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### Fiduciary Principles in Chinese Law

Nicholas C. Howson

*University of Michigan Law School, [nhowson@umich.edu](mailto:nhowson@umich.edu)*

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THE OXFORD HANDBOOK OF

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FIDUCIARY  
LAW

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*Edited by*

EVAN J. CRIDDLE, PAUL B. MILLER,

*and*

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## CHAPTER 32

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# FIDUCIARY PRINCIPLES IN CHINESE LAW

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NICHOLAS C. HOWSON

### I. INTRODUCTION

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CHINESE history evidences a substantial use and understanding of something like fiduciary obligations, especially in the private enterprise and clan organization contexts. This chapter, however, focuses narrowly on: (1) developments in law and regulation in the People's Republic of China (PRC) after the early 1980s, and (2) the advent and elaboration of what the Anglo-American legal system calls "corporate fiduciary duties" (including, for this chapter, partnership fiduciary duties).

The limited focus of this chapter is not meant to imply that other jurisdictions like Taiwan, the Hong Kong and Macao Special Administrative Regions, or Singapore do not matter, or do not have very substantial and well-articulated traditions of fiduciary law and corporate fiduciary duties. Quite the opposite; all of these jurisdictions have long and sophisticated traditions in precisely these areas, and several explicitly use the Anglo-American common law and equity court systems.

My focus on the *Reform-era PRC* here seems desirable because of the extraordinary relevance of the PRC's legal and governance system for the developing global economic, political, and legal orders, and because this area of the law in China began from a blank slate. Indeed, many readers of this chapter may be surprised that there is any notion whatsoever of fiduciary law (in this case, the separate doctrine of corporate fiduciary duties)—formal or applied—in China.

These truths also support the focus here on *corporate* and *partnership* fiduciary duties law specifically, rather than an analysis of broader developments in fiduciary law in modern China. Without doubt, fiduciary law (including trust law) is an area where there has been significant activity in China, in particular with respect to the passage of

substantive laws.<sup>1</sup> Yet aside from formal analyses by academics of how the texts of various recent statutes related to trust law might be conformed to “international standard” or employed, there is a real dearth of evidence of those principles being applied by Chinese state institutions, whether the courts or any state regulator. The difference with respect to the law of fiduciary duties, and its application to China’s business entities, is striking. At the present time, PRC-domiciled or controlled corporate entities stand as the largest—whether by market capitalization or revenues—in the world. Moreover, the PRC’s economic reform program, started in the late 1970s and designed to create a “Socialist Market Economy,” has resulted in the formation of hundreds of thousands of PRC-domiciled legal person enterprises that are (1) the domestic drivers of China’s remarkable growth story over almost three decades and (2) the leading identity of China’s “going out” policy of investment in and acquisition of foreign firms and assets. A deeper understanding of how these entities, so important both to China’s domestic economy and the global economy, are governed is critically important in the present age. Equally important is a sophisticated understanding of the checks on, and accountability for, entity leadership or control parties—many with significant political not economic or legal, endowments—provided by new, and explicitly legal, conceptions of fiduciary duties, and how these principles mesh, or don’t, with the formal legal system and the all-embracing political system.

Finally, some might also question an analysis of the alleged creation and elaboration of corporate fiduciary duties in the PRC because such legal duties originate in the Anglo-American, common law (and equity), and capitalist contexts, an environment radically distinct from the modern PRC’s traditional Chinese cum Soviet-inspired, civil law tradition-like, legal system. In my view, this is not a valid objection now (if it ever was). That is because of the extraordinary rise of the PRC’s corporations, their explicit (if partial) modeling on U.S. corporations, their interaction with global capital markets acting as a prod for engagement with the U.S. model, the at least rhetorically celebrated virtues of separation of ownership and management as a spur to production efficiency and the efficient allocation of capital through functioning capital markets, the rise of a shareholder rights movement in the PRC, and—as readers of this chapter will see—the amount of time and resources China’s legislators, regulators, courts, academics, civil society actors, and others have dedicated to creating, explaining, contesting, and implementing (whether via adjudication or enforcement) corporate fiduciary duties.

In telling this story, I seek to demonstrate how a particular set of legal doctrines originating in a distinct legal, political, and economic system have been given life by private actors (both investors and the fiduciaries who seek to extract investment capital from those investors) and state institutions embedded in a political economy vastly different from the homeland of those doctrines. The process has been driven largely by domestic

<sup>1</sup> See, e.g., *Zhonghua Renmin Gongheguo Xintuo Fa* [PRC Trust Law] (passed by the 21st Standing Comm. of the 9th Nat’l People’s Cong., Apr. 28, 2001, effective the same date) and what is designed to be the first book of “General Principles” in a future PRC Civil Code: *Zhonghua Renmin Gongheguo Minfa Zongze* [General Rules of the Civil Law of the PRC] (passed by the 5th Session of the 12th Nat’l People’s Cong., Mar. 15, 2017, effective Oct. 1, 2017).

PRC investors, managers, and state institutions, and not, as some would suppose, the demands of foreign investors.

## II. THE ADVENT OF CORPORATE FIDUCIARY DUTIES

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Basic conceptions of corporate fiduciary duties entered Chinese law and practice through at least three separate tracks: academic, regulatory, and jurisprudential.

### A. Academic

First, I address the “academic” story, and how the success of academic resistance to Anglo-American style fiduciary duties in 1993 spurred countervailing initiatives by regulators and the judiciary in the decade before 2005.<sup>2</sup> Prior to passage of the 1994 PRC Company Law, for most senior PRC academics there was only disdain for the Anglo-American idea of corporate fiduciary duties and a business judgment rule subject to private enforcement before judicial institutions. Instead, most PRC academics understood a stronger affiliation between China’s then just-developing corporate law system and the doctrinal tradition alleged to hold sway in two other “East Asian” (meaning “Confucian” heritage) and “civil law family” jurisdictions with their own “modern” assumption of capitalist institutions and technologies: Japan and Taiwan.

Both Japan and Taiwan originally structured their notion of corporate directors’ duties on the Roman law concept *mandatum*, or mandate, which arrived in Asia via Japan’s immediate translation into Japanese and almost word-for-word enactment of Germany’s new civil code, the *Bürgerliches Gesetzbuch* (BGB), at the end of the nineteenth century. “Mandate” (*i’nin* in *kanji* for Japan’s statutes, and (in *Pinyin* romanization) *weiren* or sometimes *weituo* in Chinese characters) understood a consensual contract, written or oral, by which one party (the mandator) requests another (the mandatary) to perform a service without compensation, and the mandator promises to indemnify the mandatary against any loss. Under Roman law, the arrangement was necessarily gratuitous, as the mandatary was supposed to act pursuant to a moral duty, or as a friend of the mandator. Consistent with this moral charge, and balancing the indemnification obligation of the mandator, was a standard that required the mandatary to use something like reasonable care in performing under the mandate.

