

UNDERSTANDING THE CORPORATE GOVERNANCE OF CHINA'S STATE-OWNED ENTERPRISES IN THE CONTEXT OF THE STATE-OWNED ENTERPRISES REFORM: THE PARTY, THE STATE, AND THE ENTERPRISES

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ABSTRACT

China's State-owned enterprises ("SOEs") are demonstrating strong financial capabilities. Unlike the financial performances known to the globe, the corporate governance of the SOEs remains opaque and understudied. In this Article, I aim to reveal the general structure of SOE corporate governance in the context of the SOE reform. I first examine the respective roles of the State and the Communist Party of China ("CPC" or "Party") in SOE corporate governance. By first identifying the unique dynamics throughout the SOE reform of "*the State retreats and the CPC advances*," I dissect the interactions between the CPC and the State in China's politics and argue that the CPC and the State are fundamentally different institutions. I thereby adopt a new triangular analytical framework that covers the Party, the State, and the SOEs. In this framework, I further argue that the corporate governance of the State-owned enterprises has transformed from the previous Party–State model to the current Party–State–SOE model and would ultimately develop into the Party–SOE model. In this Party–SOE model; the CPC would only broadly exercise its leadership to mobilize the SOEs when necessary; the SOE would retrieve its decision-making powers over non-material matters, including daily operations and appointments and dismissal; the State would relinquish its control by participating solely as a non-exclusive shareholder instead of a regulator with SOE-specific powers. Upon realizing this model of SOE corporate governance in the foreseeable future, the CPC and the State will be aggressive in SOEs in non-strategically important industries as well as in local SOEs and subsidiaries of central group SOEs; for SOEs in strategically important industries and central group SOEs, the CPC, and the State will take a wait-and-see attitude.

KEYWORDS:

State-owned enterprises, State-owned enterprise reform, corporate governance, Xi's era, Communist Party of China, Party-state relationship, State-Owned Assets Supervision, and Administration Commission

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I. INTRODUCTION

The State-Owned Enterprises¹ and China's central and local SOEs together occupied 82 positions on the Fortune Global 500 List in 2021, representing approximately 15% of the List and around 60% of Chinese enterprises on the List.² The number of the SOEs on the Fortune Global 500 List has demonstrated a boost of 51% since 2012 and 1,266% since 2003.³

The obverse of the globally recognized, strong financial performances of China's SOEs is the SOE corporate governance that is "opaque and often deviant from international standards."⁴ When digging into this topic, the vast majority of scholarships have channeled considerable attention to the role of the "party-state" on account of the unique features of the State ownership and the participation of the Communist Party of China ("CPC" or "Party").⁵ Indicated in the notion of the "party-state" is the inclination that the CPC and the State be treated as a whole, as well as the assumption that the CPC and the State are aligned in the SOEs.⁶ Even the scholars who have particularly

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¹ PRC laws have not given a clear definition of "SOE." For the purposes of this Article, unless otherwise specified, "SOE" means the enterprise of which the central or the local State-owned Assets Supervision and Administration Commission holds exclusive or controlling equity interests. For the purposes of this Article, "China" does not include Hong Kong, Macau, or Taiwan.

² 82 Chinese SOEs Listed among 2021 Fortune Global 500, STATE-OWNED ASSETS SUPERVISION AND

ADMIN. COMM'N OF THE STATE COUNCIL (Aug. 3, 2021), http://en.sasac.gov.cn/2021/08/03/c_7528.htm [<https://perma.cc/H7SX-EM3P>].

³ NAT'L PEOPLE'S CONG. OF PEOPLE'S REPUBLIC OF CHINA: (国务院关于国有企业改革与发展工作情况的报告) [Report of the State Council on the Work of the SOE Reform and Development] (2012), <http://www.npc.gov.cn/npc/c12491/201210/b821fd47442745b0a88bb20979f8be44.shtml> [<https://perma.cc/J7LZ-LFKN>].

⁴ Li-Wen Lin, *China's National Champions: Governance Change Through Globalization?*, 11 U. PA. ASIAN L. REV. 81, 81 (2015).

⁵ See, e.g., Li-Wen Lin & Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697 (2013); Lin & Milhaupt, *see infra* note 99; Lin, *see infra* note 193; Brødsgaard, *see infra* note 193.

⁶ This is sometimes accompanied by the *deemphasis* of the State. Holly Snape & Weinan Wang, *Finding a Place for the Party: Debunking the "Party-state" and*

noted the twin-governance-structure of political and legal governances in the SOEs did not bother to respectively examine the dynamics of the CPC and the State in the SOEs.⁷ Such practice is not uncommon among scholarships. Shiping Zheng has pointed out that “[s]tudies of post-1949 Chinese politics, though varying in their focuses, share much in accepting the party-state argument” and “[have] long [presented] a tendency to equate the Chinese Communist Party with the post-1949 Chinese state.”⁸ Rewarding as the literature on SOEs are in shedding light on the various mechanisms that have molded the SOE corporate governance, a puzzle remains as to whether the CPC and the State are necessarily a seamless whole in the SOE corporate governance throughout the long sweep of the SOEs’ history. What if the moves of the CPC and the State were, in fact, not aligned—would the CPC and the State then characterize a different SOE corporate governance model? These are not questions coming out of nowhere; they are invited by reality. In this Article, I argue that the CPC and the State have consistently presented the following dynamic: “[T]he State retreats and the CPC advances.”⁹

As the SOE reform is “a topic of major significance” for SOE corporate governance in China, I contextualize the discussion in the SOE reform process.¹⁰ The dynamics of “the State retreats and the CPC advances” have been delineated by the history of the SOE reform before Xi Jinping’s era. For decades after the establishment of the “new China” in 1949, China’s SOEs had little autonomy and were restricted by the State on almost all matters, from output and pricing to employee salaries.¹¹ The SOE reform in China

Rethinking the State-Society Relationship in China’s One-Party System, 5 J. OF CHINESE GOVERNANCE 477, 480 (2020).

⁷ See Jiangyu Wang, *The Political Logic of Corporate Governance in China’s State-Owned Enterprises*, 47 CORNELL INT’L L.J. 631, 648–58 (2014).

⁸ SHIPING ZHENG, *PARTY VS. STATE IN POST-1949 CHINA: THE INSTITUTIONAL DILEMMA* 9 (William Kirby ed., 1997).

⁹ Jiangyu Wang & Tan Cheng-Han, *Mixed Ownership Reform and Corporate Governance in China’s State-owned Enterprises*, 53 VAND. L. REV. 1055, 1090, 1094 (2021). The expression might be originated from “[t]he State retreats and the private sector advances (*guotui minjin*),” and “[t]he State advances and the private sector retreats (*guojin mintui*),” which have both been used to describe the SOE privatization and the takeover of the private enterprises during the SOE reform process respectively. See SARAH EATON, *THE ADVANCE OF THE STATE IN CONTEMPORARY CHINA: STATE-MARKET RELATIONS IN THE REFORM ERA* 1 (Cambridge Univ. Press 2016).

¹⁰ Curtis J. Milhaupt & Mariana Pargendler, *Governance Challenges of Listed State-Owned Enterprises around the World: National Experiences and a Framework for Reform*, 50 CORNELL INT’L L.J. 473, 475 (2017).

¹¹ See generally Bruce J. Dickson, *Integrating Wealth and Power in China: The Communist Party’s Embrace of the Private Sector*, 48 CHINA Q. 835 (2007); Gisela Grieger, *State-owned Enterprise (SOE) Reforms in China: A Decisive Role for the Market at Last?*, EUR. PARLIAMENTARY RSCH. SER. (2016),

was initiated in 1978 with the major theme of separating the State from the SOE. Thereafter, the State gradually returned the management power to the SOEs through legislation and institutional restructurings.¹² Together with the SOE reform was the establishment of the CPC's status as the political core and political leadership in the SOEs since 1989.¹³ In Xi's era, the retreat of the State and the advancement of the CPC embraced synchronous intensification. Recent major SOE reform measures include the introduction of mixed-ownership reform ("MOR"),¹⁴ the creation of the State Capital Investment and Operation Companies ("SCIOC"),¹⁵ and the establishment of the Lists of Supervisory Authorities and Responsibilities ("Supervisory List")¹⁶ and the Lists of Authorized and Devolved Powers ("Authorized List").¹⁷ These efforts have empowered minority shareholders, segregated the State from the pilot SOEs, and limited the scope of the State's rights and responsibilities, thus undercutting the State's powers in the SOEs.¹⁸ At the same time, the political assertiveness of the CPC in the SOEs has been magnifying. Apart from mere political campaigns, the CPC has also

[https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583796/EPRS_BRI\(2016\)583796_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583796/EPRS_BRI(2016)583796_EN.pdf) [<https://perma.cc/732K-5KFH>].

¹² See *infra* Part II.A.

¹³ See *infra* Part II.B.

¹⁴ GUANYU GUOYOU QIYE FAZHAN HUNHE SUOYOUZHI JINGJI DE YIJIAN (关于国有企业发展混合所有制经济的意见) [OPINIONS OF THE STATE COUNCIL ON DEVELOPMENT OF MIXED OWNERSHIP ECONOMY BY STATE-OWNED ENTERPRISES] (2015) (promulgated by the STATE COUNCIL, Sept. 23, 2015, effective Sept. 23, 2015), http://www.gov.cn/zhengce/content/2015-09/24/content_10177.htm [<https://perma.cc/TSA8-S7GT>] (China) [hereinafter SOE MOR Opinion].

¹⁵ Guanyu Shenhua Guoyou Qiye Gaige de Zhidao Yijian (关于深化国有企业改革的指导意见) [GUIDING OPINIONS ON DEEPENING THE REFORM OF STATE-OWNED ENTERPRISES] (promulgated by the CPC CENT. COMM. AND THE STATE COUNCIL, Aug. 24, 2015, effective Aug. 24, 2015), art.13, http://www.gov.cn/zhengce/2015-09/13/content_2930440.htm [<https://perma.cc/P6XS-9FP3>] (China) [hereinafter SOE Deepening Opinion].

¹⁶ Yi Guanziben Weizhu Tuijin Zhineng Zhuanbian Fangan de Tongzhi (以管资本为主推进职能转变方案) [The Plan of Promoting the Function Transformation to Capital-Focused Regulation] (promulgated by the SASAC, Apr. 27, 2017, effective Apr. 27, 2017), http://www.gov.cn/zhengce/content/2017-05/10/content_5192390.htm [<https://perma.cc/X826-X9KG>] (China) [hereinafter Capital-Focused Regulation].

¹⁷ Guowuyuan Guoziwei Shouquan Fangquan Qingdan (2019 Nian Ban) (国务院国资委授权放权清单 (2019年版)) [THE LIST OF AUTHORIZED AND DEVOLVED POWERS OF THE STATE-OWNED ASSETS SUPERVISION AND ADMINISTRATION COMMISSION OF THE STATE COUNCIL (2019)] (promulgated by the SASAC, June 3, 2019, effective June 3, 2019), <http://www.sasac.gov.cn/n2588025/n2588119/c11421043/content.html> [<https://perma.cc/T9JS-QF2L>] (China) [hereinafter Authorized List].

¹⁸ See *infra* Part III.A.

institutionalized the CPC's leadership and relevant decision-making powers in legislation¹⁹ and in Articles of Associations ("AoA") of the SOEs.²⁰ The CPC has comprehensively penetrated the SOEs by extending its clout to the decision-making of major issues, personnel management, and supervision and governance.²¹

The entire SOE reform process has demonstrated the distinguishing dynamics of "the State retreats and the CPC advances" in the SOE corporate governance. The dynamics have denoted that the moves of the CPC and the State in the SOEs' corporate governance have indeed been in the opposite direction. While some scholars have *partially* caught such dynamics, they have failed to expressly separate the CPC and the State, nor have they examined the fundamental indications of these moves.²²

In this connection, I argue that the CPC and the State should be respectively discussed *in the specific topic* of SOE corporate governance. The CPC and the State, deeply intertwined as they may be, are different institutions in terms of their powers and functions in China's fundamental political logic. Ever since the "new China" was established out of the CPC's revolution against the "old regime," the CPC has retained its dominance over the State.²³ To date, the CPC still grasps the real power and represents the supreme interests in China, although through a more nuanced mechanism. Instead of wantonly intervening in and taking over the State's decision-making powers as it used to in Mao's era, the CPC has sought to legitimize its political influences by embedding itself into the State institutions and transplanting its decisions into the State's administrative measures.²⁴ This change has resulted in fine-tuning of the functions of the CPC and the State: the CPC is in charge of the decision-making of China's major and

¹⁹ Gongsifa (Xiuding Caoan) (公司法(修订草案)) [Company Law (Draft Revision)] (promulgated by Standing Comm. Nat'l People's Cong., Dec. 24, 2021, non-effective), art. 145, <https://npcobserver.com/wp-content/uploads/2021/12/Company-Law-Draft-Revision.pdf> [<https://perma.cc/6BYJ-XF2B>] (China) [hereinafter Draft Chinese Company Law].

²⁰ Guanyu Zhashi Tuidong Guoyou Qiye Dangjian Gongzuo Yaoqiu Xieru Gongsu Zhangcheng de Tongzhi (关于扎实推动国有企业党建工作要求写入公司章程的通知) [Notice on Solidly Promoting the Party-building Requirements for State-owned Enterprises to be Written into the Articles of Association] (promulgated by Org. Dep't of the CPC Cen. Comm. and the CPC Org. in SASAC, Mar. 15, 2017, effective Mar. 15, 2017), art. 1, <https://www.pkulaw.com/chl/902dc7396fa91619bdfb.html> [<https://perma.cc/JW2L-57U4>] (China) [hereinafter AoA Notice].

²¹ See discussion *infra* Section III.B.

²² See generally Wang & Cheng-Han, *supra* note 9 (only noting that the State retreats and the CPC advances occurs in the MOR, instead of the entire SOE reform history).

²³ See ZHENG YONGNIAN, *The Chinese Communist Party as Organizational Emperor: Culture, Reproduction, and Transformation* 8–16 (Routledge 2010).

²⁴ See Dingping Guo, *The Changing Patterns of Communist Party-State Relations in China: Comparative Perspective*, 31 THE J. OF E. ASIAN AFF. 65, 91 (2017).

macroscopical policies, with special focuses on national security and public interest; the State, with substantial regulatory powers, becomes a practical tool that the CPC mobilizes for the detailed implementation of the policies that the CPC decided.²⁵

The separation between the CPC and the State is “not only conceptionally constructive, but also analytically imperative.”²⁶ It distinguishes from the existing scholarships and avails the studies on the SOE corporate governance in three aspects: first, such interpretation regards the CPC and the State as two distinguishable players in the SOEs, hence preliminarily resolving the inner contradiction of “the State retreats and the CPC advances” that would occur if the CPC and the State were treated as a whole; second, such interpretation peels off the monolithic structures of and reveals the nuanced interactions between the CPC and the State instead of broadly inferring a generic power hierarchy. The nuanced interactions would illuminate the fundamental rationales of the “the State retreats and the CPC advances” and the corporate governance model that the CPC and the State have envisioned; third, such interpretation accommodates the situation where the interests of the State and the CPC in the SOEs require a tradeoff and facilitates an explanation thereof. Packing the CPC and the State as a whole, perfectly reasonable as it might be under the circumstances where the moves of the CPC and the State are aligned, could hardly appreciate the above subtleties of the SOE corporate governance.

Against this backdrop, the underlying rationale of “the State retreats and the CPC advances” affords a reasonable explanation: the SOE reform and the SOEs have been generally entrusted to fulfill a two-fold purpose, i.e., the political ambitions and the economic agendas.²⁷ As the CPC’s absolute leadership has been an almost iron law in China’s politics, the CPC clings to its political position in the SOEs. To balance the two-fold purpose, the State, in turn, compromises its power in the SOEs.²⁸

Such rationale has already transformed the corporate governance of the SOEs from the previous Party–State model to the current Party–State–SOE model by restructuring the positions of the State and the SOEs. The rationale would keep the momentum and ultimately drive the corporate governance model towards a Party–SOE model.²⁹ The two-fold purpose and the labor divisions of the CPC and the State would foster a corporate governance mechanism in the Party–SOE model: the CPC would broadly exercise its leadership power and mobilize the SOEs only when necessary; the SOE would retrieve its decision-making rights over non-material matters, including daily operations and appointment and dismissal; the State, however,

²⁵ See discussion *infra* Section IV.A.

²⁶ ZHENG, *supra* note 8, at 12.

²⁷ Wendy Leutert & Sarah Eaton, *Deepening Not Departure: Xi Jinping’s Governance of China’s State-owned Economy*, 62 CHINA Q. 200, 215 (2021).

²⁸ See discussion *infra* Section IV.B.2.

²⁹ *Id.*

would relinquish its control by renouncing its position as a regulator with SOE-specific intervention powers and instead participating mainly as a non-exclusive shareholder according to the Company Law of the People's Republic of China ("Chinese Company Law").³⁰

Further implications affect the reform process of the SOE corporate governance. Though constantly balanced, the political ambitions and the economic agendas could be in competition and thus sometimes require a trade-off.³¹ The decision seems obvious if put in the context of China's politics: the CPC, representing the real power and the supreme interests of China, would never sacrifice its political leverage. The political ambitions would prevail over the economic agendas of the SOEs. Accordingly, the SOE corporate governance reform by classifications, which has expressly been formulated by the CPC and the State, is not a short-term whim that could be explained fully by the documents. Beneath such reform classifications is the trade-off taken and the reform process envisioned by the CPC and the State. In the long-term, the SOE corporate governance reform would still be comparatively tardy in the SOEs of which the control is deemed vital to the CPC's political leverage, i.e., the central group SOEs which are all significant in national strategy and sheer size, as well as in other SOEs in strategically significant industries and public SOEs. However, the reform tends to be aggressive in the SOEs in non-strategically important industries, as well as in local SOEs and subsidiaries of the central group SOEs.³²

The remainder of this Article is organized as follows: Part II examines the historical features of the SOE reform and the CPC political campaigns in the SOEs.³³ Part III characterizes the dynamics between the CPC and the SOE reform in Xi's era by explaining the major SOE reform measures and the mechanisms through which the CPC exerts influence on the SOEs.³⁴ Part IV elaborates on the interactions between the CPC and the State, proposes a new triangular analytical framework, and re-interprets the corporate governance of the SOEs.³⁵ Part V concludes this Article.³⁶

³⁰ *Id.*

³¹ There is scholarship that has forwarded the argument more aggressively. The scholarship has argued that the economic agendas and the political ambitions of the SOEs are represented respectively by the State and the CPC and are fundamentally in confrontation. See Ding Chen, *Why Is China's SOEs Reform Always Disappointing—A New Political Economic Explanation*, 13 J. COMP. L. 120, 131–40 (2018).

³² See *infra* Part IV.C.

³³ See *infra* Part II.

³⁴ See *infra* Part III.

³⁵ See *infra* Part IV.

³⁶ See *infra* Part V.

