Learning from Your Rival?

A Surprising Convergence of Chinese and American Corporate and Securities Laws

Wei Zhang*

*Despite the increasing tension between China and the United States, a student of Chinese law will be surprised at the increasing similarity between corporate and securities laws in China and the United States. As many Chinese twists as there are, the overall trajectory of China's corporate and securities laws appears to be evidently moving closer toward their American counterparts. I will trace the recent changes in Chinese laws, regulations, and judicial interpretations and decisions to substantiate this point. At the same time, I will also present an analytical framework to explain this legal convergence in an era of decoupling between China and the United States. My explanation is based on two key factors: legal professionalism and political populism. Understanding the convergence of Chinese corporate and securities laws to their American counterparts will enable us to make a better-informed assessment of the uniqueness of China's corporate governance and securities regulation paradigms.***

* Associate Professor, Singapore Management University, Yong Pung How School of Law. I appreciate the help and comments provided by Shoushuang Li, Wentong Zheng, Chun Zhou and the participants at the *Symposium on the Impact of China on the Future of International and Transnational Law* at the University of California, Irvine. All errors are mine.

** This paper was written in Aug. 2023 when the last available version of the amendment to PRC Company Law was the 3rd draft amendment. Thereafter, the final revision was passed on Dec. 29, 2023. Most of the contents of the 3rd draft amendment discussed in this paper were adopted as they were. This paper's Section I.A. was updated in Apr. 2024 to address significant changes the promulgated final revision made to the 3rd draft amendment.

INTRODUCTION

Perhaps no other transnational issue has garnered so much political attention or created so profound socioeconomic implications in recent years as the "decoupling" of the United States and China, the two largest economies in the world. Although the rhetoric evolves over time, the tension between the two countries remains fresh. Legislations, regulations, executive orders, and "window" instructions mushroomed from both sides, overtly or covertly, taking aim at each other. [1] For lawyers of all sorts, whether general counsels of multinational enterprises or solo practitioners advising on EB-5 immigration, strategizing compliance with or circumventions of these mounting rules has turned increasingly arduous, if not impossible. In short, the United States and China appear to have become rivals in all directions.

Regardless of the level of animosity between the two countries, however, students of Chinese corporate and securities laws may surprisingly not feel it. Quite on the contrary, for those who are reasonably familiar with the laws on both sides, it is readily recognizable that the corporate and securities laws in China have converged, in many ways, toward their American counterparts. While this development started in the 2000s, it has amazingly endured the latest downturn of the Sino-U.S. relationship and the sweeping ideological regression inside China. At least, the converging trajectory is not terminated. If anything, it is probably strengthened. Hence, it is vastly interesting to examine this apparent outlier in the grand scheme of U.S.-Sino interaction.

---

1. Some prominent examples include the Holding Foreign Companies Accountable Act, the Biden's administration's restriction on US investments in Chinese entities in certain high-tech sectors for the American side, and the Anti-Foreign Sanction Law and the Law on Foreign Relations from the Chinese side.

By "laws", I mean mainly formal statutes, regulatory rules, and judicial interpretations, although I also refer to practices by courts and regulators at times. They are publicly available and often officially binding. With the notable shift in China's political environment that escalates party control, state ownership, and nationalist spirit, much academic attention among overseas scholars of Chinese company law has been paid to the political influence on governance of Chinese companies, especially President Xi Jinping's call for party-building.[2] This attention also reflects a more general focus of Chinese legal studies outside China that prioritizes informal social and political norms. From a legal realist perspective, this focus is rightfully placed. After all, it is the law in action that matters the most in people's life. Particularly in a country without robust institutions or an embraced tradition of rule of law, explorations into political policies and social customs often yield profound insights about the actual rules that guide behaviors of individuals and organizations.

This being said, for several reasons, studies of formal rules are nevertheless essential to our understanding of the Chinese legal system. First, formal laws serve expressive functions. They promote the values endorsed by the legislature and instill these values into rational people.[3] In fact, it is said that President Xi is distinctly keen to express his policies in laws.[4] This expressive aspect makes the inquiry especially interesting why the Chinese government is willing to learn from its ideological rival in certain areas of law. Second, the Chinese government, like governments elsewhere, cares about legitimacy. As the wedge between law in book and law in action grows, legitimacy concerns will loom large. In other words, it is costly to declare a rule in book but enforce a contrary one in action. Such costs may be particularly high in an era where grievances can foment swiftly among hundreds of millions of netizens before being censored.[5]Thus, formal rules oftentimes should positively correlate, even if not always consistently, with actual practices.

Finally, informal norms, state policies in particular, need to be operationalized before they can exert practical influence, and formal laws build the platform for operationalization. Operationalization is especially crucial in corporate and

---

2. Some well-known studies are Lauren Yu-Hsin Lin & Curtis J. Milhaupt, *Party Building or Noisy Signaling? The Contours of Political Conformity in Chinese Corporate Governance*, 50 J. LEGAL STUD. 187 (2021); Tamar Groswald Qzery, *The Politicization of Corporate Governance: A Viable Alternative?*, 70 AM. J. COMP. L. 43 (2022); Christopher Chao-hung Chen, Re-Jin Guo & Lauren Yu-Hsin Lin, *The Effect of Political Influence on Corporate Valuation: Evidence from Party-Building Reform in China*, 73 INTER. REV. LAW ECON. 1 (2023).

3. Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998).

4. *Rule by Law, with Chinese Characteristics*, THE ECONOMIST (Jul. 13, 2023), https://www.economist.com/china/2023/07/13/rule-by-law-with-chinese-characteristics.

5. Censorship on the Chinese internet, potent as it is, is not impervious. For instance, "The Voice of April", a famous video of the lockdown of Shanghai during Covid, was removed within 24 hours after its posting. Nevertheless, the original video had been viewed at least 5 million times before it was taken down, let alone the various reuploaded copies in a relay to circumvent the censorship. *See* Zeyi Yang, *WeChat Wants People to Use Its Video Platform. So They Did, for Digital Protests*, MIT TECH. REV. (Apr. 24, 2022), https://www.technologyreview.com/2022/04/24/1051073/wechat-shanghai-lockdown-protest-video-the-voice-of-april/.

securities laws given the complexity of business entities and capital market. For party-building to make a systemic difference in Chinese companies, for example, specific governance mechanisms need to be established in the company law to accommodate party committees.[6] In short, formal rules to be discussed in this article bear substantive pertinence to the practice of corporate and securities laws in China. One vivid case in this point is Zuig Investment's public bid for Zhenxing Biopharmaceutical & Chemical, a high-profile hostile takeover transaction in the late 2010s. The offense and defense strategies deployed by both sides in this case were largely following the formal company law and securities regulatory rules.[7] In other words, to a significant extent, sophisticated business entities in China do calibrate their actions in the shadow of law.

Consequently, it would be, at least, incomplete to leave aside the formal rules of Chinese corporate and securities laws which serve as the primary foundation for practices of corporate lawyers and the clients they advise. This article is a preliminary attempt to explain the unexpected convergence of China's corporate and securities law toward their American counterparts from a political economy perspective. Specifically, I will focus on two impetuses of rulemaking in China: professionalization of the legal community and the populist bent of Chinese politics.

These two ostensibly opposite tendencies have surprisingly collaborated to enable the Americanization of Chinese corporate and securities laws in that they

---

6. Surprisingly, such mechanisms are absent even in the latest draft amendment to the PRC Company Law, leaving it mainly to corporate articles to fulfil the mission of party-building. Even with respect to companies controlled or wholly owned by the state, the draft amendment merely states that party organizations "exert the leadership function according to the Chinese Communist Party (CCP) Constitution, and. . .support the corporate organizational institutions' exercise of power under the law." Zhonghua Renmin Gongheguo Gongsi Fa (Xiuding Caoao) (Disanci Shenyi Gao) (中华人民共和国公司法（修订草案）（第三次审议稿）) [Company Law of China (Draft Amendment) (Third Draft for Review)] (Sept. 1, 2023), art. 170, Nat'l People's Cong., Sept. 1, 2023, http://www.npc.gov.cn/flcaw/flca/ff8081818a1cb709018a49c960946d08/attachment.pdf (China) [hereinafter The 3rd Draft Amendment]. In other words, CCP committees are still not part of the official corporate governance apparatus, so they play the leadership role from outside the corporate governance system. However, in China's Party-state, the Party has always been the leader of any entity in the public sector, and SOEs are never an exception. In fact, the main provision about the CCP's presence in Chinese corporations has been codified ever since the first version of the Company Law of China in 1994 (Article 17), and its current form has remained fundamentally the same since the Company Law of China of 2006 (Article 19). *Compare* Gongsi Fa（公司法）[Company Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1993, effective July 1, 1994), art. 17, https://www.lawinfochina.com/Display.aspx?lib=law&ID=641, CLI.1.7672(EN) (Lawinfochina) [hereinafter Company Law (1994)], *with* Gongsi Fa（公司法）[Company Law (2005 Revision)] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006), art. 19, https://www.lawinfochina.com/display.aspx?lib=law&id=4685, CLI.1.60597(EN) (Lawinfochina) [hereinafter Company Law (2005 Revision)]. Hence, there is little wonder it is a strenuous task to empirically identify the unequivocal and consistent impact of party-building on firm value. See Chen et al. *supra* note 2 for some empirical evidence in this regard. Some of their reported results seem to indicate positive impacts, while others paint an opposite picture, and still others show the irrelevance of party-building. For whatever impact there might be, the specific channels through which the party-building reform has worked is primarily a theoretical conjecture.

7. For detailed accounts of the strategies used in this first successful hostile takeover in China, see ZHANG WEI (张巍), ZIBEN DE GUIZE II (资本的规则 II) [LAW OF CAPITAL II], 174-195 (2019).

both cater to the interest of a major populist group in China, i.e. the hundreds of millions of individual investors. The interaction of legal professionalization and political populism provides reasonable accounts for not only those rules that have changed in the American direction, but also those having resisted changes, and even those having changed halfway in between. In passing, the rules and practices discussed hereinafter, at the minimum, present a certain degree of emulation of substance rather than a sheer alteration of name. Thus, I do not include the so-called "registration reform" of public listing rules as the reform, in effect, only borrows the word "registration" from the U.S. securities regulation scheme without actual removal of barriers to listing.[8]

The rest of the article will be organized as follows. Part I describes the convergence of Chinese company law toward its American counterpart in several material aspects. Part II discusses certain pronounced developments of the Chinese securities law indicative of a U.S.-leaning trajectory. In both parts, I will also depict the deviations when the Chinese laws take in significant elements from the American laws. Part III then presents my explanations for the adoption of American rules in Chinese corporate and securities laws built on two key factors, legal professionalization and political populism. A short conclusion follows.

I. CONVERGENCE OF CORPORATE LAW

A. Legal Capital Doctrine

As a hallmark of its heritage from Germany,[9] Chinese company law has long enshrined the legal capital doctrine since the very first PRC Company Law in 1994. The three pillars of the doctrine, capital fixation, capital maintenance, and capital immutability,[10] have been considered cornerstones of company law for decades.

The 1994 version of PRC Corporation Law established the legal capital doctrine in full swing. It required capital contributions to be actually made at the time of incorporation and specified the minimum capital amount for different corporations based on operational and legal categorizations.[11] Members were not allowed to withdraw their capital contributions in corporations whose capital was not divided into shares ("limited liability company" [有限责任公司]),[12] while corporations were strictly constrained in buying back their own shares if their capital was divided into shares ("share limited liability company" [股份有限公司]). Buybacks were allowed only in case of capital reduction or merging with other corporations that held its shares. Any share bought back by the corporation had to

8. In fact, the reform might have set up higher barriers to becoming a listed company in that it imposes stricter industrial requirements for Chinese companies to go public.

9. For the German origin of China's legal capital doctrine, see WANG JUN (王军), ZHONGGUO GONGSI FA (中国公司法) [COMPANY LAW OF CHINA] 111–12 (2nd ed. 2017).

