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China's "Corporatization without Privatization" and the Late 19th Century Roots of a Stubborn Path Dependency

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Abstract

This paper analyzes the contemporary program of "corporatization without privatization" in the People's Republic of China ("PRC") directed at China's traditional state owned enterprises ("SOEs") through a consideration of long ago precursor enterprise establishments – starting from the last imperial dynasty's creation of "government promoted/supervised-merchant financed/operated" (*guandu shangban*) firms in the latter part of the 19th century. While analysts are tempted to see PRC corporations with listings on international exchanges that dominate the global economy and capital markets as expressions of "convergence", in this article I argue that such firms in fact show deeply embedded aspects of path dependency unique to the Chinese context even prior to the fall of the Qing dynasty in 1911. To that end, I identify commonalities between China's large-scale state (imperial court)-promoted or -operated enterprises after 1870 and the PRC's largest corporations and corporate groups that have grown since the early 1990s – commonalities which touch on *macro* policy motivations behind such firm establishments, financing, operations, monopoly franchise rights, corporate governance, relationship to law and domestic and transnational legal systems, the interaction between the state and other non-state sectors, and more. Conversely, I also investigate key differences in the surrounding geopolitical, political, legal, economic and market environments between the late 19th century and today, so as to investigate how today's largest Chinese enterprises are, and going forward will be, distinct from their 19th century ancestors. This article does not address the extent to which China's corporatized SOEs with public markets shareholders should nonetheless be understood as "sovereign" for purposes of evaluating foreign sovereign immunity and the like. Instead, my hope is that this analysis will help policy makers, global capital markets participants and even corporate governance specialists to understand more concretely the underlying differences between modern China's apparently convergent corporations, on one side, and corporate enterprises operating and financed in other parts of the world, on the other, and the future trajectory of the PRC and its rising corporate entities as global political and economic actors of abiding power and influence.

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Introduction – Convergence, Path Dependency and the "Corporatized" Chinese State-owned Enterprise ("SOE")

For almost two decades developed world academic discourse on "the firm", corporate governance and corporate and securities law has been fixated on the possibility of global "convergence" and the continuing frustration of that possibility because of "path dependence".

On the one side, convergence with respect to firm organization and governance across distinct political, economic and legal systems seemed assured given agreement on what kind of firm was most economically efficient – efficient in its productive tasks, but also what kind of firm (as active in what kind of capital market) offered the best mechanism for the efficient allocation of capital. This, so argued the strongest proponents of convergence, was the Anglo-(U.S.) American "shareholder-oriented" model of firm organization and governance: widely-held companies with most or all of their shares publicly-traded, featuring complete separation of ownership and management, all regulated by (i) enabling corporate law with an key role ceded to *ex post* standard-applying common law-style judicial institutions,[1] and (ii) a securities regulatory system focused on mandatory information disclosure and strict prohibitions on manipulative trading.[2] Emphasis on the way to best ensure the efficient allocation of capital allowed for the possibility of slightly weaker convergence, but specifically with respect to the world's largest publicly-listed companies, or a convergence driven by the shared expectations of the increasingly global capital markets and the impact of securities law and regulation of key capital markets (New York, London, etc.) to the law of corporate organization and governance.[3] Perhaps the most penetrating vision of convergence identified national systems where *functional* convergence (sometimes effected simply by contract) might occur, notwithstanding apparently frustrated *formal* convergence.[4] Informing this side of the debate was a justified questioning of the viability and long-term success of organizational and legal transplants from allegedly more mature political, economic and legal systems (mostly Northern hemisphere Western, but usually including pre-Recession Japan) to "less developed" national systems.[5]

On the other side, academic analysts predicted not convergence, but stubborn and persistent "divergence", resulting from historical developments and political/ideological forces unique to the apparently still-relevant national unit. These path dependent factors resulted not only in specific, and distinct, firm capital structures and legal and organizational norms, but insulation of certain national

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[1] *See*, in particular, the "legal origins" law and finance literature, attempting to prove empirically that an Anglo-American, common law, system is superior, at least in comparison to civil law systems and with respect to the creation of strong and efficient capital markets. These authors asserted that (i) common law jurisdictions are more protective of property rights generally, and specifically the rights of minority shareholders in corporate firms, and (ii) civil law systems "over-regulate" private economic activity, and private ordering in particular. *See*, for example, R. La Porta, F. Lopez-de-Silanes, A. Schliefer & R. W. Vishny, *Legal Determinants of External Finance*, 52 J. of FIN. 1131 (1997).

[2] *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEORGETOWN L.J. 439 (2003).

[3] *See* John Coffee, *The Future as History: The Prospects of Global Convergence in Corporate Governance and its* Implications, 93 NORTHWESTERN L. REV. 641 (1999).

[4] *See* Ronald Gilson, *Globalizing Corporate Governance: Convergence of Form and Function*, 49 AM. J. COMP. L. 239 (2001).

[5] *See* Hideki Kanda & Curtis Milhaupt, *Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate* Law, 51 AM.J. COMP.L. 887 (2003); and Curtis Milhaupt, *In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan*, 105 COLUMBIA L. REV. 2171 (2005).

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systems or practices from the global forces identified as the drivers behind hoped-for convergence – mostly the firm and capital allocation efficiency goals described above.[6]

In the almost two decades between the start of the convergence-path dependency debate and the present day, the globe has witnessed the rise of explicitly *corporate* behemoths from the People's Republic of China ("PRC" or "China"). These PRC-controlled firms, whether domiciled in the PRC "mainland"[7] or outside, now complete the largest initial public offerings ("IPOs") and corporate finance transactions in history, dominate lists of the world's largest enterprises by market capitalization, have shares traded on both PRC exchanges and the major international stock exchanges, and increasingly act beyond China's national borders to acquire control of firms and assets positioned in other national jurisdictions, including many of China's erstwhile tutors in the arts of economic and legal system development.

Superficial analysis -- sadly not just from global underwriters managing and hard-selling gargantuan PRC-origin IPOs -- has always explicitly trumpeted the PRC's new corporate entities and the corporate governance system within which they are situated as "convergent" in the terms described above. After all, they say, the PRC's corporate firms feature every formal aspect of a "modern" corporation and corporate law system: legal personality for the firm; perpetual existence of the corporation; "owner-shielding" asset partitioning (*i.e*., limited liability for investor shareholders) coupled with "entity shielding" asset partitioning (*i.e*., state provided rules that protect the firm from the claims of creditors of the firm's investors or other entities in which such shareholders are invested);[8] formal separation of ownership (the shareholders) from management (the board of directors); centralized management (the board of directors, again) acting pursuant to a simple majority vote; *indicia* of a desirable "shareholder orientation" in the PRC's formal company law and securities regulation, including: a board of directors elected and dismissed by voting shareholders; officers appointed by a board of directors responsible to the shareholders, corporate fiduciary duties owed to the firm (and its shareholders) by orthodox fiduciaries (directors, supervisory board members, and officers) and even controlling shareholders, corporate law doctrines like "oppression" (to protect minority shareholders), and a corporate derivative action allowing minority shareholders to work around the board in suing breaching fiduciaries on behalf of the firm, etc.; free transferability of, often publicly-traded, share capital; veil piercing (to protect third party creditors in tort or contract), and much, much, more.

At the same time, there has been a good deal of writing by more discerning analysts identifying how the products of China's "corporatization without privatization" established in the political legal system and corporate governance ecology unique to Reform-era PRC are anything but convergent, and have about them a "Chinese characteristics"-hugging path dependency. That path dependency is often understood as rooted in (i) China's post-1949 political and ideological settlement, or the basic tenets of Mao Zedong's elaboration of Marxist orthodoxy which requires that ownership of the means of

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6 *See* Lucian A. Bebchuk & Mark L. Roe, *A Theory of Path Dependency in Corporate Ownership and Governance*, 52 STANFORD L. REV. 127 (1999); Mark West, *The Puzzling Divergence of Corporate Law: Evidence and Explanations from Japan and the United States*, 150 U. PENN. L. REV. 527 (2001).

7 For the purposes of this article, the PRC means the PRC, excluding the Special Administrative Regions of Hong Kong and Macao, and Taiwan/the Republic of China.

8 *See* Henry Hansmann, Reinier Kraakman & R. Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335 (2006).

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production firmly vested in "the people"[9] as represented by the Chinese Communist Party-controlled state (what I refer to here as the PRC's "Party State"), (ii) China's development model – increasingly called "state capitalism"[10] -- and (iii) the resistance against any alternative path arising from the power and interest of incumbent control parties which actually operate PRC firms.

Yet, even the most discerning analysts have rarely looked further back into history to understand how China's 19th century and early 20th century "firms" (for want of a better term) were shaped by the same factors, contributing to the same path dependency.[11] It is that underperformed backwards glance into history that is the stimulus for this writing. Said another way, I propose to revive consideration of some of China's late 19th century and early 20th century firms -- not as historical artifacts proving or denying the buds of a pre-Communist industrial capitalism[12] or as exotic curiosities demonstrating how late imperial China failed to understand the power of the British East India Company[13] (they did) -- but as the precursors of, and in some ways determinative models for, the same massive PRC corporations that now stand astride the world. Accordingly, in this article I proceed as follows. In Part I, I will summarize the basic elements describing the genesis and fruits of the PRC's corporatization without privatization program, with a particular emphasis on the political, organizational and legal ecologies in which such firms exist. As this aspect of the article has been extensively analyzed by contemporary writers (including, I hope, myself), I will be concise. In Part II, I focus on a lesser-known story -- aspects of firm and/or enterprise organization and governance norms in China from a time before the end of imperial rule in 1911, which I think have very strong resonance for today's PRC firms established in a radically different political, economic, and historical circumstance informed by a completely different degree of transnational engagement. In Part III, I try to isolate what I think are common elements between the two generations of enterprise establishment in China, regardless in many cases of the governing (domestic or transnational) law, the surrounding political legal environment, and the degree of interaction with the world outside of China. My hope will be to tease out aspects of firm organization and governance from more than a century ago that reveal, I think, the path dependencies working so strongly today in the PRC. Part IV concludes, with a consideration of the possible future trajectory of the PRC and its corporate

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[9] Note that for Mao and the CCP in 1949, the "people" was more than just the "proletariat" and included, at least initially, the "the workers, peasants and military", while excluding class enemies (landlords, capitalists, haute bourgeoisie, etc.), reactionary party members, spies, etc. This alternative formulation of who precisely the Chinese Communist Party, and the Chinese Marxist state it controls, represent has important implications for the contemporary corporatization program discussed here.

[10] *See*, for instance, REGULATING THE VISIBLE HAND? THE INSTITUTIONAL IMPLICAITONS OF CHINA'S STATE CAPITALISM (Curtis Milhaupt & Benjamin Liebman eds., 2015).

[11] Each of Ruskola, Kirby and Zelin have written extremely useful studies of China's pre-1980s firm establishments, but published this work before the PRC's "state capitalist"-model corporatized SOEs developed to the form we see today. Accordingly, their studies are useful as histories of institutional and legal (both statutory and contractual) developments, but do not look to those historical institutions and arrangements to understand similar kinds of institutions in the late 2010s. *See* Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STANFORD L.REV. 1599 (2000); William Kirby, *China Unincorporated: Company Law and Business Enterprise in Twentieth Century China*, 54 J. of ASIAN. STUD. 43 (1995); and Madeline Zelin, *The Firm in Early Modern China*, 71 J. OF ECON. BEHAVIOR & ORG. 623 (2009).

[12] The real focus of Albert Feuerwerker's studies of Qing industry and firm development. *See*, for example, ALBERT FEUERWERKER, CHINA'S EARLY INDUSTRIALIZATION: SHENG HSUAN-HUAI (1844-1916) AND MANDARIN ENTERPRISE (1958).

[13] One aspect of the breezy history of the corporation set forth in JOHN MICKLETHWAIT & ADRIAN WOOLIDGE, THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA (2005).

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entities as global actors of great and abiding influence, and whether – in this sphere at least – "law – Chinese or foreign – matters".[14]

[14] I should note that this particular writing does not address the ever-important question of how "sovereign" China's corporatized state owned enterprises and groups are for traditional or modern statutory sovereign immunity analysis. Nonetheless, I believe there are aspects of this analysis which will help observers understand the relationship of some of the world's largest enterprises with China's sovereign power.