II. THE BRIEF HISTORY OF THE SOE REFORM BEFORE XI'S ERA

A. *The SOE Reform Measures in Retrospect*

The SOEs in China have a pedigree dating back to the era when the CPC gradually took power of the country. The CPC established factories and shops under its control before the establishment of the “new China” and nationalized the enterprises that had previously been privately owned after the establishment of the “new China.”³⁷ The factories, shops, and nationalized enterprises became the initial form of the SOEs. For almost 30 years after the founding of the country, no corporate legislation was in place, and the SOEs were managed simply through administrative and political measures. In the context of the planned economy, the SOEs faced no competition and were dependent on the State for funding, as well as on employees’ salaries, subsidies, housing, and even offspring education.³⁸ By that time, the SOEs were deprived of any substantial decision-making powers.³⁹

The situation did not change until the late 1970s. In 1978, the State launched the reform and opening. Having realized the low efficiency and the sluggish performance of the SOEs that were borne with their governance mechanisms, the State took advantage of the reform opening up and initiated the SOE reform. The major theme of the SOE reform was to separate the State from the SOEs’ operations and to thus materially change the corporate governance of the SOEs.⁴⁰ The State tested the waters by allowing the SOEs to retain part of their profits and formulate their own business plans after fulfilling the production requirements set by the State.⁴¹ Incentive mechanisms that allowed the SOEs to decide pricing and sale quantities free from the State’s intervention were also introduced.⁴² Though the productivity of the SOEs has improved due to the first-step reform, the profits have decreased because of the increasing competition and the tangle of the governance mechanism adjustment.⁴³ The State thus decided to further “corporatize” the SOEs.

In 1993, the “socialist market economy” was enshrined into the Constitutional Law of People’s Republic of China (“Chinese Constitutional

³⁷ Wang, *supra* note 7 at 644; *see also* WU JINGLIAN, UNDERSTANDING AND INTERPRETING CHINESE ECONOMIC REFORM 139–40 (2005).

³⁸ *See generally supra* note 11.

³⁹ *See generally supra* notes 11 and 37.

⁴⁰ *See* LIGANG SONG, STATE-OWNED ENTERPRISE REFORM IN CHINA: PAST, PRESENT AND PROSPECTS, IN CHINA’S 40 YEARS OF REFORM AND DEVELOPMENT: 1978–2018, 349 (Ross Garnaut et al. eds., ANU Press 2018).

⁴¹ *Id.*

⁴² *Id.*; *see also* Grieger, *supra* note 11, at 2.

⁴³ Song, *supra* note 40 at 351.

Law”) and ended the planned economy era in China.⁴⁴ Taking this watershed, the State enacted the first Chinese Company Law and officially established the Anglo-American-style board of directors and board of supervisors in the SOEs.⁴⁵ For enterprises that are exclusively and wholly owned by the State, no shareholders’ meeting is set up. The corresponding functions are assumed by the appropriate State-owned assets supervision and administration institutions, with some non-material ones authorized to the board of directors.⁴⁶ Shortly after the enactment of the first Chinese Company Law, the CPC and the State further clarified the corporate governance system they expected to construct: clearly established property rights, well-defined power and responsibilities, separation of businesses from the State, and scientific management.⁴⁷ In 1997, the State started to press ahead with the SOE reform under the policy of “grasping the large and letting go of the small.” The State retained its control over large SOEs, while privatizing small SOEs through multiple methods, including but not limited to mergers, restructuring, and establishment of joint ventures.⁴⁸

⁴⁴ XIANFA [Constitution] 1993, art. 15, §1 (China).

⁴⁵ Gongsì Fa (公司法) [Company Law] (promulgated by Standing Comm. Nat’l People’s Cong., Dec. 29, 1993, effective Jul. 1, 1994), art. 37, 45, 68, 102, 112, <https://www.chinacourt.org/law/detail/1993/12/id/18710.shtml> [<https://perma.cc/W7WL-DGUS>] (China) [hereinafter Chinese Company Law].

⁴⁶ *Id.*, at art. 66.

⁴⁷ Guanyu Jianli Shehui Zhuyi Shichang Jingji Tizhi Ruogan Wenti de Jueding (关于建立社会主义市场经济体制若干问题的决定) [Decision on Several Issues Concerning Establishing the Socialist Market Economy] (promulgated by the CPC Cent. Comm., Nov. 14, 1993, effective Nov. 14, 1993), <https://www.pkulaw.com/chl/4cbd93d7254ee66bfdfb.html?keyword=关于建立社会主义市场经济体制若干问题的决定&way=listView> [<https://perma.cc/LX5U-MPLU>] (China) [hereinafter Socialist Market Economy Decision]; Guanyu Guomin Jingji he Shehui Fazhan “Jiuwu” Jihua he 2010 Nian Yuanjing Mubiao Gangyao de Baogao ji Guanyu Gangyao Baogao de Jueyi (关于国民经济和社会发展“九五”计划和 2010 年远景目标纲要的报告及关于《纲要》报告的决议) [A Report on the 9th Five-Year Plan of National Economy and Social Development and the Perspective and Goals for 2010 and a Resolution on the Report] (passed by the 4th Meeting of the 8th Nat’l People’s Cong., Mar. 17, 1996), art. 4, <https://www.pkulaw.com/chl/beae656b9b09c14bdfb.html?keyword=关于国民经济和社会发展“九五”计划和 2010 年远景目标纲要的报告&way=listView> [<https://perma.cc/J49D-RJ9M>] (China).

⁴⁸ Guanyu 1996 Nian Guomin Jingji he Shehui Fazhan Jihua Zhixing Qingkuang yu 1997 Nian Guomin Jingji he Shehui Fazhan Jihua Caoan de Baogao (关于 1996 年国民经济和社会发展计划执行情况与 1997 年国民经济和社会发展计划草案的报告) [A Report on the Implementation of the Plan for National Economic and Social Development for 1996 and on the Draft Plan for National Economic and Social Development for 1997] (passed by the 5th Meeting of the 8th Nat’l People’s Cong., Mar. 14, 1997),

In 2003, the State established the State-owned Assets Supervision and Administration Commission (“SASAC”). The central SASAC is an ad-hoc ministry-level institution directly under the State Council, and the local SASACs are subordinated to the local governments. The central SASAC directly supervises the central group SOEs and indirectly supervises its subordinates; the local SASACs directly supervise the local group SOEs and indirectly supervise their subsidiaries (as shown in Diagram 1).⁴⁹ The establishment of SASAC was allegedly for the purpose of consolidating the governance rights on the SOEs that had previously scattered among different governmental institutions and, more importantly, extricating the State from acting as both the regulator and the investor at the same time.⁵⁰ In 2005, the then newly revised Chinese Company Law deleted the provision which had previously provided that the ownership of the SOE property belonged to the State and instead stipulated that the SOEs have the “right to the legal person property.”⁵¹ This revision has been widely regarded as “the process of the SOEs truly becoming an independent entity of the socialist market economy.”⁵²

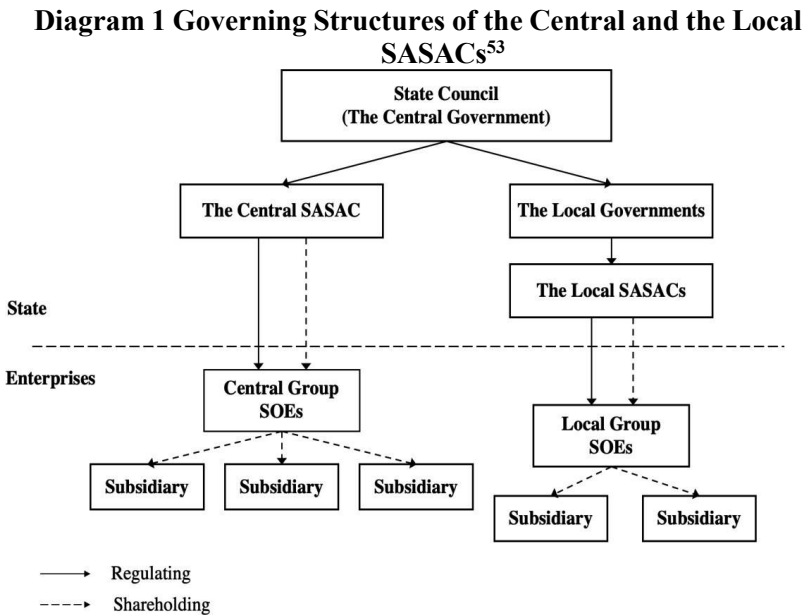
<https://www.pkulaw.com/chl/eb8d6d5a17f6f582bdfb.html?keyword=关于1996年国民经济和社会发展计划执行情况与1997年国民经济和社会发展计划草案的报告&way=listView> [<https://perma.cc/HU8S-DAXK>] (China).

⁴⁹ *About Us*, STATE-OWNED ASSETS SUPERVISION AND ADMIN. COMM’N OF THE STATE COUNCIL, <http://en.sasac.gov.cn/aboutus.html> [<https://perma.cc/Q9TK-QMLS>] (last visited Mar. 11, 2022).

⁵⁰ Yan Shi (言实), *Chengli Guozhiwei he Buchengli Guozhiwei Dabuyiyang (成立国资委和不成立国资委大不一样)* [*There is Huge Difference Between Establishing and Not Establishing the SASAC*], STATE-OWNED ASSETS SUPERVISION AND ADMIN. COMM’N OF THE STATE COUNCIL (Nov. 18, 2004), <http://www.sasac.gov.cn/n2588035/n2588320/n2588340/c4427076/content.html> [<https://perma.cc/FTN6-5DJ5>].

⁵¹ Hu Jintao, Chinese Company Law (revised by Standing Comm. Nat’l People’s Cong., Oct. 27, 2005, effective Jan. 1, 2006), art. 3, <https://www.chinacourt.org/law/detail/2005/10/id/104490.shtml> [<https://perma.cc/G7T8-V9TQ>].

⁵² Chen Xiaohua (陈晓华), *Guoyou Qiye Falü Guizhi yu Zhengzhi Guizhi: Cong Jingzheng dao Ronghe (国有企业法律规制与政治规制：从竞争到融合)* [*The Legal Governance and the Political Governance of the State-Owned Enterprises: From Competition to Combination*], 37 FAXUE PINGLUN (法学评论) [LAW REVIEW] 111, 112 (2019); see also Liu Kaixiang (刘凯湘) & Liu Jing (刘晶), *Woguo Gudonghui Zhongxin Zhuyi de Lishi Chengyin (我国股东会中心主义的历史成因)* [*History Cause of Chinese Shareholder Primacy*], 37 FAXUE LUNTAN (法学论坛) [LEGAL FORUM] 51, 55–60 (2021) (contending that the revision to the previous Chinese Company Law marks the recognition of the SOEs as an independent entity and the State as a shareholder; noting that the expression of “right to the legal person property” instead



B. *The CPC's Presence in the SOEs Throughout the SOE Reform*

The CPC's role in the SOEs has not always been clear during the SOE reform process. The initial attempt of the SOE reform was to also weaken the

of “property right” is to avoid potential contradictions with the Chinese Constitutional Law, which regulates that State-owned assets belong to the State. This reasoning would explain why Article 3 of Law on State-owned Assets of Enterprises enacted in 2008 still regulates that the State has the “ownership rights to the State-owned assets”).

⁵³ See *supra* note 49. Note that the central and the local SASACs are not technically the shareholders of the central or the local SOEs. The SOEs in China follow a sophisticated shareholding system: the shareholders of the SOEs are the “whole people” of China, i.e., the State. The State Council and the local governments, on behalf of the State, respectively assume the shareholder position of the central and the local SOEs. In practice, the State Council and the local governments may and do further authorize respectively the central and the local SASACs to perform the functions as SOE shareholders. Unlike shareholders of private companies, “shareholders” of the SOEs (be it the State, the State Council, local governments, or SASACs) do not receive dividends. For convenience, Diagram 1 simplifies the relationship between SASACs and SOEs as, *inter alia*, “shareholding.” For more details regarding the shareholding system of the SOEs, see Qiye Guoyou Zichan Fa (企业国有资产法) [Law on the State-owned Assets of Enterprises] (promulgated by Standing Comm. Nat'l People's Cong., Oct. 28, 2008, effective May. 1, 2009), art. 3, 11, http://www.gov.cn/flfg/2008-10/28/content_1134207.htm [<https://perma.cc/DF83-BSEF>] (China) [hereinafter SOA Law].

CPC's influence in the SOEs.⁵⁴ In 1984 and 1988, the CPC and the State introduced and launched the pilot "director (manager) responsibility system," in which the management responsibilities of the trial SOEs were spun off from the CPC members and transferred purely to the directors (managers).⁵⁵

Such an attempt had not been able to be expanded or deepened before the CPC's attitudes toward the SOE reform experienced a sharp volte-face. In 1989, the CPC released the Notice on Enhancing the Party Building. The document served as a response to the political turmoil that occurred in 1989 and was addressed to prevent "new political disturbances."⁵⁶ Though the document was not narrowly tailored to the SOEs, the SOEs on which the decoupling of the CPC had been experimented inevitably triggered the CPC's concerns. The CPC expressly in this Notice mandated that the SOE reform shall never undermine the CPC's leadership in the SOEs.⁵⁷ For the first time, the CPC clarified that the CPC's organizations *shall* serve as the "political core" and *shall* "discuss and comment on major issues" in the SOEs.⁵⁸ Ever since this Notice, the CPC's role as the "political core" was emphasized in numerous documents at different stages of the SOE reform.

In 1992, the CPC Constitution was enacted and formally recognized the CPC's function as the "political core" in the SOEs.⁵⁹ In the following years,

⁵⁴ Cf. Sun Jin (孙晋) & Xu Zelin (徐则林), *Guoyou Qiye Dangweihui he Dongshihui de Chongtu yu Xietiao* (国有企业党委会和董事会的冲突与协调) [*The Conflicts and Coordination Between the CPC Organizations and the Board of Directors in the State-Owned Enterprises*], 37 FAXUE (法学) [LAW SCIENCE] 124, 125 (2019) (arguing that the CPC's role in the SOEs has experienced several transformations. One of the transformations resulted from the "director (manager) responsibility system" project, discussed immediately thereafter in the Article).

⁵⁵ Guanyu Jingji Tizhi Gaige de Jueding (关于经济体制改革的决定) [Decision on Reforming the Economic System] (promulgated by CPC Cent. Comm., Oct. 20, 1984, effective Oct. 20, 1987), art. 7, http://www.gov.cn/test/2008-06/26/content_1028140_2.htm [<https://perma.cc/98YN-7JT8>] (China); Quanmin Suoyouzhi Gongye Qiye Fa (全民所有制工业企业法) [Law of Industrial Enterprises Owned by the Whole People] (promulgated by Standing Comm. Nat'l People's Cong., Apr. 13, 1988, effective Aug. 1, 1988), art. 7, <https://www.chinacourt.org/law/detail/1988/04/id/7668.shtml> [<https://perma.cc/76PP-ZL9G>] (China).

⁵⁶ Guanyu Jiaqiang Dang de Jianshe de Tongzhi (关于加强党的建设的通知) [Notice on Enhancing the Party-Building] (promulgated by the CPC Cent. Comm., Aug. 28, 1989, effective Aug. 28, 1989), <http://www.reformdata.org/1989/0828/4060.shtml> [<https://perma.cc/R7R6-ZE8Z>] (China).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Gongchandang Zhangcheng (共产党章程) [Constitution of the Communist Party] (promulgated by the CPC Nat'l Cong., Sept. 6, 1982, revised and passed by the Fourteenth CPC Nat'l Cong., Oct. 18, 1992, effective Oct. 18, 1992),

apart from articulating the CPC's position, the CPC also specified the meanings and the functions of the "political core," namely: ensuring the implementation of the plans and the policies of the CPC and the State, facilitating the ideological and political educations in the SOEs, participating in the decision-making process of the enterprises, managing the leadership of the SOEs, and mobilizing the employees' creativity and enthusiasm.⁶⁰ Notably, in 1997, the CPC for the first time referred to its role in the SOEs as the "political leadership," as opposed to the "political core," and stressed that the CPC's political leadership shall be strengthened.⁶¹ The "[CPC's] political leadership" was also determined as a fundamental principle in the SOEs.⁶²

The 2000s continued the gradual and silent transition of the CPC's position in the SOEs from the "political core" to both the "political core" and the "political leadership." Not only did the CPC further emphasize its position as the "political core,"⁶³ there were voices that started to equate the "political core" as the "political leadership."⁶⁴ For instance, in 2006, the State

<http://cpc.people.com.cn/GB/64162/64168/64567/65446/6415682.html>

[<https://perma.cc/T7ZJ-R7RM>] (China) [hereinafter CPC Constitution].

⁶⁰ See Socialist Market Economy Decision, *supra* note 47; Guanyu Guoyou Qiye Gaige he Fazhan Ruogan Zhongda Wenti de Jueding (关于国有企业改革和发展若干重大问题的决定) [The Decision on Major Issues Concerning the Reform and Development of State-Owned Enterprises] (promulgated by the CPC Cent. Comm., Sept. 22, 1999, effective Sept. 22, 1999), art. 9, <http://www.lawinfochina.com/display.aspx?lib=law&id=991&CGid> [<https://perma.cc/9YMF-DVTD>] (China) [hereinafter Decision on SOE]; *infra* note 61.

⁶¹ Guanyu Jinyibu Jiaqiang he Gaijin Guoyou Qiye Dang de Jianshe Gongzuo de Tongzhi (关于进一步加强和改进国有企业党的建设工作的通知) [Notice on Further Enhancing and Improving the Party-Building in the State-owned Enterprises] (promulgated by the CPC Cent. Comm., Jan. 24, 1997, effective Jan. 24, 1997), <http://jtt.sc.gov.cn/jtt/c101702/2016/5/16/bc57af27d1df4e6a9d8c932932659810.shtml> [<https://perma.cc/X2VE-GFR2>] (China).

⁶² *Id.*

⁶³ See Guanyu Jiaqiang he Gaijin Zhongyang Qiye Dangjian Gongzuo de Yijian (关于加强和改进中央企业党建工作的意见) [Opinions on Strengthening and Improving Party Building in Central SOEs] (promulgated by the Organization Dep't of the CPC Cent. Comm. and the SASAC, Oct. 31, 2004, effective Oct. 31, 2004), <http://www.qinfeng.gov.cn/info/1964/61382.htm> [<https://perma.cc/3X7H-V5ZW>] (China) [hereinafter SOE Opinion].

⁶⁴ See Guozhiwei Dangwei Zhongxinzu Renzhen Xuexi Guanche Hu Jingtao Tongzhi "Qiyi" Zhongyao Jianghua Jingshen (国资委党委中心组认真学习贯彻胡锦涛同志"七一"重要讲话精神) [The Central Group of the CPC Committee of the SASAC Earnestly Learn and Implement the Spirits of the Major Speech Delivered by Comrade Hu Jingtao on July 1st], STATE-OWNED ASSETS SUPERVISION AND ADMIN. COMM'N OF THE STATE

published on its website an article drafted by the Party Secretary of a central group SOE, where the author claimed that the CPC's function as the "political core" meant the CPC's "political leadership" over the SOEs.⁶⁵ Another central group SOE also claimed that deepening the reform of the SOEs meant unswervingly adhering to the "CPC's leadership" over the SOEs.⁶⁶

Apart from pure political agendas, the CPC also gradually institutionalized the CPC's position in the laws and regulations of China to legitimize the CPC's activities in the SOEs throughout the SOE reform process. In 2003, the SOE Party-building mechanisms specified in the CPC Constitution were transplanted into the Interim Measures for the Supervision and Administration of State-Owned Assets of the Enterprise.⁶⁷ In 2005, the Chinese Company Law was substantially revised and required that all the companies, including the SOEs, "provide necessary conditions for the activities of the CPC."⁶⁸

C. *The Dynamics: The State Retreats and the CPC Advances*

The history before Xi's era has indicated interesting dynamics where the State retreats and the CPC advances. On the one hand, the State relinquished

SOUNCIL (Jul. 7, 2011), <http://123.127.249.132/n2588025/n2588119/c2669709/content.html> [<https://perma.cc/U7ZK-BJ8V>]; see also *infra* notes 65–66.