10. Taken together, these three doctrines (资本确定、资本维持、资本不变) are dubbed the "trio-capital doctrine" (资本三原则).

11. Company Law (1994), *supra* note 6, arts. 23, 78.

12. *Id.* art. 34.

be cancelled within ten days. In other words, treasury stocks were not recognized.[13] On the other hand, when it comes to issuance of new stocks, shareholder authorization always had to be obtained beforehand.[14]

The 1994 Corporation Law also laid down the regulatory frameworks for dividend payments and reduction of registered capital that have persisted ever since. For the former, dividends can be distributed only out of profits after payment of tax, making-up of operational losses, and retainment of capital reserve.[15] For the latter, not only a shareholder resolution is needed, but all corporate creditors must be notified and entitled to request for accelerated repayment or security provision.[16]

The ironclad legal capital doctrine started to budge first in 2006. The 2006 revision to the PRC Company Law allowed capital contribution to be paid in installments, but the actual contribution made at the time of incorporation could not be less than 20 percent of the total amount of capital committed by members or shareholders, neither could it be below the minimum registered capital required under the law. Moreover, the 2006 version of PRC Company Law expanded the exceptions to stock buybacks by granting employee rewards and appraisal rights in mergers and acquisitions as additional justifications for buybacks. However, still no stocks bought back by corporations were permitted to be kept in treasury. And all buybacks must be approved by shareholders unless they were conducted in appraisal proceedings.[17]

Eight years later, PRC Company Law experienced a major revision. In the 2014 version of Company Law, the requirements on capital contribution were further relaxed. The minimum amount of initial contribution and the minimum percentage of cash contribution were removed.[18] Therefore, since then, members or shareholders of Chinese corporations can generally undertake to make payments for, instead of actually paying, capital contribution at the time of incorporation. In effect, this is similar to payment for shares using promissory notes, which is widely recognized in the U.S.[19]

The only change made in the 2018 amendment to the PRC Company Law relates to stock buybacks. The amendment further enlarged the scope of buybacks so that they can be carried out "for listed companies to maintain corporate value or shareholder interest." In effect, this opens the door for listed companies to purchase their own stocks to pump up stock prices or even to defend against hostile bids.

---

13. *Id.* art. 149.
14. *Id.* art. 138.
15. *Id.* art. 177.
16. *Id.* arts. 38, 39, 103, 106, 186.
17. Company Law (2005 Revision), *supra* note 6, art. 143. In practice, appraisal rights have almost never been exercised.
18. Gongsi Fa (公司法) [Company Law (2013 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 2013, effective Mar. 1, 2014), arts. 26, 27, 28, 80, 82, http://www.lawinfochina.com/display.aspx?id=16202&lib=law, CLI.1.218774(EN) (Lawinfochina) [hereinafter Company Law (2013 Amendment)].
19. Delaware General Corporate Law (DGCL), DEL. CODE ANN. TIT. 8, § 152 (2023); MODEL BUS. CORP. ACT § 6.21(B) (AM. BAR ASS'N., 2003).

Moreover, when corporate articles so authorize, the board can initiate buybacks on its own to grant stock incentive plans, issue convertible bonds, or maintain corporate value or shareholder interest.[20] Furthermore, the 2018 version of PRC Company Law recognized treasury stocks for the first time. Stocks bought back for the three purposes mentioned above can be kept in the corporate treasury for three years, but the number of treasury stocks cannot exceed 10 percent of total outstanding stocks.[21]

It is worth mentioning that Chinese law apparently doesn't limit the source of funds for buybacks to profits or proceeds of fresh share issuance. Consequently, when companies acquire their own stocks as treasury stocks, they may not maintain their registered capital any longer. Hence, the 2018 amendment constitutes a major deviation from the legal capital doctrine, especially when buybacks do not have to go through shareholder approvals. This amendment, however, brings the Chinese law closer to the American practice, which involves a large number of stock buybacks conducted at the discretion of corporate boards. In this respect, the current Chinese law resembles the American law even more than the corporate laws of UK and some other Commonwealth jurisdictions that do set limit on financing of stock repurchases at least for listed companies.[22]

Shortly after the adoption of the 2018 amendment, one influential judicial decision was made to confirm the legitimacy of repurchasing stocks from private equity investors when the redemption condition was satisfied under the equity investment agreement. The court justified this repurchase as one for capital reduction.[23] However, the judicial reasoning obviously put the cart before the horse. The real cause of the buyback was the triggering of the redemption clause that served as an exit option for Private Equity (PE) investors whereas capital reduction was merely the consequence of the buyback.

It is important to notice that this appellate court decision was in contradiction

---

20. The grant of employee rewards was reframed as a grant of employee stock incentive plans in the Company Law of China of 2018. Two-thirds of the directors in attendance at the board meeting need to approve the buybacks for these purposes. *See* Gongsi Fa (公司法) [Company Law (2018 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 26, 2018, effective Oct. 26, 2018) BEIDA FABAO (北大法宝) [PKULAW], https://www.pkulaw.com/en_law/aec0c211a78989e9bdfb.html, CLI.1.324551(EN) (China) [hereinafter Company Law (2018 Amendment)].

21. *Id.* art. 142.

22. *See* U.K. Cos. Act 2006, c. 46, § 692(2); H.K. Cos. Ordinance, (2014) Cap. 622, 282, § 257(3). Both limited sources of financing to profits and proceeds of new share issuance. Neither Chinese nor Delaware corporate law have similar restrictions.

23. Jiangsu Huagong Chuangyetouzi Youxiangongsi Su Yangzhou Duanyajichuang Gufenyouxiangongsi (江苏华工创业投资有限公司诉扬州锻压机床股份有限公司) [Jiangsu Huagong Entrepreneurial Investment Limited Company. v. Yangzhou Forging Machinery Share Limited Liability Company], Zhongguo Caipan Wenshu Wang (中国裁判文书网) [China Judgments Online], June 3, 2019 (High Ct. of Jiangsu Province Apr. 3, 2019), https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=MK+xUnmVnDNvEYgtnxn3ibmOTFWPWY5hjke0WvaUZBd6vv4ZOCtxrJ/dgBYosE2ghFyxggJX4bhC/TYerSTDQ7i0wV9QEOOucmTXZtPih6oj4MXJAzJTySA7EUb7Bb8q (China).

of an earlier PRC Supreme People's Court (SPC) decision which outlawed a similar type of payout to PE investors based on equity investment agreements.[24] For many years since that SPC decision, lawyers as well as PE investors in China had believed that a direct buyback of investors' stocks by the target company was not allowed. Interestingly, the SPC later publicly endorsed the appellate decision at odds with its own decision.[25] In fact, the PRC Company Law has allowed buybacks to reduce capital ever since 1994. The SPC's earlier hesitance in invoking the relevant section of law to permit repurchases of stocks held by PE investors might well be a result of its awareness that such repurchases were for a purpose other than capital reduction. Therefore, the drastic change in judicial position lends extra support to the argument that Chinese Company Law, over time, has shifted toward its American counterpart, both in doctrine and in practice, in terms of relaxing the legal capital doctrine.

The PRC Company Law was revised again in 2023. Unlike its first two draft amendments, the last draft, publicized on September 1, 2023, permits only proportional capital reduction from all shareholders.[26] This draft essentially reverts to the original judicial position before 2019 that disabled PE investors' redemption rights, hence moving the Chinese law apart from America's liberal stance pertaining to stock buybacks from PE investors. However, the rule finally adopted in the promulgated Company Law (2023 Revision) allows companies to opt out of this restriction in unanimous shareholder agreements for limited liability companies or in articles for share limited liability companies.[27] Therefore, this part of the law reverts its course toward the American practice.

Besides, in the third draft amendment to the Company Law, as well as in the ultimately promulgated 2023 revision, new provisions are added to allow the board of share limited liability companies, with general authorization by corporate articles or shareholder resolutions, to issue new shares as long as the total number of newly issued shares within three years does not exceed 50 percent of outstanding shares.[28] For the first time, the Chinese law will confer corporate boards the power to issue new capital stocks for general purposes at their own discretion. This new scheme

---

24. Suzhou Gongyeyuanqu Haifu Touzi Youxian Gongsi Su Gansu Shi Heng Youse Ziyuan Zailiyong Youxian Gongsi Deng (苏州工业园区海富投资有限公司诉甘肃世恒有色资源再利用有限公司等) [Suzhou Industrial Park Haifu Investment Limited Liability Company v. Gansu Shiheng Non-Ferrous Resource Recycling Limited Liability Company et al.], Sup. People's Ct. Gaz., no.4, 2014 (Sup. People's Ct. Nov. 7, 2012), http://gongbao.court.gov.cn/Details/0e07feeb9a41c731e3730b9a4555f4.html (China).

25. Quanguo Fayuan Minshangshi Shenpan Gongzuo Huiyi Jiyao, Fa [2019] Erbai Wushisi Hao (全国法民商事审判工作会议纪要，法【2019】254 号) [Minutes of the National Conference on Civil and Commercial Adjudications, Court Document No. 254 [2019]] (promulgated by the Sup. People's Ct., Sept. 11, 2019, effective Nov. 11, 2019), sec. 5, China Ct., Nov. 11, 2019, https://www.chinacourt.org/law/detail/2019/11/id/149992.shtml (China).

26. *See* The 3rd Draft Amendment, *supra* note 6, art. 224.

27. *See* Gongsi Fa (公司法) [Company Law (2023 Revision)] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2023, effective Jul. 1, 2024) art. 224, BEIDA FABAO (北大法宝) [PKULAW].

28. *See* The 3rd Draft Amendment, *supra* note 6, art. 152; *see also id.* art. 152.

conspicuously alters the rigid principle of capital immutability, one of the three pillars of the legal capital doctrine, and moves the rules of corporate capital in China closer to those in Anglo-American jurisdictions.[29]

B. Corporate Governance Structure

A hallmark of the German influence on China's Company Law is the dual-board structure and codetermination principle in corporate governance.[30] Since the first version of the PRC Company Law of 1994, a supervisory board with substantial representation of employees has been the most salient German vestige in China's Company Law.

However, the real function of supervisory boards in China has long been questioned by both legal and finance scholars.[31] To a large extent, supervisory boards are perfunctory. In fact, very little is known about the actual operation of German supervisory boards among Chinese scholars and practitioners alike. Hence, a departure from the dual-board structure seems nothing but natural. Nevertheless, perhaps due to a strong path dependance and the tenacity of China's self-affiliation to the German tradition, supervisory boards have remained largely intact in its Company Law for nearly three decades. In fact, the only noticeable change to the provisions of supervisory boards was to strengthen their codetermination flavor by mandating at least one-third membership for employee representatives in the 2006 amendment, which may well be seen as a double-down on the German heritage.

In its latest draft amendment, for the first time, the PRC Company Law will allow Chinese companies, both limited liability and share limited liability, to dispense with the supervisory board and, instead, set up an audit committee in its board of directors.[32] This is clearly following suit of the US-style corporate governance structure, which places the monitoring responsibility on the board of directors in general and its audit committee in particular. In fact, the idea of board committees itself seems very American and was first introduced to the PRC

---

29. Admittedly, the cap of 50% of outstanding shares may still impose tighter restrictions on Chinese corporate boards than their American counterparts, and the 3-year duration of authorization makes the proposed Chinese rule more like the English rule, which sets the maximum duration at 5 years. *See* U.K. Cos. Act 2006, c. 46, § 551(3)(b). In the first draft, though, the share issuance rules were almost equivalent to those under the Delaware Corporate Law which does not cap the new issuance at a certain percentage of outstanding shares but requires a specific shareholder approval if the issuance exceeds 20% of outstanding shares. The reason for the change between the first and second drafts is unclear.

30. Codetermination, compared to sole determination by capital, is also more congruous to a socialist corporate law.

31. *E.g.*, Li Weian (李维安) & Wang Shiquan (王世权), Zhongguo Shangshi Gongsi Jianshihui Zhili Jixiao Pingjia Yu Shizheng Yanjiu (中国上市公司监事会治理绩效评价与实证研究) [Assessing the Effectiveness of Supervisory Boards in Governance of Listed Companies in China: An Empirical Study], 1 Nankai Guanli Pinglun (南开管理评论) [Nankai Bus. Rev.], vol.8, no.1, 2005, at 4; Guo Li (郭雳), Zhongguoshi Jianshihui: Anyu Hechu, Quxiang Hefang – Guoji Bijiao Shiye Xia de Zaishensi (中国式监事会：安于何处，去向何方 – 国际比较视野下的再审思) [Chinese Style Supervisory Boards: Current Situation and Future Direction – Reflection in a Global Comparative Perspective], 2 Bijiaofa Yanjiu (比较法研究) [Compar. L. Stud.], no.2, 2016, at 74.

32. *See* The 3rd Draft Amendment, *supra* note 6, arts. 69, 121.

Company Law in the ongoing amendment.[33] Moreover, similar to the Sarbanes-Oxley Act, the draft amendment to the PRC Company Law emphasizes independence of audit committee members in share limited liability companies. Though not to the same extent of the Sarbanes-Oxley Act, the amendment proposes to mandate a majority of independent directors, with at least one accounting professional, in audit committees.

