

# REFORM OF CORPORATE GOVERNANCE IN CHINA<sup>+</sup>

by

Cindy A. Schipani\* and Junhai Liu\*\*

Corporate governance has become a globally debated topic.<sup>1</sup> As multinational corporations enter new global markets, complications abound due to the myriad of corporate governance rules existing among the various legal systems.<sup>2</sup> One example of the new markets becoming more available to American investment is the Chinese market. In light of both the grant of permanent normal trade relations (PNTR) to China<sup>3</sup> and China's recent membership in the World Trade Organization (WTO),<sup>4</sup> the American business community is apt to find more opportunity for investment in China.<sup>5</sup>

American investors are likely to be increasingly interested in understanding the current Chinese corporate governance regime as they consider the Chinese market for investment of their assets. The goal of this paper is to provide an analysis of the corporate governance system in China and offer some suggestions for improvement to make the Chinese market more attractive to foreign investors. Part I provides general background information on the historical corporate governance structures prevalent in China. Part II then analyzes current governance issues, in particular those occurring in the context of corporatization of China's State-owned enterprises. Part III offers proposals for reform and is followed in Part IV by our concluding remarks.

## **I. A Historical Perspective - The State-Owned Enterprise (SOE)**

Traditionally, the production of goods and services in China has been conducted by state owned enterprises (SOEs). The SOE has evolved in China from a model where the State held all property ownership and managerial rights, to a contracting model where the enterprise became responsible for its own profits and losses, to a model that resembles a corporation in the United States. These SOE governance models can be classified as follows: (1) the traditional model (1950s to 1984); (2) the transitional model (1984 to 1993); and (3) the modern corporate model (1993 to present). An understanding of the history of the SOE governance model is essential to identifying proposals for modern corporate governance requirements for corporatization of SOEs. Salient features of the traditional and transitional models are described below. The modern corporate model is the topic of Part II.

### **A. Traditional model (1950s to 1984)**

The traditional model of SOE governance could also be referred to as the State-ownership model, or the State-owned and managed model. This model was dominant from the 1950s through 1984. Under this model, State ownership was generally assumed to be the only legal form available to provide safeguard for State property. Not only did the State have ownership of all the property of the SOEs, but it also enjoyed managerial powers. The backbone rationale behind this model was paramount State property ownership.<sup>6</sup>

Unfortunately, the concept of State ownership not only depressed the growth of private sector in China,<sup>7</sup> but also deprived SOEs of economic and legal independence.<sup>8</sup> This concept, developed in a planned economy,<sup>9</sup> provided justification for State planners to mobilize human and financial resources and to decide production and distribution demands. The duties of SOE executives were to fulfill the production plans of the government, rather than enhance profits for the State investor. In other words, SOEs were not real business enterprises. The terms “corporation” or “legal person” did not exist in China during the central-planning period. Most SOEs were simply referred to as “factories”( *Gongchang* ), and merely functioned as government affiliates responsible for producing goods or rendering services.<sup>10</sup>

Accordingly, the governance structure in SOEs was an integral part of the general governmental framework. The executives of SOEs were appointed and dismissed by government agencies, and enjoyed the same political and economic treatment of government officials (so called “State cadres” -- *Guojia Ganbu* ).<sup>11</sup> The executives were responsible to government agencies. Their achievements were not evaluated by the enterprises' financial performance, but by the enterprises' performance in satisfying the plans made by government agencies.

The traditional model not only served as an organizer of economic resources and activities, but also as a tool to firmly bind the State, SOEs and employees. State coffers were the sole source of SOEs input; SOEs and their employees effectively lived off of the SOE coffers. SOEs were thus both production units and social security units. Once a person entered an SOE, he or she gained a “iron rice bowl” which could be kept for life in terms of salary, housing, medical treatment, and pension. SOE as a State-owned Working Unit (*gongzuo danwei*) had a rich and unusual meaning for Chinese employees, and could not be easily understood by their counterparts in the U.S.<sup>12</sup> Unfortunately, most SOEs were static and uncompetitive.

### **B. Transitional model (1984 to 1993)**

The transitional model of SOE governance is also referred to as the State-creditor's rights model, or the contracting model. This model was dominant from approximately 1984 through 1993, until the Corporate Law was enacted. As a strategy to encourage SOEs to expand production and to earn profits, SOE reform had been the main part of Chinese economic reforms since the late 1970s.<sup>13</sup> The goal of the reform initiatives was to make SOEs responsible for their own gains and losses in the market. In the official language, “SOEs should become legal persons that enjoy full management authority and full responsibility for their own profits and losses.”<sup>14</sup> One of the leading theories advocated by this reform initiative was “separation between the State ownership and the SOE management rights.”<sup>15</sup> Policy-makers at the time believed that this was the best way to transform SOEs into legal entities, while simultaneously retaining State property ownership. To accomplish the reform objectives, the SOEs Law was adopted in 1988 (SOEs Law).<sup>16</sup>

The corporate governance structure introduced by the SOEs Law of 1988 has three salient features. First, the factory director (manager) assumes overall responsibility for the enterprise management.<sup>17</sup> This means that the factory director acts as the legal representative of the enterprise, and exercises leadership in the production, operation and management of the enterprise. In other words “the factory director occupies the central position in the enterprise.”<sup>18</sup> The law also

imposed a requirement of establishing a management committee or another consulting body to be chaired by the factory director, to assist the factory director in making decisions on important issues.<sup>19</sup>

Second, the SOEs Law provides that the local organization of the Chinese Communist Party in the enterprise guarantees and supervises the implementation of the guiding principles and policies of the Party and the State in the enterprise.<sup>20</sup> Third, the enterprise is allowed, through the employees' congress and other forms, to practice democratic management,<sup>21</sup> trade unions are permitted to represent and safeguard the employees' interests and employees may organize and participate in democratic management and supervision.<sup>22</sup>

Between 1987 and 1993, the contracting system (*Cheng Bao Zhi*), was adopted in many SOEs to govern their relationship with the State and factory director. In April, 1987, the Central Committee of the Chinese Communist Party and the State Council adopted a contracting system in SOEs nationwide.<sup>23</sup> According to contracting system, the two parties to the contract are the government agency and the SOE as represented by its chief executive officer (CEO).<sup>24</sup> The CEOs of SOEs are selected through a competitive process.<sup>25</sup> The CEOs act as the legal representatives of SOEs, and take full responsibility for managing their SOEs.<sup>26</sup> The basic principle of contracting system was to "lock the minimum amount of profit for the SOEs to pay to the State," and entitle SOEs "to keep the remaining profit, but [remain] liable for paying the fixed amount to the State even if [the] SOEs have not made satisfactory profit."<sup>27</sup>

As a result of the contracting process, governmental intervention in the operation of SOEs was significantly diminished, and SOEs gained more freedom to make their own business decisions. The SOEs were allowed to retain part of their profits after completing the government's assignments. As an economist commented, with the help of the contracting system, "the State fiscal revenue was reasonably increased. The loss-making SOEs only accounted for 10% among all the SOEs. There was no enterprise having difficulties in paying their employees, and there was no enterprise going bankrupt or laying off their employees."<sup>28</sup>

But the contracting system and the transitional model it represented failed to provide much in the way of SOE reform for a number of reasons. First, it was very difficult to identify a reasonable minimum amount of profit for the SOEs to pay to the State.<sup>29</sup> Second, although most SOEs enjoyed benefits when they were profitable, they were unable to pay the fixed amounts required to the State when they sustained losses.<sup>30</sup> Third, there was a fair amount of exploitation of the assets of SOEs for personal use.<sup>31</sup> Finally, too little SOE profit was retained for development purposes, leaving insufficient resources for future expansion.<sup>32</sup> With these problems in mind, SOE reform in 1993 reflected a desire to building a modern enterprise system compatible with market economy.<sup>33</sup> To achieve this goal, Chinese policy makers began to look to the modern corporation model in the Western world for possible solutions.

## **II. Modern Corporate Model (1993 - Present)**

After the late leader, Mr. Deng Xiaoping called for an introduction of the market economy in China in 1992, one of the goals of SOE reform was officially identified as to "set up [a] modern enterprise system (modern corporation system)<sup>34</sup> in the majority of backbone large and

medium-sized SOEs.<sup>35</sup> SOE reform policy also accelerated the process of corporate legislation, which was perceived as an essential legal instrument for corporatizing SOEs.<sup>36</sup>

China is in the process of restructuring many traditional SOEs. The corporations restructured from traditional SOEs in China are referred to as SOE-corporatized corporations. Compared with traditional SOEs, the ownership structure of SOE-corporatized corporations include more well-defined shareholder rights than its traditional counterpart, and promotes more efficiency and accountability. In comparison with corporations held by individuals or private institutions, SOE-corporatized corporations are expected to present more sophisticated and difficult governance issues during the current transition period from the planned economy to the market economy in China. The Corporate Law of 1993 provides solid legal foundations for transformation of SOEs into different business corporations, including wholly State-owned corporations, closely held corporations and publicly held corporations.

### **A. The Corporate Law**

In China today, the most important legal sources of corporate governance rules are the laws passed by the National Peoples' Congress (NPC)<sup>37</sup> and its Standing Committee.<sup>38</sup> These laws include the Corporate Law of 1993 (Corporate Law),<sup>39</sup> and the Securities Law of 1998 (Securities Law).<sup>40</sup> In addition to legal sources, the memorandum of associations (*Gongsi Zhangcheng*)<sup>41</sup> of each corporation plays an active role in designing each corporation's corporate governance structure. The Chinese memorandum of associations is comparable to a document that would combine both the articles of incorporation and bylaws of American corporations.<sup>42</sup>

The Corporate Law (Law) requires corporations to form three statutory and indispensable corporate governing bodies: (1) the shareholders, acting as a body at the general meeting; (2) the board of directors; and (3) the board of supervisors.<sup>43</sup> In addition, the Law introduced two statutory corporate positions - the chair of board of directors (chair) and the chief executive officer.<sup>44</sup>

Chinese corporate law recognizes only two types of corporations: closely held corporations (*Youxian Zeren Gongsi*) and publicly held corporations (*Gufen Youxian Gongsi*).<sup>45</sup> Within each category of corporation, there are special provisions applicable to subcategories, organized according to the corporation's ownership structure. The governing bodies in closely and publicly held corporations are substantially the same.<sup>46</sup>

#### **1. Closely Held Corporations**

Although governance rules for closely held corporations are similar to those of publicly held corporations, Chapter 2 of the Corporate Law contains a number of special provisions applicable only to closely held corporations. For example, a corporation with "few shareholders" and "small capital size" is not required to set up a board of directors, instead it is required only to have a single executive director and the executive director may serve concurrently as the manager. In addition, this type of corporation does not need an entire board of supervisors, one or two supervisors will suffice.<sup>47</sup> Although in general the voting rights of shareholders in closely held corporations are exercised in proportion to their capital contributions,<sup>48</sup> in the situation where a shareholder wishes to assign its capital contribution to non-shareholders, the consent of greater than 50% of the total number of shareholders is required.<sup>49</sup>

The Corporate Law has different rules for closely held corporations wholly-owned by the State as opposed to those that include a foreign investor. These rules are discussed below.