⁶⁵ See Liu Guosheng (刘国胜), *Guoyou Qiye Dangzuzhi Fahui Zhengzhi Hexin Zuoyong de Neihan he Yiyi* (国有企业党组织发挥政治核心作用的内涵和意义) [*The Meanings and the Significance of the CPC Organization Playing the Role of Political Core in the State-owned Enterprises*], THE CENT. PEOPLE'S GOV'T OF PEOPLE'S REPUBLIC OF CHINA (Aug. 10, 2006), http://www.gov.cn/zwhd/2006-08/10/content_358929.htm [<https://perma.cc/ZW9B-CPCX>].

⁶⁶ See *Yi Gaige Chuangxin Jingshen Tuijin Guoyou Qiye Dang de Jianshe* (以改革创新精神推进国有企业党的建设) [*Press Ahead the Party-building in the State-Owned Enterprises with the Spirit of Reform and Innovation*], STATE DEV. & INV. CORP. LTD. (Mar. 25, 2010), <https://www.sdic.com.cn/cn/zhuanti/dygy/xxzl/webinfo/2010/03/1269476839069243.htm> [<https://perma.cc/U2CA-6R2R>].

⁶⁷ *Qiye Guoyou Zichan Jiandu Guanli Zhanxing Tiaoli* (企业国有资产监督管理暂行条例) [Interim Measures for the Supervision and Administration of State-Owned Assets of the Enterprises] (promulgated by the State Council, May 27, 2003, effective May 27, 2003), art. 43, ST. COUNCIL GAZ. <https://www.chinacourt.org/law/detail/2003/05/id/85388.shtml> [<https://perma.cc/X869-5LNU>] (China) [hereinafter SOE Measures].

⁶⁸ *Gongsi Fa* (公司法) [Company Law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006), art. 19, <https://www.chinacourt.org/law/detail/2005/10/id/104490.shtml> [<https://perma.cc/G7T8-V9TQ>] (China).

its power over the SOEs. At the earliest stage of the SOE reform, the State returned to the SOEs the decision-making powers on output and pricing. Along with the development of the SOE reform, the State further limited its power by massively privatizing the SOEs, establishing the Anglo-American-style corporate governance system, and giving back to the SOEs the ownership rights of the property. On the other hand, the CPC did not step back from the SOEs as the State did; rather, the CPC sought to ideologically establish its role as the “political leadership” and the “political core,” and legally institutionalize its activities in the SOE corporate governance throughout the SOE reform process ever since 1989. History, thus, presents the dynamics of the State retreating and the CPC advancing.⁶⁹

III. THE SOE REFORM IN XI’S ERA

The history has featured the SOE corporate governance dynamics where the SOE reform measures, and the CPC’s political campaigns were parallelly advanced. Decades after the first initiation of the SOE reform, the current SOE corporate governance dynamics are still captured by this pattern.

A. *The SOE Reform Measures: A Three-Dimensional Design*

The SOE reform has been constantly pressed ahead in Xi’s era. The State launched a Double-Hundred project from 2018 to 2020, in which hundreds of central SOEs and hundreds of local SOEs were selected as the pilot enterprises for the SOE reform.⁷⁰ The State also outlined the Three-Year Course of Action for SOE Reform in 2020 to enhance the autonomy of the board of directors and the managers in the SOEs, promote marketization of the SOEs, and deepen the SOE reform.⁷¹ Most recently, the State has incorporated the SOE reform into its national five-year plan and objectives for 2035, stressing the importance of building the “Chinese-style modernized SOEs.”⁷² The State has envisioned establishing a *balanced* corporate

⁶⁹ See Wang & Cheng-Han, *supra* note 9, at 1090–97.

⁷⁰ See *Guoqi Gaige Shuangbai Xingdong* (国企改革 双百行动) [*SOE Reform Double Hundred Project*], STATE-OWNED ASSETS SUPERVISION AND ADMIN. COMM’N OF THE STATE COUNCIL,

<http://www.sasac.gov.cn/n4470048/n10286230/n10870882/index.html>

[<https://perma.cc/L2AW-CH2J>] (last visited May 3, 2022).

⁷¹ See Qiushi Theory, *Qiushiwang: Guoqi Gaige Sannian Xingdong de Zhongdian Renwu* (求是网：国企改革三年行动的重点任务) [*Qiushi Theory: The Major Missions of the Three-year SOE Reform*], STATE-OWNED ASSETS SUPERVISION AND ADMIN. COMM’N OF THE STATE COUNCIL (Feb. 1, 2021), <http://www.sasac.gov.cn/n4470048/n13461446/n15390485/n15390510/c16630747/content.html> [<https://perma.cc/DVS5-3L95>].

⁷² See Guomin Jingji he Shehui Fazhan Di Shisige Wunian Guihua he 2035 Nian

governance system in the SOEs in which the board of directors is empowered to make business decisions.⁷³

To implement the reform and materialize the reform effects, the State has adopted three major measures, including advancement of the MOR, creation of the SCIOC, and establishment of the Supervisory List and the Authorized List. The following parts of this section will discuss in detail the above three major SOE reform measures and their impacts.

1. *Ownership Reform: The Advancement of the MOR*

The MOR's history may be traced back to the 1990s. Since its invention, the MOR has been serving as a mechanism to "corporatize" the SOEs.⁷⁴ The idea has been stressed again in Xi's era.

In 2013, the CPC formulated the "proactive development of the mixed ownership" as one of the key resolutions and referred to the mixed-ownership economy as a crucial way to "realize the basic economic system of China."⁷⁵ As a general principle, the CPC encouraged the state-owned capital, the collective capital, and the non-public capital to be collectively held and mutually fused.⁷⁶

In 2015, the State aligned the principle with the SOE reform and has since then facilitated the injection of the non-public capital into the SOEs. Specifically, the State has classified the SOEs by industries and designated priority SOEs for the MOR in accordance with such classifications (as shown

Yuanjing Mubiao Gangyao (国民经济和社会发展第十四个五年规划和2035年远景目标纲要) [The 14th Five-Year Plan for National Economic and Social Development of the People's Republic of China and Outline of the Vision for 2035] (passed by the 4th Meeting of the 13th Nat'l People's Cong., Mar. 13, 2021), ch. 19, § 2, http://www.gov.cn/xinwen/2021-03/13/content_5592681.htm

[<https://perma.cc/UA64-DPSX>] (China).

⁷³ *Id.*

⁷⁴ See generally Guanyu Guoyou Qiye Gaige he Fazhan Ruogan Zhongda Wenti de Jueding (关于国有企业改革和发展若干重大问题的决定) [The Decision on Major Issues Concerning the Reform and Development of State-Owned Enterprises] (promulgated by the CPC Cent. Comm., Sept. 22, 1999, effective Sept. 22, 1999), <http://www.lawinfochina.com/display.aspx?lib=law&id=991&CGid> [<https://perma.cc/9YMF-DVTD>] (China).

⁷⁵ Guanyu Quanmian Shenhua Gaige Ruogan Zhongda Wenti de Jueding (关于全面深化改革若干重大问题的决定) [Decision of the Central Committee of the Communist Party of China on Several Major Issues Concerning Comprehensively Deepening the Reform] (Adopted at the 3rd Plenary Session of the 18th CPC Cent. Comm., Nov. 12, 2013), http://www.gov.cn/jrzq/2013-11/15/content_2528179.htm [<https://perma.cc/D7LM-WLWM>] (China).

⁷⁶ *Id.*

in Table 1 below).⁷⁷ In short, for the SOEs that do not operate in public welfare or in the strategically important industries, the State is willing to partially, or even completely, transfer its control to the non-State investors.⁷⁸ Apart from sorting priority SOEs by industries, the State also takes the levels of the SOEs into account. The local SOEs and the subsidiaries of the central group SOEs are supposed to serve as a template for the mixed-ownership reform, while the majority of the central SOEs are to be preserved from radical changes.⁷⁹

Table 1 The MOR Measures and the Types of SOEs⁸⁰

SOE Types	Industries	Sub-Industries	Post-Reform Paradigms
Commercial SOEs	Fully competitive industries	N/A	The State is the absolute controlling shareholder, the relative controlling shareholder, or the minority shareholder.
	Major industries concerning the national security or national economic lifeline	Important telecommunication infrastructure, pivotal transportation, infrastructure, etc.	The State is the exclusive or controlling shareholder.

⁷⁷ Guanyu Guoyou Qiye Gaige de Zhidao Yijian (关于国有企业改革的指导意见) [Guiding Opinions on State-Owned Enterprises Reform], (promulgated by the State Council, Aug. 24, 2015, effective Aug. 24, 2015), http://www.gov.cn/zhengce/2015-09/13/content_2930440.htm [<https://perma.cc/GN9Q-BEN2>] (China).

⁷⁸ *See id.*

⁷⁹ Guanyu Guoyou Qiye Fazhan Hunhe Suoyou zhi Jingji de Yijian (关于国有企业发展混合所有制经济的意见) [Opinions of the State Council on Development of An Economy of Mixed-Ownership of State-Run Enterprises] (promulgated by the State Council, Sept. 23, 2015, effective Sept. 23, 2015), <http://www.gov.cn/zhengce/content/2015-09/24/content10177.htm> [<https://perma.cc/TSA8-S7GT>] (China).

⁸⁰ *Id.*

		Exploitation and utilization of important water resources, forest resources, strategic mineral resources	
		Trunk river channels, main petroleum and natural gas pipeline networks, power grids	The State is the exclusive or controlling shareholder.
		Nuclear power, important public technology platforms, etc.	<ol style="list-style-type: none"> 1. The State is the exclusive or controlling shareholder (<i>if with natural monopoly</i>). 2. Non-State-owned capitals are allowed (<i>if without natural monopoly</i>).
		National reserves of strategic material supplies	<ol style="list-style-type: none"> 1. The State is the exclusive or controlling shareholder. 2. Non-State-owned capitals are allowed.
		National defense and military industry	The State is the exclusive or controlling shareholder.
		Strategic industries serving national	The State is the exclusive or controlling shareholder.

		strategic targets, shared	
		Technology platforms, etc.	The State-owned capitals increases.
SOEs for Public Welfares	All	N/A	<ol style="list-style-type: none"> 1. Generally, the State is the exclusive shareholder. 2. Non-State-owned capitals are only allowed if specific conditions are met.

At the central level, the number of pilot SOEs that adopt the MOR has been steadily increasing, from nine in the first batch to 160 in the most recent fourth batch in 2019.⁸¹ The average equity interests held by the newly introduced non-State investors in the 100 pilot SOEs which have completed the MOR has reached 35.9%.⁸² The central SOEs that do not fall within the pilot lists have been adopting reform measures as well. The three years from 2018 to 2020 saw an increase of 3,000 central SOEs that brought in non-State investors. As of the end of 2021, over 70% of the central SOEs have embraced the MOR.⁸³

The majority of the MOR cases at the central level have occurred in the tertiary subsidiaries of central group SOEs. One of the benchmarking MOR examples is China Eastern Air Logistic Co., Ltd (“CEAL”). Before the MOR, CEAL was a tertiary subsidiary wholly owned by the central SOE China

⁸¹ Liu Zheng (刘政), *Hunhe Suoyouzhì Gaige Ruhe “Hun” Zenme “Gai”* (混合所有制改革如何“混”怎么“改”) [*The Mixed Ownership Reform: How to Mix and How to Reform*], NAT’L DEV. AND REFORM COMM’N (Dec. 31, 2021), https://www.ndrc.gov.cn/wsdwhfz/202112/t20211231_1311180.html?code=&state=123 [<https://perma.cc/4ZFQ-2P8V>]; see also PricewaterhouseCoopers, *Guoqi Gaige Guanxiang Tai: Zhongyang Qiye Hunhe Suoyouzhì Gaige Huigu* (国企观察台：中央企业混合所有制改革回顾) [*SOE Observatory: SOE Mixed Ownership Reform in Retrospect*], PRICEWATERHOUSECOOPERS, <https://www.pwccn.com/zh/blog/state-owned-enterprise-soe/review-on-the-reform-mixed-ownership-central-enterprises.html> [<https://perma.cc/S76V-GH2G>] (last visited Apr. 20, 2022).

⁸² Zheng, *supra* note 81.

⁸³ *Id.*

Eastern Air Group (“CEAG”). In 2017, CEAL decided to adopt the MOR measures and introduced four non-State investors, including Legend Holdings, Deppon Logistics Co., Ltd., Global Logistic Properties Investment Management (China) Co., Ltd., Greenland Financial Holdings Group Co., Ltd., and the “core employee shareholder.”⁸⁴ The MOR measures restructured the shareholding of CEAL, where the non-State investors and the core employees together represented 55% of equity interests, and marked CEAG’s renouncement of its previous position as exclusive shareholder.⁸⁵ In 2021, CEAL went public on the Shanghai Stock Exchange. CEAG’s equity interests in CEAL were further diluted to 40.5%, with all the other equity interests held by non-State investors.⁸⁶ Apart from the changes in shareholding, the MOR have also brought in non-State directors. Currently, out of the total nine directors of CEAL, three were appointed by non-State investors, one by the employee representative, and five by CEAG.⁸⁷ Other MOR cases at the central level include, without limitation, China National Gold Group Gold Jewelry Co. Ltd., China United Network Communications Group Co. Ltd., and Shanghai Panasia Shipping Co., Ltd.⁸⁸

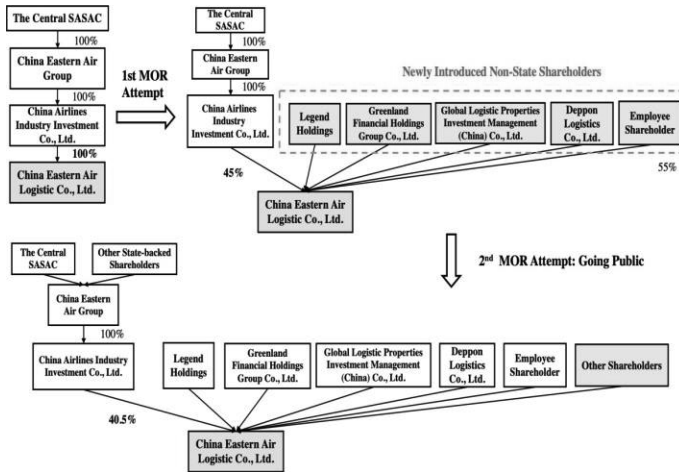
⁸⁴ Chen Shanshan (陈姗姗), *Lianxiang Debang Puluosi Lvdi Canyu Donghang Wuliu Hungai Guanliceng Chigu Zuigao Yaotao 3000 Wan* (联想德邦普洛斯绿地参与东航物流混改 管理层持股最高要掏3000万) [*Lenovo, Deppon, GLC, and Greenland Participate in the Mixed Ownership Reform of CEAL The Management to Pay up to 30 Million to Hold Equity Interests*], *DIYI CAIJING* (第一财经) [YICAI NEWS] (June 19, 2017), <https://www.yicai.com/news/5302089.html> [<https://perma.cc/Q6SQ-GH3E>]; China Eastern Air Group, *Donghang Wuliu Yinru Lianxiang deng Sijia Touzizhe Dazao Minhang Lingyu Hungai Diy Yangben* (东航物流引入联想等四家投资者 打造民航领域混改第一样本) [*CEAL Introduces Four Investors Including Lenovo to Become the First Sample of MOR in the Civil Aviation Industry*], STATE-OWNED ASSETS SUPERVISION AND ADMIN. COMM’N OF THE STATE COUNCIL (June 20, 2017), <http://www.sasac.gov.cn/n2588025/n2588124/c4615427/content.html> [<https://perma.cc/XP8V-YSQT>].

⁸⁵ China Eastern Air Group, *supra* note 84.

⁸⁶ China Eastern Air Logistic Co., Ltd., *Donghang Wuliu 2021 Nian Banniandu Baogao* (东航物流 2021 年半年度报告) [*2021 Semi-Annual Report of China Eastern Air Logistic Co. Ltd.*], CHINA E. AIR LOGISTIC CO. LTD., <https://www.eal-ceair.com/announcements.html> (follow the “下载” hyperlink to the right of “2021-08-28-601156.SH-601156 东航物流 2021 年半年度报告.pdf”) [<https://perma.cc/2SB3-47DY>] (last visited Apr. 1, 2022).

⁸⁷ *Gongsi Zhili* (公司治理) [*Corporate Governance*], CHINA E. AIR LOGISTIC CO. LTD., <https://www.eal-ceair.com/governance.html#Chairman> [<https://perma.cc/2L7Z-LZVY>] (last visited Apr. 1, 2022, 1:47 PM).

⁸⁸ *Zhongguo Liantong Hungai Sange Meixiangdao* (中国联通混改“三个没想到”) [*China Unicom Has “Three Surprises” in the MOR*], CHINA UNITED NETWORK COMM’N GRP. CO. (Aug. 21, 2017), <http://www.chinaunicom.com.cn/news/201708/1503301913304050446.html>

Diagram 2 Shareholding Changes of CEAL Throughout the MORs⁸⁹

The MOR at the local level has generally been approached more aggressively. Despite the huge number of local SOEs, the MOR has managed to cover 54% of them as of January 2021.⁹⁰ Compared with the reform practice at the central level, the MOR at the local level has more broadly and directly touched upon local group SOEs instead of only their subsidiaries. The local SASACs have also been more inclined to relinquish their actual control over the SOEs.⁹¹ Some local SASACs have further managed to

[<https://perma.cc/74S3-QREE>]; see also Zheng, *supra* note 81; see generally Shanghai Zhengquan Bao (上海证券报) [Shanghai Securities News], *Shanghai Fanya Hangyun Wancheng Hunhe Suoyouzhi Shidian Gaige* (上海泛亚航运完成混合所有制试点改革) [*Shanghai Panasia Shipping Co., Ltd. Complete Pilot Mixed Ownership Reform*], SHANGHAI ZHENGQUAN BAO (上海证券报) [SHANGHAI SECURITIES NEWS] (July 11, 2017), https://company.cnstock.com/company/scp_gsxw/201707/4101576.htm [<https://perma.cc/WX5E-DV29>].

⁸⁹ See generally *supra* notes 83–86.

⁹⁰ Wang Jiang (王绛), *Fenceng Fenlei Shenhua Guoqi Hunhe Suoyouzhi Gaige* (分层分类深化国企混合所有制改革) [*Deepen the SOE Mixed Ownership Reform by Layers and Classifications*], XINHUA NEWS AGENCY (Jan. 29, 2021), http://www.xinhuanet.com/fortune/2021-01/29/c_1127039088.htm [<https://perma.cc/A7SY-CHMS>].