As far as codetermination is concerned, the latest draft amendment has shown deviations too. In this draft, companies with more than three hundred employees need to have employee representatives on its board of directors if they do not have supervisory boards.[34] For these companies, therefore, they are required to have only one member in their boards to represent employees compared to the prior rules that mandate at least one-third of the supervisory board represented by employees. Thus, for relatively large companies, the overall weight of employee representation in management is likely to fall. On the other hand, if a company has fewer than three hundred employees, no representation of employees on the board of directors is mandated. This means that these companies can fully do without codetermination if they choose not to have supervisory boards.[35]

Furthermore, China introduced independent directors to the board of listed companies in 2001. At least a third of the board of a listed company should be composed of independent directors.[36] Like in the U.S., independent directors in China cannot take positions in a company other than those on the board.[37] Most recently, the 3rd draft amendment to the PRC Company Law has explicitly extended the requirement of having independent directors to share limited liability companies in general, regardless of their listing status, at least when an audit committee is established in the board.[38]

One salient feature of directors' independence in China is insulation from blockholders. The regulatory rules require independent directors to be disconnected from individual shareholders of one percent or more shares or institutional shareholders of five percent or more shares.[39] Besides, independent directors are

---

33. For listed companies, the rules of board committees, including the audit committee, were adopted in 2002 by the China Securities Regulatory Commission (CSRC). *See* Shangshi Gongsi Zhili Zhunze, Zhengjianfa [2002] Yi Hao (上市公司治理准则，证监发【2002】1 号) [Governance Standards for Listed Companies], CSRC Document No.1 [2002]] (promulgated by the China Sec. Regul. Comm'n, Jan. 7, 2002, effective Jan. 7, 2002), art. 52, St. Council Gaz., no.3, 2003, https://www.gov.cn/gongbao/content/2003/content_62538.htm (China) [hereinafter Governance Standards (2002)].

34. *See* The 3rd Draft Amendment, *supra* note 6, arts. 68, 120.

35. If these smaller companies do have supervisory boards, however, a minimum of one third of supervisory board members still need to be employee representatives.

36. *See* Guidelines for Introducing Independent Directors to the Board of Directors of Listed Companies (Zhengjianfa [2001] No. 102) (promulgated by the China Sec. Regul. Comm'n, Aug. 16, 2001, effective on Aug. 16, 2001), sec. I.3, China Sec. Regul. Comm'n, Aug. 16, 2001, http://www.csrc.gov.cn/csrc_en/c102030/c1371185/content.shtml (China) [hereinafter Guidelines for Introducing Independent Directors].

37. Governance Standards (2002), *supra* note 33, arts. 34, 49.

38. The 3rd Draft Amendment, *supra* note 6, art. 121.

39. Guidelines for Introducing Independent Directors, *supra* note 36, sec. III.2, 3. In its latest

not allowed to receive stocks or stock options as compensations.[40] Consequently, independent directors in Chinese listed companies are not only supposed to be disconnected from the management, but from shareholders as well. This appears in contrast to the U.S. practice, which stresses alignment of interests between directors and shareholders by awarding significant portions of stock- or option-based director compensations. While Delaware courts do pay enormous attention to the influence of controlling shareholders when determining the independence of directors,[41] their connection to shareholders of one percent stocks probably will not be frowned upon for lack of independence. Indeed, when the controller is not in conflict with other shareholders, independence of directors may not even be an issue in Delaware.[42]

Similar to their American counterparts, independent directors in Chinese listed companies are charged with reviewing transactions for conflicts and monitoring officers.[43] However, one thing stands out in Chinese independent directors' responsibilities. These directors are required to guarantee the accuracy of publicly disclosed information. In fact, under the slogan of "zero tolerance" of securities frauds, independent directors have been increasingly viewed as gatekeepers for misrepresentations in recent years. Independent directors would face devastating consequences if misrepresentations were found. In a famous case of securities fraud, the issuer's five independent directors were ordered to be jointly and severally liable for damages totaling to RMB 369 million (US$53.5 million).[44] The astronomical amount of damages imposed on individual independent directors were so intimidating that, within about two weeks of the court decision, forty-three independent directors of thirty-nine Chinese listed companies resigned from their board positions.[45] Although the Chinese regulatory rules allow listed companies to

---

regulation on independent directors, CSRC further clarifies that independent directors cannot be connected to controlling shareholders or actual controllers. Shangshi Gongsi Duli Dongshi Guanli Banfa, Di Erbai Ershi Hao (上市公司独立董事管理办法，第 220 号) [Regulatory Measures of Independent Directors of Listed Companies, Order No. 220] (promulgated by the China Sec. Regul. Comm'n, Jul. 28, 2023, effective Sept. 4, 2023), art. 6(2), (3), (4), Lawinfochina, https://lawinfochina.com/display.aspx?lib=law&id=41689 (China) [hereinafter Regulatory Measures].

40. Guidelines for Introducing Independent Directors, *supra* note 36, sec. VII.5.

41. *E.g., In re Oracle Corp. Derivative Litig.*, 824 A.2d 917 (Del. Ch. 2003)**;** *Beam v. Stewart*, 845 A.2d 1040 (Del. 2004).

42. *See Sinclair Oil Corp. v. Levien*, 280 A.2d 717 (Del. 1971); *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022 (Del. Ch. 2012). Singapore also tries to detach independent directors with shareholders, but only if their shareholding reaches 10% or more. SING. CODE OF CORP. GOVERNANCE 2012, Guidelines 2.3.

43. Guidelines for Introducing Independent Directors, *supra* note 36, secs. V.1, VI.1; Regulatory Measures, *supra* note 39, arts. 17(2), 18(5).

44. Li Zhiqiang (李志强), Youyou Dudong Beipan Peichang, Dongzexian Shou Guanzhu (又有独董被判赔偿，董责险受关注] [*Independent Directors Found Liable Again, Attentions Paid to D&O Insurance*], Zhengquan Shibao Wang (证券时报网) [STCN] (Aug. 19, 2022, 08:44 AM), https://news.stcn.com/news/202208/t20220819_4808134.html#:~:text=%E5%9C%A8%E8%82%A1%E5%8F%B2%E4%B8%8A%E6%9C%80%E5%A4%A7,%E8%B5%94%E5%81%BF%E8%B4%A3%E4%BB%BB3.69%E4%BA%BF%E5%85%83%E3%80%82.

45. Ge Jia (葛佳), Kangmei An Xuanpan Hou 43 Ge A Gu Dudong Cizhi, Lizhichao Zhende

purchase liability insurance for independent directors,[46] Directors and Officers (D&O) insurance remains highly underdeveloped in China. After all, when the risk of liability is immeasurable, the insurance premium is likely to go through the roof if there is ever a policy up for purchase.[47] To address the drastic liabilities faced by independent directors, both SPC and China Securities Regulatory Commission (CSRC) revised rules this year to establish due diligence defenses against fraud liabilities. Particularly, independent directors can rely on expert opinions for decisions outside their own professional areas.[48]

By contrast, independent directors are rarely found personally liable in securities fraud cases. In the exceptional case of *In the Matter of W.R. Grace & Co.*,[49] the U.S. Securities and Exchange Commission (SEC) merely issued a report of investigation regarding the potential liabilities of an independent director without imposing actual sanctions. Even such a light-touch regulatory action, however, seems rather controversial with a potent dissenting opinion uttered from within the Commission.[50] The vast majority of securities class actions in the U.S. are settled with payments covered by D&O insurance, hence independent directors have little exposure to the risk of personal liability.

C. Directors' Duties

With respect to the rules of directors' duties, China again appears to follow American footsteps in many ways. Although the term "fiduciary duties" has yet to appear in PRC Company Law, including in its latest draft amendments, fiduciary duties are widely deemed as the central legal requirement placed on corporate directors among Chinese scholars and practitioners.[51] It is particularly noteworthy

---

Lailema? (康美案宣判后 43 个 A 股独董辞职，离职潮真的来了吗？) [*Independent Directors Resigned in the Wake of the Kangmei Decision, the Wave of Independent Director Resignment Really Coming?*], Pengpai Xinwen (澎湃新闻) [THE PAPER] (Dec. 1, 2021, 08:48 PM), https://www.thepaper.cn/newsDetail_forward_15596302.

46. Guidelines for Introducing Independent Directors, *supra* note 36, sec. VII.6; Regulatory Measures, *supra* note 39, art. 40.

47. For the meltdown of D&O insurance soon after *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), see Fred McChesney, *The "Trans Union" Case: Smith v. Van Gorkom, in* THE ICONIC CASES IN CORPORATE LAW 254 n.72 (Jonathan R. Macey ed., 2008).

48. Zuigao Renmin Fayuan Guanyu Shenli Zhengquan Shichang Xujia Chenshu Qinquan Minshi Peichang Anjian De Ruogan Guiding, Fashi [2022] Er Hao (最高人民法院关于审理证券市场虚假陈述侵权民事赔偿案件的若干规定，法释【2022】2 号) [Several Provisions on Adjudication of Civil Compensation for Tortious Liability for Misrepresentations in Securities Market, Judicial Interpretation No. 2 [2022]] (promulgated by the Judicial Comm. Sup. People's Ct., Jan. 21, 2022, effective Jan. 22, 2022), art.16, Sup. People's Ct. Gaz., Jan. 21, 2022, http://gongbao.court.gov.cn/Details/bc2d1e8ed5c2eeacd862fc3752c0dd.html (China); Regulatory Measures, *supra* note 39, art. 46.

49. Report of Investigation Concerning W. R. Grace & Co., Exchange Act Release No. 39157 (Sept. 30, 1997).

50. *See* Report of Investigation Concerning W. R. Grace & Co., Exchange Act Release No. 39157 (Sept. 30, 1997) (Wallman, dissenting).

51. For instance, the theme of the annual "21st Century Commercial Law Forum" held by the Tsinghua University Law School in 2019 was fiduciary duties. A big proportion of the presentations at the forum, including this author's, were about the fiduciary duties of corporate directors.

that, since 2006, PRC Company Law has established the duty of loyalty and duty of care as the two fundamental elements of directors' duties. These twin duties distinctly echo the concept of directors' fiduciary duties under US law.[52] In fact, even in the UK and other Commonwealth jurisdictions, directors' fiduciary duties are often presented as a wide array of obligations.[53]

As far as duty of care is concerned, China has rejected the business judgement rule. Instead, in the latest draft amendment to PRC Company Law, duty of care requires directors to exercise reasonable precaution that should have usually been exercised by those who manage affairs for others.[54] In essence, the standard used for judicial review of corporate directors' duty of care is the same as the one applicable to other professionals in malpractice actions. Hence, the Chinese version of duty of care diverges from the Delaware rule and the current version of the Model Business Corporation Act (MBCA), which do not hold directors liable for ordinary negligence.[55] However, before it was revised in 1997, the MBCA had indeed adopted a similar ordinary negligence standard to determine the breach of duty of care.[56] In one often-cited Chinese court decision, the standard of judicial review in litigations over duty of care was deemed to have three prongs.[57] The first prong asks whether the board's action was taken in good faith. The second prong looks into whether directors exercised the same level of precaution that a reasonable person would have in handling his or her own affairs. The final prong investigates whether directors had reason to believe that they had discharged their obligation in the best interest of the corporation. This three-prong approach appears to replicate the rule set in the 1980 version of MBCA.

With respect to directors' duty of loyalty, China has employed a general rule restricting exploitation of corporate opportunities since 2006. It imposes shareholder approval as the precondition for directors' use of such opportunities.[58] However, in determining whether management has usurped corporate

---

52. Delaware courts once added the duty of good faith as the third prong of directors' fiduciary duties in *In re the Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006). After *Stone v. Ritter*, 911 A.2d 362 (Del. 2006), however, corporate fiduciary duties in Delaware have reverted to the two-prong structure.

53. For example, one leading UK corporate law textbook listed 7 types of directors' duties (see LEE ROACH, COMPANY LAW 242–90 (2nd ed. 2002)), while a commonly used Singapore corporate law textbook enumerated 3 statutory duties and 5 general law fiduciary duties set for corporate directors (see PEARLIE KOH, COMPANY LAW, 107–28 (3rd ed. 2017)).

54. The 3rd Draft Amendment, *supra* note 6, art. 180.

55. *See* MODEL BUS. CORP. ACT § 8.30(a) (1969) (AM. BAR ASS'N, amended 2016).

56. *See* MODEL BUS. CORP. ACT § 8.30 (1969) (AM. BAR ASS'N, amended 1980).

57. Shanghai Chuanliu Jidian Zhuanyong Shebei Youxian Gongsi Su Li Xinhua Special (上海川流机电专用设备有限公司诉李鑫华) [Shanghai Chuanliu Electromechanical Special Appliance Ltd. Liab. Co. V. Li Xinhua], *in* ZHONGGUO SHENPAN ANLI YAOLAN (2011 NIAN SHANGSHI SHENPAN ANLIJUAN) (中国审判案例要览（2011 年商事审判案例卷）] [BRIEF COLLECTIONS OF CHINESE JUD. DECISIONS (COMMERCIAL CASES IN 2011)] 218-24 (Guojia Faguan Xueyuan & Zhongguo Renmin Daxue Faxueyuan Bian, 2013) (国家法官学院 & 中国人民大学法学院 编，2013)) [National Judges College & Renmin University of China Law School eds., 2013].

