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Original Paper

Eliminating the Board in Chinese Listed SOEs: Using Anti-Corruption Law as Monitoring Device

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Abstract

I begin by asking two questions: Why have independent directors and boards of directors failed to protect minority shareholders in Chinese listed state owned enterprises? Is there a solution to this problem? Close examination reveals listed SOEs to operate as organs of the Party and the State. Independent directors and boards of directors play little role in governance, nor should they be expected to do so under contemporary circumstances.

The course of these inquiries leads to the conclusion that boards of directors are inappropriate organs in listed SOEs and are inconsistent with the way contemporary Chinese corporate business works. The misdesign of Chinese corporate governance lies in the misunderstanding of Chinese corporations as operationally similar to western corporations when in fact they remain organs of the Party-State. Anti-corruption law, despite its flaws, is a more appropriate monitoring device for listed SEOs than is a board of directors.

This paper concludes by calling for a reversal of normal scholarly methodology in studying these corporations. Understanding should start with empirical research modeling the governance system of listed SOEs in practice. Only then can theorizing and the creation of truly Chinese business enterprises begin.

1. Introduction

There has been increasing scholarly attention to problems of Chinese corporate governance since partial privatization of SOEs began in the late 1970s. (Note 1) Particular attention has focused on minority shareholder protection, which is the predominant agency issue in countries like China whose corporate structures are characterized by block holding. The requirements of a board of directors and mandatory independent directors have been introduced with little explanation but, presumably, as attempted solutions to the problems facing minority shareholders. (Note 2)

I will argue that, given the realities of the way SOEs operate and contemporary party policy toward SOEs, these governance institutions should not be expected to work in the same manner as they do in the west and, in fact, they do not work at all. This is because they do not appropriately fit the Chinese context in which listed SOEs incorporate a Party structure parallel and superior to their statutory governance mechanisms and exist to fulfill state and party goals as much as to secure private benefits. (Note 3) These quasi-governmental characteristics suggest a solution consistent with Chinese history, culture, and contemporary governance practices. The board should be eliminated and replaced with a dominant CEO monitored by anti-corruption laws.

I begin by examining the propriety and workability of independent directors as a form of minority shareholder protection in the Chinese system. I conclude that the institution of independent directors is conceptually incoherent and practically useless in a corporate system comprised of companies where boundaries between party, state, and enterprise are fluid. (Note 4) This incoherence is demonstrated by the imposition of the trappings of western corporate governance on Chinese corporations when those trappings are unsuitable. Indeed, despite its form, in practice the Chinese SOE may well have already shape-shifted into something quite different from its western (and most Asian) counterparts. (Note 5)

This insight leads to a more fundamental question. Is the board of directors itself a useful institution in Chinese SOE corporate governance? I conclude that it is not, based on two related lines of argument. The first is the way Chinese SOEs operate at both a board and managerial level. The second is a fairly recent move by the Communist Party of China (“CPC”) to emphasize SOEs as state-owned and party-managed enterprises. While the board might play some role in attracting western investment it is, at best, superfluous. At worst, it is misleading to investors. More important, it may interfere with the efficient development of Chinese business enterprises on their own terms. A far better solution for listed SOEs is to eliminate the board entirely.

The listed Chinese SOE is a branch of the State controlled by the Party. (Note 6) The partial privatization of this branch of government creates the governance complications that reformers have been trying to resolve. But they have been trying to resolve them largely on the assumption that Chinese SOEs are more like private corporations than like government agencies. This simple category mistake has led to reforms, like independent directors, that are inappropriate and unworkable. The idea of a one-size fits all western-style corporate model may be a misapprehension, obscuring the desirability of hybrid or even different corporate governance structures that suit local circumstances. (Note 7)

I suggest that effectively designed and applied anti-corruption laws, which are appropriate to governmental institutions, are better suited than are boards of directors to protect minority shareholders in listed SOEs from asset diversion by managers and state officials, and can serve as a potentially powerful corporate governance mechanism.

There is evidence that the Chinese government agrees with the idea that anti-corruption laws are a useful instrument with which to fight managerial malfeasance in SOEs. On March 20, 2018, President Xi issued the Supervision Law of the People's Republic of China, passed by the National People's Congress, (Note 8) and replacing the previous Administrative Supervision Law. (Note 9) Section 15(3) of that law specifically directs the anti-corruption agencies created under it to supervise managers of SOEs, a departure from the previous law, which only covered public officials. This law is new and as yet untested. It may not be wholly effective because of continuing Party influence in SOEs (and perhaps in the supervisory organs themselves). (Note 10) Yet it is at least some indication that the government recognizes that independent directors don't work. (Note 11)

Finally, as a theoretical matter, I conclude that our analysis of Chinese corporations has been upside down. Analysis typically starts with something like western-corporate theory and practice as the lens. I shall argue, however, that the standard method of analysis should be reversed. The Chinese SOE is so different from other types of business organizations that we need far deeper empirical analysis of their actual operations before we can construct workable theories and structures. It is only after we thoroughly know what is happening on the ground that we can begin to theorize and design. (Note 12)

Part I of this paper discusses the origins of independent director governance in the United States. Part II describes the structure and governance of Chinese corporations, arguing that reliance on independent directors to protect minority shareholders is a category mistake. Part III argues that the board is a meaningless organ in Chinese SOEs and is neither a necessary nor desirable institution of Chinese corporate governance. Part IV explores the possible use of anti-corruption laws as a corporate governance tool to address the specific problems of Chinese SOEs. Part V concludes.

2. The Origins and Development of Independent Directors

The American practice of using independent directors to monitor management developed over the course of almost eighty years in response to a unique set of perceived political and economic problems. (Note 13) When America explosively experienced the separation of ownership from control at the beginning of the 20th Century, board members consisted of bankers, inside managers, lawyers, and others related to the corporation's business. Disinterested and independent directors were rare. (Note 14)

Corporations gradually included and increased the number of independent directors for the purpose of protecting self-dealing transactions, not for monitoring management. The duty of loyalty permitted directorial self-dealing as long as the transaction was actually in the corporate interest. This could be demonstrated by approval of the transaction by disinterested directors. Thus, it was in the interest of the insiders on the board to seat directors who could meet this qualification with respect to any particular transaction. (Note 15)

The board was powerful, but almost nobody paid attention to the actual function of the board until the early 1970s. A wave of conglomerate failures, foreign bribery scandals, and substandard products led Americans, newly energized by Vietnam-era protests, to turn their attention to corporate America. They laid the blame for these problems at the feet of the insular and unaccountable inside board. (Note 16) Scholarly attention followed. (Note 17) The role of the board had to be defined, and the concept of a monitoring board comprised largely of outside directors began to develop.

Corporate finance and structure were also changing in a manner that brought an increasing number of outsiders to corporate boards. The growing market for corporate control put managers' and directors' jobs in jeopardy, creating clear conflicts of interest. The principal agency problem had evolved from a concern with simple self-dealing transactions to the realization that corporate control transactions could themselves be a form of self-dealing. (Note 18)

The Delaware courts responded by molding existing fiduciary law into a way to determine whether a board's resistance to control transactions was in the best interest of the corporation. (Note 19) Independent directors were needed to ensure disinterested judgments. As a consequence, outside directors increased from roughly 20% of the average board in the 1950s and 1960s to a majority of outsiders by 2000. (Note 20)

The importance of independent directors as a monitoring mechanism was cemented by corporate scandals in 2001-02 that revealed dramatic board oversight failures. The Sarbanes-Oxley Act required independent directors as a matter of federal law (Note 21) as did the stock exchanges as part of their own listing requirements. (Note 22) And there matters stood when China introduced its own requirement of independent directors on corporate boards. (Note 23)

My narrative is revealing. The use of disinterested directors developed as a matter of the peculiarly American agency problem of managerial self-dealing in the context of corporations characterized by widely dispersed stockholdings, which became especially problematic in the rapidly developing market for corporate control. The strong move to independent directors arose from a reconceptualization of the American board from an (allegedly) failed managerial model to a monitoring model in which the independent director was the motive force and which arose in significant part as a result of political concerns, embraced by efficiency scholars as perhaps the best means of controlling agency costs. (Note 24)

None of this has anything to do with the situation in China.