#### **a. Wholly State-owned corporations**

A wholly State-owned corporation is defined as “a limited liability corporation invested and established solely by the State-authorized investment institutions or government agencies.”<sup>50</sup> Under the Corporate Law as originally enacted, there were only two corporate bodies statutorily required in wholly State-owned corporations: the board of directors and the CEO. Because there are no general meetings of shareholders and no board of supervisors in state-owned corporations, the board of directors and the CEO have more governing powers than their counterparts in other types of corporations. State-authorized investment institutions or government agencies have the power to make decisions on important corporate issues.<sup>51</sup> Certain types of transactions, such as corporate mergers, divisions, dissolutions, increases and reductions of capital, and issuance of corporate bonds, may only be decided by the State-authorized investment institutions or government agencies.<sup>52</sup>

With generous powers in the hands of insiders of wholly State-owned corporations, many senior executives in SOEs prefer to transform their SOEs into wholly State-owned corporations.<sup>53</sup> Unfortunately, though, the generous powers provided to the management of wholly State-owned corporations have led to management irresponsibility in recent years.<sup>54</sup> In order to strengthen the supervisory mechanism in wholly State-owned corporations (and therefore, to address the problem of corruption), the Standing Committee of the NPC amended the Corporate Law on December 25 of 1999 to require wholly State-owned corporations to establish boards of supervisors, whose members shall be chosen by the State Council, or by the State-authorized investment institutions, or by government agencies.<sup>55</sup> Under this amendment, the number of supervisors shall be no fewer than three, and the board of supervisors should include at least one employee representative.<sup>56</sup> In addition to the power to examine corporate financial affairs and to supervise directors and executives, the board of supervisors also enjoys other powers delegated by the State Council.<sup>57</sup>

#### **b. Foreign invested corporations**

Another special provision applicable to closely held corporations concerns those that are foreign invested. In China, there are three types of foreign invested corporations: (1) wholly foreign-invested enterprises; (2) Chinese-foreign equity joint ventures; and (3) Chinese-foreign contractual joint ventures. These types of foreign invested corporations are governed by three separate laws: the Wholly Foreign-Invested Enterprises Law of 1986,<sup>58</sup> the Chinese-Foreign Equity Joint Ventures Law of 1979,<sup>59</sup> and the Chinese-Foreign Contractual Joint Ventures Law of 1988,<sup>60</sup> respectively. These three statutes were enacted before the enactment of the Corporate Law, thus the relationship between the foreign investment legislation and the Corporate Law is left unclear. The Corporate Law attempts to address this issue by providing that the Corporate Law “shall apply to limited liability corporations with foreign investment; where legislation on Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures and wholly foreign-invested enterprises provide otherwise, such provisions shall prevail.”<sup>61</sup>

#### **1. Wholly foreign-invested enterprises**

Wholly foreign-invested enterprises may take different legal forms, such as a corporation, partnership or sole proprietorship. The Wholly Foreign-Invested Enterprises Law<sup>62</sup> is generally silent on corporate governance structure. The corporate governance structure of these entities is therefore governed by the law applicable to their specific form of entity.

## **2. Chinese-foreign equity joint ventures**

Chinese-foreign equity joint ventures must be organized as closely held corporations,<sup>63</sup> but neither a general meeting of shareholders nor a board of supervisors is required. The composition of the board of directors is to be stipulated in the contract and the memorandum of associations after negotiation among the shareholders. The Chair and the Vice-Chair shall be chosen through consultation by the parties to the venture, or elected by the board of directors. If the Chinese party or the foreign party takes the office of the Chair, the other party shall assume the office of the vice-Chair. The CEO and associate CEO shall be chosen from the various shareholders.<sup>64</sup>

## **3. Chinese-foreign contractual joint ventures**

Both equity joint ventures and contractual joint ventures are invested by foreign corporations, enterprises, economic entities and individuals in collaboration with Chinese corporations, enterprises and economic entities. There are, however, a number of differences between equity joint ventures and contractual joint ventures. First, equity joint ventures must take the form of closely held corporations.<sup>65</sup> This organizational form is not required for contractual joint ventures. Only contractual joint ventures may acquire the status of a Chinese legal person in accordance with law.<sup>66</sup> Second, the investors of equity joint ventures share dividends and undertake risks and losses in accordance with the percentage of shareholding in the registered capital,<sup>67</sup> whereas the investors of contractual joint ventures share dividends or products and undertake risks and losses in accordance with the agreements prescribed in the contractual joint venture contract.<sup>68</sup> Third, the investors of equity joint ventures usually receive monetary dividends,<sup>69</sup> while the investors of contractual joint ventures could receive either monetary dividends or products as the form of investment return. Fourth, foreign investors of contractual joint ventures may seek return of their capital contribution before the company is wound up, if all of the fixed assets of the contractual joint venture belong to the Chinese party, and if agreed to by both the Chinese and the foreign parties.<sup>70</sup> In most other respects, contractual joint ventures organized as closely held corporations are governed in a similar manner as equity joint ventures.<sup>71</sup>

## **2. Publicly Held Corporations**

A publicly held corporation is also called a joint stock limited company (*Gufen Youxian Gongsì*). The Corporate Law defines a publicly held corporation as a corporation in which the "total capital shall be divided into equal shares, shareholders shall assume liability towards the company to the extent of their respective shareholdings, and the corporation shall be liable for its debts to the extent of all its assets."<sup>72</sup> Publicly held corporations can be categorized into listed corporations, and non-listed corporations. A listed corporation refers to "a joint stock limited corporation which has its issued shares listed and traded at stock exchanges with the approval of the State Council or the department of securities administration authorized by the State Council."<sup>73</sup> The shares of a non-listed corporation are not listed on a stock exchange. Publicly held corporations are governed by both the Corporate Law<sup>74</sup> and the Securities Law.<sup>75</sup>

## **B. Modern SOEs**

The modern SOE is governed today both by the SOEs Law of 1988 and the Corporate Law of 1993. The SOEs Law requires modern SOEs to: (1) clearly establish ownership; (2) provide well-defined rights and responsibilities; (3) separate the enterprise from government; and (4) employ principles of scientific management.<sup>76</sup>

Pursuant to the requirement of clearly established ownership, shareholders of modern SOEs are entitled to enjoy their shareholders' rights in proportion to their shares, and are obligated to transfer the ownership of their investment to the corporation.<sup>77</sup> Further, corporations enjoy full ownership over the capital contributed by shareholders, as well as ownership of the profits and properties subsequently acquired by the corporation. Shareholders are also entitled to dividends after the dividends are declared, and to net assets when the corporation is liquidated. Finally, the shareholder's personal property, including their capital investment, is separate and independent from the corporation's property.

The phrase "well-defined rights and responsibilities" refers to a clear and certain delineation of rights, obligations and liabilities between and among the corporation, shareholders, employees, creditors, consumers and other stakeholders. Eight legal relationships are specifically enumerated. These are: (1) the relationship between the corporation and its shareholders including a corporate parent; (2) shareholder relationships among themselves; (3) the fiduciary relationship between a corporation and its directors, supervisors and top management; (4) the relationship between a corporation and its creditors; (5) the relationship between shareholders and creditors; (6) the legal relationship between a corporation and its employees; (7) the relationship between a corporation and its competitors; and (8) the relationship the corporation has with its consumers. The SOEs Law also promotes a policy of separation of government from the enterprise. However, as will be discussed below, this goal has been somewhat difficult to achieve.

The term "scientific management" was coined to tackle the problems of "random decision-making, relaxed management, undisciplined job performances, and low-level managerial abilities"<sup>78</sup> inherent in SOEs. Scientific management describes the goals of achieving democratic decision-making processes, efficient execution, and strong supervision over decision-making. Reaching these goals requires establishment of effective mechanisms of incentive and restraint, and checks and balances inside the corporate governance structure.

The Corporate Law of 1993 also provides generous privileges for SOE-corporatized corporations, which are unavailable to other corporations. For instance, "there must be five or more sponsors for incorporating a publicly held corporation, while a waiver is granted where a SOE is restructured into publicly held corporation."<sup>79</sup> Another example of a privilege is that "publicly held corporation, a wholly State-owned corporation, and a *closely held corporation incorporated by two or more SOEs or State-owned investment entities* may, for the purpose of raising funds for its production and operation, issue corporate bonds."<sup>80</sup> Other closely held corporations are not qualified to issue corporate bonds.

Beginning in early 1992, some SOEs began to be corporatized on pilot basis. Since 1994, after implementation of the Corporate Law, government agencies have been making further efforts to push forward SOE corporatization. The Central government selected 100 SOEs for

corporatization.<sup>81</sup> Based on a survey conducted by the Department of Enterprise Reforms,<sup>82</sup> ninety-eight SOEs had been corporatized by the end of 1998.<sup>83</sup> One SOE became bankrupt and the other failed to provide information for the survey. Among the other SOEs, sixteen were transformed into publicly held corporations, sixteen were transformed into closely held corporations, and sixty-two were transformed into wholly State-owned corporations with various subsidiaries.<sup>84</sup> Four SOEs still operate under the traditional enterprise regime.<sup>85</sup> During the period between 1995 and 1998, forty-eight pilot SOEs were transformed into listed corporations, or parent corporations of listed subsidiaries, and raised funds of RMB 3.9 billion Yuan from overseas securities markets.<sup>86</sup>

Corporate governance changes do not necessarily produce immediate profits, however. In a survey conducted by the China Confederation of Enterprises in 1999 of over 1,235 SOE managers (Confederation of Enterprises Survey),<sup>87</sup> only 14% of the managers reported better corporate financial performance following the corporatization,<sup>88</sup> although 55% of the respondents reported better corporate governance.<sup>89</sup>

As a pillar of China's national economy, SOEs have significant social and political implications for contemporary China. However, due in large part to the side effects of several decades of a highly centralized economy and radical changes in market conditions, many SOEs have run into serious financial difficulties. According to the Ministry of Finance, "there are 238,000 non-commercial SOEs with RMB 13,500 billion Yuan (US\$1,626.5 billion) of State assets in 1998. The number of large SOEs is only 9,357, and medium-sized and small SOEs account for 96% of total SOEs. However, more than 45% of the assets are owned by the smaller firms, which in many cases engage in low-level repetitive production and are not competitive."<sup>90</sup> In early 1999, "about 49% of Chinese large and medium-sized SOEs are suffering the loss."<sup>91</sup>

Moreover, it appears that internal corporate governance itself is in need of improvement in most SOEs. For instance, although the governing corporate bodies in many SOE-corporatized corporations have been established, they do not function very well. According to a survey conducted by State Committee of Economy and Trade, only twenty-two of ninety-eight corporations have been conducting meetings of shareholders.<sup>92</sup> Among the twenty-two corporations which have been holding meetings of shareholders, the meetings have been properly conducted in only eleven of these corporations.<sup>93</sup> The meetings of shareholders in seven corporations have been relatively effective, and the meetings of shareholders in four corporations have been moderately effective.<sup>94</sup>

On the other hand, ninety of ninety-eight corporations have set up boards of directors. Most boards of directors (seventy-five) have been functioning very well, while in the other fifteen corporations, boards play a limited role. Seventy-eight of the ninety-eight corporations have set up boards of supervisors. Two-thirds of the boards of supervisors have been functioning well.