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Part I - The State-controlled Chinese Corporation and Enterprise in 2017

In this section I will introduce and describe one form of the modern PRC enterprise legal person (or group of legal persons) as it exists today. So as to set up the desired comparison with Chinese firms of yesteryear, I must necessarily generalize a rather complex picture, but also focus on a particular form of Chinese corporation -- the corporatized traditional state owned enterprise ("SOE") and its group of companies, the same entities and groups which presently occupy the heights of China's productive economy and not incidentally the global capital markets.[15] Accordingly, I mostly neglect the very large number of firms active in China today that are not built upon the assets or franchise rights of former SOEs or government departments, small and medium enterprises which have grown from (often *local government*-owned) "collectively-owned" and "township and village enterprises" ("TVEs"), and the myriad of other successful enterprises in the Chinese landscape evidencing something closer to "private" rather public ownership, including entities active outside of China but with only opaque relationships to the PRC party state such as Anbang and Wanke, etc.[16] The path dependencies that I seek to illustrate in this telling are most immediately identifiable when studying the PRC's present day corporate (and group) giants that have been erected on the foundations of China's traditional SOEs.

Donald Clarke and I, among others, have tried to explain China's reform era "corporatization" program, and its consequences for the Chinese firm and the nature of corporate law and corporate governance in the PRC.[17] The traditional PRC SOE – or in literal English translation of the Chinese term "enterprise under the system of ownership by all the people" (*quanminsuoyouzhiqiye*) – was not what many mistook it for, a legal person owned by a single shareholder, the state (on behalf of "all the people"). The traditional and pre-Reform policy SOE was in fact a division or ring-fencing of productive and social assets by a given state administration, which did not grant separate legal personality or competence to that group of assets or the SOE it was deemed to be a part of. Nor did the division or ring-fencing have the status of an independent accounting unit, and thus by the same token it did not have profits, losses, or taxable gains, or any accountability for the same. Indeed, historically there was no enterprise income tax system for domestic SOEs, and thus no enterprise income tax levied on the gross revenues of SOEs, which were in effect solely cost centers. This made perfect sense when SOEs operated pursuant to a centralized state plan, using annual grants from the state to fund the purchase of inputs and meet annual operating expenses and the cost of social services, with the mandate that all net earnings were returned to the funds-granting government. In China, the traditional SOE had Chinese Communist Party-appointed, non-business professional, managers scaling the Party's *nomenklatura* personnel

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15 In the 2015 Fortune Global 500, three of the top five companies (State Grid, China National Petroleum Corporation and Sinopec) and ten of the top fifty (in addition Industrial and Commercial Bank of China, China Construction Bank, Agricultural Bank of China, Bank of China, Ping An Insurance, China Mobile, and the Shanghai Automotive Industry Corporation) are corporatized PRC SOEs that have accessed the global and PRC capital markets. See http://beta.fortune.com/global500/.

16 *See*, for example, my *Return of the Prodigal Form? – Partnerships and Partnership Law in the People's Republic of China*, in 390, 390-1 RESEARCH HANDBOOK ON PARTNERSHIPS, LLCS AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS (Robert Hillman & Mark Loewenstein eds., 2016).

17 *See*, for example, Donald Clarke & Nicholas C. Howson, *Pathway to Minority Shareholder Protection – Derivative Actions in the People's Republic of China*, *in* THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH 243, 245-9 (Daniel Puchniak, Harald Baum & Michael Ewing-Chow eds., 2012) and Nicholas C. Howson, *"Quack Corporate Governance" as Traditional Chinese Medicine – the Securities Regulation Cannibalization of China's Corporate Law and a State Regulator's Battle Against Party State Political Economic Power*, 37 SEATTLE. U. L. REV. 667, 690-94.

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appointments system and thus moving through a defined *bureaucratic* hierarchy into progressively more powerful *political* positions.[18] The traditional SOE did not issue ownership interests in itself, like stock or equity. The SOE "borrowed" from other traditional SOEs configured as "banks" (only after 1994 "commercial banks" (thus distinguished from "policy banks" which continued as channels for direct grants from the state)), with such "borrowings" functioning as another channel for the infusion of state-provided funding, outside of direct grants by the state to the enterprises. The "control" interest in SOEs (the right to appoint management and appropriate some portion of gross revenues, and once an enterprise tax system came into existence, net revenues) was vested in some identity of the state – often central line ministries (*e.g*., the Ministry of Textile Industry) or ministry-type bodies transformed directly into SOEs (*e.g*., the Ministry of Petroleum Industry metamorphosed into the China National Petroleum Corporation ("CNPC")), but also subordinate units of government such as local (usually provincial or large municipal)-level bureaus of the line ministries (*e.g*., the Jiangsu Bureau of Textile Industry) or equivalent local-level People's Governments (*e.g*., the Jiangsu Provincial People's Government).

This was the *status quo ante* system for traditional SOEs addressed by the corporatization program that began, experimentally and without much central government sanction, in the mid-1980s. Corporatization, confirmed in (all-important) policy terms with the advent of the "modern enterprise system" articulated in Communist Party policy in the early 1990s, and in (far less important) legal terms with the 1994 PRC Company Law, sought to abolish the SOE as a non-law-based *organizational* form[19] by converting such SOEs, or parts of them, into a *legal* form under a "Company Law". That new legal form for SOEs governed by the new Company Law could take one of three forms: (i) the company limited by shares or "CLS" (*gufen youxian zeren gongsi*) for widely-held firms issuing stock with assumed separation of ownership and management;[20] (ii) the limited liability company or "LLC" issuing less liquid equity interests (formally "registered capital interests") for smaller and more closely-knit groups of investors with less presumed separation of ownership and management;[21] and (iii) the wholly state-owned company or "WSOC" sub-form of the LLC, for companies erected on the back of traditional SOEs owned directly by state agencies with no shareholders' meeting and a merely optional board of directors.

Most important for this article, is the fact that this process of corporatization did not initially, or even today does not, implicate "privatization" of the PRC economy or its traditional SOEs, much less any withdrawal of the PRC Party State from the same. Why? Because a controlling equity interest in the resulting company went to or was maintained by the incumbent Party State control party of the pre-conversion SOE, originally at a level of 100%, but diluted as the newly-established corporate entity engaged, post-hiving off of the burdens connected to the SOEs traditional social assets, in the issuance of new capital to capital markets retail purchasers with the equity control position decreasing to 70-80%. (Over time of these absolute control positions have been further diluted with subsequent capital raisings,

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18 *See* Nicholas C. Howson, *China's Restructured Commercial Banks: Nomenklatura Accountability Serving Corporate Governance Reform?*, *in* 123 CHINA'S EMERGING FINANCIAL MARKETS: CHALLENGES AND GLOBAL IMPACT (Zhu Min, Cai Jinqing & Martha Avery eds., 2011).

19 Ironically, the SOE was only given a *post hoc* legal basis in 1988 with the promulgation of a "law" concerning SOEs, promulgated just as the PRC was intent on abolishing SOEs as an organizational and legal form.

20 Modeled on the German *Aktiengesellschaft* or "AG".

21 Modeled on the German *Gesellschaft mit beschränkter Haftung* or "GmbH".

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but never below a strong 50-60% (alone or held in concert)).[22] Moreover, the prior bureaucratic channels of control working on SOEs remain largely undisturbed by the change in organizational form from Communist Party State policy authorized SOE to state law-based corporate entity, which continuing lines of authority and decision-making subvert almost completely the overlay of public norms described in law and regulation.

To the present day, the PRC Party State remains absolutely committed to retaining control over converted enterprises in the broadest range of sectors – not just the usual suspects for state control (*e.g.*, defense and national security, power generation, extractive industries, key infrastructure, etc.) but also non-national security and non-key infrastructure sectors that are extremely profitable for central or local Party State insiders especially when financed by largely passive and information-deprived public investors, Chinese and foreign.

In the recent decade and a half, traditional SOE systems have increasingly used corporatization of specific asset groups to assemble corporate "groups" of legal person subsidiaries and non-legal person divisions under a core group holding company, which holding company serves as either (i) the controlling shareholder of the group's legal person subsidiaries or (ii) the headquarters of the subordinate divisions, with those corporate subsidiaries – not the holding company positioned at the top -- seeking finance from the Chinese and foreign capital markets. These groups benefit from monopoly rights over a certain business sector (or operational or geographical sub-division of that sector), sometimes implemented as a duopoly or triopoly to create the impression of competition. The group's core holding company is now "owned" on behalf of "all the people" entirely by a central government (State Council) agency called the State-owned Assets Supervision and Administration Commission ("SASAC"), and so the core holding company of the enterprise group is usually organized as a WSOC, the wholly state-owned sub-species of the LLC described above which has no shareholders' meeting and an optional board of directors. The core holding company, managed by Party State *nomeklatura* appointees who rotate between central and local official posts and enterprise executive offices or directorships – and even between allegedly competing enterprise groups in a single monopoly or duopoly sector – co-ordinates the entire group's subsidiaries and divisions business activities in the interest, above all, of state industrial policy, and certainly with a preference for such national policy over what might be in the interest of shareholder wealth maximization for the non-group, always minority, shareholders invested in the individual legal person subsidiaries often through the public capital markets.

Almost on a level with the group core holding company is a group "finance holding company", which directs *group internal* revenue streams to *group internal* subsidiary enterprises or divisions,

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[22] Some analysts understand the "share split reform" (*guquan fenzhi gaige*) initiative of 2005 as a remedy to such overly concentrated capital structures at Chinese listed firms. That is a misconception. The share split reform sought to address market overhang and public equity valuation problems arising from the fact that the state's controlling equity positions in companies with listed shares were held *via* non-tradable shares. Under this 2005-6 reform initiative, holders of non-tradable shares (the state and legal person shareholders holding equity on behalf of the state) were given the right to sell their shares on the exchanges in return for present compensation payable to the suddenly diluted shareholders of the public float. While this reform did make state and legal person shares liquid, and there was some moderate selling down of the state's interest in listed firms, the program only reduced very moderately the Party State's controlling position in listed firms. *See* the report of the PRC State Council, *Guquan Fenzhi Gaige Jiben Wancheng* [*The Share Split Reform is Basically Complete*], available at: http://www.gov.cn/ztzl/gelszfgzbg/content_554986.htm.

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without much concern for the boundaries of distinct legal entities, much less the basic creditworthiness of *group internal* recipient entities. In short, the finance holding company entity allocates finance and investment strictly inside its group of subsidiaries and affiliates, and serves the group's controlled entities, with no concern whatsoever for the financing of external entities, much less the ultimate, formal, "owner" of the group, the state (acting through SASAC).

SASAC is (at least in my view) an empty bureaucratic box, or a proxy for the state's (or "all the peoples'") majority ownership interest in the nation's productive assets. SASAC is thinly staffed, has little or no political heft when not the cats paw of powerful State Council or Politburo actors, and exercises *nil* governance control over its "owned" core holding companies positioned at the top of various groups. As such, SASAC continues as the long-standing "absent principal" in the Chinese corporate governance scheme formerly known as the "state" or "all the people" represented by the state, just under a different name or institutional title. PRC corporate groups, and by extension their subsidiaries and divisions, are therefore actually controlled by Party State *nomenklatura* appointees working at the core holding company level, and as directors and officers of the subsidiary entities controlled by the core holding company. As Party State bureaucratic political actors seeking advancement in the Party system, these individuals are perfectly responsive to Party State policy (which necessarily includes national industrial policy) while at the same time content to ignore the interests of shareholder investors in the listed subsidiaries they formally manage.[23]

To give a concrete illustration of how this structure works, I offer a slightly anachronistic vision of the China National Petroleum and Chemical ("Sinopec") Group,[24] anachronistic only because some of the elements described together below were not in place concurrently. Posit that Sinopec has a monopoly on all downstream hydrocarbons businesses in the nation, thus gas stations, refining, petrochemicals, etc., everything separate from exploration, development and production, and energy transportation businesses, all of which are the province of other enterprise groups (here, the separate families of companies under the CNPC and China National Offshore Oil Corporation ("CNOOC") groups). There is a Sinopec core holding company at the center of this group, which Sinopec Group Holding Company (let's call it) is a WSOC "owned" 100% by a State Council department now called SASAC. A major controlled subsidiary, department or affiliated entity would function as a dedicated "finance" holding company (or department) necessary for the allocation of funds and finance to and among operations and entities included in the Sinopec Group. Sinopec Group Holding Company, explicitly permitted in its business license to invest in other entities, in turn owns a vast number of only Sinopec business-related subsidiaries, each with business scopes allowing them to operate in defined sectors within the group's larger monopoly (*e.g*., oil refining, or gas stations, or petrochemicals, et.) or defined geographical areas (*e.g*. just Jiangsu Province, or just three southern coastal provinces, etc.). Those subsidiary entities will always show majority equity ownership in the hands of the Sinopec Group Holding Company or one that core holding company's controlled subsidiaries, but can be financed by bank loans, minority non-public investment, or access to the public capital markets (domestic or foreign). Thus, for example, this Sinopec

[23] *See* Li-Wen Lin & Curtis J. Milhaupt, *We Are The (National) Champions: Understanding The Mechanisms of State Capitalism in China*, 65 STANFORD L. REV. 697 (2013) (which gives a good account of the PRC's state-owned groups, but I believe a misleading analysis of SASAC and its role).