<sup>2</sup> See Nicholas Calcina Howson, *The Doctrine That Dared Not Speak Its Name—Anglo-American Fiduciary Duties in China’s 2005 Company Law and Case Law Intimations of Prior Convergence*, in *Transforming Corporate Governance in East Asia 193* (Hideki Kanda, Kon-sik Kim & Curtis Milhaupt eds., 2008) [hereinafter *Doctrine That Dared Not*].

For corporate law, this doctrinal position is explicitly enunciated in what is now Section 330 of the Japanese Corporate Code:<sup>3</sup> “The relationship between a company and its directors shall be [construed] in accordance with the provisions regarding mandate.” The “mandate” idea is further elaborated at Article 644 of the Japanese Civil Code, which states that the mandatary (i.e., the corporate director) has a duty of “due care of a faithful manager” toward the mandator (i.e., the company). These same provisions and doctrinal settlements were echoed directly in Article 192 of Taiwan’s Company Law (for the mandate relationship) and Taiwan’s Civil Code (for the standard of care operating under the mandate relationship).

Japan and Taiwan each subsequently built upon these translated aspects of the German civil law, both because of the strong U.S. influence on the two nations after World War II and because of firms of both jurisdictions’ increasing engagement with global capital markets. There is a dispute in the Japanese law literature as to how precisely Japan did this. Either it was merely confirmed or explained in 1970 by the Japanese Supreme Court’s application of what some think was a preexisting (from 1896) “duty of loyalty,” or it was imported in 1950 by ill-informed American Occupation era U.S. law drafters by writing an apparently separate “duty of loyalty” into the Japanese Commercial Code and then the Corporate Code (the idea being that the “mandate” obligation in Japanese law from 1896 did not encompass the duty of loyalty).<sup>4</sup> Whatever the origin of this explanation or addition for Japan, Taiwan built on the German-Japanese inheritance with 2001 amendments to its Company Law, which, like modern Japan, emphasized a separate “duty of loyalty” and made explicit the “mandate” basis (and associated standard of care) for directors’ duties, as follows:

Article 23. The responsible persons of a company should loyally (*zhongshi*) implement their duties and do their utmost to take the duty of care (*zhuyi yiwu*) of a good [faith] manager (*shanliang guanlire*); if these duties are contravened so that the company suffers harm, then [such responsible persons] shall be liable for compensation of such harm.

The Japanese and Taiwanese developments sketched out immediately above had a strong influence on senior PRC corporate law academics and key drafters of the PRC’s first Company Law in the early 1990s. As the PRC commenced corporatization of state-owned assets in the late 1980s and early 1990s and simultaneously began to grapple with the substantive legal norms that would be applied to the new “corporate” and “legal” entities, those same academics vigorously critiqued the idea of incorporating Anglo-American style corporate fiduciary duties into China’s law. Conversely, they supported a strong declaration of doctrinal affinity to the Roman law “mandate” idea in China’s hoped-for equivalent of a civil code. There is no better articulation of this posture than the 1993 writing by the late Professor Wang Baoshu, a key participant in the drafting of the PRC’s first corporate law:

<sup>3</sup> Previously, Section 254-1(3) of the Japanese Commercial Code. See J. Mark Ramseyer & Masayuki Tamaruya, *Fiduciary Principles in Japanese Law*, this volume, at 646.

<sup>4</sup> See *id.*, at 647–649.

For China's legislators and corporate law scholars, we must conform to our own national situation (*guoqing*), and introduce doctrine that is consistent with China's legal tradition. . . . Most importantly, the [fiduciary duties] system originally comes from the Anglo-American system, which is very unfamiliar (*mosheng*) for China—a nation used to a very long tradition of the civil law system. If we use this concept to explain the relationship between a director and the company, it will be difficult for people to become accustomed to it or accept it in their hearts. Conversely, if we introduce the mandate (*weiren*) concept to explain the relationship between a company and its directors, it conforms quite well to the customs and traditions of the Chinese people. We must pay attention to the fact that whenever we seek to evidence that the director's position is determined by the mandate doctrine, there must be corresponding stipulations [describing that doctrine] in the company law. . . . First, we should add further stipulations to the [1986] General Principles of the Civil Law regarding the mandate [relationship]; . . . second, we should clearly stipulate in the [1994 PRC] Company Law that the relationship between the directors and the company is determined by the stipulations on mandate.<sup>5</sup>

In the resulting legislation, Wang's position won the day—mostly. For, as noted in Section II.B, the 1994 PRC Company Law contained no pronouncement of Anglo-American style corporate fiduciary duties, even if it did not explicitly declare affiliation with the mandate doctrine, and the never-passed PRC civil code was not able to carry the same concept into law.

There was also a momentary, pre-2006, effort by some PRC academics to use Article 25 of the 2001 PRC Trust Law—asking trustees to “be attentive to duties and perform their obligations honestly, in a trustworthy way, prudently and effectively”—to regulate corporate fiduciaries.<sup>6</sup> However, the passage of the 2006 PRC Company Law made this project moot, and to my knowledge no PRC court has ever ruled on a question of corporate fiduciary duties with reference to the PRC Trust Law provisions on the duties of trustees.

## B. Regulatory

This doctrinally determined failure to include corporate fiduciary duties in the 1994 PRC Company Law spurred the public markets regulator and China's judicial institutions to pick up the slack prior to 2006, to which regulatory and judicial initiatives I now turn. On what I call the “regulatory” track, it is no exaggeration to say that corporate

<sup>5</sup> Wang Baoshu, Gufen Youxian Gongsì De Dongshi He Dongshihui [Directors and the Board of Directors at Companies Limited by Shares], 1 Waiguo Faxue Shiping [Foreign Legal Studies Commentary and Explanation] 5, 5 (1994).

<sup>6</sup> See Professor Liu Junhai in Xiandai Gongsifa (Di Er Ban) [Modern Company Law (Second Edition)] 506–507 (2011) (“As China adopted the Trust Law in April 2001 and the trust obligations stipulated in the Trust Law are higher than the obligations . . . of mandate under the [PRC] Contract Law, we could also use trust obligations to describe the relationship between the company and its directors, supervisors and senior executives in the PRC.”).

fiduciary duties for both orthodox fiduciaries and, more provocatively, controlling shareholders were injected into Chinese law from the early 1990s not by the PRC national legislature but instead by the PRC's early securities regulatory bureaucracy and, once the agency was established, the China Securities Regulatory Commission (CSRC), working alone and with other PRC administrative agencies.