III. The Structure and Content of Chinese Corporate Law

The structure and content of Chinese corporate law have been written about extensively. I will, therefore, only briefly identify the relevant sources of law and the provisions relating to independent directors. The Company Law was created in late 1993 and was revised in 1999, 2005, and 2013. (Note 25) As currently in effect, the source of corporate power is the shareholders' meeting. Shareholders elect (and remove) directors and supervisors, inspect financial statements, and approve capital changes and mergers. (Note 26) Given the concentrated nature of Chinese corporate ownership, the actions of the shareholders' meeting typically reflect the preferences of the controlling shareholder. (Note 27)

The board of directors is the next power organ, charged with the kinds of duties boards typically have in western countries. (Note 28) The Company Law requires that corporations have independent directors. The Chinese Securities Regulatory Commission("CSRC") requires that listed companies have at least one-third of their boards composed of independent directors. (Note 29) The controlling shareholder controls the appointment of independent directors. (Note 29) This suggests that directors, including independent directors, are likely to be highly responsive to the controlling shareholder's interests, as are the managers appointed by the board. (Note 30)

The supervisory board follows, with the responsibility of monitoring (but not appointing) the directors. (Note 31) The supervisory board must consist of at least three members, one-third of whom must be employee representatives. The supervisory board must also include shareholder representatives. Although the board is denominated supervisory, it exists at the same level in the corporate hierarchy as the board of directors itself, limiting its actual supervisory power over the board. (Note 32) The ineffectiveness of the supervisory board has been frequently observed, leading to the conclusion that, despite the German-style structure of the Chinese corporation, it effectively operates in an American-style way. (Note 33)

Board composition presents problems. 42.11% of independent directors are academics, and another 10.16% are retired officials. (Note 34) While independent director compensation is not high by western standards (averaging $10,523 in 2013), it does provide significant additional income to relatively low paid academics, in two notable cases providing eight times the independent director's annual academic salary. (Note 35) A seat on the board can thus be a valuable asset for the people who constitute a substantial proportion of Chinese outside directors. Chinese law requires independent directors to file annual reports explaining their voting throughout the year. (Note 36) A reputation for dissent has the likely effect of diminishing the opportunities available to an independent director. (Note 37) The independent director approval rate of 99.1% is perhaps a consequence of this. (Note 38)

The law includes a broad duty of loyalty as well as detailed prohibitions on director conduct that look much like the fiduciary duties of directors in the US. These include prohibitions on bribery, misappropriation, taking corporate opportunities, engaging in specified related transactions, competing with the corporation, and disclosing confidential information. (Note 39) The CSRC adds to these requirements for listed companies by imposing its own duty of loyalty and duty of diligence, as well as the obligation to treat all shareholders fairly. (Note 40)

These provisions have not been terribly effective. As Guangdong Xu and his colleagues argue, their utility has been limited by conflict among the terms of these provisions and their "overly simplistic, vague," and "unworkable" nature, as well as the absence of detailed regulations andeffective enforcement mechanisms. (Note 41)

Most commentators believe that these problems can be fixed, or at least ameliorated. (Note 42) One widespread solution has been the introduction of independent directors on corporate boards, including those of listed SOEs. But this reform has not been successful. Some believe that an important reason for failure is the nation's stage of economic development, which has left China with an insufficient population of qualified independent directors. (Note 43) This may change over time as more people obtain more experience in the contemporary business world. (Note 44) While this may be true, I shall argue that poor governance is primarily a matter of poor institutional design that fails to account for the distinctly Chinese characteristics of its SOEs.

2.1 Why Independent Directors?

We must first begin by understanding the problem Chinese independent directors are meant to address in order properly to analyze their effectiveness. As outlined in Part I, the primary function of independent directors in the US is to facilitate the market for corporate control. Self-dealing is a considerably lesser concern. (Note 45) Monitoring risk management is, arguably, an important function of the board, one that could be well-performed by independent directors, but the lack of a meaningful American duty of care suggests that this function is, as a legal matter, relatively unimportant, no matter how important it may be as a practical matter. It is significantly less important both as a legal and practical matter in listed SOEs because of the existence of multiple corporate goals (including social goals) in contrast to the American corporation's single goal of shareholder profit.

The most significant agency problem in China is the tunneling of assets from the corporation to the controlling shareholder or to other entities owned in whole or in part by the controlling shareholder. (Note 46) This is the problem that independent directors are supposed to ameliorate. (Note 47)

Simply to describe the problem as tunneling, however, is over-broad. A controlling shareholder will have natural incentives to tunnel. The model case in western block holding countries is a controlling individual or family. But the controlling shareholder in Chinese listed SOEs is the State, and tunneling may well be undertaken for policy purposes and not for private gain. This is intrinsic to the notion of a state-owned enterprise, and it is clear in China that SOEs are not primarily run to maximize shareholder profit in the way that drives American corporations. (Note 48) From a more traditional tunneling perspective, there is evidence that significant tunneling from the corporation to individual managers and state officials has been a significant problem. (Note 49)

What is the role of independent directors in all of this? It is sometimes argued that the function of independent directors in China is different from that in western economies and in fact provides some utility in stopping at least the most outrageous self-dealing transactions. Kang suggests that the presence of independent directors may serve the salubrious function of encouraging controlling shareholder self-censorship, or quiet persuasion outside the boardroom. Sappideen acknowledges the apparent relative mess of Chinese corporate governance (from a western perspective) but happily notes that, whatever the problems, it seems to work. (Note 50) By "work," he seems to mean to behave efficiently, presumably based on Chinese economic growth, but without more analysis it is difficult to conclude that individual corporations operate efficiently (SOEs are notorious for their inefficiency) (Note 51) or whether, despite its success to date, the Chinese economy would grow at even a faster rate were corporate governance to be made more efficient. (Note 52)

Lin presents the most interesting analysis, one that seems to explain Sappideen's impression of success. Rather than attempting to analyze the governance of Chinese SOEs through the lens of the western institutions China has transplanted, she looks instead at the ecology of SOEs as consisting of a rich set of networks connecting operating corporations, finance institutions, and the State-owned Assets Supervision and Administration Commission ("SASAC") within a highly centralized top-down control structure. Within these networks, party and state work alongside (often directly through) executives to purse the SOEs goal of balancing the interests of stakeholders while seeking economic growth. (Note 53) SOEs are listed, in her view, to improve corporate governance, but from her description it appears to be the case that the western governance reforms demanded by listing agencies are more designed for the enticement of foreign capital than for true functionality. (Note 54) While she suggests that western-style reforms including the establishment of boards and the recruitment of more independent directors are likely in SOEs, she notes the unlikelihood of any of this diminishing party-state control. (Note 55)

With all of this observation and analysis, two questions remain. First, do independent directors make sense in China or is there a better monitoring mechanism available? This leads to a second question. Is a board of directors itself a useful or appropriate institution in Chinese corporations?