⁹¹ Chen Hongxia et al. (陈红霞) et al., *Difang Guoqi Jinru Jiasuqi Hungai Renshi Zhongtouxu* (地方国企改革进入加速期 混改仍是重头戏) [*The Reform of the Local SOEs Is Accelerating The MOR Is Still the Focus*], 21 SHIJI JINGJI BAODAO (21世纪经济报道) [21ST CENTURY BUSINESS HERALD] (Jan. 16, 2018) (noting that cases have emerged

marketize the appointment of the board of directors.⁹² Cases in Yunnan, Shanxi, Hubei, Tianjin, and Shanghai have been demonstrative of the local SASACs' vigorous efforts.⁹³ One featured local MOR case is the reform of Yunnan Baiyao Holding Co., Ltd. ("YBH"). YBH, once exclusively owned by the Yunnan SASAC, introduced New Huadu Industrial Group ("New Huadu") as a new strategic shareholder in 2016. After this move, the Yunnan SASAC and New Huadu each held 50% equity interests of YBH. Together with the introduction was the abolishment of the administrative levels of the leaders of YBH.⁹⁴ In 2017, a new shareholder Jiangsu Yuyue Technology Development Co., Ltd. joined YBH. Yunnan SASAC's equity interests further reduced to 45%, thereby renouncing its control over YBH.⁹⁵ In 2018, Yunnan Baiyao Group Co., Ltd. ("YBG") announced a merger through which

where controlling equity interests of the SOEs have been transferred in provinces or municipalities, including Yunnan, Shanghai, Shanxi, Tianjin, and Hubei), <http://www.21jingji.com/2018/1-16/yOMDEzNzlfMTQyMzUyOQ.html> [<https://perma.cc/F572-RMBX>]; Liu Liliang (刘丽靓), *Difang Guoqi Hungai Xian Sanda Qushi Jingzhenglei Guoqi Rangdu Kongguquan Cheng Liangdian* (地方国企混改现三大趋势 竞争类国企让渡控股权成亮点) [*The MOR of the Local SOEs Presents Three Major Trends Competitive SOEs Transferring Controlling Equity Interests Becomes the Highlights*], ZHONGGUO ZHENGQUAN BAO (中国证券报) [CHINA SECURITIES JOURNAL] (July 24, 2017) (analyzing the MOR cases and policies in Yunnan, Shanghai, Shenzhen, and Shanxi), https://www.cs.com.cn/xwzx/201707/t20170724_5387908.html?from=groupmessage [<https://perma.cc/TV86-GPLG>]; see, e.g., Wang Yajie (王雅洁), *Fangqi Kongguquan! Tianjinshi 60 Ge Guoqi Xiangmu Kaimen "Zhaoqin" Guoziwei Difang Zhuanxiang Diaoyan Daiqi* (放弃控股权! 天津市60个国企项目开门“招亲”国资委地方国企专项调研待启) [*Give up Controlling Equity interests! 60 Tianjin SOEs to Receive Non-State Investors SASAC Local SOE Research Project to Start*], JINGJI GUANCHA BAO (经济观察报) [THE ECONOMIC OBSERVER] (Mar. 6, 2020) (examining the cases in Tianjin where the controlling equity interests of the local SOEs have been or will be transferred), <http://www.eeo.com.cn/2020/0306/377724.shtml> [<https://perma.cc/324J-28WL>].

⁹² Liliang, *supra* note 91.

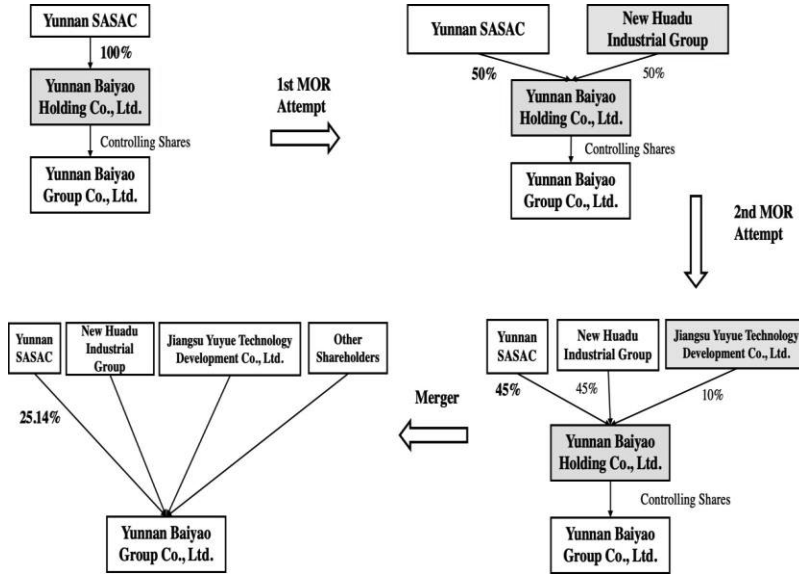
⁹³ Hongxia et al., *supra* note 91.

⁹⁴ *Yunnan Baiyao Konggu Hunhe Suoyouzhi Gaige Shunli Wancheng* (云南白药控股混合所有制改革顺利完成) [*Yunnan Baiyao Group Co. Ltd. Successfully Complete the Mixed Ownership Reform*], YUNNAN BAIYAO GRP. CO. LTD. (Apr. 19, 2017), <http://www.yunnanbaiyao.com.cn/view/ynbyPc/1/92/view/1924.html>

⁹⁵ *"Baiyao Hungai" Xinjieduan, Yinru Jiangsu Yuyue Wanshan Zhili Jiegou* ("白药混改"新阶段, 引入江苏鱼跃完善治理结构) [*To the New Stage of the Mixed Ownership Reform, Baiyao Introduces Jiangsu Yuyue and Optimizes the Governance Structure*], YUNNAN BAIYAO GRP. CO. LTD. (June 6, 2017), <http://www.yunnanbaiyao.com.cn/view/ynbyPc/1/92/view/1926.html>.

it would absorb its controlling shareholder, YBH.⁹⁶ After the closing of this deal, YBH deregistered and Yunnan SASAC's ownership of 45% equity interests in YBH was further diluted to 25.14%.⁹⁷

Diagram 3 Shareholding Changes of YBG Throughout the MORs⁹⁸



⁹⁶ Yunnan Baiyao Group Co., Ltd., *Yunnan Baiyao Jituan Gufen Youxian Gongsi Xishou Hebing Yunnan Baiyao Konggu Youxian Gongsi ji Guanlian Jiaoyi Yuan* (云南白药集团股份有限公司吸收合并云南白药控股有限公司暨关联交易预案) [Plan of Yunnan Baiyao Group Co., Ltd. Merging by Absorption Yunnan Baiyao Holding Co., Ltd. and Related Transactions], JUCHAO ZIXUN (巨潮资讯) [CNINFO], <http://static.cninfo.com.cn/finalpage/2018-11-02/1205575390.PDF> [<https://perma.cc/R5JR-N8P6>] (last visited Apr. 19, 2022).

⁹⁷ Yunnan Baiyao Group Co., Ltd., *Yunnan Baiyao 2020 Nian Niandu Baogao* (云南白药2020年年度报告)

[2020 Annual Report of Yunnan Baiyao Group Co. Ltd.], YUNNAN BAIYAO CO. LTD., <http://www.yunnanbaiyao.com.cn/uploadDir/pdf/20210616/1623828849592.pdf> (last visited Apr. 19, 2022); Yunnan Baiyao Group Co., Ltd., *Yunnan Baiyao 2019 Nian Niandu Baogao* (云南白药2019年年度报告) [2019 Annual Report of Yunnan Baiyao Group Co. Ltd.], YUNNAN BAIYAO CO. LTD., <http://www.yunnanbaiyao.com.cn/uploadDir/pdf/20200608/1591607065381.pdf> (last visited Apr. 19, 2022).

⁹⁸ See *supra* notes 93–96.

With measures and cases in place at both central and local levels, the MOR has in effect reshuffled the power dynamics inside the SOEs.

The most direct result of the MOR is the introduction of the non-State investors. The non-State investors bring not only different types of capitals for these SOEs, but, more significantly, also the diversified opinions from non-State investors regarding the business decisions and thus the possibility to counterbalance the will of the State in these SOEs. Some scholars have indicated that the CPC's political governance prevails over the legal governance in practice and makes the MOR a puppet.⁹⁹ While such an argument might be proper in revealing the considerable influences of the CPC in the SOEs, it has overlooked the dynamics between the State and the SOEs. As the decision-making process of the shareholders' meeting in the SOEs is still legally required, chances are that the non-State investors would be able to project their voices and undercut the State's assertiveness in the SOEs so far as they can be effectively brought in by the MOR. The situation of the State dictating the decision-makings would be mitigated. The effects of the MOR are even more distinct in cases in which the MOR has been approached more aggressively. For the SOEs in which the equity interests of the State reduce to less than 66%, any major decisions require the agreement of the non-State investors.¹⁰⁰ For the SOEs in which the central or the local States give up their positions as a controlling shareholder, the non-State investors may legally overthrow the State's decisions through the shareholders' meeting.¹⁰¹

⁹⁹ Compare Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665, 667–70 (2015) (noting that the ownership structure is not entirely irrelevant in the analysis of the corporate governance of the SOEs, though looking beyond ownership is necessary); and Wang & Cheng-Han, *supra* note 9, at 1059–60 (arguing that a change of the ownership structure would lead to the private investors' demand and legal empowerment of participating in corporate decision making), with Wang, *supra* note 7, at 648–60 (arguing that the ownership structure is largely irrelevant, given that the CPC controls the appointment and the dismissal of the board of directors).

¹⁰⁰ Gongsi Fa (公司法) [Company Law] (revised by Standing Comm. Nat'l People's Cong., Oct. 26, 2018, effective Oct. 26, 2018), art. 43, 121, 142, 181, 2018 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 685 http://ghiplegal.com/static/frontend/img/pdf/company_law_en.pdf [<https://perma.cc/YEC9-V7ED>] (China);

¹⁰¹ Circumstantial evidence where the MOR has facilitated an effective balance of decision-making power is the resistance to incorporate Party-building-related provisions in the AoAs. As examined by some scholars, the adoption of the Party-building-related provisions has been affected by the SOEs' ownership structures and exposure to the capital markets. See generally Lauren Yu-Hsin Lin & Curtis J. Milhaupt, *Party Building or Noisy Signaling? The Contours of Political Conformity in Chinese Corporate Governance*, 50 J. LEGAL STUD. 187, 187–217 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3510342 [<https://perma.cc/X6V2-B7VR>].

The MOR also restricts the State's power in personnel management. Depending on the types of SOEs, the State has taken to different degrees the personnel management power from the shareholders' meeting and the board of directors. For the SOEs that are exclusively owned by the State, the State is empowered to directly *appoint* or *dismiss* the board of directors and the board of supervisors, including the chairpersons and the vice chairpersons of these two boards, as well as to *suggest* the manager candidates.¹⁰² For the SOEs in which the State serves as a controlling shareholder, the State may *propose* the directors and the supervisors, *recommend* the chairperson and the vice chairperson of the board of directors as well as the president of the board of supervisors, and *suggest* the manager candidates.¹⁰³ For the enterprises in which the State only holds non-controlling equity interests, the power of the State is further reduced to *proposing* the directors and the supervisors.¹⁰⁴ The MOR has transformed the shareholding of the State in the SOEs. Depending on whether the State's position in an SOE is shifted to the controlling or non-controlling shareholder, the State's rights on personnel management may be

¹⁰² Qiye Guoyou Zichan Jiandu Guanli Zhanxing Tiaoli (企业国有资产监督管理暂行条例) [Interim Measures for the Supervision and Administration of State-Owned Assets of the Enterprises](promulgated by the State Council, May 27, 2003, effective May 27, 2003; rev'd by the State Council, Mar. 2, 2019), art. 17(2), St. Council Gaz. (Jan. 2019), http://www.gov.cn/gongbao/content/2019/content_5468931.htm [https://perma.cc/7BC5-2KSN]; Qiye Guoyou Zichan Fa (企业国有资产法) [Law on the State-owned Assets of Enterprises] (promulgated by Standing Comm. Nat'l People's Cong., Oct. 28, 2008, effective May 1, 2009), art. 22, St. Council Gaz, Oct. 28, 2008, http://www.gov.cn/flfg/2008-10/28/content_1134207.htm [https://perma.cc/DF83-BSEF] (China).

¹⁰³ Qiye Guoyou Zichan Jiandu Guanli Zhanxing Tiaoli (企业国有资产监督管理暂行条例) [Interim Measures for the Supervision and Administration of State-Owned Assets of the Enterprises](promulgated by the State Council, May 27, 2003, effective May 27, 2003; rev'd by the State Council, Mar. 2, 2019), art. 17(3), ST. COUNCIL GAZ., Jan. 2019, http://www.gov.cn/gongbao/content/2019/content_5468931.htm [https://perma.cc/7BC5-2KSN]; Qiye Guoyou Zichan Fa (企业国有资产法) [Law on the State-owned Assets of Enterprises] (promulgated by Standing Comm. Nat'l People's Cong., Oct. 28, 2008, effective May 1, 2009), art. 22, ST. COUNCIL GAZ, Oct. 28, 2008, http://www.gov.cn/flfg/2008-10/28/content_1134207.htm [https://perma.cc/DF83-BSEF] (China).

¹⁰⁴ Qiye Guoyou Zichan Jiandu Guanli Zhanxing Tiaoli (企业国有资产监督管理暂行条例) [Interim Measures for the Supervision and Administration of State-Owned Assets of the Enterprises] (promulgated by the State Council, May 27, 2003, effective May 27, 2003; rev'd by the State Council, Mar. 2, 2019), art. 17(4), ST. COUNCIL GAZ., Jan. 2019, http://www.gov.cn/gongbao/content/2019/content_5468931.htm [https://perma.cc/7BC5-2KSN]; Qiye Guoyou Zichan Fa (企业国有资产法) [Law on the State-owned Assets of Enterprises] (promulgated by Standing Comm. Nat'l People's Cong., Oct. 28, 2008, effective May 1, 2009), art. 22, ST. COUNCIL GAZ, Oct. 28, 2008, http://www.gov.cn/flfg/2008-10/28/content_1134207.htm [https://perma.cc/DF83-BSEF] (China).

transformed from the sole and final decision-making to proposals, recommendations, and suggestions that are subject to arguments and oppositions from the non-State investors. The State may also be insulated from managing an enterprise's managers.

The above changes have further implications on the decision-making of the SOEs' daily operations. The newly introduced non-State investors the weakening State's powers on the appointment and dismissal have also heralded an increasing number of non-State-backed directors in the SOEs. As in the case of CEAL illustrated above, the directors appointed by the non-State investors have taken up over one-third of the entire board. The business decisions, hence, are less likely to be made under the shadow of the State. The composition of the board of directors would further influence the managers in the SOEs. As the managers are appointed by the directors, the managers also tend to exercise the will of the SOEs instead of the State after the MOR.

In sum, the State has forged ahead the MOR at both central and local levels. The MOR has effectively curbed the State's power in major and daily decision-making and personnel management of the pilot SOEs.

2. *Institutional Reform: The Creation of the SCIOC*

Since its establishment, the SASAC has served as a representation of the State and played an exceptional role in the corporate governance of the SOEs. Before Xi's era, the SASAC was entrusted to administer comprehensively on the personnel, affairs, and assets of the SOEs.¹⁰⁵ The year of 2015 marked a watershed moment, where the SASAC's functions were reduced to only "capital-focused" regulation on the SOEs. The transformation was aimed at furthering the separation of the State from the SOEs.¹⁰⁶

¹⁰⁵ Guanyu Zai Guozhiwei Xitong Tuidong Goujian Guozhi Jianguan Dageju de Zhidao Yijian (关于在国资委系统推动构建国资监管大格局的指导意见) [Guiding Opinions on Pressing Ahead the Construction of a Major Regulatory Pattern in the SASAC System] (promulgated by the SASAC, Oct. 11, 2011, effective Oct. 11, 2011), <http://www.sasac.gov.cn/n2588035/n2588320/n2588335/c20180618/content.html> [<https://perma.cc/E6XK-ZSX9>] (China); see, e.g., Guanyu Jiaqiang he Gaijin Zhongyang Qiye Dangjian Gongzuo de Yijian (关于加强和改进中央企业党建工作的意见) [Opinions on Strengthening and Improving Party Building in Central SOEs] (promulgated by the Organization Dep't of the CPC Cent. Comm. and the SASAC, Oct. 31, 2004, effective Oct. 31, 2004), <http://www.qinfeng.gov.cn/info/1964/61382.htm> [<https://perma.cc/3X7H-V5ZW>] (China).

¹⁰⁶ Guomin Jingji he Shehui Fazhan Di Shisange Wunian Guihua Gangyao (国民经济和社会发展第十三个五年规划纲要) [Outline of the 13th Five-Year Plan for the National Economic and Social Development] (passed by the 4th Meeting of the 12th Nat'l People's Cong., Mar. 17, 2016), http://www.gov.cn/xinwen/2016-03/17/content_5054992.htm [<https://perma.cc/AB2S-RH3T>] (China).

To materialize such transformation, the CPC and the State proposed to establish the SCIOC and envisioned the SCIOC to inherit the SASAC's responsibilities with regard to the pilot SOEs.¹⁰⁷

On the basis of this preliminary vision, the State clarified in 2018 that the SCIOC is a specific type of SOE exclusively owned by the State, with no business operation but only investment functions.¹⁰⁸ The SCIOC may be established through restructuring or by new establishment, depending on the market requirements.¹⁰⁹ Analogous to common wholly State-owned enterprises, the SCIOC will establish the board of directors, the board of supervisors, the management team, and the CPC organization, however, with no Anglo-American-style shareholders' meeting.¹¹⁰ The powers of the shareholders' meeting of the SCIOC, including, but not limited to, appointing the executive and external directors and designating the chairman and the vice chairman of the board of the directors, will be assumed by the corresponding SASAC.¹¹¹ After the establishment, the SCIOC will take over the assets of the pilot SOEs and replace the SASAC's previous role as the pilot SOEs' shareholder.¹¹² As of August 2019, a total of 21 SCIOCs were established on the central level, including nineteen State Capital Investment Companies and two State Capital Operation Companies. Correspondingly, 142 SCIOCs were founded on the local level.¹¹³

¹⁰⁷ Guanyu Shenhua Guoyou Qiye Gaige de Zhidao Yijian (关于深化国有企业改革的指导意见) [Guiding Opinions on Deepening the Reform of State-owned Enterprises] (promulgated by the CPC Cent. Comm. and the State Council, Aug. 24, 2015, effective Aug. 24, 2015), ST. COUNCIL GAZ., http://www.gov.cn/zhengce/2015-09/13/content_2930440.htm [<https://perma.cc/P6XS-9FP3>] (China).

¹⁰⁸ Guanyu Tuijin Guoyou Ziben Touzi, Yunying Gongsi Gaige Shidian de Shishi Yijian (关于推进国有资本投资、运营公司改革试点的实施意见) [Implementation Opinions on Advancing the Pilot Program of the Reform of State Capital Investment and Operation Companies] (promulgated by the State Council, July 14, 2018, effective July 14, 2018), art. 2, ST. COUNCIL GAZ. July 30, 2018, http://www.gov.cn/zhengce/content/2018-07/30/content_5310497.htm [<https://perma.cc/YT26-3QE5>] (China).