As far as the appointment of executives is concerned, government agencies have been playing decisive roles in fifty-two corporations, and boards of directors have been playing decisive roles in thirty-five corporations. Other approaches have been adopted in ten corporations. In short, twenty-nine pilot corporations admit that their corporate bodies have been functioning irregularly.<sup>95</sup>

In addition to the 100 pilot samples mentioned above, other SOE-corporatized corporations as well as listed corporations have been facing similar governance problems. Although many SOEs have been transformed into business corporations, their managements still tend to avoid the corporate governance requirements imposed by the Corporate Law and retain the traditional SOE governance model.<sup>96</sup> Some listed corporations do not convene regular meetings of board of directors, thus there is little check on managerial power.<sup>97</sup> There are also some directors who do not take the board meeting rules seriously.<sup>98</sup> In some corporations, all directors act as managers and executives.<sup>99</sup> The excessive overlaps between directors and executives frequently cause problems of insider control and managerial corruption.<sup>100</sup> In some cases, executives are employed in the parent corporation and the subsidiary at the same time, and these dual positions greatly threaten and weaken the shareholders' powers. In corporations with highly centralized shareholding structures, the controlling shareholders are extremely dominant and, therefore, minority shareholders are unable to enjoy proper protection.<sup>101</sup> Although several listed corporations, including Zhongxing Communication Co., Jiangnan Heavy Industry Co., and Xiaoya Electricity Co. have attempted to introduce independent directors and supervisors, the reality is that serious governance problems still exist.<sup>102</sup>

### **III. Proposals for Governance Reform**

As noted above, in spite of current efforts at reform, improvements are needed in Chinese corporate governance. This Part identifies some of the issues that need to be addressed in order to achieve further governance reform in SOE-corporatized corporations and offers some modest suggestions.

#### **A. Repeal SOEs Law**

The SOEs Law of 1988 was enacted in connection with the transitional model of corporate governance whereas the Corporate Law of 1993 is aimed at governing modern corporations. Today, many SOEs are still governed by the SOEs Law and its regulations. In many cases, provisions of the Corporate Law and the SOEs Law and regulations conflict.<sup>103</sup> As a first step in reform, we propose that as China corporatizes its SOEs, the SOEs Law and its subordinate regulations should be repealed. Instead, all SOEs should be governed by the Corporate Law. This not only simplifies corporate governance, it applies the most current Chinese thinking to all of its corporate enterprises.

#### **B. Build Autonomy**

Historically, the government has played a key role in corporate governance. In the period of the planned economy, the civil society was almost replaced by the political state, and SOEs and government agencies were to a great extent commingled. Moreover, SOEs were generally regarded as government branches. Although some people described the relationship between the government and SOE as "the relationship between a father and his son," it is more accurate to describe it as the relationship between "a father and his hand,"<sup>104</sup> because an SOE, like a hand, did not have its own legal independence.

China is in a transition period from a planned economy to a market economy. Some government agencies still treat SOE-corporatized corporations like traditional SOEs, and control them in the traditional ways with excessive administrative power. This control includes requiring

approval of decisions already made by the board of directors, bypassing the general meeting of shareholders and directly appointing directors and executives, and interfering with daily operations. The main reason for the absence of comprehensive business autonomy in many SOEs is the old system of inseparability or commingling between government and enterprises.<sup>105</sup> There is still a long way to go before SOEs and SOE-corporatized corporations become truly independent from the government agencies.

In order to build sound corporate governance and corporate autonomy, it is imperative to disassociate business corporations from government agencies, to reduce government intervention in business affairs, and substantially liberalize corporate business activities from government control. In fact, the Chinese government has recently recognized this principle, and promised to separate the government from corporate functions.<sup>106</sup>

Yet, as agents of the State shareholder, government agencies should be permitted to exercise shareholders' rights on behalf the State shareholder, but not interfere in the daily corporate management and operations, or intervene in lawful corporate decision-making processes. The State shareholder should enjoy the same shareholder rights as the private investors. In terms of personnel and financial controls, however, government agencies should fully disassociate with the SOE-corporatized corporations under their control.<sup>107</sup>

In light of their public role, it is appropriate for government agencies to intervene in the market in some ways, however. Governmental intervention can be useful for providing: (1) respect for corporate autonomy; (2) protection of fair competition; (3) guidance of the micro-economy; (4) facilitation of achievement of corporate goals; and (5) fulfillment of business opportunities and other legitimate interests, including government procurement.<sup>108</sup> Micro-control legislation should give equal attention to the controller and the controlled and principles of legitimacy, efficiency, and fairness should be respected when government intervention is introduced.

Given the difference in the legal nature between private right and public power, the shareholder's rights enjoyed by the State and the administrative powers possessed by government agencies, should be separated, and should be exercised by different entities. In this regard, it is extremely important to identify the proper institutions or organizations acting as the agents of State shareholder.

### **C. Redefine the Relationship Between Old and New Corporate Bodies**

Prior to adoption of the Corporate Law, the main governance bodies in the traditional SOEs were the committee of Communist Party, the trade union, and the meeting of employees' representatives in the traditional SOEs. As noted above, modern Chinese corporations are now governed by the general meeting of shareholders, the board of directors, and the board of supervisors. However, the old corporate bodies continue to play a role. It has been held that “[p]arty organizations should perform duties according to the Party Constitution, and trade unions and employees' congresses should carry out their respective duties in accordance with relevant laws and regulations.”<sup>109</sup> Yet overlap between the new and the old corporate bodies is still possible. “Party committee leaders of wholly State-owned corporations and State share-holding corporations can be included in [the] board of directors and [the] board of supervisors in

accordance with legal procedures, and employees' representatives should be included in the boards of directors and supervisors."<sup>110</sup> Moreover, "[t]he Party secretary and the Chair of board of directors can be the same person, but in principle, the Chair of board of directors and chief executive officer should be two separate people."<sup>111</sup> Despite the roles of the old governing bodies, "it is necessary to give full play to the role of board of directors in making unified decisions on major issues and the effective supervisory role of board of supervisors."<sup>112</sup> To achieve the objectives of the Corporate Law reforms, the three new corporate bodies created by the Corporate Law should be permitted to function independently.

#### **D. Improve the Function of the General Meeting of Shareholders**

The general meeting of shareholders in China is considered the supreme sovereignty in corporate governance, or "the organ of power of the corporation."<sup>113</sup> The shareholders are provided the following comprehensive decision-making powers at the general meeting by statute: (1) to make decisions regarding corporate policies on business operation and investment plans; (2) to elect and replace directors and to determine their remuneration; (3) to elect and replace shareholder supervisors and to determine their remuneration; (4) to examine and approve the reports of board of directors and of the board of supervisors; (5) to examine and approve plans of corporate fiscal financial budget and final accounts; (6) to examine and approve plans of corporate profit distribution and of making up of losses; (7) to make resolutions on the increase or the reduction of the corporation's registered capital; (8) to decide whether to issue corporate bonds; (9) to make decisions regarding corporate mergers, divisions, dissolution and liquidation; and (10) to amend corporate memoranda of associations.<sup>114</sup>

In the United States, some of these powers, such as the power to approve plans of corporate profit distribution and the power to determine the directors' remuneration, are reserved to the board of directors, rather than the shareholders. The rationale behind this institutional arrangement in China is that the shareholders are considered the ultimate source of authority. In other words, the powers enjoyed by the board of directors and the board of supervisors are derived from the shareholders, and not from the legislature. This corporate governance philosophy resembles the political governance philosophy expressed by the Chinese Constitution. Pursuant to the Constitution, the "NPC is the supreme State power organ."<sup>115</sup> "All the executive branches, judiciary branches and procurator branches shall be elected by people's congress, responsible to people's congress, and are subject to the supervision by people's congress."<sup>116</sup> In other words, the NPC is the supreme power center in the Chinese political life. All other state bodies derive their powers from the NPC. Given the similarities between the governance structure in the political states and that in business corporations, it was natural for the Chinese legislature to translate the rationale of the political governance regime into the corporate life, and to compare the meeting of shareholders to the NPC.

As Chinese Corporate Law undergoes further revision, the question is whether the general meeting of shareholders should keep its current powers, or whether some powers, especially substantial managerial powers, should be transferred to the board of directors. It is reasonable to maintain the status quo in order to deal with excessive managerial power, particularly during a transitional period. However, it may be wise to consider the corporate governance arrangements in

other legal systems, and perhaps reduce some powers currently possessed by the shareholders, in order to harmonize the Chinese system of corporate governance with global investment requirements.

We propose some refinement in the Corporate Law. The current Corporate Law lists statutory powers enjoyed by the shareholders and the board of directors. By granting various powers to both bodies, it is unclear which body prevails in the case of conflict. For example, if the board of directors exercises the powers not prescribed by the legislature and makes a decision, it will become an open question regarding whether the shareholders will have the power to repeal the decision. Another question under Chinese law concerns whether the shareholders may exercise the powers provided exclusively to the board of directors. Under the current Chinese legislation, the answer to each of these questions is that the shareholders may repeal decisions of the board of directors and even exercise powers purportedly reserved exclusively to the board. To avoid unnecessary power struggles between the corporate bodies, one option is to limit the powers of the shareholders to the items prescribed by the legislature, and reserve all other managerial powers to the board of directors, while reserving all other supervisory powers to board of supervisors.

Another issue concerns the practical realities of the general meeting of the shareholders. For example, although according to written law the general meeting of shareholders is very powerful in China, in reality the meeting is often simply a rubber stamp for the wishes of the majority of shareholders. There is little or no opportunity for minority shareholders to be heard. Oppression of minority shareholders is a serious issue.

As noted by a reporter from the *China Securities Daily*, the meetings of shareholders can be quite boring.<sup>117</sup> First, the reporter observed that there is an increasing number of inside shareholders, namely, employee shareholders, amicable to management attending the meetings, and that the number of minority shareholders and outside shareholders attending the meetings is declining.<sup>118</sup> He cited an example of a meeting of shareholders where seven auditing reporters attended the meeting, while only six participating shareholders were in attendance.<sup>119</sup> Second, the reporter found that the proceedings were often very mechanical -- the Chair or the CEO always read the already published annual report, without adding any meaningful discussion regarding development, planning, the budget or management goals for the coming year. After reading the report, the Chair or CEO usually asked the shareholders to vote without offering them an opportunity to ask questions. Finally, shareholders rarely asked questions during the meetings. For instance, in five of the seven shareholder meetings audited by this reporter, no shareholder asked a single question.<sup>120</sup> Moreover, the voting results were almost always 100% in favor of the resolutions proposed by management.<sup>121</sup>

There are several possible explanations for the inactivity of shareholders at the general meeting. In addition to factors such as time, travel expenses and inability to influence results, the main explanation may be that management appears indifferent to the concerns of minority shareholders. Some directors refuse to disclose more information than published in the annual reports, believing that they will have fewer difficulties with shareholders if they present them with minimal information.<sup>122</sup> However, in recent years, some minority shareholders have begun taking their rights more seriously. For instance, when Shengli Co. convened its 2000 meeting of

shareholders, many minority shareholders attended either personally, or sent agents or representatives.<sup>123</sup> Fifteen hundred shareholders representing 26,260,000 shares appointed their agents to cast votes on their behalf.<sup>124</sup> Furthermore, at least twenty shareholders each holding fewer than 100 shares attended the meeting of shareholders.<sup>125</sup>

In order to provide guidelines for meetings of shareholders in listed corporations, the Chinese Securities Regulatory Commission (CSRC) issued the Standard Opinions on Meeting of Shareholders in Listed Corporations (Standard Opinions) on February 23, 1998, and amended it on May 18, 2000.<sup>126</sup> This document has enhanced the Corporate Law in a number of respects. For example, the Standard Opinions recognize the minority shareholders' right to request the board of directors to hold a special meeting of shareholders.<sup>127</sup> If the board of directors denies the request, the qualified shareholder may notify the other shareholders and convene the special meeting. Unfortunately, the purpose of the Standard Opinions, as evident from inclusion of the word "*opinions*," in its name, is to "guide the listed corporations to convene meetings of shareholders."<sup>128</sup> Thus, it is very difficult to classify its requirements as mandatory, or even legally binding. Given the sophisticated problems associated with the meeting of shareholders and the insufficiency of regulations governing this issue, it is necessary to further improve these rules. We therefore propose a number of amendments to the Corporate Law to address these issues.

