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Lost in Translation? Corporate Legal Transplants in China

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ABSTRACT

This essay examines an old question—why it is often so difficult for transplanted legal norms and institutions to take—with the hope of shedding a bit of new light on it through a specific focus on institutions for corporate governance in China. Foreign norms and institutions are borrowed because they seem to the borrowers to serve some need. Very often they are borrowed in a time of rapid social change in which the home culture, so to speak, is lagging behind. But the problem of fit is real and severe.

First, although the borrowers may imagine their needs to be the same as those of the society that produced the institution to be borrowed, this is rarely so. They may misread the needs of the source society, or may misunderstand the needs of their own society.

Second, the borrowed institution in fact does not perfectly serve any particular need in the source society. Institutions develop not in response to particular objectively defined social needs, but as a result of a complex interplay of social forces with different agendas. A given institution might be a field of contestation for different groups with radically differing goals without being the natural servant of any of them. As a result, it is virtually impossible for a borrowed institution to survive the transition into the borrowing society intact, if by "intact" we mean that it performs exactly the same function. Indeed, if it could, that would imply that the borrowing society was indistinguishable from the source society, and it is precisely the difference that prompted the borrowing in the first place.

In this essay, I look at a number of borrowings: the concept of the industrial trust, independent directors, the board of supervisors, and fiduciary duties (which might be more aptly deemed an aborted borrowing). I conclude that none of the above borrowings has taken because they were marked by a failure to understand the history and supporting institutions of the borrowed institution or concept in its home jurisdiction. I end with a speculation that it is particularly difficult for the Chinese legal system to borrow from Western jurisdictions because the Chinese system, as a result of its history both traditional and recent, is concerned more with the balancing of interests than with the vindication of rights.

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I. INTRODUCTION

Thinking of law as a language is not a new idea. Prominent theories of legal interpretation rely explicitly on the metaphor, and indeed might claim that the relationship goes beyond metaphor to literal identity.[1] There is much to be said for this conception of law when thinking about the way in which institutions and norms move from one legal system to another. In particular, thinking of law as language can remind us that the boundaries of legal systems, like those of language, are so elusive that it may be impossible to say uncontroversially whether a legal system boundary has indeed been crossed.[2] At what point do we say that a norm is so new, and its source so different, that it counts as a *transplant* into a particular body of law, and not simply an internal *development* of that body of law?

Thinking of law as a language can also remind us how truly difficult—perhaps impossible—it is to accomplish a complete graft of particular norms and institutions from one legal system into another, since those norms and institutions, like particular words, existed within a particular environment that gave them meaning.[3] And studying the fate of a term or norm transplanted from our language or legal system to another can lead us to the realization that perhaps we didn't understand the functioning of the term or norm in our own system as well as we thought we did.[4]

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[1] See, for example, the "interpretive communities" literature represented prominently by, among others, Stanley Fish in his *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies* (1989).

[2] See, for example, Edward Rock & Michael Wachter, *Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Legal Transplants*, 96 NW. U. L. REV. 651 (2002), dealing with transplants from one doctrine to another within a given legal system.

[3] *See* LYDIA LIU, TRANSLINGUAL PRACTICE: LITERATURE, NATIONAL CULTURE AND TRANSLATED MODERNITY IN CHINA 1900-1937 (1995) (arguing that meaning does not travel and that we should substitute for "translation" a conception of "translingual practice").

[4] This is what Benjamin Schwartz does in his classic *In Search of Wealth and Power: Yen Fu and the West*. He shows not only how Enlightenment values of liberalism and individualism became, upon translation of

In this essay I propose to look at what is admittedly an old question—why it is often so difficult for transplanted legal norms and institutions to take—with the hope of shedding a bit of new light on it through a specific focus on institutions for corporate governance in China. Like foreign words, foreign norms and institutions are borrowed because they seem to the borrowers to serve some need. Very often they are borrowed in a time of rapid social change in which the home culture, so to speak, is lagging behind. But the problem of fit is real and severe.

First, although the borrowers may imagine their needs to be the same as those of the society that produced the institution to be borrowed, this is rarely so. They may misread the needs of the source society, or may misunderstand the needs of their own society—something I will look at in more detail a little later when I talk about independent directors in China.

Second, the borrowed institution in fact does not perfectly serve any particular need in the source society. Institutions develop not in response to particular objectively defined social needs, but as a result of a complex interplay of social forces with different agendas. This is the social science insight behind the joke about a camel being a horse designed by a committee. A given institution might be a field of contestation for different groups with radically differing goals without being the natural servant of any of them. As a result, it is virtually impossible for a borrowed institution to survive the transition into the borrowing society intact, if by "intact" we mean that it performs exactly the same function. Indeed, if it could, that would imply that the borrowing society was indistinguishable from the source society, and it is precisely the difference that prompted the borrowing in the first place.

II. Specific Borrowings

In this essay I will look at a number of attempted borrowings in Chinese corporate governance, broadly defined. The purpose of this section is to show how borrowings take place—or at least are attempted—not merely in the realm of specific norms, but also in the realm of institutions and structures. I attempt at the end to make some generalizations.

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their classic texts into the Chinese of a weak and bullied nation, a tonic for strengthening the state, but also how the pursuit of wealth and power in the West had subverted those same values.

A. *Borrowed Structures*

1. The Industrial Trust

One of China's most remarkable early attempts at borrowing capitalist forms of industrial organization was a 1964 effort to set up industrial trusts. According to the governing document behind this effort,[5] the development of China's industrial and transportation enterprises was being severely hampered by excessive administrative interference, conflicting hierarchy, and insufficient attention to economic principles in management. These problems were to be addressed by setting up a series of industrial and transportation trusts that would consolidate lines of authority and bring principles of economic management to enterprise operations.

