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ASCERTAINING THE NOTION OF BOARD ACCOUNTABILITY IN CHINESE LISTED COMPANIES

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Abstract:

Accountability is a concept that has been frequently referred to in Anglo-American systems and in the OECD's corporate governance documents, as well as in the English translations of corporate governance documents from non-English speaking jurisdictions. It is in the Anglo-American literature, in particular, where the word finds prominence. It has been suggested in China that accountability is one of the basic principles of corporate governance that needs to be consistently enforced. But does this mean that board accountability, as it has been provided for in the Anglo-American system, is actually an element of Chinese corporate governance? If not, should it be adopted? Or should China develop a concept that is more appropriately included as a critical part of its own particular corporate governance needs? The paper aims to address these matters in order to ascertain where Chinese corporate governance stands on accountability as far as the boards of large listed companies are concerned, and what it should do. We opine that while there are elements of accountability in Chinese corporate governance, it does not have the form of accountability embraced in Anglo-American systems. But, it is argued, as China moves from having a system totally based on administrative governance to one that is based more on economic governance the kind of approach that applies in Anglo-American jurisdictions is likely to become more relevant. Within a hybrid corporate governance system combining elements of both administrative and economic governance, we develop a unique "wenzhe system" with forms and characters of accountability that is likely to develop to address the needs of corporate governance in China and the fostering of its listed companies.

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Undoubtedly China has become an economic powerhouse over the past twenty years; it is now the second largest economy in the world in nominal US dollar terms.³ As part of this economic development China has been seeking to develop its commercial systems, to encourage the incorporation and expansion of large corporate entities and to make sure that these companies are competitive, efficient and attractive for investment. Over the last decade company law and corporate governance issues in China have received much attention, both in theory and in practice, with the Chinese Government making this area a top priority. This is manifested by the establishment of many government-funded corporate governance research centres, such as the Chinese Centre for Corporate Governance at the Chinese Academy of Social Sciences.⁴ The focus has been primarily on how to develop an effective corporate governance system in order to improve the performance of listed companies and protect their shareholders and stakeholders, and with the additional objective of establishing an international corporate governance standard.⁵ The improvement of corporate governance is an ongoing battle that calls for the participation of many people and entities, such as regulators, market participants and academics. In order to have standards that are congruent with those applied internationally, successive Chinese governments have been developing policies to create internationally recognised oversight mechanisms and corporate governance models in order to improve public confidence, both domestically and internationally. The development of Chinese company law and other related legislation and codes of practice has allowed listed companies in China to shape their structure in a more modern manner and to imitate their counterparts in developed markets, giving Chinese listed companies a “Western appearance.”

An important aspect of Chinese economic development is ensuring that the corporate governance environment in which companies are to operate is rigorous and respected. For some years China has been concerned that its corporate governance framework should accord with OECD recommendations, and that it should meet international standards.

³ China-Britain Business Council: http://www.cbbc.org/who_we_are/china_context/uk_china_factfile (accessed on 4th November 2015).

⁴ See C. Hawes and T. Chiu, “Flogging a dead horse? Why Western-style corporate governance reform will fail in China and what should be done instead?” (2006) 20 Australian Journal of Corporate Law 25.

⁵ Y. Cheung, P. Jiang, P. Limpaphayom and T. Lu, “Does corporate governance matter in China?” (2008) 19 China Economic Review 460 at 460.

The board of directors, which is granted broad powers in order to manage a company, plays a major role in corporate life in any jurisdiction. Various sources have identified the accountability of boards as a critical issue in the governance of companies. The UK's Report of the Committee on the Financial Aspects of Corporate Governance (commonly known as the "Cadbury Report") said in 1992 that: "The issue for corporate governance is how to strengthen the accountability of boards of directors to shareholders."⁶ According to the G20/OECD's Principles of Corporate Governance the corporate governance framework should ensure the accountability of boards to the company and the shareholders.⁷ It has been stated on many occasions that good corporate governance is best achieved by focusing on the accountability of directors. It has been argued that accountability of directors is the basis for the success of all other principles of corporate governance.⁸ Holding directors accountable for their behaviour and decisions is fundamental to good corporate governance.⁹ Clearly, in the main, accountability is seen as something that is good and commendable. In fact, it has been said that "accountability" has become an icon of good governance,¹⁰ and board accountability has been held up as a cornerstone of effective corporate governance.¹¹ Boards in Anglo-American jurisdictions¹² enjoy very wide powers and discharge a whole range of functions, making them the very centre of companies.¹³ The board of

⁶ 1 December 1992, Gee, under the chairmanship of Sir Adrian Cadbury, at para 6.1 and accessible at : <http://www.ecgi.org/codes/documents/cadbury.pdf> (accessed on 8th July 2015).

⁷ G20/OECD, Principles of Corporate Governance 2015, at 51 and accessible at: <http://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf> (accessed on 15th September 2015).

⁸ E. Makuta, "Towards Good Corporate Governance in State-Owned Industries: The Accountability of Directors" (2009) 3 Malawi Law Journal 55 at 56. While the author was writing about the corporate governance of State Owned Enterprises, it is argued that the comment is just as applicable to the normal commercial public company.

⁹ J. Solomon and A. Solomon, Corporate Governance and Accountability (John Wiley & Sons, 2004), at 14.

¹⁰ M. Dubnick & K. Yang, 'The Pursuit of Accountability: Promise, Problems, and Prospects' in D.C. Menzel & H.L. White (edns), The State of Public Administration: Issues, Challenges and Opportunities (Routledge 2011), 171.

¹¹ A. Young, "Corporate Governance in China and Hong Kong: Reconciling Traditional Chinese Values, Regulatory Innovation and Accountability" 2011 at 3 and accessible at: <http://ssrn.com/abstract=1533904> (accessed on 8 July 2015).

¹² This includes many countries, such as the UK, the US, Australia, Canada and New Zealand.

¹³ For example, in relation to the UK see the Companies Act 2006, s.172(1). In relation to the US see H. Hansmann and R. Kraakman, 'The End of History for Corporate Law' (2001) 89 Georgetown Law Journal 439; G. Hayden and M. Bodie, "Shareholder Primacy and the Curious Turn Toward Board Primacy" (2010) 51 William and Mary Law Review 2071 at 2081; Dodge v Ford (1919) 170 NW 668 at 684 (Mich). In relation to Australia, see the Parliamentary Joint Committee on Corporations and Financial Services, Commonwealth of Australia, Corporate Responsibility: Managing Risk and Creating Value (2006) Chapter 4 and accessible at:

directors in China also has broad powers and functions. It is the de facto decision-making body of the company,¹⁴ and it is regarded as an important mechanism in providing for sound corporate governance.¹⁵ Article 46 of China's Company Law 2005 provides that the board of directors has, inter alia, the following functions and powers: deciding on the operational plans of the company; formulating the financial budget plan and final accounts for the year; formulating plans for profit distribution and for making up the losses of the company; preparing plans for the increase or reduction of capital and the issue of corporate bonds; determining what administrative bodies need to be established; appointing or dismissing the manager of the company; and deciding on the management system of the company. In China, as in many other countries around the world such as Germany, Austria and the Netherlands,¹⁶ companies have two boards, namely a board of management and a board of supervision.¹⁷ However, unlike supervisory boards in other nations, and particularly Germany, this type of board in China has limited powers. For instance, it does not appoint the members of the board of directors; they are appointed by the shareholders' meeting.¹⁸

Accountability is a concept that is frequently referred to in Anglo-American systems and in the OECD's documents, as well as in the English translations of corporate governance documents from non-English-speaking jurisdictions. It is in the Anglo-American literature in particular where the word finds prominence. The word is peculiar to the English language, but nevertheless it has been considered to be an important element in other systems. For example, the Brazilians became so frustrated with the fact that Portuguese does not have an equivalent word for accountability that the English word has been officially accepted as part of its formal lexicon.¹⁹ The Japanese have

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2004-07/corporate_responsibility/report/index (accessed on 8th July 2015); Corporations and Markets Advisory Committee, 'The Social Responsibility of Corporations' December 2006 at pp.102–113 and accessible at [http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/\\$file/CSR_Report.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/$file/CSR_Report.pdf) (accessed on 8th July 2015).

¹⁴ Y. Kang, L. Shi and E. Brown, *Chinese Corporate Governance* (Santa Monica, Rand Corporation, 2008) at 14.

¹⁵ H. Liu and M. Fong, "Board characteristics of medium to large Chinese companies" (2010) 10 *Corporate Governance* 163 at 163.

¹⁶ Companies in the Netherlands can now choose to have a single board, but two tier boards still predominate.

¹⁷ See article 118 of the Company Law 2005.

¹⁸ See article 38(2) of the Company Law 2005.

¹⁹ M. J. Dubnick, 'Accountability as Cultural Keyword' in M. Bovens, R.E. Goodin, T. Schillenmans (edns) *The Oxford Handbook of Public Accountability* (Oxford University Press) at 23.

many words for responsibility but only one term that equates to accountability, and that is a transliteration of the English word.²⁰ This manifests the fact that the meaning of words and concepts can be lost in translation.

It has been suggested in China that accountability is one of the basic principles of corporate governance that needs to be consistently enforced.²¹ So, some form of accountability as far as boards are concerned is a critical element of a well-functioning corporate governance system, but what sort of concept of accountability is provided for in China? Is it the same or similar to that provided for in the Anglo-American system? If not, should that applying in the latter be adopted? Or should China develop a concept that is more appropriate for its own particular corporate governance needs? The paper aims to address these matters in order to ascertain where Chinese corporate governance stands on accountability as far as the boards of large listed companies are concerned, and what it should do.

Tackling these issues is important given the fact that many Chinese government and non-government bodies have made it clear that accountability of boards is an integral aspect of Chinese corporate governance. Understanding and developing accountability in China in a way that is appropriate for China's current needs and aspirations is particularly important so as to provide guidance, especially for legislators, boards of directors, those drafting corporate reports, codes and legislation, shareholders and stakeholders. An appreciation of what accountability involves as a concept is necessary in constructing appropriate mechanisms that will ensure that accountability occurs. The paper argues that there is uncertainty concerning the meaning of accountability in Chinese corporate governance, and it certainly is not equivalent to the approach adopted in Anglo-American jurisdictions. It is argued that Chinese corporate governance should not borrow the Anglo-American concept of accountability in corporate governance, although it can learn from it, but rather it should embrace what we term as a "wenzhe

²⁰ Ibid at 23.

²¹ Protiviti/China and Chinese Academy of Social Sciences, "Corporate Governance Assessment Summary Report on the Top 100 Chinese Listed Companies for 2012 at 1: <http://www.protiviti.co.uk/China-en/Documents/CN-en-2012-Corporate-Governance-Survey-Report.pdf> (accessed on 8th July 2015)

system” of accountability that will enhance corporate governance and be able to develop a unique Chinese approach to fit into its unique corporate governance.²²

The paper is structured as follows. First, there is a consideration of the meaning of accountability in corporate governance with an emphasis on board accountability. Second, the paper introduces the concept of hybrid corporate governance that operates in China and identifies the nature of listed companies in China with a focus on the power behind these companies. This is followed by an examination of whether the concept of accountability, as envisaged in Anglo-American systems, has been understood in China and is operating in Chinese companies and a proposal for an accountability system that is unique, dynamic and workable in Chinese corporate governance. The discussion includes a linguistic analysis of legal documentation and some empirical research undertaken in relation to corporate reports in various industrial sectors and academic arguments relating to developing the accountability of boards in China through the employment of what is called a “wenzhe system” of accountability. Fourthly, consideration is given to the way that accountability has been used in the context of administrative law in China in order to determine whether that could contribute to developing a Chinese approach to accountability. Finally, there are some concluding remarks.