¹⁰⁹ *Id.*

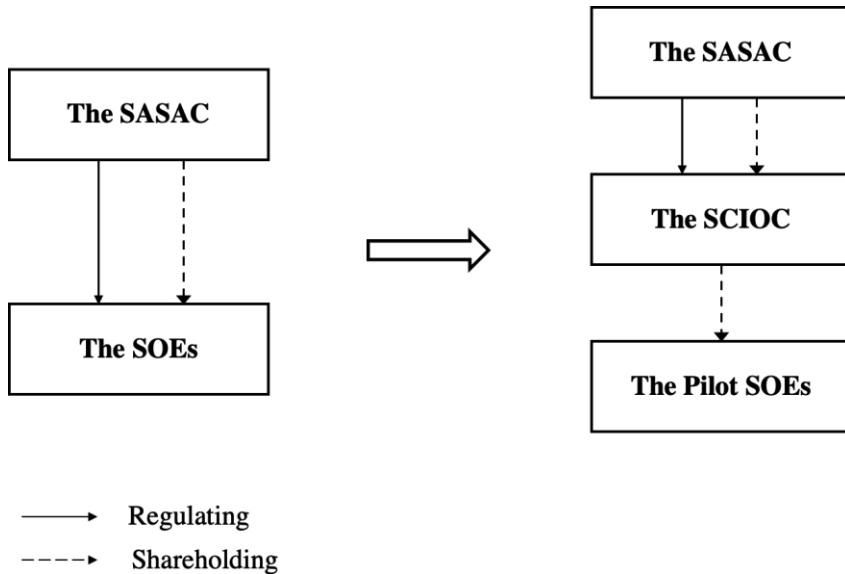
¹¹⁰ *Id.*, at art. 4.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Wang Jiang (王绛), *Dangqian Guoyou Ziben Touzi, Yunying Gongsi Yunxing Tedian ji Gaige Qushi* (当前国有资本投资、运营公司运行特点及改革趋势) [Current Operation Features and Reform Trends of State Capital Investment and Operation Companies], ECON. OBSERVER (Aug. 10, 2019), <http://www.eeo.com.cn/2019/0810/363306.shtml> [<https://perma.cc/57XX-K4SH>].

**Diagram 4 Changes of Regulating and Shareholding Structures
After the Establishment of
the SCIOC¹¹⁴**



The creation of the SCIOC, arguably an imitation of the Singaporean Temasek's model which has proved to be a success in terms of the SOE reform, has more directly separated the State from the pilot SOEs than the MOR.¹¹⁵ With the SCIOC established and the pilot SOEs selected, the

¹¹⁴ See *supra* notes 107-112. (Note that the SCIOCs are not technically the shareholders of the pilot SOEs. SCIOCs are authorized by the SASACs to assume the functions of shareholders); see Guanyu Tuijin Guoyou Ziben Touzi, Yuning Gongsi Gaige Shidian de Shishi Yijian (关于推进国有资本投资、运营公司改革试点的实施意见) [Implementation Opinions on Advancing the Pilot Program of the Reform of State Capital Investment and Operation Companies] (promulgated by the State Council, July 14, 2018, effective July 14, 2018), art. 3, ST. COUNCIL GAZ. July 30, 2018, http://www.gov.cn/zhengce/content/2018-07/30/content_5310497.htm [<https://perma.cc/5JYU-TGME>] (China). For convenience, Diagram 4 describes the relationship between the SCIOCs and the pilot SOEs as "shareholding". For more information regarding the SASAC's legal position with regard to the SOEs, see *supra* note 53 and its discussions.

¹¹⁵ Wei Jie Nicholas Ng, *Comparative Corporate Governance: Why Singapore's Temasek Model Is Not Replicable in China*, 51 N.Y.U. J. INT'L L. & POL. 211, 213 (2018); see generally Wang Jianwen (王建文), Lun Danmaxi Dongshihui Zhidu Zai Woguo Shangyelei Guoyou Gongsi Gaige zhong de Yunyong (论淡马锡董事会制度在我国商业类国有企业改革中的运用) [On the Application of the Temasek's System of the

SASAC will no longer be recognized as a shareholder of the pilot SOEs, nor will the SASAC be entitled to exercise shareholder's rights in accordance with the Chinese Company Law. The powers regarding the formulation of the business plans, the decision-making of major business issues, and the management of the board of directors, will now rest exclusively with the SCIOC and the non-State shareholders, if any. The SASAC is also restrained from exercising its SOE-specific regulatory powers on the pilot SOEs. Instead, it is the SCIOC that the SASAC is now regulating. Notably, the SCIOC is a limited liability company which is not borne, nor particularly tasked, with the responsibility to regulate the pilot SOEs. Contrarily, the SCIOC, as a mere shareholder, is supposed to avoid intervening with the daily operations of the pilot SOEs and limit its rights and responsibilities to those stipulated by the Chinese Company Law. The possibility that the daily operations and businesses of the SOEs being intervened by the State plummets. The State is directly spun off from the pilot SOEs.

That said, some scholars have been concerned that the creation of the SCIOC is nothing more than whitewashing the SOE reform: as the SASAC reigned over the SCIOC by acting as a shareholder and controlling the appointment and the dismissal of the board of directors, the SASAC still retains the *de-facto* control over the pilot SOEs.¹¹⁶ As reasonable as the argument might be in its own way, the SASAC's clout on the pilot SOEs is hardly comparable with the time before the creation of the SCIOC. As the SASAC has expressly abdicated its legal positions as the shareholder and the regulator, the only possible channel that the SASAC will involve in the corporate governance of the pilot SOEs is through the board of directors of the pilot SOEs' shareholder; that is, the board of directors of the SCIOC. However strong the SASAC's control over every director of the SCIOC may be, the lengthy chain of governance renders the SASAC's influence over the pilot SOEs remote and marginal.

3. *Managerial Reform: The Establishment of the Supervisory List and the Authorized List*

Apart from the SCIOC, another mechanism that the CPC and the State have adopted in response to the requirement of "capital-focused regulation" is the Supervisory List and the Authorized List.

The Supervisory List was proposed in 2017 together with the document

Board of Directors on Commercial State-owned Enterprises in China], 32 DANGDAI FAXUE (当代法学) [CONTEMP. L. REV.] 60 (2018).

¹¹⁶ See Hu Gairong (胡改蓉), *Guoyou Gongsi Dongshihui Dulixing zhi Baozhang* (国有公司董事会独立性之保障) [The Guarantee of Independence of the Board of Directors of the State-owned Enterprises], 12 FAXUE LUNTAN (法学论坛) [LEG. F.] 52, 54 (2010).

that mandated the power streamlining of the SASAC.¹¹⁷ The rudimentary contour of the Supervisory List broadly consisted of forty-three items where the central or local SASAC's regulations were to be canceled, authorized, devolved, or transferred to the corresponding SOEs.¹¹⁸ The detailed and complete Supervisory List at the central level ("Central Supervisory List") was released in 2018. The Central Supervisory List sets out thirty-six matters in nine categories on which the SASAC will exercise authorities. For the matters that are not recorded on the Central Supervisory List, the decision-making power will be deprived from the central SASAC and returned to the central SOEs; for the matters that have been recorded on the Central Supervisory List, the approval or filing requirements by the central SASAC will be substantially reduced.¹¹⁹ After the publication of the Central Supervisory List, the provincial level SASACs, including but not limited to Jilin, Shandong, Guangdong, Beijing, and Hunan, gave proactive responses by establishing the Supervisory Lists at the provincial level ("Provincial Supervisory List").¹²⁰

In 2019, the central SASAC further published the Authorized List to echo the requirements of deepening the SOE reform and expanding the SOE autonomy stressed by President Xi Jinping. The Authorized List selects parts of the matters on the Supervisory List and entitles the SASAC to authorize the decision-making rights of the selected matters to the SOEs.¹²¹ The

¹¹⁷ Capital-Focused Regulation, *supra* note 16.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See, e.g., *Guanyu Yinfa "Beijingshi Guoziwei Chuziren Jianguan Quanli he Zeren Qingdan" de Tongzhi* (关于印发《北京市国资委出资人监管权力和责任清单》的通知) [*Notice on Publishing the List of Supervisory Authorities and Responsibilities of Beijing SASAC*] (promulgated by Beijing SASAC, Dec. 6, 2019, effective Dec. 6, 2019), http://gzw.beijing.gov.cn/xxfb/zcfg/201912/t20191229_1542178.html [<https://perma.cc/CG64-GW4X>] (China); *Guanyu Yinfa Shandongsheng Guoziwei Chuziren Jianguan Quanli he Zeren Qingdan de Tongzhi* (关于印发山东省国资委出资人监管权力和责任清单的通知) [*Notice on Publishing the List of Supervisory Authorities and Responsibilities of Shandong SASAC*] (promulgated by Shandong SASAC, Apr. 4, 2019, effective Apr. 4, 2019), <http://gzw.shandong.gov.cn/articles/ch06103/202006/e297714b-435b-4a76-8aa8-c9d5279e1959.html> (China); *Sheng Guoziwei Quanze Qingdan* (省国资委权责清单) [*Supervisory List of Guangdong SASAC*] (promulgated by Shandong SASAC, Feb. 23, 2017, effective Feb. 23, 2017), http://gzw.gd.gov.cn/jggk/content/post_1338352.html [<https://perma.cc/A7XY-SQ3U>] (China).

¹²¹ *Guanyu Yinfa Gaige Guoyou Ziben Shouquan Jingying Tizhi Fangan de Tongzhi* (关于印发改革国有资本授权经营体制方案的通知) [*Notice of Issuing the Plan for Reforming the State-owned Capital Authorized Operation System*] (promulgated by the State Council, Apr. 28,

Authorized List further flags matters of which the decision-making power is to be devolved or returned to the SOEs.¹²² A total of thirty-five streamlined matters in five categories have been recorded on the Authorized List in accordance with the classifications of the enterprises, namely the central SOEs, the pilot SOEs for SOE reform, the SCIOCs, and the specific enterprises.¹²³ Depending on the types of enterprises, examples of the matters that could be authorized include, with certain qualifiers, the hiring of managers and the determination of their salaries, granting of stock-based incentive compensation, and initiation of equity investment outside the business scope. Examples of the matters to be devolved include the approval of the MOR plan, the transfer of equity interests, issuance of debt, and asset reorganization that meet specific requirements.¹²⁴ The Authorized Lists at the provincial level (“Provincial Authorized List”) were successively released from 2019 to 2021. According to publicly available information, at least twenty provisional level SASACs have published the Authorized Lists, representing two-thirds of the total 31 provisional level SASACs.¹²⁵

The impacts of the establishment of the Supervisory List and the Authorized List are probably the most tangible among the three major SOE reform measures in Xi’s era analyzed in this Article. The Supervisory List limits the rights of the central and the local SASACs to only no-more-than-a-dozen matters that have been recorded on the Supervisory List. The Authorized List also progressively absorbs matters that are vital to the SOEs’ operations; for instance, the appointment and the dismissal as well as the salaries of the managers. The Authorized List thus further endows the SOEs with the decision-making power of the specific matters which the SASAC has been maintaining an iron grip. As explained by Jiangyu Wang and Tan Cheng-Han, the Supervisory List and the Authorized List have denoted the fact that the SASAC previously encroached on the rights which should have belonged to the SOEs and its current determination to return these rights to

2019, effective Apr. 28, 2019), http://www.gov.cn/zhengce/content/2019-04/28/content_5387112.htm [<https://perma.cc/Z6QG-HE74>] (China).

¹²² Authorized List, *supra* note 17.

¹²³ See State Owned Assets Report Magazine, *Guoziwei Youguan Fuzeren jiu “Guowuyuan Guoziwei Shouquan Fangquan Qingdan (2019 Nian Ban)” Dajizhe Wen* (国资委有关负责人就《国务院国资委授权放权清单 (2019 年版)》答记者问) [*The Persons in Charge Answers Questions Regarding the Lists of Authorized and Devolved Powers of the State-owned Assets Supervision and Administration Commission of the State Council (2019)*], STATE-OWNED ASSETS SUPERVISION & ADMIN. COMM’N OF THE STATE COUNCIL

(Oct. 12, 2019), <http://www.sasac.gov.cn/n2588025/n4423279/n4517386/n12348553/c12355853/content.html> [<https://perma.cc/28S6-FMFJ>] (China); see also *id.*

¹²⁴ Authorized List, *supra* note 17.

¹²⁵ I manually conducted the research on the official websites of each provincial SASACs.

the SOEs.¹²⁶

B. *The CPC's Presence in the SOEs: A Comprehensive Penetration*

The positioning of the CPC in the SOEs has officially transited from the pure “political core” into the overall “leadership” after Xi Jinping inaugurated the President. In November 2013, the CPC’s general leadership function in the SOEs was confirmed in the document regarding the plan for the formulation of CPC’s rules in the next five years.¹²⁷ Such leadership role was more expressly asserted by the CPC in 2015 and beyond. In 2017, the CPC Constitution explains the “leadership” as comprehensively covering the following: “setting the right direction, focusing on the big picture, ensuring the implementation of the CPC’s policies and principles, and discussing and deciding on major issues of the SOEs.”¹²⁸

Apart from the political campaigns, the CPC has also sought to institutionalize the CPC’s political influence. Starting from 2015, the CPC has required the SOEs to include provisions regarding the general requirements of Party-building into their AoA, including the organizational structures, positions, rights and responsibilities of the CPC organizations in the SOEs.¹²⁹ In December 2021, the Draft Chinese Company Law has incorporated the provisions regarding the CPC’s leadership and the CPC’s participation of the major events of the SOEs.¹³⁰ With the CPC’s being constantly advanced, the following part dissects the current political governance mechanism of the CPC in the SOEs.

1. *Decision-Making Powers of Major Issues*

According to Chinese Company Law, the decision-making power of major issues belong to the shareholders and the board of directors of the

¹²⁶ Wang & Cheng-Han, *supra* note 9, at 1093.

¹²⁷ Xinhua News Agency, Zhongyang Dangnei Fagui Zhiding Gongzuo Wunian Guihua Gangyao (2013–2017 Nian) (中央党内法规制定工作五年规划纲要 (2013—2017 年)) [Outline of the Five-Year Plan for the Formulation of Laws and Regulations Within the CPC Central Committee (2013–2017)] The Cent. People’s Gov’t of the People’s Republic of China [promulgated by the CPC Central Committee, Nov. 2013, effective Nov. 2013], http://www.gov.cn/jrzq/2013-11/27/content_2536600.htm [<https://perma.cc/Y9PN-E63U>] (China).

¹²⁸ Communist Party of China [CPC][Constitution] (revised and passed by the 19th CPC National Congress, Oct. 24, 2017, effective Oct. 24, 2017), art. 33, <https://www.qxnzsb.gov.cn/zhfwdzgdg/dz/2021-01-15/2860.html> [<https://perma.cc/H9N6-FEYX>] (China).

¹²⁹ SOE Deepening Opinion, *supra* note 15, art. 2; AoA Notice, *supra* note 20, art. 1.

¹³⁰ Draft Chinese Company Law, *supra* note 19, art. 145.

companies.¹³¹ This might be the case for private enterprises where the CPC's presence is relatively limited. For the SOEs in China, however, such powers have been considerably shared by the CPC.

In 2010, the CPC introduced the "Three Majors and One Large" system. Decisions regarding major issues, major personnel appointments and dismissals, investments in major projects and use of large sums of money of the SOEs ("Three Majors and One Large") require discussions with the CPC organization in the SOEs in advance.¹³² The Three Majors and One Large covers all the events of whom decision-making rights belong to the shareholders' meeting or the board of directors according to the Chinese Company Law.¹³³ In this connection, the CPC has the right to participate in the decision-making process of, among others, the SOEs' operation guidelines, investment, merger and acquisition, profit distribution, and the provisions of guarantees. Further, the directors who at the same time assume the leadership positions of the CPC organization in the SOEs shall comply with and implement the CPC's opinions after the discussion.¹³⁴ The discussion with the CPC as a pre-requisite for the final decision was further emphasized and incorporated in CPC documents thereafter.¹³⁵

Notably, the Three Majors and One Large system, as a political invention

¹³¹ Chinese Company Law, *supra* note 45, art. 37, 46, 99, 108, 113.

¹³² See XinhuaNet, Guanyu Jinyibu Tuijin Guoyou Qiye Guanche Luoshi "Sanzhongyida" Juece Zhidu de Yijian (关于进一步推进国有企业贯彻落实"三重一大"决策制度的意见) [The Opinion on Further Promotion of State-owned Enterprises Implementing "Three Majors and One Large" Decision-making System] (promulgated by General Office of the CPC Central Committee and General Office of the State Council, July 16, 2010, effective July 16, 2010), art. 3(9) and 3(13), <http://www.sasac.gov.cn/n2588035/n2588320/n2588335/c4260827/content.html> [<https://perma.cc/5ATV-Q8PH>] (China) [hereinafter Three Major One Large].

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See, e.g., Xinhua News Agency, Zhongguo Gongchandang Guoyou Qiye Jiceng Zuzhi Gongzuo Tiaoli (Shixing) (中国共产党国有企业基层组织工作条例(试行)) [Regulation on Grassroot Organizations of Communist Party of China in State-owned Enterprises (For Trial Implementation)] (promulgated by CPC Central Committee, Dec. 30, 2019, effective Dec. 30, 2019), art. 15, http://www.gov.cn/xinwen/2020-01/05/content_5466687.htm [<https://perma.cc/P6HT-62CC>] (China) [hereinafter SOE CPC Regulation]; Xinhua News Agency, Zhonggong Zhongyang Bangongting Yinfā Guanyu Zhongyang Qiye zai Wanshan Gongsī Zhili Zhong Jiaqiang Dang de Lingdao de Yijian (中国中央办公厅印发关于中央企业在完善公司治理中加强党的领导的意见) [General Office of the CPC Central Committee Publishes Opinions on Enhancing the Party's Leadership During the Improvement of the Corporate Governance of the Central Enterprises], STATE-OWNED ASSETS SUPERVISION AND ADMIN. COMM'N OF THE STATE COUNCIL (May 30, 2021), http://www.gov.cn/xinwen/2021-05/30/content_5614000.htm [<https://perma.cc/EBT2-GCBZ>] (China).

without having been legally recognized, has not been regarded by China's judicial practice as mandatory on the validity of the SOEs' decisions. In other words, decisions without beforehand communication with the CPC organization on the matters that fall within the Three Majors and One Large system would still be regarded as valid.¹³⁶ Realizing how loosely the Three Majors and One Large system might be enforced in practice, the CPC has asked the SOEs to incorporate Party-building-related provisions into their AoAs. Shortly after CPC's requirement, all the central group SOEs and their secondary and tertiary subsidiaries have included such provisions in the AoAs.¹³⁷ The CPC has also attempted to include the CPC's participation on major issues of the SOEs into the Chinese Company Law, which is to be revised in the near future.¹³⁸

¹³⁶ Gansusheng Nonggong Jinchang Nongchang Youxian Gongsi, Jinchang Shuini (Jituan) Youxian Zeren Gongsi Jueyi Xiaoli Queren Jiufen Zaishen Shencha yu Shenpan Jiandu Minshi Caidingshu (甘肃农垦金昌农场有限公司、金昌水泥(集团)有限责任公司公司决议效力确认纠纷再审查与审判监督民事裁定书) [Civil Ruling of Retrial and Trial Supervision on the Dispute Regarding Corporate Resolution Validity Between Gansu Agriculture Reclamation Jinchang Farm Co., Ltd. and Jinchang Cement (Group) Co., Ltd.], <https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?doId=PAToVzfjJQP+QZ+oc9AHY8MtkqGrTRA7qexzpLTxdMbafeD5bcaF2I3IS1ZgB82+n1VkJMAoQVhNAER7taQoUs17qQQKeFd/o9ni1ObwwQkrnG5PHgCNa4cYWkYlk84> [https://perma.cc/LB64-WPQY] (Sup. People's Ct. 2021) (China) (explaining that in 2011, Jinchang Cement (Group) Co., Ltd. ("Jinchang Cement") had two capital contributors. Gansu Agriculture Reclamation Jinchang Farm Co., Ltd. ("Gansu Farm") contributed 59.43% of Jinchang Cement's registered capitals and the Jinchang SASAC 40.57%. In 2014, the shareholders' meeting of Jinchang Cement decided to re-assess the value of the land that had been freely allocated by Jinchang Government. The value of the land would be injected into Jinchang Cement and the corresponding equity interests would be held by the Jinchang SASAC. After the assessment and increase of capitals, the capital contribution of Jinchang SASAC changed to 62.48%, and Gansu Farm to 37.52%. Gansu Farm and Jinchang SASAC signed the resolution. Later, Gansu Farm sought to invalidate the resolution. One of the major claims was that the assessment and increase of capitals had not been submitted to the CPC organization in Jinchang Cement for beforehand discussions. The Supreme People's Court ruled against Gansu Farm, holding that resolution is valid, as it does not violate any laws or the AoA of the company).

