

## A TALE OF TWO CITIES: BUSINESS TRUST LISTINGS AND CAPITAL MARKETS IN SINGAPORE AND HONG KONG

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### INTRODUCTION

Business trusts have been utilized for over a hundred years in the Anglo-American legal world as an alternative business organizational form to the traditional corporation; for example, they were very strong competitors to the corporation as a way of business organization in early 20th century America (John D. Rockefeller's Standard Oil, the largest oil refiner in the world during its time, was notably organized as a business trust).<sup>1</sup> Academic interest in business trusts flourished as well in the early twentieth century.<sup>2</sup> Numerous civil law countries – including Japan, Korea, and continental European nations – also now have business trust laws.<sup>3</sup> Business trusts emerged out of private trusts<sup>4</sup> and historically were used to reap the benefits of incorporation while escaping certain regulatory and tax requirements that were usually levied against corporations.<sup>5</sup>

To provide a basic definition by way of introduction, business trusts are similar to traditional, private, donative trusts in that certain trustees are given legal title to property owned by the trust; these trustees then manage the property for the trust's beneficiaries who hold title to the property, usually through transferable certificates of beneficial interest. A written declaration, which creates the trust, sets forth the specific details of the trust, such as its terms, the obligations and powers of the trustees, and the precise interests of the beneficiaries.<sup>6</sup> Business trusts were historically governed under traditional common law principles,

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<sup>1</sup> Robert H. Sitkoff, *Trust as "Uncorporation": A Research Agenda*, 2005 U. ILL. L. REV. 31, 32 (2005). See also Sheldon A. Jones et al., *The Massachusetts Business Trust and Registered Investment Companies*, 13 DEL. J. CORP. L. 421, 425-28 (1988) (providing an overview of the historical beginnings of business trusts in Massachusetts).

<sup>2</sup> Id. at 32. Many treatises on business trusts were written. See, e.g., JOHN H. SEARS, *TRUST ESTATES AS BUSINESS COMPANIES* v (2d ed. 1921); SYDNEY R. WRIGHTINGTON, *THE LAW OF UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS* v-vi (2d ed. 1923).

<sup>3</sup> Steven L. Schwarcz, *Commercial Trusts as Business Organizations: An Invitation to Comparatists*, 13 DUKE J. COMP. & INT'L L. 321, 323 (2003).

<sup>4</sup> Tamar Frankel, *The Delaware Business Trust Act Failure as the New Corporate Law*, 23 CARDZOO L. REV. 325, 325 (2001).

<sup>5</sup> Wendell Fenton & Eric A. Mazie, *Delaware Statutory Trusts*, in 2 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, *THE DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS* 19.1-14 (3d ed. Supp. 2012).

<sup>6</sup> See, e.g., *Hecht v. Malley*, 265 U.S. 144, 146-47 (1924) (defining a business trust as "a form of business organization . . . consisting essentially of an arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may from time to time be the holders of transferable certificates issued by the trustees showing the shares into which the beneficial interest in the property is divided. These certificates, which resemble certificates for shares

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which mandated that the trustee have fiduciary obligations to the trust and the beneficiaries; the trustee could not hand over any of his authority over management of the trust's business decisions to third parties. If he did, this would have caused the trust to be seen as an agency instead of the trust (thereby imposing an agency relationship); such a label would also cause the beneficiaries to become liable for the trust's obligations and allow creditors of the beneficiaries to reach into the trust and seize the trust's assets to satisfy the particular beneficiary's obligations. The trustee, in this situation, could also become personally liable for any losses without liability indemnity.<sup>7</sup>

In order to resolve these uncertainties and remove the disadvantages associated with common law principles of trusts, many states in the US have now passed statutes regulating business trusts; therefore, these business trusts are more accurately referred to as statutory business trusts.<sup>8</sup> For example, Delaware passed the Delaware Business Trust Act in 1988,<sup>9</sup> which facilitates the use of business trusts as a form of business organization by eliminating several disadvantages associated with common law principles of trusts. For example, the Act gives both trustor and trustee much leeway in the trust's governing written instrument to define, as they see fit, their responsibilities, liabilities, and how the trust is to be administered.<sup>10</sup> Sections 3805 and 3806, which deal with the critical areas of the rights of beneficial owners and trustees in the trust property and management of the trust, respectively, are all subject to the qualifier “[e]xcept to the extent otherwise provided in the governing instrument of the statutory trust” highlighting the contractual flexibility of the Delaware statutory business trust.<sup>11</sup> The Act also makes clear, as opposed to common law principles, that “[n]o creditor of the trustee shall have any right to obtain possession of . . . the property of the statutory trust” to satisfy obligations of the trustee not related to the statutory trust.<sup>12</sup> The duties and liabilities of the trustee may also be modified by the trust's governing instrument.<sup>13</sup> If one were to summarize the key advantage of the Act in one word, it would be flexibility.

As one can imagine, given the advantages, statutory business trusts have become a significant and popular mode of business organization. For example, in 2000, Delaware had 7,000 active statutory business trusts; by 2007, that number rose to 20,000.<sup>14</sup> In the United States, business trusts have also become a significant tool in financing debt through asset securitization trusts, and are now the primary vehicle for investing pension dollars and structuring mutual funds.<sup>15</sup> As mentioned earlier, other common law and also civil law countries have also adopted business trust statutes, at testament to the growing global popularity of

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of stock in a corporation and are issued and transferred in like manner, entitle the holders to share ratably in the income of the property, and, upon termination of the trust, in the proceeds.”).

<sup>7</sup> Scott E. Waxman, *Alternative Entities: Delaware Statutory Trusts*, POTTER ANDERSON & CORROON LLP (July 1, 2008), available at <http://www.potteranderson.com/publication/delaware-statutory-trusts>.

<sup>8</sup> I will focus on statutory business trusts in this Article, and use “business trust” and “statutory business trust” interchangeably.

<sup>9</sup> See Delaware Statutory Trust Act, DEL. CODE ANN. tit. 12, §§ 3801- 3826 (2011).

<sup>10</sup> Frankel, *supra* note 4, at 326.

<sup>11</sup> See, for example, Del. Code Ann. tit. 12, §§ 3805(a), 3806(a).

<sup>12</sup> *Id.* § 3805(g).

<sup>13</sup> *Id.* at § 3806(a)

<sup>14</sup> Elizabeth Bennett, *Delaware Sees Explosion of Statutory Business Trusts*, DEL. L. WKLY, Oct. 17, 2007, at 3.

<sup>15</sup> Steven L. Schwarcz, *Commercial Trusts as Business Organizations: Unraveling the Mystery*, 58 BUS. LAW. 559, 559-60 (2003).

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business trusts. As a further sign of the importance and growing proliferation of business trusts as a business organization form, the National Conference of Commissioners on Uniform State Laws approved in 2009 a uniform statute, the Uniform Statutory Trust Entity Act, in an effort to promote consistency among varying state statutory treatments of business trusts.<sup>16</sup>

Despite the rise of the business trust form in the United States and indeed around the world, it continues to be understudied and not well-understood in modern corporate legal scholarship.<sup>17</sup> It is also not usually included in law school curriculum or courses on corporate law or even trust law, which continues to be dominated by issues surrounding donative trusts.<sup>18</sup> Despite the business trust's importance in global capital markets,<sup>19</sup> it remains a "woefully under-analyzed and under-appreciated form of business organization."<sup>20</sup> Most existing literature has focused on business trusts predominantly in the American legal context, with an emphasis on analyzing the advantages that business trusts offer for modern commercial transactions;<sup>21</sup> there have also been some empirical studies which have attempted to compare the efficiency of the business trust as opposed to traditional corporate form.<sup>22</sup> Despite the penetration of the business trust form into both common law and civil law foreign jurisdictions, there are far fewer studies that set forth a comparative analysis of business trusts. Indeed, leading business trust scholars, such as Robert H. Sitkoff, have argued that there needs to be more "comparative analysis of trust as a business organization within and without the rest of the common-law world."<sup>23</sup>

Comparative studies that currently do exist generally only use American business trusts as a model to ask what other jurisdictions can learn and gain from the American model,<sup>24</sup> or they do not solely focus on the modern statutory business trust.<sup>25</sup> The general dearth of scholarship on business trusts, especially in a comparative framework, has led Sitkoff to correctly lament that the business trust is "something of an orphan in the domestic [American] legal academy."<sup>26</sup>

This Article thus attempts to adopt the business trust child and to partially fill this void in specifically comparative business trust law research by examining and analyzing busi-

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<sup>16</sup> See Uniform Statutory Trust Entity Act, available at [www.law.upenn.edu/bll/archives/ulc/ubta/2009final.pdf](http://www.law.upenn.edu/bll/archives/ulc/ubta/2009final.pdf); see also Thomas E. Rutledge & Ellisa O. Habbart, *The Uniform Statutory Trust Entity Act: A Review*, 65 BUS. LAW. 1055 (2010). (providing an overview and review of the Uniform Statutory Trust Entity Act).

<sup>17</sup> Numerous law review articles espouse this view. See Sitkoff, *supra* note 1, at 31, 34; Schwarcz, *supra* note 3, at 321; John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165 (1997).

<sup>18</sup> Sitkoff, *supra* note 1, at 48.

<sup>19</sup> Paul B. Miller, *The Future for Business Trusts: A Comparative Analysis of Canadian and American Uniform Legislation*, 36 QUEEN'S L. J. 443, 444 (2011).

<sup>20</sup> *Id.* See also Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434 (1998). For a similar view, see also Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434 (1998).

<sup>21</sup> See, e.g., Langbein, *supra* note 17, at 166.

<sup>22</sup> See, e.g., A. Joseph Warburton, *Trusts Versus Corporations: An Empirical Analysis of Competing Organizational Forms*, 36 J. CORP. L. 183-84 (2010).

<sup>23</sup> Sitkoff, *supra* note 1, at 35.

<sup>24</sup> See, e.g., Schwarcz, *supra* note 3, at 322-25.

<sup>25</sup> See, e.g., MAURIZIO LUPOI, *TRUSTS: A COMPARATIVE STUDY* 122 (Simon Dix trans., 2000); David Hayton, *Principles of European Trust Law*, in *MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW* 21-23 (1999).

<sup>26</sup> Sitkoff, *supra* note 1, at 34.

