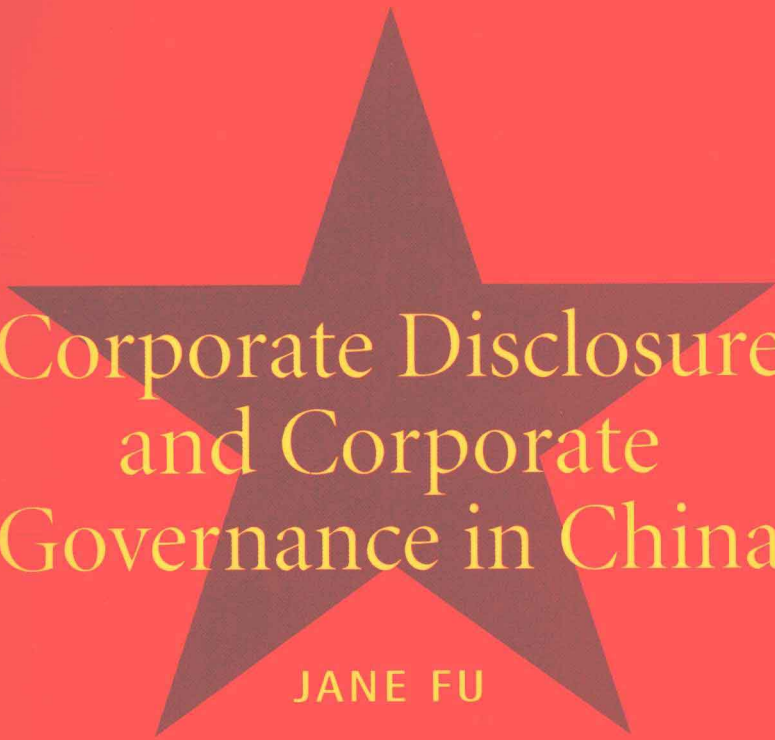


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Corporate Disclosure
and Corporate
Governance in China

JANE FU



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About the Author

Jane (Jian) Fu, LLB (Beijing), LLM (Canberra) and PhD (UNSW), worked for eight years as a draftsman for the Legislative Affairs Commission of the Standing Committee of the PRC National People's Congress in Beijing. During this period, she was a Judge at the People's Court in Beijing, as a researcher at School of Law, City University of Hong Kong and as an associate in the office of an international law firm in Hong Kong. Ms Fu worked at four Australian law schools as an academician. She is currently a Senior Lecturer in Law in the School of Law, Deakin University, Australia. She also held visiting positions at Oxford University in 2006, and University of California at Berkeley in 2006 and 2007. Ms Fu publishes her work extensively in China, Australia and elsewhere. Her publications focus on Chinese commercial law, Chinese civil law, comparative study of China's company and securities law and the Australian corporations law.

Foreword

Dr Jane Fu's book reviews the development of China's securities market and seeks to convey an in-depth understanding of its corporate disclosure laws and rules by examining their origins and functions. This is the first book, as far as I know, that particularly focuses on China's lawmaking process and the manner in which foreign experiences have been drawn upon in this process. Through a comparative study, this book persuasively argues that the inefficiency of China's current disclosure regulations have, to a great extent, resulted from the lack of empirical studies of foreign corporate disclosure laws and the mistakes made by the drafters of Chinese laws and regulations in the process of transplanting foreign laws into China. This book also recommends Australia as a model for incorporating foreign laws into China's unique environment.

Dr Fu was educated at law schools in both China and Australia. She has drawn upon her work experience as a draftsman for the Legislative Affairs Commission of the People's Republic of China's Standing Committee of the National People's Congress and as a legal academic in Australia to undertake her research on corporate disclosure issues under both Chinese law and Australian law. Her book casts a much-needed light upon features of the background of Chinese corporate disclosure law that are not often discussed and debated by legal academics. It also reviews the unique history of the development of the Australian corporate disclosure system that spans more than a century. Dr Fu's empirical research supports her detailed descriptions, discussions, and evaluations of corporate disclosure laws in both China and Australia.