II The Notion of Accountability

So, as mentioned earlier, board accountability is important, with the UK’s Department for Business Innovation and Skills finding that along with transparency it is the most important element of good corporate governance.²³ Other commentators have said that to improve corporate governance practices it is necessary to foster the effectiveness and

²² This is in accord with the recommendations of the Asian Development Bank : Governance : Sound Development Management, 1995 and referred to in J. Iu and J. Batten, “The Implementation of OECD Corporate Governance Principles in Post-Crisis Asia” (2000) 4 Journal of Corporate Citizenship 47 at 51.

²³ The definition originally appeared at : <http://www.berr.gov.uk/bbf/corp-governance/page15267.html>, but now this has been superseded by the following link: <http://webarchive.nationalarchives.gov.uk/20090902193559/berr.gov.uk/whatwedo/businesslaw/corp-governance/page15267.html> (accessed on 8th July 2015).

accountability of boardrooms.²⁴The G20/OECD stated that: “The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board’s accountability to the company and the shareholders.”²⁵ But what does accountability in this context actually entail? We consider this from an Anglo-American perspective given that ‘accountability’ is an English word and the concept of accountability has been emphasised repeatedly in Anglo-American jurisdictions, and transnational codes such as the OECD’s Principles of Corporate Governance have obviously based their reference to accountability on the Anglo-American approach.

Although accountability has been mentioned frequently in the corporate governance literature, has been used often in definitions of corporate governance, and has been relied on as a critical factor in corporate governance by a variety of sources,²⁶ there have been few attempts to explain what it actually means, certainly in the context of corporate governance. This is to be contrasted with other areas of law and society, such as public administration, politics and even administrative law, where there have been several attempts to articulate and develop the notion of accountability.²⁷ The reason

²⁴ I. Filatotchev et al., ‘Key Drivers of “Good” Corporate Governance and the Appropriateness of UK Policy Responses,’ Final Report, January 2007, DTI, at p.7 and accessible at: <http://www.bis.gov.uk/files/file36671.pdf> (accessed on 8th July 2015).

²⁵ G20/OECD, Principles of Corporate Governance 2015, at 51 and accessible at: <http://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf> (accessed on 15th September 2015).

²⁶ For example, see, S. Demirag, Corporate governance, accountability and pressure to perform: An international study (Stamford, Conn, JAI Press, 1998); D. Bavly, Corporate Governance and Accountability: What Role for the Regulator, Director and Auditor? (Westport, Quorum Books, 1999); R. Warren, Corporate Governance and Accountability (Liverpool, Liverpool Academic Press, 2000); R. Aguilera, “Corporate governance and Director Accountability : an Institutional Comparative Perspective” (2005) 16 British Journal of Management S39; R. Jones, “Law, Norms and the Breakdown of the Board: Promoting Accountability in Corporate Governance” (2006) 92 Iowa Law Review 105; H. Hutchison, “Director Primacy and Corporate Governance: Shareholder Voting Rights Captured by the Accountability/Authority Paradigm” (2005) 36 Loyola University Chicago Law Journal 1111; P. Koh et al., “Accountability and Value Enhancement Roles of Corporate Governance” (2007) 47 Accounting and Finance. 305; N. Brennan and J. Solomon, “Corporate governance, accountability and mechanisms of accountability: an overview” (2008) 21 Accounting Auditing and Accountability Journal 885; Corporations and Markets Advisory Committee, Guidance for Directors (Canberra, Australian Government, April 2010) at pp.13–15 and accessible at: [http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2010/\\$file/Guidance_for_directors_Report_April2010.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2010/$file/Guidance_for_directors_Report_April2010.pdf) (accessed on 8th July 2015).

²⁷ For instance, see B. Romzek and M. Dubnick, ‘Accountability in the Public Sector: Lessons from the Challenger Tragedy’ (1987) 47 Public Administration Review 223; R. Mulgan, “‘Accountability’: An Ever Expanding Concept?” (2000) 78 Public Administration 555; R. Mulgan, Holding Power to Account: Accountability in Modern Democracies (London, Palgrave MacMillan, 2003); P. Jos and M. Tompkins, ‘The Accountability Paradox in an Age of Reinvention: The Perennial Problem of Preserving Character and Judgment’ (2004) 36 Administration and Society 255; L.

might be that accountability is notoriously difficult to articulate; it is certainly a complicated and elusive concept.²⁸ Therefore, a sense of what accountability actually involves in a precise way has been lacking.²⁹

It has been argued, and we accept it here for the purposes of discussion and analysis, that accountability in relation to corporate governance, certainly as far as Anglo-American corporate governance is concerned, entails a process involving several stages.³⁰ Before considering these stages it must be recognised that for accountability to occur, boards (the accountor) need to accept responsibility for their actions or inactions.³¹ If boards fail to acknowledge the fact that accountability constitutes a critical aspect of corporate governance, there cannot be worthwhile and effective accountability to the accountee (the shareholders). Unless boards take responsibility, they are likely to engage in thwarting the effectiveness of many of the accountability mechanisms that have been established. If a person is not responsible for something, in the sense either of being assigned particular duties in respect of it or of having caused the end result, he or she would not usually be held to account for it.³² Acceptance of the need for board members to be accountable does not, of itself, necessarily demand any action, but it is an attitude that should exist within boards.

O'Connell, 'Program Accountability as an Emergent Property: The Role of Stakeholders in a Program's Field' (2005) 65 *Public Administration Review* 85; C Harlow and R Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach' (2007) 13 *European Law Journal* 542; M. Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism' (2010) 33 *West European Politics* 946.

²⁸ R. Behn, *Rethinking Democratic Accountability* (Washington, DC, Brookings Institution Press, 2001) at 221; A. Sinclair, "The Chameleon of Accountability : Forms and Discourses" (1995) 20 *Accounting, Organizations and Society* 219 at 221; I. Demirag, M. Dubnick and M. Khadaroo, "Exploring the Relationship Between Accountability and Performance in the UK's Private Initiative (PFI)" at p7 – paper presented at the "Conference on Governing the Corporation: Mapping the Loci of Power in Corporate Governance Design," at Queen's University, Belfast, 20–21 September 2004; A. Sinclair, "The Chameleon of Accountability: Forms and Discourses" (1995) 20 *Accounting, Organizations and Society* 219 at 221; M. Bovens, "Analysing and Assessing Accountability : A Conceptual Framework" (2007) 13 *European Law Journal* 447 at 448, 449.

²⁹ M. Dubnick, "The Pursuit of Accountability: Promise, Problems, and Prospects" 2009, at 14 and accessible at: <http://ssrn.com/abstract=1548922> (accessed on 8th July 2015).

³⁰ See A. Keay and J. Loughrey, "The Framework for Board Accountability in Corporate Governance" (2015) 35 *Legal Studies* 252.

³¹ Canadian Democracy and Corporate Accountability Commission, *Canadian Democracy and Corporate Accountability: An Overview of Issues*, Toronto, 2001 at iii.

³² R. Mulgan, "'Accountability': An Ever Expanding Concept?" (2000) 78 *Public Administration* 555 at 561.

Accountability generally, and certainly in the context of corporate governance, is not about a simple single meaning. It is a highly nuanced word. It is argued that there are in fact four stages involved in the accountability of boards,³³ all of which contribute to the meaning of the word. The first stage is the board providing accurate information concerning its decisions and actions, so that shareholders are informed as to what has been done by it on behalf of the company. A part of this is transparency, which involves making disclosure and providing reports concerning the work of the board.³⁴ The second stage involves a board explaining and justifying the things for which it is responsible, including what it has done and what it has failed to do.³⁵ Often this is seen as the predominant aspect of accountability, involving the board being answerable for what it has done, and it is the stage that is often focused on by elements of the accountability literature dealing with other areas of society and law. This stage requires the board to justify and explain what it has done (or not done), and why. The third stage is constituted by the questioning and evaluating of the board's reasons given for what has been done. Fourth, the final stage is that there is the possibility, but not the requirement, of the imposition of consequences. This might simply entail the provision of feedback to the board. It might, but it need not, constitute negative consequences which could involve some sort of sanction, perhaps involving the removal of one or more directors or the decision not to re-elect a director when his or her term comes to an end.

III A Hybrid Corporate Governance Model and the Controlling Power of Chinese Listed Companies

Before addressing the issue of accountability in the boards of Chinese companies, it is necessary to establish, albeit briefly, the framework of corporate governance in which any form of accountability will operate in China and to introduce the nature of power in Chinese companies.

³³ A. Key and J. Loughrey, "The Framework for Board Accountability in Corporate Governance" (2015) 35 *Legal Studies* 252.

³⁴ A. Licht, "Accountability and Corporate Governance," 2002 at 24, 32 and accessible at <http://ssrn.com/abstract=328401> (accessed on 8th July 2015).

³⁵ AccountAbility, 'AA1000 Framework Standards for Social and Ethical Accounting, Auditing and Reporting' (November 1999) 8, accessible at <http://www.accountability.org/images/content/0/7/076/AA1000%20Overview.pdf> (accessed on 8th July 2015).

Corporate governance in China has emerged and developed in line with the shift of the Chinese economy from a planned to a market model. Unlike classic corporate governance models, the governance model adopted by Chinese listed firms can best be described as a control-based system, in which the controlling shareholders, and this is predominantly the State or State officials, “tightly control listed companies through concentrated ownership and management friendly boards”.³⁶ This control-based model is a hybrid due to the gradual transition that is taking place in China, namely from administrative governance to economic governance, something that has been occurring over the past three decades during the transformation of the Chinese economy from a planned to a market model.³⁷ It has meant that now China has a hybrid model with both administrative and economic dimensions. These two elements of governance are expected to co-exist and develop an equilibrium in China over a long period, during which there will inevitably be various institutional and ideological obstacles to be overcome.³⁸ The transition that has taken place thus far has led to a corporate governance model that is now characterised by gradualism, dualism, systematisation and path dependency.³⁹ Any transition in the style of corporate governance can only be achieved through a long process and during this time both administrative and economic corporate governance models will co-exist. This transformation is a systematic one due to developments in legislation and legal enforcement, as well as changes in the nature of the shareholding ownership structure, all of which follows from the influence of Chinese traditions, history, values and culture.

Within the administrative corporate governance mode directors of State Owned Enterprises (SOEs) are appointed directly by the Chinese government, and directors always retain certain administrative roles within the government while also acting as

³⁶ Q. Liu, ‘Corporate Governance in China: Current Practices, Economic Effects and Institutional Determinants’ (2006) 52 *CESifo Economic Studies* 415 at 429; see also N.W. Leung and M. Cheng, ‘Corporate Governance and Firm Value: Evidence from Chinese State-Controlled Listed Firms’ (2013) 6 *China Journal of Accounting Research* 89.

³⁷ W. Li, Y. Xu, J. Niu and A. Qiu, ‘A Survey of Corporate Governance: International Trends and China’s Mode’ (2010) 3 *Nankai Business Review International* 4 at 5–7; see also W. Li, X. Chen and Q. Yuan, *Chinese Corporate Governance: Road to Transition and Perfection* (中国公司治理：转型与完善之路) (Beijing: China Machine Press 2012) 139–141.

³⁸ See W. Li, X. Chen and Q. Yuan, *Chinese Corporate Governance: Road to Transition and Perfection* (中国公司治理：转型与完善之路) (Beijing: China Machine Press 2012) 140.

³⁹ W. Li and D. Yan, ‘Transition from Administrative to Economic Model of Corporate Governance: A New Analytical Framework for Research on China’s Corporate Governance’ (2013) 4 *Nankai Business Review International* 4.

directors. Under this administrative corporate governance system the government always intervenes in the business decision-making process by the employment of administrative actions. This approach has been subject to criticism based on the fact that it produces an inefficient system of operation.

The first and second rounds of privatisation of SOEs started in 1979 and 2014 respectively, when thousands of poorly performing national and regional SOEs were privatised or liquidated.⁴⁰ This manifests the transformation that is occurring, from a purely administrative model to a hybrid one.