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ness trust structures in two jurisdictions – Singapore and Hong Kong – to provide a comparative perspective. The obvious question therefore is, of course, why look at Singapore and Hong Kong? First and foremost, these two jurisdictions are arguably at the front line of further empowering business trusts as viable alternatives to other business organizational forms. First, some historical background is needed – Singapore was the first Asian country to introduce the concept of business trusts with the passage of the Business Trusts Act (BTA) in 2004.<sup>27</sup> Hong Kong, in fall of 2011, approved the business trust form in preparation for a business trust listing on the Hong Kong Stock Exchange (HKEx) by PCCW, Hong Kong's dominant telecommunications company.<sup>28</sup> Thus, both Singapore and Hong Kong now not only permit business trusts as a business form, but most significantly, they allow for business trusts to actually list on their respective stock exchanges, the Singapore Exchange (SGX) and HKEx. They are, to my knowledge, the only two main jurisdictions in the world that have really actively promoted and opened their stock exchanges up for business trust listings. Through the example of Singapore and Hong Kong, I hope to address three general questions in which leading business trust scholars like Sitkoff have encouraged more research: what role do business trusts play in other areas of the world; why are business trusts so attractive in these foreign jurisdictions; and, the policy question - how might Singapore and Hong Kong serve as models for other jurisdictions? Despite the novel developments in Singapore and Hong Kong and their significance for the business trust field, based on my research and knowledge, there have been no academic pieces written on business trusts in either Singapore or Hong Kong.

The second reason for focusing on Singapore and Hong Kong lies in their status and importance as leading financial centers in the world – Hong Kong and Singapore are currently ranked respectively as the world's third and fourth leading financial centers (behind London and New York), by the Global Financial Centers Index,<sup>29</sup> and Hong Kong led the IPO market in 2010, beating out New York by almost US\$20 billion in terms of moneys raised.<sup>30</sup> Indeed, the largest IPO in financial history, Agricultural Bank of China's raising of US\$22.1 billion, took place on HKEx (along with some subsequent shares sold in Shanghai).<sup>31</sup> Speaking more generally, because financial centers like Hong Kong and Singapore are in a hotly developing market and region, they are also interesting places to study as they are more on the front, cutting-edge lines of financial regulatory reform and development.

This Article's basic argument is the following: the experience in Hong Kong and Singapore and hype there over business trusts shows that business trusts are gaining some popularity in foreign jurisdictions as important capital-raising vehicles, apart from traditional business trust forms in jurisdictions such as the United States (such as mutual funds and pension funds). As seen through the Singaporean and Hong Kong experiences, when listed on

<sup>27</sup> Business Trusts Act, 2004, c. 31A (Sing.).

<sup>28</sup> Fox Hu & Mark Lee, *Richard Li's PCCW Said to Win Approval for First Hong Kong Business Trust*, BLOOMBERG (Sept. 8, 2011), <http://www.bloomberg.com/news/2011-09-09/richard-li-s-pccw-said-to-win-approval-for-first-hong-kong-business-trust.html>.

<sup>29</sup> Global Fin. Centres Index [GFCI], GFCI 10 Report (September 2011), available at <http://zyen.com/PDF/GFCI%2010.pdf>.

<sup>30</sup> *Hong Kong leads IPO Race for Second Year*, AFP (December 12, 2010), <http://www.asiaone.com/Business/News/Story/A1Story20101212-252305.html>.

<sup>31</sup> *Agricultural Bank of China Sets IPO Record as Size Raised to \$22.1 Billion*, BLOOMBERG (Aug. 15, 2011), <http://www.bloomberg.com/news/2010-08-15/agricultural-bank-of-china-sets-ipo-record-with-22-1-billion-boosted-sale.html>.

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public stock exchanges, business trusts arguably offer numerous advantages, namely: greater distributions to the beneficiaries, since distributions can be made out of cashflows rather than accounting profits); more funding opportunities (through listing); increased investor liquidity; and the asset owner's ability continue to exercise control over the trust's assets, to name a few. The control advantage is especially important, as Singapore and Hong Kong currently do not permit dual class stock structures – thus, business trusts offer management a suitable alternative to raise capital while maintaining control. Therefore, the business trust form, as seen through Singapore and Hong Kong's examples, do generate some corporate governance concerns, some of which may have been exaggerated; excitement and hype over the business trust and business trust listings as capital-raising vehicles should also be somewhat tempered by the fact that not all companies would be able to take advantage of the business trust form and its benefits. Ultimately, however, Singapore (and Hong Kong, which is still finalizing its business trust listing regulatory regime) can serve as potential models for empowering business trusts as an alternate corporate form.

This Article proceeds as follows: Part 1 analyzes the business trust legal regime in Singapore (because essentially no scholarship has been written on Singapore business trusts, a fair amount of laying out the law will be required) and also discusses and evaluates the corporate governance concerns associated with Singapore's business trust regulatory regime; Part 2 discusses developments in Hong Kong's business trust legal regime as seen through PCCW's recent business trust spinoff; and Part 3 provides a general, broader analysis of Singapore and Hong Kong's business trust schemes and a comparison between business trusts and dual-class structures, as well as a discussion of the possible utility of Singapore and Hong Kong's business trust listing scheme in the United States.

### PART 1: BUSINESS TRUSTS IN SINGAPORE

#### **Basic Regulatory Framework of Business Trusts**

By way of introduction, Singapore's legal system<sup>32</sup> is based on English common law traditions and practices;<sup>33</sup> the Application of the English Law Act mandates that English common law that was part of Singaporean law before November 12, 1993 "shall continue to be part of the law of Singapore," subject to modification depending on the particular "circumstances of Singapore and its inhabitants."<sup>34</sup> The Constitution of the Republic of Singapore is the supreme law of the land, and any laws enacted by the Singapore Parliament (which is elected by general election every five years)<sup>35</sup> are void and null to the extent they are inconsistent with the Constitution. Thus, Singapore offers us a way to increase our understanding of business trusts in another common law, Anglo-American jurisdiction.

There are numerous ways to start a business in Singapore, including creating a limited liability company, a representative office, a general partnership or limited liability partnership, a sole proprietorship business, and of course, a business trust.<sup>36</sup> Business trusts in

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<sup>32</sup> KEVIN YL TAN, THE SINGAPORE LEGAL SYSTEM (2d ed. 1999).

<sup>33</sup> Shari Rasnayagam, *Singapore*, in A LEGAL GUIDE TO DOING BUSINESS IN THE ASIA PACIFIC 316 (Albert Vincent Y. Yu Chang & Andrew H. Thorson eds., 2010).

<sup>34</sup> Application of English Law Act, Ch. 7A, § 3(1)-(2) (1994).

<sup>35</sup> Rasnayagam, *supra* note 33, at 316.

<sup>36</sup> *Id.* at 316-17.

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Singapore may be registered with the Monetary Authority of Singapore (MAS), Singapore's central bank and financial regulatory authority; they however *must* be registered if they wish to eventually contemplate a listing on SGX.<sup>37</sup> Hence, as this Article specifically looks at the innovation of business trust listings, I will focus on registered business trusts. Registered business trusts are governed by the MAS under the Business Trusts Act, which came into force on October 2004. Like in Delaware, Singapore's business trusts are initially created through a written declaration – a trust deed, which must set forth some of the following items: defining the property and purpose of the trust; the business to be carried out under the trust; particulars regarding the remuneration of the trustee-manager and how such remuneration is to be paid; procedures for winding up the business trust, if applicable; the duties of the trustee; and the entitlements of the trust's beneficiaries.<sup>38</sup>

The BTA definition of business trust is also similar to the definition in the US legal context. In Singapore, a business trust is defined as a trust established in respect of any property with certain characteristics, including: 1) the purpose of the business trust is to enable the unitholders (i.e., beneficiaries), who hold units (i.e., shares in the beneficial ownership in the trust property of the business trust) are allowed "to participate in or receive profits, income or other payments or returns arising from the management of the property or management or operation of a business;" 2) "unitholders of the trust do not have day-to-day control over the management of the property;" the property of the trust is carried out by a "trustee-manager."<sup>39</sup> The trustee-manager must be a Singapore registered company whose sole business is management and operation of the trust.<sup>40</sup> He has statutory duties to "at all times act honestly . . ." and in the best interests of the unitholders of the business trust as a whole, and should there be a conflict of interest, he must put the unitholders' interest as a whole over his own.<sup>41</sup> A director, officer, and agent of the trustee-manager also has certain duties – he, like the trustee-manager, must also "act honestly and exercise reasonable diligence in the discharge of the duties of his office" and also give priority to the interests of all unitholders as a whole over the interests of the trustee-manager; in addition, he must take "all reasonable steps to ensure that the trustee-manager discharges its duties" as set forth in the BTA.<sup>42</sup> These BTA-mandated statutory duties of the directors, officers, and agents of the trustee-manager override any conflicting duty of directors under section 157 of the Singapore Companies Act,<sup>43</sup> a testament to Singapore's desire to regulate business trusts under the BTA entirely separately from other pieces of corporate law legislation.<sup>44</sup> It is important to note that certain trusts do not qualify as business trusts and are thus not subject to regulation under the BTA (for example, trusts not engaged in business, or trusts where "each of the unitholders carries on a business other than investment business and enters into the trust solely incidental to that other business").<sup>45</sup> Thus, to summarize the basics, registered business trusts in Singapore are statutory – investors (unitholders) hold units rather than shares, and the property (assets) of the business trust are held by the trustee-manager for their benefit. The unitholders have an

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<sup>37</sup> BTA, *supra* note 27, at Part II, § 3(1).

<sup>38</sup> *Id.* § 28.

<sup>39</sup> *Id.* § 2.

<sup>40</sup> *Id.* § 6.

<sup>41</sup> *Id.* § 10.

<sup>42</sup> *Id.* § 11(1).

<sup>43</sup> Singapore Companies Act, Ch. 50, Pt. V, § 157 (2006).

<sup>44</sup> Business Trusts Act, *supra* note 27, § 11(3).

<sup>45</sup> *Id.* sch. 1.