Trusts occupy a peculiar position in the Leninist version of Marxism dominant in the Chinese Communist Party. At the time Lenin was observing Western economies, in particular that of the United States, trusts were in their full flower. Lenin shared Marx's mixture of contempt and admiration for capitalist industrial organization and viewed the giant monopolistic trusts as the highest stage of capitalist economic organization. It was his ambition under socialism—an ambition inherited by the Chinese Communists—not to dismantle them, but to enlarge them even further:

> Any large-scale industry—which is the material source and foundation of production in socialism—unconditionally must have a rigorous, unified will to direct the collective work of hundreds, thousands, and even millions of men. But how can the rigorous unity of wills be assured? Only by the wills of the thousands and millions submitting to the will of a single individual.[6]

Given this tradition, then, it is not surprising that the Party's leaders turned to the idea of a trust in order to solve their problems of industrial organization. What makes this borrowing remarkable, however, is the fact that the leadership does not seem to have had a clear idea of what an industrial trust was, how it functioned, or why it had ever existed. The term used in the document was *tuolasi*, a direct transliteration of the sound of the English term with no inherent meaning in Chinese legal language then or now.

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[5] Guojia Jing Wei Dang Zu [State Economic Commission Party Group], *Guanyu shiban gongye, jiaotong tuolasi de yijian de baogao* [Report on the Opinion on Experimentally Establishing Industrial and Transportation Trusts], July 17, 1964.

[6] 2 V.I. LENIN, SELECTED WORKS 398 (Moscow 1952), *cited in* FRANZ SCHURMANN, IDEOLOGY AND ORGANIZATION IN COMMUNIST CHINA 255 (2d ed. 1968).

The great industrial trusts of the 19th-century robber baron era of American capitalism were formed for one reason only: state corporate law at the time prohibited corporations from holding stock in other corporations, and thus holding companies could not exist. Instead of a straightforward structure in which Company A would control Company B through acquiring a majority of its stock, the shares of both Company A and Company B would be held by a trust controlled by whoever controlled Company A. Once state corporate laws were changed to allow holding companies, the complex structure of the trust was no longer needed and it disappeared from the corporate landscape.

Needless to say, Chinese law relating to enterprise organization barely existed in 1964, and had it prohibited holding companies, it could certainly have been amended to allow them. Moreover, the legal vehicle of the trust, with its complexities of legal versus beneficial ownership and the fiduciary duties of the trustee, did not exist at all, so a genuine trust as a replacement for a holding company would have been impossible. All the leadership seems to have meant by "trust" is "large monopolistic enterprise under unified control from the top and run along economically rational lines", but distributing a document calling for the formation of such enterprises is a very different thing from actually establishing them.

To sum up, the leadership was attempting to achieve essentially two objectives with this reform. First, it expected that re-organizing state-owned enterprises into trusts would produce economically rational (instead of administratively or bureaucratically rational) behavior, and that this would result in greater operational efficiency. Yet neither the Chinese legal system nor administrative custom at the time contained any norms about the operation of trusts that would have changed the incentive structure facing enterprise managers. "Trust" was nothing more than a word, and a foreign word at that.

Second, the leadership expected that the trust structure would solve the problem of administrative interference and multiple lines of command over enterprises. Again, however, it is easy to see why this was a vain hope. If by "trust" we mean a genuine trust along classic American lines, there existed no set of norms applicable to such organizations that could define and govern lines of authority within them. If we mean simply something akin to a holding company structure in which a parent exercises authority over a subsidiary by virtue of its ownership interest, then Chinese law at the time also lacked any set of norms that would make that possible. The only set of norms that existed within the state-owned sector—and this was the sector of concern to policymakers in this case—was that of the classic government administrative structure, in which enterprise managers were essentially state officials of a certain rank who obeyed their superiors and commanded their inferiors. But this was the structure that had been causing problems in the first place. Not surprisingly, therefore, the trust reform led nowhere and was not heard of again—at least not in that form.

Although the abortive history of trusts in China might seem like nothing more than an interesting footnote to the history of business organization, in fact the leadership has not lost its fascination with bigness. The words "large enterprise groups" and "internationally competitive" are frequently linked in official discourse: in his March, 2000 Work Report to the National People's Congress, for example, Premier Zhu Rongji called for further efforts "to cultivate internationally competitive large enterprise groups," although of course China's most internationally competitive industries are those such as textiles in which numerous small producers compete fiercely with each other and with foreign producers. These group companies are explicitly modeled after Korean *chaebol*, but few are asking why, if such group companies are so efficient, they should require government support for their birth and continued operation.

B. *Borrowed Institutions*

1. <u>Board of Supervisors</u>

When China's Company Law[7] was being formulated in the early 1990s, the drafters looked to both American and continental models. In its basic structure, the Company Law hews fairly closely to the continental model in terms of the types of company that it contemplates and in some of its rules regarding corporate governance. The Board of Supervisors (*jianshi hui*) (BOS), for example, is explicitly modeled on, and often compared to, the upper board in the German dual-board system for large public corporations.[8]

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[7] *Zhonghua Renmin Gongheguo Gongsi Fa* [*Company Law of the People's Republic of China*], adopted Dec. 29, 1993, effective July 1, 1994 [hereinafter *1993 Company Law*]. This version of the Company Law was superseded in 2006. *See Zhonghua Renmin Gongheguo Gongsi Fa* [*Company Law of the People's Republic of China*], as amended Oct. 27, 2005, effective Jan. 1, 2006 [hereinafter *Company Law*].

[8] *See, e.g.*, Gong Jia & Yang Hai, *"OECD guodu jingji gongsi fa yiban yuanze" yu Zhongguo gongsi fa de xiugai yu wanshan* [The "OECD General Principles of Company Law for Transition Economies" and the Reform and Perfection of China's Company Law], ZHENGZHI YU FALÜ [Politics and Law], No. 5, 2001, at 49, 52.