As I have detailed elsewhere,<sup>7</sup> in June of 1993 and thus before China had a company law statute, the now defunct PRC Commission on Restructuring of the Economic System (CRES) issued a letter to the Hong Kong Securities and Futures Commission making a gloss on four Chinese characters then found in a CRES text supporting the establishment of PRC-domiciled companies limited by shares. This is the May 1992 "Opinions on Standards for Companies Limited by Shares" (Opinion on Standards for CLSs). The CRES letter was deemed necessary for the completion of the first initial public offerings and listings on the Hong Kong Stock Exchange (with American Depositary Shares (Receipts) for the same shares listed on the New York Stock Exchange) by PRC-domiciled issuers. Why? Because, or so it was believed in Beijing, the gloss provided an assurance to foreign investors that the issuer's directors and senior officers had traditional corporate fiduciary duties to the issuer. With that gloss on Chinese characters appearing in the 1992 Opinions on Standards for CLSs, the Chinese government absorbed all then current Hong Kong (and thus English) corporate fiduciary duties jurisprudence into Chinese law, at least for PRC-domiciled issuers issuing stock and gaining listings in the pre-1997 (and Handover) Hong Kong capital markets. Specifically, the June 1993 CRES letter stated that the four characters *chengxin zeren* appearing in the Opinions on Standards for CLSs and describing the duties of directors and senior management personnel "has the same type of meaning (*juyou leiside hanyi*) as *fiduciary duty* under Hong Kong law" (with only the words "fiduciary duty" here italicized appearing in English in the otherwise Chinese language letter). When, in late 1993, the form of the 1994 PRC Company Law<sup>8</sup> was promulgated, not only was there no explicit statement of corporate fiduciary duties<sup>9</sup> but the four characters glossed in the CRES letter of June 1993 were missing from the new company law statute now replacing completely the prior regulatory host for those important characters. In response, the CSRC immediately issued a regulatory "addendum" to China's new company law statute applicable to PRC-domiciled issuers with "overseas" listings, stating once again that directors and senior management personnel of such corporate issuers had the previously glossed duty of *chengxin zeren*

<sup>7</sup> See Doctrine That Dared Not, *supra* note 2, at 210–211.

<sup>8</sup> Zhonghua Renmin Gongheguo Gongsifa [Company Law of the PRC] (passed by the Standing Comm. Nat'l People's Cong. Dec. 27, 1993, effective July 1, 1994, and as amended Dec. 25, 1999, and Aug. 28, 2004) [hereinafter 1994 PRC Company Law].

<sup>9</sup> The 1994 PRC Company Law contained only a vague loyalty provision and a scattering of duty of loyalty-related prohibitions, at arts. 59 (echoing Japan's Commercial Code Section 254-2 and later Corporate Code Section 355, instructing "loyal" (*zhongshi*) performance, protection of the interests of the company, and prohibiting acting for personal gain), 60 (prohibition against misappropriation of firm assets), 61 (prohibition against competition and unapproved related party transactions), 62 (confidentiality), and 123 (applying the foregoing provisions for limited liability companies to companies limited by shares).



appearing in the Opinions on Standards for CLSs, thereby maintaining the vehicle for the absorption of Hong Kong jurisprudence relating to “fiduciary duty.”<sup>10</sup>

These rather unique moves by CRES and the CSRC designed to inject Anglo-American common law (specifically Hong Kong and English) corporate “fiduciary duties” into Chinese corporate governance law were only the start of a sustained campaign by the PRC bureaucracy tasked with supervision of China’s listed companies to introduce and solidify corporate fiduciary duties in Chinese law, a campaign that culminated in the formal articulation of duty of loyalty and duty of care in the 2006 company statute described in Section III.A. This pre-2006 project was implemented across a wide spectrum of administrative action. The project encompassed, for example, nonlegally binding “principles for corporate governance” applicable to listed companies, which went beyond the 1994 PRC Company Law to describe Delaware-type corporate fiduciary duties of “care,” “loyalty,” and “good faith.”<sup>11</sup> It also included the promulgation of the forms of articles of association required to be adopted by PRC public capital markets issuers (necessary for issuers to be granted public offering and listing approval). In the latter case, in 1994 the CSRC promulgated “mandatory” articles of association for overseas listing PRC-domiciled issuers,<sup>12</sup> and then in 1997 “guiding” (but equally mandatory) articles of association for PRC-domiciled issuers listing only on China’s domestic exchanges.<sup>13</sup> (As noted in Section III.A, these “guiding” articles of association for domestically listing PRC-domiciled issuers were amended in 2006 to conform to the new 2006 PRC Company Law articulation of corporate fiduciary duties.) Chapter XIV and Article 16 of the Mandatory Articles of Association for Overseas Listing Companies force issuers to have corporate directors and senior management undertake the *chengxin* obligation (the pre-2006 proxy for “fiduciary duties” as described in Hong Kong law jurisprudence), and Chapter V and Articles 80 and 81 of the Guidance Articles of Association for domestically listing PRC-domiciled issuers force issuers to have directors under obligations of loyalty (*zhongshi*), prudence (*jinshen*), and diligence (*qinmian*) (after 2006 the Chinese characters employed to signal a “duty of care” obligation), and act in a conscientious (*renzhen*) manner.

This same CSRC-led project took its most substantive turn with the promulgation of administrative rules (tantamount in many ways to statute) that directly imposed corporate fiduciary duties on specific corporate actors. For instance, in 2001 the

<sup>10</sup> See Doctrine That Dared Not, *supra* note 2, at 211.

<sup>11</sup> See Shangshi Gongsi Zhili Zhunze [Principles for Listed Company Corporate Governance] (promulgated by CSRC and State Econ. Trade Comm’n, Jan. 7, 2002), zhengjianfa [2002] 1, art. 33 (“Directors should undertake their responsibilities loyally (*zhongshi*), in good faith (*chengxin*) and diligently (*qinmian*) in accordance with the best interests of the company and the entire body of the shareholders.”).

<sup>12</sup> See Guanyu Zhixing “Dao Jingwai Shangshi Gongsi Zhangcheng Bibeitiaoquan” de Tongzhi [Notice Regarding Implementation of the “Mandatory Articles of Association for Overseas Listing Companies”] (promulgated by the State Council Sec’s Comm’n & CRES, Aug. 27, 1994), zhengweifa [1994] 21, and the attached form of articles of association.

<sup>13</sup> See Guanyu Fabu “Shangshishi Gongsi Zhangcheng Zhiyin” De Tongzhi [Notice Regarding the Issuance and Promulgation of the “Guidance Articles of Association for Listed Companies”] (promulgated by CSRC, Dec. 16, 1997) zhengjian [1997] 16, and the attached form of articles of association.

CSRC promulgated its “Measures for the Acquisition of Listed Companies,” which declared—without any basis in Chinese law at that time—that a target board of directors, supervisory board, and high-level management had what amounted to fiduciary duties to the target firm in approving or recommending an external offer and predecision process requirements.<sup>14</sup> These duties were very similar to those identified in the Delaware Supreme Court’s 1985 *Van Gorkom* decision.<sup>15</sup>

Similarly, the CSRC also took the provocative step of declaring the existence of fiduciary duties for *controlling* shareholders (and thus giving rise to a common law–derived corporate “oppression” claim for minority shareholders) in a series of enactments starting in 2002<sup>16</sup> and ending in 2005,<sup>17</sup> and thus before the same idea was made concrete in Article 20 of the 2006 PRC Company Law. This move was, and remains, provocative, because the long process of “corporatization without privatization” of China’s state-owned enterprises has resulted in a good number of corporatized state-owned enterprise assets where the resulting controlling shareholder(s) (and their insider appointees) are identities of the supremely empowered PRC party state.