58. Company Law (2005 Revision), *supra* note 6, art. 149(5); Company Law (2018 Amendment), *supra* note 20, art. 148(5).

opportunities, Chinese courts consider the circumstances in which corporate directors or officers became aware of these opportunities, and whether corporate resources had been employed to benefit from the opportunities. Chinese courts have appeared to deem a corporation's inability to make use of opportunities as a justification for a director or officer's use.[59] These judicial practices are largely consistent with the positions taken by American courts.[60] Most recently, the Third Draft to PRC Company Law brings the rules of corporate opportunities in China even closer to those in US by permitting directors or officers to seek board approval in lieu of shareholder approval when seeking to use corporate opportunities, and by explicitly including the corporation's inability to use an opportunity as a valid reason for management use.[61]

Authorization of self-dealings or related-party transactions is a key issue regarding directors' duty of loyalty. In the U.S., such authorization can be obtained based on informed approvals of disinterested directors or shareholders.[62] Starting from its 2006 version, PRC Company Law has generally conferred the power of authorizing self-dealings or related-party transactions on shareholders alone.[63] With respect to listed companies, Chinese Company Law seems to allow disinterested directors to approve interested transactions.[64] But it is not clear from the law whether this means that board approval alone will suffice, or that board approval is merely a prerequisite for further authorization by shareholders. In any event, the latest draft amendment tries to dispel the confusion by clarifying that both self-dealings and related-party transactions can be authorized by either disinterested directors or shareholders regardless of a company's listing status.[65] This new development is again in alignment with the American rule.[66]

---

59. *E.g.*, Zhongye Jingtai Gongsi Su Congmou, Zhongye Quantai Gongsi (中冶京泰公司诉丛某、中冶全泰公司) [China Metallurgical Jingtai Co. V. Cong, China Metallurgical Quantai Co.]; Ningboshi Kejiyuanqu Xinhua Xinxi Jishu Youxian Gongsi Su Xulijian Deng (宁波市科技园区新华信息技术有限公司诉徐利建等) [Ningbo Tech Park Xinhua Information Technology Limited Liability Co. V. Xu Jianli et al.] (both *cited in* WANG, *supra* note 9, at 370, 374-76).

60. For the leading Delaware decisions on corporate opportunities, see *Guth v. Loft, Inc.*, 5 A.2d 503, 514 (Del. 1939); *Broz v. Cellular Info. Sys.*, 673 A.2d 148, 154 (Del. 1996).

61. The 3rd Draft Amendment, *supra* note 6, art. 184(1), (2).

62. *E.g.*, Delaware General Corporate Law (DGCL), DEL. CODE ANN. TIT. 8, § 144 (2023).

63. *See* Company Law (2005 Revision), *supra* note 6, art. 149(4); *see also* Company Law (2018 Amendment), *supra* note 20, art. 148(4). Sub-article 4 of these two articles only refers to self-dealings. Arguably, however, related-party transactions are treated similarly. *See* Zhongguo Mou Youxiangongsi Su Wangmou (中国某有限公司诉王某) [X Chinese Co. Ltd. v. Wang], *cited in* WANG, *supra* note 9, at 385–87.

64. *See* Company Law (2005 Revision), *supra* note 6, art. 125; *see also* Company Law (2018 Amendment), *supra* note 20, art. 124.

65. The 3rd Draft Amendment, *supra* note 6, art. 183.

66. However, in both Delaware and China, judicial review of self-dealings and related-party transactions is still possible even after board or shareholder approvals. *See Fliegler v. Lawrence*, 361 A.2d 218 (Del. Supr. 1976); *In re KKR Fin. Holdings LLC S'holder Litig.*, 101 A.2d 980 (Del. Ch. 2014); Guanyu Shiyong <Zhonghua Renmin Gongheguo Gongsi Fa> Ruogan Wenti De Guiding (Wu), Fashi [2019] Qi Hao (关于适用《中华人民共和国公司法》若干问题的规定（五），法释【2019】7 号) [Provisions on Several Issues Concerning the Application of the Company Law of the People's Republic of China (V), Judicial Interpretation No. 7 [2019]] (promulgated by the Judicial Comm. Sup. People's

Moreover, although Chinese law has no direct provision about directors' duty of oversight, some Chinese courts apparently referred to American decisions when adjudicating cases about oversight. The presiding judge of such a case[67] plainly cited the Delaware case of *Graham v. Allis-Chalmers Manufacturing Co.*[68] to support his decision in an article explaining the reasoning of the case.[69] Admittedly, this may just be an ad hoc instance, and *Allis-Chalmers* was later overruled by *In re Caremark International Inc., Derivative Litigation* in Delaware.[70] It nevertheless shows the influence of American corporate law on certain members of the Chinese judiciary.

D. Allocation of Power

Finally, we look at the allocation of decision power between shareholders and the board. In stark contrast to the American tradition which concentrates power at the board, China has always assigned the ultimate power of decision-making to shareholders.[71] In fact, the shareholders in a corporation are akin to the National People's Congress in China's government. Both are dubbed as the "organ of power," which officially means the highest authority within an organization. Corporate boards, on the other hand, are viewed as the organ to execute decisions made by shareholders.

Consistent with this primary structure of power allocation, shareholder approvals are required for a variety of corporate governance and finance decisions, from amending corporate articles to paying dividends and issuing equities or debts. Shareholders with at least 10% shares are entitled to call special shareholder meetings. In limited liability companies, those who hold 3% or more shares can make proposals to shareholder meetings without being screened by the board.[72] And shareholder proposals, once adopted, are binding on the board. Chinese companies hold shareholder meetings much more frequently than their American counterparts.

However, as mentioned in various sections above, the latest draft amendment has shifted certain important decision-making powers to the board, no longer

---

Ct., Apr. 22, 2019, effective Apr. 29, 2019), art. 1, Sup. People's Ct. Gaz., Apr. 29, 2019, http://gongbao.court.gov.cn/Details/a562cc2efa4ee68aef39531e26c147.html (China).

67. Chongqing Dongya Fangshui Jiancai Youxian Gongsi Su Yangguize (重庆东亚防水建材有限公司诉杨桂泽) [Chongqing East Asia Water-Proof Building Materials Limited Liability Co. v. Yang Guize], *cited in* ZHU JINQING (朱锦清), GONGSI FAXUE (XIUDING BEN) (公司法学（修订本）) [Corporate Law (Revised ed. 2019)] 631, 631 (Chongqing First Interm. People's Ct. 2012) (China).

68. *Graham v. Allis-Chalmers Manuf. Co.*, 188 A.2d 125 (Del. 1963).

69. ZHU, *supra* note 68.

70. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del Ch. 1996).

71. This was made clear in articles 37 and 102 of the PRC Company Law of 1994 and has been inherited by every amendment to the law ever since. Company Law (1994), *supra* note 6; s*ee* Company Law (2005 Revision), *supra* note 6; *see also* Company Law (2013 Amendment), *supra* note 18; *see also* Company Law (2018 Amendment), *supra* note 20.

72. In the third draft amendment to the Company Law, the percentage requirement is lowered mandatorily to 1%. The 3rd Draft Amendment, *supra* note 6, art. 115. See *infra* note 107 (Shanghai Hile Bio-Tech. Co., Ltd.) for a court decision that treated the statutory conditions for making shareholder proposals as mandatory even before the current amendment.

requiring specific authorization by shareholders. Corporate boards in China will be able to issue a substantial percentage of new equity, approve interested transactions, and approve use of corporate opportunities by directors and officers. Additionally, with general authorization of shareholders, the board will be empowered to issue corporate debts under the new draft amendment.[73] Although the formal power allocation in China still favors shareholders, these new developments clearly pivot toward the American practice of strengthening the position of the board.

Interestingly, as a byproduct of the long-lasting shareholder-centric power allocation structure, China's Company Law has essentially institutionalized the shareholder primacy principle. Although employee representatives are required on the board or supervisory board, Chinese Company Law inevitably elevates the interest of shareholders above that of employees and any other stakeholder, as it is the shareholder meeting that has the final say on operation and finance decisions. Shareholder primacy is also a clear hallmark of American corporate law.

On the other hand, as stakeholder capitalism has risen in the U.S. in recent years, Chinese law has again followed suit. The latest amendment expands the existing rule of general corporate social responsibility to protect the interest of employees, consumers, and other stakeholders, as well as the environment.[74] Nevertheless, as explained in the prior paragraph, China's Company Law has not altered its basic governance apparatus that prioritizes shareholders' interests, just like the Delaware law has yet to abandon its fundamental stance of shareholder primacy.[75]

II. CONVERGENCE OF SECURITIES LAW

A. Introduction of Dual-Class Structure

Like many other jurisdictions in Asia, China has insisted on one-share-one-vote in its listing rules for a long time. The situation changed in 2017 when President Xi declared his intention to launch a new board in the Shanghai Stock Exchange, the Science and Technology Innovation Board, or the STAR Market. The introduction of dual-class listing is a hallmark of the listing rules of this new board.[76] While this was but one episode of the fresh embrace of the dual-class structure by Asian jurisdictions in the past decade,[77] the inspiration doubtlessly came from the U.S. where, since Google's IPO in 2004, dual-class listing has been acclaimed for its

73. The 3rd Draft Amendment, *supra* note 6, arts. 59, 112.

74. *Id.* art. 20.

75. *See eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010).

76. Shanghai Zhengquan Jiaoyisuo Kechuangban Gupiao Shangshi Guize (上海证券交易所科创板股票上市规则) [Rules Governing the Listing of Stocks on the Science & Technology Innovation Board of Shanghai Stock Exchange] (promulgated by the Shanghai Stock Exch. Mar. 2019, amended Apr. 30, 2019, effective Apr. 30 2019), ch. 4, sec. 5, Shanghai Stock Exch., Apr. 30, 2019, http://english.sse.com.cn/news/newsrelease/c/10114022/files/ed50139ef0e4460f8a7499eea704a1ab.docx (China) [hereinafter SSE STAR Market Stock Listing Rules].

77. For instance, Hong Kong adopted its dual-class listing rules in 2017 and Singapore started its own in the following year.

amenability to innovative companies.[78]

In the recent spate of amendments to dual-class listing rules in Asia, China included, there is one uniform feature modeled on the American rules. The dual-class structure can only be adopted at IPO and not through midstream recapitalization. [79] However, these listing rules added a variety of minority protection rules not seen in the U.S., apparently due to the negative impacts of the dual-class structure on corporate governance found in prior studies on the American stock market.[80]

In China, stocks with super-voting rights can only be awarded to directors who make "material contributions" to corporate business. Stockholders with these rights should have at least 10 percent cash flow rights of the outstanding stocks in total.[81] The votes included in each share of super-voting stocks cannot exceed 10 times the votes of regular common stocks,[82] and regular shareholders must maintain at least 10 percent voting rights.[83] Super-voting stocks cannot be traded at the secondary market.[84] Moreover, sunsets are mandatory when holders of super-voting stocks leave office, transfer their stocks to others, are incapacitated or dead, or when corporate control has changed.[85] Notably, however, time-based sunsets are not required. Finally, the super-voting power is not applicable to certain shareholder resolutions, including those about amendments to corporate charters, changes in the number of votes held by super-voting stocks, elections or dismissals of independent directors, engagement of auditors, corporate mergers and acquisitions, spin-offs, or dissolutions.[86]

B. Securities Class Action

The PRC Securities Law was moderated in 2019 to add an opt-out style securities class action. The opt-out feature, which allows all victims of the same securities fraud to be compensated by default, is typical of class actions in the U.S. Before the 2019 amendment, multiple securities investors could bring actions

78. Dual class structure is said to promote long-term visions of the corporate management when information asymmetry prevents outside investors adequately appreciating such visions. *See* Jeremy Stein, *Takeover Threats and Managerial Myopia*, 96 J. POL. ECON. 61 (1988); Thomas J. Chemmanur & Yawen Jiao, *Dual Class IPOs: A Theoretical Analysis*, 36 J. BANKING & FIN. 305 (2012). High-tech firms are considered harboring particularly serious information asymmetry.

79. *See* SEC Rule 19c-4, 17 C.F.R. § 240.19c–4; SSE STAR Market Stock Listing Rules, *supra* note 76, sec. 4.5.2; H.K. EXCH. & CLEARING LTD., CONSOLIDATED MAIN BOARD LISTING RULES, Rule 8.05A, https://en-rules.hkex.com.hk/sites/default/files/net_file_store/consol_mb.pdf (last visited Mar. 18, 2024); SING. STOCK EXCH., SINGAPORE STOCK EXCHANGE MAINBOARD RULES (amended 2023), Rule 210(10)(c), https://rulebook.sgx.com/rulebook/210 (last visited Mar. 18, 2024).