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economic interest in the business trust, but they do not have rights in the trust's actual assets.<sup>46</sup>

One major advantage of business trusts in Singapore is that the trustee-managers have the right to declare distributions of, as briefly mentioned above, "profits, income or other payments or returns" to the unitholders of the registered business trust's property.<sup>47</sup> As the broad language indicates, distributions can be made out of any operating cashflows, giving the business trust more flexibility than corporations, since corporations are limited to distributing dividends out of accounting profits only. In other words, even if the business trust has a net loss, it could still make distributions.<sup>48</sup> Besides enjoying these distributions, unitholders themselves are protected, enjoying limited liability; the BTA makes clear that unitholders essentially "shall not be liable to contribute to the registered business trust or in respect of any debts" of the trustee-manager.<sup>49</sup> Furthermore, similar to the Delaware Statutory Trust Act,<sup>50</sup> the BTA unequivocally prohibits creditors of unitholders of the registered business trust in question from seizing the business trust's property.<sup>51</sup> Thus, these asset protection provisions, coupled with the opportunity to receive a higher return through distributions on their investments are, as one can imagine, quite appealing to investors; the business trust and its sponsor, at the same time, can also partake of greater access to capital through listing on SGX.

However, how can we ensure that the business trust will not go bankrupt if keeps making distributions? Distributions must be made only with a written resolution of the board of directors of the trustee-manager and signed by at least two of the directors, affirming that the board is reasonably satisfied that after making the distribution, the trustee-manager can fulfill any liabilities of the registered business trust.<sup>52</sup> In order to prevent collusion between the trustee-manager and the board, or between the board and the trustee-manager's shareholders, the BTA mandates that more than 50% of the board must be independent of any management and business relationship with the trustee-manager, and at least 1/3 of the board must be independent from any management and business relationship with every substantial shareholder (as defined under the Singapore Companies Act)<sup>53</sup> of the trustee-manager. Furthermore, an audit committee must be established to oversee financial disclosures; such a committee must be comprised of at least three directors independent from management and business relationships with the trustee-manager, and the majority must be independent from any management and business relationship with every substantial shareholder.<sup>54</sup> There are also other disclosure requirements, such as disclosure of directors' interests and certain transactions.<sup>55</sup> Some of these are in fact higher corporate governance standards than those imposed on traditional corporations listed on SGX.<sup>56</sup>

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<sup>46</sup> Jake Robson & Daniel Yong, *Singapore Business Trusts*, NORTON ROSE LLP (Sept. 1, 2010), <http://www.nortonrose.com/knowledge/publications/29416/singapore-business-trusts> .

<sup>47</sup> Business Trusts Act, *supra* note 27, § 33(1). *See also id.*

<sup>48</sup> Robson & Yong, *supra* note 46.

<sup>49</sup> Business Trusts Act, *supra* note 27, § 32(1).

<sup>50</sup> *See* Delaware Statutory Trust Act, DEL. CODE ANN. tit. 12, § 3805 (2011).

<sup>51</sup> Business Trusts Act, *supra* note 27, § 34.

<sup>52</sup> *Id*§ 33.

<sup>53</sup> Singapore Companies Act, Ch. 50, Pt. V, § 81 (2006).

<sup>54</sup> Business Trusts Act, *supra* note 27, § 15.

<sup>55</sup> *Id.* §§ 12-13.

<sup>56</sup> Robson & Yong, *supra* note 46. The Code of Corporate Governance governs independence requirements of listed companies on SGX. The Code was first issued by the Singapore Corporate Governance Committee in the

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Still, it should be noted that the written certification requirement by the trustee-manager's board of directors was chosen by MAS over a more laborious and stringent proposed net asset test, after the solicitation of public comments from various corporations, individuals, and banks – a testament to Singapore's desire to arguably promote business trusts as much as possible by making it easier for trustee-managers to make distributions to investors. In MAS Consultation Paper 15-2003, which initially laid out a proposed regulatory framework for business trusts before the BTA was passed in 2004, MAS had originally proposed that distributions could be made to unit holders only if the directors of the trustee-manager were satisfied on reasonable grounds that after making the distribution: 1) the business trust's property value would exceed the liabilities (including contingent liabilities) incurred by the trustee-manager in its capacity as trustee-manager for that business trust (i.e., a net assets test) and 2) that the trustee-manager could pay such liabilities in the normal course of business as they fall due.<sup>57</sup> After soliciting public comments, respondents (which included the Law Society of Singapore, Association of Banks in Singapore, Deutsche Bank AG, Price-waterhouseCoopers, and Morgan Stanley) argued that this test would be too burdensome, requiring business trusts to undertake regular revaluation of assets and liabilities each time a distribution was made; others argued that the net assets test was misleading and moot in some cases, as businesses in certain industries with strong cash flows would be able to support high debt financing even without a vigorous asset base.<sup>58</sup> Following these comments, MAS eliminated the net asset test, agreeing that valuation of the assets in question could be problematically difficult, as historical cost might not reflect their value in use or future cash flows to be derived for a continuing business.<sup>59</sup> Instead, the certification requirement was established, as well as mandating that the trustee-manager send to all unitholders of the business trust (among other things) a copy of the written certification by the board of directors and a written statement disclosing the distribution policy and how the amount was derived.<sup>60</sup>

Thus, this section has attempted to lay out the basic regulatory framework for business trusts in Singapore. To summarize, it would be useful to provide a diagram of the basic structure and parties involved in the formation of a listed business trust in Singapore.<sup>61</sup>

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spring of 2011; compliance with the Code is not strictly mandatory, but the Listing Rules of SGX require that all listed companies disclose their corporate governance practices in their annual reports and explain any deviation from the Code, if applicable. Thus, for all practical purposes, listed companies seek to adhere with the Code. HANS TJO, PRINCIPLES AND PRACTICE OF SECURITIES REGULATION IN SINGAPORE (2004). A revised version of the Code was issued in July 2005. Monetary Authority of Singapore [MAS], *Code of Corporate Governance*, available at [http://www.mas.gov.sg/fin\\_development/corporate\\_governance/code\\_of\\_corporate\\_governance.html](http://www.mas.gov.sg/fin_development/corporate_governance/code_of_corporate_governance.html). The Code requires that “independent directors mak[e] up at least one-third of the Board” and defines “independent director” as a person who has “no relationship with the company, its related companies or its officers . . . .” Code of Corporate Governance 2005, § 2.1 (2005), available at [http://rulebook.sgx.com/en/display/display\\_main.html?rbid=3271&element\\_id=5885](http://rulebook.sgx.com/en/display/display_main.html?rbid=3271&element_id=5885). The BTA, as mentioned in text of the Article, requires that at least a majority of the board is independent.

<sup>57</sup> Monetary Authority of Singapore [MAS], *Public Consultation on Regulation of Business Trusts*, at 19-20, Consultation Paper 15-2003 (Dec. 10, 2003), available at [http://www.mas.gov.sg/resource/publications/consult\\_papers/2003/Regulation%20of%20BT\\_Consultation%20Paper.pdf](http://www.mas.gov.sg/resource/publications/consult_papers/2003/Regulation%20of%20BT_Consultation%20Paper.pdf).

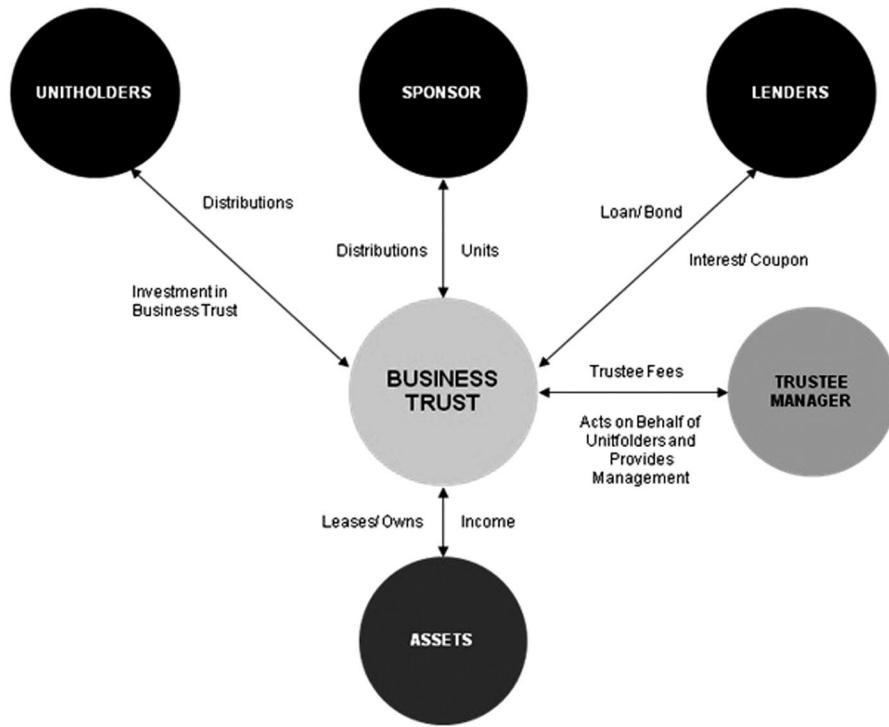
<sup>58</sup> MAS, *Consultation on Regulation of Business Trusts – MAS' Response to Feedback Received* (Jul. 2004), available at [http://www.mas.gov.sg/publications/consult\\_papers/2004/Response\\_to\\_Feedback\\_BT\\_Public\\_Consultation.html](http://www.mas.gov.sg/publications/consult_papers/2004/Response_to_Feedback_BT_Public_Consultation.html).

<sup>59</sup> *Id.*

<sup>60</sup> Business Trusts Act, *supra* note 27, § 33(2)(a).

<sup>61</sup> This diagram is taken from the SGX website. See *Business Trusts*, SINGAPORE EXCHANGE, [http://www.sgx.com/wps/portal/sgxweb/home/listings/listing\\_products#panelhead2](http://www.sgx.com/wps/portal/sgxweb/home/listings/listing_products#panelhead2).

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Here, the sponsor company (usually a controlling shareholder of the trustee-manager, as we will see in a later section of the Article when we discuss specific listed business trusts in Singapore) often purchases units itself in the business trust and contributes capital to the business trust, which in turn manages certain assets (property) for the benefit of the unitholders, who invest in the trust. The business trust makes distributions to the unitholders and the sponsor (if the sponsor owns units in the business trust). Lenders may also be involved to contribute capital to the trust, and the trustee-manager manages the business trust and its assets, and in return, receives fees for its services.