Our first proposal is to incorporate the Standard Opinions into the Corporate Law. This would help make the requirements of the Standard Opinions and the Corporate Law consistent and coherent. After the revision of the Standard Opinions in May 2000, the first reported case of a special meeting of shareholders convened by the shareholders, instead of by the board of directors, occurred. This was the meeting of the shareholders of Xingfu Shiye Corporation.<sup>129</sup> Mingliu Investment Limited Corporation owned 60 million of 312.8 million outstanding shares of Xingfu Shiye Corporation. After Mingliu's proposal to convene a special meeting of shareholders was denied by the board of directors, Mingliu proceeded to send out the notices and convened a special meeting of shareholders as provided by the Standard Opinions.<sup>130</sup> Some commentators considered this a positive event because it meant that the board of directors was not the sole decision-maker regarding convention of special meetings of shareholders.<sup>131</sup>

Next, shareholders should be excluded from voting on issues in which they are interested parties to curb the increasing number of interest-conflicting transactions in listed corporations, also as provided in the Standard Opinions. Current legal rules focus only on information disclosure, and make it easy for some parent corporations to allocate their profits on their business transactions with their subsidiaries. The Standard Opinions provide that "the shareholders who are the parties to the business transactions between themselves and the listed corporations, should not cast their votes on such transactions, and the votes held by such shareholders should not be included in the total votes represented by the shareholders at the meeting of shareholders."<sup>132</sup>

Further, the shareholder's right to question management and to offer proposals should be strengthened. These two rights, alongside with the right to information, are mentioned in the Corporate Law only generally.<sup>133</sup> To make these rules more workable, the rules should delineate appropriate procedures for shareholders submission of proposals and requests for information.

A cumulative voting mechanism for the election of directors might also be made available to provide minority shareholders a voice in corporate governance. The current Corporate Law is silent on this point. This provision could be made optional, as is true generally throughout the United States.<sup>134</sup>

Finally, detailed provisions should cover issues such as solicitation of proxies, the validity of voting agreements, and exceptions to the general rule of "one share, one vote" (for example, non-voting shares, multiple voting shares, corporate self-owned shares, interlocking shares, etc.). Additionally, modern telecommunication technologies, especially Internet services and video conference technologies, might be considered as alternative ways to provide for the meetings of shareholders to make it easier for the minority shareholders to participate in the corporate decision-making process. Modern telecommunication technologies could be employed alongside with the traditional face-to-face general meetings of shareholders.

#### **E. Recognition of Multiple Legal Representatives**

Both the chair of the board of directors and the CEO are statutory and indispensable corporate positions in China. The Chair holds the following statutory powers: (1) to chair the meeting of shareholders and to convene and chair the meetings of board of directors;<sup>135</sup> (2) to examine the implementation of resolutions passed by the board of directors;<sup>136</sup> (3) to sign shares and bonds issued by the corporation;<sup>137</sup> (4) to act as the sole corporate legal representative;<sup>138</sup> and (5) to exercise some powers of the board of directors under the authorization from the board when the board is not in session.<sup>139</sup> In addition, the Chair, as a member of the board of directors, may cast one vote at the board meetings.<sup>140</sup> Decisions are made by majority rule.<sup>141</sup>

The position of the CEO can be described as follows. The CEO is an agent of the corporation and enjoys the rights conferred by the Corporate Law<sup>142</sup> and the corporate memorandum of associations. As an employee, the CEO enjoys the rights and interests recognized through the employment contract and by labor laws. Under the Corporate Law, the CEO takes general responsibility for daily corporate operations.<sup>143</sup> Further, the CEO is hired and dismissed by the board of directors,<sup>144</sup> and therefore is responsible to the board.<sup>145</sup>

Because the Corporate Law recognizes the Chair as the sole corporate legal representative, some Chairs believe that they are the paramount corporate leaders and usurp the authority of the shareholders and directors.<sup>146</sup> In other words, they confuse the position of legal representative recognized by the SOEs Law and that recognized by the Corporate Law. Under the SOEs Law, the manager, as the only legal representative in SOEs, not only has the authority to represent the SOEs in transactions with third parties, but also enjoys paramount decision-making and executive power. One fundamental change introduced by the Corporate Law is that managerial powers have been redistributed between several corporate bodies. The power to represent the corporation under the SOEs Law is held by the Chair of the board of directors. The general meeting of shareholders holds the most fundamental decision-making power. The CEO holds the detailed daily decision-making power. The board of directors holds the mid-level decision making powers. The traditional internal executive powers are divided again between board of directors and CEO. Therefore, the power attached to the legal representative, namely, the Chair of the board of directors, has been greatly reduced.

Under current legislation, however, the Chair is the only corporate legal representative authorized to execute contracts and other legal documents on behalf of the corporation. If other directors are required to represent the corporation in legal relationships with third parties, they must receive a special authorization from the Chair. It is thus inconvenient for a corporation to enter transactions when the legislation permits only a single legal representative. Thus, law reform should include recognition of multiple corporate legal representatives, in order to achieve transaction efficiency and to provide safeguards for third parties in the market.

## **F. Improve the Role of the Board of Directors**

### **1. The function of the board of directors**

As mentioned above, the general meeting of shareholders is intended to be the power center in corporations under the Corporate Law. This institutional arrangement may be reasonable and feasible for closely held corporations with few shareholders. However, it is time consuming, expensive, and inflexible for corporations to respond to frequent market changes and other business environments if shareholders are required to meet on every significant managerial decision. In general, in the U.S., although "all corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation,"<sup>147</sup> much corporate power is delegated to senior officers. According to the U.S. Model Business Corporation Act "the management of the business of a publicly held corporation should be conducted by or under the supervision of such principal senior executives as are designated by the board of directors, and by those other executives and employees to whom the management function is delegated by the board or those executives, subject to the functions and powers of the board . . . ."<sup>148</sup>

If China were to follow the American approach as a possible solution to the problem, the Chinese legislature would need to reallocate the powers between the meeting of shareholders and the board of directors, and thus transfer all the ordinary business managerial powers from the shareholders to the board of directors. Because the CEO also enjoys substantial managerial powers under the current Corporate Law, it is possible that there will be a conflict between the board of directors and CEO when both of them perform statutory powers. To avoid these power struggles, it is essential that the legislation define the powers of the CEO in a coherent way. Thus, the board of directors, instead of the shareholders, should become the power center in the future Chinese corporate governance, and the board should have the authority to delegate some managerial powers to the CEO or to other senior executives. The board of directors should also have the authority to supervise the performance of individual directors, the CEO and other executives.

In the U.S., committees of the board of directors, including executive committees, audit committees, nominating and compensation committees, "are assuming increasingly important roles in the governance of publicly held corporations."<sup>149</sup> However, the Corporate Law is silent on whether a Chinese board of directors is authorized to appoint committees to assist the board in making informed and conscientious decisions. No Chinese corporation, except for overseas listed corporations, has reportedly appointed committees. Nevertheless, the boards of directors in

overseas-listed corporations are encouraged to set up necessary professional committees with respect to matters such as strategic decision-making, auditing, and other issues, in order to improve corporate long-term development strategies.<sup>150</sup> In light of the U.S. experience, it may be efficient to authorize boards of directors to act through committees of directors, but to also specify the nondelegable powers to be exclusively exercised by the full board in order to protect shareholders' rights from being injured by excessive committee powers. As the Corporate Law recognizes the board of supervisors as a comprehensive corporate body, the audit committee under the board of directors (similar to that in the U.S.), should serve under the supervision of the board of supervisors. To hold directors accountable and diligent, it may also be advisable for Corporate Law to adopt a provision similar to that of section 8.25(f) of the Model Business Corporation Act in the U.S. to provide that "the creation of, delegation of authority to, or action by a committee does not alone constitute compliance by a director with the standards of conduct."<sup>151</sup>

## **2. Independence**

In the U.S., as well as in other legal systems, outside directors play active and decisive roles in the governance of large publicly held corporations. According to a 1999 survey conducted by the Organization for Economic Cooperation and Development (OECD), the average percentage of independent directors on the board of directors is 62% in the U.S., 34% in the United Kingdom, and 29% in France.<sup>152</sup> Corporate Law in China has no mandatory requirements for appointing outside directors in large publicly held corporations.

Since March 29, 1999, the CSRC began to require overseas-listed corporations to "increase the number of outside directors. When the board of directors concludes its term of service, outside directors should hold more than half the board seats with at least two independent directors."<sup>153</sup> In order to prevent outside directors from becoming figureheads, the CSRC provided that "an outside director should have sufficient time and necessary knowledge to perform his/her duties. [To assist the] outside director [in] perform[ing] his/her duties, the corporation must supply [all] necessary information and materials."<sup>154</sup> In addition to imposing qualification requirements for outside directors, the CSRC also granted substantial powers to outside directors. For instance, according to the CSRC "the views of an independent director should be specified in the board resolution." Moreover, a related transaction of the corporation may not take effect until approved by an independent director. Two or more independent directors may propose that the board of directors call for a special meeting of shareholders. Independent directors may directly report to the meeting of shareholders, the CSRC and other relevant agencies.<sup>155</sup>

These CSRC requirements apply only to overseas-listed corporations. As far as domestically-listed corporations are concerned, the Guidelines on Memorandum of Associations in Listed Corporations provides an optional article according to which "the listed corporations may appoint independent directors when it deems it necessary."<sup>156</sup> However, it has no requirement for a minimum number of outside directors, nor requirements regarding their duties. In October, 2000, the State Committee of Economy and Trade permitted SOE-corporatized corporations to "have independent directors, who are independent from the shareholders, and take no position in the corporation."<sup>157</sup> In reality, some listed corporations voluntarily elect some independent scholars to serve as independent and outside directors, and encourage them to play active roles. For example,

in Xiao Tian'e Corporation, six out of the twelve members of the board are independent directors, and three directors may act together to veto board resolutions.<sup>158</sup>

However, many independent directors find it difficult to exert any substantial influence, other than symbolic, with the board.<sup>159</sup> According to a senior Chinese economist and a former independent director in Lanzhou-based Huanghe Co., the independent outside directors are dispensable, and they only play a very limited role on the boards of most listed corporations in China.<sup>160</sup> This former director personally served as an independent director for approximately only six months in Lanzhou-based Huanghe Co.<sup>161</sup> When the Chair and the CEO of the company ran into serious confrontations, the independent outside directors could not function, and this director felt he had no choice but to resign.<sup>162</sup> Moreover, during his six months of service, he only had one opportunity to attend the meeting of board of directors.<sup>163</sup>

The indispensable position of outside and independent directors in listed corporations should be recognized by the Corporate Law on a mandatory basis. In order to provide outside directors with stronger powers, the legislature should determine a statutory minimum percentage of independent and outside directors in listed corporations. Nevertheless, a significant challenge will be balancing the need to encourage independent directors to play a more significant role in listed corporations while avoiding corruption. For this purpose, both sufficient remuneration and enforcement of legal duties are essential for independent directors.