80. *E.g.*, Ronald Masulis, Cong Wang & Fei Xie, *Agency Problems at Dual-Class Companies*, 64 J. FIN. 1697 (2009); Paul Gompers, Joy Ishii & Andrew Metrick, *Extreme Governance: An Analysis of Dual-Class Firms in the United States*, 23 REV. FIN. STUD. 1051 (2010).

81. SSE STAR Market Stock Listing Rules, *supra* note 76, sec. 4.5.3.

82. *Id.* sec. 4.5.4.

83. *Id.* sec. 4.5.7.

84. *Id.* sec. 4.5.8..

85. *Id.* sec. 4.5.9.

86. *Id.* sec. 4.5.10.

against particular fraudulent acts together. But only those who actually filed the suit would be considered as plaintiffs and entitled to damages, if any, awarded by the court. That was essentially an opt-in mechanism. Introduction of the opt-out mechanism is remarkable in light of the long-lasting wariness of so-called "mass incidents" by Chinese authorities. In securities fraud lawsuits, tens or even hundreds of thousands of investors can be involved, a substantial part of whom are retail investors.

In fact, Chinese courts started with an outright rejection to hear private actions against securities frauds allegedly because of lack of essential conditions for courts to decide such cases.[87] Later on, the Chinese Supreme People's Court (SPC) cautiously allowed civil actions for damages in securities frauds but insisted on regulatory enforcements as a prerequisite.[88] This prerequisite remained in place until 2022. From "just-say-no" to establishing a civil proceeding that can include a massive number of plaintiffs by default, the trajectory of securities litigations in China has come pronouncedly closer to the American rules.

This being said, perhaps out of the concern of frivolous suits seen in the U.S., or, more likely, of the loss of control over a potential trigger of mass incidents, the PRC Securities Law delegates the power to file the opt-out type of securities class actions as the lead plaintiff, in effect, to China Securities Investor Services Center (CSISC), an entity established by CSRC for investor protection. CSISC can decide which cases it wants to file by soliciting at least fifty investors who are alleged victims of securities frauds.[89] Obviously, this will substantially limit the number of class actions filed. CSISC is supposed to keep out meritless suits, but, at the same time, the deterring effect of class actions on frauds may be compromised. Given its limited resources, CSISC can handle only a very small number of cases. If fact, it has filed merely one class lawsuit against securities frauds as of the end of April

87. Zuigao Renmin Fayuan Guanyu She Zhengquan Minshi Peichang Anjian Zanbuyu Shouli de Tongzhi, Famingchuan [2001] Sibailingliu Hao (最高人民法院关于涉证券民事赔偿案件暂不予受理的通知，法明传【2001】406 号) [Notice of the Supreme People's Court on Refusing to Accept Civil Compensation Cases Involving Securities for the Time Being [Expired], Court Notice No. 406 [2001]] (promulgated by the Sup. People's Ct. Sept. 21, 2001, effective Sept. 21, 2001), http://lawinfochina.com/display.aspx?id=27056&lib=law, CLI.3.306467(EN) (Lawinfochina). However, the PRC Securities Law has always permitted private actions against securities frauds ever since its first version of 1998. *See* Zhengquan Fa (证券法) [Securities Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1998, effective July 1, 1999), art. 63, BEIDA FABAO (北大法宝) [PKULAW], https://law.pkulaw.com/falv/129efb8781be7c76bdfb.html, CLI.1.21319 (China).

88. Zuigao Renmin Fayuan Guanyu Shouli Zhengquan Shichang Yin Xujia Chenshu Yinfa de Minshi Qinquan Jiufen Anjian Youguan Wenti de Tongzhi, Famingchuan [2001] Sishisan Hao (最高人民法院关于受理证券市场因虚假陈述引发的民事侵权纠纷案件有关问题的通知，法明传【2001】43 号) [Notice of the Supreme People's Court on Questions about Accepting Civil Tort Cases Resulting from Securities Misrepresentations [Expired], Court Notice No. 43 [2001]] (promulgated by the Sup. People's Ct., Jan. 15, 2002, effective Jan. 15, 2002) Zhengzhou VIOS Foreign Inv. Serv. Center, Jan. 24, 2022, https://www.waizi.org.cn/doc/85940.html (China).

89. Zhengquan Fa (2019 Xiuding) (证券法（2019 修订）) [Securities Laws (2019 Revision)] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 2019, effective Mar. 1, 2020), art. 95, BEIDA FABAO (北大法宝) [PKULAW], https://www.pkulaw.com/en_law/1c35c5991418728abdfb.html, CLI.1.338305(EN) (China) [hereinafter Securities Laws (2019 Revision)].

2023,[90] nearly three years after the SPC had laid out the details of litigating such lawsuits.[91]

C. Civil Liabilities of Securities Fraud

The SPC publicized a new judicial interpretation on civil liabilities for securities fraud in early 2022[92] to replace its previous interpretation regulating the same matter issued some twenty years ago.[93] This latest judicial interpretation has brought civil liabilities for securities fraud in China nearer to those in the U.S. in several patent aspects.

First, the new judicial interpretation provides for transaction causation, or reliance, as one essential element of liabilities for securities fraud. It appears that the fraud-on-the-market theory is also adopted for inference of this causation.[94] Chinese courts had conducted analysis on transaction causation in line with the fraud-on-the-market theory even before the new misrepresentation interpretation.[95] But it is the first time for the SPC to officially introduce such inference to establish transaction causation. The previous judicial interpretation merely referred to loss causation. However, the Chinese version of fraud-on-the-market inference seems to be broader than its American counterparts in that it infers even the publicity of misrepresentation, as long as such misrepresentation is about securities traded in

90. Gu Huajun, Liu Shujun Deng 11 Ming Touzizhe Su Kangmei Yaoye Gufen Youxian Gongsi (顾华骏、刘淑君等 11 名投资者诉康美药业股份有限公司) [Gu Huajun et al. v. Kangmei Pharmaceutical Co., Ltd.], Beida Fabao (北大法宝) [PKULAW], Jan. 29, 2022, CLI.C.409260664(EN) (Guangzhou City Interm. People's Ct. of Guangdong Province Nov. 12, 2021) (China). As this article is being written, the CSISC is preparing for its second securities class lawsuit against Essence Information Technology Co. Ltd. (泽达易盛天津科技股份有限公司).

91. Zuigao Renmin Fayuan Guanyu Zhengquan Jiufen Daibiaoren Susong Ruogan Wenti de Guiding, Fashi [2020] Wu Hao (最高人民法院关于证券纠纷代表人诉讼若干问题的规定，法释【2020】5 号) [Provisions of the Supreme People's Court on Several Issues Concerning Representative Actions Arising from Securities Disputes, Judicial Interpretation No. 5 [2020]] (promulgated by the Judicial Comm. Sup. People's Ct., July 23, 2020, effective July 31, 2020) Sup. People's Ct. Gaz., July 30, 2020, http://gongbao.court.gov.cn/Details/901656fb3fe561257ecb5f8212dbbc.html (China).

92. Zuigao Renmin Fayuan Guanyu Shenli Zhengquan Shichang Xujia Chenshu Qinquan Minshi Peichang Anjian de Ruogan Guiding, Fashi [2022] Er Hao (最高人民法院关于审理证券市场虚假陈述侵权民事赔偿案件的若干规定，法释【2022】2 号) [Several Provisions of the Supreme People's Court on the Trial of Civil Cases for Damages for the Tort of Misrepresentation in the Securities Market, Judicial Interpretation No. 2 [2022]] (promulgated by the Judicial Comm. Sup. People's Ct., Dec. 30, 2021, effective Jan. 22, 2022) Sup. People's Ct. Gaz., Jan. 21, 2022, http://gongbao.court.gov.cn/Details/bc2d1e8ed5c2eeacd862fc3752c0dd.html (China) [hereinafter New Misrepresentation Interpretation].

93. Zuigao Renmin Fayuan Guanyu Shenli Zhengquan Shichang Yin Xujia Chenshu Yinfade Minshi Peichang Anjian de Ruogan Guiding, Fashi [2003] Er Hao (关于审理证券市场因虚假陈述引发的民事赔偿案件的若干规定，法释【2003】2 号) [Some Provisions of the Supreme People's Court on Trying Cases of Civil Compensation Arising from False Statement in Securities Market [Expired], Judicial Interpretation No. 2 [2003]] (promulgated by the Judicial Comm. Sup. People's Ct., Jan. 9, 2003, effective Feb. 1, 2003) Sup. People's Ct. Gaz., Jan. 9, 2003, http://gongbao.court.gov.cn/Details/736c8d392b7a1d755a9c1a7a1a0e7e.html?sw= (China) [hereinafter Old Misrepresentation Interpretation].

94. New Misrepresentation Interpretation, *supra* note 92, art. 11.

95. *E.g.*, Gu Huajun et al., CLI.C.409260664(EN).

public market, as well as the market efficiency.[96]

Second, under the slogan of "zero tolerance" of securities fraud, the Chinese authorities have tightened the liability of intermediaries assisting in securities offering, including underwriters, accountants, lawyers, and, in case of debt issuance, credit-rating agencies. Obviously, this was, again, inspired by the legal theories and practices in the US to hold "gatekeepers" accountable for scrutinizing securities offering documents.[97] In September 2021, one Chinese court rendered an influential decision that ordered various offering intermediaries to pay damages of nearly US$800 million, jointly and severally, to investors in a civil action against fraudulent issuance of debt instruments.[98] The unprecedented amount of damages has caused strong chilling effect on securities intermediaries in China. Hence, thereafter, the new misrepresentation interpretation sets in provisions to circumscribe their liabilities. These newly installed protections have followed section 11 of the US Securities Act by limiting intermediaries' expert liability to expertized portion of issuance documents and furnishing "gatekeepers" with the due diligence defense.[99]

Third, the new misrepresentation interpretation also adds a fresh protection of projections and other forward-looking statements from securities fraud claims, which substantially follows the safe harbor established in section 27A of the US Securities Act of 1933 as well as the bespeaks caution doctrine applied by American courts. To be protected, it requires forward-looking statements to include sufficient cautionary language, not based on obviously unreasonable assumptions, and be updated once their assumptions have changed materially.[100]

D. M&A and Shareholder Activism

Corporate Mergers and Acquisitions (M&A) and shareholder activism bear on both corporate and securities laws. This section looks specifically into the hostile bids for and proxy contests in publicly listed companies. These business activities are subject to securities regulations enacted by CSRC. Hence, I discuss M&A and shareholder activism under the securities law part.

The past few years have seen a pronounced shift in the regulatory attitude toward hostile bids for control of public companies. As recent as in 2016, hostile

---

96. *See* New Misrepresentation Interpretation, *supra* note 92, art. 11. *Cf. Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

97. The most well-known academic work in this regard is JOHN COFFEE, GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE, (2006).

98. 487 Ming Ziranren Touzizhe Su Wuyang Jianshe Jituan Gufen Youxian Gongsi Deng Beigao Zhengquan Xujia Chenshu Zeren Jiufenan (487名自然人投资者诉五洋建设集团股份有限公司等被告证券虚假陈述责任纠纷案) [Wang et al. v. Wuyang Construction Group Co., Ltd., et al. (Case of dispute over liabilities for misrepresentation in the issuance of securities)], Beida Fabao (北大法宝) [PKULAW], Jan 29, 2022, CLI.C.409259210(EN) (High People's Ct. of Zhejiang Province Sept. 22, 2021) (China). The credit-rating agency and the law firm involved in this issuance were ordered to be liable for 10% and 5%, respectively, of the damages.

99. *See* New Misrepresentation Interpretation, *supra* note 92, arts. 17-19.

100. *See id.*, art. 6.

bidders were considered rather negatively by the Chinese securities regulators. Perhaps, remarks of the former Chairman of CSRC, Liu Shiyu, present a good account of that old attitude. On Dec. 3, 2016, he declared that private equity funds making hostile bids were "barbarians," "industry robbers," and "challenging the bottom line of corporate and securities laws and regulations of the state."[101]

However, the Chinese regulators' views regarding hostile bidders pivoted within a short period of time thereafter. One telling sign of such change in attitude is the regulators' response to the first successful hostile tender offer for control of a Chinese listed company. Soon after the bid had closed on Dec. 5, 2017,[102] CSISC, an arm of China's securities regulatory authority, publicly acclaimed market-based hostile bids, [103] and hailed the success as a "milestone of public tender offers in Chinese capital market."[104] And CSRC quickly reposted CSISC's announcement on its official web portal.[105]

Furthermore, in Dec. 2018, Shanghai Stock Exchange and Shenzhen Stock Exchange both amended their listing rules, apparently at the instruction of CSRC, to substantially shorten the duration of voluntary trading halts from three months or longer to ten days in principle.[106] This change represented a major success to

---

101. Wu Lihua (吴黎华), 1700 Yi Xianzi Jupai Langchaoxiongyong, Liushiyu Nuchi "Yemanren" (1700 亿险资举牌浪潮汹涌 刘士余怒斥"野蛮人") [*1.7 Trillion Insurance Funds Launching Surging Waives of Stock Acquisitions, Liu Shiyu Rebuking "Barbarians" Scathingly*], SHANGHAI SEC. NEWS (Dec. 5, 2016, 07:54 AM), https://news.cnstock.com/news,zxk-201612-3968801.htm.