Under German law, each such corporation has an elected supervisory board (*Aufsichtsrat*), which appoints a managing board (*Vorstand*) composed of senior corporate managers. The role of the supervisory board is that of overseeing the management of the company,[9] but its role is limited to just that. Its major powers are the power to appoint and dismiss members of the managing board and the power to represent the company in its dealings with members of the management board;[10] the law explicitly allocates managerial power to the managing board.[11]

It seems universally acknowledged in the Chinese academic and policy community that this transplant has not taken. While official commentary tends to rebuke enterprise managers in moralistic tones for not listening to the BOS, other commentators point out that while the Board's name made the trip over from Germany, the Board's powers got left behind like so much vacation luggage. The Company Law expects that the BOS will perform a supervisory role by simply saying that it will, without actually giving the BOS any significant powers. Article 126 of the 1993 Company Law states, for example, that the BOS shall "exercise supervision over the actions of directors or the manager" and that it has the power to "request directors and the manager to remedy a situation when the acts of such directors or manager harm the interests of the company". But nowhere does the statute provide the BOS with any powers that would make the directors and managers sit up and take note. The October 2005 revisions to the Company Law brought a modest increase to these powers, but no qualitative change.[12]

Nor does the Company Law provide structurally for the independence of BOS members from those that they supervise. As a formal matter, they are elected by shareholders, and there is no reason to expect that the interests dominating director voting will fail to dominate supervisor voting. In reality, its members tend to be administrative cadres who are the subordinates of the enterprise's leadership. In many cases, they are representatives of the union and of the congress of staff and workers, two employee bodies in the enterprise that are controlled by the Party organization in the

[9] *See* Aktiengesselschaften [Law on Stock Corporations] § 111(1), *translated in* COMMERCIAL LAWS OF THE WORLD: GERMANY (rev. ed. 1995).

[10] *See* Walter Oppenhoff & Thomas O. Verhoeven, *Stock Corporations*, in BUSINESS TRANSACTIONS IN GERMANY, Ch. 24 § 24.03 (Bernd Rüster ed., Matthew Bender 2003).

[11] *See* Aktiengesselschaften [Law on Stock Corporations], *supra* note 9, at § 76(1).

[12] *See Company Law*, *supra* note 7, art. 54.

enterprise, which is intertwined with management. Thus, as one study of the BOS put it, "if one day they should dare to offend management and exercise the sacred functions given to them by the law, perhaps the day after proposing to inspect the finances of the company they wouldn't even have their job at the company, and therefore wouldn't be able to continue to represent the staff and workers."[13] They cannot be expected to exercise meaningful supervisory power.

Why did the powers of the BOS get lost in translation? I propose two reasons. First, Chinese legislative norms are frequently intended more for edification than for litigation. It is expected that the objects of the legislation will read the text and internalize its norms. There may or may not be an institutional structure to add strength to those norms through some kind of enforcement mechanism, but its absence is not necessarily viewed as a fatal flaw in the legislative scheme. The July, 2004 draft of the revised Company Law, for example, provides more duties for directors and officers than the current Company Law, enacted more than a decade earlier, but little more by way of remedies for shareholders and others injured by a breach of those duties. So little consideration is given to institutional context that the entire section on fines and other state-imposed sanctions on companies for breaches of the law neglects (in both the original version and the draft revised version) to specify which state organ has the authority to impose such sanctions.

How does this relate to the powers of the BOS? It suggests that Chinese legislators may have seen the ability of the German board of supervisors to dismiss members of the board of managers as a particular function they could take or leave, without seeing it as the ultimate weapon that made the supervisors' other powers meaningful.

Second, it must be recalled that the Company Law was designed largely to serve the needs of state-owned enterprises that were undergoing an internal organizational restructuring, but no significant change of ownership. A state-owned enterprise restructured into a joint stock company

[13] Wang Changbo & Feng Hualan, *Lun duli dongshi zhidu yu jianshihui zhidu xiang jiehe de jian guan moshi* [On the Monitoring Model Combining the Independent Director System and the System of the Board of Supervisors], SHENGCHANLI YANJIU [Research in Productive Forces], No. 1, 2002, at 119, 120. *See also* Wang Shaokai, *Woguo shangshi gongsi faren zhili jiegou xiaoneng fenxi* [An Analysis of the Efficiency of the Corporate Governance Structure of Chinese Listed Companies], JINGJI ZONGHENG [Economics from All Angles], No. 7, 2001, at 38, 39; Jiang Qiangui, *Gongsi zhili yu guoyou qiye gaige* [Corporate Governance and State-Owned Enterprise Reform], in ZHONGGUO ZHENGQUAN BAO [China Securities News], Internet Edition, June 12, 2001; Gao Yong, *Duli dongshi zhidu yu shangshi gongsi zhili* [The Independent Director System and Corporate Governance in Listed Companies], JINGJI TIZHI GAIGE [Economic System Reform], No. 1, Jan.-Feb. 2002.

had the same "owner" as before—a state agency or agencies—only this time it was called a stockholder instead of a superior administrative department. Officials in this agency would remain actively interested in the affairs of the enterprise. It must have seemed otiose, then, to impose an extra layer of supervision and bureaucracy between the governmental department in charge of the enterprise and its management when there already existed a board of directors. Thus, the BOS may have been written into the law because it seemed necessary under the German model the drafters had decided to follow, but they also made a rational decision not to waste time worrying about how to make its powers meaningful.