#### **G. Provide Restraint and Incentive Mechanisms for Directors and Executives**

Unfortunately, in Chinese SOEs and SOE-corporatized corporations, it is common for directors and executives to misuse their powers and to seek personal gain, or to even seize corporate property.<sup>164</sup> For instance, some SOE directors and managers control the power to appoint and dismiss treasurers, and therefore have the means to force treasurers to keep several different accounting books for fraudulent purposes.<sup>165</sup> For example, in one case, some perfect machines were sold as steel rubbish, while the corporation purchased more raw materials than it could use in the next several hundred years.<sup>166</sup> Some directors and executives made great personal profits during the process of corporate asset restructuring.<sup>167</sup>

In one typical case, a former CEO of Anqing Paper Industry Corporation decided to establish three branches of the corporation, costing the corporation approximately \$1,000,000, although no profit was generated.<sup>168</sup> He also invested over \$1,000,000 in technology innovation, but the company has yet to produce a qualified product.<sup>169</sup> In addition, he also entered into a purchase of waste paper for the corporation from someone with whom he had a personal relationship, at an extremely high price.<sup>170</sup>

Some SOE officers behave appropriately during most of the SOE life, but become corrupted just before their retirement.<sup>171</sup> Because many corrupted directors and executives are approximately fifty-nine years old, their "sunset misbehavior" is referred to as the "phenomenon of fifty-nine."<sup>172</sup> Moreover, many corrupted directors and executives are famous figures, and serve in several leadership positions at the same time, including Chair, CEO, secretary of the Communist Party Committee, chief of government agencies, etc.<sup>173</sup> In some SOEs, the Chairs and CEOs hold supreme managerial power, and other corporate bodies are unable to successfully challenge their authority.<sup>174</sup>

The irresponsibility of directors and executives has resulted in insolvency or bankruptcy of many SOEs. A survey conducted by the Anhui Province authorities in 1997 revealed that directors and executives were responsible for more than half of the insolvency or bankruptcy cases in 110 SOEs.<sup>175</sup> In addition, many managers in SOEs and SOE-corporatized corporations are unhappy with their current situation. In the Confederation of Enterprises Survey, 83% of the respondent managers said that the biggest obstacle for the growth of first rate of directors and executives in China is the lack of an effective incentive and disciplinary mechanism; and 77% of them prefer more generous annual salary as the major form of their compensation.<sup>176</sup> Thus, current managers are almost equally concerned about both sound incentives and disciplinary rules for Chinese directors and executives.

### **1. Accountability**

In the U.S., directors and officers are deemed fiduciaries of the corporation because their relationship with the corporation and its shareholders is one of trust and confidence. As fiduciaries, directors and officers owe legal duties to the corporation and the shareholders. These fiduciary duties include the duty of care and the duty of loyalty,<sup>177</sup> and directors and officers are held personally accountable for breach of these duties. In contrast, in the Chinese traditional planned economy, the legislation was silent with respect to the duties and obligations of directors and executives. It has been common for directors and executives who have caused damage to one enterprise, to be appointed by government agencies to serve in another enterprise.<sup>178</sup> Legal liability, including civil liability, has been rarely imposed on wrongdoers or corrupted directors and executives.

In light of the significant deficiencies in the traditional governance structure of SOEs, the Corporate Law provided for a number of provisions relating to the duties of directors, supervisors and officers.<sup>179</sup> It also introduced some provisions dealing with the legal liabilities against them, including civil, criminal and administrative liabilities.<sup>180</sup>

Unfortunately, the Chinese Corporate Law is silent on the director's duty of care, and does not provide a workable test for monitoring directors' performance. In order to curb the incidents of misuse of corporate powers, it is necessary to employ mechanisms to hold the management of SOEs accountable for their behavior. China might therefore consider the U.S. approach to the duty of care and require directors and officers to exercise the degree of care in accordance with the knowledge, diligence and experience expected from an ordinarily prudent director in a similar position, and under similar circumstances, and hold them personally accountable if they fail to do so.<sup>181</sup>

The governing corporate bodies should assert claims whenever the corporate interest is damaged or threatened by directors or executives' breach of duties. However, it is possible that the board of directors may refuse or fail to do so due to the amicable relationships between the wrongdoing directors and the remaining directors. The same phenomenon may occur with respect to the board of supervisors, when some supervisors are close friends of the wrongdoing director.

In the U.S., shareholders have a right, under certain circumstances, to bring a derivative action when the corporation suffers a wrong not redressed by the corporate directors.<sup>182</sup> Influenced by the U.S. experience, Japan introduced derivative actions in 1950, with revisions in 1993.<sup>183</sup>

Currently, the Chinese Corporate Law is silent on the issue of shareholder derivative suits. However, this silence has not prevented the Chinese courts from hearing shareholders' derivative actions.

Nevertheless, Chinese shareholders are not very active in pursuing derivative actions. If China wishes to make derivative actions available to shareholders to provide a check on managerial abuse, it is necessary that the Chinese legislature provide some clear procedural rules.

## **2. Compensation**

One of the most serious problems with corporate governance in China is that many directors and executives are underpaid. In the forty-nine published annual reports of listed corporations for the financial year of 1998, forty-five listed corporations reported the salary of their directors and senior executives.<sup>184</sup> According to the report, 47% of the directors and senior executives received annual compensation below RMB 30,000 Yuan (about US\$ 3,500), 29% received annual compensation ranging from RMB 30,000 Yuan (about US\$ 3,500) to RMB 50,000 Yuan (about US\$ 6,000), 13% earned annual compensation ranging from RMB 50,000 Yuan (about US\$ 6,000) to RMB 100,000 Yuan (about US\$ 12,000), and 11% received over RMB 100,000 Yuan (about US\$ 12,000) of annual compensation. For instance, the Chair of the board of directors of China Light Motor Group Co. earned 40,000 Yuan (about US\$ 4,500) as annual compensation in 1998, while his corporation sold 1.5 million motorcycles that year. The chair of another corporation, Houjian, earned only RMB 39,000 Yuan (about US\$ 4,400) as annual compensation in 1998, while his corporation sold RMB 8.2 billion (about US\$ 1 billion) of products that year.<sup>185</sup>

Since many Chinese directors and executives are underpaid, some of them are tempted to seek illegal income. Unreasonable compensation is likely to be one of the major reasons for the "phenomenon of fifty-nine." For instance, the former Chair and CEO of Hongta Tobacco Corporation, embezzled US\$ 1.7 million in corporate funds. His total lawful compensation during the seventeen years of serving his corporation was RMB 800,000 Yuan (about US\$96,000), while the corporation made profits of RMB 80 billion Yuan (about US\$9.6 billion). In other words, his lawful income accounted for a mere 0.001 percentage of the total corporation's income.<sup>186</sup>

It is essential to improve the compensation mechanism for directors and executives. To help attain this objective, innovative compensation mechanisms, such as stock option programs, might be made available to directors and executives in most SOE-corporatized corporations. In spite of their adoption by foreign-invested enterprises in China, stock option programs are relatively new to many SOEs and SOE-corporatized corporations. In Beijing, ten enterprises have been attempting to implement the stock option contract system, including Bofei Instrument-Making Corporation, Beijing Switch Gear Share-holding Limited Corporation, Tongzhou Subsidiary Corporation of Tongrentang, Shuangqiao Pharmaceutical Factory, Zhongguancun Real Estate Corporation, and Caishikou Department Store.<sup>187</sup> Among these corporations, Zhongguancun Real Estate Corporation and Caishikou Department Store have recently cancelled the project because their managers were concerned about their value.<sup>188</sup>

According to a typical stock ownership plan, SOE managers receive a certain amount of stocks in installments at a fixed price during their tenure and can earn profits on these stocks in the future.<sup>189</sup> The managers must reinvest the profits in the enterprise by transferring them into new

shares during the first three years.<sup>190</sup> The managers are also responsible for losses incurred during that period.<sup>191</sup> Only after the managers' performance is considered satisfactory, may they cash in their stocks or reinvest the profits in the enterprise two years after they leave the post.<sup>192</sup> Shanghai also carried out a trial reform rewarding senior executives of enterprises with stock options. "Directors of listed corporations, are given a certain number of shares, but they can only be cashed in years later, sometimes even after their retirement. Passing a strict and comprehensive long-term assessment of the director's working performance is the prerequisite for obtaining the reward."<sup>193</sup>

Stock option programs should be implemented nationwide. The legislature should offer guidelines for the content and validity of stock option contracts. For example, the legislature should provide guidelines on methods for determining proper rewards. Relatively moderate rewards may be unattractive to the directors and executives, while overly generous ones may be unfair to shareholders and employees. In assessing the performance of directors and executives, strong supervision is also necessary to ensure the objectivity and impartiality of the appraisal process.

#### **H. Improve the Role of the Board of Supervisors**

The board of supervisors is an indispensable corporate body in the Chinese corporate governance structure. Pursuant to the Corporate Law, the supervisors shall perform the following duties: (1) examine the corporate financial affairs; (2) supervise directors and executives' breaches of statutes or memorandum of associations in performing their duties; (3) demand directors and executives to redress their misconduct damaging the corporate interest; (4) propose special meetings of the shareholders; and (5) other duties as stipulated in memorandum of associations. Supervisors also have the power to audit the meeting of board of directors.<sup>194</sup> The board of supervisors includes shareholder representatives and certain employee representatives, with the percentage of representation of each group to be stipulated in the memorandum of association. The employee representatives are elected by the corporate employees in democratic elections.<sup>195</sup> In order to secure the impartiality of supervisors, "directors, executives or financial officers may not concurrently serve as supervisors."<sup>196</sup>

As an efficient watchdog for the corporation and shareholders, the board of supervisors should obtain meaningful tools for confronting problems associated with insider control. However, the current supervisory mechanism is generally incapable of identifying and addressing managerial corruption. As a survey conducted by State Committee of Economy and Trade indicated, some SOE-corporatized corporations have no boards of supervisors, and one-third of those with boards of supervisors have difficulties performing their supervisory duties.<sup>197</sup> In the absence of meaningful supervisory mechanisms, many SOE-corporatized corporations have been faced with serious problems of corruption.<sup>198</sup> For instance, hundreds of millions of dollars of corporate funds were misused by the senior executives in Zhengzhou Baiwen Corporation in Henan Province.<sup>199</sup> Therefore, further legislative reform with respect to rules governing the board of directors is necessary.

First, having outside supervisors in the board of supervisors should be mandatory for large publicly held corporations. To achieve impartial supervision, the supervisors should be

completely independent from the directors and executives. Supervisors should have strong expertise in essential matters, such as corporate management, corporate finance or business law.

Second, the powers possessed by the board of supervisors should be redefined. The current supervisory powers recognized by the Corporate Law are of a postmortem and passive nature. To enable supervisors to obtain relevant and crucial information, the board of directors should be obligated to report to the board of supervisors on a regular basis. Moreover, the board of supervisors should have authority to take legal actions against directors or executives on behalf of the corporation. The board of supervisors should become a corporate body between the shareholders and the board of directors in the corporate hierarchy, and should hold the power to appoint and dismiss directors. The board of supervisors should also hold statutory decision-making powers with respect to fundamental investment decisions or transaction plans. In addition to comprehensive supervision over managerial activity, the board of supervisors should be required to supervise the financial and accounting activities. In order to fulfill their obligations, the board of supervisors should be permitted to employ outside advisers, such as lawyers, auditors, and accountants.