¹³⁷ Jiang Lin (江琳), Guoqi, Dangjian Gongzuo Yaoqiu jin Zhangcheng (国企, 党建工作要求进章程) [Party-building is Required to be Incorporated in the SOEs' Articles of Associations], RENMIN RIBAO (人民日报) [PEOPLE'S DAILY] (June 20, 2017), <http://politics.people.com.cn/n1/2017/0620/c1001-29349436.html>. [https://perma.cc/9F29-8WXR] (China).

¹³⁸ Draft Chinese Company Law, *supra* note 19.

2. Personnel Management

The Three Majors and One Large has also covered the personnel management of the SOEs. Major personnel-related issues would require the participation to different degrees of the CPC organizations in the SOEs. For instance, the appointment and the dismissal of the management personnel of the mid-level and the above need to be consulted with the CPC organizations before the decisions are made.¹³⁹

The CPC's influence on the SOEs' personnel management is further evidenced in the political backgrounds of the directors and the supervisors. The CPC emphasized in Xi's era the "Two-way Access and Cross-representation" system.¹⁴⁰ The system has facilitated the members who hold the leadership in the SOE's CPC organization to assume the offices of the board of directors, the board of supervisors, or the management positions of this SOE, and has allowed the members of an SOE's board of directors, board of supervisors, or management positions who are CPC members to access to the leadership positions of the CPC organization in this SOE.¹⁴¹ Further, as a general principle, the secretary of the CPC organization and the chairman of the board of directors shall be served by the same person.¹⁴² The "Two-way Access and Cross-representation" system has been treated as mandatory requirements by many SOEs in practice. As of October 2021, the "Two-way Access and Cross-representation" system has been implemented in all of the central SOEs, ninety percent of the provincial SOEs, and eighty percent of the municipal SOEs.¹⁴³ Apart from managing the political backgrounds of the board of directors, many scholars have also argued that the CPC has extended its clout to the SOE personnel management through its discretion on the leadership's career promotions and political lives.¹⁴⁴

¹³⁹ Three Major One Large, *supra* note 132.

¹⁴⁰ SOE Deepening Opinion, *supra* note 15, art. 24.

¹⁴¹ *Id.*

¹⁴² See, e.g., SOE CPC Regulation, *supra* note 135, art. 14; Guanyu Jiaqiang he Gaijin Zhongyang Qiye Dangjian Gongzuo de Yijian (关于加强和改进中央企业党建工作的意见) [Opinions of Strengthening and Improving the Party-Building of Central Enterprises] (promulgated by the Organization Department of the CPC Central Committee and the SASAC, Oct. 31, 2004, effective Oct. 31, 2004), <https://news.12371.cn/2015/03/12/ARTI1426131063462262.shtml> [<https://perma.cc/DZ6F-33QJ>] (China).

¹⁴³ Liu Weitao (刘维涛) & Meng Xiangfu (孟祥夫), Dangjian Luodao Shichu Fazhan Gengju Youshi (党建落到实处 发展更具优势) [The Party-building is Implemented the Development Boasts More Advantages], RENMIN RIBAO (人民日报) [PEOPLE'S DAILY] (Oct. 11, 2021), http://paper.people.com.cn/rmrb/html/2021-10/11/nw.D110000renmr_20211011_1-13.htm [<https://perma.cc/U3V5-GDTK>] (China).

¹⁴⁴ See generally Li-Wen Lin, *State Ownership and Corporate Governance in China:*

On a more generic note, the CPC has long held “placing cadres and talents under the management of the CPC” as a fundamental principle.¹⁴⁵ The principle broadly catches nearly every aspect of the management of the cadres, including but not limited to appointment, dismissal, supervision, and evaluation.¹⁴⁶ In 2019, the CPC expressly mandated the management of the SOEs’ leadership to follow this principle.¹⁴⁷ In other words, the CPC’s political influence on the personnel management has permeated the SOEs through the assertion of the long-held principle before the introduction of any specific management mechanism.

3. *Supervision and Governance*

The CPC has touched upon the supervision of the SOEs by establishing both internal and external inspection systems.

The CPC organizations in each SOEs are required to establish a Commission for Discipline Inspection or to appoint a Discipline Inspector (together, the “Inspection Institution”), depending on the size of the SOEs.¹⁴⁸ The Inspection Institution is not a new invention. In 1990, the CPC already asked the industrial enterprises owned by the people who had established a CPC organization to form an Inspection Institution inside the enterprises.¹⁴⁹

An Executive Career Approach, 2013 COLUM. BUS. L. REV. 743 (2013); Kjeld Erik Brødsgaard et.al, *China's SOE Executives: Drivers of or Obstacles to Reform?*, 35 THE COPENHAGEN J. OF ASIAN STUDIES 52, 71 (2017).

¹⁴⁵ See Gongchandang Zuzhi Gongzuo Tiaoli (共产党组织工作条例) [Regulation on the Work of the Organizations of the Communist Party of China] (promulgated by the CPC Central Committee, May. 22, 2021, effective May. 22, 2021), art. 4, http://www.gov.cn/zhengce/2021-06/02/content_5615053.htm [<https://perma.cc/NEE3-CYRC>] (China); *Guanyu Jiaqiang Dang de Zhengzhi Jianshe de Yijian* (关于加强党的政治建设的意见) [Opinions on Strengthening the Political Building of the Party] (promulgated by the CPC Central Committee, Jan. 31, 2019, effective Jan. 31, 2019), art. 15, http://www.gov.cn/zhengce/2019-02/27/content_5369070.htm [<https://perma.cc/G78N-EVHP>] (China).

¹⁴⁶ Wang Dongqi (王懂棋), *Zenyang Lijie Dangguanganbu* (怎样理解党管干部) [*How to Interpret Placing Cadres Under the Management of the Party*], Xinhua Wang (新华网) [Xinhua Net] (October 15, 2020), http://www.xinhuanet.com/politics/2020-06/22/c_1126143926.htm [<https://perma.cc/98SX-A7KM>] (China)

¹⁴⁷ SOE CPC Regulation, *supra* note 1 135, art. 3.

¹⁴⁸ *Id.*, art. 8.

¹⁴⁹ *Guanyu Quanmin Suoyouzhi Gongye Qiye Jili Jiancha Gongzuo de Zanxing Guiding* (中共中央纪律检查委员会关于全民所有制工业企业纪律检查工作的暂行规定) [*Interim Regulations on Discipline Inspection Work of the Industrial Enterprises Owned by the Whole People*] (promulgated by the Central Committee for Discipline Inspection of the CPC, Nov. 5, 1990, effective Nov. 5, 1990), art. 8, https://china.findlaw.cn/fagui/p_1/29250.html [<https://perma.cc/3VQZ-NBEA>] (China).

The major responsibilities of the Inspection Institutions were to ensure the compliance of the enterprises with the CPC's guidelines.¹⁵⁰ Today, the Inspection Institutions have inherited and expanded their responsibilities. The current Inspection Institutions in the SOEs supervise leaders of the SOEs regarding their discipline and duty fulfillment, assist the CPC organizations in the SOEs in furthering the Party-building and Party-governance, and coordinate the anti-corruption work.¹⁵¹

Apart from the Inspection Institutions established inside the SOEs, the CPC has also created an external inspection mechanism. The CPC's central and local committees have set up the central and the local inspection teams respectively. The central CPC inspection team will inspect and supervise the leaders and the members of the CPC organizations in the pillar central SOEs, and the local CPC inspection teams all the local SOEs at their same level.¹⁵² The CPC aims to cover all the SOEs, either on the central or the local level, with an external inspection mechanism.¹⁵³ Though ostensibly targeting only the CPC organizations in the SOEs instead of the SOEs themselves, the external inspection mechanism can be well extended to the SOEs. As the Two-way Access and Cross-representation system has substantially made the leadership of the CPC organizations in the SOEs and the leadership of the SOEs be assumed by the same members, the inspection on the CPC organizations is in effect checking the board of directors of the SOEs as well. The SOEs have now witnessed numerous cases where a CPC's external inspection team has been dispatched. On the central level, for example, forty-two central SOEs have accepted the central inspection teams in 2019, where the feedback of the inspections mainly focused on Party-building, inclusion of the CPC's leadership, and integrity risks.¹⁵⁴ The CPC's inspection teams

¹⁵⁰ *Id.* at art. 16.

¹⁵¹ SOE CPC Regulation, *supra* note 135, art. 31.

¹⁵² *Gongchandang Xunshi Gongzuo Tiaoli* (共产党巡视工作条例) [*Regulation on Inspection Work of the Communist Party*] (promulgated by the CPC Central Committee, July 2, 2009, effective July 2, 2009, revised by the CPC Central Committee, July 1, 2017, effective July 1, 2017), art. 13(3) and 14(3), http://www.gov.cn/zhengce/2017-07/14/content_5210576.htm#allContent [<https://perma.cc/Q72H-8X9Y>] (China) [hereinafter Inspection Regulation].

¹⁵³ Li Zhiyong (李志勇), *Xunshi: Quanguo Shixian Quanfugai* [巡视: 全国实现全覆盖] (*Inspection: To Cover the Entire Country*), CENT. COMM'N FOR DISCIPLINE INSPECTION (May 10, 2017), https://www.ccdi.gov.cn/yaowen/201705/t20170510_147171.html [<https://perma.cc/B3HQ-A2FF>] (China).

¹⁵⁴ See generally *Benwang Jizhong Gongbu Shijiuji Zhongyang Disanlun Xunshi Fankui Qingkuang* (本网集中公布十九届中央第三轮巡视反馈情况) [*This Official Website Collectively Releases the Feedbacks of the 3rd Round Inspection of the 19th Central Committee of the CPC*], CENT. COMM'N FOR DISCIPLINE INSPECTION (Aug. 4, 2019), https://www.ccdi.gov.cn/specialn/19zyxsgz/yw19zyxsgz/201908/t20190803_102954.html [<https://perma.cc/XN3K-NWWH>] (China).

have not been strangers to the local SOEs either. They have inspected local SOEs in the past two years that have covered across the country. Recent cases include without limitation to Beijing City, Shanghai City, and Gansu Province.¹⁵⁵

Circumstantial evidence has also suggested that the CPC's internal and external inspection mechanisms have penetrated the corporate governance system of the SOEs. For instance, scholars have so far identified only one case where the SASAC acts as the plaintiff in a lawsuit against the directors who breach their fiduciary duties, albeit the fact that the Chinese Company Law has qualified the board of supervisors or the shareholders as plaintiff in such context.¹⁵⁶ A much more common practice in China has been that the CPC initiates the investigations, identifies relevant evidence and exercises punishment against the board of directors who failed to meet their fiduciary duties.¹⁵⁷

C. *The Intensifying Dynamics: The State Retreats and the CPC Advances*

The CPC's political campaigns and the SOE reform measures in Xi's era have both been intensively advanced. For both the CPC's political agendas

¹⁵⁵ See, e.g., Beijing Ribao (北京日报) [Beijing Daily], *Shierjie Beijing Shiwei Di Shilun Xunshi Quanbu Jinzhu Jubao Dianhua Youxiang Gongbu* (十二届北京市委第十轮巡视全部进驻 举报电话邮箱公布) [*The 10th Round of Inspection of the 12th Municipal Committee of the CPC Starts Report Telephones and Emails Are Published*], TAEKFOTO (Aug. 12, 2020), <https://www.takefoto.cn/viewnews-2258269.html> [<https://perma.cc/F9CG-TNFC>] (China); *Shiyijie Shanghai Shiwei Di Shiyilun Xunshi Wancheng Jinzhu* (十一届上海市委第十一轮巡视完成进驻) [*The Eleventh Round of Inspection of the Eleventh Shanghai Municipal Committee of the CPC Starts*], SHANGHAI CENT. COMM'N FOR DISCIPLINE INSPECTION (Dec. 3, 2021), <http://m.people.cn/n4/2021/1203/c1406-15329241.html> [<https://perma.cc/PP9V-NHU8>]; *Gansu Shengwei Dijiulun Xunshi Wancheng Fankui* (甘肃省委第九轮巡视完成反馈) [*The 9th Round of Inspection of Gansu Provincial Committee of the CPC Completes Feedbacks*], CENT. COMM'N FOR DISCIPLINE INSPECTION (Feb. 19, 2022), https://www.ccdi.gov.cn/yaowenn/202202/t20220214_171428.html [<https://perma.cc/57J5-N2QU>] (China).

¹⁵⁶ Xu Xiaosong (徐晓松), *GUOYOU GUQUAN XINGSHI HE JIANDU FALU ZHIDU YANJIU* (国有股权行使和监管法律制度研究) [RESEARCH ON THE LEGAL SYSTEM OF EXERCISING AND SUPERVISING THE STATE-OWNED EQUITY] 283 (2005).

¹⁵⁷ Xiaohua (陈晓华), *supra* note 52, at 121; see generally *Zhongyang Yiji Dang he Guojia Jiguan, Guoqi he Jinrong Danwei Ganbu* (中央一级党和国家机关、国企和金融单位干部) [*Central-Level Cadres of the Party, State Institutions, SOEs and Financial Institutions*], CENT. COMM'N FOR DISCIPLINE INSPECTION, <https://www.ccdi.gov.cn/scdcn/> [<https://perma.cc/4UT3-2MY2>] (China) (last visited Apr. 20, 2022).

and the SOE reform measures, the advancement does not simply stay at the textual stage but has been put into practice with ample evidence in place. Consistent with the history before Xi's era, the corporate governance of the SOEs in the context of the SOE reform is manifesting the dynamics that the State retreats and the CPC advances.

The State continues to relinquish its control over the SOEs through the MOR, the creation of the SCIOC, and the establishment of the Supervisory List and the Authorized List. Though each of the three major SOE reform measures might not individually suffice to substantially curb the State's influence in the SOEs, the effects of these measures magnify when they are examined all together. More importantly, the three major reform measures have collectively demonstrated the trend and the determination of the State's continuous retreatment from the SOEs.

The CPC, on the other hand, is constantly advancing in the SOEs. With the political campaigns forged ahead and the CPC's presence institutionalized, the power of the three highest authorities in a modern enterprise have been shared by the CPC. For the shareholders' meeting, their decision-making powers regarding fundamental business issues and major personnel management have been caught by the Three Major and One Large system. For the board of directors, their decision-making powers regarding major business moves and the management of the managers have been molded by the Three Major and One Large system, the Two-way Access and Cross-representation, and the principle of "placing cadres and talents under the management of the CPC." The board of supervisors is also in competition with the CPC's external and internal inspection mechanisms.

Therefore, the corporate governance of the SOEs in Xi's era is still presenting the dynamics of "the State retreats and the CPC advances."

IV. RE-CHARACTERIZING THE CORPORATE GOVERNANCE OF THE SOES IN THE CONTEXT OF CHINA'S SOE REFORM

A. *Party Over State: A Fundamental Political Logic Embedded in China*

The consistent dynamics of "the State retreats and the CPC advances" throughout the SOE reform process could hardly reconcile with the premises in current SOE scholarships that the CPC and the State are an integrated whole and that their moves are aligned.¹⁵⁸ Accordingly, a close examination on the interactions between the CPC and the State is demanded. With the recognition that one chapter would by no means be enough to comprehensively capture such sophisticated interactions, discussions below serve as an initial attempt to separate the CPC and the State and seek to

¹⁵⁸ For more discussions concerning the tendency of treating the CPC and the State as a whole, see Lin & Milhaupt, *supra* note 5.

provide a rudimentary framework for further analysis of the SOE corporate governance.¹⁵⁹

The entanglement between the CPC and the current State dates back to the establishment of the “new China.” Before 1949, the CPC had decades of revolutionary experiences in combating the Kuomintang (“KMT”) and the State built thereunder. When the CPC seized the victory in 1949, the KMT, together with the “old State,” moved to Taiwan and left the regime a vacuum.¹⁶⁰ The CPC soon realized its incapability and illegitimacy of running the entire country with a population 100 times that of the CPC members.¹⁶¹ In light of this, the CPC started to establish a “new State.”

The fact that the State had been built out of the CPC’s revolution later led to the CPC’s dominance over the State.¹⁶² The CPC organizations penetrated into the newly founded State institutions, with the CPC members occupying positions from leadership to grassroots.¹⁶³ The CPC was *obligated* to participate in discussions, decision-makings, and approvals of the State’s work, even though the State was, on paper, given the utmost power on administrative affairs.¹⁶⁴ The CPC could also join the State at its own will in enacting joint decrees.¹⁶⁵ The CPC’s ill-defined powers were ultimately translated into its wanton intervention in the State’s jurisdiction. Attempts to separate the CPC from the State unfolded in the 1950s. The overheated criticisms from the intellectuals of the CPC’s unrestrained influences, however, raised the CPC’s concerns of potential political instabilities and, hence, eradicated the CPC’s willingness to further this reform.¹⁶⁶ In response, the CPC successively waged massive political movements which erased all the previous reform efforts and resulted in active reformers shelving their ideas to avoid further troubles in the political upheavals.¹⁶⁷ As a result, the

¹⁵⁹ Existing literatures that discuss the relationship between the Party and the State often define the “State” broadly to cover the legislation entity, the judicial branch, the administrative organs, and the military in China. However, I adopt a slightly different approach in this Article. I narrowly define the “State” as only the administrative organs in China (i.e., the government, the governmental institutions, and the relevant government officials). The reason is that the “State,” which would directly engage in the SOE corporate governance, includes only the administrative organs, especially the central and the local SASACs. That said, I will briefly cover the legislation entity and the judicial branch in Chapter IV. Based on the recognition, these two institutions would remotely affect the SOE corporate governance and affect the understanding of the role and the dynamics of the CPC in China’s politics.