2. Independent Directors

Policymakers in several countries have turned to independent directors as an important element of legal and policy reform in the field of corporate governance. In the United States, insider-dominated boards have been rare for years,[14] and although the New York Stock Exchange (NYSE) has required that independent directors constitute a board majority in domestic companies only since 2004,[15] as of 2001 approximately 75% of NYSE-listed companies already had such majorities.[16]

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[14] *See* Sanjai Bhagat & Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 BUS. LAW. 921, 921 (1999) ("In the 1960s most [large American companies] had a majority of inside directors; today, almost all have a majority of outside directors and most have a majority of 'independent' directors.").

[15] *See* NEW YORK STOCK EXCHANGE, LISTED COMPANY MANUAL § 303A.01 (2003), *available at* http://www.nyse.com/listed [hereinafter Listed Company Manual]. In 2002, in the wake of widely-publicized failures of corporate oversight, the SEC Chairman issued a public statement requesting that the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD) to review and modify corporate governance standards. Securities and Exchange Commission, Release No. 34-48745, NASD and NYSE Rulemaking: Relating to Corporate Governance (Nov. 4, 2003) (discussing the history of the new NYSE rules and citing Commission Press Release No. 2002-23 (Feb. 13, 2002)). In response, NYSE generated corporate governance reform proposals now included in Section 303 of the Listed Company Manual. *See id.*

[16] *See* Joann S. Lublin, *NYSE Considers Rules to Boost Power of Boards—Fostering the Independence Of Directors Could Improve Governance, Advisers Say*, WALL ST. J., June 3, 2002, at A2 (citing report by Investor Responsibility Research Center). In a 2003 survey of its 150 members, the Business Roundtable, an organization of large American corporations, found that 80% had boards that were at least 75% independent, and that 90% had boards that were at least two-thirds independent. *See* Press Release, Business Round Table, The Business Roundtable Releases Corporate Governance Survey (July 15, 2003), *available at* http://www.brt.org/press.cfm/970.

Disinterested[17] directors have, with the rise of takeover activity since the 1980s, played an increasingly important role in related state-level litigation, and the modest role for independent directors contemplated in the listing rules of the NYSE a few years ago has given way, in the wake of Enron and other corporate scandals, to federal mandates for listed companies under the Sarbanes-Oxley Act (SOA). Thus, companies listed on the New York Stock Exchange must, under the SOA, have audit committees composed entirely of independent directors as defined in the SOA. Under the current NYSE listing rules, the board overall must have a majority of independent directors, as defined by those listing rules.

Britain's own set of corporate scandals led to the Cadbury Report, which recommended, along with subsequent similar reports and studies, a greater role for outside and independent directors,[18] and the last decade has seen a number of corporate law reforms in Japan designed to enhance the role of directors and auditors not tied to management.

In any case, the increasing worldwide interest in independent directors did not go unnoticed by Chinese policymakers. Indeed, Chinese interest pre-dated the corporate scandals that led to federal-level corporate governance reforms in the United States, possibly because of the many similar scandals that had already occurred among Chinese companies listed on one of the country's two stock exchanges.[19] Chinese policymakers and academics despaired of the power of the BOS to act effectively, and began promoting the institution of independent directors, particularly in publicly listed companies, as a way of strengthening supervision over corporate malfeasance.[20]

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[17] I discuss the difference between disinterested and independent directors below; for a more detailed discussion, see Donald C. Clarke, *Setting the Record Straight: Three Concepts of the Independent Director*, 37 DEL. J. CORP. L. ___ (forthcoming 2007).

[18] As of 2001, outside directors were a board majority in 53% of companies on the London Stock Exchange. *See* CORPORATE GOVERNANCE 2001 (PIRC ed., Dec. 2001), *cited in* MOTOMI HASHIMOTO, COMMERCIAL CODE REVISIONS: PROMOTING THE EVOLUTION OF JAPANESE COMPANIES 14 (Nomura Research Institute, NRI Papers, No. 48, May 1, 2002). In 2004, however, Pensions Investment Research Consultants reported a board majority of independent directors in well under 15% of LSE-listed companies. Pensions Investment Research Consultants Ltd. (PIRC), Presentation of Corporate Governance Annual Review 2004 (Nov. 18, 2004), *available at* www. pirc.com.

[19] The two Chinese stock exchanges are in Shanghai and Shenzhen.

[20] For a more detailed discussion, see Donald C. Clarke, *The Independent Director in Chinese Corporate Governance*, 36 DEL. J. CORP. L. 125 (2006).

In August of 2001, the China Securities Regulatory Commission (CSRC) issued its Guidance Opinion on the Establishment of an Independent Director System in Listed Companies.[21] Covering all companies listed on Chinese stock exchanges (but not Chinese companies listed overseas), it constituted the most comprehensive measure taken to that date, or since, by the CSRC—or indeed by any Chinese governmental authority—to regulate internal corporate governance through the institution of the independent director. It was also portrayed unapologetically as a borrowing from United States corporate governance law and practice,[22] and as such implicates many issues relevant to legal transplants.[23]

Despite the view of policymakers that they were borrowing a successful institution of American corporate law, the reality is remarkably different. To paraphrase Voltaire's remark about the Holy Roman Empire, it could be said that at least as of the time of the borrowing, the institution of independent directors was not nearly so successful, American, or part of the law as the borrowers imagined.

First, it is not at all clear that having independent directors does in fact improve corporate performance. Several researchers have studied the effect of independent directors on corporate performance in the United States: the overall weight of their findings is that there is no solid evidence

[21] Zhongguo Zhengquan Jiandu yu Guanli Weiyuanhui [China Securities Regulatory Commission], *Guanyu zai shangshi gongsi jianli duli dongshi zhidu de zhidao yijian* [Guidance Opinion on the Establishment of an Independent Director System in Listed Companies], issued August 16, 2001 [hereinafter Independent Director Opinion]. The 2005 revisions to the Company Law delegate power to the State Council to make rules providing for independent directors in listed companies, *see* Company Law, *supra* note 7, art. 132; the intriguing corollary is that if the State Council did not already have such powers, *a fortiori* the CSRC could not have such powers.