The facts suggest that the Chinese board simply cannot function in any manner recognizable in the west. (Note 56) Eliminating the board from the Chinese corporate structure in favor of CEO management would better conform to reality and would reduce the unnecessary expenses and complexity of Chinese corporate governance. By placing ultimate legal responsibility on the CEO, governance would also become considerably more transparent. The CEO would be kept in check by anti-corruption laws. This regime of monitoring one person-the CEO-for corrupt behavior is likely to increase transparency, improve law enforcement, and diminish the incidence of corruption. It is also consistent with traditional and contemporary Chinese top-down governance structures.

b. The Disutility of the SOE Board of Directors in China

As I earlier discussed, the contemporary American monitoring board is the product of a long evolution, during most of which the board's function was ambiguous at best. During the days of the managerial board, composed as it was of top corporate executives, one could argue that its function was high-level oversight of the company's finances as well as its marketing, production, and development strategies. (Note 57) That board also maintained some balance among the interests of shareholders, workers, consumers, and the community in general. (Note 58)

The monitoring board, composed as it is almost entirely of independent directors, (Note 59) is ill suited to this task and was not designed to perform it. Originally created for the purpose of overseeing managerial performance, it has come to be quite intensely focused on its corporation's share price. Its interest is the shareholders, not other corporate stakeholders

Like so much else in life and law, the existence of the corporate board is more or less taken as a given. Rarely is its existence questioned. But why have a board in China? In the case of the managerial board, the functions I described above could just as well be handled in a vertical structure with the CEO as the top monitor and ultimate decision maker. (Note 60) While it is often argued that collective decision-making is better than individual decision making, the high rate of Chinese board approval of corporate decisions belies this argument. (Note 61) Indeed, as Lin describes it, Chinese SOEs are highly centralized with vertical control structures that bypass the board on some of the most important decisions boards make. (Note 62) This is, of course, consistent with Chinese governance in general.

Moreover, it is hardly the case that a competent CEO would make decisions without consulting the relevant top executives (and the Party). US CEOs do in fact consult others before making decisions, especially senior corporate executives (and sometimes the board), (Note 63) and Chinese CEOs consult senior executives and party officials. (Note 64) Collective corporate decision-making does not require a board. Placing responsibility on the board for decision-making where it doesn't really make decisions can obscure responsibility for corporate decisions.

The purpose of the American monitoring board has changed essentially to hiring and firing the CEO and monitoring stock price. The two are related. From 1992 to 2005, the rate of CEO termination among the 2,500 largest American public corporations increased by 170%. Eighty-five Fortune 1000 CEOs were terminated in 2003 (the year following the Enron scandal) and 97 in 2004. (Note 65) The numbers, while not large, represent significant increases. But it is important to note that a drop in stock price typically precedes these terminations, (Note 66) thus tying stock price monitoring to the board's primary role.

The contemporary purpose of the monitoring board is to monitor stock price, and in this respect the board appears to have succeeded reasonably well. From an S&P index of 404. 99 in 1985, inflation-adjusted growth has been a cumulative 8.57% by 2018, a period that included several significant, and one historic, market collapse.

These are not the functions of a Chinese board. The Party, not the board, appoints the CEO. Balancing stakeholder interests takes place primarily at the Party-State level, so a stakeholder oriented board is of little use. (Note 67) Finally, the ultimate power of the CEO in Chinese corporations, despite the structure of Company Law, (Note 68) suggests perhaps that the board is redundant.

It may be that a Chinese board will help expand the network of guanxi available to the corporation, but guanxi is notoriously personal (Note 69) and one might expect individual directors to use their networks to benefit their corporations only in a manner that increases the individual's guanxi. (Note 70) Milhaupt and Zheng suggest that directors in privately-owned enterprises ("POEs") might help strengthen government ties and improve the corporation's influence and access to resources. (Note 71) This may be reason enough to retain the board in POEs, but does not explain its utility in SOEs.

The second function, monitoring stock price, is clearly inapplicable in the Chinese context. Chinese SOEs, as state organs, perform many functions for the State that are not profit-maximizing and therefore not share-price maximizing. (Note 72) Without a radical (and unlikely) change in Chinese corporate purpose, the contemporary monitoring board simply doesn't fit.

Finally, the board itself, at least in the American context, is the pinnacle of corporate democracy. Shareholders elect the board and thus have input into its governance. While, as a legal matter, the board is said to represent the corporation rather than its shareholders, (Note 73) shareholder voting has been held to be the legitimating factor in American corporate governance. (Note 74) In this way the structure of American corporate governance mirrors, at least superficially, the structure of American democracy.

This is clearly not the case with respect to Chinese corporate governance, a set of institutions existing within (and tightly connected to) a non-democratic Party-State. (Note 75) Simply put, the structure of the SOE mirrors the structure of the Chinese Party-State. (Note 76) Corporate success provides corporate legitimacy in China, (Note 77) just as economic success legitimizes the Party. (Note 78) Legitimacy in Chinese governance does not come from voting.

The contradictions of a Chinese SOE board of directors are evident in the Party's own policy. Two consecutive paragraphs in The State Council's General Office on Strengthening and Improving the State-owned Assets Supervision and Preventing the Loss of State-owned

Assets Opinions issued by the State Council stand out. (Note 79) The first directs that the enterprise group should "establish a supervision system covering various governance entities and auditing, disciplinary inspection and supervision, inspection, legal, and financial departments . . . . We will . . . further play the roles of chief accountant and general counsel, and strengthen financial and legal audit checks on major corporate decisions and major business activities." The next paragraph directs the strengthening of the board of directors, including the addition of "external directors," strengthening the checks and balances within the board of directors, and other goals that are more or less familiar to westerners. (Note 80)

The first paragraph is entirely consistent with contemporary party policy of strengthening SOEs and increasing the Party's role within them. The latter simply makes no sense in light of the former. In light of what we already know about Chinese corporate governance in practice, and contemporary Chinese policy, it is the first paragraph that appears to be more authentic. The presence of and language about the board seems only to have the potential to create false consciousness among western investors.

The Chinese board is a recent and largely unsuccessful creation, transplanted from legal and political systems very different from China's. (Note 81) China's corporate governance should reflect its own realities, not the realities of others.

3. Anti-Corruption as a Tool of Corporate Governance

Minority shareholder investment in SOEs is an important source of capital, (Note 82) and market flotation of at least a portion of SOE shares has the potential to lead to more efficient management in response to market signals (Note 83) if management is honest and adequately transparent. My analysis demonstrates that neither the board of directors nor independent directors can reasonably be expected to protect minority shareholders in listed SOEs and thus assure honesty and transparency, leaving capital formation at risk.

Anti-corruption law might well be the best (if imperfect) tool to provide some protection to minority shareholders from illegitimate managerial activity.Anti-corruption law typically targets public, not private, behavior. (Note 84) But, as should be clear by now, it is incorrect to think of Chinese listed SOEs as private corporations in western terms. (Note 85) The form of the SOE in action is different from the form on the books, (Note 86) and the form in action looks very much like a branch of government. Thus the use of anti-corruption laws in place of, or at least supplemental to, traditional corporate governance measures follows almost as a matter of logic.