In order to strengthen the State shareholder's supervision of SOEs, the State has begun to send special inspectors to supervise traditional SOEs and SOE-corporatized corporations.<sup>200</sup> The State Council appointed the first group of twenty-one special inspectors to large SOEs on April 28, 1998.<sup>201</sup> The main duties of the inspectors have been to conduct financial supervision of enterprise operations on behalf of the State, and evaluate the senior executives' performance in terms of legality and administrative capability. The inspectors have not been involved in the production or management of the enterprises. Vice-minister level officers are qualified to serve as special inspectors. Each inspector has four special assistants, which are chosen from officials with professional backgrounds in banking, finance, personnel, auditing and supervisory bodies, and macro-control agencies. The inspector and the four assistants form a special inspector's office, and are generally responsible for supervising five enterprises. The term of office for a special inspector and assistants is three years, and they may not serve a second term in the same enterprise. Members of the special inspector's office cannot hold a position in the enterprise they supervise, and may not accept any compensation, benefits, entertainment or gifts from the enterprise.<sup>202</sup>

The inspectors have been very harsh in supervising and investigating the management of their supervised corporations. We propose that special inspectors should be replaced by the board of supervisors in the future. There is no need to have both supervisory authorities, provided that the board of supervisors actually functions as a supervisory body.

### **I. The State as a Shareholder**

In China, the State acts as a majority shareholder in many listed corporations.<sup>203</sup> This situation will probably remain unchanged in the near future. State shareholder status may trigger a number of conflicts of interest -- on the one hand, the government may be concerned about whether the State is sufficiently protected as a shareholder of the enterprise, and on the other hand, minority shareholders and potential investors may be concerned about potential misuse of the controlling shareholder position by the State.<sup>204</sup> Both concerns are understandable. Protective and restrictive mechanisms are, therefore, indispensable with respect to the State shareholder.

## **1. Conceptual orientation: differentiating the State shareholders' rights from traditional property ownership**

There are three basic forms of State ownership in China: (1) traditional property ownership; (2) creditor's rights; and (3) shareholder's rights. Upon corporatization of SOEs, the State's property ownership over SOEs is that of a shareholder. As a shareholder, the State may not directly control, utilize or dispose corporate property. The State shareholder may exercise its right to dividends and net assets, the right to governance participation, and other shareholder rights.

When the State owns a large portion of the shares of SOE-corporatized corporations, it is very easy for the State (or the State agent) to exercise dominant influence on the corporation. To facilitate the relationship between SOE-corporatized corporations and the State shareholder, it is essential for the State shareholder to respect corporate property rights. The Corporate Law provides that "a corporation, as a legal person, shall enjoy corporate *property rights* regarding all the properties formed by the shareholders' investments, and possess civil rights and bear the civil liabilities in accordance with the law."<sup>205</sup> The language "*corporate property rights*" was introduced for the first time in China by the Corporate Law.

The Corporate Law also states that "the ownership of State-owned assets in a corporation shall vest in the State."<sup>206</sup> This statement is imprecise, or even misleading, because it ignores the difference between shareholders' rights and corporate property ownership. However, the Corporate Law also states that "a corporation shall, with all its corporate assets, operate independently and be responsible for its own profits and losses according to law. A corporation shall, under the macro-adjustment and control of the State, organize its production and operation independently in accordance with market demand for the purpose of raising economic benefits and labor productivity, maintaining and increasing the value of its assets."<sup>207</sup> This provision implies that the above-mentioned clause regarding vesting of State-owned assets was included in the Corporate Law to confirm the shareholder's rights enjoyed by the State -- not to permit the State to take away the corporate property rights of the corporation.<sup>208</sup>

## **2. Transferability of State-owned shares**

At the present time, there are various classifications of shares in Chinese listed corporations. Some shares are transferable<sup>209</sup> while others, including those owned by the State, are not. The non-transferability of State shares is proving detrimental to the growth of Chinese securities market and devalues the State's shareholdings.<sup>210</sup> Given that only one third of the total shares of the listed corporations are tradable, State shares should be freely tradable. This should not only benefit the State shareholder, but also fundamentally stabilize the excessively speculative stock market in China. In 1999, as a first bold step, the Ministry of Finance permitted the State-owned shares to be reduced to 51%.<sup>211</sup> This is a welcome step.

## **IV. Conclusion**

In light of the shortcomings with both its traditional and transitional governance structures, China has begun to look to the successful corporate governance role models in market economies and has thus begun implementing some common corporate governance norms (including general meeting of shareholders, board of directors and board of supervisors). In his government working report before the NPC on March 5, 2000, Premier Zhu Rongji promised that the "Chinese

government will actively encourage multinational corporations to participate [in] the restructuring and transformation of SOEs.”<sup>212</sup> Multinational corporations will be able to acquire State shares in the future. More liberalized policies are expected to attract foreign investors to enter the Chinese securities market now that China has entered the WTO.

Corporatization reform will not, however, be successful without sound corporate governance. It is necessary for Chinese policy makers to consider the corporate governance structure as the core of the corporate system, and clarify the duties of the various corporate actors such as the shareholders, the board of directors, the board of supervisors and the executives.<sup>213</sup> It is hoped that by eliminating excessive governmental control, ensuring the government's interest as an investor, and effectively holding the management accountable, Chinese SOEs will become more successful and attractive to foreign investment.

Good corporate governance in China, however, will not result from merely changes in the Corporate or Securities Laws. Good corporate governance will also depend heavily upon successful reform of government agencies and the legal system.

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<sup>\*</sup> Professor of Business Law, University of Michigan.

<sup>\*\*</sup> Associate Professor of Business Law, Institute of Law, Chinese Academy of Social Sciences.

<sup>1</sup> For instance, in May 1999, the Organization for Economic Cooperation and Development (OECD) Ministers adopted the OECD Principles of Corporate Governance. See [http://www.g7.utoronto.ca/g7/what\\_is\\_g7.html](http://www.g7.utoronto.ca/g7/what_is_g7.html) [Visited on 10-8-01]. For further discussion of other various issues of global corporate governance, see, e.g., Lawrence A. Cunningham, *Commonalities and Prescriptions in the Vertical Dimension of Global Corporate Governance*, 84 CORNELL L. REV. 1133 (July 1999); Eileen M. Filliben & Michael D. Goldman, *Corporate Governance: Current Trends and Likely Developments for the Twenty-First Century*, 25 DEL. J. CORP. L. 683 (2000).

<sup>2</sup> In addition to differences in corporate governance regimes existing between developing and developed countries, differences also exist among developed countries. For instance, the U.S., Germany and Japan each has its own institutional features regarding corporate governance. See, e.g., Michael Bradley et al., *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 LAW & CONTEMP. PROBS. 10, 50-77 (Summer 1999); Brian R. Cheffins, *Current Trends in Corporate Governance: Going From London to Milan Via Toronto*, 10 DUKE J. COMP. & INT'L L. 5 (Fall/Winter 1999); John H. Farrar, *The New Financial Architecture and Effective Corporate Governance*, 33 INT'L LAW. 927 (Winter 1999); Timothy L. Fort & Cindy A. Schipani, *Corporate Governance in a Global Environment: The Search for the Best of All Worlds*, 33 VANDERBILT J. TRANSN'L L. 829, 842-58 (2000).

<sup>3</sup> 22 U.S.C. § 6901; H.R.4444 Public Law No: 106-286, entitled "To authorize extension of nondiscriminatory treatment (normal trade relations treatment) to the People's Republic of China, and to establish a framework for relations between the United States and the People's Republic of China. Authorize extension of nondiscriminatory treatment (normal trade relations treatment) to the People's Republic of China."

See <http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HR04444:@@L&summ2=m&>. [Visited on 9-14-01].

<sup>4</sup> China is one of the founding members of the General Agreement on Trade and Tariffs (GATT), which was succeeded by the World Trade Organization (WTO). See Xinhua, *Trade Minister: China's Stance on WTO Accession Unchanged*, CHINA DAILY, Mar. 13, 2001.

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<sup>5</sup> For a discussion of the possible benefits (including investment opportunities) to inure to the United States by China's WTO entry, see sources cited at <<http://www.uschina.org/public/wto/archive.html#pntr>>. [Visited on 9-14-01]

<sup>6</sup> State ownership was considered the highest form of public ownership and the goal of socialism.

<sup>7</sup> For instance, Article 11 of Chinese Constitution of 1982 provided only the existence of self-employed businesses, but not the existence of private businesses. On April 12, 2001, the NPC amended this Article to allow the existence and development of private businesses. However, this recognition carried some restrictions, as this amendment only considered as private businesses those that supplemented the socialist public-sector economy. These restrictions were lifted after amendment of the Chinese Constitution in 1999. The amendments updated Article 6 of Chinese Constitution of 1982 to read as follows: "In the primary stage of socialism, China should uphold the basic economic system in which public ownership is dominant and diverse forms of ownership develop side by side. It should also uphold the distribution system with distribution according to work remaining dominant and with a variety of modes of distribution coexisting." See *Zhonghua Renmin Gongheguo Xianfa Xiuzheng An* (Amendments to the Constitution of People's Republic of China), passed by the NPC on March 15, 1999.

<sup>8</sup> The traditional SOEs in the period of the planned economy were not regarded as independent legal persons. See *Zhonggong Zhongyang Guanyu Jingji Tizhi Gaige De Jueding* (The Decision of the Central Committee of Chinese Communist Party on Several Issues Concerning the Reform of Economic System), RENMIN CHUBANSHE (PEOPLE'S PRESS), 1984. The phrase "legal person" became a popular phrase associated with SOE reform in China only after this Decision was published in 1984.

<sup>9</sup> Article 15 of Chinese Constitution of 1982 declared that "the State practices planned economy on the basis of socialist public ownership." Such language was replaced by "the State practices socialist market economy" when the NPC amended the Constitution on March 29, 1993. See *Zhonghua Renmin Gongheguo Xianfa Xiuzheng An* (Amendments to the Constitution of People's Republic of China), passed by the NPC on March 29, 1993.

<sup>10</sup> Prior to the Constitutional Amendments of 1993 referring to these entities as "State-owned enterprises," SOEs had been referred to as "State-managed enterprises" (*Guoying Qiye*). On March 29 of 1993, the Constitutional Amendments adopted the language of "State-owned enterprises" to replace the old term of "State-managed enterprises." JUNHAI LIU, *GUFEN YOUXIAN GONGSI GIDONGQUA DE BAOHU* (PROTECTION OF SHAREHOLDER'S RIGHTS) 336, PRESS OF LAW (Beijing, China, 1997).

<sup>11</sup> The Decision on SOEs Reform of 1999 declares that "official rankings should not be granted to enterprises and their leaders any more." This means that SOE executives are no longer treated as government officials.

<sup>12</sup> For instance, the typical traditional SOE offered housing benefits to their employees. American workers seldom enjoy such benefits.

<sup>13</sup> For instance, the State Council enacted several provisions on expanding the autonomous managerial powers enjoyed by SOEs in 1979, enacted Provisional regulations on SOEs in 1983, and enacted several provisions on deepening enterprise reforms and increasing enterprise vigor in 1986, etc.

