolution (65% majority)
	Transactions with related parties	Only direct contracts between company and director	Y/N some do not require approval	Yes, if the transaction is above the de minimis limits	Yes	Yes (interested person shall abstain from voting)	Yes Ordinary resolution (>50%); interested person shall abstain from voting	Yes, in case of investment in associated companies (Special resolution)	Ratification when interested director counted in quorum or vote of the board (2/3 majority)	Yes Ordinary resolution (>50%); interested person shall abstain from voting	Disclosed in annual report	No	Yes, if transaction > 10 mil. Baht or 3% of net tangible assets Special resolution	Yes, if contract valued at > 20% of the total value of assets
	Changes to company business or objectives	Yes Special resolution (75 %)	Yes If change to articles is required	Yes (75 %), if requires amendment of the articles	Yes Special resolution (75% majority)	Yes	Yes Special resolution (75% majority)	Yes Special resolution	Yes, by >50% vote of the board and ≥2/3 of outstanding capital stock entitled to	Yes Special resolution (75% majority)	Yes Ordinary Resolution (>50%)	Yes, if this requires an amendment of the articles.	Yes Special resolution (75% majority)	Yes, if this requires an amendment of the articles

	Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
								vote					
2.5. How are votes counted and by whom?	Show off hands or poll, by Chairman of the meeting	Poll, counted by at least two shareholde rs and one supervisor under monitoring of notary public	Show of hands, the Chairman of the meeting is obliged to demand a poll if the results of the vote of hands is different from the proxies in his hands (representi ng 5% or more of the voting rights) Further, shareholde rs can request a poll. Counted by share registrar or auditor	Show of hands counted by Chairman. Shareholde rs (10% of shares or Rp. 50,000) can request a poll		Show of hands, but shareholde rs (10%) can request a poll counted by the Chairman	Show of hands, but shareholde rs can request a poll. Counted by Chairman/ nominee.	Show of hands, poll or other means provided in the by-laws	Show of hands, but shareholde rs can request a poll	Show off hand or poll counted by Chairman of the meeting	Show of hands or poll Board may recommen d but not nominate a monitoring person.	Show of hands or poll, by a person appointed by the Chairman	Depends company charter
2.6. Does law provide for the disclosure of voting-agreements?	No	No	No	No		No	No	Voting trust agreement s are filed with the SEC	No	No	Yes	Material agreement s disclosed in annual report	No
2.7. How may shareholders directly nominate candidates for the board of directors?	No special procedure required	1% of shares for independen t directors, >5% of shares for	5% or 100 members may request appointmen t of a	No special procedure required		Yes, ≥5% of voting rights, or not less than 100 members	Nomination s submitted by candidates (sharehold ers)No	No special procedure required	Shareholde rs holding over 5%	Shareholde rs holding > 1 % of shares over 6 months	No special procedure required	No special procedure required	Shareholde rs holding > 10 % of shares over 6 months

	Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
		other directors	director			holding shares in company with average sum per member not less than RM500 (approx. US$ 130	special procedure required						
2.8. To what extent and how does the board of directors nominate candidates for the board?	No nominations by board of directors	Board of directors can nominate candidates at AGM	Candidates nominated by board of directors	Candidates nominated by board of directors		Nominations usually made by the nomination committee of the board of directors	No nominations by board of directors	Board nominates candidates through Nomination Committee, which must include an independent director	Nominating Committees are usual for public listed companies	Nominating Committees are usual for large companies	Since 5/2003, board of directors can make recommendations	Nominations are usually made by the board of directors	No right to nominate candidates, unless provided in company's charter
2.9. Can shareholders place items on the shareholders' meeting agenda?	Yes, 10% of issued shares required for an EGM	Yes, 5% of shares required	Yes, 5 % shares or 100 members may request a resolution	Yes, if application is made by at least 100 shareholders	Yes, 10 % of shares required	Yes, ≥5% of voting rights, or not less than 100 members holding shares in company with average sum per member not less than RM500 (approx. US$ 130	Yes (circulation shall be made before the meeting)	Yes	Yes	Yes, but must have held 1% of shares for six months	Shareholders may only propose contemporaneous motions at meetings	Yes, 1/3 of issued share capital required	Yes, 10% of shares held for six months required
3. Share in the Profits of the Corporation													

	Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
3.1. Does law or regulations provide for timely payment of dividends to the shareholders?	Dividends payable within 2 months after declaration	Dividends payable within two months after declaration	No Date fixed by board	Dividends payable within 30 days after declaration		Payable within 1 month after book closure, 3 months after declaration	Payable within 45 days after declaration	Cash and stock dividends payable within 18 trading days after record date	No	Dividends payable within one month after their declaration	No Date fixed by board, based on shareholder resolution	Payable within 1 month after declaration	No Date fixed by board
3.2. Body responsible for declaring, approving and issuing dividends:	Declaration and issue: board; Approval: shareholders	Declaration and issue: board; Approval: shareholders	Interim: by board; Final dividends proposed by board must be approved by shareholders. Shareholders can only approve or reject the proposal and cannot set own dividend	Interim: board; Final dividend: shareholders		Declaration and issue by company; approval by shareholders	Shareholders	Cash and property dividend: board; Stock dividend: board declares at ≥2/3 shareholders approve	Shareholders	Shareholders	Shareholders	Interim: board; Final dividend: shareholders	Declaration and issue: board; Approval: shareholders
4. Corporate Control													
4.1. Thresholds for notification in case of substantial acquisition of shares:	None (rules in process of being issued)	5%	5	5%		5%	10%	5% and 10% for non-directors; no threshold for directors	5%	5%	10%	5%	5%
4.2. Thresholds requiring a mandatory offer for all shares at a particular price:	None	30%	30%	15 % (mandatory offer to an extra 20 %)	25%	33%	25%	35% interim	30%; or 1% in any 6-month period if shareholder already owns ≥30%	NP	Acquisition of 20% within 50 days	25%, 50%, 75%	25%

		Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
4.3. Under which circumstances do shareholders have pre-emptive rights to purchase company shares?		Increase in share capital	Options on SPO	Issuance of new shares, under the listing rules	Issuance of new shares		Issuance of new shares offered pro rata to existing shareholders	Issuance of new shares and issuance or disposition of authorised but previously unissued shares belonging to the original stock of the company (offers in proportion to existing shareholders)	Issuance of new or un-issued shares	Approval by shareholders for issue of shares, convertible securities or options		Issuance of new shares, except for qualified acquisitions / warrants, private placement, merger, stock options, public offerings	None	Issuance of new shares (offers in proportion to existing shareholders)
5. Shareholders' Redress														
5.1. How can shareholders seek redress if their rights are violated?														
	Derivative Action	No	No	Yes	Yes (100 shareholders holding 10 % of voting rights)		Yes	No	Yes	Yes	Yes, for shareholders who own more than 1% of outstanding shares	Yes (shareholders holding 3% of shares within 1 year)	Yes (Minimum 5 shareholders or 20 % of shares)	Yes
	Direct individual action	Yes	Yes	Yes	Yes (Company Law Board and Tribunal)		Yes	Yes	Yes	Yes	Yes	Yes	NP	Yes

	Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
Class action/ Minority action	No	No	Yes	Yes (Company Law Board)		Yes, with procedural limitations	Yes	Yes	Yes	No	Yes	In progress (draft bill reviewed by State Council)	No
5.2. Are lawyer contingency fees allowed?	No	No	No	With the permission of the court		No	No	Yes	No	NP	Yes	No	No
5.3. Who pays the legal fees of the prevailing party?	The prevailing party	The losing party	The losing party	The prevailing party		Decided by the court	Decided by court	Decided by court	NP	NP	The prevailing party	The losing party	The losing party
6. Insider Trading													
6.1. Penalties attached to the offence of insider trading:													
Civil liability	NP	Yes, but no detailed regulations	Yes	Yes Penalty up to 3 times of the made profit		Yes Penalty up to RM 500,000 or 3 times made profit	Yes Up to the amount of gain/loss avoided	Yes Up to 3 times the transaction value plus actual damages	Yes, up to 3 times profits obtained or loss avoided, subject to minimum penalties	Yes, up to the value of the shares purchased or sold	Yes Up to 3 times of the amount of the damage	Yes	Yes
Fines	Up to Tk. 5.000 or Tk.100 per day of breach	Up to the value of the shares purchased or sold	Up to HK$ 10 million	Determined by adjudicatin g officer	Up to Rp 15 billion	Minimum fine of RM 1,000,000	Up to 3 times of the gain/loss avoided	Min. fine of P50,000; max. fine of P5 million	Up to S$ 250,000 for individuals, S$500,000 for companies	Up to Won 20 million	Up to NT$ 3 million	Min. Baht 500,000, Max. 2 times of the made profit	From 20-50 million VMD (US$ 1,250-3,125))
Imprisonment	NP	Up to 10 years	Up to 10 years	Up to 3 years	Up to 5 years	Up to 10 years	Up to 3 years	7-21 years	Up to 7 years	Up to 10 years	Up to 7 years	Up to 2 years	NP

		Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
	Others	Cancellation of licenses/ certificates	Restriction on exercise of profession	Restriction on exercise of profession	Restriction on exercise of profession		Actions for recovery and civil penalties by SC		Suspension of registration, Disqualifications	Restriction on exercise of profession	NP	Restriction on exercise of profession	Disqualification	Restriction on exercise of profession
6.2. Bodies or institutions tracking stock-market activity using statistical or computer-based methods:		Stock Exchanges, Electronic Trading System	Stock Exchange Surveillance department	Stock Exchange and Securities & Futures Commission	Stock Exchange/ Securities Exchange and Board of India		KLSE and the SC	SECP, Stock Exchanges	Market Regulation Department of SEC, PSE Market Surveillance Department	Singapore Exchange (SGX)	KSE, KSDA, FSC	SFC, TSE and GTSM	Stock Exchange and the SEC	State Securities Commission, Securities Trading Centre
7. Related party-transactions														
7.1. Does the legal and regulatory framework provide for the disclosure of related-party transactions?		Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
7.2. Must related-party transactions be approved by the shareholders?		No, except direct contracts between companies and their directors	Yes, if value of transaction is >5% of net tangible assets or >30 million RMB	Yes, if above de minimis limits	Yes (with exceptions)	Yes	Yes, if value of transaction ≥5% of net tangible assets	Yes, in case of investment in associated companies	Yes, if interested director counted in quorum or majority vote of the board	Yes, if value of transaction > 5% of net tangible assets	NP	No (only major corporate transactions)	Yes, if transaction > 10 M Baht or 3 % of net tangible assets	Yes, if contract valued at + 20 % of the total value of assets
7.3. Are related persons required to abstain from voting on the transactions?		Yes	Yes	Yes	Yes	Yes	Yes	Yes	No (in practice abstention is common)	Yes	Yes	Yes	Yes	Yes