### Criticisms and Benefits of Business Trusts in Singapore

One major criticism of Singapore's business trust regime is a corporate governance critique,<sup>62</sup> namely, concerning the BTA's provision on removal of the trustee-manager. The trustee-manager may be only removed by unitholders, and a resolution to remove the trustee-manager must be approved by 75% or more of the unitholders of the business trust in question,<sup>63</sup> a rather high voting threshold; this high percentage has been justified by MAS as reaching the "right balance between the need to guard against frivolous removal of a trustee-

<sup>62</sup> One of the leading critics has been David Webb, a corporate governance activist based in Hong Kong, who has been quoted in numerous media outlets, including the *Financial Times*. See, e.g., Rahul Jacobs, *PCCW Seeks 'Business Trust' Listing for Unit*, *FINANCIAL TIMES* (March 21, 2011), <http://www.ft.com/intl/cms/s/0/a65f086-53cf-11e0-a01c-00144feab49a.html>. For an article critical of the BTA, see David Webb, *HPH Trust is no Loss to HK*, *WEBB-SITE.COM* (Jan. 21, 2011), available at <http://webb-site.com/articles/hutchport.asp>.

<sup>63</sup> Business Trusts Act, *supra* note 27, § 20.

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manager and the need to provide sufficient rights to unitholders to remove the trustee-manager.”<sup>64</sup> The concerns over the trustee-manager’s ability to easily entrench itself seems to be amplified by the predominant structure that business trusts that have listed in Singapore have chosen to use.

There are currently ten (10) listed business trusts in Singapore (as of May 14, 2012); Pacific Shipping Trust, which was Singapore’s first listed business trust, delisted from SGX on March 8, 2012 – however, I will still include Pacific Shipping Trust in my analysis below, as its original business trust structure is germane to the Article.<sup>65</sup> Therefore, the eleven (11) business trusts in Singapore to be analyzed are: 1) Pacific Shipping Trust (listed on May 26, 2006; delisted on March 8, 2012),<sup>66</sup> the first business trust to be listed in Singapore, established with the goal of giving the public the opportunity to invest in container vessels chartered to liner operations for liner trade and/or feeder trade;<sup>67</sup> 2) CDL Hospitality Business Trust (HBT) (listed on June 12, 2006),<sup>68</sup> involved in the business of hospitality and hospitality-related development projects and acquisitions, as well as serving as “a master lessee of last resort for a REIT which owns several leading hotels in its portfolio;”<sup>69</sup> 3) CitySpring Infrastructure Trust (listed on February 12, 2007),<sup>70</sup> the first infrastructure business trust registered with MAS, with an objective of investing infrastructure assets (its initial portfolio of assets made up of 100% of the City Gas Trust, the sole producer/retailer of town gas and sole user of low-pressure piped town gas network in Singapore, as well as 70% of SingSpring Trust, the sole supplier of desalinated water to Singapore’s water agency);<sup>71</sup> 4) First Ship Lease Trust (listed on March 27, 2007),<sup>72</sup> “another shipping trust engaged in the business of providing leasing services via bareboat charter to the international shipping industry and owning and investing in that industry’s lease assets (such as long-term bareboat charters of a broad range

<sup>64</sup> MAS, *Consultation on Regulation of Business Trusts – MAS’ Response to Feedback Received*, *supra* note 58.

<sup>65</sup> *Current List of Registered Business Trusts*, MAS (May 14, 2012), [http://www.mas.gov.sg/legislation\\_guidelines/business\\_trust/sub\\_legislation>List\\_of\\_Registered\\_Business\\_Trust.html](http://www.mas.gov.sg/legislation_guidelines/business_trust/sub_legislation>List_of_Registered_Business_Trust.html).

<sup>66</sup> *Id.*

<sup>67</sup> *Pacific Shipping Trust Prospectus*, 1 (2006), [http://info.sgx.com/webipo.nsf/96feb765c2b96486482574da0024288d/62f56668d04605ac4825732300039fda/\\$FILE/Ascendas%20Clean%20Prospectus%20-%20FINAL.pdf](http://info.sgx.com/webipo.nsf/96feb765c2b96486482574da0024288d/62f56668d04605ac4825732300039fda/$FILE/Ascendas%20Clean%20Prospectus%20-%20FINAL.pdf). Note that in October 2011, Pacific Shipping Trust’s sponsor proposed de-listing the Trust. *Pacific Shipping Trust to De-List*, NEXTINSIGHT (Oct. 5, 2011), <http://www.nextinsight.net/index.php/story-archive-mainmenu-60/912-2011/4409-pacific-shipping-trust-to-de-list-yzj-buys-more-shares-zhongmin-opens-mall>. On November 17, 2011, Pacific Shipping Trust announced it had received in-principle approval from SGX for its voluntary delisting. Carine Lee, *Pacific Shipping Trust Receives In-Principle Approval to Delist*, THE BUS. TIMES, Nov. 17, 2011. The delisting was concluded on March 8, 2012; Pacific Business Trust became the first business trust in Singapore to be delisted and privatized. SGX, Announcement – Compulsory Acquisition of Units and Voluntary Delisting of Pacific Shipping Trust, (March 5, 2012), available at [http://info.sgx.com/webcoranncaath.nsf/VwAttachments/Att\\_A5E029C7FF62FC64482579B8003B1D7F/\\$file/PST\\_Delisting\\_Announcement.pdf?openelement](http://info.sgx.com/webcoranncaath.nsf/VwAttachments/Att_A5E029C7FF62FC64482579B8003B1D7F/$file/PST_Delisting_Announcement.pdf?openelement).

<sup>68</sup> *Current List of Registered Business Trusts*, *supra* note 65.

<sup>69</sup> CDL Hospitality Business Trust, Prospectus 3 (July 10, 2006) [hereinafter CDL Hospitality Prospectus], available at [http://info.sgx.com/webipo.nsf/96feb765c2b96486482574da0024288d/68c822f91fd32c15482571a7002776a9/\\$FILE/cdl\\_10\\_July\\_2006.pdf](http://info.sgx.com/webipo.nsf/96feb765c2b96486482574da0024288d/68c822f91fd32c15482571a7002776a9/$FILE/cdl_10_July_2006.pdf).

<sup>70</sup> *Current List of Registered Business Trusts*, *supra* note 65.

<sup>71</sup> CitySpring Infrastructure Trust, Prospectus 1 (Jan. 30, 2007) [hereinafter CitySpring Prospectus], available at [http://info.sgx.com/webipo.nsf/ddd103e44c41ff09482574da0023f8d9/17b86c01f1c8f26b48257273002b7e43/\\$FILE/CitySpring\(30%20Jan\).pdf](http://info.sgx.com/webipo.nsf/ddd103e44c41ff09482574da0023f8d9/17b86c01f1c8f26b48257273002b7e43/$FILE/CitySpring(30%20Jan).pdf).

<sup>72</sup> *Current List of Registered Business Trusts*, *supra* note 65.

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of commercial ocean vessels to customers);<sup>73</sup> 5) Rickmers Maritime (listed on May 4, 2007),<sup>74</sup> a shipping business trust engaged in the business of owning containerships and chartering them to container liner shipping companies under long-term charters, as well as building their fleet through acquisitions;<sup>75</sup> 6) Ascendas India Trust (listed on August 1, 2007),<sup>76</sup> the first Singapore-listed Indian property trust with a portfolio composed of information technology parks in Bangalore, Chennai, and Hyderabad<sup>77</sup> engaged in the business of owning income-producing real estate used as business space in India as well as acquiring and developing land to be used as business space while holding onto these properties after they are completed;<sup>78</sup> 7) Indiabulls Properties Investment Trust (listed on June 11, 2008),<sup>79</sup> a property trust (similar to Ascendas) engaged in the business of investing in income-producing office space in India, acquiring and developing office space in India and holding such properties after they are completed, and investing in connected real estate assets;<sup>80</sup> 8) Treasury China Trust (listed on June 21, 2010),<sup>81</sup> a property trust engaged in the business of owning and investing in income-producing office, retail, and industrial real estate (as well as hotels and serviced apartments) in China, as well as acquiring and developing commercial real estate land in China;<sup>82</sup> 9) K-Green Trust (listed on June 29, 2010),<sup>83</sup> a green-environmental infrastructure trust, designed to offer investors the opportunity to invest in “green” infrastructure (such as waste management, wastewater treatment, and renewable energy initiatives) in Singapore and around the world, and to also acquire “green” infrastructure assets;<sup>84</sup> 10) Perennial China Retail Trust (listed on June 9, 2011),<sup>85</sup> Singapore’s Main Board-listed first pure-play Chinese retail development trust, engaged in the business of investing in, owning, and developing land, uncompleted developments, and income-producing real estate in the PRC (similar

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<sup>73</sup> First Ship Lease Trust, Prospectus 1 (Mar. 19, 2007) [hereinafter First Ship Prospectus], available at [http://info.sgx.com/webipo.nsf/96feb765c2b96486482574da0024288d/53558e3085124630482572a600006cce/\\$FILE/FSL%20Trust%20prospectus.pdf](http://info.sgx.com/webipo.nsf/96feb765c2b96486482574da0024288d/53558e3085124630482572a600006cce/$FILE/FSL%20Trust%20prospectus.pdf).

<sup>74</sup> *Current List of Registered Business Trusts*, *supra* note 65.

<sup>75</sup> Rickmers Maritime, Prospectus 1 (Apr. 24, 2007) [hereinafter Rickmers Prospectus], available at [http://info.sgx.com/webipo.nsf/96feb765c2b96486482574da0024288d/d29da3763974f73e482572c8002117c1/\\$FILE/Rickmers\\_Sgp\\_Prospectus\\_24Apr.pdf](http://info.sgx.com/webipo.nsf/96feb765c2b96486482574da0024288d/d29da3763974f73e482572c8002117c1/$FILE/Rickmers_Sgp_Prospectus_24Apr.pdf).

<sup>76</sup> *Current List of Registered Business Trusts*, *supra* note 65.

<sup>77</sup> Ascendas Rolls Out India Property Trust, HINDUSTAN TIMES, July 25, 2007, <http://www.hindustantimes.com/Indians-Abroad/IndiansAbroadNewsyoucanuse/Ascendas-rolls-out-India-property-trust/Article1-238614.aspx>.

<sup>78</sup> Ascendas India Trust, Prospectus 1 (July 24, 2007) [hereinafter Ascendas Prospectus], available at [http://info.sgx.com/webipo.nsf/96feb765c2b96486482574da0024288d/62f56668d04605ac4825732300039fda/\\$FILE/Ascendas%20Clean%20Prospectus%20-%20FINAL.pdf](http://info.sgx.com/webipo.nsf/96feb765c2b96486482574da0024288d/62f56668d04605ac4825732300039fda/$FILE/Ascendas%20Clean%20Prospectus%20-%20FINAL.pdf).