¹⁶⁰ ZHENG, *supra* note 8, at 47–48.

¹⁶¹ *Id.* at 47.

¹⁶² See Sujian Guo, *The Party-State Relationship in Post-Mao China*, 37 CHINA REP. 301, 302 (2001); ZHENG, *supra* note 23, at 10.

¹⁶³ ZHENG, *supra* note 8, at 64–65.

¹⁶⁴ *Id.* at 85.

¹⁶⁵ *Id.* at 89.

¹⁶⁶ *Id.* at 66–68.

¹⁶⁷ *Id.* at 67–77, 85–95.

state-building embryo was paralyzed and the CPC retained its dominance over the State for decades thereafter.

Deng Xiaoping reactivated the state-building against the background of Mao's death and in consideration of the urgent need to unleash China's economic potential. The demand to separate the CPC from the State was stressed soon after Deng had assumed the office. Concrete reform measures included, *inter alia*, limiting the CPC in enacting joint decrees with the State, decreasing the number of CPC organizations in the State, and abrogating the system where the first secretary of the local CPC committee and the highest government position at the local level were assumed by the same person.¹⁶⁸ Though these measures had been raised at an early stage of Deng's era, the implementation process afterwards was anything but smooth. Together with the reform measures were the restoration of the CPC's status which had been equally subverted and the regain of power of high-ranking CPC leaders who had been purged in the massive campaigns in Mao's era.¹⁶⁹ Some of the CPC's leaders were concerned that the empowerment of the State would marginalize the CPC in China's politics, the attitude of which simmered constrains and failures of an effective state-building.¹⁷⁰ The political turbulence in 1989 became the turning point where fierce objections inside the CPC against the reform process were finally triggered. Further efforts to empower the State and to restrain the CPC were largely abandoned.¹⁷¹

Decades thereafter, the CPC's dominance has not been shaken, but rather has been consolidated and has become almost an iron law in China's politics. Despite the failure to construct a State purely independent of the CPC's control as once envisioned, a noteworthy feature in the CPC's exercise of its dominance has evolved from Deng's era and has become distinctive in Xi's era: in an attempt to legitimize its roles and activities, the CPC is gradually discarding its revolutionary nature and transforming to a "ruling Party."¹⁷² Specifically, the CPC is refraining from waging massive political campaigns or *taking over* the decision-making powers of the State to maintain its dominant status, as it used to do in Mao's era. Instead, the CPC is progressively accepting the State's increasing administrative powers and tends to exert its influences by *embedding* itself into the State and *transplanting* the CPC's general policies into administrative measures.¹⁷³ Such a general feature has also indicated a transformation of the roles and functions of the CPC and the State in contemporary China: the CPC reigns

¹⁶⁸ *Id.* at 192–96.

¹⁶⁹ *Id.* at 192.

¹⁷⁰ *Id.* at 192–94.

¹⁷¹ Snape & Wang, *supra* note 6, at 483.

¹⁷² Guo, *supra* note 24, at 91.

¹⁷³ YONGNIAN ZHENG, *The Institutionalization of the Communist Party and the Party System in China* in THE INSTITUTIONALIZATION OF THE COMMUNIST PARTY AND THE PARTY SYSTEM IN CHINA 162, 163 (Allen Hicken & Erik Martinez Kuhonta eds., 2015); Snape & Wang, *supra* note 6, at 487.

the power to determine the macroscopical policies and represents the supreme interests in China; the State, with substantial administrative powers, becomes an instrument that implements the CPC's decisions.¹⁷⁴ Under this general framework, the CPC has placed particular focus on areas including national security and public interests, while the State has been given more autonomies on economic and civil affairs.¹⁷⁵ The subtle transformation is not unique for the Party–State relationship. The CPC's interactions with the legislative and judicial branches may also serve as a broader implication for the CPC's repositioning in China's politics and a remote reference for the CPC's relationship with the State: the CPC is now adopting a similar approach where the CPC asserts its leadership position while refrains from reviews and approvals of the legislative and judicial work.¹⁷⁶

The above illustration is not simply insipid histories of the CPC and the State; it has flagged three consistent characteristics and development trends regarding the Party–State relationship. First, the CPC and the State are never a seamless whole throughout the history. There have been attempts to separate, and times that have witnesses the partial separation of, the CPC and the State. Thus, neither the CPC nor the State is monolithic. The interactions between the CPC and the State have been sophisticated, constantly transiting, and subject to various painstaking separation efforts in different political environments of different eras. Second, despite the reshuffles of the relationships and the counterbalances between the two institutions, the CPC's leadership is an iron law in China's politics. The CPC has always boasted the “real power” with its political interests unchallengeable.¹⁷⁷ Third, the CPC's absolute leadership does not necessarily infer a weak State which functions as nothing more than a rubber stamp. The state-building efforts in the past decades have manifested the expectation for a paradigm where a strong CPC and a strong State coexists.¹⁷⁸ Such paradigm is currently envisioned to be realized by a subtle division of labor: The CPC designs the general policies and makes major decisions, with special focuses on national security and public interest. The State, with substantial administrative measures, is utilized as a tool by the CPC for the implementation of the CPC's policies and decisions.

¹⁷⁴ *Id.*; see also Shihai Zhu, *Multidimensional Review of The Relationship Between Party Regulations and State Laws*, 49 H. K. L. J. 697, 700 (2019); Ling LI, “Rule of Law” in a Party-State: A Conceptual Interpretive Framework of the Constitutional Reality of China, 2 ASIAN J. L. & SOC'Y 93, 95 (2015).

¹⁷⁵ ZHENG, *supra* note 8, at 175

¹⁷⁶ *Id.* at 167–71.

¹⁷⁷ TERESA WRIGHT, PARTY AND STATE IN POST-MAO CHINA 18 (2015); Larry Catá Backer, *The Communist Party as Polity and the Chinese Party-State Constitutional Order*, reprinted in *Routledge Handbook of Constitutional Law in Greater China*, (forthcoming Dec. 2022) (unpublished manuscript at 4) (on file with SSRN).

¹⁷⁸ ZHENG, *supra* note 8, at 185; see also Guo, *supra* note 24, at 76–77.

B. *Dissecting the Corporate Governance of the SOEs: Explanation and Anticipation*

1. *A New Analytical Framework: The Party, the State, and the Enterprises*

On top of the conclusion that the CPC and the State are distinguishing institutions positioned in different power hierarchies with different functions in China's politics, I propose a new analytical framework in the SOE corporate governance.

The dynamics of "the State retreats and the CPC advances" have denoted that the CPC and the State, each with their active roles in the SOEs, are not in synchronicity during the SOE reform process. Given that they have persisted for decades throughout the SOE reform, such dynamics would likely implicate the fundamental rationale of the corporate governance of the SOEs in the context of the SOE reform. Further, if the CPC and the State were treated as an integrated whole, the moves of the CPC and the State in the SOEs would inevitably cause internal contradictions and afford no reasonable explanation. It would also be untenable to argue that the retreatment of the State is simply a smokescreen to conceal the CPC's regain of exclusive control over the SOEs, as the argument can hardly explain the costly implementation of the intensive SOE reform measures. The dynamics of "the State retreats and the CPC advances" hence demand to appreciate the interactions between the CPC and the State and to separate the CPC and the State as two distinguishing players in the corporate governance of the SOEs. Apart from the CPC and the State, the SOEs also are a major player in the examination of the corporate governance. The legal governance of the SOEs still rest with the shareholders' meeting, the board of directors, and the board of supervisors of the SOEs. More importantly, the SOE reform has extracted substantial powers from the State and returned them to the SOEs. Thus, the SOEs shall also be taken into consideration in the SOE corporate governance.

In this connection, a new triangular analytical framework that covers the CPC, the State, and the SOEs is formed. In this framework, there will be an equal focus upon the CPC, the State, and the SOEs. As elaborated on in this Article, the CPC's political campaigns and the SOE reform measures have respectively generated tangible effects. The CPC's presence in the SOEs progresses; the State's voice in the SOEs decreases; and the SOEs are gaining more autonomy.¹⁷⁹ A disproportionate analysis on any of the three parties would thus fail to appreciate the full extent of the corporate governance in the SOEs and would be misleading.

This new triangular analytical framework distinguishes from current scholarships and avails studies on the SOE corporate governance in the following three aspects: First, the triangular framework preliminarily

¹⁷⁹ See *supra* Part III.

resolves the contradictions in the dynamics of “the State retreats and the CPC advances” which would have occurred were the notion of “party-state” adopted. Second, the triangular framework peels off the monolithic structures of the CPC and the State and appreciates the dynamic interactions among the CPC, the State, and the SOEs. The interactions would illuminate the fundamental rationales of the SOE reform and the ultimate corporate governance model envisioned. Third, the triangular framework would accommodate the situation where the interests of the State and the CPC in the SOEs require a tradeoff and observe its influences on the corporate governance of the SOEs. The traditional analytical framework where only the “party-state” and the SOEs are included could hardly appreciate the above subtleties in the SOE corporate governance.

To be very clear, by no means in this Article do I intend to radically overthrow all the scholarships that accept the notion of “party-state” or argue that the CPC and the State shall *always* be respectively treated in isolation, nor do I aim to construct an impression that the CPC and the State are *neatly* separable, or the CPC and the State are fundamentally *in confrontation*. On the contrary, I appreciate the tight connections between the CPC and the State and agree with the essential power hierarchies indicated in the notion of “party-state”. I also recognize that the notion of “party-state” might be perfectly appropriate under the circumstances where the moves of the CPC and the State are aligned. What I intend to argue in this Article is that packing the CPC and the State as a whole in the *specific topic* of SOE corporate governance could be *incomplete* and *misleading*. The notion of “party-state” is a broad and loose reference which can hardly accommodate the nuances in the corporate governance of the SOEs. I thus seek to distinguish the CPC and the State as two separate institutions when analyzing the *specific topic* of the corporate governance of the SOEs.

Accordingly, I adopt a new analytical framework in this Article where the CPC, the State, and the SOEs are all included and equally focused upon when analyzing the corporate governance of the SOEs.

2. *A Shifting Corporate Governance Model of the SOEs in the Context of the SOE Reform*

The new triangular framework serves as a basis for the analysis of the corporate governance model of the SOEs. Before getting into in-depth discussions of SOE corporate governance model, however, an inquiry into the dynamics of “the State retreats and the CPC advances” is necessary in the first place. The contradiction on the surface of the dynamics was solved preliminarily by the separation of the CPC from the State. Taking a step further, the distinctions between the CPC and the State also explain the fundamental rationales beneath such dynamics. The CPC and the State have designed the functions of the SOE reform to be two-fold. Politically, the CPC and the State have envisaged consolidating and increasing their leverages at

home and abroad through maintaining the management powers over the SOEs. Economically, the CPC and the State have placed grandiose hopes on the SOE reform to boost the domestic economy, demonstrate international competitiveness, and offer tangible commitments to non-State investors.¹⁸⁰ Correspondingly, the SOEs also incur a two-fold function. In contrast to the privately-owned enterprises whose major goal is to maximize profits, the SOEs are tasked with an *additional* mission as to incur the social responsibilities and contribute to the public well-beings.¹⁸¹ The fundamental political logic in China has been eloquent that the CPC, instead of the State, *must* eventually retain the real power. Therefore, the above political goals can only be fulfilled by the CPC's advancement, and the economic goals are in turn met by comprising the State's position. The two-fold functions are balanced by the dynamics of "the State retreats and the CPC advances".

With this understanding, the SOE corporate governance model can now be dissected in the new triangular framework. The dynamics of "the State retreats and the CPC advances" have shifted the corporate governance model from the previous Party-State governance to the current tripartite Party-State-SOE governance. Before the initiation of the SOE reform, the corporate governance of the SOEs was shared only between the CPC and the State. The CPC designed the rules and mechanisms that govern the SOEs, and the State determined and managed the operation details from the capitals and the salaries to the output and the pricing. The SOEs' decision-making powers regarding their own corporate governance were cautiously monitored and considerably squeezed. The initiation of the SOE reform has marked the departure from the Party-State corporate governance model. The SOE reform has steadily promoted the SOEs to retrieve part of its decision-making powers regarding daily operations and personnel management from the State.¹⁸² Though the CPC persistently held the "leadership" position in the SOEs, the SOE reform has charted the way for the power balance between the State and the SOEs. The corporate governance in the SOEs is currently following the Party-State-SOE model.

¹⁸⁰ See Leutert & Eaton, *supra* note 27, at 215; Lin Zhang, *The Harmonization Principle in Corporate Governance Reform in China*, 88 FRONTIERS L. CHINA 560, 577 (2013); Curtis J. Milhaupt, *The State as Owner – China's Experience*, 36 OXFORD REV. OF ECON. POL'Y 362, 363 (2020).

¹⁸¹ Ever since the first version of the Chinese Constitutional Law, the state-owned economy has been designated as the "leading force" in the national economy. See, e.g., XIANFA

art. 6, §1 (1978) (China); XIANFA art. 7, §1 (1982) (China); XIANFA art. 7, §1 (1993) (China); XIANFA art. 7, §1 (2018) (China); see also Wendy Leutert, *Challenges Ahead in China's Reform of State-owned Enterprises*, 21 ASIA POL'Y 83, 85 (2016); Zhaofeng Wang, *Corporate Governance under State Control: The Chinese Experience*, 13 THEORETICAL INQUIRIES L. 487, 488, 490–91 (2012).

¹⁸² See generally *supra* Part II.A and Part III.A.

However, the Party–State–SOE model is far from a stable and static one. The boundaries among the responsibilities of each party are unclear and oftentimes in competition. For instance, the CPC and the State both may intervene in the major decision-making of the SOEs;¹⁸³ the State’s residual role as both the shareholder and the regulator with SOE-specific powers also leaves itself with substantial possibilities of encroaching on the rights that should have rested with the SOEs.¹⁸⁴ These features of the current Party–State–SOE model have determined that this corporate governance model is transitional, unfinalized, and subject to future transformation.

Against this background, I argue that a Party–SOE model would ultimately emerge in the corporate governance of the SOEs. The transformation to the Party–SOE model is firstly premised upon the continuous retreatment of the State. As the vision for the regulation on the SOEs to be capital-focused only is still nascent, the reform is to be deepened in the following years to fulfil the CPC and the State’s goal. Specifically, provinces have committed to forge ahead the implementation of the MOR in 2022 in order to catch up with the requirements of a three-year SOE reform project¹⁸⁵; on the other hand, as the SCIOCs have demonstrated their abilities of generating profits and been recognized by the CPC and the State, more pilot SOEs will presumably be included.¹⁸⁶ Further regulations on deepening the reform of the SCIOCs are already under formulation as well.¹⁸⁷ On a more generic note, though the three-year SOE reform project is coming to a

¹⁸³ See Chinese Company Law, *supra* note 45; see Three Major and One Large, *supra* note 132.

¹⁸⁴ Chi Hung Kawn, *Post Third Plenum Reform of State-owned Enterprises: Can Corporate Governance be Improved*, China in Transition (Rsch. Inst. Econ., Trade, & Indus., 2014);

Gu Gong-yun (顾功耘) & Hu Gai-rong (胡改蓉), *Guoqi Gaige de Zhengfu Dingwei ji Zhidu Chonggou* (国企改革政府定位及制度重构) [*The Study of the Government Positioning and System Reconstruction in the Reform of State-owned Enterprises*], 36 XIANDAI FAXUE (现代法学) [MODERN LAW SCIENCE] 81, 82 (2014).

¹⁸⁵ Huang Sheng (黄盛), *Duodi Xihua Guoqi Gaige Gongzuo Mingque Fali Hungai yu Chongzu Zhenghe* (多地细化国企改革工作 明确发力混改与重组整合) [*Local Governments Specify SOE Reform with Focuses on MOR, Merger and Restructuring*], RENMIN RIBAO (人民日报) [PEOPLE’S DAILY] (Feb. 17, 2022), <http://finance.people.com.cn/n1/2022/0217/c1004-32354215.html> [<https://perma.cc/A3XE-TUGW>].

¹⁸⁶ Du Yanfei (杜燕飞), *Guoyou Ziben Touzi Gongsigongsi Gaige Jinzhan Lianghao Shangbannian Shidian Qiye Jinglirun Tongbi Zeng 72.2%* (国有资本投资公司改革进展良好 上半年试点企业净利润同比增 72.2%) [*SCIOC Reform Does Well Profits of the Pilot SOEs Increase by 72.7% YoY*], RENMIN RIBAO (人民日报) [PEOPLE’S DAILY] (July 22, 2021), <http://finance.people.com.cn/n1/2021/0722/c1004-32166731.html> [<https://perma.cc/8M88-PX7B>].

¹⁸⁷ *Id.*

closure in 2022, the vice director of the SASAC has publicly stated that the closure is not the end of the reform. The achievements of the SOE reform would be further consolidated and improved.¹⁸⁸ Apart from the short-term commitments and actions that the State has made, the long-term incentives for the retreatment of the State would be well served by the demands for firm efficiency and a robust economy.¹⁸⁹

The realization of the Party–SOE model also depends upon the CPC’s persistent leadership in the SOEs. The CPC’s leadership in the SOEs is not only expected to be institutionalized in the next revision of the Chinese Company Law, but has also been the major political slogan that governs the entire country.¹⁹⁰ A more practical concern that renders the CPC’s persistence a near certainty is the State’s inability to retain an effective management over the SOEs. Circumstantial evidence has been ample before the CPC’s intensive assertions of its leadership, including the mass failure to enforce the Three Major and One Large system,¹⁹¹ the resistance to incorporate the CPC’s

¹⁸⁸ Zhu Yanran (祝嫣然), *Yangqi Duibiao Xingdong Wancheng chao 92%, Jinnian Guoqi Gaige Sannian Xingdong “Shouguan Bu Shoubin”* (央企对标提升行动完成超92%, 今年国企改革三年行动“收官不收兵”) [*Over 92% of Central SOE Benchmarking and Upgrading Actions Are Completed The Three-year SOE Reform Project Ends Without Abandonment This Year*], *DIYI CAIJING* (第一财经) [YICAI NEWS] (Feb. 25, 2022), [<https://perma.cc/VED5-5P4E>].

¹⁸⁹ Another popular toolkit that the CPC and the State have utilized for the SOE reform is the merger and acquisition among the SOEs. However, merger and acquisition may not on its own fulfill the goal of increasing firm efficiency and boosting economy. The retreatment of the State by, for instance, relinquishing ownership, is alleged to be more effective. See Leutert, *supra* note 180, at 89–90 (contending that merger and acquisition among SOEs would lead to, among others, inefficiency and lose control of the SOEs); See also Chen Lin, Yue Ma & Dongwei Su, *Corporate Governance and Firm Efficiency: Evidence from China’s Publicly Listed Firms*, 30 *MANAGERIAL & DECISION ECON.* 193, 205 (2009) (contending that the empirical studies have represented that State ownership is negatively related to the firm efficiency).