III. The Role of Stakeholders

	Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
1. Codes of conduct													
1.1. Self-binding instruments applied by companies to protect stakeholder rights:	None	Codes of corporate governance for listed companies in China	Codes of conduct may be issued by companies (no statutory provision)	Recommendations of the Kumar Mangalam Committee Report on Corporate Governance, voluntary code of conducts	By agreement, or per company's articles or code of conduct	Codes of conduct may be issued by companies	Statements of ethics and business practices required by Code of Corporate Governance	Company policies, Manuals of corporate governance and self-rating following SEC policies	Memorandum and articles of association	NP	Corporate Governance Best Practice Principles, Internal company rules following SFC Guidelines	Stock Exchange Guidelines, codes of conduct issued by companies	Working manuals, internal rules
2. Employees' rights													
2.1. What are the rights of employees regarding													
Information on the company	No special rights (public information only)	No special rights (public information only)	No special rights (public information only)	No special rights (public information only)	No special rights (public information only)	No special rights (public information only)	No special rights (public information only)	No special rights (public information only)	No special rights (public information only)	NP	No special rights (public information only)	No special rights (public information only)	No special rights, except annual meeting of employees for state owned enterprises
Collective bargaining	Through registered trade unions or collective bargaining agents	No specific regulations	Through labour unions	Right to collective bargaining	Through labour unions	Through trade unions	No special right	Through labour unions and labour-management councils/committees	No restrictions	Yes	Through employee unions	Through employee committees and unions	Right to collective bargaining
Participation in the board of directors	None	None	None	None	None	None	None	None	None	None	None	None	None

	Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
Consultation	None	Prescribed by Labour Code	None	No special rights	None	Prescribed by the Code of Conduct on Industrial Harmony issued by the Ministry of Human Resources	None	Prescribed by Labour Code	No restrictions	Yes	None	None	None (only in case of divestment of SOEs)
2.2. Can employees participate in the company's profits by													
Share ownership	Yes, but no statutory right	Yes	Yes	Yes	Yes	Yes, but no statutory rights	Yes, but no statutory rights	Yes, but no statutory rights	Yes	Yes	Yes	Yes	Yes
Share options	Yes, but no statutory right	No	Yes	Yes	Yes	Yes, but no statutory rights	Yes, through a scheme approved by SECP	Yes, but no statutory rights	Yes	Yes	Yes	Yes	Yes, available to shareholding employees
Profit sharing schemes	Yes, but no statutory right	No	May be included in employment contract	Yes	Yes	Yes, but no statutory rights	Yes (Companies Profit Participation Act)	Yes, but no statutory right	Yes	NP	Yes	Depends on contractual provisions	Productivity-based bonuses
2.3. Who manages employee pension funds?	Trustees	Social Security Administration	Fund managers/ trustees	Government trustees, Regional Provident Fund Commissioner	State-owned fund, private insurance company or company itself	Employee Provident Fund Board, other governmental pension funds and approved private schemes	Board of Trustees	Either managed in-house or by a third party	The Central Provident Fund (CPF) Board	National Pension Fund and employer	Central Trust Bureau of China	Asset management companies	Vietnam Social Insurance Agency (government-initiated funds)
2.4. What priority do employee wages and benefits have in the event of insolvency	Fourth (after administration costs, receiver's fees, government dues)	Second, after fees and costs of bankruptcy proceeding	Employees' claims come after the costs of insolvency administration	None	Second, after government	Second, after costs and expenses of winding up, including the taxed	Second (after debts owed to government)	Second (after national government taxes)	Before secured creditors	First priority for last three-months wages, accumulated severance	Second (after expenses and debts pertaining to the estate in insolvency)	Among the priority claims under Section 130 of Bankruptcy Code	Second (after fees and costs of bankruptcy proceeding)

	Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
						costs of petitioner, remuneration of liquidator and costs of audit, (after all other secured debts)				payments for last three years and compensation for work related injuries			
2.5. Do employees have access to internal redress mechanisms (mediation/arbitration) in case of violation of their rights?	May be prescribed by statutes or contract	Depends on the company	NP	Yes, Trade Unions / Board of Conciliation	Yes, Labour Unions / Board of Conciliation, or court	May be prescribed by contract	May be prescribed by contract	Yes, HDR, grievance machinery (collective bargaining agreement)	Yes, representation of workers' rights through unions	Arbitration Committee, collective contract with employer	Yes, Labour Dispute Mediation Office, Labour Relations Committee	Depends on the company	Yes, Labour conciliatory councils of companies, Labour office's labour conciliators
3. Creditors' rights													
3.1. Are creditors involved in governance in the context of insolvency?	No	Yes (application to court for appointment of insolvency committee members)	Yes (participation in creditors' meetings, membership in committee of inspection possible)	Y/N (right to initiate process of winding-up of the company)	Yes, through creditors' meeting	Yes (consent of creditors required for arrangement scheme under appropriate company law provisions)	Y/N (courts shall have regard to wishes of creditors or contributories)	Yes (by proper representation or with prior approval in selection of a receiver committee/restructuring)	Y/N (creditors can initiate proceedings to wind up company)	NP	Yes (Creditors meeting may decide on procedure, administration, continuation and discontinuation of bankruptcy)	Yes (vote on composition or reorganisation plan, Creditors' Committee monitors performance of plan administrator and receiver)	Yes (meeting of creditors proposes restructuring solutions and motions on the distribution of assets to the judge)
3.2. How are creditors protected against fraudulent conveyance / insolvent trading in the context of insolvency?	Statutory prohibitions of fraudulent preferences	Statutory prohibitions and insolvency committee	Personal liability of directors and management	Any transfer done within 6 months before winding-up shall be deemed a	Internal control and insolvency committee (curator)	Personal liability of parties to fraudulent conveyances, application to court by	Statutory protection available	Court takes jurisdiction over properties and assets during insolvency proceeding	Protected by criminal sanctions	NP	The trustee in bankruptcy shall apply to the court in cases of insolvent trading	Application to the court, insolvent-trading legislation	Insolvent trading laws prohibit disposals and certain transactions during

	Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
				fraudulent preference		liquidator or creditor							insolvency
3.3. How can creditors seek redress if their rights are violated?	Judicial redress	Judicial redress	Personal liability of officers, promoters, receivers or liquidators towards the company	Criminal prosecution	Judicial redress or arbitration	Judicial redress	Judicial redress	Judicial redress	Seek redress from insolvency administrator and courts	Civil and insolvency law	Trustee may avoid acts done within 6 months after adjudication of bankruptcy	Through Creditors' Committee, Judicial redress	NP