[24] *See* the (English) language website for the Sinopec *Group* here: http://www.sinopecgroup.com/group/en/, and the (Chinese) language website for the major, and separate, listed Sinopec subsidiary, China Petroleum and Chemical Co., Ltd. here: http://www.sinopec.com/listco/.

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Group might seek to re-organize a traditional SOE grouping of productive and social assets doing a petrochemicals business in the Shanghai suburbs of Jinshan District into a Sinopec Group Holding Company-controlled company called "Sinopec Shanghai Petrochemical Company Limited" which could IPO on the PRC domestic or foreign capital markets. After the IPO, the issuer Sinopec Shanghai Petrochemical Company Limited would still be dominated absolutely by the core holding company *via* an 80% equity stake and the appointment of all directors and officers of the public subsidiary by the holding company. Moreover, the IPO issuer would benefit from well-advertised preferences critical to its commercial success, preferences relating to regulatory breaks, supply or other inputs availability or pricing, or exclusive access to certain markets at preferred (higher) prices, importantly preferences delivered not just by other Sinopec group affiliates but even from other Party State controlled competitors (*e.g*., the supply of crude oil for refining from CNPC).[25]

The negative effects of such a "corporatization without privatization" program on corporate governance and productive efficiencies – at least with respect to the controlled subsidiary firms which have a public float -- have been well aired in the literature, but suffice to say here that the result has been a keen horizontal not vertical (*i.e*., minority shareholders *vs.* controlling shareholders, not genereal shareholders' meeting *vs.* board of directors) agency problem, where the party able to extract the private (here the better word is "specific" or "tunneled") benefits of control of the enterprise and expropriating returns from and otherwise oppressing the minority (often) public shareholders is far more than a run-of-the-mill control party, and instead a legal person or natural person identity of the Party State (central or local) giving it/them a potent mix of political and economic power, especially against disaggregated, non-politically privileged minority shareholders. The result was and is as to be expected: an unconstrained opportunity for control parties *qua* controlling shareholders to engage in oppression of minority shareholders, tunneling and outright expropriation, where other state institutions (*i.e*., the judiciary or agencies) that might act against such control parties are politically conflicted, burdened with limited bureaucratic autonomy, or suffering from competency constraints.

Notwithstanding that expected result, however, and perhaps most important for the current analysis, China's largest corporate issuers continue to attract ready purchasers on the PRC's domestic capital markets and the global exchanges, even when the underlying business and assets are in very bad shape.[26] Said another way, if corporatization without privatization was, at least in part, about financing

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[25] This is not a fanciful example, and tracks exactly the first IPO of a PRC-domiciled issuer on the Hong Kong Stock Exchange in 1992 and indirectly via American Depositary Shares and Receipts ("ADRs") on the New York Stock Exchange ("NYSE"). *See* the website for Sinopec Shanghai Petrochemical Company Limited, which trades on the Hong Kong Stock Exchange (under "SEHK"), the New York Stock Exchange (American Depositary Receipts, "SHI") and the Shanghai Stock Exchange (A shares, under "SSE"), at: http://www.sinopec.com/listco/en/about_sinopec/subsidiaries/subsidiaries_joint_ventures/20161109/news_20161109_400111388102.shtml . It has long been rumored that this long-ago initial listing vehicle for the Sinopec group will be "privatized", meaning the public investors in this Shanghai subsidiary will be bought out, so that the later (2000-1)-appointed Sinopec group listed subsidiary, China Petroleum & Chemical Company Limited (also trading in Shanghai, Hong Kong and New York), will stand alone as Sinopec's finance window on the domestic and international capital markets.

[26] *See*, for example, the 2010 US$22.1 billion IPO by the Agricultural Bank of China, still the largest IPO in world history, but one completed with respect to a vastly underperforming "bank" entity. *See* Michael Wines, *China Bank IPO Raises $19 billion*, N.Y. Times, July 6, 2010, at: http://www.nytimes.com/2010/07/07/business/global/07ipo.html (2010 IPO effected after purchase of US$60 billion in non-performing loans in the late 1990s, the revelation of fraudulent loans of US$7.5 billion in 2006, a 2008

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money-losing state assets through the public capital markets – *i.e*., gaining finance through legal forms recognized across the world whereby (i) the incumbent control party's absolute control of the assets remains undisturbed, (ii) state banks do not have to pile in more money from the PRC state treasury, and (iii) the investors are assuredly passive, and uniquely information- and collective action-challenged – then it has been an undiluted success. However, for Chinese policy makers who saw corporatization without privatization as the way to separation of ownership and management, and effective monitoring of and accountability for firm managers in the service of economically efficient (shareholder wealth rewarding) firms, the process has proven almost irrelevant.

It bears emphasizing that the process outlined above, or the track whereby SOEs "owned" and operated directly by the Party State have been corporatized but not privatized, is not the entire picture of what has happened in the PRC over the past several decades. Indeed, very often after corporatization of traditional PRC SOEs but (formal) maintenance of the Party State's – central or local-level -- control position, real control is in fact given over to insiders who increasingly act in their own interest, or the interest of their "system" (*xitong*). As we will see, this fuller process has distinct similarities to what occurred in China of the late 19th and early 20th centuries during the transitions of Qing enterprise from (i) state financed and operated to (ii) state-promoted but privately financed and operated to (iii) state private co-operated and finally (iv) (present or former) state official-operated but in the private interest of those state officials upon whom control is bestowed. An example of how this occurred in the mid-1990s in China arose from the command by then General Secretary Jiang Zemin for the military (the People's Liberation Army or "PLA") – the third and roughly co-equal silo of power in the PRC Party State, alongside the CCP and the state – to remove itself from industry and commerce which it had piled into wildly from the earliest days of the Reform program. The PLA complied, but not by withdrawing from industry. Instead, the PLA, or more specifically departments of the PLA, established holding companies separate from the PLA with national and international investments (*e.g*., China Northern Group ("Norinco"), China Southern Group, Poly Group, etc.) operated by PLA "system" insiders. Or, in many cases, PLA personnel who had been managing significant groups of assets controlled by the military simply retired from their military positions to become full-time civilian directors or officers (*e.g*., Huawei). So, instead of the PLA withdrawing from industry, PLA assets were withdrawn from the PLA (and aggregated under corporate groups run by civilians) or PLA officers withdrew from the PLA to continue to engage in industrial pursuits (and act on behalf of their former military masters). The same process is also identified in the recent rise of new PRC conglomerates like Anbang Insurance and Ping An Insurance, huge groups operating in sectors that didn't exist in the planned economy of the pre-Reform era, but with the benefit of Party State networks and patronage, and under the direction of individuals closely connected to the Party State.

The foregoing is, admittedly, a rather superficial and generalizing picture of the PRC's policy-driven corporatization without privatization process over several decades. How do we then sum up and identify what policy imperatives have caused a system like this to exist, and then how do we describe some of the key resulting characteristics (other than the fact that "law" seems to have little relation to the process)?

US$19 billion recapitalization of the bank when 25% of its loans were non-performing, and another purchase of bad debt of US$120 billion just before the IPO (leaving the bank, at the time of the IPO, with almost 3% of its loans as non-performing, the highest of any reporting bank *in the world*).

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First, I address some of the key policy imperatives supporting a program of "corporatization without privatization" and Party State-"owned" groups:

- Whatever organizational adjustments are made with respect to the institutions governing accumulations of productive assets or sectors of economic activity, the state and/or its agents remain in control, at least formally (at inception), and then over time, functionally
- The PRC needs large amounts of capital for projects designed to make China "rich and powerful";
- The government of the PRC seeks protection against -- and the creation of domestic (and eventually global) competition for -- capital- and technology-rich foreign invested enterprises, in China or (eventually) globally, especially in a period where foreign trading inside China and/or foreign investment in China benefits from capital endowment and (foreign) market access advantages, and/or regulatory protection or preferences;
- The PRC state treasury is unable, or unwilling, to continue, or wants to minimize, unrecoverable funding of the operation of productive assets and their related enterprises, whether by direct grants, loans or other expenditures;
- The government of the PRC seeks to utilize idle Chinese savings, and to employ that liberated investment capital on Chinese national economic development, while at the same time stopping or dissuading the flight of available domestic capital to finance development external to China;
- The government of the PRC seeks to use global capital markets to finance the development of its industrial firms, but in a way that cedes little or no governance role for, or accountability to, such foreign providers of capital;
- If absolute state "ownership" of key productive assets cannot be maintained, then at least state "control" must be undiluted; and
- Whatever mechanism for the financing of state-owned assets is employed, it must conform to what is perceived of as "modernity" and "global practice", and eventually must comply with transnational treaty norms and obligations, thus -- if only for an initial appeal to global capital markets -- cannot be too exotic or *sui generis*.

Second, I summarize just some of the key elements of the resulting architecture put in place to serve the above-described policy aspirations (and "enterprise" here should be read to include "enterprise group"):

- Promotion of the enterprise by state, using generally applicable state legal norms, but those which apply only to state controlled investments (the WSOC form), or if others (the PRC Company Law) with an underlying capital structure which directly enables the state's maintenance of its incumbent control position and the open exploitation of minority investors;
- Donation of hard assets to the enterprise by the state in exchange for a controlling equity position in the new enterprise, and monopoly franchise or extraction rights conferred on the enterprise to ensure revenues and the exclusion of competitors, domestic or foreign;
- Direct financial support from the state to the enterprise *via* additional equity capitalization (*e.g.*, the successive recapitalizations of PRC commercial banks and the transfer of non-performing loans to the balance sheets of Asset Management Companies (AMCs)), loans by state controlled lenders (which ripen into grants, or are transferred off balance sheet as non-performing loans for AMCs), direct grants, subsidies, regulatory (or tax) exemptions, preferential prices for inputs provided by other state-controlled enterprises, etc.;

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- Management of enterprises by Party State *nomenklatura* personnel who are not necessarily appointed because of expertise in the specific industrial or service provision sector, and respond to national development plans and priorities rather than enterprise efficiency or investor wealth maximization, all as they seek bureaucratic (Party State) advancement, for which enterprise efficiency or productivity is mostly irrelevant;
- The raising of equity investment from a body of widely-dispersed, passive and information-deprived investors *via* domestic and global capital markets, with initial assurances: (i) for domestic and global investors, that the enterprise is too important to fail and will benefit from continuing state protection and support; and (perhaps contrarily) (ii) for foreign investors, that the state will stand back from undue intervention in enterprise operations management, notwithstanding the state's role in promotion of the enterprise, the ceding of monopoly or exclusive franchise rights grants, direct subsidies or soft loans, etc.;
- The promise, and enforcement of, monopoly franchise rights over (or participation in a monopoly covering) a certain activity or revenue stream, and strict prohibition against new entrants, domestic or foreign;
- Something like a guaranteed return for non-state investors, at least in terms of equity appreciation (and if the markets betray that promise, direct intervention in those markets to support equity prices); and
- After establishment and capital markets financing gained on promises of lack of state intervention, migration back towards state (or Party State insider) dominated governance of the enterprise.

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Part II - The Firm in Chinese History

Above I have tried to generalize the structures and key elements shared by the products of the PRC's post-1980 "corporatization without privatization" project. In this Part II, I will try to lay out some of the structures and key elements seen at Chinese firms or proto-firms from a much earlier time, specifically after the mid-19th century, a period during when imperial rule of China ended forever, and the Chinese nation endured almost half a century of intense political instability, warlord contest or civil war, and foreign intervention and eventually invasion.

Specifically, I will describe the following kinds of firm or enterprise organization in China from the late 19th century and into the early 20th century: (i) the *guandu shangban* ("official promoted, merchant operated") enterprises (transitioned to *guanshang heban* ("official and merchant jointly operated") enterprises) from the latter part of the 19th century; and (ii) so-called "regional enterprises" like former official Zhang Jian's government-promoted but finally privately-operated Da Sheng textile group of enterprises.