[22] *See*, *e.g.*, Gao Yong, *Duli dongshi zhidu yu shangshi gongsi zhili* [The Independent Director System and Corporate Governance in Listed Companies], JINGJI TIZHI GAIGE [Economic System Reform], No. 1, Jan.-Feb. 2002, at 8, 8; Ma Gengxin, *Wanshan woguo shangshi gongsi duli dongshi zhidu jianshe de sikao* [Some Thoughts on Perfecting the Construction of the Independent Director System in China's Listed Companies], ZHENG-FA LUNTAN [Political-Legal Forum], Vol. 20, No. 6, Dec. 2002, at 61, 61; Yan Hai & Chen Liang, *Duli dongshi zhidu yanjiu* [A Study of the Independent Director System], FAXUE LUNTAN [Legal Studies Forum], No. 4, 2001, at 23, 24.

[23] On legal transplants in corporate law, with many intriguing parallels to China, see HIDEKI KANDA & CURTIS MILHAUPT, RE-EXAMINING LEGAL TRANSPLANTS: THE DIRECTOR'S FIDUCIARY DUTY IN JAPANESE CORPORATE LAW (Columbia Law School Center for Law and Economic Studies, Working Paper No. 219, Mar. 24, 2003), *available at* http://ssrn.com/abstract=391821.

suggesting they improve it.[24] Some studies have even found a negative correlation between board independence and corporate performance.[25] The most recent comprehensive study is that of Sanjay Bhagat and Bernard Black,[26] who in a review of other studies as well as with their own research find, among other things, that:

- There is no evidence that greater board independence leads to better firm performance. Poor performance is correlated with subsequent greater independence, but there no evidence that this strategy works to improve performance.
- Having insiders on the board can add value.[27]
- Independent directors with significant stock positions may add value, whereas others do not.

Intriguingly, researchers have also failed to find empirical support in China for the effectiveness of independent directors in enhancing corporate performance. One study, for example, looked at all listed companies—a sample of over 1000—of which 83 had appointed independent directors in the last three years. It found no support for the hypothesis that there is a clear difference

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[24] As this is not the place to review the literature comprehensively, see generally Dan R. Dalton *et al.*, *Meta-Analytic Reviews of Board Composition, Leadership Structure, and Financial Performance*, 19 STRATEGIC MGMT J. 269 (1998); Jill E. Fisch, *The New Federal Regulation of Corporate Governance*, 28 HARV. J.L. & PUB. POL'Y 39 (2004); Benjamin E. Hermalin & Michael S. Weisbach, *Boards of Directors as an Endogenously Determined Institution: A Survey of the Economic Literature*, FED. RES. BANK N.Y. ECON. POL'Y REV., Apr. 2003, at 7; Laura Lin, *The Effectiveness Of Outside Directors As A Corporate Governance Mechanism: Theories And Evidence*, 90 NW U. L. REV. 898 (1996); STEPHEN M. BAINBRIDGE, A CRITIQUE OF THE NYSE'S DIRECTOR INDEPENDENCE LISTING STANDARDS (UCLA School of Law, Research Paper No. 02-15, 2002), *at*http://www.ssrn.com/abstract_id=317121; and Sanjai Bhagat & Bernard Black, *The Non-Correlation Between Board Independence and Long-Term Firm Performance*, 27 J. CORP. L. 231 (2002) for reviews of other studies and meta-analyses.

It is worth noting that the results of these studies have been reported in the Chinese corporate governance literature. *See*, *e.g.*, NI JIANLIN, GONGSI ZHILI JIEGOU: FALÜ YU SHIJIAN [The Structure of Corporate Governance: Law and Practice] 115 (Falü Chubanshe 2001).

[25] *See* Anup Agrawal & Charles R. Knoeber, *Firm Performance and Mechanisms to Control Agency Problems Between Managers and Shareholders*, 31 J. FIN. & QUANTITATIVE ANALYSIS 377 (1996); Catherine M. Daily & Dan R. Dalton, *Board of Directors Leadership and Structure: Control and Performance Implications*, 17 ENTREPRENEURSHIP: THEORY AND PRACTICE 65 (1993).

[26] Bhagat & Black, *supra* note 24.

[27] This finding is also supported by Barry D. Baysinger & Henry N. Butler, *Revolution vs. Evolution in Corporate Law: The ALI's Project and the Independent Director*, 52 GEO. WASH. L. REV. 557 (1984).

in performance between companies with independent directors and companies without, or for the hypothesis that there is a positive correlation between the percentage of independent directors on the board and corporate performance.[28] A more recent study found that the establishment of an independent director system was followed by a subsequent *decline* in corporate performance as measured by earnings per share and return on equity.[29]

Second, while the CSRC attempted to make a one-third independent director board presence mandatory for Chinese listed companies, state-imposed requirements of independent directors were not a significant part of American corporate law at the time of the borrowing. Prior to the passage of the Sarbanes-Oxley Act, there was no general legal requirement, at the federal or the state level, for publicly listed companies to have any independent directors. The New York Stock Exchange (NYSE) required that listed companies have independent directors, but only for audit committees,[30] and even then the audit committees did not need to have exclusive authority to retain and dismiss the company's outside auditors. In imposing independent directors as a legal requirement, then, the CSRC displayed far more confidence in the unqualified desirability of independent directors than did the society from which the borrowing came.