¹⁹⁰ See generally *supra* Part III.B.

¹⁹¹ See, e.g., Shen Ye (沈叶), *Wushi Jia bei Xunshi Guoqi you Weifan Baxiang Guiding Jingshen he Sifeng Wenti, Zhanbi chao Jiucheng* (50家被巡视国企有违反八项规定精神和四风问题, 占比超9成) [*Fifty Inspected CEOs Violate “Eight Spirits” and “Four Styles”, Accounting for over Ninety Percent*], *PENGPAI XINWEN* (澎湃新闻) [THE PAPER] (Dec. 5, 2015), [https://www.thepaper.cn/newsDetail_forward_1405286_1] [<https://perma.cc/W5NP-GB5U>]; Teng Yangguang (滕阳光) & Wang Bingbing (汪兵兵), *Zhongtie Shiyiju Ergongsi Jiwei Kaichu Weifan “Sanzhongyida” Zhidu Shouzhang Fadan* (中铁十一局二公司纪委开出违反“三重一大”制度首张罚单) [*The First Penalty Case Regarding the Violation of Three Major and One Large is Executed by the Committee for Discipline Inspection in China Railway Eleventh Bureau Group Second Engineering*

leadership in the AoA,¹⁹² the investment into the real estate market regardless of the SASAC's objection,¹⁹³ and the boycott of the merger and acquisition during the SOE reform.¹⁹⁴ The loss of control in reality may be attributed to multiple reasons. For one thing, as a substantial number of the group SOEs hold hundreds of subsidiaries, the State's influence is difficult to reach every of these State-owned subsidiaries.¹⁹⁵ For another, the director of the central or local SASACs has the same or a similar administrative level as the directors of the SOEs that they directly supervise. Thus, the personnel management system may occasionally fail.¹⁹⁶ However, CPC's leadership as a principle catches all the SOEs and their leaders who are also CPC members. The nomenklatura system broadly controls the career tracks and the political lives of the leaders of the SOEs with various punishment toolkits.¹⁹⁷ As the State gradually retreats from the SOEs for economic purposes, the CPC's advancement would also serve to check and balance the growing SOE autonomy.

The Party–SOE model remotely echoes with the recent legitimatization attempts of the CPC in the SOEs. Even though numerous political documents have paved the way for the CPC to interpose the SOE corporate governance in practice, the CPC's activities in the SOEs have never been formally recognized by laws and judicial precedents.¹⁹⁸ In response, the State, apart from assuming the role of the SOEs' regulator, also in practice serves as a medium to legitimize the CPC's presences in the SOEs by regulating the SOEs *under* the CPC's general guidelines and translating the CPC's opinions into the State's actions. This situation would have changed after the finalization and the enactment of the new Chinese Company Law, the tentative provision of which provides that the CPC shall discuss and participate in the decision-making of major affairs of the SOEs.¹⁹⁹ As the CPC's role would formally be recognized by laws, the State would no longer be an indispensable party in the SOE corporate governance and could thus

Company], TIELU ZHIJIA (铁路之家) [TIELU] (Mar. 21, 2017), <http://news.tielu.cn/yixian/2017-03-21/130925.html> [<https://perma.cc/Q94K-PBQ2>].

¹⁹² Laruen Yu-Hsin Lin, *Institutionalizing Political Influence in Business: Party-Building and Insider Control in Chinese State-Owned Enterprises*, 45 VT. L. REV. 437, 464–65 (2021); Xianchu Zhang, *Integration of CPC's Leadership with Corporate Governance*, 25 CHINA PERSPECTIVES 55, 59–60 (2019).

¹⁹³ See Milhaupt & Zheng, *supra* note 99, at 681.

¹⁹⁴ *Id.* at 682.

¹⁹⁵ *Id.* at 678.

¹⁹⁶ Kjeld Erik Brødsgaard, *Politics and Business Group Formation in China: The Party in Control*, CHINA Q. 624, 626 (2012); Li-Wen Lin, *A Network Anatomy of Chinese State-Owned Enterprises*, 16 WORLD TRADE REV. 583, 588 (2017).

¹⁹⁷ See Brødsgaard, *supra* note 196, at 633.

¹⁹⁸ See *supra* note 134.

¹⁹⁹ See Draft Chinese Company Law, *supra* note 19.

safely retreat, keeping the CPC's activities in the SOEs still legitimized.

In the Party–SOE model, the functions and responsibilities of the CPC and the State would also experience a significant transformation. I argue that the CPC would retain its control only over major decision-makings of the SOEs, and the SOEs would acquire the autonomy in determining the non-material issues regarding their daily operations. The retreatment of the State and the progress of the CPC in the SOEs are themselves broadly a posture that the governance on the SOEs will shift from micromanaging to general-direction-wised regulations. The political logic in China has stated that the CPC reigns the power to decide the general policies, and that the State incurs the responsibilities of detailed implementation of the CPC's decisions.²⁰⁰ The retreatment of the State in the SOEs is thus indicating the tendency of relinquishing regulations on specific issues that are deemed immaterial in the SOEs.

The indication is further evidenced in the specific responsibilities of the CPC and the State in the SOEs. On one hand, the CPC's position in the SOEs has been loosely referred to as the “leadership” or the “political core” throughout history, with few specific responsibilities designated.²⁰¹ On the other hand, the State is entrusted to conduct the specific approval, evaluation, supervision, communication, and punishment regarding the daily operations of the SOEs.²⁰² In addition, the CPC only sought to broadly institutionalize in the newly released Draft Chinese Company Law and in the AoAs of the SOEs its “leadership” instead of comprehensive and overall management powers on all SOE activities.²⁰³ As the “leadership” has been interpreted as setting the direction, managing the whole situation and ensuring the implementation, the legitimized CPC's functions are in effect confined to formulating guidelines, participating in major business moves, and supervising.²⁰⁴ In the context of the advocate of “rule of law” in Xi's era, the process is thus alluding that the CPC only aims to retain the general control to ensure possible mobilization of the SOEs when the public interest demands.

Lastly, the above interpretation coincides with the major expectations on the SOE reform and the SOEs. So long as the SOEs are generally under control, the CPC would be reluctant to seize every aspect of the SOE operations and ultimately break the balance that has been cautiously managed throughout the SOE reform process. After all, given that economic development remains as one of the major tasks for the SOE reform and a long-emphasized goal for the entire country, the CPC can hardly afford the

²⁰⁰ See discussion, *supra* Part IV.B.1.

²⁰¹ See discussion, *supra* Part II.B, Part III.B.

²⁰² See generally SOA Measures, *supra* note 67.

²⁰³ See Draft Chinese Company Law, *supra* note 19; see AoA Notice, *supra* note 20.

²⁰⁴ CPC Constitution, *supra* note 128.

reappearance of the 1970s on the SOEs.²⁰⁵ The CPC would, instead, only exercise its leadership role generally to ensure the mobilization of the SOEs when necessary.

For the avoidance of any doubt, I do not intend to argue in this Article a paradigm where the State completely fades away. The non-SOE-specific State agencies, including, among others, State Administration for Market Regulation and China Securities Regulatory Commission, will continue to exercise regulatory powers on the SOEs, in a way parallel to that on private enterprises. The State will still act as the shareholder of the SOEs, while exerting its influence on the SOEs through a “corporatized” mechanism. In other words, the State will refrain from intervening in the SOE corporate governance as a regulator with SOE-specific powers but will exert its influence as a common shareholder.

In conclusion, the corporate governance in the SOEs is currently presenting a Party–State–SOE model and would transfer to the Party–SOE model in the future. In the Party–SOE model, the CPC would *de-facto* control the decision-making rights of major issues, while the SOEs would independently determine the non-material issues in their daily operations.

C. Further Implications: Reform Priorities Determined by SOE Industries and SOE Levels

The general trend of the corporate governance of the SOEs is to transform to the Party–SOE model. However, the transformation would be unlikely to be achieved once and for all. For now, the CPC and the State would be reluctant to reform the SOEs instantly and aggressively in strategically significant industries or the SOEs incorporated for public welfares. The same situation would apply to the central group SOEs as well. In other words, the corporate governance model of the above SOEs would still take a gradual and cautious transformation to the Party–State–SOE model on a case-by-case basis, instead of directly converting into the Party–SOE in the foreseeable future.

The short-term reluctance of the CPC and the State is evidenced in the reform priorities by industries and by administrative levels that have been expressly articulated. By industries, the State is required to retain controlling shareholding in the commercial SOEs that operate in strategically significant industries and in the SOEs incorporated for public welfares.²⁰⁶ At administrative levels, the MOR on the central group SOEs is to be explored,

²⁰⁵ See generally Xun Yugen (荀玉根), *Cong Lianghui Kan Zhengce Zhongxin (从两会看政策重心)* [Identify the Policy Focuses from the “Two Sessions”], *DIYI CAIJING (第一财经)* [YICAI News] (Mar. 17, 2022), <https://www.yicai.com/news/101351813.html> [<https://perma.cc/BE9H-VQHA>].

²⁰⁶ SOE MOR Opinion, *supra* note 14.

instead of encouraged or advanced.²⁰⁷ In the current practice, the MOR has been rarely adopted in the central group SOEs. For the handful cases where the new strategic investors are introduced, the investors are all ultimately State-backed.²⁰⁸

The long-term concerns extend beyond the above documents and exemplified cases. The long-term concerns are alluded to more fundamentally and systematically in the purposes of the SOE reform and the SOEs, as well as the interactions between the CPC and the State. The SOE reform is a constant balance between the economic and political interests.²⁰⁹ Though the CPC and the State generally believe in the feasibility of the parallel advancement of the two-fold goal, this two-fold goal ultimately serves different purposes and could thus be in and on itself in competition.²¹⁰ When the economic and the political agendas have stuck in a gridlock and demanded a trade-off, the CPC would be willing to sacrifice the economic agendas. The decision is self-evident when put in the context of China's politics: the CPC *must* retain the ultimate real power and represent the supreme interest in China. Any conflicting interests that would potentially threaten the CPC's political interests would thus be compromised.²¹¹

The reservations on the commercial SOEs that operate in strategically significant industries and the SOEs incorporated for public welfares are the first trade-off made by the CPC and the State. The CPC and the State have been sensitive of the potential domestic instabilities and disturbances due to decades of revolutionary experiences. The increasing national security concerns have further incited apprehension.²¹² The instant and massive introduction of the non-State investors to the commercial SOEs that operate

²⁰⁷ *Id.*

²⁰⁸ As the central group SOEs are all limited liability companies and afford no legally required duty to disclose their shareholding structures, very limited official information could be identified. This Article extracts and cross-checks the relevant information from the two commonly used commercial databases of corporate information in China: Qichacha (企查查) and Aiqicha (爱企查). See, e.g., *Shareholding Structure*, AIQICHA, <https://aiqicha.baidu.com/relation/stockchart?pid=91988630482228> [https://perma.cc/26DM-SA4A] (last visited Mar. 22, 2022).

²⁰⁹ For more discussion, see Li, *supra* Part IV.B.2.

²¹⁰ See Ding Chen, *supra* note 31 (arguing that the interests of the State and the CPC in the SOEs are conflicting).

²¹¹ For more discussion, see Li, *supra* Part IV.A.

²¹² See generally Li Jianwei (李建伟), *Zongti Guojia Anquanguan de Lilun Yaoyi yu Chanshi* (总体国家安全观的理论要义与阐释) [*Theoretical Interpretation of Holistic View on National Security*], 40 ZHENGZHI YU FALÜ (政治与法律) [POL. SCI. AND LAW] 65, 65–67 (2021); Cai Baogang (蔡宝刚), *Lun Xi Jinping Fazhi Sixiang zhong de Guojia Anquan Fazhi Lilun* (论习近平法治思想中的国家安全法治理论) [*On the Rule of Law of National Security in Xi Jinping Thought on the Rule of Law*], FAXUE (法学) [LAW SCI.] 3, 3–7 (2022).

in strategically significant industries and the public SOEs would expose the CPC and the State to the risks of losing their political leverage, which the CPC and the State refuse to incur.²¹³ The political considerations thus outweigh the demands for economic development. The evaluation system of the central SOEs has served as supporting evidence. The commercial SOEs in non-strategically significant industries are evaluated predominately by the SOEs' business performance.²¹⁴ The commercial SOEs in industries concerning national security and national economic lifeline are assessed mainly by their contributions to the public well-beings and required to generate only "reasonable" profits.²¹⁵ The SOEs incorporated for public welfares are further imposed with no requirement regarding business performance.²¹⁶

The reservations on the central group SOEs are the second trade-off that the CPC and the State have made. The central groups SOEs are vastly scattered across different strategically significant industries and boast sheer size and massive subsidiaries.²¹⁷ The relinquishment of control would thus alarm the CPC and the State of the possible unexpected chain effects.²¹⁸ In

²¹³ See Michał Bogusz & Jakub Jakóbowski, *The Chinese Communist Party and Its State: Xi Jinping's Conservative Turn*, 2020 OSW REPORT 1, 14 (2020); Razeen Sappideen, *Corporate Governance with Chinese Characteristics: The Case of State Owned Enterprises*, 12 FRONTIERS L. CHINA 90, 112 (2017).

²¹⁴ Zhongyang Qiye Fuzeren Jingying Yeji Kaohe Banfa, (中央企业负责人经营业绩考核办法) [*Measures on Evaluating the Operation Performance of the Persons in Charge of the Central Enterprises*] (promulgated by the SASAC, Mar. 1, 2019, effective Apr. 1, 2019), art.12, http://www.gov.cn/zhengce/zhengceku/2019-11/01/content_5447595.htm [<https://perma.cc/F2W5-PS3H>] (China).

²¹⁵ *Id.* art. 13.

²¹⁶ *Id.* art. 14.

²¹⁷ As of March 2022, there are a total of 97 central group SOEs directly regulated by the central SASAC. The 97 central group SOEs cover industries that are commonly recognized as "strategically important", including but not limited to oil, railway, electricity, nuclear, military, and communication. See *Central Enterprises List*, STATE-OWNED ASSETS SUPERVISION AND ADMIN. COMM'N OF THE STATE COUNCIL, <http://www.sasac.gov.cn/n4422011/n14158800/n14158998/c14159097/content.html> [<https://perma.cc/HFJ6-ZW5Z>] (last visited Mar. 21, 2022).

²¹⁸ See Chenxia Shi, *Recent Ownership Reform and Control of Central State-Owned Enterprises in China: Taking One Step at a Time*, 30 U.N.S.W.L.J. 855, 856 (2007) (contending that China has a history of being circumspect of ownership change in the large SOEs); see generally Mary E. Lovely & Yang Liang, *State Enterprise Reform in China: Grasp or Release?*, THE IMPACTS OF CHINA'S RISE ON THE PAC. AND ON THE WORLD, at 83–105 (Wei-chiao Huang et al. eds., 2018) (arguing that the State will presumably continue to grasp the large SOEs in various forms after the introduction of MOR, especially those affiliated with high-level governments, according to the historical data under the "grasping the large and the letting go of the small" policy).

contrast, the subsidiaries of the central group SOEs and the local SOEs are relatively small in size with less sophisticated shareholding structures. With fewer possibilities of becoming runaway, the subsidiaries of the central group SOEs and the local SOEs are ideal for the CPC and State to implement the SOE reform. Therefore, the transformation to the Party–SOE model will be approached depending on the industries and levels of the SOEs in the foreseeable future. The transformation would aggressively occur at the commercial SOEs in non-strategically significant industries, as well as the local SOEs and the subsidiaries of the central group SOEs; the transformation for commercial SOEs in strategically significant industries, SOEs incorporated for public welfares, and central group SOEs would be implemented gradually on a case-by-case basis.

V. CONCLUSION

The history and the status quo of the corporate governance of the SOEs have consistently displayed the feature of “the State retreats and the CPC advances.” The State has been gradually returning the decision-making powers to the SOEs through different SOE reform measures.²¹⁹ The CPC has been enhancing its political clout through political campaigns and attempts to institutionalize the CPC’s leadership role.²²⁰ The dynamics of “the State retreats and the CPC advances” allude to the need to examine the distinctions and the interactions between the CPC and the State. As a fundamental political logic in China, ever since 1949, the CPC has dominated the State. To date, the CPC remains the ultimate real power and manages to transplant the general policies it has decided into legislation and regulations. The State serves as a tool for the detailed implementation of the CPC’s guidelines and policies.²²¹

The interactions between the CPC and the State demand to treat the CPC and the State as two distinguishable players in the SOE corporate governance. In this Article, I establish a new tripartite analytical framework that covers the CPC, the State, and the SOEs.²²² In this framework, I argue that the corporate governance of the SOEs is transferring from the Party–State model to the current Party–State–Enterprise model and would ultimately develop into the Party–Enterprise model. In the ultimate Party–Enterprise model, the CPC and the SOEs would divide their responsibilities: the CPC would reserve the power over the SOEs’ major decisions to mobilize the SOEs only when necessary; the SOEs would possess the decision-making power on non-material issues of daily operations; the State would focus on enacting relevant rules and participating solely as a shareholder instead of a

²¹⁹ See Li, *supra* Part II.A and Part III.A.

²²⁰ See Li, *supra* Part II.B and Part III.B.

²²¹ See Li, *supra* Part IV.A.

²²² See Li, *supra* Part IV.B.1.

regulator with SOE-specific regulating power from concluding.²²³ During the process of realizing this model of corporate governance, the CPC and the State would focus primarily on the commercial SOEs in non-strategically significant industries, as well as the local SOEs and the subsidiaries of the central group SOEs; for commercial SOEs in strategically-significant industries, SOEs incorporated for public welfares, and central group SOEs, the CPC, and the State would take a wait-and-see attitude in the foreseeable future.²²⁴

The corporate governance of the SOEs intertwines with China's fundamental political logic, features the alternation of the participants, and is subject to the constantly changing power dynamics and policy contemplations. The details of the SOE reform measures and the CPC's political campaigns in the SOEs are limited to official documents, press releases, and the disclosures of the SOEs. Sophisticated and opaque as the corporate governance of the SOEs is, a simple conclusion of which party "controlling" the corporate governance of the SOEs would likely be inaccurate, incomplete, and sometimes misleading.

Therefore, I do not intend to conclude in this Article whether it is the CPC, the State, or the SOEs themselves that ultimately take the dominance in the SOE corporate governance. Instead, I aim at preliminarily explaining the fundamental logic, establishing a comprehensive analytical framework and constructing models at different stages of the SOE reform of corporate governance of the SOEs. In this way, I intend to provide in this Article a structure that captures possible developments of the SOE corporate governance and facilitates characterization of how each party operates in the SOE corporate governance.

This Article's current analysis is mainly based on paper rules by the CPC and the State and limited publicly available information. Studies remain to be conducted on the details of the rule implementations and the cases in reality. Specifically, how are the "CPC's leadership" and the SOE reform measures operated in practice? Are there any indications that either of the above prevails over the other? Are there other factors that have been generated to shift the dynamics among the CPC, the State, and the SOEs? The studies on these issues would further enrich the understanding of the corporate governance of SOEs and supplement the existing research on paper rules and cases.

²²³ See Li, *supra* Part IV.B.2.

²²⁴ See Li, *supra* Part III.B.3.