

Securitisation of State-owned Enterprises and the Ownership Controversy in the PRC[†]

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I. Introduction

The reform of state-owned enterprises (SOEs) in the People's Republic of China (PRC), referred to as "invigorating the state enterprises" (*gaohuo guoying qiye*) by Chinese scholars, started in 1979. The State Council issued five sets of Regulations granting certain autonomous managerial powers to SOEs.¹ Since then, various measures have been implemented by the state Government to reform the SOEs. These measures have included, permitting a commodity economy to supplement the planned economy, granting enterprises legal person status and recognising that ownership can be separated from the right of operation. Such measures reflect the contemporary Chinese expression, "using capitalism" for socialism.²

† "Securitisation" in this article and generally refers to the economic reform measure through which property of enterprises is divided into shares and sold to the public. Securitising state-owned enterprises is a process that has a potential for privatisation. At present, the PRC government is using securitisation as an alternative to privatisation. However, a majority share is often required to be retained by the State to maintain the principle of socialist public ownership. For this reason "securitisation" is used in this paper instead of the popular term and wider concept of "privatisation".

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1 These five Regulations are: Certain Measures Concerning the Expanding Operative Administration Autonomy of State Enterprises; Regulations on the Implementation of Profit Retention in State-owned Enterprises; Provisional Regulations on the Increase of Depreciation Rates on Fixed Capital and Improvement of the Use of Depreciation Fees in State-owned Industrial Enterprises; Provisional Regulations on Levying Fixed Capital Tax in State-owned Industrial Enterprises; and Provisional Regulations on Bank Loans for the Full Quota of Working Capital in the State-owned Industrial Enterprises. These Regulations can be found in *Zhonghua Renmin Gongheguo Fagui Huibian (A Collection of Laws and Regulations of the People's Republic of China)* (January-December 1979) (1986) at 249-262.

2 The bold and open call "to use capitalism" came during Deng Xiaoping's visit to Shenzhen and Zhuhai Special Economic Zones in January 1992, when he was reported as saying that "if capitalism has something good, then socialism should bring it over and use it", *The Sydney Morning Herald* 31 January 1992, at 6. Since then, the Party news organ, *Renmin Ribao (People's Daily)*, has been flooded with editorials and articles calling for the use of capitalism. See eg Sheng, F, "Open up to the world and utilise capitalism" *People's Daily* 24 February 1992, at 1 and 4. Party and State leaders are now also calling for the use of capitalism. See eg *People's Daily* 3 March 1992, at 1; 12 March 1992, at 1; 13 March 1992, at 1; and 14 March 1992, at 1. The emphasis on the use of capitalism, however, is on Western capital, technology, and modern capitalist management; "decadent bourgeois ideas" and the idea of "total westernisation" are emphatically and pointedly rejected. See *People's Daily* 21 May 1992, at 1.

Precisely because many reform measures are "capitalistic" in nature or have the potential of causing consequences that are seen as "capitalistic", economic reform and SOE reform in particular have not been without serious obstacles and difficulties. Consequently, a series of "reform cycles" of decentralisation-recentralisation (the latter is often in the name of stabilising the economy) have occurred in the last decade or so.³

Securitisation (*gufenhua*) of SOEs has caused the greatest controversy among all economic reform measures introduced. Many scholars believe that such reform or the introduction of a joint-stock system (*gufenzhi*) may change property right relations between the State and SOEs, and hence change the nature or content of socialist public ownership. Thus intense debates rage in ideological, economic, and legal circles in the PRC. These debates have touched a wide range of issues from fundamental principles of socialism and the efficiency of alternative economic and business forms to property rights of shareholders and joint-stock companies. Debates led many scholars to formulate various theories concerning ownership in general and SOEs' property rights.

These theories guided and directed economic reform in the early period and now serve to defend and justify the adoption of capitalistic practice and measures in socialist reform policies.⁴

This paper analyses Chinese views on securitisation of SOEs in the context of economic, legal and ownership reforms. First, the initial tentative steps towards securitisation in the PRC are reviewed. Second, the World Bank proposal to securitise SOEs is analysed. Third, ideological and political-economic debates are discussed. Finally, various theories of property rights of SOEs after securitisation and of ownership reform are examined.

II. *The Experiments of Securitisation in the PRC*

The experiment of issuing bonds and/or shares started in the early 1980s with the primary purpose of raising funds for collective enterprises.⁵ The first city to experiment with the joint-stock system is Shenyang, capital of Liaoning Province in northeastern China.⁶ An investment company in Baoan County, Shenzhen, was the pioneer company in China to issue shares to the public in 1983.⁷ The first joint-stock company (*gufen gongshi*), the Beijing Tianqiao General Merchandise Joint-Stock Company, was established in Beijing in July 1984.⁸ Official sanction began with the 1983 Interim Provisions of the State Council on Several Policy Issues Concerning Urban Collective

3 See World Bank, *China: Between Plan and Market* (1990) at 1-10.

4 See, eg, Liang, X, "A Review of Studies on Economic Restructuring and the Question of Ownership", *Zhongguo Shehui Kexue (Social Sciences in China)* No3 (1986) at 114.