<sup>79</sup> *Current List of Registered Business Trusts*, *supra* note 65.

<sup>80</sup> See Indiabulls Properties Investment Trust, Prospectus 1 (June 2, 2008) [hereinafter Indiabulls Prospectus], available at [http://info.sgx.com/webipo.nsf/96feb765c2b96486482574da0024288d/b49689bbc0251edc4825745d001b20cb/\\$FILE/IPIT%20Final%20Prospectus%20dated%202008.pdf](http://info.sgx.com/webipo.nsf/96feb765c2b96486482574da0024288d/b49689bbc0251edc4825745d001b20cb/$FILE/IPIT%20Final%20Prospectus%20dated%202008.pdf).

<sup>81</sup> *Current List of Registered Business Trusts*, *supra* note 65.

<sup>82</sup> Treasury China Trust, Introductory Document 1 (May 21, 2010) [hereinafter Treasury China Prospectus], available at [http://info.sgx.com/webipo.nsf/96feb765c2b96486482574da0024288d/bd20185ae87954c74825772e00178d06/\\$FILE/P.%20Zuma%20\(Treasury%20China%20Trust\)%20-%20Intro%20Doc%20dated%2021%20May%202010.pdf](http://info.sgx.com/webipo.nsf/96feb765c2b96486482574da0024288d/bd20185ae87954c74825772e00178d06/$FILE/P.%20Zuma%20(Treasury%20China%20Trust)%20-%20Intro%20Doc%20dated%2021%20May%202010.pdf).

<sup>83</sup> *Current List of Registered Business Trusts*, *supra* note 65.

<sup>84</sup> K-Green Trust, Introductory Document 1 (May 31, 2010) [hereinafter K-Green Prospectus], available at [http://info.sgx.com/webipo.nsf/96feb765c2b96486482574da0024288d/b8a08403db59b5eb48257737000aaa42/\\$FILE/SCR1004003\\_Proj\\_Emerald\\_ID\\_CLEAN\(0020\)Final.pdf](http://info.sgx.com/webipo.nsf/96feb765c2b96486482574da0024288d/b8a08403db59b5eb48257737000aaa42/$FILE/SCR1004003_Proj_Emerald_ID_CLEAN(0020)Final.pdf).

<sup>85</sup> *Current List of Registered Business Trusts*, *supra* note 65.

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to the business objectives and fields of Treasury China Trust);<sup>86</sup> and finally (and arguably the most famous), 11) Hutchison Port Holdings (HPH) Trust (listed on March 18, 2011),<sup>87</sup> the largest IPO in Singapore's history (raising an estimated US\$5.8 billion)<sup>88</sup> and the first publicly traded container port business trust in the world, engaged in the business of investing in, developing, operating, and managing deep water container ports in the Pearl River Delta, as well as engaging in certain port complementary services such as trucking and warehousing.<sup>89</sup>

Are the corporate governance criticisms levied against Singapore's business trust regulatory regime justified? As a first step to answer this question, I have reviewed all of the above eleven SGX business trusts' prospectuses, and first, they all are indeed structured in such a way where the trustee-manager is controlled directly or indirectly by the sponsor company, which provides funding and capital to the trust (in many cases, the trustee-manager is the direct or indirect wholly-owned subsidiary of the sponsor).<sup>90</sup> This of course gives the sponsor control over the trustee-manager, the trustee-manager's board of directors, and the business trust, leading some to worry that other unitholders will have little to no say in the administration of the business trust, since they do not elect the trustee manager's board of directors. Furthermore, having reviewed all of the prospectuses, I have confirmed that business trust listing transactions in Singapore have all been structured in such a way where public and institutional investor unitholders will hold far less than 75% of the units,<sup>91</sup> and in nine out of the eleven analyzed Singaporean listed business trusts, structured in such a way where the sponsor will, even with the unit offerings to public and institutional investors, still control

<sup>86</sup> See Perennial China Retail Trust, Prospectus 1 (May 27, 2011) [hereinafter Perennial China Prospectus], available at [http://info.sgx.com/webipo.nsf/96feb765c2b96486482574da0024288d/4f61ca0b1c3b6de6482578a100018879/\\$FILE/PCRT%20Final%20Prospectus.pdf](http://info.sgx.com/webipo.nsf/96feb765c2b96486482574da0024288d/4f61ca0b1c3b6de6482578a100018879/$FILE/PCRT%20Final%20Prospectus.pdf).

<sup>87</sup> *Current List of Registered Business Trusts*, *supra* note 65.

<sup>88</sup> The HPH Trust IPO beat out SingTel's S\$4.0 billion listing in 1993 to become the largest IPO in Singapore's history. *Hutchison Port Holdings Trust launches S'pore's largest IPO*, CHANNELNEWSASIA.COM (Singapore), Mar. 7, 2011 [hereinafter Hutchison], <http://www.channelnewsasia.com/stories/singaporebusinessnews/view/114825/1/.html>.

<sup>89</sup> HPH Trust, Prospectus 1 (Mar. 7, 2011) [hereinafter HPH Prospectus], available at [http://info.sgx.com/webipo.nsf/96feb765c2b96486482574da0024288d/bd55f4b9e6ed34184825784d00202c88/\\$FILE/HPH%20Trust%20Final%20Prospectus.pdf](http://info.sgx.com/webipo.nsf/96feb765c2b96486482574da0024288d/bd55f4b9e6ed34184825784d00202c88/$FILE/HPH%20Trust%20Final%20Prospectus.pdf).

<sup>90</sup> Ascendas Prospectus, *supra* note 78, at 28 (explaining that Ascendas India Trust's trustee-manager is, by chain, indirectly wholly-owned by its sponsor); CDL Hospitality Prospectus, *supra* note 69, at 25 (explaining that CDL Hospitality trustee-manager is a wholly-owned subsidiary of the sponsor); CitySpring Prospectus, *supra* note 71, at 7 (explaining that CitySpring trustee-manager is wholly owned by the sponsor); First Ship Prospectus, *supra* note 73, at 8 (explaining that First Ship trustee-manager is wholly owned by the sponsor); HPH Prospectus, *supra* note 89, at 11 ("[HPH] Trustee-Manager is an indirect wholly-owned subsidiary of [the parent company]"); Indiabulls Prospectus, *supra* note 80, at 16 (explaining that Indiabulls trustee-manager is indirectly wholly-owned by the sponsor); K-Green Prospectus, *supra* note 84, at 8 (explaining that K-Green trustee-manager is wholly-owned by the sponsor); Pacific Shipping Prospectus, *supra* note 67, at 9 (explaining that Pacific Shipping trustee-manager is wholly-owned by the sponsor); Perennial China Prospectus, *supra* note 86, at 20 (explaining that Perennial China trustee-manager is direct, wholly-owned subsidiary of the sponsor); Rickmers Prospectus, *supra* note 75, at 12 (explaining that Rickmers trustee-manager is wholly owned by the sponsor); Treasury China Prospectus, *supra* note 82, at 21 (explaining that Treasury China trustee-manager is indirect wholly-owned subsidiary of the sponsor).

<sup>91</sup> Ascendas Prospectus, *supra* note 78, at 74 (explaining that sponsor holds 17% of units, public and institutional investors hold 56.4% without over-allotment option (OAO) and 62% with OAO); Perennial China Prospectus, *supra* note 86, at 85 (public and institutional investors hold 50.2% of the units, sponsor holds 3.7%). But note that in *Perennial's* case, the rest of the units are held by cornerstone investors which most likely would be closely aligned with the sponsor. See Perennial China Prospectus, *supra* note 86, at 91.

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greater than 25% of the units after the offering;<sup>92</sup> these structural methods thereby hinder the other unitholders' ability to remove the trustee manager as they will not have the requisite BTA-mandated 75% of votes to initiate the removal. Therefore, it is very common to see, listed as a risk factor in the business trust listings prospectuses, language akin to the following: "It is difficult to remove a trustee-manager of a registered business trust."<sup>93</sup>

I question, however, whether such criticism is truly warranted – while it is true that these sponsor, parent companies do exercise considerable control and influence, it seems to me that investors can always simply not buy the units. Those who are more concerned about shareholder activism issues will stay away from business trust unit listings, while others, such as institutional investors and hedge funds, may not be as concerned and thus may be more willing to purchase the units. Business trusts represent only one product out of many on the Singapore stock exchange; the market seems perfectly capable of drawing those investors who would most value an investment in business trusts and who are therefore not that concerned with corporate governance issues.

Furthermore, such criticism is based on an assumption that unitholders want to or will want to overthrow the trustee-manager – this assumption, however, may not be entirely accurate. First, business trusts are only one investment product on the market, and so investors who are more pro-active in corporate governance matters or who want to have the power to remove corporate officials will most likely not invest in business trusts, so there is a self-selecting and self-excluding mechanism naturally built into the market. Thus, those who enter into investments in the business trust are arguably less likely to remove a trustee-manager, and they probably have little reason to do so – in fact, the difficulty of removing a trustee-manager may be seen as a benefit to the investment – it allows the sponsor and trustee-manager more discretion to undertake long-term business developmental plans to try and make the trust more profitable without worrying about short-term unitholder tempers or backlash. Especially in the industries represented in the motley of Singapore's current listed business trusts – infrastructure, shopping, and real estate – which necessarily involve long-term business planning, illiquid assets, and most importantly, professional expertise, this discretion is even more important and valued by investors.

And, from the perspective of the entities forming the business trust, this corporate governance criticism may also very well be an advantage to the business trust form – indeed, from the perspective of companies looking to perhaps spin-off part of their operations into an independently listed business trust, one of the advantages of Singapore's business trust regime is precisely that the sponsor (parent company) can still exercise control over the trustee-man-

<sup>92</sup> CDL Hospitality Prospectus, *supra* note 69, at 69 (explaining that sponsor and its subsidiaries hold 39.1% of the units, while public and institutional investors hold 60.9%); CitySpring Prospectus, *supra* note 71, at 38 (explaining that sponsor owns, through wholly-owned subsidiaries, 28.5% of the units, assuming over-allotment option (OAO) was not exercised, and 21.4%, assuming over-allotment option was exercised); First Ship Prospectus, *supra* note 73, at 8 (explaining that sponsor holds 32% of units assuming OAO not exercised and 25% if exercised); HPH Prospectus, *supra* note 89, at 69 (explaining that the sponsor holds 38.0% of units, assuming OAO is not exercised); Indiabulls Prospectus, *supra* note 80, at 55 (explaining that sponsor holds indirect interest of 42.8% of units); K-Green Prospectus, *supra* note 81, at 8 (explaining that sponsor holds 49% of the units); Pacific Shipping Prospectus, *supra* note 67, at 36 (explaining that sponsor holds 34.1% of units, subject to OAO); Rickmers Prospectus, *supra* note 75, at 145 (explaining that sponsor owns 28% without OAO and 25.7% of units with OAO); Treasury China Prospectus, *supra* note 82, at 91 (explaining that sponsor holds about 33.9% of units).