<sup>14</sup> *Zhonggong Zhongyang Guanyu Jingji Tizhi Gaige De Jueding* (The Decision of the Central Committee of Chinese Communist Party on Several Issues Concerning the Reform of Economic System), RENMIN CHUBANSHE (PEOPLE'S PRESS), 1984.

<sup>15</sup> *Id.*

<sup>16</sup> SOEs Law §2 (1988).

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<sup>17</sup> *Id.* at §7.

<sup>18</sup> *Id.* at §45.

<sup>19</sup> *Id.* at §47.

<sup>20</sup> *Id.* at §8.

<sup>21</sup> *Id.* at §10.

<sup>22</sup> *Id.* at §11.

<sup>23</sup> Ding Genxi & Zhang Jianping, *Brave Exploration and Stablemarch: SOE Reform in Progress*, ECONOMIC REFERENCE DAILY, Oct. 26, 1998, at 2.

<sup>24</sup> The Provisional Regulations on Contracting Management System in SOEs §14 (1988).

<sup>25</sup> *Id.* at §§26-28 (1988).

<sup>26</sup> *Id.* at §30 (1988).

<sup>27</sup> *Id.* at §5 (1988).

<sup>28</sup> Yang Peixin, *Reexamination of Contracting System*, ECONOMIC REFERENCE DAILY, Nov. 24, 1998, at 4.

<sup>29</sup> Ding Genxi & Zhang Jianping, *Brave Exploration and Stable March: SOE Reform in Progress*, ECONOMIC REFERENCE DAILY, Oct. 26, 1998, at 2.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> The wording “modern enterprises” triggered heated debates regarding its exact meaning in China. “Modern enterprises” could refer to various enterprises existing in [the] modern market economy, including modern partnerships, modern co-operatives, modern proprietorship, modern corporations and other derivative enterprise forms, such as the European Economic Interest Groups (EEIGs) in the European Union. However, the most suitable modern enterprises for SOE restructuring are modern corporations, especially publicly held corporations, including listed corporations.

<sup>35</sup> Decision on SOEs Reform, 15th CPC Central Committee (Sept. 22, 1999).

<sup>36</sup> *Id.* Some Western scholars are inclined to use the term “privatization of SOEs” to describe the process of SOE reform. In China the term “corporatization of SOE” is used instead of “privatization of SOEs” in the official documents. One of the reasons is that corporatization of SOEs is not a tool for encouraging privatization, but rather a tool for “magnifying the functions of State capital.”

<sup>37</sup> Under Article 57 of the Constitution of People's Republic of China of 1982 (Constitution), the NPC is “the supreme state power organ.” Pursuant to Article 62 (3) of the Constitution, the NPC has the power to enact and amend criminal law, civil law, state organ law, and other basic laws.

<sup>38</sup> Article 67 (2) of the Constitution gives the Standing Committee of the NPC the power to enact and amend laws other than those already enacted and amended by NPC itself.

<sup>39</sup> The Corporate Law (*Gongsi Fa*) of 1993 (Corporate Law or Law) is the first comprehensive piece of legislation on business corporations since 1949 when the People's Republic of China was founded.

<sup>40</sup> Securities Law of 1998.

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<sup>41</sup> The Corporate Law requires that the memorandum of associations (Memorandum) be formulated when a company is incorporated, and provides that it shall be binding on the company, its shareholders, directors, supervisors and managers. *See* Corporate Law §§ 11, 22, 29.

<sup>42</sup> The CSRC promulgated two administrative regulations to provide the guidelines for listed corporations in the formulation of their memorandum of associations. The first guideline is “The Indispensable Provisions of Memoranda of Associations in Overseas-Listed Corporations” of Sept. 29, 1994, and the second is “The Guidelines on Memorandums of Associations in Listed Corporations” of Dec. 16, 1997. The former deals with overseas-listed corporations, and the latter deals with generally listed corporations.

<sup>43</sup> For specific provisions regarding the general meeting of shareholders, see §§37-44, 102-110 Corporate Law (1993). For provisions concerning the board of directors, see §§45-49, 51, 68, 112-18 Corporate Law (1993). Provisions with respect to the board of supervisors can be found at §§52-54 Corporate Law (1993).

<sup>44</sup> For the legal status of the chair, see Corporate Law §§45, 113-14 (1993). For the legal status of the CEO, see Corporate Law §§50, 69, 119 (1993).

<sup>45</sup> Corporate Law §2 (1993).

<sup>46</sup> The general meeting of shareholders, the board of directors, and the board of supervisors are mandatory for both types of corporations.

<sup>47</sup> Corporate Law § 51, 52 (1993).

<sup>48</sup> Corporate Law §41 (1993).

<sup>49</sup> Corporate Law §35 (1993).

<sup>50</sup> Corporate Law §64 (1993).

<sup>51</sup> Corporate Law § 66 (1993).

<sup>52</sup> *Id.*

<sup>53</sup> SOEs are governed by legislation predating enactment of the Corporate Law, the SOEs Law of 1988.

<sup>54</sup> As the director of the State Council Office of Legislative Affairs, indicated “although the Corporate Law has clear provisions regarding the composition and function of the board of supervisors in closely held corporations and publicly held corporations, it is silent on the board of supervisors in wholly State-owned corporations. In reality, many financial and managerial problems exist in wholly State-owned corporations.” *See* Cui Shixin, *Yang Jingyu Explains the Corporate Law Amendments*, PEOPLE’S DAILY, Dec. 18, 1999, at E.

<sup>55</sup> Quanguo Renmin Dabiao Dahui Changwu Weiyuanhui Guanyu Xiugai Gongsifa De Jueding (The Decision on Amending Corporate Law by the Standing Committee of the NPC) (1999). *See* PEOPLE’S DAILY, Dec. 18, 1999, at E.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* The State Council is considered the central government in China. It is the supreme executive branch and is responsible to the NPC.

<sup>58</sup> This Law was enacted by the NPC on April 12, 1986.

<sup>59</sup> This Law was enacted by the NPC on July 1, 1979, and was amended by the NPC on April 4, 1990.

<sup>60</sup> This Law was enacted by the NPC on April 13, 1988.

<sup>61</sup> Corporate Law §18 (1993).

<sup>62</sup> Wholly Foreign-Invested Enterprise Law of 1986.

<sup>63</sup> Chinese-Foreign Equity Joint Ventures Law §4 (1979).

<sup>64</sup> Chinese-Foreign Equity Joint Ventures Law §6 (1979).

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- <sup>65</sup> *Id.* at §4(1) (1979).
- <sup>66</sup> Chinese-Foreign Contractual Joint Ventures Law §2(1) (1988).
- <sup>67</sup> Chinese-Foreign Equity Joint Ventures Law §4(3) (1979).
- <sup>68</sup> Chinese-Foreign Contractual Joint Ventures Law §22(1) (1988).
- <sup>69</sup> Chinese-Foreign Equity Joint Ventures Law §4(3) (1979).
- <sup>70</sup> Chinese-Foreign Contractual Joint Ventures Law §22(2) (1988).
- <sup>71</sup> Chinese-Foreign Equity Joint Ventures Law §6(1979); Chinese-Foreign Contractual Joint Ventures Law §12 (1988).
- <sup>72</sup> Corporate Law §2 (1993).
- <sup>73</sup> Corporate Law §151 (1993).
- <sup>74</sup> *See, e.g.*, Chapters 3, 4 and 5 of the Corporate Law of 1993.
- <sup>75</sup> *See, e.g.*, Chapters 2, 3 and 4 of the Securities Law of 1998.
- <sup>76</sup> *Id.*
- <sup>77</sup> *See* Corporate Law §25 (1993).
- <sup>78</sup> *Id.*
- <sup>79</sup> Corporate Law §75 (1993).
- <sup>80</sup> Corporate Law §159 (1993).
- <sup>81</sup> Survey Team of Reform in 100 Pilot SOEs & Cheng Yuan, *Enterprises Demand Supportive Reforms*, JINGJI RIBAO (ECONOMIC DAILY), Jan. 10, 2000, at 5.
- <sup>82</sup> *Id.*
- <sup>83</sup> *Id.*
- <sup>84</sup> *Id.*
- <sup>85</sup> *Id.*
- <sup>86</sup> *Id.*
- <sup>87</sup> China Confederation of Enterprises, *The Comments and Proposals from SOE Managers*. ZHONGGUO JINGJI SHIBAO (CHINA ECONOMIC TIMES), Sept. 2, 1999, at 5.
- <sup>88</sup> *Id.*
- <sup>89</sup> *Id.*
- <sup>90</sup> Zhao Huanxin, *State Assets Need to be Restructured*, CHINA DAILY, Sept. 22, 1999.
- <sup>91</sup> Zhao Huanxin, *Training to Improve Management of SOEs*, CHINA DAILY, Jan. 30, 1999.
- <sup>92</sup> Survey Team of Reform in 100 Pilot SOEs & Cheng Yuan, *Enterprises Demand Supportive Reforms*, JINGJI RIBAO (ECONOMIC DAILY), Jan. 10, 2000, at 5.
- <sup>93</sup> *Id.*
- <sup>94</sup> *Id.*
- <sup>95</sup> *Id.*
- <sup>96</sup> *Id.*
- <sup>97</sup> Wang Yanchun, Che Haigang & Zhao Ming, *Listed Corporations Walking on the Old Way in New Shoes*, ZHONGGUO JINGJI SHIBAO (CHINA ECONOMIC TIMES), Jan. 20, 2000, at 1.
- <sup>98</sup> *See* Chen Qingtai, *The Chair is Not the Number One Leader in the Corporation*, RENMIN RIBAO (PEOPLE'S DAILY), Jan.10, 2000, at 12.

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<sup>99</sup> Wang Yanchun, Che Haigang & Zhao Ming, *Listed Corporations are Walking on the Old Way in New Shoes*, ZHONGGUO JINGJI SHIBAO (CHINA ECONOMIC TIMES), Jan. 20, 2000, at 1.

<sup>100</sup> Chen Qingtai, *Dongshizhang Bushi Yibashou (The Chair is not the Number One Leader in the Corporation)*, RENMIN RIBAO (PEOPLE'S DAILY), Jan. 10, 2000, at 12.

<sup>101</sup> Wang Yanchun, Che Haigang & Zhao Ming, *Listed Corporations are Walking on the Old Way in New Shoes*, ZHONGGUO JINGJI SHIBAO (CHINA ECONOMIC TIMES), Jan. 20, 2000, at 1.

<sup>102</sup> *Id.*

<sup>103</sup> The subsidiary administrative regulation is called the Regulations on Transformation of Management Mechanism in SOEs of 1992.

<sup>104</sup> JUNHAI LIU, GUFEN YOUXIAN GONGSI GUNDONGQUAN DE BAOHU (PROTECTION OF SHAREHOLDER'S RIGHTS), PRESS OF LAW 336 (Beijing, China, 1997).

<sup>105</sup> *Id.*

<sup>106</sup> The most comprehensive official interpretation on the separation between corporation and government (*Zhengqi Fenkai*) reads as follows: "The government performs the functions of shareholders in the SOEs or state share-holding corporations via its designated representatives, enjoys the rights to share profits from assets, make major decisions and select managers in accordance with the scale of investment, bears limited responsibilities for enterprises' debts, and will not interfere in the daily operations of enterprises. Enterprises will operate business independently according to law, pay taxes in accordance with relevant regulations, be responsible for preserving and increasing the value of the net assets of the owners, and not be allowed to tamper with the legitimate rights of the owners. In terms of personnel and financial management, Party and government agencies at different levels should fully separate themselves from the economic entities they run or enterprises they directly administer." Decision on SOEs.