Dr Fu's work is an important source for further study and research on Chinese securities law, not only for legal academics, legal researchers, legal practitioners, and members of the business community, but also for Chinese lawmakers and policy makers. With the development of globalization and internationalization, it is necessary for all countries in the world to examine their lawmaking methods

Foreword

and processes from a comparative perspective. This is especially important for emerging and transitional countries such as China. It is equally important for other countries to understand Chinese law from a comparative perspective.

For these reasons, I commend this book of my former colleague, Dr Jane Fu, to scholars, legal practitioners, and students, as well as to lawmakers and policy makers who are concerned with China's securities laws and policy issues.

Li Fei
Vice Chairman
Legislative Affairs Commission
Standing Committee of the National People's Congress
The People's Republic of China

Preface

Information disclosure is a fundamental technique in securities regulation and corporate governance. Most countries with securities markets have developed securities regulatory regimes that strongly focus on corporate disclosure. The modern securities market in the People's Republic of China re-emerged in the late 1980s and developed extremely quickly thereafter. This market has been modelled on Western markets, especially the United States model. Chinese securities regulation reformers advocated the establishment of United States-style securities regulation, which includes a detailed corporate disclosure regime.

After the establishment of the Chinese securities market, the improvement and further reform of China's corporate disclosure regime continued to follow the United States model. Further research on Chinese securities markets has tended to be focused upon segmented areas of regulation without regard to the overall context of disclosure in China. There has been little, if any, in-depth research on the historical development of China's securities market and the formation and reform of its corporate disclosure laws and regulations. This book is intended to fill these gaps.

I have been following the development of the Chinese securities market since the mid-1990s, when I left my position as a draftsman for the Legislative Affairs Commission of the Standing Committee of the People's Republic of China's National People's Congress so as to pursue postgraduate studies in Australia. The lack of a wide understanding of the Chinese securities market from a historical and comparative perspective prompted my interest in researching this area. My interest in this research continued after I finished my postgraduate studies. This book reports on my decade-long research efforts, and I hope it will be of interest to legal researchers, policy makers, and legal practitioners. It provides a detailed picture of the Chinese corporate disclosure regime that has emerged during the period of China's economic transition since the 1990s.

Preface

This book could not have been completed without strong support from a number of people. I wish to thank Professors Roman Tomasic, Angus Corbett, Ian Ramsay, Paul Redmond, Wang Baoshu, Wang Weiguo, Zhao Xudong, Gu Gongyun, and Jiang Ping for their kind encouragement, valuable direction, and the comments that they provided as Australian or Chinese company law authorities. I would also like to express my special gratitude to my former colleagues at the Legislative Affairs Commission of the National People's Congress for their friendly support and help. Finally, I wish to thank the anonymous interviewees who assisted me with this research, as well as Dr Hu Ruyin, Mr Yuan Xiuguo, and Mr Ouyang Danian of the Shanghai Stock Exchange, and Mr Zhang Yujun, formerly of the Shenzhen Stock Exchange, for sharing their views and insights. I should add that any errors or omissions that may exist in this book are entirely my own.

I am greatly indebted to Mr Simon Bellamy and his editorial team at Kluwer Law International for their patience and professional support of this project.

This book is dedicated to my parents. Without their unselfish support, I could not have achieved what I have in my life. During the writing of this book, my children have sustained me and have given me great joy, comfort, and support.

Jane Fu
Melbourne
January 2010

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Chapter 1

Corporate Disclosure, Corporate Governance, and Law Reform in the People's Republic of China

1.1. WHY HAS THE STUDY OF CORPORATE GOVERNANCE IN THE PEOPLE'S REPUBLIC OF CHINA BECOME IMPORTANT?

On 1 October 2009, the People's Republic of China (hereinafter PRC) held the sixtieth anniversary celebration of its founding in 1949. For the Chinese people, sixty years traditionally constitute a cycle. The PRC government organized a grand and lavish event, celebrating its many significant achievements. In his National Day Speech, PRC President Hu Jintao, wearing a Sun Yatsen suit, as Chairman Mao Zedong did on the founding day of the PRC on 1 October 1949, proudly announced that, 'today a socialist China has stood straight in the East of the world, facing modernization, facing the world and facing the future'.¹