102. This was Zuig Investment's bid for control in Biopharmaceutical & Chemical Corp.

103. Zhongxiao Touzizhe Huanying Shichanghua de Yaoyue Shougou (中小投资者欢迎市场化的要约收购) [*Small and Medium Investors Welcome Market-Based Tender Offers*], Toufu Zhongxin (投服中心) [CSISC WECHAT OFFICIAL ACCOUNT] (Dec. 6, 2017, 01:16 AM), https://mp.weixin.qq.com/s/yQNmyD9ivEACRxxsyE52hA.

104. ST Shenghua Yaoyue Shougou de Chenggong Yiyi Zhongda (ST 生化要约收购的成功意义重大) [*The Success in the Tender Offer for ST-Biochem Has a Profound Significance*], Toufu Zhongxin (投服中心) [CSISC WECHAT OFFICIAL ACCOUNT] (Dec. 7, 2017, 09:50 PM), https://mp.weixin.qq.com/s/S1XFGlIQ5nfouI588qiD1Q.

105. Zhuo Songlin & Xu Jinzhong (周松林 & 徐金忠), ST Shenghua Yaoyue Shougou de Chenggong Yiyi Zhongda (ST 生化要约收购的成功意义重大) [*The Success in the Tender Offer for ST-Biochem Has a Profound Significance*], Zhongguo Zhengquan Bao & Zhongzheng Wang (中国证券报·中证网) [CHINA SEC. J. & CS.COM.CN] (Dec. 6, 2017, 09:14 PM), https://cs.com.cn/ssgs/gsxw/201712/t20171206_5610773.html.

106. *Compare* Shangshi Gongsi Chouhua Zhongda Shixiang Tingfupai Yewu Zhiyin, Shangzhengfa [2016] Shijiu Hao (上市公司筹划重大事项停复牌业务指引，上证发【2016】19号) [Notice of the Shanghai Stock Exchange on Issuing the Guidelines on Trading Suspension and Resumption for Listed Companies Planning Major Events, No. 19 [2016] of the Shanghai Stock Exch.] (promulgated by the Shanghai Stock Exch., May 27, 2016, effective May 27, 2016) CLI.6.271109(EN) (Lawinfochina), *with* Shanghai Zhengquan Jiaoyisuo Shangshi Gongsi Chouhua Zhongda Shixiang Tingfupai Yewu Zhiyin (上海证券交易所上市公司筹划重大事项停复牌业务指引) [Notice on Issuing the Guidelines on Trading Suspension and Resumption for Listed Companies Planning Major Events] (promulgated by the Shanghai Stock Exch., Dec. 28, 2018, effective Dec. 28, 2018) Shanghai Stock Exch., Dec. 28, 2018, http://www.sse.com.cn/aboutus/mediacenter/hotandd/a/20181228/6f6c9f3b4769b34442365f1b558c8aeb.docx (China); *compare* Zhuban Xinxi Pilu Yewu Beiwanglu Dijiuhao—Shangshi Gongsi Tingfupai Yewu (Shenjiaosuo) (主板信息披露业务备忘录第 9 号——上市公司停复牌业务（深交所）) [Main Board Information Disclosure Business Memorandum No. 9 - Listing Suspension and Resumption of Listed Companies (Shenzhen Stock Exchange) [Expired]] (promulgated by the Shenzhen Stock Exch., May 27, 2016, effective May 27, 2016) Listed Co. Ass'n of

hostile bidders as voluntarily suspending trading of its own stocks by target management for an extended period of time had been a key defense against hostile bids in China.[107]

Apart from endorsing hostile bids by private players, CSISC itself has led campaigns actively against anti-takeover mechanisms embedded in articles of listed companies, the so-called "shark-repellents." On Apr. 28, 2018, CSISC won its first lawsuit against a listed company, Haili Biotech, on its amendment to articles restricting shareholders' nomination and proposal rights at general shareholder meetings.[108] The court sided with CSISC and held that, in essence, any condition on exercising these rights beyond the statutory requirements would be invalid.[109] In fact, the Chinese court's concern in this case is similar to that of the Delaware courts over advance notice bylaws,[110] but China takes a more draconian approach than Delaware to remove any discretion by corporations, even with shareholder approvals, to set a higher bar for shareholder proposals.

On Jun. 17, 2021, CSISC even launched a proxy fight in Chinese capital market. It targeted at the management of China Baoan Group, one of the oldest listed companies in China. CSISC successfully mobilized more than 3,000 retail investors to grant their proxies, representing about one-third of the outstanding votes.[111] Acting in concert with a major shareholder, CSICS managed to force an amendment to the articles of China Baoan Group, scraping off two clauses with

---

Shandong, June 1, 2016, http://www.sdlca.org.cn/file/2016/06/20160601163116924.pdf (China), *with* Shenzhen Zhengquan Jiaoyisuo Shangshi Gongsi Xinxi Pilu Zhiyin Dierhao—Tingfupai Yewu, Shenzhengshang [2018] Liubailiushiliu Hao (深圳证券交易所上市公司信息披露指引第 2 号—停复牌业务，深证上【2018】666 号) [Guidelines of Shenzhen Stock Exchange on Information Disclosure by Listed Companies No. 2: Suspension and Resumption of Trading, No. 666 [2018] of the Shenzhen Stock Exch.] (promulgated by the Shenzhen Stock Exch., Dec. 28, 2018, effective Dec. 28, 2018) Shenzhen Stock Exch., Dec. 28, 2018, http://docs.static.szse.cn/www/disclosure/notice/W020181228656889898301.pdf, CLI.6.328205(EN) (China).

107. The most prominent case in this regard is Vanke's defense against Baoneng's unsolicited bid which involved a halt in trading of Vanke's stocks for as long as 6 months.

108. Zhongzheng Zhongxiao Touzizhe Fuwu Zhongxin Youxianzeren Gongsi Su Shanghai Haili Shengwujishu Gufen Youxiangongsi Gongsi Jueyi Xiaoli Queren Jiufen An (中证中小投资者服务中心有限责任公司诉上海海利生物技术股份有限公司公司决议效力确认纠纷案) [CSISC v. Shanghai Hile Bio-Tech. Co., Ltd.], Beida Fabao (北大法宝) [PKULAW], Dec. 13, 2018, CLI.C.65771472 (Shanghai People's Ct. of Fengxian District Apr. 28, 2018) (China).

109. At the time, these requirements were continuous holding of at least 3% of shares for a minimum of 90 days. The position of this opinion is acknowledged by article 115 of the 3rd draft amendment to the PRC Company Law while the shareholding threshold is reduced to 1%. *See* The 3rd Draft Amendment, *supra* note 6, art. 115.

110. For recent Delaware decisions on advance notice bylaws, see Rosenbaum v. CytoDyn Inc., No. CV 2021-0728-JRS, 2021 WL 4775140, at *1 (Del. Ch. Oct. 13, 2021); Strategic Inv. Opportunities LLC v. Lee Enter., Strategic Inv. Opportunities LLC v. Lee Enterprises, Inc., No. CV 2021-1089-LWW, 2022 WL 453607, at *1 (Del. Ch. Feb. 14, 2022); Jorgl v. AIM Immunotech Inc., No. 2022-0669-LWW, 2022 WL 16543834, at *1 (Del. Ch. Oct. 28, 2022).

111. CSISC, Gongkai Zhengji Shouzhan Gaojie, Xiaogudong Yeneng Ningju Daliliang (公开征集首战告捷 小股东也能凝聚大力量) [*Proxy Solicitation First Battle Won: Small Shareholders Can Also Amass Big Force*], Zhongguo Touzizhe Wang (中国投资者网) [INV. ORG. CHINA] (July 5, 2021), https://www.investor.org.cn/about_us/introduction_to_investor_service_center/dynamic/202107/t20210705_499132.shtml.

apparent anti-takeover effects. One of the two was a "golden parachute" arrangement allowing directors and officers to pocket ten times of their annual compensations in case of dismissal before expiration of their terms. The other was an extreme form of staggered board that could take as long as four years to reshuffle its majority.[112] Before this event, proxy contests had almost been unheard of in China. By doing so, CSISC has brought shareholder activism in the country to a new level.

Since shareholders in China are entitled to broader voting and proposal rights than their American counterparts, Chinese investors have plenty of opportunities to vote against management proposals or put forward proposals. But such actions were usually taken by a single institutional investor or no more than a few parties in concert.[113] Soliciting proxies openly from public investors had been extremely rare. The PRC Securities Law added a new provision to explicitly authorize the board, shareholders with more than 1% voting shares, and investor protection agencies to solicit proxies from other shareholders.[114] CSISC's campaign was evidently inspired by this recent revision of law.

III. WHY CONVERGE?

The previous two parts briefly reviewed the trajectory of China's corporate and securities laws edging closer toward their American counterparts even against the backdrop of mounting tension between the United States and China, as well as President Xi's magnified ambition to revive the Chinese tradition in nearly all domains. Then why has this trend occurred? Will it remain in momentum? In this part, I try to analyze the reasons for the surprising legal convergence through the lens of interaction between two driving forces behind the evolvement of China's corporate and securities laws: legal professionalism and political populism.

A. Professionalization of the Chinese Legal Community

Earlier judicial reform in China under the former President Jiang Zeming placed a good deal of emphasis on upgrading professional skills of the judiciary.

---

112. For details of the proxy solicitation, see CSISC, Zhendui Zhongguo Baoan Xiugai Gongsi Zhangcheng Shixiang Gongkai Zhengji Gudong Toupiaoquan (针对中国宝安修改公司章程事项公开征集股东投票权) [*Public Solicitation of Shareholder Voting Rights for China Baoan's Revision of the Company's Articles of Association*], Zhongguo Touzizhe Wang (中国投资者网) [INV. ORG. CHINA] (June 22, 2021), https://www.investor.org.cn/about_us/introduction_to_investor_service_center/dynamic/202106/t20210622_498285.shtml.

113. For a list of activism cases by institutional investors in China by 2021, see Lin Lin & Dan W. Puchniak, *Institutional Investors in China: Corporate Governance and Policy Channeling in the Market Within the State*, 35 COLUM. J. ASIAN L. 74 (2022).

114. Securities Laws (2019 Revision), *supra* note 89, art. 90. Before the 2019 revision of the Securities Law, CSRC regulations apparently allow certain shareholders in listed companies to solicit proxies. *See* Governance Standards (2002), *supra* note 33, art. 10; *see also* Shangshi Gongsi Zhili Zhunze (上市公司治理准则) [Governance Standards for Listed Companies (2018 Revision)] (promulgated by the China Sec. Regul. Comm'n, Sept. 30, 2018, effective Sept. 30, 2018) art. 16, St. Council Gaz., no.4, 2018, https://www.gov.cn/gongbao/content/2019/content_5363087.htm (China). Nevertheless, proxy contests in China have long been dormant until 2021.

Then SPC President Xiao Yang spearheaded this reform and regarded professionalism as a path toward greater fairness and efficiency in judicial work. The theme of professionalism was eminently inscribed on Xiao's reform agenda in late 1990s and early 2000s.[115] China's unified national bar exam was officially launched in 2002, and, since then, all entry level judges have been required to pass this exam. Almost at the same time, CSRC received its first Vice Chairman with a JD degree from a major American law school and practicing experience in Wall Street law firms, Gao Xiqing, who was also heavily involved in the drafting of the PRC Securities Law and other capital market regulations.[116] In fact, the technocratic spirit was a hallmark of China's reform in Jiang's time, permeating various parts of its government.[117]

Echoing professionalization in China's judiciary and securities regulatory authorities was modernization of its legal education. Since the early 2000s, elite law schools in China started to recruit only doctoral degree holders in law to their faculties and often prioritized job candidates with legal education overseas. With this change in law school hiring practices, a comparative approach rose to prominence in both research and teaching in Chinese law schools. Chinese law students in those years were inspired to look at works by foreign legal experts and even hone their professional skills abroad. While Japan, Germany, and several other continental European countries turned popular destinations for those specializing in traditional disciplines of civil law, such as contracts, torts, and property, the United States was unequivocally the top choice for students of corporate and securities laws.