China has attempted to root out corruption for decades, ramping up significantly with Xi Jin Ping's elevation to the Presidency and Party Chairmanship. (Note 87)

There is recent evidence that the Chinese government understands both the propriety and necessity of using anti-corruption law in a corporate context. The new Supervision Law of the PRC is China's anti-corruption law. (Note 88) As such, it self-consciously seeks to promote the rule of law in China. (Note 89) The law sets up a national and local set of anti-corruption agencies, charged broadly with the task of supervising "public officials exercising public power," including managers of SOEs. (Note 90) The Supervision Law replaces the earlier Administrative Supervision Law, which covered only public officials. (Note 91) Even if traditional anti-corruption actions did not target private officials, (Note 92) the new inclusion of managers of SOEs strongly suggests that the State views these managers as public officials. (Note 93).

Whether the law will be effective is a different question. (Note 94) One issue is the extent to which the Party uses the law for political ends beyond the even-handed discipline of corruption. (Note 95) Such an approach could undermine business confidence in the system. (Note 96) More importantly, it could result in the diversion of enforcement resources for political purposes, resulting in inefficient or under-enforcement of anti-corruption laws in the corporate sector.

The Supervision Law itself reveals this possibility. The Supervision Law states that supervisory commissions created by the law are guaranteed freedom from "interference by any administrative organ, public organization or individual." (Note 97) Yet the role of the Party remains unclear. Article 2 at least implies a role for the Party in supervising these agencies: "The leadership of the Communist Party of China over the national supervision work shall be adhered to." (Note 98) This qualification further suggests that the supervisory commissions may be used for political ends.

Several other issues may curb the extent to which the Supervision Law (or the anti-corruption campaign in general) will succeed. Of first importance, as Julius Shi-Rong Yam has argued, Chinese corruption may itself be a tool of governance rather than a governance failure. (Note 99) Second is the problem of determining what actually constitutes corruption in a system where the state's conflicts of interest with minority shareholders are both structural and also obvious, expected, and accepted. (Note 100) Additional problems include the decentralized nature of anti-corruption enforcement (Note 101) and the continued integration of the Party, state, and corporate sector. (Note 102)

Yam makes the interesting argument that corruption in China, systemic and systematic, provides some actual economic benefits to the CPC. (Note 103) Starting from the often-observed contradiction of China's astonishing economic growth in the face of high levels of corruption (which characteristically retards economic growth), he examines the subtleties of the relationship between growth and corruption in China. He starts with the observation that the Party's "political logic" is "'performance legitimacy,'" a "pragmatic and conservative" form of governance. (Note 104) Continuing economic growth is essential to the Party's stability and perhaps to its survival.

But how has economic growth been sustained in the face of potentially crippling corruption? One answer is that corruption gains may be a regulated form of supplemental compensation to high performing (and somewhat subtle) officials. As Yam explains it, there appears to be two ways of being caught and punished for corruption in China: misbehavior so extreme that it embarrasses the Party, or as a consequence of losing political battles. As Yam observes, if you avoid these two problems and remain below the radar, you have pretty good assurance that you can get away with some modest fruits of corrupt activity. "Thus the act of not prosecuting corrupted officials when the Party has full reasons to do so, supplemented by the potential of severe economic punishment as a means of deterrence, become the Party's way of regulating corruption." (Note 105)

This practice of selective prosecution for corruption acts as a way of compensating poorly paid party members for their contributions to economic growth. (Note 106) While Yam writes primarily about provincial and local officials, there is no reason to believe that the same practice does not occur within corporations. Yam concludes by suggesting that while this process may currently work effectively, it has the potential to cause significant economic problems in China in the future as irreparable damage may already have been done to Chinese economic development. (Note 107)

If corruption is so deeply ingrained as a governance device, it seems unlikely that the use of an anti-corruption campaign or the Supervision Law will be effective as formal corporate governance tools, and it is to formal tools that investors look for comfort. (Note 108) While the use of corruption itself as a governance device might have been effective in stimulating growth, its opacity, selectiveness, and distastefulness make it an unlikely substitute for the lofty fiduciary duties of directors. But my analysis in this paper leads to the conclusion that any formal, western-style governance system superimposed on this reality should not be expected to work. (Note 109)

The other challenges to using anti-corruption law follow from this discussion. In a system in which corruption is tolerated instrumentally and produces perceived social benefits, a definition of corruption seems almost irrelevant. What seems to matter here is not the kind or kinds of corruption that might be controlled but rather the degree of corruption. As odd as it seems, one might argue that as long as the Party limits corruption to relatively modest levels, the problem for minority shareholders diminishes. But while this argument might have some traction in case by case corruption analysis, it remains that case that, in the aggregate, corruption diverts an enormous amount of money from the system and the lack of transparency is a hindrance to investor confidence.

Yet independent directors are surely not the answer. In the first place, one can assume that they have the opportunity to profit by participating in this practice of corruption. More important, if corruption is in fact managed as a governance tool by the Party, it seems rather unlikely that independent directors will have the ability to prevent managerial or controlling shareholder misbehavior (although it is possible that their presence might diminish the degree of tunneling). Finally, the new Supervision Law further implies the redundancy or non-utility of boards of directors, and especially independent directors, as monitoring mechanisms.

Finally, there is the problem of selective enforcement. Selective enforcement is a problem in any system with limited resources. The question is always how to select particular cases for enforcement. From what has been said so far, it would appear that the Party has decided upon a regime of selective enforcement that privileges provincial and local officials who best promote economic growth. (Note 110) One might well imagine that in the corporate setting, this same criterion would be applied. (Note 111) This approach would seem to be beneficial.

Another possible economic benefit of using of corruption as a tool for stimulating economic growth comes from the use of anti-corruption laws to penalize those who have failed in this endeavor (and yet seek to profit from the system). This brings us to the possibility that anti-corruption measures could indeed serve as a useful corporate governance device. While they would not prevent tunneling (since presumably in the corporate setting tunneling is part of the compensation scheme), they could well inhibit excessive tunneling while at the same time helping to stimulate corporate growth.

I do not recommend this. It is highly distasteful, at least from a western standpoint, and hardly a standardized, transparent, and procedurally satisfactory method of corporate governance. Yet one must take account of reality, and so I reach the tentative conclusion that the use of anti-corruption measures that target autocratic CEOs might better suit the Chinese situation than independent directors or boards of directors. The solution should not be, and is unlikely to be, a permanent one, if for no other reason than Yam's observation of its ultimate unsustainability. But dressing Chinese SOEs in western clothing is just that, and there is real danger that the clothing hides reality and misleads investors and analysts.

4. Conclusion

I began this project to better understand the failure of independent directors as an institution of corporate governance designed to protect minority shareholders in Chinese SOEs. My conclusion is that they don't work in this manner because the particular Chinese context makes it impossible for them to work. While it is conceivable that, as a structural matter at least, independent directors could play such a role in state-owned enterprises as they do in some European SOEs, (Note 112) the actual interplay of party and state governance in corporate governance proves this to be impossible in contemporary China.

This conclusion led me to question whether the institution of the board itself plays a helpful role in Chinese SOE corporate governance. For many of the same reasons that independent directors are ineffective, the board itself appears to be superfluous and misleading, if not as a structural matter than as a consequence of the reality of Party-State corporate governance.

But China is among the most important economic players in the world and its corporations need capital. The problem of providing some comfort to minority investors that their money won't be expropriated is serious. Thus I explored whether the use of anti-corruption laws might be an appropriate solution to this governance problem and discovered China's current use of anti-corruption laws, not so much as a governance device but as a tool to encourage economic growth. It may be that this use produces incidental benefits like reducing levels of corporate corruption to below what they might have been, but corruption remains a problem and Chinese anti-corruption efforts would have to undergo substantial procedural reform before they could be considered as an effective governance device. Perhaps the Supervision Law will provide that, but it will take considerable time to know whether it does.