While, administrative corporate governance involves significant political involvement in the governance process, elsewhere in the world economic corporate governance is dominant. For instance, in Anglo-American systems there tends to be a focus on the economic power of companies, and as far as many companies are concerned this involves the directors running the company so that it makes as much profit as possible and in such a way as to lead to the maximisation of the wealth of shareholders. The model prevails in common law countries with an effective legal enforcement of shareholder rights. Corporate law provides relatively extensive protections for shareholders, and also courts are relatively active in enforcing those protections.

The long-term coexistence of administrative and economic corporate governance is a unique element in China. The main characteristic of administrative corporate governance in China lies in the “administrativisation” of resource allocation, corporate objectives, and the appointment and removal of senior executives. The political involvement in, and impact on, corporate governance is seen as one of the manifestations of administrative corporate governance.⁴¹ The goal of reform in China, consistent with the reform of the modern enterprise system, is to change this dual character of corporate governance in the direction of pure economic governance, the latter being regarded, comparatively speaking, as a more mature and efficient approach to promoting company

⁴⁰ See G. Wildau, ‘China Kicks off Second Round of Privatisation’ 10 August 2014; available via <http://www.ft.com/cms/s/0/ec28674c-13ac-11e4-84b7-00144feabdc0.html#axzz3DOzmmx3b> (accessed on 15th September 2014).

⁴¹ W. Li, A. Qiu and Z. Gu, ‘Dual Corporate Governance Environment, Political Connections Preference and Firm Performance – Study on Governance Transition of China’s Private Listed Firms (双重公司治理环境_政治联系偏好与公司绩效_基于中国民营上市公司治理转型的研究) (2010) 6 China Industrial Economics 85 at 94.

success.⁴² This transformation is characterised by the weakening of administrative governance and the strengthening of economic governance. However, the existing hybrid corporate governance model does retain many administrative characteristics and it continues to be subject to strong government interference and reliance on government support and direction. It is also shaped by top-down bureaucratic intervention and government control through the government's controlling power over corporate management, via agents appointed by the State who were previously government officials.⁴³ Therefore, an understanding and interpretation of how "accountability" works in administrative law will be helpful and appropriate to inform corporate governance research in China at the present time, and, perhaps, for some time in the future.

Under this unique hybrid corporate governance model, listed companies in China can be divided into two broad groups: SOEs, and listed companies that are not controlled by the State (referred to here as "private companies" even though they are public companies as their shares are available to the public in general). Until early 2000 a reference to a listed company normally referred to listed SOEs, since before that date the overwhelming majority of listed companies were SOEs, whose largest shareholder normally is the State. Since then efforts have been made by the Chinese government to reduce the concentration of state shareholding, and it has a general objective to create a more dispersed and competitive shareholding structure, corporatisation and ownership diversification. This has led to the emergence of new owners such as individual minority shareholders, institutional investors, and employee shareholders.⁴⁴ But by September 2014, listed private companies outnumbered SOEs. While there are 1007 SOEs listed on the Shanghai and Shenzhen stock exchanges, there are 1562 private companies.⁴⁵ As for the SOEs, the very high concentration of ownership is directly linked to control of the board of directors, which is regarded as a critical link

⁴² As indicated earlier, the pursuit of economic goals does not necessarily mean that social and environmental concerns have to be eschewed by companies. Clearly many Anglo-American companies have policies on corporate social responsibility.

⁴³ M.N. Young, M.W. Peng, D. Ahlstrom, G.D. Bruton and Y. Jiang, 'Corporate Governance in Emerging Economies: A Review of the Principal-Principal Perspective' (2008) 45 *Journal of Management Studies* 196 at 211.

⁴⁴ S. Tenev, C. Zhang and L. Brefort, *Corporate Governance and Enterprise Reform in China: Building the Institutions of Modern Market*, Washington, DC, World Bank and the International Finance Corporation (2002) pp.2-3.

⁴⁵ See Statistics of China Securities Regulatory Commission, September 2014 available via http://www.csrc.gov.cn/pub/zjhpublic/G00306204/zqscyby/201410/t20141028_262444.htm (accessed on 4th November 2014); see also J. Liu, 'CSRC: State Owned and Controlled listed Company own market capitalisation of 16 Trillion RMB (证监会: 国有控股上市公司总市值 16 万亿)' (2014) 4th November, *China Economics Weekly*.

between ownership and control in the current Chinese corporate governance scheme.⁴⁶ When SOEs are listed, they are predominately owned and controlled by central or regional governments, with at least 50 per cent (and usually more) of their shares held by government entities. The State Asset Supervision and Administration Commission (SASAC) acts as the largest shareholder, and the chairman of the board of directors is usually a representative of the management of SASAC who will consult with the board and nominate the directors of SOEs.⁴⁷ The decisions made by the board will be based significantly on what are the interests of the largest shareholder. SASAC's mandate is to "own" these listed companies and direct them in the interests of the public. SASAC is the ally of these large companies, and it seeks to improve managerial competence and capability and increase the value of state-owned assets.⁴⁸

A limited liability company in China is required by Chinese Company Law 2005 to "have a supervisory board composed of no less than three members",⁴⁹ who are to supervise "the acts of the directors and senior executives performing their functions."⁵⁰ A two-tier board structure is adopted in China which is similar to the German insider model.⁵¹ The Chinese Company Law has a series of stipulations upon employees' participation and the membership of the board of directors must include representatives of the staff and workers of the company.⁵² Moreover, trade unions also play a crucial role in promoting the interests of employees in the Chinese corporate governance system carrying out their activities in such a way as to protect the lawful rights and interests of the staff.⁵³ For SOEs, their top executives are normally appointed by the Communist Party ("the Party") and government agencies and are all veteran socialist managers, government officials or Party secretaries.⁵⁴ Apart from their directorship position, they normally have an official title within government that is endorsed by

⁴⁶ L.H. Tan and J.Y. Wang, 'Modeling an Efficient Corporate Governance System for China's Listed State-Owned Enterprises: Issues and Challenges in a Transitional Economy' (2007) 7 *Journal of Corporate Law Studies* 143 at 147.

⁴⁷ J.F. Huchet and X. Richer, 'China in Search of an Efficient Corporate Governance System: International Comparison and Lessons', Centre for Economic Reform and Transformation, Heriot-Watt University, Edinburgh, Discussion Paper No 99/01 (11, Feb 1999).

⁴⁸ B. Naughton, 'SASAC and Rising Corporate Power in China' (2008) 24 *China Leadership Monitor* 1 at 8.

⁴⁹ Article 51, Chinese Company Law 2006.

⁵⁰ Article 53(2), Chinese Company Law 2006.

⁵¹ Centre for Financial Market Integrity, *China Corporate Governance Survey* (2007) at 8.

⁵² Article 44 and Article 108, Chinese Company Law 2006.

⁵³ Article 18, Chinese Company Law 2006.

⁵⁴ A.G. Walder, 'From Control to Ownership: China's Managerial Revolution' (2009) 7 *Management and Organization Review* 19 at 31.

government, and this will be at a level that matches their company's position. Many of them return to government positions after a stint as executives. The supervisory board, as an independent board, offers independent opinions on corporate decisions and monitors the directors' executive management, while the board of directors makes the main decisions on the day-to-day operations of the company. It was shown in a recent survey carried out by the Chinese Centre of Corporate Governance, titled "Developing Effective Boards of Directors of SOEs",⁵⁵ that members of the supervisory board are encountering difficulties in performing their duties. They are civil servants, and their education levels and qualifications are normally lower than those of the directors on the main board.⁵⁶ They also normally have limited knowledge about the company itself. Moreover, they are not independent from the board of directors for the following reason. It is not surprising in Chinese listed companies that internal directors and senior management teams have "guanxi"⁵⁷ (meaning "a close relationship") with the supervisors, or sometimes individuals even act both as internal directors and supervisors (or part-time supervisors) on the supervisory board.⁵⁸

IV The Concept of Accountability in China

Notwithstanding the use of the word "accountability" in the G20/OECD's Principles of Corporate Governance,⁵⁹ a document relied on by many developing nations in the construction of their corporate governance systems and also considered by the Chinese, accountability is, as mentioned earlier, an English word that does not have universal application, and appears to be difficult to translate. Even in English there are phrases or other words that are seen as conveying all or some elements of the meaning of accountability. Examples are "transparency," "accepting responsibility" and "being

⁵⁵ Chinese Centre for Corporate Governance and Chinese Academy of Social Science, *Developing Effective Boards of Directors of SOEs* (2005).

⁵⁶ Corporate Governance Research Group of Nan-kai University and Chinese Commission of Economy and Trade, *The Internal Corporate Governance Survey of Chinese Listed Corporations* (2005).

⁵⁷ For discussions on "guanxi" and Chinese corporate governance see U. Braendle, T. Casser and J. Noll, 'Corporate Governance in China – Is Economic Growth Potential Hindered by Guanxi?' (2005) 16 *Business Strategy Review* 42, T.W. Dunfee and D.E. Warren, 'Is Guanxi Ethical? A Normative Analysis of Doing Business in China' (2004) 32 *Journal of Business Ethics* 191.

⁵⁸ Y. Li, 'Comparative Studies on Supervisory Board of Limited Corporations' in S. Shen (ed.) *Essays on International Commercial Law II*, Beijing: Law Publishing (2002) p.265 (in Chinese).

⁵⁹ G20/OECD, *Principles of Corporate Governance* 2015, at 51 and accessible at: <http://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf> (accessed on 15th September 2015).

answerable”.⁶⁰ The word has been difficult to translate into other languages, as the concepts that it conveys in English are not readily transferable through another language.

A. Elements of Accountability within Chinese Company Law

In order to address the issue of whether the notion of “accountability” or a functional equivalent of it exists in Chinese corporate governance, elements of accountability will be discussed in this section. Based on the four stages discussed in the last section including information disclosure, explaining and justifying, questioning and evaluating and the imposition of consequences, we can observe, despite lacking a well-developed accountability notion, certain elements of board accountability embedded within current corporate law legislation.

As for the disclosure of information, it is clear from Article 46 of the Company Law 2005 that the board of directors shall be accountable to the board of shareholders, and shall exercise the functions and powers to report on its work to the board of shareholders. Section 33 provides that shareholders shall have the right to examine the resolutions of the meetings of both the board of directors and the board of supervisors as well as financial and accounting reports. Furthermore, section 37 states that the shareholders meeting shall exercise the functions and powers to consider and approve reports of the board of directors and other company proposals such as annual financial budgets and final accounts, profit distribution plans and plans for making up losses. Section 97 gives the shareholders right to examine minutes of the meetings of the board of directors,⁶¹ minutes of the meetings of the board of supervisors, and to give suggestions for or inquire about the operation of the company. Specifically on the issue of questioning, the director is to attend the shareholders’ meeting as a non-voting

⁶⁰ See M. Bovens, ‘Two concepts of accountability’ (2010) 33(5) West European Politics 946 at 946 and referring to R. Behn, *Rethinking Democratic Accountability* (Washington, DC, Brookings Institution Press, 2001) at 3–6; D. Dunn and J. Legge, ‘US Local Government Managers and the complexity of Responsibility and Accountability in Democratic Governance’ (2000) 11 *Journal of Public Administration Research and Theory* 73 at 74; A. Ebrahimi ‘The Many Faces of Nonprofit Accountability’ Harvard Business School Working Paper, 2010 at 3, and available at: <http://www.hbs.edu/faculty/Publication%20Files/10-069.pdf> (accessed on 3rd April 2014).

⁶¹ Based on section 48 of Chinese Company Law, the board of directors shall keep minutes of its decisions on the matters under its consideration. The directors present at the meeting shall sign the minutes of the meeting.

attendee and accept inquiries from the shareholders if he or she is required to attend.⁶² Thus the Chinese law does provide provisions that allow for a degree of questioning, evaluating, explaining and justifying. The Company Law also imposes consequences in some situations where directors account and are found wanting or in situations where they fail to be accountable. For example, if directors breach their duties they can be held liable to pay compensation in respect of losses to the company.⁶³

While the company law legislation in China does include elements of accountability, it does not carry a well-rounded notion of accountability or an equivalent. Despite the significance of the topic itself, the aim of this article is not focused on how to promote board accountability, but to ascertain what accountability does exist and how the concept could be fostered. Before examining Chinese law any further it is critical that a commonly understood and recognised Chinese version of the notion be proposed first.