5 See Zheng, H R, *China's Civil and Commercial Law* (1988) at 355; Jing'an, X, "The Stock-Share System: A New Avenue for China's Economic Reform", Reynolds, B L, *Chinese Economic Reform: How Far, How Fast?* (1988) at 219; Chen Ziqiao, "The Way to Invigorate Enterprises — Joint-stock System in China" *Fazhi Jianshe (Legal Construction)* No3 (1988) at 6-8; and "Preliminary Achievements of Reforms through Joint-stock System in China" *People's Daily* 20 May 1992, at 2.

6 Chen, above n5, at 6.

7 *People's Daily*, above n5.

8 *Ibid.*

Economy.⁹ These Provisions allow collective enterprises to issue shares to their own employees to raise funds. Under these Provisions, there is a 15 per cent ceiling on the rate of return of the money invested and shares are to be gradually redeemed from enterprise profits.¹⁰

More rapid development occurred in 1985 and 1986. Stock exchange markets were established and operated by state banks in Shenyang, Shanghai, Beijing and other cities located in 12 Provinces including Henan, Hebei, Anhui, Hubei provinces and Inner Mongolia.¹¹ Experimentation with securitisation of SOEs was authorised by a State Council Circular of 1985. This Circular provided that "a few large-sized SOEs may issue stocks to their own employees" as a measure to raise funds and allowed some small SOEs to be transformed into collective enterprises by way of issuing stocks.¹² In 1986, Guangdong, Xiamen, Shenyang and Beijing issued securities Regulations providing detailed rules for the issuance of stocks and bonds by various types of enterprises including SOEs.¹³ In practice however, these early experiments were mainly confined to small and medium-sized collective enterprises,¹⁴ the stock issued were mainly bonds and debentures and did not confer ownership rights.¹⁵

The rapid developments in securitisation soon led some reformist scholars to predict that, like the household contracting system replacing production brigades in the rural area, stock companies would eventually replace all SOEs.¹⁶ Contrary to this prediction, the year 1987 saw some significant restrictions in the use of stocks as a means of raising funds. In March 1987, the State Council issued Interim Regulations on Administration of Enterprise Bonds.¹⁷ Under these Regulations, the People's Bank of China in cooperation with State planning and financial organs was to set an annual quota for issuing bonds, all issuance was to be approved by a People's Bank of China at an appropriate level (Articles 12 and 13). The State Council issued a Notice subsequently to strengthen the administration of shares and bonds.¹⁸ Under this Notice, the issuance of shares was restricted and only approved collective enterprises were allowed to issue shares on an experimental basis. SOEs were

9 Issued by the State Council on 14 March 1983. These Interim Provisions are reprinted in *Zhonghua Renmin Gongheguo Falu Quanshu (A Complete Collection of Laws of the PRC)* (1989) at 1152-1157.

10 Item 15 of the Interim Provisions.

11 See above n5. See also, Chao, H and Xiaoping, Y, "The Reform of the Chinese System of Enterprise Ownership", (1987) 23 *Stanf J International L* 365 at 379; and Haitao, Y, "China Opens Securities Market" *Beijing Review* 1-7 February 1988 at 20.

12 Item 2 of Minutes of the All-China Conference of Experimental Locations for the Economic Reform, in Selected Readings of Important Documents Since the Third Plenary Session of the Eleventh Conference of the Chinese Communist Party (*Shiyijie Sanzhong Quanhui Yilai Zhongyao Wenxian Xuandu*) *People's Press* (1987) at 852-860 and at 855.

13 See discussions in Chao and Yang, above n11 at 379; and Zheng, op cit at 355-363.

14 See Xu, above n5 at 220; Jianguo, Y, "Stock System and Stock Legislation in China" *Zhongguo Faxue (Jurisprudence in China)* No1 (1991) at 54.

15 Yue, above n11 at 20; Singh, A, "The Stock Market in a Socialist Economy", Nolan, P and Fureng, D (eds), *The Chinese Economy and Its Future: Achievements and Problems of Post-Mao Reform* (1990) at 167.

16 See, eg, Yining, L, "Some Thoughts on the Reform of the Ownership System in Our Country" *People's Daily* 26 September 1986, at 5.