Rapid economic development has attracted attention from around the world upon China's corporate governance developments. There is no doubt that China can be proud of its achievements since the commencement of the economic reform effort some thirty years ago. According to the World Bank, by 2007, China had become the third-largest economy in the world.² In the past few years, some of China's companies, mainly large state-owned companies (usually known as SOEs), have been aggressively buying foreign businesses overseas. The failed bid

1. <<http://cpc.people.com.cn/GB/64093/64094/10152026.html>>, 2 Oct. 2009.

2. 'Li Rongrong Encourages Takeover Overseas', <www.caijing.com.cn/2009-07-04/110193145.html>, 5 Jul. 2009.

of China National Offshore Oil Corporation Ltd (CNOOC),³ which is 70% owned by the Chinese government, to buy Unocal in the United States of America (USA) in 2005⁴ caused political uproar in the USA and raised the alarm for many other countries that are China's trading partners. China Steel bought Midwest in Australia and held five seats on Midwest's board of directors in September 2008.⁵ In 2009, China Minmentals' investment in Oz Minerals in Australia was finalized.⁶ China Hunan Valin's investment in Fortescue is proceeding. Chinalco's failure to acquire a further shareholding in the dually listed Australian – United Kingdom company Rio Tinto in early 2009 raised concern and anxiety among China's Western business partners and their various governments.

The large scale of China's capital injection and aggressive investments in countries that are rich in natural resources has raised increasing and deep concerns among these countries' governments, their business communities, and the public. While it is very important for the PRC to improve its corporate governance law and practice, it is equally important for the PRC's business-partner countries, such as Australia, to understand corporate governance issues within Chinese companies, especially state-owned companies. Only after having acquired substantial knowledge and understanding of corporate governance in the PRC can foreign governments and their business communities, such as those in Australia, deal effectively and efficiently with the Sino-Australian relationship. Unfortunately, up until now, limited comprehensive research on corporate governance in China has been done from a comparative perspective. This book aims to fill this vacuum.

The concept of corporate governance did not come into use in the PRC until the mid-1990s.⁷ The lack of understanding of corporate governance in the first decade of the twenty-first century by the senior management of listed Chinese companies was confirmed by some senior executives of these companies.⁸ China's great economic achievements do not compare well with the poor corporate governance practices of many Chinese companies. If we take corporate disclosure as

3. 'Unocal Shareholders Approve Chevron Takeover', *All Business: A D&B Company*, <www.allbusiness.com/retail-trade/food-stores/4486656-1.html>, 2 Oct. 2009.

4. Unocal was the ninth-largest oil company in the world at the time. CNOOC withdrew its bid in early August 2005 for 'unprecedented political opposition' after a flurry of legislation was introduced in both Houses of Congress of the United States aiming to derail the deal, *ibid*.

5. 'China Steel Finalises Buying Midwest by Mid September', <www.caijing.com.cn/2008-09-11/110011795.html>, 13 Jul. 2009.

6. ABC, 'Minmetals Launches Oz Minerals Takeover Bid', <www.abc.net.au/lateline/business/items/200902/s2493057.htm>, September 2009.

7. Tu, Guangshao & Zhu Congjiu (eds), *Corporate Governance: International Experience and China Practice* (Beijing: People's Press, 2001), 1.

8. The author and her colleagues' interviews of an Australian Research Council-funded Discovery Project on Corporate Governance of China's Top 100 Listed Companies, which finished at the end of 2005. Also, Mary Ma's unpublished speech at the Ninth Annual Conference of the Asia Corporate Governance Association entitled Asia Business Dialogue on Corporate Governance, which was held in Beijing from 11–12 Nov. 2009. Ma is the Managing Director of TPG (Hong Kong) and a non-executive director and former Chief Finance Officer of Lenovo Ltd, which bought the PC business from IBM. She acknowledged that even in 2007, when she was the CFO of Lenovo, she did not know much about corporate governance.