Third, not only is the status of independent directors as a *successful* institution of American corporate law, or as an institution of American corporate *law*, questionable, but its status as an important institution of *American* corporate law itself is questionable. Independent directors are almost exclusively a creature of federal law in the United States. But far more important than federal law in the United States for purposes of internal corporate governance is state law, and this for the most part—at least in terms of economic impact—means the law of Delaware. United States corporation law at the state level does *not* in fact generally provide for the institution of independent directors as such or define them. Instead, state corporate statutes focus on particular

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[28] *See* Gao Minghua & Ma Shouli, *Duli dongshi zhidu yu gongsi jixiao guanxi de shizheng fenxi* [An Empirical Analysis of the Relationship Between the Independent Director System and Corporate Results], NANKAI JINGJI YANJIU [Nankai University Economic Studies), No. 2, 2002, at 64-68.

[29] *See* Luo Pinliang *et al.*, *Duli dongshi zhidu yu gongsi yeji de xiangguanxing fenxi: laizi Hushi A gu de shizheng yanjiu* [An Analysis of the Relationship Between Independent Directors and Corporate Performance: An Empirical Study of A-share Performance in the Shanghai Stock Market], SHANGHAI GUANLI KEXUE [Shanghai Management Science], No. 2, 2004, at 20-23.

[30] NEW YORK STOCK EXCHANGE, LISTED COMPANY MANUAL § 303.01 (2002).

conflict-of-interest transactions—transactions, for example, between a corporation and one of its directors or officers, or between a corporation and another entity in which one of its directors or officers has an interest, or the taking by corporate officers of business opportunities that arguably belong to the corporation—and provide that certain consequences will follow depending on whether or not those with decisionmaking power who have a conflict of interest recuse themselves from the decisionmaking process.

"Independence" in state corporate law thus amounts only to *disinterest* in a particular conflict-of-interest transactions — something quite different from abstract independence. State corporate law attempts to deal with such transactions generally through disclosure to and approval by directors who are not involved in the transaction. But it does not assume that such directors will always be the same person, and do not require the institution of abstractly independent directors. Instead, it takes a transaction-by-transaction approach, and asks in each case whether there was approval by directors (or other decisionmakers) who were disinterested *in the transaction in question*. The Delaware judiciary has stressed the preferability of case-by-case analysis over the application of abstract definitions on several occasions. For example, when asked how a court would determine whether a board had acted independently, the Chief Justice of the Delaware Supreme Court replied,

> We can't set down rules for independence. In Delaware, we're a judicial body, not a legislative one. . . . But we didn't just fall off the turnip truck, you know. We can tell whether somebody is acting independently or not. I don't think, for instance, that lawyers who get substantial fees from a corporation can be considered independent directors for most purposes, although they might be for some.[31]

While the concept of the disinterested director is constantly being tested and refined through litigation, there is virtually no jurisprudence on who counts as an independent director for the purposes of the (usually federal) laws and regulations calling for them. Disinterested directors are a concept in Delaware's corporate law, and Delaware has courts and a responsive legislature that sees problems and responds to them. The NYSE rules, by contrast, carry with them no system for spotting problems and resolving disputes through a fair process resulting in written decisions. The

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[31] *What's Wrong with Executive Compensation*, HARV. BUS. REV., Jan. 2003, at 68.

same applies to the rules of the SOA: they come from a source that cannot be changed quickly.[32] Furthermore, if Delaware wants disinterested directors, it can give incentives to shareholders to sue if they don't get them. But the exchanges have only the blunt tool of delisting for the enforcement of their rules.

In short, what China borrowed was an institution that did not exist in the way policymakers thought it did. Legally mandated independent directors are, for the most part,[33] as new in the United States as they are in China. The legal system of both countries thus faces a new problem in applying the abstract statutory standards in real life. China has borrowed little more than a term, but is unable to borrow the history behind that term that might give it meaning, because to a large extent that history does not exist.

C. *Borrowed Norms: Fiduciary Duties*

Sometimes the most interesting borrowings are those that do not take place. In 1993, China's State Commission on Reform of the Economic System (SCRES), a ministry-level government body, issued a letter to the Hong Kong Stock Exchange.[34] In it, SCRES solemnly assured the Exchange that the "responsibility of good faith" (*chengxin zeren*)[35] provided for in Article 62 of its Opinion on

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[32] The arguments in this paragraph are made more fully in WILLIAM B. CHANDLER & LEO E. STRINE, JR., THE NEW FEDERALISM OF THE AMERICAN CORPORATE GOVERNANCE SYSTEM: PRELIMINARY REFLECTIONS OF TWO RESIDENTS OF ONE SMALL STATE (New York University Center for Law and Business, Working Paper No. CLB 03-01, Feb. 26, 2003), *available at* http://papers.ssrn.com/abstract=367720.

[33] United States federal law did, prior to the Sarbanes-Oxley Act, have scattered requirements for independent directors (for example, under the Investment Companies Act of 1940).

[34] Guojia Jingji Tizhi Gaige Weiyuanhui Guanyu "Gufen Youxian Gongsi Guifan Yijian" he "Guanyu Dao Xianggang Shangshi de Gongsi Zhixing 'Gufen Youxian Gongsi Guifan Yijian' de Buchong Guiding" zhi Xianggang Lianjiaosuo de Han [Letter from the State Commission on Reform of the Economic System to the Hong Kong Stock Exchange Regarding the "Opinion on Standards for Joint Stock Companies" and "Supplemental Rules Regarding the Implementation of the 'Opinion on Standards for Joint Stock Companies' in Companies Going to Hong Kong to Be Listed"], June 10, 1993.

[35] The Chinese term *chengxin* is an abbreviation of *chengshi xinyong*, which in turn is the standard translation of civil law term "good faith" (*bonne foi* in French or *Treu und Glauben* in German).