Regrettably, because of space limitation, I am not able to address other important commercial establishments in Chinese history, namely: (i) large enterprises with national scope that were not promoted or maintained by the court or state and/or understood as "family" enterprises; and (ii) so-called charitable trusts, an innovation stretching back to the Song Dynasty. In this exposition, I unavoidably rely upon the excellent scholarship of a number of modern China historians,[27] but also select elements that I think correlate well to the PRC's Reform era corporate enterprises, the real focus of this article.

Two things to note, however, before I commence:

First, it may be deeply misleading to refer to firm establishments in Qing, Provisional Republican, Beiyang Government, *Guomindang* ("KMT") Republican, pre-Great Proletarian Cultural Revolution, or post Third Plenum, pre-1992 Communist China as "companies" or "corporations", etc. That terminology may cause a misapprehension for readers, who will map the broader meanings of those essentially *Western* and *legal* terms of art – or the specific accepted elements of the corporate form (limited liability, centralized management, separation of ownership and managements, perpetual life, freely transferrable share capital) -- onto radically different enterprise structures and groups. As I note below, many of the *guandu shangban* enterprises described below are commonly translated as the "XXX *Company*", even though there was no company law in existence at the time and thus no legal basis for the form, these entities did not have distinct legal personality or limited liability, and indeed used a Chinese

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[27] *See* WELLINGTON K.K. CHAN, MERCHANTS, MANDARINS AND MODERN ENTERPRISE IN LATE CH'ING CHINA (1977); DOU JIANMIN, ZHONGGUO GONGSIZHI SIXIANG YANJIU (1842-1996) [A STUDY OF CHINA'S COMPANY SYSTEM THOUGHT - 1842-1996 (1999); SHERMAN COCHRAN, BIG BUSINESS IN CHINA: SINO-FOREIGN RIVALRY IN THE CIGARETTE INDUSTRY, 1890-1930 (1980); SHERMAN COCHRAN, ENCOUNTERING CHINESE NETWORKS: WESTERN, JAPANESE AND CHINESE CORPORATIONS IN CHINA, 1880-1937 (2000); Kirby, *supra* note __; ELIZABETH KÖLL, FROM COTTON MILL TO BUSINESS EMPIRE – THE EMERGENCE OF REGIONAL ENTERPRISES IN MODERN CHINA (2004); Chi-Kong Lai, *The Qing State and Merchant Enterprise: The China Merchant's Company, 1872-1902*, in TO ACHIEVE SECURITY AND WEALTH: THE QING IMPERIAL STATE AND THE ECONOMY, 1644-1911 139 (1992); Kenneth Pomeranz, *"Traditional" Chinese Business Forms Revisited: Family, Firm and Financing in the History of the Yutang Company of Jining, 1779-1956*, 18 LATE IMPERIAL CHINA 1 (1997); and Zelin, *supra* note __.

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character in their Chinese language name (*jü*) indicating that they were more closely akin to a government department used as a vehicle to match something like private investment and management alongside state investment. While Chinese intellectuals and officials have certainly appreciated the Western model of the corporate enterprise, what has appeared through history in China is an enterprise form which is decidedly not a transplant and utterly distinct from those models, except with respect to certain mechanisms deemed useful – *e.g.*, widely dispersed investment to accumulate funds on a large scale and from a relatively disempowered and collective action/co-ordination challenged body of participants.

Second, many of the enterprise structures I will describe below had little engagement with "law" *per se*, and instead were structures which existed and occasionally thrived either without the benefit of authorization in state law, and or in direct contravention of state law when it was enacted. As historian Bill Kirby has recited in detail,[28] China only gained its first analogue to a company law statute near the end of imperial rule (the Qing court's *Gongsilü* of 1904), a specific and explicitly legal norm hardly used in practice. Much the same fate awaited successor company laws and regulations (of 1914, 1929 and 1946 under Beiyang Government and pre- and post-Anti-Japanese War KMT governments respectively), which the state, company promoters, and entrepreneurs certainly engaged with more fully than at any prior time in Chinese history, but not in the ways another political legal system might dictate.

At least for the Chinese sector of the economy, new industrial development in the 19th century was led by the state (the Qing court, at that time).[29] Most historians of China tie the outsized role of the state, and minimal private sector, in matters pertaining to economic development to a Confucian (*rujia*) orthodoxy hostile to commerce and trade. While I admit the rhetorical power of that oft-articulated Confucian hostility, I instead see the greater and determinative power of a surviving Legalist (*fajia*) obsession with the state's pursuit of "wealth and power" as the wellspring of heavy state involvement in first agricultural and then industrial and commercial pursuits, and certainly large scale projects critical to economic development.[30] Indeed, in the long course of Chinese imperial history, it seems that few have seriously questioned the necessity of an active and interventionist state, with the governing elite, Han or foreign (Mongol or Manchu), instead questioning the nature and extent of such state involvement. So it was that by the middle and late 19th century, after the serial trauma of the "unequal treaties" resulting from the Opium Wars and the Taiping Rebellion, etc., no official could consider expansion of the economy and industrial development except under close state supervision. As Wellington Chan has noted, this basic assumption gave rise to at least two important premises which I submit have continued life more than a hundred years later and in a vastly different global circumstance: (i) that the state had the right to run, or at least intervene in, the affairs of any major business enterprise, and (ii) that the state had a preferred right over the returns from such an enterprise.[31]

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28 *See* Kirby, *supra* note __.

29 Before the Sino-Japanese War and the Treaty of Shimonoseki in 1895, foreigners were not permitted to establish manufacturing enterprises in China (even in the so-called "Treaty Ports" where the rights granted to foreign powers were "trading" rights). The weakened Qing government ignored small-scale foreign-owned enterprises in non-essential sectors (*e.g.*, shipbuilding and repair), but was strict in enforcing the ban on large, capital-intensive, industry (e.g., cotton spinning and weaving). The Treaty of Shimonoseki, and rights therafter gained by other foreign powers (and their agents) as a result of "most favored nation" clauses in the prior Qing treaties, changed all of that.

30 [*See* Shang Yang, Hen Feizi, Bernard Schwartz.]

31 *See* Chan, *supra* note __, at 67-8.

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Thus, the need for huge amounts of capital for projects designed to make China "rich and powerful" (again), the government's inability or unwillingness to provide that capital, the desire to protect against incursion by capital-rich foreign run enterprises, and the aim of employing idle Chinese capital or constraining its flight to fund external development, all spurred the Qing court – but really individual officials -- to create or allow new investment and business structures, chief among them the joining of official promotion and private investment known as "*guandu shangban*" or what I translate as "official promoted, merchant operated".[32]

The *guandu shangban* enterprises started in the 1870s actually have their roots in entirely government-funded and –managed – thus "*guanban*" -- operations of the 1860s in sectors directly relevant to what we now call national security – *e.g.,* shipyards and arsenals. The new enterprises of the 1870s were designed to be active in areas both traditionally occupied by some level of private entrepreneurs (Chinese and foreign) – *e.g*., textiles and shipping – and where there was an established state interest or monopoly – *e.g*., mining. Li Hongzhang, for a time the most powerful Qing official and the political mastermind behind the first *guandu shangban* firm China Merchants' Steam Navigation Company (*lunchuan zhaoshangju*) ("CMS"), neatly merged two ideas – the established imperial Chinese bureaucratic construct utilized in the salt monopoly (*guandu shangban*) and a very partial model of the Western European joint stock company – to advocate for a new kind of enterprise in the late Qing. The salt monopoly program was useful because it showed a precedent for co-opting wealthy "merchants" (non-officials) to provide capital and management skills.[33] The joint stock model – a newish Western legal mechanism much encountered then at the hands of European companies active on the China coast (*e.g*., British American Tobacco) but also known domestically and from Chinese diaspora enterprises[34] – was deemed useful as a vehicle for raising huge amounts of capital from a large number of dispersed investors (without, it is important to note, any vision of shareholders' meetings, a centralized and elected board of directors with fiduciary duties to the merchant investors, or (merchant-representing) board appointed senior management, etc.)[35]

Notwithstanding this state (at this time "court") innovation, a bedrock fact of industrial development in pre-1895 China remained -- no moderate to large-scale manufacturing enterprise could be established without the approval and support (which, as described below, took many forms) of a senior official. So it was that the first new large-scale industrial enterprises established in China with any

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[32] I differ here from the accepted English translation of "*guandu shangban*", usually rendered as "government supervised-merchant managed", because that translation implies more ongoing state supervision – rather than initial promotion – than I think was originally envisioned. However, as there was constant flux in the balance between state involvement and enterprise (investor) autonomy *per* both state policy and the identity of the officials or managers involved, my term may over-privilege Li Hongzhang's original rhetorical promise for these enterprises.

[33] The imperial salt administration's policy construct allowed the appointment of wealthy merchants to act as "chief merchants" (*zongshang*), which merchant managers were actually given official (government) rank to run operations with broad administrative power over both lesser private salt shippers but even other officials administering the same network. Chan, *supra* note __, at 71.

[34] *See* Pomerantz, *supra* note __; and Cochran 2000, *supra* note __.

[35] Traditional enterprises in China that correlated with at least the possibilities inherent in the joint stock form at this point were smaller in scale, usually dependent upon the resources of an extended family or a few partners, and – importantly – managed by hired (non-family) managers. The formal owners or investors in such enterprises ceded a great deal of control to the hired managers, with little intervention in enterprise management or reporting demands. If the hired managers failed, they could be fired, but replaced by new stranger managers with the same management independence and power. *See* Chan, *supra* note __, at 71.

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private involvement, such as those seen in armaments, mines, shipping, and shipyards, were created under government sponsorship and the imprimatur of a specific court official. There are many examples of the so-called *guandu shangban* enterprise establishments in the 19th century, including the Hanyeping Company, the Hengfeng Spinning Mill, the Shanghai Cotton Cloth Mill, the Kaiping Mining Company, and CMS, all of which were created without sanction in state law, regulation or indeed any utterance from the Qing court or bureaucracy but each of which is identified with the concrete patronage of a specific government personality.

The traditional view of the *guandu shangban* establishments in the late Qing was that they suffered from "state" (court) interference, notwithstanding real indications of growth in China's late 19th century modern productive economy and a lack of real impact by the state generally in that growth story.[36]

To understand the specific role of the state vis a vis such firms, and be able to compare the role of the state with respect to such 19th century firms and the PRC's corporatized SOEs of today, it is useful to analyze in granular detail the state policy framework for the creation – really court permission for the allowance -- and operation of such entities, and how that changed over time.

As noted above, the *guandu shangban* firm establishments were occasioned by the following imperatives:

- The need for large amounts of capital for projects designed to make China "rich and powerful";
- The government's inability or unwillingness to provide that needed capital;
- Protection against, and competition for, capital- and technology-rich foreign invested enterprises with their eyes on China's domestic markets and pre-established dominance of external markets;
- The employment of idle Chinese capital on domestic infrastructure projects (and/or stopping the flight of domestic capital to finance development projects external to China).

Or as the CMS patron Li Hongzhang wrote in a December 1872 letter to a comrade official Zhang Shusheng about the promotion of CMS and explicitly dismissing the importance (for the state) of its monopoly over domestic waterways transport of tribute rice:

> *The use of steamships for the transport of tribute rice by sea route is but a minor consideration. The project will open up new prospects for the dignity of the state, for commerce, for revenue, and for military strength for China for hundreds of years to come*.[37]

What characterized the organization and operations of the *guandu shangban* and the relationship of the state to these enterprises? Here, we need to understand different phases of the *guandu shangban* style of enterprise, different phases that are identifiable even before the increasingly desperate Qing state (and its officials) reversed course and pushed their way back into direct involvement in the operation of these enterprises for what became known as *guanshang heban* (or "co-operation by merchants and the state") and the choice between final retrenchment to pure state ownership and operation (*guanban*) or

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36 *See*, for example, Lai, *supra* note __, at 139-40.
37 Excerpted in Lai, *supra* note __, at 142.