Ultimately I, like others, remain puzzled by the success of a system of corporate governance so dramatically different from the system that western analysis would privilege and, indeed, a system that western analysis would predict would fail. My ultimate conclusion from all of this is that we need to rely upon deeper empirical study of what goes on in Chinese SOEs without prior theorizing as to what should or should not work in order to offer meaningful suggestions for reform. Perhaps, unlike other areas of study, where theorizing and modeling lead to empirical testing, it seems that this particular set of inquiries should begin with an assessment of empirics without prior judgments. Only then can a model be built.

In short, what is needed is not corporations with Chinese characteristics, but indigenous Chinese business organizations.

Notes

Note 1. Corporate governance reform took on even greater importance with the Central Committee of the Communist Party's 2015 directive "to perfect the corporate governance structure." Guiding Opinion of the CPC Central Committee and the State Council on Deepening the Reform of State-owned Enterprises (08-24-2015) (hereinafter, "Guiding Opinion 2015"). I should be very clear that, in this paper, I am focusing solely on partially-privatized SOEs with minority investors, not with wholly-owned SOEs.

Note 2. The desire to attract western capital has also been an important driver of these reforms. Chinese scholars appear to pay more attention to reforming the supervisory board than the managing board, while scholars writing in English focus more on independent directors. The problems I identify in this paper would apply to the supervisory board as much as to the managing board, which I analyze in this paper. Board reform is not the solution.

Note 3. Perhaps the most careful and influential early analysis of these problems is Donald C. Clarke, The Independent Director in Chinese Corporate Governance, 31 Del. J. Corp. L. 125 (2006). For optimistic views of Chinese corporate governance see Razeen Sappideen, Corporate Governance with Chinese Characteristics: The Case of State Owned Enterprises, 12 Frontiers of Law in China 90 (2017)(concluding that, despite real governance flaws, Chinese SOEs have succeeded, demonstrating that the system works); Sang Yop Kang, Reconsidering the Independent Director System in China: A Silver Lining Amidst Weaknesses, Peking University School of Transnational Law Research Paper No. 16-7 (October 16, 2015), available at: https://ssrn.com/abstract=2820435 or http://dx.doi.org/10.2139/ssrn.2820435 (acknowledging overall failure of the independent director system but finding hope in informal mechanisms providing independent directors with some degree of influence over controlling shareholders).

Note 4. Independent directors are widespread throughout Asia. But the functions they perform are very different from those in the United States. Dan W. Puchniak & Kon Sik Kim, Varieties of Independent Directors in Asia: A Taxonomy, in Independent Directors in Asia: A Historical, Contextual, and Comparative Approach (Dan W. Puchniak, Harald Baum & Luke Nottage eds., 2017), available at: https://ssrn.com/abstract=2930785 or http://dx.doi.org/10.2139/ssrn.2930785 . These other functions may be useful and important, at least in some countries. But they do not address the central problem I am discussing.

Note 5. For a fascinating study of Brazilian corporations and their transformation into something quite different from their appearance as Berle-Means corporations see Mariana Pargendler, How Universal is the Corporate Form? Reflections on the Dwindling of Corporate Attributes in Brazil (2018), available at: https://ssrn.com/abstract=3126838. See also Li-Wen Lin, A Network Anatomy of Chinese State-Owned Enterprises, Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2017/07 (2017),

available at: https://ssrn.com/abstract=2912818, showing how Chinese SOEs are embedded in networks of corporations, financial enterprises, and the state, illustrating that the conventional western institutions of corporate governance adopted by China do not function as in their countries of origin and that the Chinese structure has produced its own success.

Note 6. Lin notes that top executive officers are appointed by the Party, ‘entirely bypassing’ the board, which also determines their compensation, again ignoring the board. Lin, supra note 5 at 4,5. The Guiding Opinion 2015 calls for strengthening anti-corruption measures in SOEs.

Note 7. Pargendler, supra note 5 (analyzing significant changes in Brazilian corporations, arguing that perhaps they present a new, universally optimal, form).

Note 8. Order No. 3 of the President, 03-20-2018. There is also evidence that the corruption problem has significantly moved from the public sector to the private sector with a shift in supervision over managers of SOEs. Kilkon Ko and Cuifeng Weng, Structural Changes in Chinese Corruption, 211 China Quarterly 718, 735-36(2012).

Note 9. Law of the People's Republic of China on Administrative Supervision (adopted at the 25th Meeting of the Standing Committee of the Eighth National People's Congress on May 9, 1997 and promulgated by Order No. 85 of the President of the People's Republic of China on May 9, 1997).

Note 10. See text at notes 98-99.

Note 11. He Jiahong, Assessment and Analysis of Corruption in China, 3 China Legal Sci. 3,6 (2015), notes that anti-corruption measures should be extended to workers in private companies as well. Jon S.T. Quah also includes the abuse of private power for private gain in his definition of corruption. Jon S.T. Quah, Minimizing Corruption in China: Is This an Impossible Dream?, 2013 Md. Ser. Contemp. Asian Stud.1, 5 (2013).

Note 12. Chinese sociology originated in such methodology. FEI XIAOTONG, FROM THE SOIL: THE FOUNDATIONS OF CHINESE SOCIETY (Gary G. Hamilton & Wang , eds.1992). Some excellent literature already exists that explores the realities of Chinese SOEs. See Li-Wen Lin, Reforming China's State-owned Enterprises: From Structure to People, 229 The China Quarterly 107 (2017); Lin, supra note 5; Curtis J. Milhaupt & Wantong Zheng, Beyond Ownership: State Capitalism and the Chinese Firm, 103 Geo. L. J. 665 (2015); Li-Wen Lin & Curtis J. Milhaupt, We are the (National) Champions: Understanding the Mechanisms of State Capitalism in China, 65 Stan. L. Rev. 697 (2013); YONG KANG, LU SHI & ELIZABETH D. BROWN, CHINESE CORPORATE GOVERNANCE: HISTORY AND INSTITUTIONAL FRAMEWORK (2008).

Note 13. Baum notes the origin of independent directors in the US. Harald Baum, The Rise of the Independent Director: A Historical and Comparative Perspective, in Independent Directors in Asia: A Historical, Contextual and Comparative Approach (Dan W. Puchniak, Harald Baum & Luke R. Nottage, eds., 2017), available at: https://ssrn.com/abstract=2814978 . While the use of independent directors has spread eastward to the UK and then continental Europe, the proportion of independent directors on European boards is significantly lower than on American boards. Daniel Ferreira & Tom Kirchmaier, Corporate Boards in Europe: Size, Independence, and Gender Diversity, in Boards and Shareholders in European Listed Companies: Facts, Context and Post-Crisis Reforms. International Corporate Law and Financial Market Regulation (Belcredi, Massimo & Ferrarini, Guido eds., 2013).

Note 14. Carola Frydman & Eric Hilt, Predators or Watchdogs? Bankers on Corporate Boards in the Age of Finance Capitalism, (NBER Working Paper No. 20544, 2014), available at: http://www.nber.org/papers/w20544.

Note 15. Victor Brudney, The Role of the Board of Directors, The ALI and Its Critics, 37 U. Miami L. Rev. 223 (1983); Jeffrey N. Gordon, The Rise of Independent Directors in the United States, 1950 2005: Of Shareholder Value and Stock Market Prices, 59 STAN. L. REV. 1465 (2007); Lawrence E. Mitchell, The Trouble with Boards, inTHE NEW CORPORATE GOVERNANCE, (Troy A. Paredes & F. Scott Kieff, eds., 2010); Lawrence E. Mitchell, Fairness and Trust in Corporate Law, 43 Duke L.J. 425-491 (1993).