## C. Judicial

Third, and finally, I address the “judicial” or “jurisprudential” track of developments. Here I simply report what my own research<sup>18</sup> has shown quite clearly: that even before the 2006 “legal basis” for corporate fiduciary duties, the PRC People’s Courts did in fact enforce corporate fiduciary duties, and even enable procedural innovations like the corporate derivative action, in adjudications nationwide.

Here in very summary terms is what that research shows about pre-2006 developments in the PRC:

<sup>14</sup> See Shangshi Gongsi Shougou Guanli Banfa [Measures for the Administration of Acquisitions of Listed Companies] (promulgated by CSRC, Dec. 1, 2002) zhengjianhuiling [2002] 10, art. 33 (holding that the duty of the target’s board, supervisory board and high-level management is to not harm the lawful rights and interests of the shareholders or the company) and ch. III (laying out the *Van Gorkom*-type requirements establishing conformity with the required duty of care).

<sup>15</sup> See Julian Velasco, *Fiduciary Principles in Corporate Law*, this volume, at 69–70.

<sup>16</sup> See, e.g., 2002 Listed Company Governance Principles, *supra* note 11, art. 19 (“Controlling shareholders have a fiduciary duty (*chengxin yiwu*) to the listed company and the other shareholders.”).

<sup>17</sup> See, e.g., Guanyu Jiaqiang Shehuigongzheng Gudong Quanyi Baohu De Ruogan Guiding [Several Regulations Regarding Strengthening Protection for the Rights and Interests of Public Shareholders] (promulgated by CSRC, Dec. 2, 2004) zhengjianfa [2004] 118, art. 5(i) (declaring that control parties/shareholders have *chengxin zeren*, the same pre-2006 term of art used to describe corporate fiduciary duties in Chinese law).

<sup>18</sup> See, e.g., *Doctrine That Dared Not*, *supra* note 2 at 193–194, 197–198, 213–216; Nicholas Calcina Howson, *Corporate Law in the Shanghai People’s Courts, 1992–2008: Judicial Autonomy in a Contemporary Authoritarian State*, 5 U. Pa. E. Asia L. Rev. 303, 339, & 344 (2010) [hereinafter *Corporate Law in the People’s Courts*]; and Donald C. 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, 263–269 (Dan W. Puchniak, Harald Baum & Michael Ewing-Chow eds., 2012) [hereinafter *Pathway to Minority Shareholder Protection*].

- Chinese judges did in fact, but relatively rarely, enforce basic corporate fiduciary duties (and apply related standards, including in the duty of care realm a business judgment rule) prior to 2005, in the absence of any legal basis or authorization for the same, and in situations where (1) the defendants had not breached their affirmative statutory, corporate constitutional, or contractual obligations, or (2) the defendants had also violated such positive norms but the breach of fiduciary duties was nonetheless understood as separate;
- There is abundant evidence that the People's Courts rejected or avoided taking corporate fiduciary duties-related cases, and/or rendered judgments avoiding invocation of such duties (often by utilizing the proxy legal norm described in the following bullet point);
- The PRC People's Courts enforced corporate fiduciary duties-type obligations via an important available proxy promulgated almost a decade before the 1994 PRC Company Law, the workhorse, BGB-origin, Article 4 of the 1986 General Principles of Civil Law (GPCL) commanding "good faith" (and "fair dealing") in the commercial realm;
- What enforcement there was of corporate fiduciary duties was largely left to the PRC securities regulator via the rendering of administrative sanctions against public company officers and directors (known not from the listings on the CSRC website, which simply list "fiduciary breaches" (usually not related to corporate fiduciary duties, but disclosure breaches), but from the Chinese press where a sanctioned director or officer contested the application of a penalty by the CSRC);
- The courts enabled corporate fiduciary duties claims by permitting an ad hoc derivative action, nowhere authorized in legal or regulatory norms, and explicitly so as to work around the power of a defendant (a director or the firm "legal representative") to block the claims of the formal beneficiary of the duties and the party suffering harm (the corporate entity);
- PRC courts also allowed shareholder plaintiffs to bring claims on behalf of defendant-controlled entities explicitly as derivative actions but based on a 1994 Supreme People's Court "approving response" (*pifu*) formally only applicable to a foreign invested enterprise limited liability company but applied to entirely domestically invested companies subsequently;
- The great majority of fiduciary duties cases handled by judicial institutions pertained to (1) closely held limited liability companies, and not widely held companies limited by shares, and never to companies limited by shares with a public float; and (2) loyalty or breach of trust type claims, and not what after 2006 became available as duty of care cases;
- The courts struggled in duty of care cases with what they clearly intuit should be a "business judgment rule" equivalent (at least for cases where something less than "gross negligence" is implicated);
- The PRC courts were able to push back confidently against the inherited civil law status of entity "legal representative," and distinguish between that person's duties as the de jure agent and an elected director's fiduciary duty to the legal entity;

- Chinese People's Courts did look to other, like, judgments—even from external People's Court systems—for aid in adjudicating cases before them;
- The CSRC acted as a substitute for the judiciary in the enforcement of basic duty of care doctrines against corporate directors (at public companies)—both regularly elected directors and so-called “independent directors”; and
- There is evidence from pre-2006 People's Court adjudications of some institutional cross-fertilization, where the Chinese judiciary understood and enforced the CSRC-required mandatory or guiding articles of association provisions regarding corporate fiduciary duties (described previously under the “regulatory” track) as independent legal obligations, and not merely contractual corporate constitutional commitments by the issuer, its directors and management, and investors.

In sum then, it seems clear that before 2006, and in the absence of statutory authorization for corporate fiduciary duties claims, Chinese plaintiffs pursued such claims directly and/or derivatively against orthodox fiduciaries and controlling shareholders, Chinese judges accepted such claims, and final judgments were written enforcing these apparently nonexistent legal obligations.

### III. CORPORATE AND PARTNERSHIP FIDUCIARY DUTIES AFTER 2006

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#### A. Corporate Law

On October 27, 2005, the Standing Committee of the PRC's legislature, the National People's Congress (NPC), passed an amended form of China's 1994 company law statute, hereinafter the 2006 PRC Company Law.<sup>19</sup> One of the most important changes in the wholly revised statute was the inclusion of Article 148, an entirely new substantive provision that for the first time in the history of the PRC articulated corporate directors' and officers' fiduciary duties, and did so in a fashion clearly sourced in the Anglo-American (and not European continental civil law) tradition: “Directors, supervisory board members and high-level management personnel should abide by the laws, administrative regulations and company articles of association, *and have a duty of loyalty* (zhongshi yiwu) *and duty of care* (qinmian yiwu) *to the company.*” [Emphasis added.]