IV. Disclosure and Transparency

	Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
1. Consolidated financial reporting													
1.1. Does law or regulations provide for consolidated financial reporting?	Y/N (only for holding companies)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No, but MinFin regulations are expected
2. Non-financial information													
2.1. Are companies required to disclose information on:													
Corporate governance structures and practices	No	Yes (annual report)	Yes (compliance with Code of best practices)	Yes (quarterly compliance /annual report)	Yes (JSX listing rules)	Yes, compliance with code on corporate governance	Yes	Yes (submit Corporate Governance Manual to SEC)	Yes (annual report)	Yes	Yes (annual report)	Yes (annual report)	No
Education and professional experience of directors and key	No	Simple introduction in annual report	No	Yes (annual report)	Yes, in prospectus and per JSX listing	Yes (profile of directors)	No	Yes (annual report)	Yes (annual report)	Yes	Yes (annual reports and prospectus)	Yes (annual report)	Yes (listed companies)

	Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
executives					rules								
Remuneration of directors and key executives	No	Yes (salary brackets)	Yes	Yes (annual report)	Yes, per JSX listing rules	Yes (range of remuneration of directors)	Yes	Yes (annual report)	Yes (annual report)	Yes	Yes (annual report, financial statements, prospectus)	Yes (annual report)	Yes (listed companies)
Deviations from corporate governance codes	No	No	Yes	Yes (annual report)	Yes, per JSX listing rules	Yes	Yes	Yes, in annual report and evaluation system in Manual	Yes (annual report)	No	Yes (annual reports)	Yes (annual report)	No
Management discussion and analysis (MD&A)	No	Yes	Yes	Yes (annual report)	Yes (annual reports, prospectus)	Yes (chairman, CEO and management)	Yes (directors' report)	Yes (annual and quarterly report)	Yes (annual report)	No	Yes (annual reports, prospectus)	Yes (annual report, quarterly statements)	No
Forward looking statements of the company	No	Yes	Yes (included in MD&A)	Yes (director's report)	Yes (annual report)	Yes (chairman's statement)	Yes (directors' report)	Yes (annual and quarterly reports)	Yes (annual report)	Yes	Yes (in certain cases)	Yes (part of the MD&A)	No
3. Audit/Accounting													
3.1. Are companies required to have their financial statements externally audited?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes (listed, insurance, credit and foreign invested companies)
3.2. How and by whom are external auditors appointed?	By shareholders at AGM	By shareholders at AGM	Nominated by management and approved by shareholders at AGM)	By shareholders	By shareholders or delegated to board	Appointed by shareholders, nominated by the board	By shareholders at AGM	By shareholders at AGM	By shareholders at AGM	By Audit Committee or External Auditor Appointment Committee	By a resolution of the board of directors	By shareholders at AGM upon proposition by board	N/A (special regulations for banks and state-owned companies)

	Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
3.3. To whom do the internal auditors report?	Depends on terms of engagement	Board of directors	NP	Management	Audit Committee (if any), board of directors	Audit Committee	CEO, access to chair of audit committee	To the Board of directors or to the Audit Committee	Audit Committee	Board of directors, shareholders (AGM)	Board of directors and supervisors	Board of directors	Board of Management
3.4. Which rules regulate the audit profession?	Bangladesh Chartered Accountants Order 1973 and following rules and regulations; Bylaws of the Institute of Chartered Accountants (ICAB)	Audit law	Professional Accountants Ordinance (Chap. 50)	Institute of Chartered Accountants of India Act 1949, Companies Act 1956	Directorate General of Financial Institutions under MinFin and Indonesian Inst. of Accountants	By- laws issued by the Council of the Malaysian Institute of Accountants (MIA)	Chartered Accountant Ordinance, 1961; Chartered Accountants By-laws, 1983; Companies Ordinance, 1984	Professional Regulation Laws by the Professional Regulation Commission (PRC) and the Board of Accountancy; SEC Guidelines on Accreditation of External Auditors (effective 6/30/03)	Companies Act, Accountants Act	Act on External Audit of Stock Companies, Act on Public Accountants	Accountant Law, Securities and Exchange Law, and rulings issued accordingly to these laws	Auditing Act, Securities and Exchange Act	1988 Ordinance on Accounting and Statistics, new Law on Accounting and Audit expected by the end of 2003
3.5. Is certification or training of auditors mandatory?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
3.6. Is there a code of ethics relating to the audit profession?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
3.8. Which authorities ensure the review, quality and independence of auditors?	Institute of Chartered Accountants (ICAB) through its committees	CSRC and MOF	Yes (Hong Kong Society of Accountants)	Institute of Chartered Accountants through Accounting Standard Rules	Directorate General of Financial Institutions under MinFin and BAPEPAM (for accountants registered with BAPEPAM)	Yes (Practice Review Committee)	Institute of Chartered Accountants Pakistan (ICAP)	Board of Accountancy, Institute of Certified Public Accountants (PICPA)	Public Accountants Board and SGX	Financial Supervisory Board	Yes (CPA Association, ROC, SFC)	Board of Auditing Practices, SEC, Auditing Ethic Sub-committee	Ministry of Finance, Vietnam Association of Accountants, National Accounting Council

	Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
3.9. Is a rotation of audit firms and auditors mandatory?	No (only for bank companies: every 3 years)	CSRC is preparing a regulation to mandate rotation of auditors, but not of audit firms	No	NP	Yes	No	Yes (every 5 years for listed companies)	Yes (every 5 years, required by corporate governance code)	Yes (every 5 years)	Yes (audit partner may not direct the audit for a listed company for more than four consecutive years)	No (recommended by Best Practice Principles)	No (only for bank companies: every 5 years)	No
3.10. To what extent are national auditing and accounting norms materially divergent from international standards?	23 out of 41 of the IAS	Basic principles are similar to IAS; divergence exists in areas like measurement based on fair market value	Policy of convergence. Remaining areas of divergence currently being addressed	NP	No material divergence	Not materially divergent, national standards follow IAS and GAAP	Conformity (IAS has become part of the law upon notification by SECP)	25 areas of differences, 2003: 11 differences (programmed for adoption in 2005)	Closely aligned	Mixture of IAS and US GAAP	No material divergence	Not materially divergent	Goal of conformity by 2004
3.11. Which body is responsible for development of accounting standards and oversight of accountants?	ICAB (self-regulatory body)	Standards: MOF; Oversight: MOF and CSRC	HKSA (self-regulatory body)	Institute of Chartered Accountants of India (self-regulatory body)	Directorate General of Financial Institutions under MinFin and Indonesian Inst. of Accountants	Standards: Malaysia Accounting Standards Board (MASB), Oversight: Malaysian Institute of Accountants (MIA)	Institute of Chartered Accountants Pakistan (self-regulatory body)	PRC, Board of Accountancy, SEC, PICPA, Accounting Standards Council, Auditing Standards Council	Standards: Council on corporate disclosure and governance Committee, Oversight: Public Accountants Board	Standards: FSC, Korean Accounting Standard Board (KASB), Oversight: SFC	Standards: Financial Accounting Standards Committee (self-regulatory body), Oversight: SFC, CPA Association	Standards: Thai Institute of Certified Accountants and Auditors; Oversight: Board of auditing Practices	Ministry of Finance, Vietnam Association of Accountants (self-regulatory body)
4. Reporting Requirements													
4.1. To what extent do Stock Exchanges require													
Semi-annual reporting	Yes (financial statements)	Yes	Yes	Yes	Yes	Yes	Yes	Yes (cumulative quarterly reports)	Yes	Yes	Yes (audited financial statements)	Yes (financial institutions)	Yes

		Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
	Quarterly reporting	None	Yes	Yes, only for companies listed on Growth Enterprise Market	Yes	Yes	Yes	Yes	Yes	Yes (if market capitalisation exceeds S$75 million)	Yes	Yes	Yes	Yes
	Publication of audited annual reports	Yes (at AGM)	Yes	Yes (4 months after year end for Main Board companies (3 months for Growth Enterprise Market companies) or 21 days before AGM, whichever is earlier)	Yes (6 months after end of fiscal year and 21 days prior to AGM)	Yes	Yes (6 months after the end of the financial year)	Yes	Yes (105 days after the end of the financial year)	Yes (120 days after the end of the financial year)	Yes	Yes (4 months after the end of the financial year)	Yes (120 days after end of year, 60 days for financial statements)	Yes (90 days after the end of the financial year)
	Immediate reporting of price-sensitive information?	Yes (within ½ hour)	Yes (within two days)	Yes (as soon as reasonably possible)	Yes	Yes	Yes (immediate reporting)	Yes	Yes (within 10 minutes, confirmed within 1 day)	Yes (immediate reporting)	Yes	Yes (before trading hours of next day)	Yes (the day on which the event occurs)	Yes (on a real time basis)
4.2. What penalties are attached to the non-compliance with the above-cited prescriptions?		Tk.500.00 per day, de-listing or suspension of trading possible	Criticism by relevant media, temporary suspension of trading	Temporary suspension of dealings	Show Cause notice to the company, suspension or delisting possible	Stock exchange policy	Caution letter, reprimand, fine not exceeding RM 1 million, directions for rectification, conditions for compliance, suspension, de-listing	Reprimand/ delisting by Stock Exchanges, Fine up to Rs100,000 and Rs.1,000 per day	Fines from P50,000 - P500,000, daily fines, suspension and delisting for repeated violations	Reprimand, Fine up to S$250,000, imprisonment up to 7 years, civil penalties	Caution or warning; imprisonment ≤1 year or fine ≤5 million won. False statements: imprisonment <5 years or fine <30 million won	Fine of NT$ 120,000 - NT$ 600,000, suspension of trading or delisting possible	Fine up to 100,000 Baht + 3,000 Baht per day of contravention	Fine from 20-50 million VMD (US$ 1,250-3,125))

	Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
4.3. Is there a central registry for financial and non-financial corporate information, which is readily accessible to shareholders?	Yes (Registrar of Joint Stock Companies and Firms)	No (information kept by company and on SSE website)	Yes, Companies Registry and HKEx website	Yes (Electronic Data Information Filing and Retrieval System)	Yes, under Company registration Law and Capital Market Reference Center and per stock exchange rules	Yes (Companies Commission Malaysia)	Yes, Registrar of Companies	Yes (both in PSE and SEC)	Yes (Registry of Companies and Business, RCB)	Yes (Financial Supervisory Services & Stock Exchange)	Yes (Market Observation System Post System)	No (information kept on SEC and SET websites)	No
4.4. To what extent new technological developments are integrated into the existing disclosure regimes?	None	Electronic filing of disclosure reports	Electronic filings of disclosure reports to HKEx	Electronic Data Information Filing and Retrieval System	Capital market electronic reporting system (in progress)	Posting of corporate announcements on KLSE website	In progress	Electronic corporate disclosure rules for electronic filing approved by SEC	Electronic filings with RCB	Electronic filing of disclosure reports for listed companies	MOPS website, electronic filing	Electronic filing at SEC and SET, documents on SEC and SET websites	Electronic filing for business registration or disclosure of reports