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total letting go to entirely merchant operated (*shang ban*). In the initial phase of the initiative, we can identify the following:

- Promotion of the enterprise by the Qing court, and a powerful individual official connected to the court, all without authorization in public legal or regulatory norms (as compared to firm internal regulations, or written "instructions" from the promoting official);[38]
- Donation of hard assets (*e.g*., steamships, factories, etc.) or franchise or extraction rights (*e.g*., coastal shipping or coal mining, etc.) by the state to the firm, *gratis*, as a loan ripening into an outright grant, for a fixed (and low) use fee, or for an equity interest in the firm held by the court, or more likely the powerful official or his confederates as proxies;[39]
- The raising of finance from domestic capital (merchant) sources,[40] with a preference for state co-investment *via* loans instead of equity, with the promise *ex ante* that the Qing court would stand back on management and operations notwithstanding its promotion, monopoly grants, direct subsidies or loan-funding;
- The promise, and subsequently grant of, subsidies to the enterprise by the state, which subsidies might come in the form of loans at preferential interest rates[41] or no interest (the proceeds of which might often be used to pay down higher interest private extensions of credit),[42] with no expectation of repayment of principal or a concrete understanding that interest would be forgiven,[43] or the lease of hard assets from the state at a fixed (and low) price, etc., all justified because these apparently merchant or privately-operated and -benefiting firms had an important public and not just commercial function (*e.g*., coastal shipping, mining, armaments, etc.);

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[38] For example, after 1873, CMS had rules (*jugui*) and regulations (*zhangcheng*) which operated much as modern "articles of association" or By-Laws do, and CMS was the subject and recipient of hundreds of "instructions" from Li Hongzhang, all at a time when there was no statutory basis for the firm, and Li also appointed top management of the firm. *See* Lai, supra note __, at 144-5.

[39] Sheng Xuanhuai's April 1872 scheme for the promotion of CMS proposed that the future firm acquire steamships from the state shipyard at a fixed, preferential rental, and attract merchant participation by giving the new firm (and by extension its private investors) a participation in what had previously been the state monopoly on transportation of tribute rice. *See* Lai, *supra* note __, at 143-4.

[40] Those who understand Chinese will comprehend this aspect of the *guandu shangban* firm immediately from the formal Chinese name for CMS, which name has *nil* connection with the common English name used for the enterprise -- "China Merchant Steam Navigation Company, Ltd." The Chinese term, *lunchuan zhaoshangju*, indicates that the firm is: the "[government] department" (*jü*) for attracting (*zhao*) investment from non-state sources (*shang*) for steamships (*lunchuan*)". Most of the other *guandu shangban* establishments referred to here also used the Chinese character "*jü*" for "[state] department", for example the Kaiping Mines (*Kaiping Kuangwuju*) and the Mohe Gold Mine (*Mohe Jinkuangju*).

[41] The interest rate on the abundant state loans directed to CMS (more than half of the firm's borrowings) paid out between 7-10%, always lower than the guaranteed dividend paid to merchant investors of 10%. Lai, *supra* note __, at 145.

[42] With respect to CMS specifically, *see* Lai, *supra* note __, at 144-5 (and the table at 146) (detailing how CMS was originally promoted in October 1872 with a government loan sourced in the appropriation by Li Hongzhang of 135,000 taels of *Zhili* military funds, and showing at least 18 state loans subsequently to CMS before 1885, all a result of pressure brought to bear on officials in Jiangsu, Zhejiang and Hubei, and customs officials in Tianjin and Shanghai); indeed, Lai's study shows that before 1882, CMS' state loans were much larger than the firm's actual paid-in capital (2.2 times larger than the maximum paid in capital).

[43] For CMS, in 1877 Li Hongzhang obtained the permission of the Qing court to suspend interest payable on government loans for 3 years, and in the event, no interest whatsoever was paid on these loans between 1882 and 1885, the foregone interest equaling almost half of CMS' paid-in capital between 1882 and 1893. Lai, *supra* note __, at 145-6.

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- The promise, and enforcement of, monopoly franchise rights over (or participation in a monopoly covering) a certain activity or revenue stream, and strict prohibition against new entrants, domestic or foreign;[44]
- After promotion, operational management of the enterprise left in the hands of non-officials ("merchants");[45]
- A guaranteed, and government enforced, preferential revenue rate for firm business, often with that preferred return from the firm arising in an area of business closed to other commercial firms, domestic or foreign;[46]and
- A guaranteed, preferred, "above the line", return to "merchant" equity investors, thus regardless of any net profits from the enterprise.[47]

[44] For instance, Li Hongzhang pressured Qing officials to consign a portion of the annual shipment of tribute rice to CMS, and, as noted *infra*, at a rate two to three times higher than the rate charged even by foreign steamship companies hauling ordinary freight. Lai, *supra* note __, at 146-7.

[45] This was always deemed to be a critical proffer on the part of the Qing court, as demonstrated by Li Hongzhang's failure to successfully promote CMS in October 1872 because of appointment of an official to management (Zhu Qiang), and then successful promotion of the firm once two comprador-merchants Tang Jingxing and Xu Run were installed as the top managers (which function they performed until 1884). Lai, supra note __, at 144.

[46] For instance, the rate CMS was able to charge for the transport of tribute rice forced upon local officials, a rate rewarding the most expensive provider, or two to three times higher than the rate charged even by foreign steamship companies hauling ordinary freight. Lai, *supra* note __, at 146-7

[47] For example, the initial (and very generous) 10% fixed annual dividend offered to CMS investors in that firm's promotion stage. Lai, *supra* note __, at 144.

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In 1883, Qing court policy changed significantly, such that the state effectively replaced merchant management (the "*shangban*" part of "*guandu* *shangban*") with bureaucratic or state management (or "*guanban*").[48] A decade later, after the 1895 Treaty of Shimonoseki and the serious challenge presented by foreign industrial firms permitted to undertake manufacturing operations on Chinese soil, circumstances changed even more radically and private Chinese involvement in industry became far more active. While some purely private (*shangban*) enterprises and wholly state owned (*guanban*) enterprises continued to exist, for enterprises involving the state late period Qing officials made increasing use of an enterprise form giving the state more power than it notionally possessed under the *guandu shangban* model: the "state and merchant co-operated" (*guanshang heban*) enterprise. The new form was either promoted initially as such, or developed on the framework of a prior *guandu shangban* enterprise where the state or "official" side encroached on the "merchant" side.

Indeed, this is part of the story for Li Hongzhang's CMS, which after the 1880s saw diversion of firm revenues to activities of a decidedly non-commercial nature and increasing official involvement, leading to merchant rejection, and then privatization but with ownership and management ceded into the hands of former officials (or incumbent officials acting in their private interest). So, CMS, which had inaugurated government business cooperation in 1872, was successfully operated with real commercial autonomy until 1884, but was then subject to dominating government influence and direction from 1884 to 1895. Initially, Qing officials proposed that the government take over CMS not because it was failing, but because it was making such a profit for its merchant investors (benefiting from the subsidies, monopoly rights and preferences detailed above). Indeed, there was significant pressure from high Qing level officials for a government takeover of CMS as early as 1877 (by Shen Baozhen, governor general of Liangjiang), 1879 (by Ye Tingjuan, a tribute-grain manager inside CMS but also an official (a Shanghai *daotai*)) and 1881 (by Liu Kunyi, successor to Shen as governor-general of Liangjiang). All of these efforts were successfully resisted, and the government appointed comprador-background managers of CMS (Xu Run and Tang Tingshu) became the most significant shareholders of CMS in the late 1870s and early 1880s. However these forays by powerful officials in the direction of state takeover certainly altered the merchant (now non-manager investor) view of the viability of CMS and its future autonomy. By the early to mid-1880s, the failure of the Cixi Dowager Empress to invest in the Qing empire's defenses, the weakening of Li Hongzhang's personal political position, and the financial crisis of 1883 made it very difficult for the court to support a non-state operated enterprise like CMS. Accordingly the CMS merchant managers were replaced by officials, and the enterprise was used by the state for its often non-commercial purposes (such as funding the Beiyang defense forces, even transferring shipping personnel from CMS to the Beiyang Navy). (This change clearly signaled to China's non-state affiliated, private or "merchant" investors by the alteration in the Chinese language names given the newly-appointed managers. Whereas comprador Tang Tingshu was called "chief manager" (*zongban*) of both CMS and the Kaiping Mining Company – an appellation with slight color of official status – when he was succeeded by Sheng Xuanhuai at CMS (still a sitting government official) and later by Qing bannerman (and also sitting official) Zhang Yanmo at the Kaiping mines, the "chief manager" title was discontinued, and instead Sheng and Zhang were called "director generals" or "*du ban*", a Chinese language title which in the imperial era clearly indicated a government status and role.)[49] That shift in turn led to a rise in corruption and poor performance at CMS, as the enterprise was unable to resist significant government

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[48] Zelin, *supra* note __, at 632.

[49] Chan, *supra* note __, at 75.

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intervention. After 1885, and following the financial crisis in Shanghai of 1883, CMS was effectively re-organized, with Sheng Xuanhuai – always a sitting official (*daotai* of Chefu and Tianjin at different times) but by 1885 the largest shareholder of CMS -- appointed director general of the firm. At the same time, all merchant or investor directors were removed from their positions (in part because they had lost their capital during the 1883 crash), and Sheng appointed *his* insiders (mostly officials) to the company directorate. Finally, and somewhat ironically, CMS was facially "privatized" -- with control ceded to Sheng Xuanhuai and his group, and removed from Li Hongzhang and his "merchant" managers -- but in fact taken over by bureaucratic officials acting in their own pecuniary and bureaucratic interest.[50] Predictably, perhaps, CMS never again performed as well as in the period when it benefited from a unique balance between government financial support and enterprise autonomy, suffering instead from the withdrawal of state financial support and an increase in bureaucratic control of its operations.

The same transition was visited upon another of Li Hongzhang's *guandu shangban* enterprises, the Shanghai Cotton Cloth Mill in 1887, and by the same official acting in an enterprise capacity. In that year, Sheng Xuanhuai took over the Shanghai Cotton Cloth Mill, and tripled its capital account, but, tellingly, by taking more government loans *and diversion of the CMS funds he now controlled*. Thus, even by the late 1880s, the government was looking at already-promoted enterprises – where the government's role had been advertised as mere "supervision" (or "promotion"), weak in the face of simultaneously-offered private ("merchant") management -- as subordinate divisions (and not independent legal persons or accounting units) which the government could capitalize directly or allocate capital investment freely between. By the end of the 19th century, and after a fire destroyed much of the Shanghai Cotton Cloth Mill's original mill, Sheng converted the enterprise into yet another purely *guandu* (government operated) enterprise, but with funding solely from himself and a group of his associates. He tried to raise public investment for that iteration of the enterprise, which failed entirely as non-state investors were justifiably worried about investing in an industrial enterprise run by the state. So, he took over the enterprise under an assumed name and made it entirely private (but given his official background and roles, "private" in the sense that it was funded and operated by individuals with official backgrounds and roles but acting outside of their government statuses).[51]

Wellington Chan summarized the shared process of merchant (private capital) disillusionment thus:

> *Merchant disenchantment with the [guandu shangban] type of enterprise stemmed from replacement of merchant-managers by men of bureaucratic background. The merchant investors had not been deterred by their lack of voice in company policies (in fact, one suspects that all of the large shareholders or their friends became directors and managers). But they began to shy away from further investment when they became convinced, rightly or wrongly, that government bureaucrats were in control and making use of their capital for bureaucratic and personal ends. … [The] early [iterations of the guandu shangban form] fulfilled Li Hongzhang's intention to use merchant capital at the merchant's own risk. From the 1880s, however, as these operations passed into the*

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[50] Feuerwerker, *supra* note __; and Lai, *supra* note ___, at 148-50.
[51] Chan, *supra* note __, at 74-5.

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> *hands of official-managers and their merchant assistants, and as new ones were founded with responsible merchant-managers, merchant capital too, was conspicuously absent.*[52]

This increasingly mixed picture of ownership and operational management, and the relative abandonment of the *guandu shangban* model, can be seen across the late Qing landscape and in the run-up to demise of that last imperial dynasty. As Elizabeth Köll reports for just the mining sector – an industrial sector the central government might have strong interest in for both industrial development and defense reasons – the period between 1895 and 1911 saw 35 enterprises *founded* as fully private firms (*shangban*), compared to nine owned by the government alone (*guanban*), two as government promoted-merchant operated (*guandu shangban*), and ten as government merchant co-operated (*guanshang heban*).[53] Of course, one of the sharp ironies of this imposed transition from *guandu shangban* to any of *guanshang heban*, orthodox *guanban*, *guanban* run for the private interest of officials and their cronies, or full "privatization" (but really delivery of the enterprise into the hands of specific officials), was that finally the enterprises were unable to attract *domestic* Chinese capital investment – the basic point of the *guandu shangban* establishments in the first place -- and thus had to rely on foreign loans, leading to the inevitable foreign takeover of strategic Chinese assets later, a takeover the *guandu shangban* initiative was supposed to protect against.[54]

The late stage proffer of a legal basis for incorporation and registration, legal personality and limited liability represented by the Qing government's 1904 *Gongsilü* only accelerated increased involvement of no longer-court-tied or apparently "private" actors in the financing and operation of important industrial enterprises, as will be seen below in the story of Zhang Jian's Da Sheng. Importantly, however, the availability of incorporation provided a vehicle enabling state officials to first gain governance power over state assets but then leave the public sector, along with the assets entrusted to their care and management.