17 Issued by the State Council, reprinted in Chinese in *People's Daily* 5 April 1987, at 3.

18 "The State Council Requires Various Regional Governments to Strengthen Administration of Shares and Bonds" *People's Daily* 7 April 1987, at 3.

allowed to issue bonds only. An exception was made for those SOEs which already had approval to issue shares and still needed to. The reasons for the restriction was cited in the notice. These included spending outside State plans as a result of unchecked issuance of stocks and corrupt practice such as forcing ordinary people to purchase stocks. There is little doubt that ideological opposition to the securitisation of SOEs had a role in the decision to tighten the control of stock experimentation.¹⁹

Later in the same year, the Party changed its policy again. In his report to the 13th National Congress of the Chinese Communist Party, Zhao Ziyang, the then General Secretary of the Party, directly contradicted the above State Council Notice by announcing that:

Various forms of a system of shares in enterprises have appeared during the reform. These include purchase of shares by the State, collective purchase by departments, localities [local organs] and other enterprises and purchase by individuals. This system is one means of organising property for socialist enterprises and shall be further implemented on a trial basis. The property rights of certain small state-owned enterprises can be sold to collective or individuals.²⁰

Since then, the experimentation with securitisation appears to continue. In April 1990, the Shenzhen Stock Exchange was formally opened after more than one year of preparation.²¹ In December 1990, the Shanghai Stock Exchange opened its door to the public.²² Also in late 1990, a national automatic quotation system was set up in Beijing and began operation. The quotation system provides a national computerised network linking major cities that have stock markets.²³ In 1991, steps were taken to attract foreigners to participate in the Chinese securities markets. For instance, an international symposium on foreign participation in Chinese securities market was held in Beijing and attended by officials from Chinese government agencies and the World Bank and individuals from the US, UK, Australia, Japan, Germany, South Korea, Hong Kong and Taiwan.²⁴ For the purposes of foreign participation, the Shenzhen and Shanghai Stock Exchange Centres began to issue special "B-type" shares exclusively to foreign investors in 1991.²⁵ It is

19 Ideological difficulties will be discussed below.

20 Documents of the Thirteenth National Congress of the Communist Party of China (25 October - 1 November 1987), (1988) at 34. English translation has been modified by the author according to the original text in Chinese.

21 *Zhongguo Qingnian Bao (Chinese Youth Daily)* 4 July 1991, at 1.

22 *Beijing Review* 24 February - 1 March 1992, at 16.

23 Poming, W, "Current Situation and Its Perspective of China's Securities Market", *Conference Papers of the 1991 International Symposium On Foreign Participation in China's Securities Market (13-14 September 1991)* at 11.

24 See Preface to *Conference Papers of the 1991 International Symposium On Foreign Participation in China's Securities Market (13-14 September 1991)* id.

25 "B" shares, formally known as "renminbi special category shares", refer to registered shares of renminbi par value available exclusively to foreign investors for trading in foreign exchange. See article 2 of *Provisional Measures of Shenzhen Municipality for the Administration of Renminbi Special Category Shares* (December 1991) and Articles 2 and 14 of *Administrative Measures of Shanghai Municipality Governing Renminbi Special Category Shares*. For English translation of these regulations, see below n29. In 1991, the two central exchanges issued "B" shares worth a total of 380 million US dollars, and for 1992, Shanghai and Shenzhen have been approved to issue B-type shares worth 100 million dollars and 300 million dollars respectively. See, "China to Expand Stock

also planned that enterprises outside these two regions are to have their shares traded in these two centres. Another stock exchange centre is to be established in North China. All these will form a national network.²⁶ By the end of 1991 there were 3,220 enterprises adopting the shareholding system.

Twenty per cent were SOEs; 86 per cent issued shares to their own employees only; 12 per cent issued shares to other legal persons (enterprises). But only 89 enterprises issued shares to the public; among them, 35 enterprises had their shares traded in the Shanghai and Shenzhen Exchanges.²⁷ Large scale experimentation in the share holding system in Guangdong, Fujian and Hainan Provinces has now been approved by the Central Government.²⁸

There are no national laws governing or regulating the experimentation in securitisation although regional legal frameworks do exist.²⁹ The State, according to the State Commission for Restructuring the Economic System, was to speed up the making of relevant laws and regulations and policies in 1992.³⁰ It is reported that a Law on Shares, a Law on Limited Liability Companies and a Law on Joint-Stock Companies is being drafted.³¹

The rapid development has again led scholars to predict that this "capitalist" practice will be introduced on a large scale in China.³² However already there have been conflicting signs from China. In March 1992, at a national conference on enterprise securitisation experimentation, cosponsored

Exchange Market with Plans" *People's Daily* 13 March 1992, at 3. It was recently reported that Shanghai, with the participation of eight companies, was to issue "B" shares worth 740 million RMB, apparently over 100 million US dollars: *People's Daily* 8 June 1992, at 2.

26 *People's Daily* 13 March 1992, at 3

27 *Beijing Review* 30 March - 5 April 1992, at 7; *People's Daily* 20 May 1992, at 2; and 22 May 1992, at 2.