Article 148 is complemented by a new Article 149 that fleshes out specific prohibitions, violation of which sound in breach of the “duty of loyalty” at last proclaimed in

<sup>19</sup> Zhonghua Renimin Gongheguo Gongsifa [The Company Law of the People's Republic of China] (passed by the 18th Standing Comm. of the 10th Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006) [hereinafter 2006 PRC Company Law].

statute,<sup>20</sup> and a cause of action for the same. The 2006 PRC Company Law provides for three other important things. First, fiduciary duties for *controlling shareholders* (buried in a clause facially authorizing third-party creditors' veil-piercing claims).<sup>21</sup> Second, a new derivative lawsuit mechanism<sup>22</sup> allowing for lawsuits "on behalf of" the injured corporation by the supervisory board or directly by shareholders. These lawsuits can be against both (1) directors and senior management personnel, and (2) "others" (*taren*), a term meant to include controlling shareholders acting in what the common law calls "oppression" to disadvantage minority shareholders.<sup>23</sup> Third, a much broader (at least compared to the 1994 statutory template) private right of action accruing to shareholders for lawsuits seeking remedies for breaches of law, regulation, or the company articles of association by directors or senior management personnel where such actions directly injure the interests of shareholders.<sup>24</sup>

Revolutionary as the foregoing items were, the new dispensation on corporate fiduciary duties in the 2006 PRC Company Law did not set forth: (1) a standard for the newly created duty of care prong, (2) any instruction for judicial personnel or regulators regarding something like a business judgment rule for duty of care adjudications,<sup>25</sup> or (3) anything sounding in the separate "good faith" fiduciary obligation that has so fascinated the Delaware Chancery Court and the Delaware Supreme Court in the United States.<sup>26</sup>

The proclamation of orthodox corporate fiduciary duties in the Chinese company law statute did not halt the parallel initiatives regarding corporate fiduciary duties already commenced by PRC administrative departments more than a decade before. In Section II.B, I have detailed how before 2006 the CSRC pursued its own unique program to inject corporate fiduciary duties into Chinese law and regulation applicable to *publicly held* PRC companies limited by shares with a domestic or overseas listing. Suffice to say here that the CSRC and associated agencies did not withdraw from the

<sup>20</sup> Including misappropriation of company funds, causing the dominated company to guaranty other parties' debt, self-dealing, corporate opportunities and competitive businesses, etc. See 2006 PRC Company Law, *supra* note 19, at art. 149.

<sup>21</sup> See *id.* at art. 20 ("Shareholders that oppressively use their shareholder's powers and cause losses for the company or other shareholders shall be responsible for compensation according to law").

<sup>22</sup> See Donald Clarke's and my critique of the new derivative action at *Pathway to Minority Shareholder Protection*, at 288–293.

<sup>23</sup> See 2006 PRC Company Law, *supra* note 19, at art. 152 (in cases where there is a breach of Article 150—the catch-all provision prescribing damages for breaches of law (i.e., Articles 20, 148, and 149)—allowing shareholders to petition the supervisory board, or if there is no supervisory board, then direct to the People's Courts, to bring suit "on behalf of the company" and, where there is refusal to act, then by the shareholders directly).

<sup>24</sup> See 2006 PRC Company Law, *supra* note 19, at art. 153 ("[W]hen directors and high level management personnel breach law, administrative regulation or the stipulations of the company's articles of association, thereby harming the interests of the shareholders, shareholders may bring an action in the People's Courts").

<sup>25</sup> See Lawrence A. Hamermesh & Leo E. Strine, Jr., *Delaware Corporate Fiduciary Law: Searching for Optimal Balance*, this volume, at 876–879.

<sup>26</sup> See Velasco, *supra* note 15, at 64.

action, but maintained their separate regulatory injection of corporate fiduciary principles into Chinese law,<sup>27</sup> or conformed preexisting norms to align more closely with the new statutory articulation. For example, and as already noted, the passage of the 2006 PRC Company Law made necessary a revision of the CSRC's 1997 "guiding" articles of association for domestically listing PRC-domiciled issuers to conform to the new 2006 PRC Company Law expression of corporate fiduciary duties.<sup>28</sup> In much the same fashion, the CSRC amended its 2002 Listed Company Acquisition Rules introduced earlier to conform the target's board's fiduciary duties to the 2006 PRC Company Law Article 148 formulation.<sup>29</sup>

It is important to see the CSRC's success on one part of the fiduciary duties project in light of the fact that the CSRC was not completely successful in imposing its design for corporate law generally, or fiduciary duties specifically, on the 2006 PRC Company Law itself, or in the immediate aftermath of that statute's promulgation and effectiveness. For instance, the CSRC's proposed veil-piercing mechanism featuring a lower standard for controlling shareholder liability to creditors was frustrated by institutions tied directly to the (state) controlling shareholders of the PRC's corporatized state-owned enterprises.<sup>30</sup> Similarly, in late 2007, the CSRC, acting in concert with the Legislative Affairs Office of the State Council, released for public comment and submitted to the PRC State Council a draft omnibus regulation (*tiaoli*), entitled "Articles for the Administration and Supervision of Listed Companies."<sup>31</sup> It was designed to remake the 2006 PRC Company Law for listed PRC-domiciled companies. These articles sought (1) to collect in one administrative norm all of the pre-2006 administrative rules and pronouncements affecting corporate governance at PRC listed companies (including those items actually included in the 2006 PRC Company Law), and (2) to impose additional legal obligations, including in the fiduciary duties line. These additional obligations were: (1) elaborated fiduciary duties for orthodox corporate fiduciaries; (2) *Caremark*-style<sup>32</sup> oversight duties; (3) Sarbanes Oxley-style certification of periodic reports and financial statements; (4) controlling shareholders/parties fiduciary duties; (5) a mandate that target boards procure "fairness opinions" in public company M&A transactions; and (6) a much-expanded private right of action for shareholders (acting directly or via the newly

<sup>27</sup> The instances are too many to recite in this chapter, but the CSRC and other PRC agencies have continued to promulgate rules, regulations, mandatory forms, and policy pronouncements, which command conformity with the post-2006 ideas of duty of loyalty (*zhongzhi yiwu*) and duty of care (*qinmian yiwu*), while continuing to use the post-1992 and pre-2006 term of art *chengxin* or *chengxin zeren*.

<sup>28</sup> See Shangshi Gongsi Zhangcheng Zhiyin [Guidance Articles of Association for Listed Companies] (promulgated by CSRC, Mar. 16, 2006) *zhengjiangongsizi* [2006] 38.

<sup>29</sup> See Shangshi Gongsi Shougou Guanli Banfa [Measures for the Administration of Acquisitions of Listed Companies] (promulgated by CSRC, July 31, 2006) *zhengjianhuiling* [2006] 35, art. 8 (employing the new statutory formulation for both duty of loyalty (*zhongzhi yiwu*) and duty of care (*qinmian yiwu*)).

<sup>30</sup> See Chao Xi, *Piercing the Corporate Veil in China—How Did We Get Here?* 5 J. Bus. L. 413, 423–427 (2011).

<sup>31</sup> Shangshi Gongsi Jiandu Guanli Tiaoli (Zhengqiu Yijian Gao) [Articles for the Administration and Supervision of Listed Companies (Comment Draft)], undated copy (and the PRC State Council's Legislative Affairs Office explanation and transcripts of related hearings) on file with the author.