Note 16. Id.

Note 17. Important steps to determining board function were Mel Eisenberg'spublication of The Structure of The Corporation: A Legal Analysis (1976) and the American Law Institute's Principles of Corporate Governance: Analysis and Recommendations (1994).

Note 18. John Armour, Henry Hansmann & Reinier Kraakman, Agency Problems, Legal Strategies, and Enforcement, in Anatomy of Corporate Law (Reinier Kraakman et al. eds., 2nd ed. 2009); Zohar Goshen, The Efficiency of Controlling Corporate Self-Dealing: Theory Meets Reality, 91 Cal. L. Rev. 393 (2003) available at: http://scholarship.law.berkeley.edu/californialawreview/vol91/iss2/3.

Note 19. See, e.g., Unocal v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986); Paramount Communications, Inc. v. QVC Network, Inc. 637 A.2d 34 (Del. 1993).

Note 20. Gordon, supra note15. While Clarke, in analyzing Chinese directors, is careful to distinguish between outsiders and true independents, Clarke, supra note 3, this distinction is unnecessary to my own analysis.

Note 21. Sarbanes-Oxley Act of 2002 § 301, 15U.S.C.§7211(e)(6)(2012).

Note 22. Baum points out that the history of independent directors in the US shows a clear decision that they are useful in monitoring corporations with widely dispersed shareholders but "to be of limited or no value" in corporations with controlling shareholders. Baum, supra note 13 at 16, 34; NYSE Listed Company Manual Sections 303A.01, 303A.02, 303A.03.

Nore 23. Although the Chinese Securities Regulatory Commission first insisted on independent directors in listed companies in 2001 in its Guidance Opinion on Establishing the Independent Director System, Chinese company law had no such requirement until the revisions of 2005, which demanded that no less than one-third of the board be independent. Chinese Company Law Art. 122.

Note 24. I say "allegedly failed" because little empirical evidence exists to demonstrate that the managerial board was a failure during an age of great American industrial growth. See Ezra Wasserman Mitchell, Corporate Governance and Income Inequality: The Role of the Monitoring Board 3 G.W. Bus. Fin. L. Rev. (Fall 2019). (arguing that little proof exists that the managerial board was a failure). In addition, significant empirical research has demonstrated that independent directors make little difference in corporate performance. Seee.g., Sanjai Bhagat, Bernard Black, The Non-Correlation Between Board Independence and Long-Term Firm Performance, 27 J. Corp. L 231 (2002).

Note 25. Company Law of the People's Republic of China (Revised in 2013).

Note 26 Company Law Art. 37.

Note 27. Yuan George Shan & David K. Round, China's Corporate Governance: Emerging Issues and Problems, 46 Mod. Asian Stud. 1316 (2012).

Note 28. Company Law Art. 46; Shan & Round, supra note 27, at 1325. The institution of the board of directors was introduced in 2004. LENG JING, CORPORATE GOVERNANCE AND FINANCIAL REFORM IN CHINA'S TRANSITION ECONOMY 85 (2009).

Note 29. Guidelines for Introducing Independent Directors to the Board of Directors of Listed Companies, August 16, 2001, available at: http://www.csrc.gov.cn/pub/csrc_en/newsfacts/release/200708/t20070810_69191.html. Kang observes that the CRSC guidance opinion effectively has the force of law.Kang, supra note 3, at 11.

Note 30. C.Yunsen Chen, Yutao Wang & Le Lin, Independent Directors' Board Networks and Controlling Shareholders' Tunneling Behavior, 7 China J. Acct'ing Res. 101, 105, 115 (2014).

Note 31. LENG, supra note 28 at 85 (noting the Communist Party's continuing control over and participation in firms' general management), and 113 (predicting that matters are not likely to change given the role of the Communist Party in China's economic life). Kang describes independent directors functioning as a shield for controlling shareholders. Kang, supra note 3 at 29. Lin, supra note 5 at 6,7.

Note 32. Company Law, Art. 53

Note 33. Shan & Round, supra note 27 at 1326.

Note 34. Yong Wang, Pengjian Jin & Chongsheng Yang, Relations Between the Professional Backgrounds of Independent Directors in State-Owned Enterprises and Corporate Performance, 42Intl. Rev. of Econ. & Fin. C. 407 (2016). More than 85% of the IDs had worked or are working for 'the party-state system' and come primarily from academic institutions, government departments, or other SOEs.") The question of the value-added by politically connected independent directors in both SOEs and POEs is highly contested. Haina Shi, Hapoing X & Xin Zhang, Do Politically Connected Independent Directors Create or Destroy Value?, 83J. Bus. Res. 82 (2018), at 83(destroy value, while acknowledging that most of the literature is to the contrary); Lihong Wang, Protection or Expropriation: Politically Connected Independent Directors in China, 55 J. Banking and Fin. 92 (2015) (adding value to POEs while increasing related party transactions but not to SOEs while also increasing related party transactions).

The situation appears to have changed. A 2013 rule prohibited high-ranking cadres from serving in enterprises. Because almost all Chinese university professors work for the state, some thought the rule applied to them and resigned. In 2015, the Ministry of Education prohibited professors from serving in enterprises. This prohibition was repealed in 2016. Current data suggests that 35% of independent directors are academics, 40% of whom hold high-ranking positions at their respective universities. Jiaren Pang, Xinyi Zhang, and Xi Zhou, From Classroom to Boardroom: The Value of Academic Independent Directors, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3232670

5,6(2018).It is worth noting, for reasons that will later become clear, that most of these high-ranking academics are Party members.

Note 35. Kang, supra note 3 at 26-8.

Note 36. Kang, supra note 3 at 31; Juan Ma & Tarun Khanna, Independent Directors' Dissent on Boards: Evidence from Listed Companies in China, 37 Strategic Management J. 8 (2015).

Note 37. Kang, supra note 3 at 5.

Note 38. Guangdong Xu, Tainshu Zhou, Bin Zeng & Jin Shi, Directors' Duties in China, 14 European Business Organization Review, 57, 60 (2013), at 60; CSRC Guidelines for Articles of Association of Listed Companies, Article 97 and 98.

Note 39. Chinese Company Law Articles 148(2) and 149; Xu, et. al., supra note 39 at 60.

Note 40.Code of Corporate Governance of Listed Companies (2002).

Note 41. Xu et. al., supra note 39 at 61, 63.

Note 42. Lin, supra note 5; Zhaofeng Wang, Corporate Governance Under State Control: The Chinese Experience, 13 Theor. Inq. L., 487, (2012); T. J. Wong. Corporate Governance Research on Listed Firms in China: Institutions, Governance and Accountability, 9 Foundations and Trends in Accounting, 4, 259 (2014); Jiangyu Wang, The Political Logic of Corporate Governance in China's State-owned Enterprises, 47 Cornell Int'l L. J. 631 (2014). See also Li-Wen Lin, China's National Champions: Governance Change Through Globalization?, 11 U. Of Pennsylvania Asian L. Rev. (2015). Lin analyzes and explains the (lack of) correlation between the international exposure of Chinese SOEs and their reforms.

Note 43. LENG, supra note 28; Joseph D. Piotroski & T.J. Wong, Institutions and Information Environment of Chinese Listed Firms, inCAPITALIZING CHINA 219 (Joseph P.H. Fan & Randall Morck, eds., 2012).

Note 44. LENG, supra note 28.