<sup>93</sup> See CitySpring Prospectus, *supra* note 71, at 38, and Pacific Shipping Prospectus, *supra* note 67, at 32.

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ager and the business trust and the assets the business trust controls. This ties in with another advantage of the business trust form – it has simply one single, responsible player in the trustee-manager. Business trusts also allow sponsors to extract new sources of capital and encourage investment in otherwise illiquid assets (note in the eleven business trusts analyzed above, all of them are in infrastructure, real estate, or shipping trusts). Furthermore, as opposed to REITs, business trusts have no gearing (leverage) limits, an advantage for the sponsor.<sup>94</sup> There are also certain tax benefits for business trusts in the shipping and infrastructure sectors.<sup>95</sup> All of these benefits, coupled with the ability of the trust to distribute cash flows with little restrictions, add to the appeal of business trusts.

To conclude, Part I has attempted to lay out Singapore's regulatory regime for business trusts, introduced and examined Singapore's listed business trusts, and analyzed the advantages and criticisms of business trusts in Singapore. We now proceed to look at the situation in Hong Kong in Part II, before tying both Hong Kong and Singapore together and doing a final, combined analysis.

## PART II: HONG KONG

Hong Kong previously disallowed business trusts and business trusts listings, but the authorities there have recently had a change of heart. More broadly, the concept of the business trust as a corporate and investment vehicle has been a hot issue in Hong Kong ever since Li Ka-shing (coined by locals as "Superman" given his influence and power in the city<sup>96</sup>) eschewed his home city (as Hong Kong did not allow business trust listings earlier this year) and decided in January 2011<sup>97</sup> to list Hutchison Port Holdings Ltd. (first discussed in Part I of this Article), a subsidiary of his massive Hutchison Whampoa empire,<sup>98</sup> as a business trust in Singapore, eventually raising an estimated US\$6 billion in the process.<sup>99</sup> This, to date, is the largest IPO in Singapore's history.<sup>100</sup> Since then, many Hong Kong government officials have made approval of business trusts a priority in the city's financial policy agenda, arguably spurred on in no small part by the Hong Kong – Singapore rivalry as competing, leading financial centers. For example, Paul Chan Mo Po, a member of the Legislative Council, previously remarked with concern that Hong Kong had already lagged behind Singapore with re-

<sup>94</sup> Genevieve Cua, *Reit or Business Trust?*, SMART MONEY, April 30-May 1, 2011, at 30.

<sup>95</sup> Robson & Yong, *supra* note 46.

<sup>96</sup> MICHAEL SCHUMAN, THE MIRACLE: THE EPIC STORY OF ASIA'S QUEST FOR WEALTH (2009), as reprinted in Michael Schuman, *The Miracle of Asia's Richest Man*, FORBES, Feb. 24, 2010, <http://www.forbes.com/2010/02/24/li-ka-shing-billionaire-hong-kong-richest-opinions-book-excerpt-michael-schuman.html?boxes=Home> pagelighttop. Li Ka-shing is something of a legend in Hong Kong, with media outlets reporting on everything from his successful business to his choice of frugal shoes and watches. *Id.*

<sup>97</sup> Tan Shih Ming & Ding Qilin, *Hutchison Whampoa's Latest Move Seen as a Boost for Business Trust Market in Singapore*, XINHUA News, Jan. 30, 2011, [http://news.xinhuanet.com/english2010/indepth/2011-01/30/c\\_13714043.htm](http://news.xinhuanet.com/english2010/indepth/2011-01/30/c_13714043.htm).

<sup>98</sup> Jonathan Kwok, *Hutchison Port Trust Launches S'pore IPO*, STRAIT TIMES, March 8, 2011, available at <http://www.thejakartaglobe.com/business/hutchison-port-trust-launches-spores-biggest-ipo/427358>.

<sup>99</sup> Polly Hui, *Hong Kong Expedites Business-Trust Listing Plan*, WALL ST. J., May 18, 2011, <http://online.wsj.com/article/SB10001424052748703421204576330902787391900.html>.

<sup>100</sup> Hutchinson, *supra* note 88.

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gards to REITs, and was “losing” to Singapore with regards to business trusts.<sup>101</sup> Julia Leung Fung-Yee, Under Secretary for Financial Services and the Treasury, assured investors and the Hong Kong public in April 2011 that the government was taking steps to study how to best streamline secondary listing procedures and develop business trusts to keep Hong Kong financially competitive.<sup>102</sup>

Hong Kong has now approved business trusts and business trust listings, namely, for PCCW’s spinoff business trust (called the HKT Trust), although the generally applicable rule-framework for future listings have not yet been released; discussions with market practitioners and other parties about future business trust listing legislation and HKEx listing rules are still continuing, but HKEx plans to release the finalized regulatory package governing business trust listings in as early as July 2012.<sup>103</sup> Critics such as David Webb declared that Hong Kong had lowered its standards in an effort to attract business and business trust listings, arguing a race-to-the-bottom concern.<sup>104</sup> The spinoff of PCCW’s telecommunications business (which includes fixed-line, broadband Internet, and mobile phone services)<sup>105</sup> as a business trust<sup>106</sup> has garnered significant media and political attention especially after the transaction was finally approved by the HKEx on June 2, 2011;<sup>107</sup> HKEx had previously rejected PCCW’s proposed spinoff back in April 2011.<sup>108</sup> Headed by Richard Li, the son of Li Ka-shing, PCCW plans to retain roughly 60 to 63% control of the telecommunications business after the spinoff.<sup>109</sup> The business trust, as well as stapled securities comprised of a unit in the trust and the holding company, would be listed on the Main Board; 5 to 10 percent of the stapled securities would be distributed via a bonus issue to PCCW shareholders, while up to 30% of the offering was planned to made available to shareholders first on a preferential

<sup>101</sup> *Hong Kong Legislative Council to Follow-Up on Proposed Business Trust Legislation* (商業信託[無法]立會跟進), ORIENTAL DAILY (Hong Kong), Jan. 21, 2011, [http://orientaldaily.on.cc/cnt/finance/20110121/00202\\_019.html](http://orientaldaily.on.cc/cnt/finance/20110121/00202_019.html).

<sup>102</sup> *Julia Leung: is Studying the Development of the Business Trust the Government the Hebei Simplify the Listing Process* (梁鳳儀：正研發展商業信託 港府冀簡化第二上市程序), SING TAO DAILY, Apr. 18, 2011, <http://news.singtao.ca/vancouver/2011-04-18/finance1303106801d3134932.html>.

<sup>103</sup> Alert by Julianne Doe & Lawrence Cheng, *Hong-Kong-Introducing Business Trusts and Stapled Securities*, SNR DENTON, (Nov. 29, 2011)(follow “news & insights” hyperlink then follow “alerts” hyperlink then follow “show all” hyperlink) available at <http://www.snrdenton.com>; Lucy McNulty, *HKEx Announces Business Trust Plans*, IFLR, May 12, 2011, available at <http://www.iflr.com/Article/2823630/Exclusive-HKEx-announces-business-trust-plans.html>.

<sup>104</sup> See Rahul Jacob, *HK under Pressure to allow Business Trusts*, FINANCIAL TIMES (Hong Kong), Apr. 4, 2011, [www.ft.com/cms/s/0/6913030c-583f-11e0-9b8a-00144feab49a.html](http://www.ft.com/cms/s/0/6913030c-583f-11e0-9b8a-00144feab49a.html).

<sup>105</sup> Joshua Fellman & Mark Lee, *PCCW Wins Approval in Hong Kong for Business Trust Spinoff: Shares Surge*, BLOOMBERG-NEWS, (June 3, 2011), <http://www.bloomberg.com/news/2011-06-03/pccw-wins-h-k-approval-for-business-trust.html>.

<sup>106</sup> Donny Kwok, *PCCW gets OK for Business Trust Spinoff*, REUTERS, June 3, 2011, available at <http://www.reuters.com/article/2011/06/03/pccw-idUSL3E7H239X20110603>.

<sup>107</sup> HKEx, *Announcement Under Rule 13.09(1) of the Listing Rules, Proposed Spin-off and Separate Listing of the Telecommunications Business – Possible Major Transaction, 1,8, PCCW LIMITED ANNOUNCEMENT*, (Sep. 8, 2011), available at [http://www.pccw.com/staticfiles/PCCWCorpsite/About%20PCCW/Investor%20Relations/Announcements%20%20Notices/2011/Sep/04e-2011.09.08%20\(Rule%202013.09\(1\)\).pdf](http://www.pccw.com/staticfiles/PCCWCorpsite/About%20PCCW/Investor%20Relations/Announcements%20%20Notices/2011/Sep/04e-2011.09.08%20(Rule%202013.09(1)).pdf).