<sup>107</sup> Measures on Further Promoting Standardized Operations and Deepening the Reform in Overseas-Listed Corporations (1999).

<sup>108</sup> See Asbjorn Eide, *The Human Rights Requirements to the Social and Economic Development*, FOOD POLICY, Mar. 1996, London. See also Junhai Liu, *Legal Strategies for Preventing Financial Crisis*, 1 ACADEMIC JOURNAL OF CHINA LAW SOCIETY (Beijing, 1999).

<sup>109</sup> Decision on SOEs Reform.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Decision on SOEs Reform.

<sup>113</sup> Corporate Law §37, 102 (1993).

<sup>114</sup> Corporate Law §§38, 103 (1993).

<sup>115</sup> ZHONGHUO RENMIN GONGHEGUO XIANFA (CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA) §57 (1982).

<sup>116</sup> *Id.* at §3 (1982).

<sup>117</sup> Chen Hongyu, *Boring General Meetings of Shareholders*, CHINA SECURITIES DAILY, May 11, 2000.

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

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

<sup>120</sup> *Id.*

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

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

<sup>123</sup> Chen Xue, *Meetings of Shareholders are Not Silent*, ZHONGGUO ZHENGQUAN BAO (CHINA SECURITIES DAILY), June 1, 2000, at 1.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> <http://www.peopledaily.com.cn/zcxx/2000/05/052611.html> [Visited on 9-16-01]

<sup>127</sup> The Standard Opinions on Meeting of Shareholders in Listed Corporations §19 (2000).

<sup>128</sup> The CSRC Notice on issuing the Standard Opinions on Meeting of Shareholders in Listed Corporations. See <http://www.peopledaily.com.cn/zcxx/2000/05/052611.html>. [Visited on 9-16-01]

<sup>129</sup> Zhou Dao, *Shareholders May also Convene Meeting of Shareholders*, ZHONGGUO ZHENGQUANBAO (CHINA SECURITIES DAILY), Sept. 28, 2000, at 7.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> The Standard Opinions on Meeting of Shareholders in Listed Corporations §34 (2000).

<sup>133</sup> Corporate Law §110 (1993).

<sup>134</sup> MELVIN AARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS 157-62 (8TH ED. 2000).

<sup>135</sup> Corporate Law §114 (1993).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Corporate Law §113 (1993).

<sup>139</sup> Corporate Law §120 (1993).

<sup>140</sup> Corporate Law §117 (1993).

<sup>141</sup> *Id.*

<sup>142</sup> The CEO enjoys great statutory managerial powers, including but not confined to, the responsibility to direct corporate production, operation and management, to organize the implementation of resolutions of the board of directors, and to organize the implementation of annual corporate business plans and investment plans, etc. The CEO is also entitled to observe the meetings of the Board of directors. *See* Corporate Law §119 (1993).

<sup>143</sup> Corporate Law §119 (1993).

<sup>144</sup> *Id.* at §§50, 119 (1993).

<sup>145</sup> Corporate Law §119 (1993).

<sup>146</sup> This problem has been identified by other authors. *See, e.g.*, Chen Qingtai, *The Chair is Not the Number One leader in the Corporation*, RENMIN RIBAO (PEOPLE'S DAILY), Jan. 10, 2000, at 12.

<sup>147</sup> MODEL BUSINESS CORPORATION ACT §8.01 (b) (1999).

<sup>148</sup> AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE, ANALYSIS AND RECOMMENDATIONS §3.02 (1994).

<sup>149</sup> MODEL BUSINESS CORPORATION ACT, Official Comment to §8.25 (1999).

<sup>150</sup> China Securities Regulatory Commission, Measures on Further Promoting Standardized Operations and deepening the Reform in Overseas-Listed Corporations, §5 (1999).

<sup>151</sup> Model Business Corporation Act §8.25 (f) (1999).

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<sup>152</sup> See Zhang Yiyong, *Independent Directors should not Become the "Deaf Ears,"* JINGJI RIBAO (ECONOMIC DAILY), July 10, 2000, at 2.

<sup>153</sup> Measures on Further Promoting Standardized Operations and Deepening the Reform in Overseas-Listed Corporations §6 (1999).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> Guidelines on Memorandum of Associations in Listed Corporations §112 (1997).

<sup>157</sup> The Basic Regulations for Large and Medium-Sized SOEs to Build up Modern Enterprise System and Strengthen Governance §7 (2000).

<sup>158</sup> Zhang Wei, *Lanzhou-Based Huanghe Corporation: A Big Mess,* ZHONGGUO JINGJI SHIBAO (CHINA ECONOMICS TIMES), Jan. 11, 2001 at 2.

<sup>159</sup> Zhang Yiyong, *Independent Directors Should not Become the "Deaf Ears,"* JINGJI RIBAO (ECONOMIC DAILY), July 10, 2000, at 2.

<sup>160</sup> Luo Xinyu, *Embarrassed Independent Directors,* CHINA YOUTH DAILY, Jan. 13, 2000.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Ding Pinyu, *How to Make Supervision Effective in SOEs,* RENMIN RIBAO (PEOPLE'S DAILY), June 9, 1998, at 11.

<sup>165</sup> *Id.*

<sup>166</sup> Cui Shixin, *Do not Put the Fate of an Enterprise into One Person's Hand,* RENMIN RIBAO (PEOPLE'S DAILY), Apr. 21, 1998, at 11.

<sup>167</sup> Ding Pinyu, *How to Make Supervision Effective in SOEs,* RENMIN RIBAO (PEOPLE'S DAILY), June 9, 1998, at 11.

<sup>168</sup> Cui Shixin, *Do Not Put the Fate of an Enterprise into One Person's Hand,* RENMIN RIBAO (PEOPLE'S DAILY), Apr. 21, 1998, at 11.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Zhang Zhuoyuan, *Which Sort of Corporate Governance Structure will China Need?* CHINA ECONOMIC DAILY, Apr. 19, 2000, at 5.

<sup>172</sup> *Id.*

<sup>173</sup> Ding Pinyu, *How to Make Supervision Effective in SOEs,* RENMIN RIBAO (PEOPLE'S DAILY), June 9, 1998, at 11.

<sup>174</sup> *Id.*

<sup>175</sup> Cui Shixin, *Do Not Put the Fate of an Enterprise into One Person's Hand,* RENMIN RIBAO (PEOPLE'S DAILY), Apr. 21, 1998, at 11.

<sup>176</sup> China Confederation of Enterprises, *The Comments and Proposals from SOE Managers,* ZHONGGUO JINGJI SHIBAO (CHINA ECONOMIC TIMES), Sept. 2, 1999, at 5.

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<sup>177</sup> See, e.g., Michael Bradley & Cindy A. Schipani, *The Relevance of the Duty of Care Standard in Corporate Governance*, 75 IOWA L. REV. 1, 16-28 (1989); Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045 (October 1991).

<sup>178</sup> Cui Shixin, *Do not Put the Fate of an Enterprise into One Person's Hand*, RENMIN RIBAO (PEOPLE'S DAILY), Apr. 21, 1998, at 11.

<sup>179</sup> Corporate Law §§59, 60, 61, 62, 63 (1993).

<sup>180</sup> Corporate Law §§214, 215 (1993).

<sup>181</sup> AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE §4.01(a) (1994).

<sup>182</sup> EISENBERG, *supra* note 146 at 651-66.

<sup>183</sup> Japanese Commercial Code §§267, 268a, 268b, and 268c (1950).

<sup>184</sup> Zhou Hanmin, *Consciousness is not the Most Reliable Stuff: Perspective on the Values of the SOE managers*, I WINDOW OF SOUTH WIND 6 (Guangzhou, China, 1999).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Liu Jie, *SOEs Offered Stock Options*, CHINA DAILY, Jan. 25, 2000.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Jing Xian, *Officials Awarded Shares*, CHINA DAILY, Jan. 21, 1999.

<sup>194</sup> Corporate Law §54, 126 (1993).

<sup>195</sup> *Id.* at §§52, 124 (1993).

<sup>196</sup> *Id.*

<sup>197</sup> Survey Team of Reform in 100 Pilot SOEs & Cheng Yuan, *Enterprises Demand Supportive Reforms*, JINGJI RIBAO (ECONOMIC DAILY), Jan. 10, 2000, at 5.

<sup>198</sup> *Id.*

<sup>199</sup> *Corporatization Should not Become A Camouflage*, JINGJI RIBAO (ECONOMIC DAILY), Nov. 2, 2000, at 6.

<sup>200</sup> Xinhua, *Premier Highlights Role of New System: Inspectors to Assist Reform*, CHINA DAILY, May 11, 1998.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> As of June, 2000, there were 999 A or B Share listed companies, with a total market capitalization of 4069 billion Chinese Yuan (about 500 billion USD), negotiable market capitalization of 1322.909 billion Chinese Yuan (about 160 billion USD), stock turnover of 608.455 billion Chinese Yuan (about 72 billion USD). There are about 51.3034 million securities investors as a whole. See

<http://www.csrc.gov.cn/CSRCsite/eng/tongjiku/199908/ehhtml/y2000/07/a200007.html> [Visited on 9-16-01]

<sup>204</sup> See *The Initial Public Offering of Petro China: A Report by the AFL-CIO's Office of Investment*, at <<http://www.petrochinawatch.com/ipo/>>. [visited on 9-16-01]

<sup>205</sup> Corporate Law §4 (1993).

<sup>206</sup> Corporate Law §4 (1993).

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<sup>207</sup> Corporate Law §5 (1993).

<sup>208</sup> In the end, the legislative language should be further refined when the Corporate Law of 1993 is amended. For instance, a more suitable term such as "corporate property ownership" should replace "corporate property rights." Similarly, the phrase "the ownership of State-owned assets in a corporation shall vest in the State" should be deleted, in order to permit the existence of sound corporate property ownership.

<sup>209</sup> A shares and B shares are divided based on citizenship differences of the investors. Therefore, a listed corporation could issue both A shares and B shares. A Shares are domestically-invested shares issued domestically by Chinese corporations. B Shares are foreign-invested shares issued domestically by Chinese corporations. B Shares are also known as Renminbi Special Shares. B Shares are issued in the form of registered shares and carry a face value denominated in Renminbi. B Shares are subscribed and traded in foreign currencies, listed and traded in securities exchanges inside China. According to scholars "although owners of the A and B shares share equal rights in the same corporations, they react to different underlying forces." Hung-Gay Fung, Wai Lee, & Wai Kin Leung, *Segmentation of the A- and B-Share Chinese Equity Markets*, 22 THE JOURNAL OF FINANCIAL RESEARCH (Summer 2000).

<sup>210</sup> See <http://www.CSRC.gov.cn/CSRCsite/eng/esmintr.htm> [Visited on 9-16-01]

<sup>211</sup> *Id.*

<sup>212</sup> Zhu Rongji, *Government Working Report*, submitted to the third session of the National People's Congress on March 5, 2000. See <http://www.peopledaily.com.cn/zgrdxw/lianghui/news/0317/031701.html>.

<sup>213</sup> See Decision of the Central Committee of the Chinese Communist Party on Major Issues Concerning the Reform and Development of SOEs, adopted at the 4th Session of the 15th CPC Central Committee on Sept. 22, 1999.