Note 45. Gordon, supra note 15; Lucian A.Bebchuk & Assaf Hamdan, Independent Directors and Controlling Shareholders, 165 U. Pa. L. Rev. (2017). William W. Bratton, Reconsidering the Evolutionary Erosion Account of Corporate Fiduciary Law, presented on October 26 2019, at the 21st Century Commercial Law Forum, 19th International Symposium, at Tsinghua University, Beijing, China. (Unpublished paper on file with the author).

Note 46. Puchniak & Kim, supra note 4 at 15; Kang, supra note 3 at 39. Kim notes that related party transactions between individual managers and shareholders are "negligible." Kon Sik Kim, Related Party Transactions in East Asia, in The Law and Finance of Related Party Transactions (Luca Enriques & Tobias Tröger, eds. forthcoming), available at: https://ssrn.com/abstract=3141179; Guoping Li, The Pervasiveness and Severity of Tunneling by Controlling Shareholders, 21 China Econ. Rev. 310 (2010)(noting that while POEs have significantly more tunneling than SOEs, they also have better corporate governance, suggesting that governance does not prevent tunneling even though independent directors seem to have a negative effect on tunneling). Haina Shi, Haoping Xu & Xin Zhang, Do

Politically Connected Independent Directors Create or Destroy Value?, 83J. Bus. Res.82, 83 (2018) note that while attention has been focused on minority shareholder protection from controlling shareholders, the agency problem of managerial conflicts with shareholders also exists and requires analysis. Andrew G. Walder, From Control to Ownership: China's Managerial Revolution, 7 Management & Org. Rev. 19 (2010).

Note 47. The function of independent directors in China is to monitor controlling shareholders to protect minority shareholders. Independent directors are endowed with six special powers to help them perform. Yu-Hsin Lin, Do Social Ties Matter in Corporate Governance? The Missing Factor in Chinese Corporate Governance Reform, 5 J. Int'l & Comm. L. 38, 66-7 (2013). Yunsen Chen, Yutao Wang & Le Lin, Independent Directors' Board Networks and Controlling Shareholders' Tunneling Behavior, 7 China J. Acct'ing Res. 101, 105 (2014). Tunneling appears to be more of a problem in locally-controlled SOEs than in centrally-controlled SOEs. Ya-Leung Cheung, P. Raghavendra Rau & Aris Stouraitis, Helping Hand or Grabbing Hand? Central vs. Local Government Shareholders in Chinese Listed Firms, 14(4) Rev. Fin., 669-694 (2010), available at: https://ssrn.com/abstract=673283. Chen, Li and Chen observe that tunneling is more predominant in POEs than in SOEs. Wenting Chen, Shanmin Li & Crystal Xiaobei Chen, How Much Control Causes Tunneling? Evidence from China, 10 China J. Acct'ing Res. 231, 235 (2017).

Note 48. Milhaupt & Zheng, supra note 12 at 669; Robert C. Art & Minkang Gu, China Incorporated: The First Corporation Law of the People's Republic of China, 20 Yale J. Int'l L. 273 (1995), available at: http://digitalcommons.law.yale.edu/yjil/vol20/iss2/4;Donald C. Clarke, Corporate governance in China: An overview, 14 China Economic Review, 494–507(2003).

Note 49. Wenhao Cheng, An Empirical Study of Corruption within China's State-owned Enterprises, 4 China Rev. 55 (2004); He Jiahong, Assessment and Analysis of Corruption in China, 3 China Leg. Stud. 3 (2015).

Note 50. Sappideen, supra note 3 at 97.

Note 51. Sappideen, supra note 3 at 99.

Note 52.Pang, Zhang, and Zhou, supra note 35, provide data suggesting that academic independent directors may add value to listed companies.

Note 53. Lin, supra note 5 at 8. She expresses doubt as to whether the listing standards actually are complied with.

Note 54. Lin, supra note 5 at 10. Julius Shi-Rong Yam, Rationalisation and Analysis of Corruption in China from the Party Perspective: A Love Hate Relationship, 8 H.K.J. Leg. Stud. 21(2014).

Lin's argument to some extent fits nicely with Yam's, as I will discuss below. See text at notes 104-106.

Note 55. This may be especially true with respect to SOEs in light of the Party's desire to "embed the party's political, ideological and organizational leadership of state-owned enterprises in the corporate governance structure," Wang Yong, State-Owned Enterprises in the Field of Corporate Governance, Board of Directors Magazine (01/02/18), available at http://politics.people.com.cn/n/2015/0921/c1001-27610404.html. The presence in each SOE of a party bureaucracy paralleling the corporate bureaucracy further suggests the irrelevance of the board. See also The Person in Charge of the Central Organization Department Answered a Reporters' Question on 'Several Opinions on Upholding the Party's Construction in Deepening the Reform of State- Owned Enterprises,' People's Daily (9/21/15)(explaining goal of the party "strictly manag[ing] the leadership of state-owned enterprises.").

Note 56. Baum, supra note 13.

Note 57. Id.

Note 58. Id.

Note 59. Id.

Note 60. As is evidently the case in many SOEs. Lin, Reforming, supra note 12.

Note 61. Xu, Zhou, Zeng & Shi, supra note 39.

Note 62. Lin, supra note 5 at 2. See also Piotroski & Wong supra note 44 (". . . [C]oncentrated control gives the State . . . both the incentive and the ability to directly monitor the performance of the firms' managers.")

Note 63. See e.g., Stephen M. Bainbridge, Why a Board? Group Decision Making in a Corporate Context, 55 Vand. L. Rev. 1, 19-21 (2002).

Note 64.Lin, supra note 5; Milhaupt & Zheng, supra note 12.

Note 65. J. Carlos Rivero, Nanci R. Hibscman, Collen O'Neill & Patrick Shannon, Perspective: CEO Performance Evaluation --Getting it Right (April 21, 2005), at http://www.mercerhr.com/knowledgecenter/reportsummary.jhmtl?idContent=1180620.

Note 66. Kevin J. Murphy & Jerold L. Zimmerman, Financial Performance Surrounding CEO Turnover, 16 J. Acct. & Econ. 273, 274, 285 (1993); According to the CEO Succession Practices: 2017 Edition report, in 2016 63 CEOs were replaced among S&P 500 companies and "the CEOs of poorly performing companies were 40 percent more likely to be replaced than in 2015, and 60 percent more likely to be replaced than the CEOs of better-performing companies".The Conference Board, CEO Exits from Underperforming Companies Rise to a Level Unseen in 15 Years Amid Record-High Dismissals in the Retail Sector, News Release No. 5959, available at:https://www.conference-board.org/pdf_free/press/CEOSuccessionJuly2017.pdf .

Note 67. Lin, supra note 5; Kang, supra note 3 at 14; Art & Gu, supra note 49 at 297; Hongmei Xu& Jiang Lin, Do the Characteristics of Independent Directors and Supervisory Board Members Matter in China?, 2 Business and Management Studies, 3, 27 (2016).

Note 68. Hong, supra note 34; Milhaupt & Zheng, supra note 12.

Note 69. Udo C. Braendle, Tanja Gasser & Juergen Noll, Corporate Governance in China – Is Economic Growth Potential Hindered by Guanxi?, 110 Business and Society Review, 4, 389-405

(2005), available at: https://ssrn.com/abstract=856591; Andrew Keay & Jingchen Zhao, Accountability in Corporate Governance in China and the Impact of Guanxi as a Double-Edged Sword, 11 Brook. J. Corp. Fin. & Com. L. 377 (2017), available at: http://brooklynworks.brooklaw.edu/bjcfcl/vol11/iss2/5.