Elizabeth Köll writes about a second *genus* of Chinese enterprise establishment apparent after 1895 – what she calls the "regional enterprise" -- an evolution of the government sponsored or co-operated company in the direction of a privately controlled business, but not to the full extent of a traditional Chinese family-owned business (as originated or maintained). As Köll writes in the introduction to her book-length treatment of Zhang Jian's paradigmatic regional enterprise Da Sheng group of businesses:

> *Originally designed as motors for industrial development, they were formed by privatization of government enterprises. However, even these incorporated enterprises exhibited many of the managerial characteristics of the family business. ... Before 1895*

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52 Chan, *supra* note __, at 75-6.

53 Köll, *supra* note __, at 16.

54 *See* the excerpt of the December 1872 letter from Li Hongzhang to Zhang Shusheng, *supra* note __, and accompanying text. Wellington Chan recites an example of this unanticipated and deeply undesired consequence with respect to the Kaiping mines. Upon ex-comprador and non-official manager Tang Tingshu's death in 1892, and the Kaiping operation coming under the power of Qing bannerman and official Zhang Yanmo, corruption and fast advancing bureaucratization commenced. Chan then cites to Ellsworth Carlson's work to show that while Tang was in charge, the Kaiping mines operations were funded by merchant investment. Under Zhang, merchant investors would not invest, forcing Kaiping to rely on foreign loans, opening the way for absolute foreign control afterwards. Chan, *supra* note __, at 75-6.

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regional enterprises were nonexistent; by the time they came to be promoted, the imperial government had already been weakened by war and social disorder. Although Da Sheng was founded as a joint government-private venture, government involvement became negligible after the first five years and finally redundant when the company acquired legal status as a shareholding company in 1907. The government never played a role in the management or ownership of the company, but Zhang Jian and his family did, though without ever turning Da Sheng into a family business.[55]

It is these regional enterprises that – along with the *guandu shangban* transitioning into *guanshang heban* enterprises -- have perhaps the most to teach us about the path dependency of China's enterprises, especially when the governing national regime is weak or failing.

Köll's impressive book-length history of the Da Sheng enterprise group and its development from 1895 to its demise in the mid-20th century is extraordinarily rich in detail, and evocative of the way in which semi-private enterprise developed in China through the end of the 19th century and the start of the 20th century.[56] For the purposes of this writing, however, I am forced to give too short shrift to that compelling detail, and focus instead on aspects of the Da Sheng development – and Zhang Jian's personal role in promoting and managing it – which have direct resonance for the PRC's corporatized SOE groups today.

Following is a concise rendition of those elements:

First, the impetus for the promotion of Da Sheng was public and governmental, not private and entrepreneurial. Indeed, the entrepreneurial personality involved (Zhang Jian) only metamorphosed away from his official identity with the development of the enterprise. In fact, the share certificates distributed for the Da Sheng enterprise between 1897 and 1907 were emblazoned with Zhang Jian's name, with no allusion to his enterprise post, but instead a prominent broadcasting of his full official title (of Hanlin Scholar, or "*hanlinyuan xiuzhuan*").[57] As with high Qing official Li Hongzhang's inauguration of the paradigm "*guandu shangban*" establishments, the original driver of the Da Sheng promotion effort was Zhang Zhidong, then governor-general of the Liangjiang Provinces (Jiangsu and Zhejiang) and imperial commissioner of the southern ports and – with the demise of Li Hongzhang – the most powerful official in the Qing court, who in late 1895 contacted officials in the Suzhou and Zhenjiang prefectures and the Tongzhou department and asked them to recruit local merchants to establish manufacturing facilities for local goods. Zhang's policy aim was explicitly to resist "the plans of the foreigners" (Westerners and Japanese) after the Treaty of Shimonoseki permitted them the establishment of manufacturing businesses in China and outside of the Treaty Ports. Zhang Jian, then still a Qing official who received this governmental instruction from his bureaucratic superior to search out promoters and start-up capital from the private sector, in turn liaised directly with six promoters active in Guangzhou (Canton), Fujian, Ningbo, Shanghai, Nantong (eventually the site of the origins of the Da Sheng group) and Haimen.

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55 Köll, *supra* note __, at 18.

56 A great deal of the expositive material following is extracted from Köll's history of Da Sheng.

57 Köll, *supra* note __, at 67. This presentational aspect proved changeable, as circumstances required and China saw the demise of imperial rule by scholar officials. For instance, on the 1918 graduation certificate for the Da Sheng-established Nantong Textile School, Zhang Jian is pictured in a Western suit and with a cropped, Western-style, moustache, an image of a Westernized "modernizer" as distinct from the traditional imperial scholar official as possible. Köll, *supra* note ___ at 70.

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Initially, each of these promoters committed to investment (or bundling of investment from associates) in a cotton mill operation that still official Zhang Jian pronounced would be entirely "*shangban*" ("merchant operated"), with the promoters listed on an imperial document as "*jingli dongshi*" ("managers" or "managing directors").

Second, the enterprise was finally established, and able to operate in its early years, only because it had to backtrack on its proposed "private" or "merchant" identity and rely directly on state (Qing court) capitalization and involvement. This reversal was triggered by the backing out by the original Guangzhou, Fujian and Shanghai promoters, which at least changed the future enterprise into a far more local regional effort in terms of both capital raising and operations. More importantly, Zhang Jian as the official and direct godfather of the project found that he could not raise sufficient capital to purchase the machinery needed for manufacturing operations, which *per* the original plan was to be purchased with the proceeds of the Shanghai cash investment. Thus, Zhang Jian had to appeal for state support in financing and obtaining key capital equipment. This appeal came at a very tricky time, and one indicative of how important specific personal official patronage was, because of Zhang Zhidong's resumption of the governor-generalship of the Huguang provinces, and his replacement as governor-general of the Liangjiang provinces by an entirely different official, Liu Kunyi. Liu was apparently sympathetic to Zhang Jian's plight, but could not in the end arrange financing for the necessary equipment purchase. This resulted in a renewed intervention by the real-official-in-interest, Zhang Zhidong, who contributed second-hand English manufacture equipment originally purchased by the government under Zhang Zhidong's direction for a planned cotton mill in distant Wuchang but since warehoused in Shanghai. Zhang Jian and the Qing state agreed that the contribution of equipment would be booked as state capital investment, in fact fully 50% of the capitalization of the future Da Sheng mill, with the remainder of the capital to be contributed by private investors. Thus, even in the planning stages the future enterprise had metamorphosed from being explicitly "*shang ban*" to a paradigmatic "*guanshang heban*" enterprise, and something very close to what we know today as a corporatized SOE with a percentage of public capital markets investment/float, where productive capital has been contributed by the state, and is matched with non-state investment now procured through modern capital markets.[58] Over time, this state investment of second-hand foreign equipment was effectively appropriated from the state by the enterprise. How? Until 1908, the last year before Da Sheng's corporatization under law, the court donated equipment was listed on the enterprise accounts as "state contributed machinery capital" (*guan ji gu chengben*) to indicate that it was the fruits of a capital contribution by the largest investor, the state. After 1908, it was listed simply as "machinery capital" (*ji chengben*) of Da Sheng (even though the accounting category of

[58] Köll relates the story of a side deal that Zhang Jian tried to bring off when he immediately faced difficulties raising the other 50% of the planned capitalization for the enterprise from non-state sources, and which also has resonance in the modern PRC for the way "state" assets improperly enter the non-state owned economy: in 1897, Zhang Jian approached the former official and later investor *cum* manager extraordinaire of many prominent government sponsored enterprises in the late Qing, Sheng Xuanhuai, for finance help. Zhang Jian's proposal was to "sell" Sheng Xuanhuai half of the machinery contributed to Da Sheng by the government (by Zhang Zhidong) in exchange for cash (250,000 taels). In effect, Zhang was suggesting that Da Sheng sell state assets already contributed to Da Sheng (already recognized in the state's 50% equity interest in Da Sheng) for cash, which cash would be recognized as cash equity investment in Da Sheng by Sheng Xuanhuai (thus, double counting on the equity account). All of this would allow Zhang Jian to state that he had raised matching "private" investment for Da Sheng, even though he would have effectively disposed of state assets into private interests (with no consideration for the state seller) and radically diminished the productive capital of the planned enterprise. Luckily for all concerned, this particular grab at public assets by Sheng Xuanhuai did not pan out. See, Köll, *supra* note __, at 65.

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"state contributed machinery" (*guan ji*) continued to exist)), the state was no longer an investor in the corporatized entity, or able to collect profit share from Da Sheng for the capital it had contributed and equity it should have received in return, and there is no evidence that Da Sheng or any investor in Da Sheng actually purchased the machinery from the state.[59] In effect then a non-state enterprise, managed by non-state actors, had appropriated significant assets of the state that had at inception represented all of the in-kind capitalization of the firm, for *nil* consideration to the state or the contributing/selling party.

Third, Zhang Jian's Da Sheng was intimately involved with political as well as business tasks. Between 1898 and 1903, many of the very local cloth businesses were investors in Da Sheng. They were both investors and key links between industrial yarn production and cloth weaving in the locality, as well as the historical markets of those local weavers. Those cloth merchant investors included individuals who had lobbied the Qing government to reduce a transit tax on commercial goods that had hurt particularly in a slump experienced by such businesses in the late 19th century. They had little success on their own, but once they agreed to help finance the effectively *guanshang heban* Da Sheng, Zhang Jian – still an official, though in charge of a state-invested enterprise – petitioned the court on their behalf to relieve the burden of this tax. Here we have a small demonstration of the mixture between roles and priorities, both for officials intent on financing an enterprise, and private investors seeking a public administration benefit. Indeed, as Köll demonstrates in her telling, as the state and official patronage – in the person of Zhang Zhidong – was withdrawn, Zhang Jian as promoter of the Da Sheng enterprise relied increasingly on the support of the very local business community in Nantong.

Fourth, and again as already seen with respect to the initial "*guandu shangban*" enterprises, investors in Da Sheng were the beneficiaries not of a participation in *net profits* of the enterprise, but instead a guaranteed payment (*guanli*) – 8% in the case of Da Sheng -- to be paid by the enterprise to its investors without regard to performance or even the existence of net profits – in effect then a preferred dividend or above-the-line interest payment on a bond. While later the shares of Da Sheng were traded by the Shanghai Stock Merchants Association (starting in 1917) and the shares of Da Sheng No. 1 Cotton Mill and then the No. 2 Cotton Mill were listed on the Shanghai Stock Exchange (from 1920), and thus investors faced some equity risk, given the guaranteed dividend such investments effectively remained fixed income investments for the private investors who participated in the enterprise group.

Fifth, the initial cotton mill which Da Sheng was promoted to own and operate – the Da Sheng No. 1 Cotton Mill -- was merely the first enterprise in what through the early 20th century grew to become a group of affiliated enterprises and offices, only some actual legal subsidiaries, which in the end included flour and oil mills, shipping lines, land reclamation operations, a publishing house, a distillery, etc.[60] Primarily, these affiliated operations were established to ensure the provision of raw materials (or the land upon which to create the raw materials) and/or transportation facilities and services solely or chiefly for the Da Sheng-governed cotton mills. These affiliations, many based on ties which had nothing to do with

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59 See Köll, *supra* note __, at 126-7.

60 By 1910, and even after Da Sheng had procured limited liability company status in 1907, the group comprised seventeen different affiliated operations, including: the original Da Sheng No. 1 Cotton Mill and one branch mill on Chongming Island (established 1907); the Guansheng Oil Mill (1901); the Tonghai Land Reclamation Company (1901); the Hanmolin Publishing House (1902); the Dalong Soap Factory (1902); the Zisheng Iron Workshop (1905); and the Fuxin Flour Mill (1909). In 1921, another branch mill was established in Haimen County.

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formal ownership, subsidiary relationships, cross-ownership or even interlocking directorships, were maintained even after Da Sheng was corporatized as a limited liability company under China's first company regulation, the Qing dynasty's 1904 *gongsi lu*.

Indeed, the corporatization of one part of the Da Sheng complex of enterprises under "law", and the relationship of the resulting "legal" property and ownership relationships to actual managerial control – in particular, the way in which critical financial and managerial control of the entire group was exercised by a Shanghai "office" external to the formal legal network of enterprises – has close resonance to the way in which corporatized SOE groups are run in the modern PRC.