<sup>108</sup> *Id at 3.*

<sup>109</sup> See HKEx, *Announcement Under Rule 13.09(1) of the Listing Rules – Revised Web Proof Information Pack and Preliminary Indicative Offer Price Range for Share Stapled Units Under the Global Offering, 2,4,6, (Nov. 9, 2011) available at <http://www.hkexnews.hk/listedco/listconews/sehk/2011/1109/LTN20111109009.pdf>*

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basis.<sup>110</sup> It was originally estimated that PCCW would raise approximately HK\$4-5 billion<sup>111</sup> from the spinoff; it plans to use the proceeds to reduce the debt of its telecommunications group and to fund further development of its growth businesses.<sup>112</sup> The company also claimed that the trust will result in higher valuation, attracting investors who desire stable and steady dividend distributions.<sup>113</sup>

PCCW eventually raised HK\$9.3 billion after the IPO launched on November 23, 2011, after selling units near the bottom end of a marketed share price range; many commentators pointed out the deal drew lacklustre interest – despite offering a close to a 9% dividend yield, HKT still struggled to attract investors.<sup>114</sup> HKT made its trading debut on HKEx on November 29, 2011 and faced further struggles, closing at HK\$4.55 per share, a little bit above the IPO price of HK\$4.53; it had offered 2.05 billion units priced at the bottom of a range of HK\$4.53 to HK\$5.38.<sup>115</sup> Alex Arena, executive director at HKT Trust, sought to reassure investors in a recent news interview that HKT would generate stable returns.<sup>116</sup>

The HKT Trust is structured in a way, similarly to business trusts in Singapore, to leave the parent company with absolute control over the trustee-manager; in HKT Trust's case, the trustee-manager is wholly owned by PCCW.<sup>117</sup> The trustee-manager would also be difficult to remove; as set forth in the trust-deed, at least 50% of registered unitholders must pass a resolution to remove the trustee-manager,<sup>118</sup> and HKT Trust is majority-controlled by PCCW.<sup>119</sup> Control, in other words, is firmly in the hands of the Li family. For this particular spinoff transaction, PCCW adopted and HKEx approved, as mentioned above, a stapled security structure, adopted from Australia's framework for stapled securities.<sup>120</sup> Generally speaking, stapling is when two or more securities are combined together and traded together, allowing the investor to own two or more securities which are in turn usually bound together under one single vehicle; in Australia, stapled securities consist of a share-unit in a listed company (the stapled security's legal entity exists in this share) and a unit in a unit trust (not an independent legal entity and created by trust deed).<sup>121</sup> This allows for steady distributions to investors as the dividends from the share-units are paid out by the listed company's earnings and profits, while the trust unit's dividend distribution can be paid out from the listed company's cash flow.<sup>122</sup> By requiring investors to hold both, there are certain advantages –

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<sup>110</sup> HKEx, *supra* note 107, at 1-2.

<sup>111</sup> Donny Kwok, *supra* note 106.

<sup>112</sup> HKEx, *supra* note 107, at 1-2.

<sup>113</sup> Joshua Fellman and Mark Lee, *supra* note 105.

<sup>114</sup> Fox Hu, *PCCW Raises \$1.2 Billion in Hong Kong Business Trust IPO*, BLOOMBERG-NEWS, (Nov. 23, 2011), <http://www.bloomberg.com/news/2011-11-23/richard-li-s-pccw-raises-1-2-billion-from-trust-ipo-at-low-end-of-range.html>.

<sup>115</sup> See Elzio Bareto & Lee Chyen Yee, *UPDATE 2-Flat HK Debut for PCCW Telecoms Spin Off*, REUTERS, (Nov. 29, 2011), <http://www.reuters.com/article/2011/11/29/pccw-hktrust-debut-idUSL4E7MT0VM20111129>.

<sup>116</sup> Mark Lee & Susan Li, *PCCW's HKT Trust Will Generate Stable Returns, Arena Says*, BLOOMBERG-NEWS, (Nov. 29, 2011), <http://www.bloomberg.com/news/2011-11-29/pccw-s-hkt-trust-will-generate-stable-returns-for-investors-arena-says.html>.

<sup>117</sup> See *HKT Trust Web Proof Information Pack* (2011), at 4, available at <http://www.hkexnews.hk/listedco/listconews/sehk/2011/1129/LTN20111129463.PDF>.

<sup>118</sup> *Id.* at 60.

<sup>119</sup> *Id.* at 197.

<sup>120</sup> Doe, *supra* note 103.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

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the parent company can work for the benefit of the unitholders and not just their own original shareholders; furthermore, investors can enjoy a two-for-one deal, which not only gives them more shares but diversifies their investment and reduces liquidation risk – if one issuer winds up, this does not affect the other issuer entity. There may also be certain tax advantages, since companies and trusts are taxed differently and therefore stapling can serve the purpose of merger but with these tax benefits.<sup>123</sup> In PCCW's spinoff case, unitholders hold stapled securities which are composed of three components: 1) a unit in the HKT Trust; 2) a beneficial interest in a specifically identified ordinary share in HKT Limited, the listed company and also controlled by PCCW, and 3) a preference share in HKT Limited which is stapled to the unit.<sup>124</sup> These three components are all traded as one and have a single price quotation; as in the Australia case, steady distributions to investors are more likely as the ordinary shares will entitle investors to dividend distributions in HKT Limited, the unit in HKT Trust will entitle investors to distributions from the trust, and the preference shares give unitholders some rights over common, ordinary stockholders in HKT Limited.<sup>125</sup> Thus, there is, as in the Singaporean case, considerable appeal to the business trust.

Currently, to my knowledge, as of June 6, 2012, there are no other specific business trusts which are planned to be listed in Hong Kong in the immediate horizon. The regulatory debate and hype continue as legislation and listing rules are finalized for future Hong Kong business trusts.

### **PART III: BUSINESS TRUSTS IN SINGAPORE AND HONG KONG – COMBINED ANALYSIS**

Having analyzed the development of business trusts in Singapore and Hong Kong separately, putting them together and taking a more macroscopic view, what points might we make?

There are, of course, continued concerns over corporate governance issues (namely, as in the case of Singapore, the difficulty associated with removing the trustee-manager), but I wonder whether the apparent rush to promote business trusts in Hong Kong is truly being motivated by economic or financial considerations; political pressure is certainly a catalyzing force. One questions, for example, how much of the current hype over business trusts in Hong Kong derives simply from the fact that it is the Li family that is proposing the spinoff (the sensitivity to Hong Kong – Singapore competitive rivalry may also have been intensified because it was none other than Li Ka-shing himself who went over to list his business trust in Singapore). Singapore and Hong Kong certainly have political interests in maintaining their statuses as leading financial centers (Singapore, understandably, wants to protect its “easiest place to do business” designation by the World Bank, which it has enjoyed for six consecutive years, including in 2011 – it should be noted that in the 2011 rankings, Hong Kong was ranked second<sup>126</sup>).

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<sup>123</sup> *Stapled Securities in Hong Kong*, ALLENS ARTHUR ROBINSON-IN THE MONEY, (Apr., 2005), <http://www.aar.com.au/pubs/itm/apr05/securities.htm>.

<sup>124</sup> *HKT Trust Web Proof Information Pack*, *supra* note 117, at 4.

<sup>125</sup> Doe, *supra* note 103.

<sup>126</sup> *Singapore Still Easiest Place to do Business, Says World Bank*, STRAIT TIMES, Oct. 20, 2011, available at [http://www.straitstimes.com/BreakingNews/Singapore/Story/STIStory\\_725306.html](http://www.straitstimes.com/BreakingNews/Singapore/Story/STIStory_725306.html).

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Furthermore, despite all the benefits associated with business trust listings discussed in the Article, such excitement over business trust listings should be tempered by the worry that it is not completely clear whether business trusts as listing vehicles will necessarily become extremely popular or widely-used in Singapore, Hong Kong, or other jurisdictions that choose to enable business trust listings. Since the promulgation of the BTA, only eleven business trusts have listed at some point in Singapore. I would argue that not all companies can necessarily take advantage of business trust and business trust listings, specifically – indeed, only companies that achieved and will continue to achieve steady, stable, good growth and have ample liquidity to distribute high value cash dividends would really be able to reap the rewards associated with business trusts (utilities, real estate, shipping, and infrastructure companies, for example – it is no surprise therefore that the majority of business trusts listed in Singapore are precisely in the real estate, infrastructure, and shipping sectors – shipping playing an important role given Singapore's status as a leading world port). The narrower appeal of business trusts is arguably different from REITs, collective investment schemes investing in real estate, which can be employed by a larger and broader range of companies (commercial, industrial, hospitality, and retail companies, for example). Furthermore, looking at the Hong Kong example, not all companies can or will enjoy a presence like PCCW, whose critical telecommunication services and products are relied upon and will continue to be relied upon by Hong Kongers in their daily lives (PCCW holds, for example, approximately 61.2% market share by number of exchange lines, 12.1% market share by number of cell phone subscribers, and 65.4% market share by number of broadband access lines as of June 3, 2011, in Hong Kong)<sup>127</sup>.

One similarity we see between the Singapore and Hong Kong business trust cases is that all of them are structured in a way to leave the sponsor and/or parent company complete control over the trustee-manager, the trust, and the trust's assets through owning the trustee-manager and purchasing the business trust's units of itself; indeed, it is important to note that in Singapore and Hong Kong (as opposed to US jurisdictions such as Delaware), listed business trusts are not separate independent legal entities, thereby heightening the level of control exercised by the sponsor and/or parent company. In the Singapore cases we looked at, for example, this reduced, in some cases, quite significantly, the amount of shares that were offered to the public. One question that may arise, therefore, is why would the parent company sacrifice possibly greater capital by reducing the amount of units sold to the public? Quite simply, the parent company values control more highly than a possibly reduced amount of funds raised. There is a strong tradition of family-run businesses in Asia, and in particular, East Asia; for example, families control approximately 67% of Asia's 1,000 biggest companies, and more than 70% of Hong Kong's listed companies are controlled by either their original founders or generational members of their founding families.<sup>128</sup>

Indeed, the fact that Hong Kong and Singapore do not permit dual class structures actually increases the importance and necessity of business trusts in these two jurisdictions as substitutes for dual class capital structures.<sup>129</sup> Indeed, the SGX has clarified in a recent re-

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<sup>127</sup> *HKT Trust Web Proof Information Pack*, *supra* note 117, at 1.

<sup>128</sup> Robert Cookson, *Investors Learn how to Play the Generation Game*, FINANCIAL TIMES-CHINA, Jan. 31, 2011, <http://www.ftchinese.com/story/001036780/en>.

<sup>129</sup> Mint Kang, *Dual-Class Shares not Allowed in Singapore, Says SGX*, CORPORATE SECRETARY, Sep. 21, 2011, <http://www.corporatesecretary.com/articles/international/12008/dual-class-shares-not-allowed-singapore-says-sgx/>.