Note 70. Id. at 399, 402.

Note 71. Milhaupt & Zheng, supra note 12.

Note 72. Clarke, supra note 49.

Note 73. This is in contrast to political democracy in which the government represents the people.

Note 74. Blasius Industries, Inc. v. Atlas Corp. 564 A.2d 651 (Del.Ch. 1988). There is no particularly reason why such legitimacy could not equally be achieved by direct shareholder elections of the CEO, but this still reflects the democratic principle underlying American corporate governance.

Note 75. Notions of democracy in China are very different from those in the west. Forms of democracy do exist in China at local levels.

Note 76. Gevurtz analyzes the relationship between a nation's political ideology and it's corporate governance structures with particular reference to the board. Franklin A. Gevurtz, The European Origins and the Spread of the Corporate Board of Directors, 33 Stetson L. Rev. 925 (2004).

Note 77. Milhaupt & Zheng, supra note 12 at 694, 696.

Note 78. Milhaupt & Zheng, supra note 12 at 694, 696, 702; Christopher Marquis & Cuili Qian, Corporate Social Responsibility Reporting in China: Symbol or Substance?, 25 Organization Science, 1 (2013).

Note 79. The State Council's General Office on Strengthening and Improving the State-owned Assets Supervision and Preventing the Loss of State-owned Assets Opinions issued by the State Council, No. 79 (2015), available at: http://www.gov.cn/zhengce/content/2015-11/10/content_10282.htm (Chinese version).

Note 80. Id.

Note 81. Hong, supra note 34, at 504, 533- 537. The board of directors was introduced to the Chinese corporate governance in 1993. 2005 Company Law amendments and 2006 Guidelines for the Articles of Association of Listed Companies enhanced its functions and form.

Note 82. Milhaupt & Zheng, supra note 12 at 2,47.

Note 83. Clarke, supra note 3.

Note 84. There is no universally accepted definition of corruption but anti-corruption laws typically focus on the behavior of public officials interacting with private parties. For example, corporate managers are subject to anti-corruption laws if they inappropriately interact with governmental officials. See, e.g., The Foreign Corrupt Practices Act 15 U.S.C. § 78dd-1, et seq.; Peter J. Henning, Public Corruption: a Comparative Analysis of International Corruption Conventions and United States Law, 18 Ariz. J. Int'l & Comp. L. (2001); Bo Rothstein & Davide Torsello, Is Corruption Understood Differently in Different Cultures? Anthropology meets Political Science (QoGWorking Paper

SeriesNo.2013:5, 2013), available at: https://qog.pol.gu.se/digitalAssets/1443/1443545_2013_5_rothstein_torsello.pdf.

Note 85. While SOEs exist throughout the world, the laws of most western countries provide strict controls on the possibility of State involvement in their management. China is unique. Milhaupt &Zheng, supra note 12.

Note 86. Pace Karl N. Llewellyn, The Bramble Bush (1951).

Note 87. Dali Yang, Dirty Deeds: Will Corruption Doom China?, 96 Foreign Aff. 149 (2017); Ko and Weng, supra note 8; Quah, supra note 11.

Note 88. Supervision Law of the People's Republic of China, Order No. 3 of the President, 03-20-2018.

Note 89. Supervision Law, Art. 6.

Note 90. Supervision Law, Art. 3.

Note 91. Administrative Supervision Law, supra note 9.

Note 92. But see He Jiahong, Assessment and Analysis of Corruption in China, 3 China Leg. Sci. 3 (2015), showing the importance of combatting private corporate corruption in China's program.

Note 93. Id., Art. 15(3). It is important to note that the Supervision Law makes no distinction between wholly-owned and partially-owned SOEs. The State has already accepted the application of anti-corruption measures in SOEs. See, e.g. The State Council's General Office on Strengthening and Improving the State-Owned Assets Supervision and Preventing the Loss of State-Owned Assets Opinions issued by the State Council, (2015) No. 79, 2(7) noting the importance of "anti-corruption work" in state oversight of SOEs.

Note 94. There is evidence that, despite the intensity of the anti-corruption campaign, corruption in China has increased. Ralph Jennings, Bad for Business? China's Corruption Isn't Getting Any Better Despite Government Crackdowns, Forbes, Mar. 15, 2018.

Note 95. Quah, supra note 11, argues that one major factor hindering an effective Chinese anti-corruption campaign is that enforcement is not impartial.

Note 96. Daniel C.K. Chow, How China's Crackdown on Corruption Has Led to Less Transparency in the Enforcement of China's Anti-Bribery Laws, 49 U.C. Davis L. Rev. 685 (2015). He identifies the three major problems of battling corruption in China as "discovery, proof, and punishment." He, supra note 11 at 11. The Washington Post reports a shift in Chinese anti-corruption activities away from politics and more towards economic improvement; policy rather than politics. Gerry Shih, In China, investigations and purges become the new normal, The Washington Post, Oct. 22, 2018.

Note 97. Id. Art. 4.

Note 98. Id. Art. 2. Article 2 continues by enumerating the guiding principles as Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory, the Theory of Three Represents, the Scientific Outlook on Development, and Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era. One could be forgiven for wondering whether the Supervision Commissions will be truly independent.

For an evaluation of Leninist control of corruption, see Chen Gang, Reinforcing Leninist Means of Corruption Control in China: Centralization, Regulatory Changes, and Party-State Integration, 35 Copenhagen J. of Asian Studies 30 (2017).

Note 99. Yam, supra note 56.

Note 100. Hao Wu & Xiaoqi Sun, Managing Conflicts of Interest in China's Public Sector: Fighting Corruption at the Early Stage, 13. Rich. J. Global L. & Bus. 145 (2015), available at: http://scholarship.richmond.edu/global/vol13/iss1/5. See also Yan Sun, The Politics of Conceptualizing Corruption in Reform China, Crime, Law & Social Change 35 (2001)("public office holders" involve not only those of the party and state apparatus at all levels, but any institution or enterprise under the collective ownership or administrative control of government. This encompasses anyone employed in the myriad of "public organizations").

Note 101. Quah, supra note 11.

Note 102. Yukon Huang, The Truth About Chinese Corruption, Carnegie Endowment for International Peace, May 29, 2015.

Note 103. Yam focuses on corruption within the Party and the State but his analysis could apply equally well to corporations. Yam, supra note 56.

Note 104. Yam, supra note 56 at 22.

Note 105.Yam, supra note 56 at 26.

Note 106. Yam, supra note 56 at 32. These circumstances fit nicely with Lin's description of the Party's embeddedness in SOEs. See Lin supra note 5.

Note 107. Yam, supra note 56 at 38. He Jiahong also sees corruption in China as systemic and systematic. He, supra note 11.

Note 108. He is pessimistic, describing China's corruption as "systematic and systemic" and explaining this in terms of deep-seated cultural and social factors, which are unlikely to change in the foreseeable future. He, supra note 11 at 18, 22-26.

Note 109. For a formal and structured approach to preventing corruption, see Wu & Sun, supra

Note 110. Some have argued that the selection criteria are largely political.

Note 111. This also follows from Milhaupt and Zheng's analysis of the Party's selection of corporations for survival. Milhaupt & Zheng, supra note 12. It also follows from its policy of promoting national champions and the earlier policy of "grasping the large, letting go of the small". Milhaupt & Lin, supra note 12.

Note 112. Baum, supra note 13; Paul L. Davies & Klaus. J. Hopt, Boards in Europe: Accountability and Convergence, 61 Am. J. Comp. L.301 (2013).