<sup>32</sup> See *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

authorized derivative action) to sue on corporate fiduciary (not just securities fraud) claims. This 2007 attempt to rewrite the 2006 corporate law via administrative regulation issued by the PRC securities regulator ultimately came to nothing. However, the attempt demonstrates the ambition residing in the CSRC to craft and see to the enforcement of such corporate law norms, and stands as a marker for future enactments in law.<sup>33</sup>

## B. Partnerships

The year 2006 also saw a complete revision of the PRC's deeply flawed 1997 partnership statute, hereinafter the 2006 PRC Partnership Law.<sup>34</sup> That law provides for three basic forms of partnership under Chinese law: (1) a general partnership (*putong hehuoqiye*) analogous to a general partnership under U.S. state law; (2) a limited partnership (*youxian hehuo qiye*) analogous to the limited partnership form under U.S. state law but with no more than fifty limited partners permitted; and (3) a special general partnership (*teshude putong hehuoqiye*) analogous to the limited liability partnership in U.S. state law. Because most of the provisions of the Chinese partnership statute must work for all of PRC general partnerships, limited partnerships and limited liability partnerships (which can be managed by partners or nonpartner fiduciaries), there is no explicit declaration of generally applicable fiduciary duties obligations for partners similar to the clear articulation of such duties in the 2006 PRC Company Law for directors, officers, and supervisory board members. Instead, the 2006 PRC Partnership Law describes a number of positive mandates, prohibitions, and remedial provisions rooted in fiduciary norms and claims, and in the case of limited partnerships, a procedural vehicle for fiduciary litigation analogous to the corporate derivative action. This limited partnership-specific quasi-derivative action was designed to provide a mechanism for the limited partnership and its limited partners to hold the limited partnership's General Partner accountable, and was clearly inspired by the limited partner's derivative action under the U.S. Uniform Limited Partnership Act.<sup>35</sup> It comes only by negative implication: the 2006 PRC Partnership Law prohibits limited partners from involvement in management of the limited partnership.<sup>36</sup> However, one of the eight exemptions from that prohibition on limited partner action occurs where "in the event a General Partner neglects the exercise of its rights and powers, and a limited partner brings a lawsuit in the limited partner's own name to direct the performance of such rights and powers or in the

<sup>33</sup> See my discussion of this episode and its meaning in Nicholas Calcina 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, 684–689 (2014).

<sup>34</sup> See Nicholas Calcina Howson, Return of the Prodigal Form? Partnerships and Partnership Law in the People's Republic of China, in *Research Handbook on Partnerships, LLCs and Alternative Forms of Business Organizations* 390–411 (Robert W. Hillman & Mark J. Lowenstein eds., 2015).

<sup>35</sup> See Revised Uniform Limited Partnership Act §§ 1002–1005 (Unif. Law Comm'n 2001).

<sup>36</sup> 2006 PRC Partnership Law, art. 67.

interest of the limited partnership.”<sup>37</sup> This authorized action by one limited partner in the interest of the limited partnership thus does not trip the overall prohibition against limited partner involvement in limited partnership affairs, but is not truly “derivative” to the limited partnership because the claim and the proceeding accrue to one limited partner and not the limited partnership entire.

#### IV. THE UNDERSTANDING AND APPLICATION OF CORPORATE FIDUCIARY DUTIES BY STATE INSTITUTIONS AND PRIVATE PARTIES

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In this section, I provide a survey as to how the Chinese court system has engaged with the idea of corporate and partnership fiduciary duties in the period after 2006, and formalization of these doctrines in law.

Any analysis of state and private understandings of corporate fiduciary duties in modern China must focus on consideration of the PRC institution tasked with *ex post* application of such standards: the judiciary. Given space limitations in a chapter like this, I am unable to outline here basic characteristics, practices, and issues associated with the PRC judiciary to help make complete sense of the research observations regarding the private enforcement of corporate fiduciary duties. I will note, however, a couple of very important elements of the PRC judiciary and its function in this area. First, the modern PRC does not have what is called a common law system, which in this context means that each civil judgment is specific to the case, and the judgment neither looks to precedent arising from similar cases in the same Higher People’s Court system or in China nationally, nor stands as precedent for other People’s Courts decisions in the future. This is an important facet of PRC adjudication of corporate fiduciary duties disputes precisely because fiduciary duties adjudication is so closely tied to and dependent upon common law-style adjudication and the understanding and application of precedential decisions. Second, all observers would agree that the vast judicial bureaucracy composed of the People’s Courts formally arrayed under the PRC Supreme People’s Court and the provincial (or directly administered municipality) Higher People’s Court systems continues to face significant constraints with respect to technical competence, bureaucratic autonomy, and political independence.

The problem alluded to with the general term “political independence” allows me to state forthrightly some key considerations that determine the reality of fiduciary litigation before the PRC courts. First, the more politically important the actor in a lawsuit in China is, the more sensitive, and therefore subject to various kinds of interference, the

<sup>37</sup> *Id.* art. 68(vii).



lawsuit will be. The management and controlling shareholders of major companies in the PRC—especially companies which are the result of “corporatization without privatization” of preexisting state-owned enterprise assets—are very likely to be influential politically, nationally, or locally (especially where the corporate entity is headquartered, where it employs workers and where it pays taxes). In fact, they will usually be tied directly to local or national state or Communist Party organizations. As a result, effective pressure may be brought against local courts to protect such powerful actors from claims against them, especially where such individuals and organizations directly control the courts via appointments and direct budgetary power. For instance, some jurisdictions have a specific rule mandating that when a party from outside that area sues a locally headquartered or active enterprise, the People’s Court receiving the claim must get permission first from the local Party Committee to hear the case (or provide all-important “case establishment”), or the court must rule in accordance with the instructions of the local Party organ.

Second, there is a long-standing hostility to the possibility of lawsuits involving multiple plaintiffs or the interests of multiple parties in China regardless of the political backgrounds of named defendants. There is thus both reluctance of the People’s Courts to get involved with such lawsuits, and rules and practices which express the PRC Party State’s own aversion to them. The aversion to multiple plaintiff cases here can be different from the “local protectionism” cum protection of political actors alluded to immediately above, and is rooted in the Party State’s nervousness regarding any kind of mass action by nonpolitically or economically privileged citizens outside of the control of the Party or the Party State, and especially before a formally autonomous institution with, sometimes, ideas of its own. Even though corporate fiduciary litigation brought under the derivative action mechanism is *not* (necessarily) a “class action” familiar from securities law enforcement, in modern China the Party State and People’s Court officials alike will understand immediately how derivative lawsuits pertaining to widely held or listed companies, even where formally there is a single plaintiff (the company), will implicate the interests of a large number of common shareholders entering the courthouse to do battle with politically powerful insiders and controlling shareholders. Thus, the sensitivity to “group,” “mass,” or multiple-plaintiff claims noted in other areas of the Chinese legal system in action exists also for corporate fiduciary breach claims, especially for widely held or listed PRC companies.