B. Language Issues

In this part of the paper we examine the Chinese words that have been translated by the Chinese as “accountability” or “accountable” and those Chinese words that have been used to translate the same English words in Chinese documents addressing corporate governance and corporate law issues, in order to secure a well-rounded picture of how the concept of accountability is perceived in China. This includes consideration of documents which are translated from English into Chinese to ascertain which Chinese word(s) has been used to translate “accountable” as well as Chinese documents, including reports of companies, that have been translated into English and that have used the word “accountable” or “accountability”. It has been necessary for translations both so that non-Chinese readers might understand Chinese corporations’ reports and other documents, including Chinese legislation, and Chinese readers can get some handle on the relevance of accountability.

The discussion seeks to examine how the Chinese view accountability in the field of corporate governance in particular, and to investigate whether the Chinese words

⁶² Section 150, Chinese Company Law 2006.

⁶³ Section 149, Chinese Company Law 2006.

convey the meaning that is encapsulated in the English usage. This linguistic approach in ascertaining if there is a term used for corporate governance accountability is essential in studying and understanding corporate governance in China and the notion of accountability, and it is particularly useful for contributing to the development of corporate governance, such as the drafting of the next version of the Chinese corporate governance code. The need for an updated code is becoming exceptionally relevant in light of the financial crisis of 2008 and due to the age of the existing one.

In relation to accountability in general, it has been said that there is diversity in norms and practices among nations and across cultures.⁶⁴ However, the same commentators also note that accountability is “a universal feature of social life that inevitably arises from the norm-enforcement needs of groups and organizations”, and that it affects nearly all decisions that are made by people.⁶⁵ Other commentators assert that the “accountability of conduct remains a trans-historical and trans-cultural feature of human sociality.”⁶⁶ While Amir Licht argues that it is clearly not a universal norm of governance,⁶⁷ in several Chinese documents that have been published and translated into English the word “accountable” is used. Article 46 of the Company Law 2005, the primary Chinese legislation governing companies, states: “The board of directors shall be accountable to the shareholders [sic] assembly and exercise the following functions and powers (董事会对股东会负责，行使下列职权)”. This is the translation from the official website of “The National People’s Congress of the People’s Republic of China”.⁶⁸ “Accountability” is used in other translations of Chinese documents in other corporate contexts. For instance, paragraph 42 of the English translation of the Code of Corporate Governance for Listed Companies in China provides that: “The board of directors shall be made accountable to shareholders (董事会向股东大会负责).”⁶⁹ The

⁶⁴ J. Lerner and P. Tetlock, “Accountability and Social Cognition” (1994) 1 *Encyclopedia of Human Behavior* 1 at 2, 10 and referred to in A. Licht, “Accountability and Corporate Governance,” 2002 at 22 and accessible at <http://ssrn.com/abstract=328401> (accessed on 8th July 2015).

⁶⁵ Ibid.

⁶⁶ G. Semin and A. Manstead, “Accountability of Conduct: A Social Psychological Analysis” (1983) and referred to in J. Lerner and P. Tetlock, “Accountability and Social Cognition” (1994) 1 *Encyclopedia of Human Behavior* 1 at 1–2.

⁶⁷ A. Licht, “Accountability and Corporate Governance,” 2002 at 24, 32 and accessible at <http://ssrn.com/abstract=328401> (accessed on 8th July 2015).

⁶⁸ Available via http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384124.htm (accessed 8 July 2015).

⁶⁹ Issued by the China Securities Regulatory Commission, 7 January 2001 and accessible at: http://www.ecgi.org/codes/documents/code_en.pdf (accessed on 8th July 2015).

same Code states that the supervisory board is to be accountable to all of the shareholders (上市公司监事会应向全体股东负责).⁷⁰ The word “accountable” is used on each occasion to translate the same Chinese word, fuze 负责.

In the Chinese version of the “Corporate Governance Assessment Summary Report on the Top 100 Chinese Listed Companies for 2012” published by Protiviti/China and the Chinese Academy of Social Sciences, the word “accountability” translates the Chinese words “wenze jizhi (问责机制)”, when referring to establishing accountability and ensuring information transparency.⁷¹ An examination of the Chinese version of the OECD’s Corporate Governance Principles of 2004 shows that “accountability” has been translated differently on three occasions. In Section 2 E 2 of the Principles (providing that “Anti-take-over devices should not be used to shield management and the board from accountability”) it is translated as “wenze (问责)”. Meanwhile, it is translated as “shoutuo zeren (受托责任)” (which can be directly translated as “the responsibility of trustees”) in Section VI (“...the board’s accountability to the company and the shareholders”), and as “wenze xing (问责性)” (xing means nature of⁷²) in Part I of the Annotations (“Transparent and efficient markets serve to discipline market participants and to promote accountability”).

It can be seen from corporate governance codes, statutory provisions, government policy papers, CSR reports, and corporate governance reports, that the term “accountability” has been used to represent a number of different Chinese words or phrases and various words or phrases have been translated into English as “accountability.” This suggests that the concept of accountability from a Chinese perspective is not clear.

⁷⁰ Issued by the China Securities Regulatory Commission, 7 January 2001, article 59, and accessible at: http://www.ecgi.org/codes/documents/code_en.pdf (accessed on 8th July 2015).

⁷¹ Protiviti/China and Chinese Academy of Social Sciences, “Corporate Governance Assessment Summary Report on the Top 100 Chinese Listed Companies for 2012” at 1: <http://www.protiviti.co.uk/China-en/Documents/CN-en-2012-Corporate-Governance-Survey-Report.pdf> (accessed on 8th July 2015).

⁷² In this case, “wenze” is used as a verb rather than a noun. It is a Chinese linguistic rule that the verb will be changed to a noun by putting “xing” after the verb, e.g. 超越 (性).

Purely from the material that we have looked at above, “wenze”, “wenze zhi” and “zeren zhuijiu zhidu” are the three words or phrases that appear to be translated as “accountability” or “accountability system” most often. While “zhi” or “zhidu” can be translated as “system” without controversy, it is interesting to consider “wenze” and “zeren zhuijiu” in more detail.

The term “wenze” can be viewed as a combination of two individual words (wen and ze). “Wen” is a word that can either be used as a verb or a noun, and is more appropriately used as the former here. When used as a verb it means “enquire, ask, interrogate or examine,” while “ze”, a word that also can either be used as a verb or a noun, and which is more appropriately used as the latter here, means “responsibility”. These two words together can deliver the meaning of the process of one party enquiring of another about his or her responsibilities,⁷³ whereas “zeren zhuijiu” means investigating someone’s responsibility in order to ascertain if they are liable from a legal viewpoint. While “wenze zhidu” can be seen as a process of enquiring about responsibility and identifying possible responsibilities of someone, “zeren zhuijiu zhidu” puts more emphasis on the process of ascertaining whether there is any legal liability in relation to the responsibilities undertaken. Looking at the four stages involved in the accountability of boards in Anglo-American systems⁷⁴ which were identified earlier, namely providing accurate information, explaining and justifying actions taken in relation to responsibilities, questioning and evaluating the reasons provided for the board’s actions, and the imposition of consequences, no Chinese term accommodates all aspects of accountability as it is understood in English. Each word tends to have a specialised meaning or focus that fails to be as encompassing as the English word. For example, “wenze” puts an emphasis on enquiry and the need for explanations, while “zeren zhuijiu” puts emphasis on the consequences, namely, liability.⁷⁵

⁷³ In Chinese grammar, some strings of characters can be used as single words in some contexts, but are separable in others. Many English intransitive verbs are translated by verb+noun compounds, such as 问责 (“wenze”, “to be accountable”; literally “to enquire about the responsibilities”), which may be regarded as single lexical words, although the two parts can become separated by aspect markers.

⁷⁴ A. Keay and J. Loughrey, “Board Accountability in Corporate Governance” (2015) 35 *Legal Studies* 252.

⁷⁵ It is fair to say that there are many words that are often seen as synonyms for accountability in English, and “liability” is one of them: M. Dubnick & K. Yang, ‘The Pursuit of Accountability: Promise, Problems, and Prospects’ in D.C. Menzel & H.L. White (edns), *The State of Public Administration: Issues, Challenges and Opportunities* (Routledge 2011), 171 at 185. . Some see liability as a dimension

Having said this, it is argued that like the English word “accountability”, the Chinese word “wenze” accommodates reasonably broad dimensional connotations and certainly broader than “zhuijiu”. This is affirmed by the fact that there are derivations of wen (问) in many other words, such as “jieda 解答” (ask, enquire), “xunwen 询问” (question), “shenxun 审讯” (examine), “ganyu 干预” (manage) and even “zhuijiu 追究” (hold responsible). These derivations are related to some elements of accountability as the term is perceived in English.

C. “Wenze”

“Wenze” appears to be a critical word in two respects. It is used in the Chinese to translate accountability and it is translated by Chinese writers and in reports as accountability. Thus, we now move to discussing “wenze” in the context of the literature surrounding corporate governance and business management to determine its scope and application. In particular we investigate the term “wenze zhi”, which, as mentioned earlier, can be translated as “accountability system”.

Professor Chen Zhibin, Professor of Accounting from Nanjing University, has argued that “wenze zhi” is a system implementing balanced rights and responsibility mechanisms via an institutionalised questioning process.⁷⁶ He refers to this process as a “wenze system” and it includes the following: a rigorous scientific assessment of rights and fulfilling the corresponding obligations; noticing irresponsible actions and decisions in a timely fashion; and pursuing appropriate punishments based on breaches of duties. He described the “wenze system” as one that clarifies and balances rights and responsibilities through a systematic enquiry process in order to minimise risks from the actions of internal management.⁷⁷

of accountability: J. Koppell, ‘Pathologies of Accountability: ICANN and the Challenge of ‘Multiple Accountabilities Disorder’’ (2005) 65 Public Administration Review 94 at 96.

⁷⁶ Z. Chen, ‘Effective Enforcement of Accountability and Internal Control’ (2004) 7 Accounting Research 9; see also Z. Chen and Z. Chen, 2004, ‘Accountability and Validity of Renovation Structure in State-owned Enterprises’, in S. Cheng and C. Liu, Management Sciences and Global Strategies in the 21st Century (Macao: Macao University of Science and Technology) 2004.

⁷⁷ Z. Chen, ‘Effective Enforcement of Accountability and Internal Control’ (2004) 7 Accounting Research 9.

In one of the most influential newspapers in China, the People's Daily (人民日报 Renmin Ribao), it has been argued by Professor Li Weian, one of the most eminent Chinese scholars in the field of corporate governance, that the key issue in promoting corporate governance is accountability.⁷⁸ He explicitly used the word “wenze” when he accommodated the idea of accountability in his argument. He also argued that “real accountability in corporate governance” is a process of “collective decision making with individualized accountability”.⁷⁹ This accommodates the notion of boards and board members being accountable both collectively and individually, with individualised liabilities. For instance, individual directors can be held liable if they breach their duties when acquiescing to a particular course of action taken by the board.⁸⁰ In contemporary research on corporate governance in China and elsewhere, “personal accountability”, together with stewardship, are core elements of internal control and may be more important than performance measurement, efficiency or even profit.⁸¹ That also reflects the understanding of the “wenze system” in China in highlighting the importance of “mingxi bing jiehe quanze (明晰并结合权责)” (clarifying what a person has done but also connecting the rights of the person to his or her responsibility).