Standards for Joint Stock Companies[36] had a meaning similar to (*juyou leisi de hanyi*) that of fiduciary duty—it spelled out the term in English—under Hong Kong law.

The SCRES letter was not a response to an idle inquiry. It was (one assumes) what the Hong Kong Stock Exchange needed to hear in order for it to allow Chinese companies to proceed with their plans to list in Hong Kong—something SCRES was keen to see happen. Whether the letter's representation was wholly accurate, however, is questionable.[37]

If something very much like fiduciary duty in Hong Kong law were to exist in Chinese corporate law, it would have to have come through borrowing, since the common law concept comes from the law of trust, which in turn has no real counterpart in China.[38] If we relax our standards to include civil law concepts similar to fiduciary duty, such as the duty of a mandatary under a mandate, these would have to have been borrowed as well, since they did not exist in whatever passed for Chinese corporate law after 1949.

But no such borrowing had occurred as of 1993, when SCRES issued its letter. In other words, there was no set of legal norms, enforceable as such, governing the duties of those who managed assets on behalf of a largely passive beneficiary—at least, no set of legal norms that could claim any existence outside of textbooks. Actually, it is not clear that such norms exist even now, more than ten years after the promulgation of the Company Law. While the 1993 Company Law mentions a duty of loyalty, no duty of care—whether derived from common law fiduciary duty principles or from civil law mandate principles such as the duty of good management (*shanguan*

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[36] The Opinion, a document issued by SCRES in 1992, was at the time the closest thing China had to a law on corporate organization. Remarkably, Article 62 does not in fact refer to a "responsibility of good faith" (*chengxin zeren*); it refers to a *duty* of good faith (*chengxin yiwu*). Semantics, perhaps, but the choice of words can matter a great deal in the law, and indeed is often of critical importance in Chinese political discourse. *See generally* MICHAEL SCHOENHALS, DOING THINGS WITH WORDS IN CHINESE POLITICS: FIVE STUDIES (1992).

[37] SCRES's bland assurance can be compared with the unsuccessful struggles of the drafters of the Russian Law on Joint Stock Companies to come up with a term from the Russian legal vocabulary that would adequately reflect a concept of fiduciary duty. *See* Bernard Black, Reinier Kraakman, and Anna Tarassova, *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. 1731, 1752 n. 31 (2000).

[38] China recently passed a Trust Law, *see* Zhonghua Renmin Gongheguo Xintuo Fa [Trust Law of the People's Republic of China], April 28, 2001, but that law does not attempt—and perhaps could not be expected—to specify the contours of the trustee's duties in detail. It refers to the trustee's obligation of "honest, trustworthy, prudent, and efficient management", *see id.*, Art. 25, but these concepts have not been developed in Chinese jurisprudence.

yiwu)—can be found.[39] A duty of diligence (*qinmian*) owed to the company is added in Article 148 of the new Company Law, but whether and how this could be enforced is very unclear. Regardless of the doctrine, there are no generally known actual cases enforcing anything resembling fiduciary duties as such,[40] and therefore this method of mitigating vertical agency problems cannot be relied on.

That fiduciary duties should be hard to find is hardly surprising. The asset managers that the state was concerned with were essentially government officials at various levels, including state-owned enterprise managers. These managers, and their duties, were not different in kind from those immediately above them or immediately below them. The line between "state-owned enterprise" and "superior administrative department" (*zhuguan bumen*)—unlike, for example, the line between "corporation" and "shareholder"—was in many cases difficult to draw. Thus, the duties of those who managed assets were defined and enforced administratively. They were simply officials in a hierarchy; they operated within a certain incentive structure and were responsible to their superiors in various ways, but it would be utterly inapt to use concepts such as fiduciary or mandatary to try to understand or describe their responsibilities. The duty of an enterprise manager to his superiors was much more akin to that of a vice president in charge of widget operations to the president in a multidivisional American firm.

III. CONCLUSION

As the above stories show, when legal and institutional borrowings occur, a great deal can indeed get lost in translation. Why? No firm conclusions about legal borrowing in general, or in Chinese corporate law in particular, can be drawn from these samples; they were not randomly selected and have not been viewed through a consistent theoretical lens. But a few features stand out that are worthy of comment.

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[39] *See* Wang Wenfu & Fu Chunming, *Lun Meiguo "Gongsi fa" zhong de jingying panduan guize* [On the Business Judgment Rule in America's "Company Law"], JINGJI YU GUANLI [Economy and Management], No. 8, 2004, at 81, 82; Li Jin, Woguo 'Gongsi Fa' jiguan zhiheng zhidu de fenxi [An Analysis of the System of Mutual Restraint of Corporate Organs in China's Company Law], HENAN SHENG ZHENG-FA GUANLI GANBU XUEYUAN XUEBAO [Bulletin of the Henan Provincial Political-Legal Management Cadre Institute], No. 3, 2001, at 101, 102.

[40] *See* Nicholas C. Howson, Corporate "Fiduciary Duties" in China—Incorporation and Extension to the Heart of China's Corporate Law Problem (unpublished manuscript, 2005) (on file with author).

First, despite maintaining a prickly nationalism on many fronts, Chinese policymakers seem very receptive to foreign borrowing. To the extent Chinese policymakers understood what a trust was, they would have understood it to be a creature not only of foreign capitalism, but of foreign high capitalism at that. Yet they were ready to borrow it unapologetically. Although this essay discusses only a few examples, modern China has borrowed—or at least sought to borrow—many norms and institutions from other countries.

Second, while the borrowing of legal concepts is in many countries promoted by legal professionals, in China the borrowing—like many aspects of the legal system itself—is the responsibility of those who simply do not know very much about law.[41] It may be initiated by officials who have little more than a surface understanding of the institution being borrowed, to say nothing of the environment in which it functions in its home jurisdiction. Thus, there is a particular danger that the borrowing will be superficial and will fail to take, or may even do damage.