Köll reports that the Da Sheng No 1 Cotton Mill's status *qua* a "*guansheng heban*" enterprise was never formally annulled. The share certificates for the enterprise issued between 1897 and 1903 all advertised the operation's "*guansheng heban*" nature with the legend that the Da Sheng mills "were established in Tongzhou with approval granted by [imperial] edict in response to a memorial from the Imperial Commissioner of the Southern Ports…, per contract established in perpetuity to be jointly managed (*dingli hetong yongyuan heban*) by officials and gentry."[61] By March of 1905, an announcement appeared in the *Da Gong Bao* indicating that the Da Sheng No. 1 Cotton Mill has been approved and registered as a company (*gongsi*) with the Qing Commerce Ministry (*shang bu*) per the 1904 *gongsi lu*. Two years later, in 1907, the report of the first shareholders' meeting of the Da Sheng No. 1 Cotton Mill states that it is specifically a company limited by shares (*gufen youxian gongsi*) under the 1904 Qing statute. However, after 1907 the company's share certificates never refer to its status as a company limited by shares, and only four years after the demise of the Qing dynasty in 1911 (so from 1915) stop alluding to government involvement in what was once a "*guansheng heban*" enterprise. The Chongming Island No. 2 Branch Mill, which had many of the same investors as the No. 1 Cotton Mill, was registered as a company (*gongsi*) with the Qing Commerce Ministry in 1905, but not specifically a company with limited liability, and with no indication of a subsidiary relationship to the Da Sheng No. 1 Cotton Mill company limited by shares (which is correct, because the registered company limited by shares apparently did not own any equity in the Chongming Island No. 2 mill). As the group grew in the early 20th century, the Da Sheng No. 1 Cotton Mill as incorporated became both a holding company (holding direct equity stakes (10%, 32%, 15% and 17%) in, and maintaining interlocking directorships regarding, four true subsidiaries), and the hub of "affiliations" (for thirteen other operationally and legally separate enterprises). The affiliations grew out of common management or shareholders, investment by the Da Sheng No. 1 Cotton Mill, financing of the affiliates in the form of "deposits" (*cun*) by Da Sheng, and exclusive contractual relationships between the affiliates and the main cotton mill business. The "deposit" transactions – whereby Da Sheng financed the affiliates without making equity investment in such other enterprises (or creating a dividend obligation) but instead by making a donation of capital much harder to retrieve – were clearly a way for Zhang Jian to deprive the investors in Da Sheng No. 1 Cotton Mill from any governance power over the affiliates, which power remained in the hands of Zhang Jian and his close associates. Here we see early indications of the very fuzzy borders between in some sense affiliated enterprises (the same kinds of operations, with many of the same investors, governed by the same system of humans), but not strictly related or even affiliated in any legal or property rights sense.

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[61] Köll, *supra* note __, at 125 (Figure 5.1, showing the 1897 certificate).

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In a strong echo of the modern situation, the corporatization of Da Sheng under law and the simultaneous creation of a class of "shareholder-owners" did little to empower those investors at least insofar as management of Da Sheng or any of the affiliated enterprise was concerned. Zhang Jian was not elected by those shareholders to the position of "managing director" (*zongli*) of the enterprise, and instead just continued as the manager of the enterprise through the transition from "*guanshang heban*" to company limited by shares. When faced with criticism at the first shareholders' meeting in 1907 – surrounding rich salaries and bonuses given to other managers (including family) and even funding of welfare and educational projects expressive of the personal virtue of Zhang Jian – Zhang Jian was able to ignore the shareholder concerns and proceed with no accountability to the shareholders, and instead critique the shareholders for seeking involvement in substantive decision making in enterprise affairs.[62] Indeed, the shareholders of the corporatized entity were never able to stop Zhang Jian from engaging in these transactions, which as they complained for years were both related party transactions (in a situation where Zhang Jian and his family probably held shares under so-called "business names") or aspects of corporate "waste". This first interaction then between newly-minted Da Sheng "shareholders" and continuing managing director, part government official, part promoter reveals the state of corporate governance in the Chinese tradition of the early 20th century, a picture deeply familiar for those who study modern PRC corporatized SOE groups and their listed companies.

Likewise, the fact of corporatization and the conferring of limited liability on the Da Sheng No. 1 Cotton Mill did very little to change the *status quo ante* of the enterprise's internal governance, other than the start of annual general shareholders' meetings in 1907. Thus, internal management of the enterprise remained unchanged, with the various department heads still directly appointed by the "managing director" (Zhang Jian) rather than the new "board of directors" (*dongshiju*). Moreover even though the 1904 Qing company law regulation required the appointment of two "auditors" to review the accounts of the newly corporatized entity, the Da Sheng auditors were actually board members, and thus also directly under the power of Zhang Jian as the managing director, and generally functioned to justify the decisions they had signed off on *qua* directors. As Elizabeth Köll summarizes the changes *not* wrought by incorporation:

> *On the whole, incorporation, which we tend to associate with "modern" business enterprise in the Western sense, did not seem to lead to significant improvements in shareholder protections or curbs on the power of the managing director [Zhang Jian]. To judge from the complaints at the 1907 meeting and their complete futility, shareholders were still at a disadvantage despite the potential for openness and accountability through incorporation. The balance of power did not change in the company. The fact that from 1919 on shareholder meetings frequently took place in Zhang Jian's private villa in Nantong City symbolically confirmed his steady, strong personal hold over Da Sheng and his power vis-à-vis its shareholders*.[63]

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[62] Precisely the reason why in 192__ the patriarch of the Nanyang Brothers Tobacco enterprise resisted seeking finance of the family business (necessary to compete with British American Tobacco) *via* incorporation and a minority equity public float because it would lead to the introduction of "disloyal", short-term oriented, and non-family-tied investors. *See* Cochran 1980, *supra* note __, at 96-102.

[63] Köll, *supra* note __, at 129-30.

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Sixth, and perhaps most evocative of modern-day PRC enterprise structures, financial and managerial control of the entire Da Sheng group of enterprises (corporatized, and not, listed and not) was exercised by a Shanghai "office" external to the formal legal and reporting network of companies, group departments, and productive operations, and ruled absolutely by Zhang Jian and his personal team (including, but not limited to, family members), few of whom had formal management or equity positions in the Da Sheng complex of subsidiaries and affiliated enterprises. That office was the Da Sheng consortium's "Shanghai Central Accounts Office" (*hu zongzhangfang*), authorized in financial reporting terms by the company's 1897 articles, but already by 1910 the absolute center of decision-making and what we would today call intra-company finance for the entire Da Sheng group.

Above I have described how Da Sheng both (i) invested in group subsidiaries and (ii) contributed cash capital to "affiliated" group enterprises without making equity investment but instead "depositing" funds with the affiliates. Eventually, the external investors in Da Sheng complained and *via* the first post-incorporation shareholders' meeting of 1907 suggested the establishment of a true holding company, the Tonghai Industrial Limited Liability Company, an entity to be fully capitalized by Da Sheng. As shareholder Zheng Xiaoxu argued at that shareholders' meeting, "the volume of transactions between the subsidiary companies and Da Sheng… has become too large. [It is necessary] to draw a clear line by taking all the debts of the various companies as the share capital of the Tonghai Industrial Limited Liability Company."[64] In the event, the new holding company was duly authorized, but in fact made a free standing account of the Da Sheng No. 1 Cotton Mill entity whereby "deposit" debt to the affiliated enterprises was written off, or converted into Da Sheng No. 1 Cotton Mill's equity in the debtor enterprise held by the holding company. This attempt at reform of intra-group transactions and financial flows spurred by the Da Sheng shareholders, and its frustration, reveals the true function of the Shanghai Central Accounts Office (under the personal supervision of Zhang Jian, not the Da Sheng company or its managers) in exerting management and financial control of the group, and as an institution that allowed Zhang Jian and his insider to almost completely work around the incorporated Da Sheng No. 1 Cotton Mill that had procured capital from external investors. For in fact, the affiliated enterprises and subsidiaries of Da Sheng reported not to the No. 1 Cotton Mill incorporated entity, much less the Tonghai Industrial Limited Liability Company established to assuage concerned shareholders, but instead to the Shanghai Central Accounts Office, an institution not referred to in the company's articles or any statute or regulation, but which consistently acted as the true holding company or finance holding company for the entire Da Sheng group.

As Köll demonstrates in precise detail, the Shanghai Central Accounts Office acted as investment company, and paymaster and broker, for the Da Sheng subsidiaries and affiliated companies. With the head of the Shanghai Office dealing directly with the Managing Director of Da Sheng (Zhang Jian), this "office" did everything a group headquarters/holding company might do, and more; it: invested in (*via* "deposits") and received interest on deposits directed at the affiliates, managed and drafted the accounts of the affiliates, represented the Da Sheng group of enterprises in Shanghai (and engaged in group product transportation and sales, the negotiation of loans, and sale of equity interests (including the delivery of share certificates), for such entities), ordered machinery for affiliated enterprises, made payments to external institutions *on behalf of* Da Sheng and/or affiliates, balanced out intra-enterprise accounts moving net amounts to the affiliates, decided how various group financial transactions should be

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64 Köll, *supra* note __, at 139-40.

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entered and on which affiliate's books, etc. Critically, this mere "office" effected all of these group transactions not from a true holding company or *via* cross-directorships that – in law or *via* property rights connections – controlled the subsidiaries or affiliates, but through an entirely extra-legal institution that operated outside of shareholder governance of management and without regard to separate legal personality, distinct aggregations of investors, or the notion of separate accounts. As important, perhaps, the Shanghai Central Accounts Office was at the same time Zhang Jian's personal office running his private and family accounts, with receipts and expenditures easily comingled with Da Sheng accounts and transactions. This is not to say that Zhang Jian was in the modern sense "corrupt", or that he impermissibly used the Da Sheng complex of enterprises as a piggy bank from which he consistently misappropriated value; instead, the Shanghai Central Accounts Office reveals the existence of (i) a well-understood institution in Chinese commercial organization that effectively looks through the constraints of separate legal personality, accountability to investors, and independent entity accounts; and (ii) the mechanism by which personal control of a family of enterprises, many financed with the capital of strangers, is implemented and maintained, an aspect of control which does not distinguish between private power and managerial control over publicly-financed assets. After noting the roots of this kind of central office or account hub in traditional Chinese family businesses, and even other post-Republican explicitly corporate structures, Köll summarizes:

> *As this institution [the traditional accounts office in Chinese family businesses] was adapted to an industrial joint-stock enterprise with limited liability, one would expect conflicts of interest between the shareholders and the managing director (who was also the founder). However, in Zhang Jian's case, his personal authority and control were not curtailed by but embedded in the Shanghai office as an institutionalized tool of control. In fact, the internal organization of the Shanghai office and its placement outside the formal structure of the Da Sheng complex allowed Zhang Jian to exert full vertical authority, to use a modern management expression.*[65]

Echoing Louis XIV about another autocratic institution in another context, another civilization, and another time, Zhang Jian might justifiably have quipped, "A Da Sheng holding company? In China, le holding company c'est moi!".

Seventh and finally, Zhang Jian as the official *cum* private promoter of the Da Sheng complex relied heavily on a network of individuals which included but was not limited to family members (notably his brother Zhang Cha), but also had non-family associates with business, political or personal ties. People with a superficial understanding of Chinese business organization might assume that such networks would have to be based in family ties. Zhang Jian's promotion and management of the Da Sheng consortium makes clear that such Chinese networks are absolutely not exclusively family based, but instead are based in a network of individuals with common work experiences, geographical backgrounds, or involvement in a specific sector of industry of commerce. This kind of network might be seen as the analogue to modern day PRC enterprise groups which can be dominated by networks rarely based in familial relationships and not truly disturbed by Communist Party appointments but instead affiliated with a given "system" (*xitong*) -- for corporatized SOE groups, the ministry group from which the enterprise group sprung.

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[65] Köll, *supra* note __, at 146.