Shuqing Guo, former Chairman of the China Securities Regulatory Commission (CSRC), pointed out in his speech at the 10th Corporate Governance Forum that “enhancing oversight and accountability of controlling shareholders, directors, supervisors and executives” is instrumental to improving corporate governance, which will in turn promote the competitiveness of Chinese companies. The Chinese word that

⁷⁸ W. Li, ‘Corporate Responsibility and Importance of Establishing an Efficient Corporate Governance System Construction’ People’s Daily, 6th November 2008; (李维安, 企业履责, 制度建设是关键, 人民日报) 2008-11-6, available via paper.people.com.cn/rmrb/.../content_133517.htm

⁷⁹ W. Li, ‘Corporate Responsibility and Importance of Establishing an Efficient Corporate Governance System 李维安, 企业履责, 制度建设是关键’, 6th November 2008, page 5; the Chinese version of the article used the words “geren wenze 个人问责” to deliver the idea of individualised accountability.

⁸⁰ See Articles 147–149 of Chinese Company Law 2005; see also some reported cases such as Tan Mo 0, Li Mo 1, Li Mo 2, D Danwei v Liulan (People’s Highest Court 2013); Shenyang Tekesi Company v Zhang Mo (Shanghai Second Intermediate Court 2011 No. 1836); Tan Hui v Li Jia (Beijing Second Intermediate Court 2011 No. 16710); Shenzhen Long Digit Control Technique Company v. Li Da (Shenzhen Bao’an District Court, 2011 No. 1025); Ningbo Dahongying Medical Company v Shen Yongren (Zhejiang Province High Court, 2009 No. 1212); Shanghai Weigela Printing Equipment Company v Andreas Albert & Uhlemayer (Shanghai First Intermediate Court 2009 No. 33).

⁸¹ M.J. Jones, ‘Internal Control, Accountability and Corporate Governance: Medieval and Modern Britain Compared’ (2008) 21 Accounting, Auditing & Accountability Journal 1052.

Guo used and was translated as accountability was “wenze (问责)”.⁸² This adds to what we have already documented concerning the Chinese words used to indicate accountability, and leads us to think that “wenze” or “wenze zhi” have been broadly used in the domain of corporate governance and accounting by academics and government officers when trying to establish a link, or clarify the differences, between rights, responsibility and liability.

It is commonly agreed that “wenze” is critical to promoting the corporate governance system in China after the financial crisis of 2008.⁸³ However, wenze does not cover the full ambit of accountability, as the word was defined earlier and is used in the English sense, in relation to the elements of disclosure and justification by an accountant. The emphasis of “wenze” is very much on the role of the accountees and what they should be doing by way of making enquiry concerning the actions of the accountant, rather than the role of the accountant in reporting and justifying what has been done.

It might be possible, due to the multiple derivations of the term, for a “wenze system” to be developed along with the Chinese corporate governance system so as to secure a sound and effective accountability system, remembering that many Chinese sources have referred to the need for accountability in corporate governance. The “wenze system” can be considered from a few perspectives, including consideration of the ones who engage in “wenze”, namely the accountees (those who enquire and then assess explanations given to them), and the content, mechanism and scope of “wenze.”

The main constituents who should be seen as the ones to whom accountability is owed would be shareholders. This follows from Article 46 of Chinese Company Law 2005 and other uses of the word where it is able to be translated as accountability. The possible reasons for enquiry within the “wenze system” may include various issues such

⁸² Chairman Guo Shuqing’s Speech at the 10th Corporate Governance Forum: ‘Corporate Governance and Capital Market Sophistication Are Mutually Reinforcing’ available via http://www.csrc.gov.cn/pub/csrc_en/newsfacts/release/201208/t20120815_213799.htm and Chinese version of the speech is available via http://www.csrc.gov.cn/pub/newsite/bgt/xwdd/201112/t20111219_203915.htm (both accessed on 8th July 2015)

⁸³ X. Gong, ‘Perplexity and Countermeasures of Judicial Intervention in Corporate Governance in China – New Thinking under the Background of Financial Crisis of Wall Street’(2009) 27 *Tribune of Political Science and Law* 8.

as checking resolutions and decisions made by the board, ascertaining decisions concerning the directors' remuneration, monitoring the discharging of duties of directors, or other general strategic management policies. For example, based on Article 97 of Chinese Company Law 2005 there are several accountability mechanisms provided, such as the fact that the shareholders of a company limited by shares are given the right to "look into the articles of association of the company, the register of shareholders...minutes of shareholders' general meetings, resolutions of meetings of the board of directors and the board of supervisors... financial and accounting reports, and to make suggestions or inquiries about the business operations of the company".

The procedure of "wenze" will also be regulated by the Chinese Company Law 2005, especially through stipulations in relation to shareholders' meetings and the liability and dismissal of directors.⁸⁴ Therefore, the subject body, content and procedure of a "wenze" system in the context of corporate governance will work together to facilitate an effective accountability mechanism as far as China is concerned. This will provide investors with the means to query and assess the actions of the board and its committees in order to make them accountable for their decisions and actions. However, thus far this "wenze system" has not been introduced in legislative documents in China. Hitherto, the ideas of "wenze" or a "wenze system" are only discussed academically or within the domain of administrative law or administrative management. It will be positive and useful for China to introduce the system in relation to corporate governance in order to make important issues such as directors' duties and shareholders' rights subject to more effective and logical enforcement. Overall a wenze system would enhance corporate governance in China.

D. The Empirical Position

We have already noted that there are elements of accountability of boards in the provisions of the Company Law 2005. What the paper does now is to consider whether accountability has been embraced in the corporate governance sphere. In this respect we have considered some of the corporate reports and other documents published by Chinese companies that are available on the official websites of the company in order

⁸⁴ See Articles 98–107, 146 and 149, Chinese Company Law 2005.

to identify the extent to which the ‘law on the books’ has been translated into practice, how has the English term accountability has been accommodated in practice and to evaluate the appropriateness of the usage of accountability. We believe these corporate reports, which are available via official website for presentation purposes and to provide disclosure of corporate governance issues, and which include CSR, financial reporting and integrated reports, are trustworthy and reflect the genuine usage of the terms in companies when considering their corporate governance structure and corporate management strategies. These reports are normally professionally drafted, internally and externally scrutinised and translated by experts. There are, in our opinion, no documents available that are more reliable or can better illuminate how the notion of accountability has been currently adopted and employed in Chinese companies, and they could well be more accurate than data obtained from interviews as they are available to the public and able to be assessed widely. Both SOEs and non-SOEs from various industries were carefully selected in order to ensure that we consider data from a balanced range of companies. This is one of few ways that could enable one to ascertain what the position is in relation to corporate governance practice. This section, rather than a survey on corporate documents and academic writings on the notion of accountability, problems, misinterpretations, and inadequacy of how has value of accountability been enforced and considered in practice, aims to identify the gap between the notion of systematic accountability on the one hand, and the realisation of the term in practice, on the other, and endeavours to fill in this gap both here and in the rest of the paper.

We chose a number of large listed companies from different types of industries including the energy, telecommunications, transportation, banking, motor vehicle, pharmaceutical, airline, insurance, food, emerging technology sectors and mixed industry in order to determine how, to what extent and in what ways the notion of accountability has been embraced by companies. We studied both the Chinese and English versions of these reports in order to ascertain how relevant are the Chinese terms that we proposed in relation to the “wenze” or “wenze zhi (system)” to accountability in practice. First, we examined the reports of SOEs. The Annual Report and Account 2014 titled “Reform, Transformation, Management” of the China Petrochemical Corporation (Sinopec Group), a super-large petroleum and petrochemical company in China and ranked second in the Fortune Global 500 in 2014,

reported on the issues surrounding “accountability and auditing” alongside matters such as the work of the boards of directors and remuneration in the corporate governance sub-section of the report. It is provided that accountability should be achieved through accurate financial reporting with full responsibilities being imposed for false and misleading statements with internal control framework and self-assessment measures being put in place to support this.⁸⁵ The CSR Report 2014 of the China National Petroleum Corporation (CNPC), ranked fourth in the Fortune Global 500 in 2013 provided that the company integrates “economic, environmental and social objectives into performance evaluations of senior executives” who are “accountable for HSE misconduct” when discussing stakeholders engagement, particularly on how to consolidate safety and environmental protection”.⁸⁶

When reporting on the management of health and safety risk, the 2010 Sustainability Report of the China Ocean Shipping Group (COSCO) mentioned the implementation of a “safe production accountability system” when discussing management of health and safety risk as part of its risk management system, and this was stated to be one of the company’s goals.⁸⁷ In the same report, the notion of accountability is also embedded as one of the performance indicators for the company’s board⁸⁸.

Since food safety has become one of the topics that attracted much attention, especially after the San Lu Milk Powder scandal involving 700 tons of San Lu baby milk powder being contaminated with melamine to meet company standards for the protein content in order to achieve the short-term interests of the shareholders, we also examined the reports of one of the biggest food manufacturing companies, China Agri-Industries Holdings Limited (or China National Cereals, Oils and Foodstuffs Corporation/COFCO). In the corporate governance report contained within the 2013 Annual Report, it is disclosed that “the company recognises the importance of corporate transparency and accountability” in order to achieve a high standard of corporate governance practices and an accountable management framework in order to enhance

⁸⁵ The Chinese word used here for accountability was “wENZE (问责)”.

⁸⁶ Here, the word “accountability” translated the Chinese phrase “wENZE JIZHI (问责机制)”.

⁸⁷ The corresponding Chinese phrase used here for accountability system was “wENZE ZHI (问责制)”.

⁸⁸ The corresponding Chinese word to accountability was “ZEREN (责任)”.

the interests of shareholders. The notion of accountability was also discussed in relation to the audit function as part of the directors' responsibilities.⁸⁹

In the CSR Report 2011 of China Southern Power Grid (CSG), it is mentioned that accountability is regarded as a core value and the accountee in the accountability process is every stakeholder.⁹⁰ In the Baosteel Group CSR Report 2012, the term "Economic accountability audit" was used to discuss one of the auditing systems.⁹¹ In the same report, the accountability system that is provided for is regarded as "the basic" for a close-loop management mode to combat corruption.⁹² The Interim Report of the Industrial and Commercial Bank of China employed the term "operational management accountability" as part of an attempt to improve IT management.⁹³

In order to enhance transparency, it is emphasized in the annual report 2013 of Shanghai Automobile and Industrial Corporation that policies of accountability for significant errors made in information disclosure have been introduced.⁹⁴ In the annual report of China Mobile Limited 2014, when discussing, internal audit in the corporate governance section of the annual report, it is reported that the company promoted accountability in order to hold officers accountable, and in appropriate cases impose penalties⁹⁵. China Merchants Holding Limited, developed from the first private company that was registered in 1872 during the Qing dynasty, is one of the companies that we studied that is involved in a mixture of industries including transportation, finance and real estate. In its annual report of 2014 titled "Growing from Strength to Strength", accountability was used as one of the 16 principles of corporate governance that regulates the company's life. Accountability was important as "the Board is committed to providing shareholders with a balanced and understandable assessment of the Company's financial performance, position, and prospects via announcement of its quarterly, interim and full year financial results."⁹⁶

⁸⁹ The corresponding Chinese phrase used here for accountability system was "wenze zhi (问责制)" and "wenze (问责)".

⁹⁰ Here the corresponding phrase in Chinese is "fuze de duidai (负责的对待)".

⁹¹ The Chinese version of the document used the phrase "jingji zeren shenji (经济责任审计)".

⁹² The Chinese version of the report used the word "zeren zuijiu tixi (责任追究体系)".

⁹³ The phrase "guanli zeren zhi (管理责任制)" was used in the Chinese version of the report

⁹⁴ The equivalent word in Chinese report is wenze (问责).