To be specific with respect to the application and enforcement of fiduciary duties and the adjudication of corporate fiduciary duties claims by the PRC People’s Courts after 2006, my own research over more than a decade as well as others’ studies<sup>38</sup> have demonstrated the following issues that touch on the core concerns regarding the

<sup>38</sup> See, e.g., Wang Jun, *Gongsi Jingyingzhe Zhongshi He Qinmian Yiwu Susong Yanjiu—Yi 14 Sheng, Zhixiashi De 137 Panjueshu Wei Yangben* [Analysis of Litigation Regarding Company Management’s Duties of Loyalty and Care—Using 137 Judgment Opinions from 14 Provinces and Directly Administered Municipalities], 5 *Beifang Faxue* [Northern Jurisprudence] 24 (2011); Wang Jiangyu, *Enforcing Fiduciary Duties as Tort Liability in Chinese Courts, in Enforcement of Corporate and Securities Law—China and the World* 185 (Nicholas Calcina Howson & Robin Huang (Hui) eds., 2017).

competence, autonomy, and independence of China's judicial institutions in navigating these kinds of claims (and indeed many others). Again, because of space limitations I present these conclusions in summary form:

- Whereas in the pre-2006 context there was ample evidence of the People's Courts applying doctrines like corporate fiduciary duties without legal (statutory) authority or what Chinese lawyers fetishize as a "legal basis," after 2006 and the inclusion of Article 148 of the 2006 PRC Company Law and a clear legal basis for such doctrines<sup>39</sup> this is no longer an issue;<sup>40</sup>
- The large majority of cases touching on corporate fiduciary duties involve the closely held PRC corporate form—the limited liability company (*youxian zeren gongsi*). Cases involving the joint stock form (or companies limited by shares (*gufen youxian gongsi*)) are extremely rare. Even those cases are limited to closely held companies limited by shares without a public listing; there is a strict ban on adjudicating cases involving claims against corporate fiduciaries for widely held (i.e., with many shareholders), much less listed, companies limited by shares (i.e., in the eyes of the Chinese Party State, *too* many shareholders);
- The derivative action as a vehicle for the bringing of fiduciary claims is now used a good deal, but in a manner that hues closely to the 2006 PRC Company Law Article 152 requirements (with all of its defects) and solely with respect to the close company form, limited liability companies (*youxian zeren gongsi*), and never for companies limited by shares, closely held, or listed;
- The derivative action continues to be employed at closely held limited liability companies for what the Anglo-American system calls "oppression" claims, whereby a controlling shareholder has harmed its dominated subsidiary (and thus the minority interest in the subsidiary) and breached its 2006 PRC Company Law Article 20 duty;<sup>41</sup>
- Fiduciary litigation concerning limited liability companies and (a few) closely held companies limited by shares centers largely on duty of loyalty claims;

<sup>39</sup> There will of course be slip-ups even with clear legal authorization. See, for example, the case reported in *Pathway to Minority Shareholder Protection*, at 284 (footnote 100 and accompanying text) (the People's Court boldly allows a derivative action even though the claims arose before 2006, but then rejects the underlying substantive fiduciary duties breach claim against defendant directors and officers because "... even though the... defendants may have been in breach of their duty of care [interestingly, the opinion uses both the post-2006 enshrined term of art *qinmian yiwu* and the Taiwan statutory term of art *zhuyi yiwu*], the breach of that duty and resulting liability to the company [for damages] is a separate legal relationship (*lingwai de falu guanxi*)."

<sup>40</sup> It would be an issue if any People's Court saw fit to apply openly declared "business judgment rule" presumptions in adjudicating at least duty of care cases, but as noted below there are very few duty of care claims in reported People's Court opinions.

<sup>41</sup> As alluded to above, Article 152 of the 2006 PRC Company Law is appropriate for the PRC's controlling shareholder dominated firms because it facilitates these claims by including "others" in the list of defendants, such "others" distinguished from the normally understood fiduciaries (directors, supervisory board members, and officers) and explicitly including the control parties alluded to in Article 20 of the Company Law.

- It is far more difficult to find People's Courts opinions adjudicating duty of care claims as 2006 PRC Company Law "duty of care" claims. The possible reasons for this include: (1) the failure of private claimants to pursue these (now) legally authorized claims; (2) the courts' refusal to render "case establishment" with respect to such claims even if they are raised; (3) hesitation on the part of the People's Court judges to wield, with confidence, such a complex doctrine, especially in the absence of authority for a business judgment rule; and (4) easy substitution of claims adjudication under Article 4 of the 1986 GPCL commanding "good faith" (and "fair dealing") in the commercial realm;
- There is not, however, a *complete absence* of explicit duty of care claims adjudication in China at present—my own recent research provides evidence of some volume of duty of care cases, many of which are focused on intentional wrongdoing by orthodox fiduciaries—e.g., stealing or misappropriation of the corporate seal and thus (in China's customary enterprise legal person law) corporate authority—or what the Delaware lawyer might understand as a breach of the duty to act in "good faith"; and
- There is evidence of straightforward 2006 PRC Company Law Article 148 duty of care claims and adjudications, which present an extremely compelling picture of PRC People's Court judges striving to understand and articulate critical aspects of what underlies the duty of care (including failure to inform oneself before making a decision), the appropriate standard for duty of care breaches, business judgment rule presumptions, and much more. These instances are compelling precisely because it has long been assumed by observers (Chinese and foreign) that China's People's Court judges are unable to explicate and apply a paradigmatic common law/equity courts doctrine like duty of care in the alien circumstance of China's political economy.

In the separate realm of formal (i.e., State Administration of Industry and Commerce-registered) PRC partnerships, there is a notable lack of cases involving alleged breach of fiduciary duties between partners (including duty of loyalty-type claims), much less by specific partners—acting on their own, or on behalf of the partnership enterprise—with fiduciary breach claims against managing partners. This situation is somewhat ironic because the Chinese People's Courts have been busy using partnership principles, including what seem to be understood as universal principles of fiduciary duties *among partners*, when: adjudicating disputes between equity investors in enterprises formally established as PRC limited liability companies, in effect rejecting the applicability of corporate law to Chinese corporations; or rejecting use of the corporate derivative action with respect to the same enterprises because the claims asserted are understood as horizontal claims between co-partners/investors and not vertical claims by shareholders against a centralized management institution called the board.

There is no evidence whatsoever of suits or resulting adjudications arising from the partnership context that most lends itself to fiduciary claims because of real separation of ownership and management and sharp information asymmetries: the limited

partner's right to sue a limited partnership General Partner—either directly or on behalf of the limited partnership—for “neglect” under the 2006 PRC Partnership Law’s Article 68(vii) described in Section III.B. One 2011 study of this specific mechanism failed to find one example of its use in China until January of that year.<sup>42</sup> My own further research to late 2018 has revealed only one 2016 Supreme People’s Court opinion allowing a limited partner to sue a borrower (not a fiduciary) on behalf of a creditor limited partnership, and a 2016 Guangdong Province Basic People’s Court opinion denying the attempt by a limited partner to use the Article 68(vii) quasi-derivative action against a General Partner.<sup>43</sup> At this point we can only speculate on the reasons for the lack of limited partner quasi-derivative fiduciary claims against General Partners of limited partnerships. It may be a result of the relative rarity of (wholly domestically invested) limited partnerships in the PRC, passivity and litigation adversity among limited partner investors, lack of sophistication and/or legal rights consciousness among such investors, competence deficiencies in the receiving People’s Courts, or the collective action and financing constraints operating with respect to corporate fiduciary litigation generally.