Third, despite the government's often-repeated mantra of the desirability of "X with Chinese characteristics" (*you Zhongguo tese de* . . .), it seems that in many cases of borrowing, remarkably little attention is paid to the need to take account of the particular features of Chinese society. In particular, it often seems that policymakers themselves, perhaps because they are such thorough insiders, fail to appreciate the sheer pervasiveness with which the norms and practices of the state-owned economy continue to permeate many realms of Chinese society, and the way in which such norms and practices distort the operation of concepts borrowed from market economies.

Finally, I wish to raise a broader question that applies to all transplants from Western legal systems into the Chinese legal system: can any transplant from a legal system structured around the notion of rights flourish in the Chinese legal system? Possibly some can, but special circumstances must be present.

Indeed, it may be that the actual workings of the Chinese legal system cannot be well understood using a concept of rights. China's legal system is, in its basic principles and assumptions, fundamentally different from legal orders whose basic principles and assumptions are derived from Roman law, however much those orders may have changed in response to the needs of the modern

[41] The responsibility for drafting the Securities Law, for example, was handed to a team headed by a prominent economist.

world. China's legal system cannot be understood apart from its history, and that history—whether Imperial or modern—is overwhelmingly a story of the centrality of the state. What are the consequences of this?

In Western legal systems we are accustomed to thinking about rights as binary. One either has (or should have) a right or one does not (or should not), and debates about rights are invariably conducted in those terms. In formal terms, the Chinese legal system is no different, but in practice one frequently encounters what is called a right being treated as if it were something the strength of which varied along a continuum. In other words, rights may be treated as if they gave the holder a certain claim—sometimes stronger, sometimes weaker—against other competing interests that may or may not be characterized as rights. Whether the right holder wins will depend on the strength of the competing interests at any given moment. Conflicts between rights are not unusual in any legal system, and legal decision-makers must make a choice. What makes the Chinese system different is that instead of certain interests being elevated into the form of a right, one finds instead that rights are treated as just another kind of interest and weighed accordingly.[42]

In the era of economic planning, this view did no harm, and indeed was perhaps the only view possible. The right holders that mattered were all government institutions or state-owned enterprises. In disputes between them it made sense for the state to impose the solution that maximized the *interests* of all concerned and the concept of a robust right served no useful purpose.[43] Rights represent, among other things, a *choice* for the right holder: they can be exercised or bargained away. This kind of autonomy makes no sense in a system of pervasive hierarchy. Why should an enterprise manager have the right to insist that screws of a certain quality be delivered, if the system would work better by delivering slightly inferior screws at a much lower cost, and making an appropriate downward adjustment in the manager's quality targets?

Perhaps surprisingly, the continuous and non-binary nature of legal rights extends to state-imposed duties as well. When examined from the perspective of binary duties, Chinese legislation can

[42] The distinction I intend to draw is that while as a restaurant owner I may have an understandable *interest* in a competitor not opening down the street, the law may not give me a *right* to prevent him from doing so. Needless to say, the statute books of many jurisdictions are full of examples of this kind of right being granted to favored groups after successful lobbying efforts.

[43] Thus, the state could take an outcome that might be merely Kaldor-Hicks efficient as among private actors and turn it, by making the winners compensate the losers, into one that was Pareto efficient.

be extremely perplexing. It is full of obligations that either "should" or "must" be done, leading the Western-trained lawyer to exclaim in frustration, "Well, do I absolutely have to do it or don't I?" In my experience, few government officials will state that "should" is anything less than obligatory, but they will at the same time maintain that "must" is even more obligatory.

Legislation also frequently states that something should or must "in principle" be done, again leaving doubt as to the absolute obligatoriness of the norm. Indeed, even where the law does not explicitly provide this wiggle room, it is often implicitly present. It is a time-honored practice in China for local governments, often with central approval, to experiment with institutions and practices that everyone admits are contrary to the governing law and for which no legal exception is available. The saga of land leasing experiments in Shenzhen prior to necessary revisions in the Land Administration Law and the Constitution is a good example. With a binary conception of legal duties, we are simply unable to say much about what is going on. All we can do is to note that it is unlawful. But this does not advance our understanding very far. A conception of legal duties as continuous would open to the door to a much richer analysis that would enable us to think about just how much experimentation is permissible, and what sort of principles govern experimental deviations.

As with rights, the continuous nature of duties is a reflection of the state-centered nature of the Chinese legal system, and in particular the historical background of the modern Chinese legal system, which has evolved from a system of intra-bureaucratic communication. No successful bureaucracy operates internally on the basis of binary rights and duties. Instead, one sees a constant flow of information back and forth, and bargaining among people engaged in a long-term relationship. As a principle of bureaucratic regularity, to say that something should "in principle" or "normally" be done makes perfect sense. Assuming the general rule is wise, the state will not collapse if there are a few exceptions. This conception of duties starts to become problematic only when it is unmoored from its original intra-bureaucratic context and applied to those outside the bureaucracy.

This, I submit, is part of the problem with making borrowings from Western corporate law fit into the Chinese corporate law regime. Western corporate law does not contemplate a large state presence in the enterprises whose governance it regulates, and does not contemplate a legal system in which rights are really just interests to be weighed in any particular case against other interests that may or may not be labeled "rights". Shareholder litigation, for example, cannot serve as an effective tool of corporate governance when shareholders' statutory rights to litigate are whittled away and obstructed by the courts in the name of social stability. It is tempting to criticize Chinese courts for not giving rightholders their due. But both insiders and outside observers might better advance their respective agendas of reform and understanding by first taking the Chinese legal system as it is, and not as they wish it would be.