⁹⁵ The phrase "wenze (问责)" was used in the Chinese version of the report

Apart from SOEs, we also observed some non-state owned companies in order to look at how the notion of accountability has been adopted where there is less impact from administrative governance. In the Corporate Governance report of Huawei, “the CEO accountability system” was mentioned under the leadership of board of directors and “clear authorization and accountability of responsibilities” was highlighted as a characteristic of “a well-established governance structure”. Moreover, Part 2 of CSR report 2014 of China Minsheng Bank discussed the transformation on nature and attitudes towards CSR from being purely voluntary and philanthropic responsibilities to the expected responsibilities of board from their stakeholders with possible liabilities in order to disclose corporate actions towards stakeholders, including some of them need special attention in China including small and medium enterprises, non-state-owned enterprises, rural community, employees, environment and public welfare.⁹⁷ In the corporate governance report of 2014 of Ping An Insurance Company of China, the importance of the “formulation and implementation of an accountability system for major errors,” which had been introduced in 2010, was reaffirmed. When discussing “the assessment and evaluation of the remuneration system”, the “accountability results are closely linked to the long-term and short-term award and appointment and removal of cadres” which is closely related to the fourth stage of the notion of accountability discussed in Part II. Furthermore, “a risk prevention and control accountability system” was established in relation to “Investment Risk Management”.⁹⁸

In the corporate governance report (contained within the annual report) of Shanghai Fosun Pharmaceutical company, it is emphasises that “the board believes that high corporate governance standards are essential in providing a framework for the Group to safeguard the interests of shareholders and to enhance corporate value and accountability”.⁹⁹ In the annual report of Hainan Airline, the notion of “accountability” was employed as a means to promote safety management.¹⁰⁰

⁹⁷ The phrase “dandang (担当)” was used in the Chinese version of the report which means “undertake responsibility voluntarily”

⁹⁸ The Chinese version of the report used the word “zeren zuijiu zhidu (责任追究制度)”, “zeren zhi (责任制)”, “wenze (问责)”.

⁹⁹ The phrase “wenze du (问责度)” was used in the Chinese version of the report and du means degree of in Chinese.

¹⁰⁰ The phrase “wenze (问责)” was used in the Chinese version of the report.

In addition there are a number of statements by Chinese scholars that indicate that there is some kind of accountability going on in the corporate governance field. For example, Li Weian, as indicated above, has indicated that there is accountability in the Chinese system. Shi has argued that weak accountability is regarded as one of the major corporate governance problems in China.¹⁰¹ Zhu has discussed the existence of accountability and identified problems and the necessity of effective enforcement of an accountability system.¹⁰² Sun and Tobin have noted that Chinese companies enhanced their accountability after cross-listing in foreign stock exchanges.¹⁰³

We can see from the discussions above that accountability has been adopted in various ways to deliver the notion of responsibilities which are accompanied by possible liability. Accountability is widely used in various reports and in academic literature in the area of corporate governance. As for the corporate reports, the notion of accountability is mostly embedded within the CSR report, or corporate governance section of the annual report. The term was employed to disclose that the boards are made responsible in relation to various parties including shareholders and stakeholders and to demonstrate a clear mechanism of liabilities with internal control, especially when the accountability system was discussed and used in relation to the auditing system, risk management and product safety management. The term accountability was used to deliver the meaning of one, or more than one, stage(s) of the four stages of accountability discussed in Section II, but not all of them. The concern is that the Chinese equivalent of accountability in these documents is not consistent. The understanding of the nature and scope of the notion of accountability in both the corporate and academic world is also inconsistent, incomplete and far from being systematic.

E. A “Wenze System”

¹⁰¹ C. Shi, *Political Determinants of Corporates Governances in China* (Abingdon: Routledge) pp.134-136.

¹⁰² Y. Zhu, *The Structure and Efficiency the Board Accountability System* (董事问责：制度结构于效率) (Beijing: Law Press) (2012) p.18.

¹⁰³ L. Sun, & D.Tobin, ‘International Listing as a Mechanism of Commitment to More Credible Corporate Governance Practices: the case of the Bank of China (Hong Kong)’ (2005) 13 *Corporate Governance: An International Review* 81.

Accountability is clearly not something that is limited to corporate governance in either Anglo-American jurisdictions or in China. Political reforms through the introduction of an accountability system, that is, a “wenze system,” were introduced in China in order to make government officials more responsive to societal demands and more accountable for their performance as civil servants. Government institutions have been established for this purpose, including legislative oversight committees, supervision committees, party discipline committees, and internal administration reconsideration procedures. An accountability system for government officials (“ganbu wenze zhi 干部问责制”) is regarded as the most important of these.¹⁰⁴ Government officials will face an enquiry process which may lead to tough penalties or dismissal. The importance placed on the enquiry process within this “wenze system” is regarded as the result of government officials not being accountable for their decisions. The development of the market economy makes the government’s accountability reforms particularly important as China becomes increasingly open and diverse.

In relation to corporate governance, it is recognised that in Chinese listed companies, directors’ responsibilities need to be clarified in order to make their enforceability more credible. The professionalism and competitiveness of Chinese directors on both the executive and supervisory boards has been questioned, and reforms through corporate governance mechanisms and corporate law changes have been recommended.¹⁰⁵ These problems are widely recognised in China from the perspective of government officials, especially in relation to the actions of directors in SOEs.

¹⁰⁴ S. Zhao, ‘The China Model of Development: Can it Replace Western Model of Modernization?’ in S.P. Hsu, Y. Wu and S. Zhao (eds.) *In Search of China’s Development Model: Beyond the Beijing Consensus* (Abingdon, Routledge, 2011) 45 at 52.

¹⁰⁵ See L. Chun, *The Governance Structure of Chinese Firms*, Heidelberg and London, Springer (2009); J. Yang, J. Chi and M. Young, ‘A Review of Corporate Governance in China’ (2011) *Asian-Pacific Economic Literature* 15; N. Rajagopalan and Y. Zhang, ‘Corporate Governance Reform in China and India: Challenges and Opportunities’ (2008) 51 *Business Horizons* 55; Y. Cheung, P. Jiang, P. Limpaphayom and T. Lu, ‘Does Corporate Governance Matter in China’ (2008) 19 *China Economic Review* 460; H. Sami, J. Wang and H. Zhou, ‘Corporate Governance and Operating Performance of Chinese Listed Firms’ (2011) 20 *Journal of International Accounting, Auditing and Taxation* 106; L. Miles and Z. Zhang, ‘Improving Corporate Governance in State-Owned Corporations in China: Which Way Forward?’ (2006) 6 *Journal of Corporate Law Studies* 213; S. Li, ‘China’s (Painful) Transition from Relation-based to Rule-based Governance: When and How, not If and Why’ (2013) 21 *Corporate Governance: An International Review* 567; G. Xu, T. Zhou, B. Zeng and J. Shi, ‘Directors’ Duties in China’ (2013) 14 *European Business Organization Law Review* 57.

The concept of a *wenze* accountability system gives us opportunities to develop “*wenze*” in a manner that will benefit the development of the Chinese corporate governance system as an economic model, which is the direction China is heading. Unlike the essence of “*wenze*” itself, the *wenze* system could include dimensions with a rather wide scope relating to a process of balancing rights and responsibilities through enquiry and disclosure. The system requires directors to be accountable to the company and it includes, in a logical order, the following three broad dimensions:¹⁰⁶ the directors being responsible and exercising due diligence (“*jinze* 尽责” or “*lüze* 履责”); directors clarifying and providing information concerning their responsibility and setting standards, explaining, analysing and justifying the responsibility they have been given (“*mingze* 明责”); and “*wenze*” in a narrow sense, focusing on enquiry relative to the actions of the accountant (“*wenze* 问责”). The realisation and enforcement of the process of “*wenze*” does imply these dimensions, and these three related aspects have been practically and widely used to explain the *wenze* system. For example, it is argued by Wang Tie, Party secretary of Xinyang City, that Party committees and governments of all levels should understand the close relationship between clarifying their responsibilities (“*mingze* 明责”), exercising due diligence (“*jinze* 尽责” or “*lüze* 履责”) and making enquiries concerning the actions of the accountant (“*wenze* 问责”) in order to build a harmonious and peaceful society through the *wenze* system.¹⁰⁷ Another example is that the accountability issue is emphasized in the Guidelines for the Internal Control of Recommendations for Business drafted by the CSRC, which put forward requirements in relation to systems concerning due diligence, working papers, work diaries, internal examinations and continuous inspections as specified in the Measures for the Administration of Securities Issuance and Listing Recommendations for Business.¹⁰⁸ The accountability system is introduced in Section 5 (3) through three components and dimensions including “*mingze* (明责)”, “*jinze* (尽责)” and “*wenze* (问

¹⁰⁶ The “*wenze*” system is able to accommodate a number of dimensions. “*Ze*” is the noun and “*wen*”, “*ming*”, “*bao*”, “*cheng*” and “*xi*” are verbs; this is an accurate way to compose a word in Chinese grammar. These four phrases can be regarded as four dimensions of the “*wenze*” system.

¹⁰⁷ Speech by Wang Tie, party secretary of Xinyang City on 17th August 2009; available via http://blog.sina.com.cn/s/blog_3faf53b50100es7n.html (accessed on 4th November 2014).

¹⁰⁸ Guidelines for the Internal Control of Recommendation Business (保荐业务内部控制指引) www.csrc.gov.cn/.../P020110621654377810539.doc (accessed on 4th November 2014).

责)”.¹⁰⁹ In relation to directors, Mr. Yin Jiaxu, Chairman of the Board of the China North Industries Group Corporation, which ranks 152nd on the 2014 Fortune Global 500 list, argued in a group discipline committee training meeting in July to August 2014 in Beijing that Party committee members and members of the board at all levels should clarify their responsibilities, exercise due diligence with respect to their responsibilities, and be accountable for their decisions.¹¹⁰ It is highlighted that, in order to enforce and implement the accountability system, “mingze (明责)” is the foundation, “lüze (履责)” is the key to ensure the achievement of assigned tasks, and “wenze (问责)” can be regarded as the safeguard.

The logical flow of these three dimensions of a “wenze system” described above is important to bridge the expectation gap that exists between what is perceived as the roles to be played by the board of directors and the reality of actual board performance, something that is also needed in Anglo-American corporate governance.

The broad scope of the “wenze system” seems to come close to covering the four stages of accountability discussed at the outset, because this system as developed in administrative management includes providing accurate information concerning its decisions and actions (“xize 析责”), explaining and justifying that for which it is responsible (“mingze 明责”), questioning and evaluating of the reasons provided by the board (“zhize 质责”) and the imposition of consequences (“chengze 惩责” or “baoze 褒责”).

This “wenze system” can be regarded as a trend that should be adopted in relation to Chinese corporate governance in order for China to develop its own unique accountability system based on a constantly changing and distinctive corporate governance model and one that is becoming close to economic governance. The proposed system could possibly be included within the next Code of Corporate

¹⁰⁹ Section 5 (3) Guidelines for the Internal Control of Recommendation Business (保荐业务内部控制指引).

¹¹⁰ Yin Jiaxu emphasises in the Discipline Inspection Group Company 2014 Training Session: “Discipline should focus on fulfilling its oversight responsibilities (尹家绪在集团公司 2014 年纪委书记培训班上强调：纪委要聚焦主业 履行好监督责任)”, available via <http://www.norincogroup.com.cn/cn/newsdetail.aspx?id=34423&type=1> (accessed on 4th November 2014).

Governance for Listed Companies in China (the Code), the present one being arguably out of date as it was introduced in 2001.¹¹¹

Thus, it is not suggested here that the Anglo-American concept of accountability should be transplanted to Chinese corporate governance. While scholarly understanding of legal translating, as a ubiquitous form of legal development, is fairly rudimentary,¹¹² what is clear is that when considering whether concepts that operate in one jurisdiction should be applied in another there can be difficulty in transplanting those concepts because of a variety of factors such as the political system, culture, history, law enforcement and socio-economics.¹¹³ Whether concepts, like accountability which is a value, can be transplanted is probably a matter that is likely to be subject to aspects of the same debate that exists with respect to the transplantation of legal rules. In line with the views espoused in relation to legal transplantation, some scholars, known as transferists, may argue that concepts like accountability are equally at home anywhere where there is human endeavour and community if the concept is a good and appropriate one,¹¹⁴ while others, known as culturalists, might argue that it is not possible to effect a transplanting,¹¹⁵ as one cannot transport human meanings from one culture to another.¹¹⁶ If the successful legal transplant means using the imported legal rules in the same way that they are used in the home country subject to adaptations and local conditions,¹¹⁷ we submit that there is a middle ground where, as in this case, an accountability system can be developed that draws on the concept of accountability as

¹¹¹ See N. Rajagopalan and Y. Zhang, 'Corporate Governance Reform in China and India: Challenges and Opportunities' (2008) 51 *Business Horizons* 55; L. Guo, C. Smallman and J. Radford, 'A Critique of Corporate Governance in China' (2013) 55 *International Journal of Law and Management* 257.