V. The responsibilities of the board

	Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
1. Members of the board													
1.1. Prescribed board structure (unitary/dual board structure):	Unitary	Dual board structure	Unitary	Unitary	Dual board structure	Unitary	Unitary	Unitary	Unitary	Unitary	Modified dual structure	Unitary	Unitary
1.2. Can a dual board structure be established in the articles of association?	Yes (Option not used)	N/A	Yes	NP	N/A	Yes (Option not used)	No	No	Yes (Option not used)	No	N/A	NP	NP
1.3. Minimum/maximum number of directors for listed companies:	Min: 3; Max: None	Min: 5; Max: 19	Min: 2; Max: None	Min: 3; Max: None	Min. 2; Max: None	Min. 2; Max: None	Min: 7; Max: None	Min: 7; Max: 15	Min: 2; Max: None	Min: 3 if total capital ≥500 million Won Max: None	Min: 5 Max: None	Min: 5; Max: None	Min: None; Max: 11

	Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
1.4. Does law require representation of labour unions on the board?	No	No	No	No	No	No	No	No	No	No	No	No	No
1.5. Is cumulative voting for the election of board members permitted?	Yes, if provided for by articles of association	Yes, mandatory of a shareholder owns more than 30% of shares	No	No	Yes, if provided for by articles of association	No	Yes, mandatory	Yes	Yes, if provided for by articles of association	Yes	Yes (default rule)	Yes (default-rule)	NP
1.6. Maximum election term for members of the board:	None	3 years (re-election possible)	None	None	None	3 years	3 years	1 year, unlimited re-election	None	3 years, unlimited re-election	3 years (re-election possible)	3 years (1 year for cumulative voting)	3 years
1.7. Does the regulatory framework permit staggered election terms for board members?	No	No current specific regulation	No	No	NP	Yes, once in every 3 years	No	Not for stock/profit corporations	Yes	Yes	No	Yes, except in case of cumulative voting	Depends on company charter
1.8. Is there a limit to the number of boards on which an individual may serve?	No	No, but max. 6 years service for independent directors on any one board	No	Yes (Max: 15)	No	Yes (listed companies: 10; others: 15)	Yes (Max. 10)	No	No	Max. 2 for non-executive directors	Y/N, maximum of 5 boards for independent directors	No, except for bank directors: 5	No
1.9. Are companies required to disclose the attendance records of board meetings?	No	No	No	Yes	No	No	Yes	Yes	No (recommended best practice)	Yes	No	No (included in SEC guidelines)	No
1.10. What is the minimum number of board meetings to be held per year?	4 (one every quarter)	4	4	4 (one every quarter)	None	None	4 (one every quarter)	12 (monthly, default rule)	None	None	None (6 meetings suggested)	4	4
1.11. Limitations to the appointment of non-residents or foreigners to the board of listed companies:	None	None	None	Approval by Reserve Bank and Department Company of Affairs required	None	None	None	Foreign representation must be in proportion to foreign equity ownership	None	None	None	Yes ½ of board members shall be residents	Yes, only residents are allowed to establish or manage companies

		Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
1.12. What are the rule and procedures for														
	Nominating	Not prescribed by law	Nominated by board of directors, shareholders or supervisory board	Nominated by board of directors or shareholder through resolution in AGM	Application to be filed by candidates 14 days prior to AGM	NP	By nomination committee, if any, or the board of directors, or by shareholder having ≥5% of voting rights, or not less than 100 members holding shares in company with average sum per member not less than RM500 (approx. US$ 130	Creditors and specified institutions may nominate directors to the board	Through the nomination committee, which should include an independent director	NP	Nominated by Nomination Committee (including candidates recommended by major shareholders)	Nomination made at shareholder meetings	Nominated by Nomination Committee or major shareholders	Shareholders holding >10% of shares over 6 month (default rule)
	Electing	Elected by shareholders	Elected by shareholders	Elected by shareholders	Elected by ordinary shareholder resolution	Elected by shareholders	Elected by shareholders	Elected by shareholders	Elected by shareholders	Individually elected by shareholders	Elected by shareholders	Elected by shareholders (cumulative voting)	Elected by shareholders (cumulative or ordinary voting)	Elected by shareholders
	Removing board members?	Extraordinary shareholder resolution (3/4 majority)	No specific regulation	Removal by special shareholder resolution	Removal by ordinary shareholder resolution	Removal by shareholder resolution	Removal by ordinary shareholder resolution	Removal by shareholder resolution	Removal by shareholders (2/3 majority)	Removal by ordinary shareholder resolution (special notice requirement: 28 days)	Removal by shareholders	Removal by special shareholder resolution (2/3 majority)	Removal by special shareholder resolution (75% majority-50% quorum)	Removal by ordinary shareholder resolution (51% majority)

	Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
1.13. Does law require the separation of Chairman and CEO?	No	No	No (except Monetary Authority's rules on Authorised Institution)	No	No	No (recommended by corporate governance code)	No (code of corporate governance requires separate terms of reference)	No	No (recommended best practice)	No	No (recommended Best Practice)	No	No
2. Powers of the board													
2.1. Does the board of directors decide on:													
Appointment and compensation of senior management	No, unless required by articles of association	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Review and adoption of budgets and financial statements	Review of annual audited financial statements	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Prepared by board (reviewed by supervisor)	Yes	No
Review and adoption of strategic plans	No, unless required by articles of association	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Major transactions outside the ordinary course of business	No, unless required by articles of association	Depends on the articles of association	Yes, plus shareholder approval	Yes	Yes, plus shareholder approval	Yes, for substantial transactions	Yes	Yes, plus shareholder approval if > 25%	Yes	Yes	Yes	Yes	Yes
Changes to the capital structure	No, unless required by articles of association	Yes, plus shareholder approval	Yes, plus shareholder approval	Yes	Yes, plus shareholder approval	Yes, with shareholder approval	Yes	Yes, plus shareholder approval	Yes, plus shareholder approval/ court order	Yes	Yes (within the authorised capital)	Yes	NP
Organisation and running of shareholder meetings	No, unless required by articles of association	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Process of disclosure and communications?	No, unless required by articles of association	Yes	Yes	Yes	Yes	Yes	Yes	No (decided by management)	Yes	Yes	Yes	Yes	NP

		Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
	The company's risk policy	No, unless required by articles of association	No specific regulations	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	NP
	Transactions with related parties?	Yes	Yes, if transaction ≤5% of net tangible assets or ≤30 million RMB	Yes, shareholder approval might be required	Yes	Yes, plus independent shareholder approval	Yes, with shareholder approval also required if ≥5% of net assets	Yes	Yes, plus shareholders approve	Yes, plus shareholders approval	Yes	Yes, for acquisition of real properties	Yes	Yes, if > 20% of total assets
3. Board Committees														
3.1. Which board committees must be established under current law or regulations?														
	Audit committees	No	No	Yes	Yes	Yes, per JSX requirements	Yes	Yes	Yes	Yes	Yes (if assets>2 trillion won)	No	Yes	No
	Remuneration committees	No	No	No	Yes	No, but recommended by National Committee on Corporate Governance	No, but recommended by Code of Corporate Governance	No	Yes	No, but recommended best practice	No	No	No (recommended)	No
	Nomination committee	No	No	No	No	No, but recommended by National Committee on Corporate Governance	No, but recommended by Code of Corporate Governance	No	Yes	No, but recommended best practice	Yes (if assets>2 trillion won)	No	No (recommended)	No
	Other committees	None	None	None	Shareholders and Investor Grievance Committee	No, but recommended by National Committee on	As of 6/30/03, banks are required to set up Risk Manageme	None	Stock Exchange: governance committee	None	None	None	Risk management committee (recommended)	Inspection committee in companies with > 11 shareholde

	Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
					Corporate Governance	nt, Remuneration and Nomination Committees							rs
4. Directors' qualification													
4.1. May legal entities serve as directors?	No	No	No	No	No	No	No	No	No	No	Yes	No	NP
4.2. Prescribed minimum/maximum age for directors.	Min: None; Max: None	Min: None; Max: None	Min: 18; Max: None	25-70 (for managing directors)	None	Min: 21; Max: 70 (default rule)	Min: Majority; Max: None	Min: 18 (banks:25); Max: None	Min: 21; Max: None	Min: None; Max: None	Min: 20; Max: None	Min: None; Max: None	Min: Majority; Max: None
4.3. What other requirements must members of the board fulfill?													
"fit and proper test" (i.e. no criminal convictions or prior bankruptcies)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes (financial sector)	Yes	Yes (financial sector)	Yes	Yes	Yes
Minimum education and training	No	No	No	No	No	Yes, KLSE listing rules require mandatory training (which may take place after election to board)	No	Yes (financial sector)	Yes	No	No	No	NP
Professional experience	No	No	No	No	No	Yes	Yes	Yes (financial sector)	Yes	No	No	No	Yes (specific industries)
4.4. Does law or regulations require continuing training for board directors?	No	No	No	No	No	Yes (KLSE listing rules)	No	Only in banking sector	No, but recommended best practice	No	No	No	No
4.5. Does law or regulations provide for certification procedure of board directors?	No	No	No	No	No	Yes, accreditation	No	No	No	No	No	No	No

		Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
4.6. Does the institutional framework provide for voluntary training possibilities for board directors?		No	Yes (Stock Exchange)	Yes (Hong Kong Institute of Directors)	No	Yes	Yes, compulsory and voluntary training by KLSE and SC (via SIDC)	Code of corporate governance requires Orientation Courses for directors	Yes	Yes (Singapore Institute of Directors)	No	Yes (Securities and Futures Institute)	Yes, (Thai Institute of Directors Association)	No
5. Independent directors														
5.1. Does law, regulations or listing rules require the election of independent directors to the board?		No	Yes (SEC Guidelines)	Yes (listing rules)	Yes (1/3 if non-executive chairman, ½ if executive chairman)	Yes, JSX (listing rules)	Yes (2 directors or 1/3 of the board)	No (recommended)	Yes (2 directors or 20% of the board, whichever is lower)	No (1/3 recommended)	Yes (25% of board for listed companies; for companies, at least 3 directors and a majority of the board for banks or companies with assets > 2 trillion won)	Y/N, (listing rules; since 2/2002 for new listing applicants only)	Yes	Yes
5.2. Does the definition of "independence" exclude persons who are														
	Related to management (by blood or marriage)	NP	Yes	Yes	No	No, unless director has interest in company	Yes	Yes	Yes	Yes	Yes	Yes	Yes	N/A
	Related to major shareholders	NP	Yes	Yes	No	No, unless director has interest in company	Yes	Yes	Yes	Yes	Yes	Yes	Yes	N/A
	Employees of affiliated companies	NP	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	N/A

		Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
	Representatives of companies having significant dealings with the company in question	NP	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	N/A
6. Directors' liability														
6.1. May breaches of duty by members of the board generate their individual														
	Civil	Yes	Yes	Yes	No	Yes (possible)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	Administrative	No	Yes	NP	No	Yes (possible)	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes
	Criminal liability?	Yes	Yes	Yes	Yes	Yes (possible)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
6.2. Does law or regulations provide for														
	Individual shareholder suits against the board and management	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes (5% of outstanding shares required)	Yes
	Class action suits against the board and management	No	No	Yes, Order 15, rule 12 of the Rules of the High Court allows representative actions	Yes	Yes	Yes, though subjected to procedural requirements	Yes	Yes	Yes	No	Yes	In progress	Yes
	Derivative suits against the board and management	No	No	Yes, under common law	Yes	Yes, ≥10% of shares are required	Yes	No	Yes	Yes	Yes	Yes	Yes (5% of outstanding shares required)	Yes
	Ombudsman suits on behalf of shareholders?	No	No	No	No	No	Yes, (in limited cases) by relevant	No	Yes	No	No	Yes (Investor Protection Institute)	Yes (Corporate Registrar)	No

	Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
						regulatory authorities							
6.3. To what extent is the board responsible for the financial statements included in the company's annual report?	Responsible for timely submission to general meeting	Criminal liability	Fully responsible	Fully responsible	Fully responsible	Collectively responsible	Fully responsible	Collectively responsible	Certification by directors required	Joint responsibility; Fine of up to 30 million won or up to 3 years imprisonment	Discharged by shareholders, unless unlawful conduct	Liable as far as statement made wilfully or knowingly	Responsible for timely submission to general meeting
6.4. Do insolvent-trading laws apply to directors?	No	No specific regulations	Yes	No specific regulations	Yes	Yes	Yes	NP	Yes	NP	Yes	No	NP
6.5. Is directors/officers liability insurance commonly obtained?	No	No	Yes (for listed companies)	Yes	No	Yes	No	Gaining acceptance	Yes	Yes (for listed companies)	Tendency rising	Yes	No
6.6. In what circumstances is the company prohibited from indemnifying a director?	Breach of duty, breach of trust, negligence, default	In cases of breach of duty prescribed by law, regulation, or article of association	In cases of breach of duty, negligence or default	Actions outside course of employment and director's powers	In cases of negligence, default, breach of duty, breach of trust	In cases of negligence, default, breach of duty, breach of trust	In case of final judgement against the director	When found liable for unlawful acts	In cases of negligence, default, breach of duty, breach of trust	NP	In case of final judgement against the director	None	NP
7. Remuneration of board members													
7.1. Is there a trend towards the use of stock options for directors' remuneration?	No	No	Yes	Yes	Yes	No	No	No	Yes (limitations on the number of options a company can grant)	Yes	Yes (but limited to directors who also act as employees)	Yes (used by 3-5% of listed companies in 2001)	No (only 3 of 20 listed companies use stock-options in 2003)
7.2. Does law or regulations provide for the approval of executive directors' compensation by shareholders?	No	No	Yes	Yes, for Managing Director / Manager, Fulltime Director	Yes	No	No	Yes	Yes	Yes, aggregate amount of compensation, grant of stock options	Yes	Yes	No

	Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
7.3. Does law or regulations require directors to take a portion of their remuneration in company shares?	No	No	No	No	No	No	No	No	No	No	No	No	No
8. Self-dealing transactions													
8.1. Under which circumstances self-dealing transactions must be disclosed to													
The board of directors	Any contract or arrangement in which a director is interested	In case of director's direct or indirect interest in a contract or proposed contract	In case of directors' direct or indirect interest in a contract or proposed contract	All transactions by board members, relatives or major shareholders	All related-party and conflicts of interest transactions	All related-party transactions (as recommended by Code on Corporate Governance)	All related party transactions	All related party transactions	NP	Transactions > 1% of total sales or assets, cumulated transactions > 5 % with same person	In case of personal interest in a matter under discussion at board meeting	Varies from company to company	NP
The shareholders	Loans, guarantees or securities to a director or a company in which a director is interested	In case of director's direct or indirect interest in a contract or proposed contract	If above: (a) HK$ 1M (approx. US$0.125 M); (b) 0.03% of net tangible assets; or (c) 0.01% of total assets (depending on which criterion is adopted)	Transactions by board members, relatives, major shareholders	All related-party and conflicts of interest transactions	All related-party transactions ≥5% of net tangible assets	Investment (including loans, advances, equity,…) in an associated company	All related party transactions	Transaction value (or aggregated annual value) >3% of net tangible assets and above S$100,000	Transactions >1% of total sales or assets, cumulated transactions >5 % with same person	NP	Transactions exceeding 10 mil Baht or 3%of net tangible assets	Transactions valued at > 20% of total value of assets
The Stock Exchange or Securities Commission?	Any contract or arrangement in which a director is interested	All related party transactions	Transactions disclosed to shareholders are disclosed to regulators	No specific regulations	All related-party and conflicts of interest transactions	All related-party transactions	Quarterly returns must be filed with the SECP	All related party transactions	Transaction value (or aggregated annual value) >3% of net tangible assets and above	NP	Disclosure through financial statements and through MOPS for public reporting	Transactions exceeding 1 mil Baht or 0.03% of net tangible assets	Changes in the ownership of related-parties

		Bangladesh	China	HK China	India	Indonesia	Malaysia	Pakistan	Philippines	Singapore	South Korea	Ch. Taipei	Thailand	Vietnam
										S$100,000		companies		
8.5. Under which circumstances self-dealing transactions must be approved by														
	The board of directors	Any contract or arrangement in which a director is interested	All related party transactions	NP	Transactions exceeding a quantified price limit	No specific regulations	Not prescribed	All related party transactions	All related party transactions	NP	Transactions >1% of total sales or assets, cumulated transactions >5 % with same person	NP	All direct or indirect transactions between a director and its company	Related party transactions valued up to 20% of the total value of assets
	The shareholders	Loan, guarantee or security to a director or company in which a director is interested	Transactions above 5% of net tangible assets or 30 million RMB	Yes, if the value of the transactions is above: (a) HK$10 M (approx. US$1.25); (b) 3% of net tangible assets; or (c) 1% of total assets (depending on which criterion is adopted)	None	No specific regulations	Transactions ≥5% net tangible assets plus annual shareholders mandate for recurring transactions	Investment (including loans, advances, equity,…) in an associated company	In case the presence of self-dealing director was needed to obtain quorum or vote on the board	Transaction value (or aggregated annual value) >5% of net tangible assets	Grant of stock options	NP	Transactions exceeding 10 mil Baht or 3%of net tangible assets	Transactions valued at > 20% of total value of assets
	The Stock Exchange or Securities Commission?	Any contract or arrangement in which a director is interested	Some acquisitions and dispositions (before notification to shareholders)	No, only shareholder approval is required	None	No specific regulations	Announcements as required in KLSE listing requirements	None	None	None	NP	NP	None	NP

APPENDIX B: LIST OF ASIAN ROUNDTABLE PARTICIPANTS

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