In the past decade, the generation of Chinese law students educated in those more open-minded years have risen to positions in government agencies charged with drafting corporate and securities laws. For instance, the deputy director of the Office of Economic Law of the Legislative Affairs Committee of the National People's Congress Standing Committee, the person in the first row of the current amendment of PRC Company Law, went to law school in the early 2000s and received her doctoral degree under a prominent corporate law scholar who has organized the annual international business law forum at a leading Chinese law school for more than a decade.

---

115. Renmin Fayuan Wunian Gaige Gangyao, Fafa [1999] Ershiba Hao (人民法院五年改革纲要，法发【1999】28 号) [Five-Year Reform Outline for the People's Courts, Court Issuance No. 28 [1999]] (promulgated by the Sup. People's Ct., Oct. 20, 1999, effective Oct. 20, 1999) Sup. People's Ct. Gaz., Oct. 20, 1999, http://gongbao.court.gov.cn/Details/2557d0b4c78959398ac5df959537f9.html (China). For professionalization of the Chinese judiciary in the early 2000s, see generally Qianfan Zhang, *Judicial Reform in China: An Overview, in* CHINA'S SOCIALIST RULE OF LAW REFORMS UNDER XI JINPING 17 (John Garrick & Yan Chang Bennett eds., 2016).

116. Gao Xiqing: Ziben Shichang de Tuohuang Suiyue (高西庆：资本市场的拓荒岁月) [*Xiqing Gao: The Pioneering Days of China's Capital Market*], SOHU BUS., *reprinted at* Zhongguo Gaige Xinxiku (中国改革信息库) [REFORMDATA] (Nov. 23, 2013, 06:47 PM), http://www.reformdata.org/2013/1123/22875.shtml.

117. For the technocracy in China's reform, see generally Gang Chen, *What Is New for China's Technocracy in Xi Jinping's Time?*, 18 CHINA: INT'L J. 123 (2020).

When those professionally trained lawyers take on legislative tasks, it is not surprising for them to instill their professional knowledge into the rules they craft. This is not only an inclinational result of education but may as well be a strategy for such lawyers to have a leg up in competition for promotion inside the institution. There is certainly a limit to bet one's bureaucratic career on professional skills alone. Nevertheless, setting up rules for a capital market is, by its own nature, technically demanding. It is essential to rely on specialized knowledge, hence giving professionals some leverage within legislative and regulatory bodies.

Of course, professionalization alone only shows the potential for Chinese law to learn from more developed jurisdictions, but does not fully explain its convergence toward the American law. Two additional factors drive professionalization of Chinese corporate and securities laws particularly in the American style. First is the great success of American corporate and securities laws in view of the business accomplishments by American corporations. At those places longing for America's economic prosperity, legislators may find it hard to resist the temptation to transplant the rules that have nurtured its dynamic business entities and a robust capital market. Lawmakers don't even wait for academic conclusions on the causality between America's laws and their economic achievements. In fact, the American corporate law has become exemplary for a wide array of jurisdictions,[118] especially in East Asia.[119] In this regard, China actually looks no different from its neighbors.

Second is the dominance of English as the first foreign language taught in China. This explains the popularity of programs in U.S. law schools among Chinese students. Each year, thousands of them go to eminent U.S. law schools, mostly as LLMs and increasingly more in JD programs. For instance, in 2018, N.Y.U. Law School alone hosted 259 Chinese students.[120] Although the number appears moderate relative to the total number of law students in China, nearly a quarter million each year, graduates from U.S. law schools are often elites in the Chinese legal community, so they are more likely to exert influence on the nation's regulatory and legislative agendas.

Language ability also makes some other English-speaking countries, UK and

---

118. *See generally* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439 (2001) (discussing the convergence of corporate laws toward the American model across the world).

119. For the American influence on the Japanese corporate law and governance reform in the 20th century, see Curtis J. Milhaupt, *In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan*, 105 COLUM. L. REV. 2171 (2005); Zenichi Shishido, *Changes in Japanese Corporate Law and Governance: Revisiting the Convergence Debate*, U.C. BERKELEY: BERKELEY PROGRAM L. ECON. (Aug. 25, 2004), https://escholarship.org/content/qt9376480h/qt9376480h.pdf. For Korea's adoption of the US-style securities class action, see Dae Hwan Chung, *Introduction to South Korea's New Securities-Related Class Action*, 30 J. CORP. L. 165 (2004).

120. *See* Zai Meiguo Du Faxueyuan de Zhongguoren Renshu: Liuxue Meiguo Faxueyuan de Renshu Xianzhuang ji Qushi (在美国读法学院的中国人人数：留学美国法学院的人数现状及趋势) [*Number of Chinese Studying in Laws Schools in the U.S.: Current Status and Trends of the Number of People Studying in U.S. Law Schools*], Liumei Guihuadi (留美规划帝) [KING'S PLAN.] (May, 28, 2023, 10:54 PM), https://www.usplanking.com/article/196780.

Australia in particular, favored destinations for legal studies among Chinese students. In fact, the recent PRC Company Law's revision adopts certain English law elements as well. One obvious case is the addition to its draft of prohibition on providing financial assistance to third parties in acquisition of corporate shares.[121] Indeed, this occasional aberration from the American path even strengthens the view that the convergence is a general result of professionalization of China's legal community.

B. Populism in China's Politics

It would be naïve to attribute the development of Chinese corporate and securities laws simply to growing professional training of Chinese lawyers. In China, legislative agendas and regulatory measures are always tightly bound to their political wind. One prevailing trend in Chinese politics in the past two decades is the swelling populism. Political populism and its impact on Chinese law was documented even before President Xi took office. Both legislative and judicial behaviors started to be colored with a populist shade, at least since the late 2000s, thanks to the party-state's preoccupation with social stability.[122] Xi has adeptly carried on this political heritage and advanced it to a new level.[123] The well-known slogan of "common prosperity" is probably most revealing of his populist proclivity.[124]

In the field of legal reform, while most efforts appear to have been delivered toward centralization of judicial power, as the Party's mouthpiece unequivocally demonstrates, the fundamental metric of its success, nevertheless, rests on "the people's feeling of fairness and justice".[125] Hence, one prominent item in Xi's judicial reform is to hold judges accountable for life for "errors" in their decisions. If judges are liable infinitely, then procedural justice has to be bent so that there will essentially never be a closure of a case; since, any closed case can be reopened at any time for suspects of possible mistakes. But this fits the populist fervor well to pursue substantive and ultimate justice. Xi's reform also markedly expands laymen's

---

121. The 3rd Draft Amendment, *supra* note 6, art. 163.

122. For China's legal populism before Xi's time, see Carl F. Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935 (2011); Benjamin L. Liebman, *A Return to Populist Legality?: Historical Legacies and Legal Reform, in* MAO'S INVISIBLE HAND: THE POLITICAL FOUNDATIONS OF ADAPTIVE GOVERNANCE IN CHINA 165 (Sebastian Heilmann & Elizabeth J. Perry eds., 2011); Hualing Fu & Richard Cullen, *From Mediatory to Adjudicatory Justice: The Limits of Civil Justice Reform in China, in* CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA 25 (Margaret Y.K. Woo & Many E. Gallagher eds., 2011); Wei Zhang, *Understanding the Law of Torts in China: A Political Economy Perspective*, 11 U. PA. ASIAN L. REV. 171 (2016).

123. *See generally* Elizabeth J. Perry, *The Populist Dream of Chinese Democracy*, 71 J. ASIAN STUD. 903 (2015).

124. Nathaniel Taplin & Jacky Wong, *Common Prosperity: Decoding China's New Populism*, WALL ST. J. (Aug. 28, 2021, 10:03 AM), https://www.wsj.com/articles/common-prosperity-decoding-chinas-new-populism-11630159381.

125. Shi Pengpeng (施鹏鹏), [Zhongguo Wenjian Qianxing] Sifa Gaige rang Renminqunzhong Ganshou Gongping Zhengyi (【中国稳健前行】司法改革让人民群众感受公平正义) [*China Steadily Move Forward] Judicial Reform Enabling the People to Feel Fairness and Justice*], Qiushi (求是) [QIUSHI J.] (Sept. 18, 2019, 9:28 AM), http://www.qstheory.cn/wp/2019-09/18/c_1125006739.htm.

involvement in the judicial process. From 2013 to 2014, for instance, the number of "the people's jurors" (人民陪审员), laymen who hear and, nominally, decide cases with judges, rose by 146.5 percent. Besides, a new position, "the people's supervisor" (人民监督员), was established for non-lawyers to formally take a part in the prosecutive process.[126]

China's corporate and securities laws were initially adopted in the service of SOE reforms.[127] But since their birth, the social and political environment has evolved so that these laws are increasingly employed to tackle with the sentiment of public investors. While populism is often at odds with professionalism, it is surprising that the spirit of American corporate and securities laws have managed to coexist with China's populist political tone. Certainly, this is not to say that the American laws are populist in nature. Indeed, the American corporate law highlights a centralized professional management scheme, which is best illustrated by section 141(a) of the Delaware General Corporation Law. However, the steadfast principle of shareholder primacy in the United States, distinctively so when compared to other developed economies, matches well the populist narratives in China.

There is a myriad of retail investors in China's capital market. As of Nov. 2022, the number of retail brokerage accounts in the RMB-denominated A shares market has exceeded 200 million, which accounts for 99.76 percent of the total stock brokerage accounts in China.[128] Even at a historically low level, nearly two-thirds of the trading volume in A shares market is still contributed by retail investors as late as 2021.[129] Some commentators questioned the accuracy of the counting of Chinese retail stock investors.[130] But even their more conservative estimation from some twenty years ago nonetheless confirmed that China could have up to ten million investors in stocks, and they did not dispute that the vast majority in number were individuals.[131] In fact, what really matters is not the exact number of individual investors, but the way in which the very existence of such a massive interest group can shape regulators' perception in a populist political environment. In this regard, even commentators who question the wisdom of Chinese regulators' responses to

126. *Id.*

127. Donald C. Clark, *Law Without Order in Chinese Corporate Governance Institutions*, 30 NW. J. INT'L L. & BUS. 131, 143 (2010).

128. "Linglinghou" yi Rushi! A Gu Touzizhe Zhanghushu chao 2.1 Yi Hu, Jin Sicheng Touzizhe Zongshen Guhai chao 10 Nian ("00后"已入市！A股投资者账户数超 2.1 亿户，近四成投资者纵身股海超 10 年) [*The "Post-2000" Generation Entering the Stock Market, Investment Accounts in A-Share Market (Mainland China) Exceeding 210 Million, Nearly 40% Investors Having Experience in Trading Stocks for Over a Decade*], Quanshang Zhongguo (券商中国) [SEC. BROKERAGE CHINA], *reprinted at* SINA FIN. (Jan. 2, 2023, 00:02 AM), https://finance.sina.com.cn/stock/zqgd/2023-01-02/doc-imxytfsv2335189.shtml.

129. Quanyue (全月), A Gu Sanhu Jiaoyi Zhanbi Jiangzhi 61.35%, Geren Touzizhe Rushi Yijiu Yongyue (A 股散户交易占比降至 61.35%，个人投资者入市依旧踊跃) [*Retail Investors' Trading Volume Dropping to 61.35% in A-Share Market (Mainland China), Individual Investors Still Keen to Enter the Market*], Caixin (财新) [CAIXIN] (Nov. 24, 2022, 08:11 AM), https://finance.caixin.com/2022-11-24/101969955.html.

130. Clark, *supra* note 127, at 147.

131. *Id.*

small investors' grievances seem nevertheless to agree that this group of investors do generate "worry" or even "fear" to the Chinese government.[132] Hence, CSRC evidently deemed as its political mission to protect the tens, if not hundreds, of millions of minnows from predation by sharks in the capital market.[133]

Therefore, the Chinese Company Law has long enshrined shareholder rights and its securities law highlights protection of investors, essentially shareholders. Conceivably, the populist predilection in Chinese politics will also prevent the nation's full embrace of a stakeholder-oriented corporate governance framework. Of course, this is not to deny that other corporate stakeholders, like employees or consumers, can have a strong voice in populist politics. However, the government agency most pertinent to corporate governance issues, CSRC, is certainly a closer ally to shareholders rather than other stakeholders. Other stakeholder groups are often under the protection of different governmental agencies, for instance, the Ministry of Labor and Social Security for employees and the China Consumers Association for consumers. Thus, shareholder protection becomes a well-defined agenda for CSRC that both resonates with the nation's political theme and avoids turf wars with other agencies.[134] In short, the legions of individual investors provide political justification for CSRC's existence and growth.

C. Interaction

In this Part, I identified two major forces that might have driven the corporate and securities laws in China closer to their American counterparts, legal professionalism and political populism. To a certain degree, these two forces are counteracting each other. Professionalization tends to generate elitism, opposite to populism. However, when creating corporate and securities laws, Chinese legal professionals have managed to apply professional knowledge to populist legislative and regulatory agendas. Thanks to the engagement between the U.S. and China in the past several decades, particularly in legal education, much of the knowledge about corporate and securities laws held by elite members of the Chinese legal

---

132. *Id.* at 155.