¹¹² H. Kanda & C.J. Milhaupt, 'Re-examining Legal Transplants: The Directors' Fiduciary Duty in Japanese Corporate Law' (2003) 41 *American Journal of Comparative Law* 887 at 887.

¹¹³ D. Clarke, 'Lost in Translation? Corporate Legal Transplants in China' (2006) and available at <http://www.ssrn.com/abstract=913784> (accessed on 16th December 2015).

¹¹⁴ For example, see A. Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh, Scottish Academic Press, 1974); R. Small, "Towards a Theory of Contextual Transplants" (2005) 19 *Emory International Law Review* 1431 at 1431; D. Cabrelli and M. Siems, "Convergence, Legal Options and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis" (2015) 63 *American Journal of Comparative Law* 109 at 124.

¹¹⁵ For example, see O. Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 *Modern Law Review* 1 at 27; P. Legrand, "The Impossibility of Legal Transplants" (1997) 4 *Maastricht Journal of European and Comparative Law* 111; D. Cabrelli and M. Siems, "Convergence, Legal Options and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis" (2015) 63 *American Journal of Comparative Law* 109 at 124-125.

¹¹⁶ E. Hoffman, *Lost in Translation* (Minerva, 1991) at 175.

¹¹⁷ H. Kanda & C.J. Milhaupt, 'Re-examine Legal Transplants: The Directors' Fiduciary Duty in Japanese Corporate Law' (2003) 41 *American Journal of Comparative Law* 887 at 891.

provided for in other places, but at the same time one that meshes with China's culture and politics and meets its specific needs in order to establish an accountability system with Chinese characteristics. If a concept that has been emphasised and developed in a foreign country is able to serve another country well or is able to contribute to the development of a country's own application of the concept then the origin of the concept is not relevant.¹¹⁸ Pursuant to the middle ground approach we advocate it is not a problem if the recipient country's appreciation of the original concept is flawed as the country will not be endeavouring to stick slavishly to it in any event, but developing what it feels is best and most suitable for its particular circumstances.

It is argued that the development of this unique *wenze* system would reflect the fact that China is likely to develop its own form of accountability because the development of its corporate governance is affected by path dependence. This is a comparatively modern idea that originated in the 1980s, and it provides that an outcome or decision is shaped in specific and systematic ways by the historical path leading to it, as well as by other factors within the socio-economic context.¹¹⁹ While convergence theorists predict that countries, especially countries with weak legal systems, will adopt certain legal rules that have been demonstrably efficient in other jurisdictions, theorists who adhere to path dependence normally argue that divergence between systems will still exist because legal rules are shaped by pre-existing political and social forces.¹²⁰ As part of the domestic legal and financial framework, a corporate law system has significant sources of path dependence, which include historical accidents as well as economic and political particulars of the domestic system.¹²¹ The persistence of these sources significantly contributes to the stability of the domestic corporate governance system in any local socio-economic environment.

¹¹⁸ S. Zhuang, "Legal Transplantation in the People's Republic of China: A Response to Alan Watson" [2006] *European Journal of Law Reform* 215 at 226; H. Xanthaki, 'Legal Transplants in Legislation: Defusing the Trap' (2008) 57 *International and Comparative Law Quarterly* 659 at 662.

¹¹⁹ O.A. Hathaway, 'The Course and Pattern of Legal Change in a Common Law System' (2001) *Iowa Law Review* 1, 103–104.

¹²⁰ K. Pistor, 'Patterns of Legal Changes: Shareholder and Creditor Rights in Transition Economies' (2000) EBRD working paper 49/2000.

¹²¹ L. A. Bebchuk and M.J. Roe, 'A Theory of Path Dependence in Corporate Governance and Ownership' (2000) 52 *Stanford Law Review* 127.

It is recognised that a “one size fits all” approach will not work because of the existence of path dependence.¹²² Countries with emerging markets should avoid simply copying legislation and codes implemented in mature markets as they are likely to be inappropriate. The most appropriate and effective regulatory framework will greatly depend on how evolved a country’s markets, legal system and governmental institutions are, as well as the nature of its history and culture.¹²³ Also of importance is the shareholding ownership structure for that is often unique to each nation and which presents its own unique agency problems that each country will normally have to confront. Deniz correctly points out that “copying a code from one country to another without analysing the details of a corporate governance system or considering the applicability to a specific country’s judicial system or ensuring effective enforcement, will not bring the expected benefit and reform to that country”.¹²⁴

Path dependence theory can be regarded as a theoretical base for the adoption of a notion of accountability with unique characteristics within a unique corporate governance model, taking into account a nation’s corporate law, enforcement process, shareholder structure, civil procedure, stage of economic development and other aspects including culture, history and traditions. The existing values present in a nation will block changes and generate path dependence. It has been argued by Bebchuk and Roe that the initial ownership structure in a country will directly influence the subsequent development of ownership structure and laws.¹²⁵ Furthermore, they have developed the theory to suggest that interested parties possessing the power to influence ownership structure and corporate law will have both the incentive and the power to impede changes that might improve efficiency but are contrary to their private control interests.¹²⁶ In China, the very high concentration of state ownership is directly linked

¹²² See A. Anderson and P.P. Gupta, ‘Corporate Governance: Does One Size Fit All’ (2013) 24 *Journal of Corporate Accounting & Finance* 51; R. Gilson, ‘Controlling Shareholders and Corporate Governance: Complicating Corporate Taxonomy’, (2006) *Harvard Law Review* 1641; M.J. Roe, ‘Explaining Western Securities Market’ in M.J. Roe (ed.), *Corporate Governance: Political and Legal Perspective* (Colchester, Edward Elgar, 2005) at 279. See also R.H. Schmidt and G. Spindler, ‘Path Dependence and Complementarity in Corporate Governance’, in N. Gordon and M.J. Roe (eds.), *Convergence and Persistence in Corporate Governance* (Cambridge, Cambridge University Press, 2004) 114.

¹²³ K. Pistor, ‘The Standardization of Law and Its Effect on Developing Economies’ (2002) *American Journal Comparative Law* 97 at 97–130.

¹²⁴ O. Deniz, ‘Reforming Corporate Governance in Developing Countries and Emerging Market Economies’ (2012) *New English Journal of International Comparative Law* 67 at 77.

¹²⁵ *Ibid.*

¹²⁶ *Ibid* at 132.

to control of the board of directors, which is regarded as a critical link between ownership and control in the current Chinese corporate governance scheme.¹²⁷ This decides the uniqueness of accountability and the ways it will be adopted, appropriately and effectively, in a Chinese corporate governance code or Chinese company law in the future. While the ownership structure, corporate governance model and economy have developed and been transformed very rapidly in China, the concept of accountability will also change, assuming a form that best suits China and the promotion of the success of its companies.

If the Corporate Governance Code were updated, taking into account the use of a *wenze* system, it could reflect the fact that there has been a transformation from administrative corporate governance to something that is closer to economic corporate governance in China. The move from administrative to economic corporate governance may lead to accountability that is of a similar ilk to that found in Anglo-American systems. However, in the opinion of the authors, accountability in corporate governance in China will never be exactly the same as that applying in Western countries. This is based on several reasons in addition to the general concept of path dependency discussed above. Of critical importance is the stage of China's economic development, and, of course, its unique history, culture, politics and traditions. Deng Xiaoping introduced the socialist market economy based on the dominance of the state-owned sector and an open-market economy with capitalist techniques being permitted to thrive. Deeply rooted Confucian philosophy, the unique *guanxi* and *renqing* traditions, government interference and participation in companies (especially SOEs), and the unique shareholder structure that resulted from privatisation are all important factors, and collectively they demand that the corporate governance model should be unique.

So, in summary, we are suggesting that the Chinese language does not have an exact word that encapsulates the English word "accountability", particularly as employed in relation to corporate governance and as explained earlier in the paper. However, we do think that the use of the Chinese word "*wenze*" and its derivations conceivably can provide a system, which we have called a "*wenze* system", that while it mirrors some

¹²⁷ L.H. Tan and J.Y. Wang, 'Modeling an Efficient Corporate Governance System for China's Listed State-Owned Enterprises: Issues and Challenges in a Transitional Economy' (2007) 7 *Journal of Corporate Law Studies* 143 at 147.

of the elements of accountability as it applies in Anglo-American systems, is, more importantly one that will be able to be embraced in China, for the form of accountability that applies is never likely to be the same as in other systems around the world since China is developing accountability within its own unique corporate governance system and to address its own needs.

V “Wenze Zhi” and Accountability in Administrative Corporate Governance and Administrative Law in China

In this section, the history and definition of “wenze zhi” will be further discussed in the context of administrative law in China in order to clarify the nature and scope of the accounting system and to assess the appropriateness of employing the concept in the corporate governance field. Administrative law is used because it is in this area of law that accountability has been most frequently considered in China, as it has in many Western countries, and it has, as discussed below, had a profound influence on the development of corporate governance in China, as a hybrid corporate governance with the long-term coexistence of economic and administrative characters. This unique corporate governance with government interference and “administrativisation” of resource allocation, corporate objectives, and the appointment and removal of senior executives make the discussions of administrative law valuable and coherent without running a risk of diluting the discussion in the context of corporate governance.

An accountability system (“wenze zhi”) was introduced as the result of the construction of a system of responsible government and is regarded as representing a profound revolution. It includes administrative ideas, development targets, government patterns and policy tools.¹²⁸ The establishment of an accountability mechanism and the safeguarding of a system standard are regarded as core concepts for the success of this revolution through the idea of “power restricted by power”.¹²⁹ The standardisation and institutionalisation of this term has been essential to administrative law since the SARS crisis of 2003. It refers to a system in which government officials are required to take responsibility for their decisions and performance while subjecting themselves to the

¹²⁸ L. Xia, ‘China’s Administrative Rule of Law in 2009’ in L. Lin (ed.) *The China Legal Development Year Book (Volume 5)* (Leiden, Brill, 2010) Chapter 6 at 159.

¹²⁹ *Ibid* at 159–160.

scrutiny of those who entrusted and empowered them. It is introduced as a supervision system for the purpose of promoting administrative efficiency through enforcement mechanisms such as the following kinds of accountability: legal, political, management, and occupational ethics.¹³⁰

As far as government legislation is concerned, the introduction in 2009 of the “Interim Provisions on the Implementation of Accountability for the Leader of the Party and Government (关于实行党政领导干部问责的暂行规定)” marked the formal commencement of building a more responsible government with accountability mechanisms. This process is regarded as a major step in enabling the strengthening of the legal system in order to combat corruption. It supports advocating “clean” government and improving the code of conduct for leaders, which is of great significance in strengthening the supervision of the work of the leaders of the party and government, and enhancing their sense of accountability, as well as providing a better implementation of the scientific outlook on development and continually improving the party’s governing capacity and the art of governance.¹³¹ The Chinese word “wenzhe 问责” was explicitly used in the title of the provision and has been translated as “accountability” above.

The Interim Provision was regarded as a vital step for the growth and enlargement of the accountability system in terms of establishing three mechanisms to ensure the full implementation of the system, as well as controlling and supervising public power within the system, namely responsibility, discipline and legal investigation.¹³² These three components of accountability work in a logical way by identifying and investigating responsibility, making sure the people who are responsible are directly disciplined, and, where they are in breach, incurring legal liability based on administrative law.¹³³ This is consistent with the stages and goals of corporate

¹³⁰ T. Song, ‘On the Definition of Administrative Accountability (行政问责概念及内涵辨析)’ (2005) 2 *Journal of Shenzhen University* 42 at 42–43.