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lease that dual class voting shares are “not allow[ed]”<sup>130</sup> after rumors that the famous English soccer team Manchester United was planning on listing on SGX using a dual class structure.<sup>131</sup> This leads to the obvious question – would Singapore and Hong Kong have been better off simply allowing dual class structures, which also help management preserve control while simultaneously raising capital, rather than business trusts? Probably not – business trusts still offer significant advantages over launching an IPO or recapitalization through a dual-class structure; for example, in the PCCW example we have looked at, business trusts are especially useful for spinoffs, and can provide arguably a better stream of payments out to unitholders. Also, the corporate governance concerns traditionally raised with regards to dual class stock<sup>132</sup> – namely, that dual class stocks are unfair and take away shareholder’s ability to monitor management by eliminate or reduce their voting rights – would most likely be exacerbated in Singapore and Hong Kong since, as discussed above, many publicly-listed companies in Asia are family-owned; hence, there may be more occurrences where management will entrench themselves with superior voting rights. And, in Hong Kong’s case, dual class structures would also ultimately run up against Hong Kong’s regulatory fundamental general principle of fair and equal treatment of shareholders.<sup>133</sup>

The situation in Hong Kong and Singapore is quite different from the United States, which currently allows dual class stock listings,<sup>134</sup> some prominent American companies have listed dual class shares, which provides for usually two different kinds of shares and therefore two different ways for investors to own the company – they are often called “A shares” and “B shares.” These two shares grant different voting rights – for example, one share of Class A shares may entitle the holder to five votes. Class A shares might be sold to the company’s executives, founders, or family members, while Class B shares might entitle the holder to only one vote each, and are sold to the general public. This arrangement allows the company to list itself and take advantage of IPO capital inflows while retaining control.

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<sup>130</sup> *The Capital Structure of Listed Companies in Singapore*, Singapore Stock Exchange, DUAL-CLASS VOTING SHARES, [http://www.sgx.com/wps/wcm/connect/sgx\\_en/Misc/regulations/Regulators/The+Capital+Structure+of+Listed+Companies+in+Singapore](http://www.sgx.com/wps/wcm/connect/sgx_en/Misc/regulations/Regulators/The+Capital+Structure+of+Listed+Companies+in+Singapore).

<sup>131</sup> Michelle Quah, *Man U IPO Kicks up Interest in Dual-Class Shares*, THE BUSINESS TIMES-SINGAPORE COMPANIES, Sep. 6, 2011, <http://www.businesstimes.com.sg/sub/premiumstory/0,4574,455019-BTMarketsIPOWatch,00.html?>.

<sup>132</sup> See Peter L. Simmons, Note, *Dual Class Recapitalization and Shareholder Voting Rights*, 87 COLUM. L. REV. 106, 112 (1987); see also Jeffrey N. Gordon, *Ties that Bond: Dual Class Common Stock and the Problem of Shareholder Choice*, 76 CALIF. L. REV. 1, 11 (1988).

<sup>133</sup> See 2002 The Codes on Takeovers and Mergers and Repurchases intro. ¶1.2, Feb. 2002 available at <http://www.sfc.hk/sfcRegulatoryHandbook/EN/displayFileArchServlet?docno=H062>.

<sup>134</sup> The US Securities and Exchange Commission (SEC) has, since the 1980s, attempted to prohibit dual class stock recapitalizations; in 1994, the major US stock exchanges adopted certain anti-dual class listing standards. Lucian A. Bebchuk & Assaf Hamdani, *Federal Corporate Law: Lessons from History*, 106 COLUM. L. REV. 1793, 1804. For example, § 313.00 of the New York Stock Exchange Company Manual which mandates that companies cannot reduce or restrict unequally the voting rights of existing shareholders by any corporate action or the issuance of securities; however, the New York Stock Exchange allows companies with already *existing* dual class capital structures to issue additional shares of the existing super voting stock. NYSE, Inc., Listed Company Manual § 313.00 (2002) available at [http://nysemanual.nyse.com/LCMTTools/PlatformViewer.asp?selectednode=chp\\_1\\_4&manual=%2Flcm%2Fsections%2Flcm-sections%2F](http://nysemanual.nyse.com/LCMTTools/PlatformViewer.asp?selectednode=chp_1_4&manual=%2Flcm%2Fsections%2Flcm-sections%2F). NASDAQ, Rule 5640 similarly prohibits a company from disparately reducing or restricting existing shareholder’s voting rights; however, under IM-5640, companies with *existing* dual structures are permitted to issue additional shares of existing class of higher voting stock in a capital-raising transaction. 2010 NASDAQ, Listing Standards & Fees voting rights, July 2010 available at [http://www.nasdaq.com/about/nasdaq\\_listing\\_req\\_fees.pdf](http://www.nasdaq.com/about/nasdaq_listing_req_fees.pdf).

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One notable example is Google – when Google went public in 2004, it adopted a dual class structure, justifying that such a structure would “make it harder for outside parties to take over of influence Google . . . [t]his structure will also make it easier for our [Google’s] management team to follow the long term, innovative approach [of development].”<sup>135</sup> Google’s top executives – Eric Schmidt, Larry Page, and Sergey Brin – control approximately 66 percent of Google’s shares through ownership of only around 30 percent of the total outstanding shares.<sup>136</sup> Thus the question arises, should the United States need to even consider the Singaporean and Hong Kong business trust listing models when it already has a mechanism for simultaneously raising capital and maintaining control through dual class shares?

The answer is probably yes – business trusts might arguably be fairer, more efficient, and raise more capital than US dual class structures. First, in situations where management wants to retain control, dual class structures are set up in the United States such that only one single company to be listed – it is one single company that is selling different kinds of shares with varying voting rights. Investors who want to invest and who can only buy the diluted voting-right shares have little choice but to be part of the dual class arrangement; perceptions of unfairness may end up leading investors away from buying the company’s shares at all, leading to inefficiency and a lower amount of capital raised. Business trusts, however, allow a corporation to spinoff another entity to be listed on an exchange to raise capital while also allowing the parent corporation to retain control. Meanwhile, because it is a separately listed entity and, if control rules similar to Singapore’s BTA were adopted, the control aspect at least would be transparent. The flexibility associated with business trusts also allow managers to actually commit long-term to paying out free cash flow especially when they do not have identifiable profitable investment opportunities (business trust distributions are more flexible than dividends, which usually must be paid out of business profits only). The ability to make greater distributions can then assist managers with overcoming the free cash flow problem<sup>137</sup> – this also explains why many of the business trusts listed in Singapore and Hong Kong are very profitable in terms of cash income, such as PCCW’s telecommunications business. Therefore, this appeal of business trust distributions would draw investors, and investors who care more about these distributions over retaining control would, out of their own volition, go to purchase units in the listed business trust. If investors wanted to retain some form of control or oversight but still wanted to invest in the company’s operations, they have the choice of investing in the normal shares of the original sponsoring parent corporation, since the parent corporation would not need to adopt a dual class structure anymore. In other words, in a pure US-style dual class structure, investors have no such recourse – in a business trust framework, although the business trust is controlled by the parent corporation, investors at the very least have the opportunity to buy shares in the parent corporation. Business trusts add more flexibility and choices for both the issuer and investor. Of course, an important caveat is, as discussed elsewhere in the Article, not all corporations could and will take advantage of the business trust form.

<sup>135</sup> Google, Form S-1 filing (2005), available at <http://www.sec.gov/Archives/edgar/data/1288776/000119312504073639/ds1.htm>.

<sup>136</sup> Elinor Mills, *Google to defend dual-class stock structure*, CNET NEWS, (April 12, 2006), [http://news.cnet.com/Google-to-defend-dual-class-stock-structure/2100-1030\\_3-6060691.html](http://news.cnet.com/Google-to-defend-dual-class-stock-structure/2100-1030_3-6060691.html).

<sup>137</sup> See Michael C. Jensen, *Agency Cost of Free Cash Flow, Corporate Finance, and Takeovers*, AMER. ECON. REV. Vol. 76(2), 3 (1986).

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Herein leads to another point – as a general matter, corporate governance concerns related to business trusts and dual class structures can be somewhat assuaged by the fact, again, that business trusts are still quite rare in Hong Kong and Singapore and cannot be employed by all types of companies or businesses. Similarly, the dual class structure as used for maintaining control is also relatively rare – over the past two decades, for example, corporations with dual class share structures have made up approximately 7% of global IPOS.<sup>138</sup> In the United States, it is estimated that approximately dual-class companies comprise only 8.2% of the S&P Index.<sup>139</sup> Furthermore, some companies are reluctant to adopt dual class structures due to studies which suggest that such structures weaken corporate performance.<sup>140</sup>

In the end, it seems to me that business trusts (specifically, listing business trusts), while similar, offer certain advantages over dual class structures; thus, American regulators might consider them.

## CONCLUSION

I have attempted to provide an overview of business trusts, and more specifically, business trust listings in a comparative analysis, looking at the examples of Singapore and Hong Kong. There are certainly many benefits associated with business trusts as investment vehicles, but business trusts may be limited as appropriate only to certain companies. They are also still a relatively new investment vehicle in Singapore and Hong Kong; this “newness” may explain (among other factors, such as the global economic downturn in general) rather disappointing IPO debuts, such as in the case of HKT Trust in Hong Kong. As the public becomes more familiar and comfortable with listed business trusts, however, it seems quite likely they will be a most welcome investment form and vehicle, especially for injecting liquidity into otherwise illiquid business areas. Nevertheless, Singapore and Hong Kong’s models of business trust listings serve as a useful, informative resource for the comparative study of business trusts and might, more specifically, serve as empowering models for the United States to allow business trust listings as well so that American companies can spin-off entities and raise capital from them on a stock exchange. They can help add even more diversity, complementing US dual class regimes where issuers want to raise capital but maintain control over their business.

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<sup>138</sup> *The Problem with Dual-Class Shares: More Equal than Others*, THE ECONOMIST, Nov. 26, 2009, available at <http://www.economist.com/node/14977254>.

<sup>139</sup> Houlihan Lokey, Dual Class Stock Structures Powerpoint Presentation, (Aug. 2011), available at [www2.americanbar.org/calendar/2011-aba-annual.../1986.pdf](http://www2.americanbar.org/calendar/2011-aba-annual.../1986.pdf) (also on file with author).

<sup>140</sup> See Gompers et al., *Incentives vs. Control: An Analysis of U.S. Dual-Class Companies*, 1-32 (Nat'l Bureau of Econ. Research, Working Paper No. 10240, 2004), available at [www.afajof.org/pdfs/.../UPDF/P793\\_Corporate\\_Governance.pdf](http://www.afajof.org/pdfs/.../UPDF/P793_Corporate_Governance.pdf) and Ronald W. Masulis, Cong Wang & Fei Xie, “Agency Problems at Dual-Class Companies,” J. of FINANCE, Vol. LXIV, No. 4 (Aug. 2009).

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