133. Xu Zhao (徐昭), Yan Qingmin: Shizhong Jiang Baohu Touzizhe Hefa Quanyi Zuowei Genben Shiming (阎庆民：始终将保护投资者合法权益作为根本使命) [*Yan Qingmin: Always Taking Protection of Investors' Legitimate Interest as the Fundamental Mission*], Zhongguo Zhengquanbao & Zhongzheng Wang (中国证券报·中证网) [CHINA SEC. J. & CS.COM.CN] (May 23, 2018, 07:41 AM), https://www.cs.com.cn/xwzx/201805/t20180523_5809544.html. At the same time, considering that the Chinese state is a shareholder in all state-owned companies and even many privately owned companies, shareholder protection also benefits the state directly.

134. Among the prototype stakeholder groups, creditors are exceptionally potent. The PRC Company Law itself has established a variety of creditor protections. For instance, the latest amendment not only retains the registered capital requirement but further adds the aforementioned prohibition on financial assistance to third parties for acquisition of stocks, a dated provision under the British law which instinctively benefits corporate creditors. *See* Company Law (2018 Amendment), *supra* note 20. Given that politically powerful state-owned banks are principle corporate creditors in China, the PRC Company Law's indulgence for creditors is readily understandable from the political economy perspective, and is independent of the recent stakeholderism. *See* Wei Zhang, *Understanding the Law of Torts in China: A Political Economy Perspective*, 11 U. PA. ASIAN L. Rev. 171 (2016) (discussing the influence of political clout on China's law-making).

community came from the U.S. While both forces are essential to the convergence observed in this article, it is worth mentioning that the political factor has the upper hand. After all, professional expertise is employed to advance political needs. Therefore, the latter usually sets the limit on legal convergence between the two countries. The populist tint of China's legal reform explains not only what has been changed in its corporate and securities laws, but also what remains unchanged, as well as how certain American rules were transformed as they came to China.

In the first aspect, examples are plenty. It is quite clear that the institution of independent directors and insulating them from large shareholders, tightening directors' fiduciary duties, reducing codetermination in governance structure, upscaling liabilities and expanding the scope of potential defendants in securities fraud lawsuits, and mobilizing activism among small and medium shareholders all cater to the massive number of retail investors. Moreover, the relaxation on stock buybacks by listed companies was very likely out of the intention to boost stock prices, overtly in favor of retail investors.

On the other hand, Chinese Company Law holds steadfast the idea of shareholder supremacy in corporate governance and rejects the American board-centric governance model. This results in assigning approval rights to shareholders on a broad range of corporate matters, and accordingly, frequent calling of general shareholder meetings even though it is well-known that the vast majority of shareholders, who are retail investors, rarely participate in these meetings.[135] Cementing shareholders' supreme status in the governance structure itself, however, suits the populist political discourse way better than letting corporate power gravitate to the small club of directors.

Likewise, the Chinese Company Law resolutely resists the business judgement rule which incentivizes directors to take risk by being tolerant of their good faith errors.[136] In fact, the latest draft amendment to Company Law explicitly champions the "entrepreneurial spirit" at the very beginning.[137] The business judgement rule would have served such a spirit well. Nevertheless, in a populist context, it will be challenging to convince the public that liberating the decision-making power of a small group of business elites could actually contribute to returns of numerous retail investors. By contrast, holding directors responsible for even honest mistakes can

---

135. One estimation, based on a sample of A-share companies listed in the Shenzhen Stock Exchange between 2015 and 2018, shows that the average rate of participation by non-controlling shareholders at annual shareholder meetings is merely 0.051%. Huang Zeyue (黄泽悦), Luo Jinhui (罗进辉) & Li Xiangxin (李向昕), Zhongxiao Gudong "Renduoshizhong" de Zhili Xiaoying—Jiyu Niandu Gudong Dahui Chuxirenshu de Kaocha (中小股东"人多势众"的治理效应——基于年度股东大会出席人数的考察) [Governance Effect of Retail Shareholder Crowd: Evidence from Attendance to Annual General Meetings], Guanli Shijie (管理世界) [J. Mgmt. World], no. 4, 2022, at 159, 163.

136. Lin Yiyinhg (林一英), Dongshi Zeren Xianzhi de Rufa Dongyin yu Lujing Xuanze (董事责任限制的入法动因与路径选择) [Motivations and Approaches of Encoding the Restrictions on Directors' Liabilities], Zhengfa Luntan (政法论坛) [Trib. Pol. Sci. L.], vol. 40, no. 4, 2022, at 97 (discussing rejection of the business judgement rule in the latest corporate law amendment).

137. The 3rd Draft Amendment, *supra* note 6, art. 1.

easily win hearts and minds of the huge number of Chinese who invest in the stock market.

Moreover, with respect to stock buybacks, the latest and sudden prohibition on selected capital reduction is readily understandable against the populist backdrop, even if it will paralyze PEs' redemption rights.[138] In listed companies, numerous retail stockholders will certainly not be happy to see big players, especially those affiliated to insiders, being bought out by the company whereas they are not entitled to the same opportunity. But the drafters have probably neglected the distinction between listed and non-listed companies by painting with a broad brush. In other words, the intention of the newest draft might not be banning redemption by PEs in private companies. Instead, PE investors suffer a collateral damage from the populist tone of law-making.

Finally, certain rules in China's corporate and securities laws are apparently modeled on their American counterparts yet turn out to deviate materially from the original goal of the American rules. A good example in this regard is CSRC's regulation of stock resales by insiders promulgated in 2017. Limiting sales by holders of at least five precent stocks to one percent of outstanding stocks within every three months, CSRC ostensibly followed SEC Rule 144 of the Securities Act.[139] However, while the limitations in Rule 144 work to channel insider resales toward the registration process, CSRC's rules have entirely missed this point. Without the option of registered resales, insiders of Chinese listed companies are, in effect, prohibited from disposing of stocks beyond the limits set in CSRC's resale regulation. At the same time, CSRC showed little appetite for adjusting restrictions on insider sales based on the likelihood of their access to non-public information, as Rule 144 does.[140] In the end, CSRS's real intention rests simply on restraining stock sales by insiders, but not promoting information disclosure. This would be strange in a disclosure-centered securities regulatory system but make perfect sense when the overarching purpose of regulation is to appeal to a populist fervor. When insiders are forced to hold on to their stocks, prices will not be dragged down because of the flood of insider sales, and, hopefully, better motivates insiders to work for the public good of all shareholders, even at the expense of market liquidity.

Even though political populism is likely the dominant force in forging Chinese corporate and securities laws, China's more professionalized legal community are not always straightjacketed by populist politics. For certain issues, where another

---

138. *See supra* note 26 and accompanying text.

139. Shangshi Gongsi Gudong, Dong, Jian, Gao, Jianchi Gufen de Ruogan Guiding, [2017] Jiu Hao (上司公司股东、董监高减持股份的若干规定，【2017】9 号), [Several Provisions on the Reduction of Shares Held in a Listed Company by the Shareholders, Directors, Supervisors, and Senior Executives of the Listed Company, Announcement No. 9 of the China Sec. Regul. Comm'n [2017]] (promulgated by the China Sec. Regul. Comm'n, May 26, 2017, effective May 26, 2017), art. 9, Beida Fabao (北大法宝) [PKULAW], https://www.pkulaw.com/en_law/e30315721b53b241bdfb.html, CLI.4.295561(EN) (China). Directors and officers are subject to more restrictive resale rules under article 141 of the PRC Company Law of 2018. Company Law (2018 Revision), *supra* note 20, art. 141.

140. For description of such adjustments under Rule 144, see STEPHEN JUNG CHOI & A.C. PRITCHARD, SECURITIES REGULATIONS: THE ESSENTIALS, 354-361 (2008).

political orientation competes against populism, technical knowledge of law could be utilized to forge rules promoting those alternative agendas. For example, the introduction of dual-class listing, if anything, is inconsistent with a populist ideology. However, it probably fares well with the top leader's avidity to nurture home-grown hard-core technology startups.[141] Similarly, after populist rules led to striking outcomes with severe repercussions on the market, legal professionals may have a better chance to assert their views. To illustrate, in the aftermath of the drastic damages imposed on independent directors for securities frauds that caused a flurry of resignations, the Chinese judiciary and the securities regulators both adopted the due-diligence defense, arguably borrowed from Section 11 of the US Securities Act, to provide certain protection to the frightened Chinese independent directors.[142]

Professionalism perhaps also plays a part in differentiating China from other emerging economies, such as Brazil, India and South Africa, in the area of corporate and securities laws. All those jurisdictions implanted aggressive stakeholder interest rules in their corporate laws even prior to the rise of the Environmental, Social, and Governance (ESG) movement in Western developed nations.[143] In the eyes of Chinese legal professionals whose conception of corporate law and corporate governance is benchmarked against the American tradition, such rules appear heterodoxic, especially before ESG became mainstream in the U.S.

Of course, this article cannot account for every change in Chinese corporate and securities laws edging toward their American counterparts.[144] Still, I believe that looking into interactions between professionalism and populism in the Chinese legal environment will substantially contribute to our understanding of the development of these laws in China. For instance, as legal education turns more political than technical, the convergence of laws in China and the U.S. may encounter a strong headwind. Even if legal professionalization continues in China, the ideological confrontation between the U.S. and China could, nevertheless, drive the wedge wider between the two countries' corporate and securities laws. In that case, perhaps China will see its laws in these areas moving, instead, closer to some Commonwealth

---

141. *See* Xi Jinping (习近平), Zai Minying Qiye Zuotanhuishang de Jianghua (在民营企业座谈会上的讲话) [Speech at the Private Enterprise Forum] (Nov. 1, 2018) (transcript available at Xinhua Wang (新华网) [Xinhua Net] (Nov. 1, 2018, 08:47 PM), http://www.xinhuanet.com/politics/2018-11/01/c_1123649488.htm) (regarding the top leader's urge to forge favorable policies for high-tech startups). This speech had been delivered just 4 days before Xi declared the establishment of the STAR market which would admit dual-class corporations for the first time in China.

142. *See supra* note 48 and accompanying text.

143. Mariana Pargendler, *Corporate Law in the Global South: Heterodox Stakeholderism* (Eur. Corp. Governance Inst. - Law Working Paper No. 718/2023, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4495515.

144. Pronouncedly, allocating more power to the board regarding issuance of new stocks, approval of related party transactions and use of corporate opportunities does not go along with the populist politics. If anything, legal professionalization might have played a more prominent role in these cases. Nevertheless, shareholders are still enshrined as the ultimate decision-makers in Chinese corporations.

jurisdictions that are not at the center of the decoupling campaign.[145] But if English is removed from the core curriculum of primary and secondary schools, then even the introduction of rules from Commonwealth jurisdictions can be impeded.

At the same time, unless China's political environment shifted substantially away from populism, or its capital market regulators were reshuffled so that no authority would be charged specifically with safeguarding shareholder interest, it would be hard for stakeholderism to take root in China's corporate and securities regulatory framework.[146] In particular, the issue of climate change does not seem to appeal to any particular populist group in China. Rather, it is mainly an elitist agenda. Hence, to make China's economy greener, environmental elites need strong policy support to create excessive returns to numerous retail investors from green enterprises.[147]

CONCLUSION

This article presents an interesting observation that corporate and securities laws in China have been moving closer to their American counterparts in several salient aspects despite the U.S.-China decoupling. The two ostensibly opposite forces, legal professionalism and political populism, might have collaborated in driving the Chinese rules closer to America's. The mutation of these forces, accordingly, can assist us in predicting the further evolvement of corporate and securities laws in China. That China has learned a good deal from its strategic rival is probably an indisputable fact in its corporate governance and securities regulation paradigms. Should we not turn a blind eye to the formal rules in China, the convergence described above implies that China actually may not be treading a that unique path in managing its corporations and capital market.

145. Hong Kong, or Singapore, for instance, can substitute the influence of the U.S.

146. The newly established National Financial Regulatory Administration (NFRA) is charged with protecting "financial consumers", a broad concept inclusive of retail stock investors. But this merely adds a second authority in championing interest of this populist group. It doesn't change the basic patten that certain administrative agencies have a specific mandate to protect retail investors. In fact, the work division between NFRA and CSRC in investor protection is not necessarily clear.

147. Even among the individual investors in US, willingness to forgo investment returns to advance social goals seems weak. *See* Scott Hirst et al., *How Much Do Investors Care About Social Responsibility* (Eur. Corp. Governance Inst. - Law Working Paper, Paper No. 674/2023, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4115854.