¹³¹ Preface of Interim Provisions on the Implementation of Accountability for the Leader of the Party and Government 2009.

¹³² Y. Li, ‘Downward Accountability in Response to Collective Actions: The Political Economy of Public Goods Provision in China’, Stockholm China Economic Research Institute, Stockholm School of Economics, number 2013–26 in its Working Paper Series.

¹³³ Article 12, Interim Provisions on Implementation of the Accountability of the Leader of the Party and Government 2009.

governance accountability where directors are required to disclose information concerning their responsibilities and directors are rewarded or punished for their responsible or irresponsible corporate actions.

This Interim Provision has been seen as very effective, since 21,464 officials have been held responsible for failing in their duties and causing major workplace accidents and serious pollution incidents in the last year, and about 182,000 officials nationwide were punished in China in 2013.¹³⁴ While the number of convictions does not necessarily mean that a system is effective, the Chinese authorities have been encouraged by the convictions and this has led them to believe in the effectiveness of “wenze zhi” in administrative law. The highlight of the accountability system has been the introduction of the three-year Action Plan of China’s State Council Information Office 2012–2015, regulating accountability where there are accidents concerning product safety, food quality, land requisition and environmental pollution.¹³⁵ The accountability system has been used here to require officials and others to explain their actions, and it has led to the imposition of liability in relation to those who infringed the interests of others because of dereliction of duty. The effective use of the notion here does imply the possibilities of adopting wenze system in corporate governance.

Looking to the future, a “five year planning outline for the Central Party Regulations (2013–2017 years)” has been designed to co-ordinate arrangements for the work of the Central Party over the next five years, putting forward the basic requirements, objectives and guiding ideology.¹³⁶ It is suggested in Section 4.5 that the Interim Provisions will be amended to improve the accountability system. This will be delivered by the party in order to monitor those officials who represent it. The amendment should clarify, as far as party officials are concerned, the following: the circumstances where accountability will be required; accountability norms; the consistency and cooperation of legal accountability; and disciplinary rules and

¹³⁴ L. Gu (China News), ‘180,000 Officials Disciplined in 2013’ available via <http://www.ecns.cn/2014/01-10/96477.shtml> (assessed 8 July 2015).

¹³⁵ For the full text of the plan, see the Information Office of the State Council, National Human Rights Action Plan of China (2012–2015), available via http://news.xinhuanet.com/english/china/2012-06/11/c_131645029.htm (assessed 8 July 2015).

¹³⁶ See “Five year planning outline for the Central Party Regulations (2013–2017 years) 中央党内法规制定工作五年规划纲要” available via <http://qzlx.people.com.cn/n/2013/1128/c364565-23679929.html> (assessed 8 July 2015).

sanctions. The word “wenze 问责” was used in combination with “zhidu 制度” (system), “qingkuang 情况” (circumstances) and “fangshi 方式” (norm) in the original Chinese documents in establishing the wenze system in administrative life.

The increasing importance of the application of “wenze zhi” in administrative law is closely related to corporate governance, especially for SOEs where the relevant Party committee plays a pivotal role in the decision-making process, including the nomination of top executives, executive evolution and compensation, assets acquisition, and annual budgets.¹³⁷ The State and the Party have a massive impact on corporate governance development and board accountability. This unique corporate governance system with characteristics from both administrative and economic governance enables the wenze system employed in administrative law to be applied in corporate governance. While the “wenze zhi” regulates civil servants in administrative law in China, it also regulates and supervises directors in SOEs who are often appointed by the State. Therefore, the accountability system in administrative law applies to similar people as those that are involved in the corporate governance system in China, especially those who are appointed to SOEs.

The accountability system in Chinese administrative law is designed to promote a responsible government with more responsible governors, while the accountability system in corporate governance is established with the purpose of promoting more responsible boards of directors in a model with high state ownership and strong government involvement in corporate decisions. While the accountability system for administrative law applies to governors who lose the trust of the public, it can be observed that the accountability system for corporate governance does apply to directors who do not encourage and inspire competitiveness, and who are not trusted by the State, Party leaders, their shareholders and other related corporate constituencies.

This discussion confirms the notion that board accountability in China is and will be different from the accountability process in other jurisdictions, just as corporate governance in China differs. The term “wenze” places more emphasis on the notion of

¹³⁷ R. H. Huang and G. Orr, ‘China’s State-Owned Enterprises: Board Governance and the Communist Party’ (2007) *The McKinsey Quarterly* 108 at 109.

investigation by accountees, partly as a result of government interference, when compared to accountability in Anglo-American systems. An updated system of accountability may be developed in order to include some or all of the multiple dimensions as found in the English notion of accountability, which includes, apart from the notions of investigation, the following: information disclosure, justification and explanation by the board of directors for their decisions, and more efficient and effective legal enforcement measures to ensure the imposition of consequences from any investigation. A balance should be maintained between “wen” and “ze”, namely enquiry (“wen” as a verb) and responsibility (“ze” as a noun), and it is important to avoid : enquiry without liability (“wen er bu ze 问而不责”); overemphasising enquiry (“da wen xiao ze 大问小责”); or hiding liability through the process of enquiry (“jie wen yan ze 借问掩责”).¹³⁸ In the Chinese context, taking into account the four stages of accountability that we have identified as applying in Anglo-American systems is helpful for building more accountable and efficient boards for listed companies in China. However, during this unique transformative period from administrative to economic corporate governance, the nature of board accountability is likely to change to reflect developments in corporate governance rules, corporate law, stock markets and their rules, shareholders’ and directors’ knowledge and the qualifications and experience of directors.

VI Conclusion

The accountability of boards is clearly seen as a critical issue in corporate governance, and arguably accountability has a particular meaning in this context. In Anglo-American systems it involves disclosure and justification by a board (the accountor) as to what has been done, questioning by shareholders (the accountees), and then possible consequences being imposed on the board. This paper has sought to determine what kind of concept of accountability exists in Chinese corporate governance and whether accountability, as articulated in Anglo-American systems or something similar, has

¹³⁸ It might be helpful to translate a few individual Chinese characters here: 而 means but; 不 means no or not; 大 means big; 小 means small; 借 means using as a pretext; 掩 means hide. See also Y. Li, ‘Accountability and Effectiveness of Corporate Governance (问责动了真格公司治理才有效)’, available via <http://www.cnstock.com/08yaowen/sdfx/201112/1753422.htm> (accessed on 8th July 2015).

been embraced in China. We have found that where “accountability” is found in English language corporate governance and other related documents, it has been translated in China using different Chinese words. The reverse is the case, namely several Chinese words have been translated as accountability when the Chinese documents have been translated into English. We have suggested that Chinese does not have a word that fully encapsulates the English word “accountability,” especially as used in relation to corporate governance. The Chinese word that has been translated most often as accountability is “wenze”. However, the word “wenze” does focus on making enquiry concerning the actions of the accountant, and does not appear to embrace all of the nuances of the concept of accountability as determined in Anglo-American corporate governance.

This paper has argued that while there appears to be a form of accountability in Chinese corporate governance, it is not equivalent to the approach adopted in Anglo-American jurisdictions. The paper does not suggest that China should embrace the Anglo-American approach, but should embrace what we term a “wenze system” of accountability that will enhance corporate governance and be able to embrace a Chinese approach to corporate governance. This is a dynamic notion and the wenze system itself may change with Chinese economic development and other variable factors such as shareholding and board structure, and government policies.

We have argued in relation to administrative law in China that there is an accountability system that has some similarities to that applying in Anglo-American circles, and this is referred to as a “wenze system”. It has been posited here that the “wenze system” can provide a scheme of board accountability in China that will enable substantial accountability to take place and this will foster better corporate governance.

We opine that elements of the concept and form of accountability embraced in Anglo-American systems are likely to become more relevant in China as China moves from having a system totally based on administrative governance to one that is based more on economic governance. Nevertheless, we argue that even if China achieves this aim, and its governance has similarities to those applying in Anglo-American systems, it is never likely to embrace exactly the same concept or form of accountability as that applying in other systems around the world. The reason is that China’s corporate

governance system is different, and a unique form of accountability should develop to address the needs of corporate governance in China and the fostering of its listed companies. The link between Anglo-American accountability and a unique Chinese “wenze” system within the unique corporate governance transformative period can be seen in the following figure, which summarises the way that accountability works.

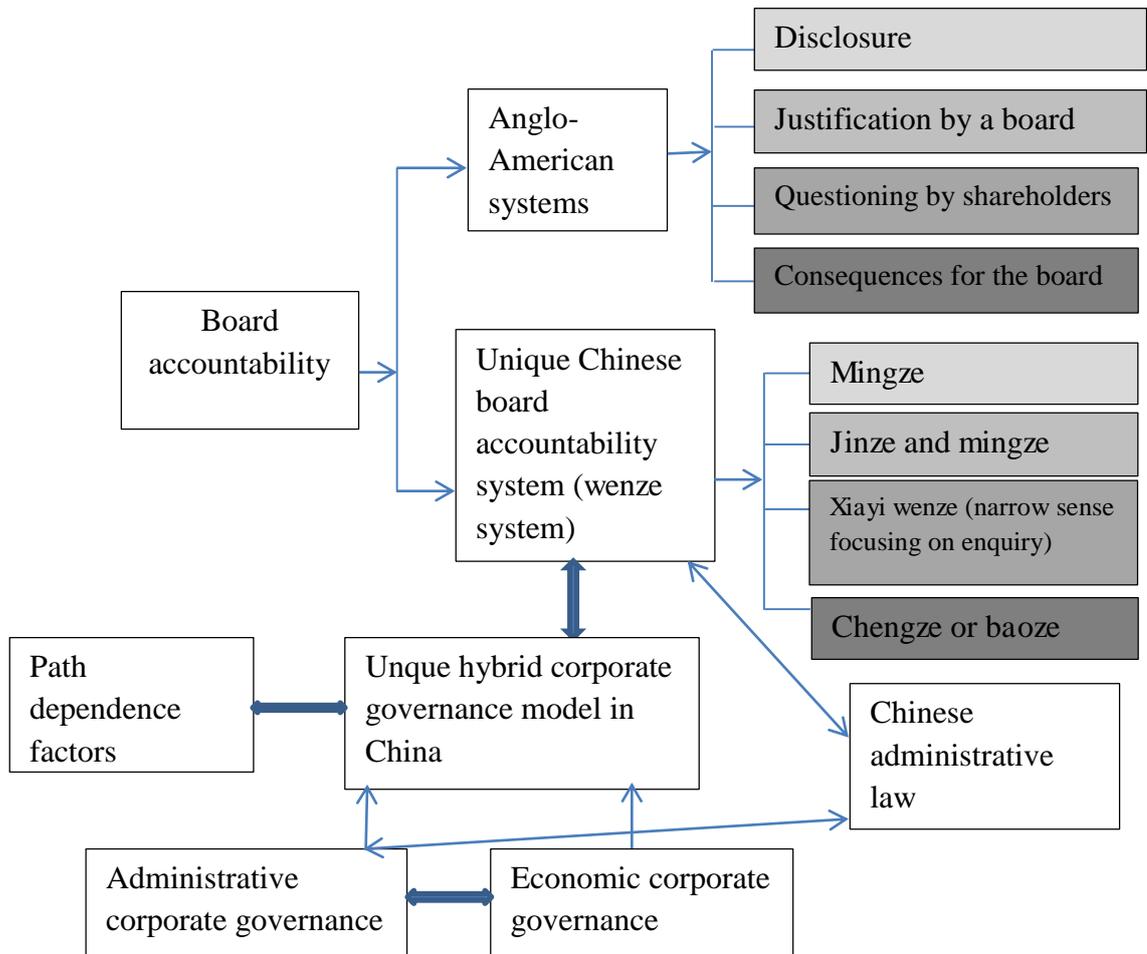


Figure 1: Corporate governance transformation and unique Chinese board accountability system