## V. CONCLUSION

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What do these research findings tell us about corporate fiduciary duties and the private enforcement of those duties against orthodox fiduciaries in contemporary China, and indeed about the development of China’s governance and legal systems more broadly?

First, it seems clear that the corporate form, and the fact of separation of ownership and management, conjures the demand for and application of basic fiduciary duties principles, even in a political economy that has very little experience with the corporate form of enterprise, much less the private firm, and even where there is no clear legal authority for such duties and their enforcement. China’s experience to date shows that something like fiduciary duties for the individuals who populate the centralized decision-making body of the firm will be demanded by equity investors and their fiduciaries alike, and enforced by state institutions like courts, even in the absence of an explicit or jurisprudential basis for such duties or any expectation that the enforcement institutions are perfectly competent, autonomous, or politically independent. If development is in part co-evolutionary, and about weak institutions sustaining early markets, which developing markets then loop back to nurture stronger institutions, which create stronger and more efficient markets, and so on,<sup>44</sup> then in China corporate fiduciary

<sup>42</sup> See Lin Lin, Limited Partners’ Derivative Action: Problems and Prospects in the Private Equity Market of China, 2 Hong Kong L.J. 201, 210 n.40 (2011).

<sup>43</sup> See Jiao Jian et al. v. Anhui Ruizhi Real Estate Development Company Limited Supreme People’s Court of the PRC, 2016 *zuigaofaminzhong* 756 (Feb. 19, 2017) and Xiang Qun v. Guangzhou International Purchasing Center Company Limited et al. Re: Guangzhou Kaide Hefeng Investment Limited Partnership, Guangdong Province Guangzhou Municipal Tianhe District People’s Court, (2015) *huitianfajinminchuzi* 5340 (July 22, 2016).

<sup>44</sup> See Yuen Yuen Ang, *How China Escaped the Poverty Trap* (2016).

duties offered by new fiduciaries and claimed by private investors without any legal basis and enforced by wobbly state actors (courts and/or regulators) might constitute such an initially weak, but over the long term useful, "institution."

Second, corporate fiduciary duties eventually require a certain kind of institution to ensure broad and expert application and enforcement of such duties, especially in an environment like China's "corporatization without privatization" program where control parties (whether directors or controlling shareholders) have overwhelming political as well as economic clout. At a minimum, that institution (whether or not a court of law) must have the requisite competence, autonomy, and political independence to reliably apply and enforce these doctrines. Where that state institution lacks any or all of the requisite competence, autonomy, or political independence, these duties, whatever their source, may not be applied or enforced, in whole or in part, and thus may have their greatest value in the realm of symbolism and the communication of "modernity," conformity with "international (or more properly, global capital markets) standards," and assurances for incurious or ill-informed equity investors. For those contexts where corporate fiduciary duties are not applied (publicly listed, widely held corporate enterprises), the critical question for China is the future cost of long-standing nonapplication and enforcement of these legal duties, even if their proclaimed existence and occasional enforcement brings desired symbolic and declaratory benefits in the short term. One might suppose there is a significant cost associated with the sapping of credibility in the institution of fiduciary law resulting from nonenforcement by weak or incompetent institutions, but China has confounded such assumptions in the past.

Third, and as the PRC Party State has recognized in another context (securities law suits on false or misleading disclosure), a real private right of action for *all* shareholders (whether seeking protection of their own interests, or the interest of the injured firm), enabled by a viable derivative action, is essential for enforcement of corporate fiduciary duties. It is simply not feasible, given resource (and competence and political) constraints, to rely on a state administrative agency like a corporate law or a securities regulator (or even, *pace* Taiwan and Korea, a not-for-profit, state-promoted, institution established to aggregate and bring private claims) to identify and enforce against all of the illegal and corporate fiduciary duty-breaching behavior across a large and complex national economy, much less a national political economy like China's which is still in the middle of an ever-shifting transition. "All" shareholders here means investors in closely held vehicles as well as public investors in widely held companies limited by shares. In today's China, all investors in Chinese firms have, in law, this private right of action to sue for fiduciary breaches, but the right is in reality limited to investors in closely held firms because of the ban on cases involving widely held companies limited by shares, or publicly listed companies (and their fiduciaries). Again, the question for the Chinese system across a broad range of legal claims (e.g., securities law claims, environmental torts, collective labor rights, etc.) is the long-term effect of continuing to obstruct private claims and enforcement (as opposed to the far more manageable idea of public enforcement).

Fourth, the Chinese case reminds us that it is difficult to evaluate the validity of what many Anglo-American common law system lawyers hold to be true in this area: that to

be fully functional, private law-based fiduciary duties and enforcement require a common law-style system of jurisprudence, authoritative precedents applied to varying factual circumstances, doctrine distilled from both of the foregoing (e.g., business judgment rule presumptions), and courts acting “in equity.” In China, so few cases involving the enforcement of fiduciary duties at widely held companies with the desired factual complexity, acute separation of ownership and management, and information asymmetry have made it past the “case establishment” block that observers just cannot say how necessary the common law equity court system is.

Fifth and finally, there is the set of questions conjured from the law and development and law and finance literatures. (Too) simply put, those two bodies of literature have asserted that in the absence of common law-style explanation and enforcement *ex post* of corporate fiduciary duties standards by a competent, autonomous, and politically independent judiciary, and as triggered by private claims far greater than what a resource and attention-constrained state regulator might pursue, capital formation will be inhibited and the economic efficiency and development that would result from such capital formation will be negatively impacted. On this idea, China, as in many other areas, remains a real puzzle—for the modern PRC is commonly thought to have a radically deficient legal system, and it is well known from reports like this chapter that fiduciary duties in particular are not widely or expertly enforced in the Chinese courts, at least where it (arguably) counts. And yet the PRC has seen historically unprecedented capital formation and economic growth in the past several decades. Great scholars continue to attack this particular “China Puzzle” with gusto and insight, many focusing on the involvement of “the state” as both promoters of capital formation and providers of a guaranty against expropriation by other aspects of the same state.<sup>45</sup> However, in the small corner of the China Puzzle which is the conception and application of fiduciary duties, we can state the following: the lack of corporate fiduciary duties applied by common law-styled judicial institutions sitting “in equity” with the requisite competence, autonomy, and independence has not strangled capital formation and economic development in the PRC. This is not to deny any importance or value for the quintessentially common law/equity courts mechanism that corporate fiduciary duties are. It is only to say that, at this point in the history of post-Revolutionary and since 1978 Reform-era China, the value of the thing may lie largely in symbolic communication to audiences domestic and foreign, pretty costless assurances for domestic and international investors sending money to Chinese issuers, and (surprisingly important) self-assurances about China’s attainment of “modernity” and/or conformity with perceived “best” (formerly “global”) standards. Whether the set of institutions associated with legal corporate fiduciary duties, as applied, will have a more substantive value and thus traction in China’s ongoing political, legal, and economic development, is the question for the future.

<sup>45</sup> See, for instance, Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 14 *Am. J. Comp. L.* 459 (2003); Ang, *supra* note 44.