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A final word about what the historical literature calls "family enterprise" in pre-Communist Party-ruled China. Family businesses of course have a very long tradition in China, and those long-standing family firms gave rise to a large number of important enterprises. Specifically, the 19th and early 20th century saw apparently "modern" enterprises grow out of family businesses, which increasingly engaged with the law and legality after promulgation of the *Gongsilü* in 1904 and successor statutes and regulations. Between 1904 and 1908, 272 companies registered with the Qing government, and more than 50% of them as what we would recognize as joint stock companies with limited liability.[66] Indeed, after the fall of the Qing dynasty in 1911, and into the uncharted waters of the Provisional Republic, the Beiyang Government of Yuan Shikai, and the warlord contest that followed, family businesses continued to register as joint stock companies with whatever Beijing-based regime claimed the title of national government. Importantly, although registered as companies under then-applicable corporate law, many of the apparently incorporated family businesses were governed in contravention of law and entirely pursuant to norms applicable to family partnerships with no separation of ownership and management (at least with respect to family owners) and scant regard, even hostility towards, stranger investors. In that sense – formal corporatization under law with incumbent control powers undisturbed – such incorporated family businesses show a similarity to the PRC's corporatized SOEs. In addition, and as described with respect to Zhang Jian's "central accounts" office for his Da Sheng group of entities, these incorporated family business also used the office of "financial controller" to allocate finance capital within the corporate group and its controlling shareholders with the same lack of respect for legal person or independent accounting unit boundaries seen in today's PRC finance company transactions and the diversions of value implemented by official patrons of the *guandu shangban* and *guanshang heban* enterprises.

Part III – Commonalities and Distinctions

The unavoidably superficial and perhaps over-specific recitation above should allow observers of the modern PRC's corporatized SOEs to see distinct commonalities between China's largest companies today and their firm ancestors from the late 1800s and early to mid-1900s. Above all, each generation of firm institution reflects acceptance of the strong Legalist assumption that state control of the key instruments of the productive economy was and is necessary in order to bring wealth and power to the Chinese nation. This assumption, at least in my mind, strongly refutes a long time counter-assumption (foreign and Chinese) -- one I find a touch "Orientalist" or at least mildly exoticizing -- which speaks to the hostility of the apparently Han dynasty-victorious philosophical "Confucian" tradition to merchant (private, commercial) activity *per se*. Reflecting on history, I believe we can see an almost unshakeable view that the Chinese state, of whatever species, must control industrial development, and the instruments that can bring about such development.

Second, it seems clear that one of the key policy drivers supporting large-scale and state-controlled Chinese enterprises is the desire to create instruments that can resist the political and economic incursions in China made by foreign firms or simply aggregations of capital managed by non-Chinese interests. Even though it seems slightly ironic in a world where PRC enterprises "march outside" (*zou chuqu*) seeking control of assets and businesses outside of China, we must see the project of firm development that commenced in the 19th century as in part defensive, and in the modern era, effective.

[66] Köll, *supra* note __, at 17.

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Third, the same mix of policy imperatives over more than one hundred years led to the same kind of firm institution in the 1880s as we now see in the late 2010's: intent on maintaining state control but creating entities that might defend against foreign capital and competitors, and yet desirous of raising enough capital to fund the appropriate scale of operations without disturbing the state's incumbent control position, and where the state cannot or will not pony up with that capital, the easy answer is public capital markets financing which introduces significant funds to the state-dominated firm alongside the assurance of passive or entirely dominated "stranger" investors. Thus was born both the initial *guandu shangban* entity described above, and the (still) state-dominated corporatized SOE issuer collecting capital on the world's capital markets with a decidedly minority float (and the public capital markets accessing company predecessor, the Chinese-foreign joint venture which from the late 1970s matched foreign capital (and know-how) alongside mostly insolvent state-owned assets).

Fourth, in both eras, state law seems to have little traction on or relevance for what is the quintessential "legal" form, the modern corporation with legal personality, limited liability for shareholders, centralized management and alienation of shareholders, and accountability of managers to owners, all conferred *by law*. I have noted above that China's first firms were created without benefit of any statute, regulation, or even Qing Emperor's edict, but instead came as a policy innovation from a then powerful government official. Even when something like law did appear in 1904, these corporate entities either acted outside of such mundane constraints, or imposed work-arounds which thoroughly gutted any law-based architecture, rules or standards, any possibility of voicing minority shareholder rights or enforcing governance constraints. Similarly, even though the PRC's first post-Revolution Company Law appeared in 1994, and was well and expertly re-written in 2006, it still has embedded in it an entire section (*i.e*., the part regarding the WSOC sub-species of LLC) and many provisions with an extreme "shareholder orientation" (pernicious, where corporatized entities are dominated by a Party State controlling shareholder) which only make sense for the establishment of corporatized SOEs with no, or radically disempowered minority shareholders. As many commentators have remarked, the PRC Company Law was never imposed upon corporatizing SOEs, instead the corporatization without privatization program has almost fully cannibalized China's "modern enterprise" system aspirations and the law that shapes and enforces it. In the modern case then, the seeds of a thoroughgoing disrespect of company law, shareholder protections and managerial accountability reside in the PRC Company Law itself.

Fifth, the firms in both eras are established and able to operate only with the contribution of public, or non-privately owned assets into the apparently autonomous corporate vehicle, and in an environment with quasi-monopoly protections provided to the enterprise by the state promoter, regulated pricing (in the form of discounted inputs or guaranteed margins embedded in revenues), and something like a fixed income return to non-state investors. Thus, such companies are anything but entrepreneurial or (for initial investors) risk-bearing, but instead represent the ability to purchase a fixed return *via* participation in a state-protected monopoly or franchise.

Sixth, these Chinese firm establishments across more than a century share a kind of perpetual contest over who precisely will govern these massive aggregations of capital, a contest between state (court, or Party) functionaries on one side, and private sector entrepreneurs ("merchants" and "merchant" participation in the Qing), on the other. Through Chinese history, the respective power balance has been extremely fluid, and as noted above, made more complex given the opportunistic migration of "official"-

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side personnel to the "merchant" side (very often along with control of what were state assets). This contest is unavoidable, because assets and governance power must be tied to individuals or networks of individuals and cannot be the instruments of the paradigmatic "absent principal", the imperial court or "all the people" (or "the state" or the Party behind the Party State). Nonetheless, this struggle over governance of firms and their productive assets has very serious implications for the efficiency gains that can be wrought from them, and the transfer of public assets into what looks like a private sector. Moreover, it has significant implications for the extent to which generally applicable state legal norms or regulation can be enforced or effective against industrial assets and corporate actors who are, or were, owned by or representing the same state that promoted the enterprise.

Seventh, this look back in history reveals extremely clearly the roots behind the particular PRC institution that is the corporatized SOE group "finance holding company". As noted above with respect to Zhang Jian's Shanghai "Central Accounts Office", as was a common feature of family business consortia in China and the Chinese diaspora, and as functioned through the person of the sponsoring official in the earliest days of the *guandu shangban* firms (*e.g.*, Li Hongzhang, Zhang Zhidong, Sheng Xuanhuai, etc.), the history of Chinese firms shows the presence of an institution (or a person) which directly managed group governance and financing, *without any regard for legal boundaries, property rights, or governance structures*. It is not our place to offended by such obvious disregard for these formal relationships. Instead, we can simply recognize that, for good or ill, PRC enterprise groups, even with companies listed on the world's most mature markets and subject to the most "modern" corporate law and securities regulation, still exert managerial and financial control over their group entities through such institutions, and still in disregard of formally proclaimed boundaries or governance relationships. This insight is useful not only in understanding the function of finance holding companies in the PRC, but also the superior Communist Party system that sits behind all formal (legal) enterprise institutions, like the board of directors, officers corps, etc.

Finally, this historical consideration of Chinese firm development from the mid-1800s on demonstrates a pattern that is also discernible today: These aggregations of state assets (or access to a state franchise or monopoly) are initially financed by external investors invited in with the promise of significant enterprise autonomy and, usually explicitly, shareholder wealth maximization. Admittedly, those promises might be subordinate to what in the Qing was a "guaranteed return" and the chance to make money in the embrace of a state-enforced monopoly, yet they appeared to be important promises at least from the standpoint of central government policy-makers so anxious to attract such investment. (Just as later in Chinese history, under both the Qing court and later the Communist Party of China, guarantees residing in formal "law" seemed important.) Notwithstanding those initial promises, however, both in the late Qing and in the recent PRC, the trajectory whereby the state has reasserted its governance power over such assets after initial promotion and financing is extremely common. In history, this has occurred both with the financial success of the enterprise, or the occurrence of a broader political or military crisis. The only real deviation from this pattern has occurred when former state functionaries leave their official role and misappropriate what were state assets (albeit financed by external investors) to assert governance over them – and the returns – as non-state actors (*e.g.*, Sheng Xuanhuai and Zhang Jian in the late Qing, PLA officers in the 1990s, the insiders connected to Pingan and Anbang in the 2010s, etc.)

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Of course, it goes without saying that China, and the world, in the late 1800s and the 2010s, are very different, and some of those differences frustrate the effort to see a useful identity between the state-promoted firms of long ago and the PRC's present behemoths. China's level, and style, of engagement with the outside world is of course radically different, although in this context, only better in that the PRC and its corporate issuers are able to access a much deeper global market for capital (compare Shanghai's Fuzhou Road Teahouse Exchange from the 1880s and the New York Stock Exchange presently). Likewise, the pressures that China faces, and the occasional "shocks" it must navigate are of a different order (contrast the defeat of the Qing empire by the upstart Japanese in 1895 and the humiliation of the Treaty of Shimonoseki, on one side, and the lesser shocks presented to the PRC by the WTO accession in 2000, and the Global Financial Crisis in 2008). The situation in the late 19th century was dire for China, and constituted an existential threat to the very fact of imperial government (duly overthrown in 1911). Nonetheless, both eras presented the same development and nation strengthening imperatives, which as I have tried to suggest here shaped similar responses at least insofar as enterprise establishments was and is concerned. Finally, by way of example, the development of a domestic legal and regulatory system in China, and engagement by China with external legal and regulatory systems, are now of a completely different order than what they were at the end of the 1800s. That being true, it only highlights for me the strong persistence or path dependency of certain institutions, arrangements and practices related to enterprise formation, financing and governance stretching back more than a century ago, and notwithstanding real advances in what the PRC calls "legal construction".

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Part IV -- Conclusion

In this article, I have tried to draw a line between specific institutions that arose or were promoted by the Qing court in the latter part of the 1880s and the contemporary PRC's corporatized SOE enterprise groups and their domestically- and internationally-listed subsidiaries.

My aim has been to show that the PRC's program of "corporatization without privatization" -- whereby traditional SOEs were transformed into companies limited by shares under the PRC Company Law and financed through the public capital markets (domestic and foreign), but continue to be managed by non-professional CCP *nomenklatura* appointments, and feature transparent and *ex ante*-understood exploitation of non-state capital investors by controlling (state) shareholders empowered under a "shareholder-oriented" corporate law -- is not something that rose from a blank slate in the mid-1990s.

Instead, these modern, PRC era, institutions have their roots in very similar enterprise establishments conceived in the middle 1880s and continuing right through to the start of the Anti-Japanese War -- wherein the state promoted large scale enterprise in protected or monopoly sectors critically necessary to build China's "wealth and power" with the promise of a guaranteed return and non-state management, all as a means to attract non-state capital investment.

In the modern case, this program has succeeded beyond the wildest dreams of any PRC policy maker, allowing that nation to finance the world's largest (by market capitalization) enterprises critical to China's industrial development policy and ability to compete globally, without any promise of autonomous management much less ousting of state functionaries from their management role.

Indeed, if the comparison holds, it only means that the future trajectory of PRC firm development will see ever-increasing assertion of state control over such enterprises as the financing mechanism has worked and continues to work well, and there is no cost associated with, or real resistance – political, economic, or legal – to, such state controlling shareholder domination when identified. There are only two ways in which I see that this trajectory in the direction of increasing state control shareholder domination may be altered. First, if state-origin insiders continue to misappropriate state assets initially placed under their governance power and convert them and the associated value flows to private or non-state property, then there may be enough domestic political resistance – elite and popular -- to re-think the process and its institutional expressions. (The PRC is seeing some of this resistance in the course of the still very popular Anti-Corruption Campaign being implemented by Xi Jinping and Wang Qishan.) Second, there is the chance, but only a slim chance, that foreign capital participation in these enterprises (and eventually perhaps domestic investor participation), and the expectations of such investors regarding formal legal constraints and enforcement, may act to push back against oppression or detrimental self-dealing by the control shareholders and/or its agents, or price discount unacceptably for the issuers involved. I note that this possibility is slim because the investor population that now participates in the modern PRC's version of the late Qing's *guandu shangban* or *guanshang heban* enterprise is much more diffuse and distant, and never had the expectation dear to the late 19th century "merchant" investor/operators of any management influence in the first place. In a sense then, a 20th century Communist Party-led government navigating modern, global, capital and information markets and a real legal system has achieved for its enterprises and national development strategy what a 19th century imperial regime could not for its enterprises or industrial development, even without the burdens of international investment explanations or a developed legal or regulatory system.

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