28 *Ibid.*

29 The most comprehensive regional legal frameworks on stock market experiment are those of Shenzhen and Shanghai. These regulations can be found in *China Law for Foreign Business* (loose-leaf service).

30 "Speeding Up Economic Reform in '92", *Beijing Review* 23-29 March 1992, at 14. In June 1992, a set of 15 documents was jointly issued by the State Commission for Restructuring the Economic System, the State Planning Commission, the Ministry of Finance, the People's Bank of China and the Office of Production of the State Council. This set of policies fills the legal vacuum by providing guiding principles for the experiment of securitisation, standard rules for setting up companies limited by shares and limited liability companies; rules governing general management, accounting, labour and wages, taxation, auditing, financial management, material supplies, administration of state property, registration, share issuing and trading. See *People's Daily* 19 June 1992, at 1.

31 "China to Expand Stock Exchange Market with Plans" *People's Daily* 13 March 1992, at 3; and "China to Further Strengthen Economic Legislation" *People's Daily* 28 March 1992, at 4. In fact, as early as 1987, the Law on Limited Liability Companies and Law on Joint-Stock Companies were reported as being drafted: Junyan, W., "On Legal Issues Concerning the Shareholding System", Institute of Civil and Economic Law of the China Law Society (ed) *Chengbao Yu Zulin De Falu Wenti (Legal Problems on Leasing and Contracting Systems)* (1987) at 269

32 For instance, Professor Li Yining of Beijing University told the *New York Times* 5 December 1988, in late 1988 that "By 1995 virtually every state-owned corporation will have issued shares that will be publicly traded on exchanges around the country". See Singh, above n15, at 162. At the National People's Congress in March 1992, he again told reporters that joint-stock system would win more popularity (become a popular form of enterprise) across the country by 1995. See *Beijing Review*, 30 March - 5 April 1992, at 8.

by the State Commission for Restructuring Economic System and the Office of Production of the State Council, was held in Shenzhen. At this conference, it was decided that experimentation in stock systems should be further pursued and carried out.³³ The State Council endorsed the Main Points for 1992 Economic Reform proposed by the State Commission for Restructuring Economic System which included promotion of various forms of shareholding as among the main points for 1992 economic reform.³⁴ In contrast, the final report of the national conference on enterprise securitisation experimentation, approved by the State Council, takes a more cautious approach. In the final report, the enthusiastic response from the public towards a stock market is criticised as an "over-heated reaction". The report states a general guideline for further experimentation: "firmly pursuing the experiment but not on a large scale; carrying out the experiment but in good order".³⁵ The report classifies shareholding enterprises into four types: those with shares held by legal persons, those with shares held by their employees, those with shares issued to the public but not traded in exchange centres, and those whose shares are traded in exchange centres. Chinese government authorities have decided that experiment on a national scale should be focused on the first two types of enterprises. Experimentation with the third type should be restricted to the Guangdong, Fujian and Hainan Provinces and the fourth type should be confined to Shanghai and Shenzhen. Enterprises outside Shanghai and Shenzhen who wish to have their shares traded in these two centres must seek approval from the State Council.³⁶

These conflicting signals reflect the indecisiveness of the Chinese Government at a top level towards the use of capitalist measures to serve socialism and especially the use of capitalist means to reform the SOEs.

III. The Early Proposal of the World Bank

Some scholars suggest that the idea of securitising SOEs was first proposed by the World Bank in a report to the Chinese Government.³⁷ The World Bank suggestion of instituting a socialist joint-stock ownership system is contained in a report of a World Bank mission ("WBM") to China in 1983.³⁸ The WBM first examined various SOE reform policies that had already taken place in China. It believed that changes in the State-enterprise relationship had been only marginal and the fundamental problem of the proper relationship between the State and SOEs still remained.³⁹ The WBM's view that the recognition that "ownership right can be separated from operating right" was an important step taken by the Chinese Government to deal with the

33 *People's Daily* 6 March 1992, at 1.

34 *People's Daily* 30 March 1992, at 3.

35 *People's Daily* 22 May 1992, at 2.

36 *Ibid.*

37 Xiao, above n4 at 121; and Ng, Y and Xiaokai, Y, "Why China Should Jump Directly to Privatisation" *Shijie Jingji Daobao (World Economic Herald)* 6 February 1989, at 12. I gratefully acknowledge that Professor Ng and Mr Yang kindly supplied me with references which support their argument but were not indicated in their original article.

38 World Bank, *China: Long-Term Development Issues and Options* (1985) see particularly at 164-171 164-171.

39 *Id* at 164.

relationship between the State and SOEs; but it also believed that the ultimate control of property remained in the State under this principle. Such development still left unresolved the question of the proper degree of SOE autonomy and measures of state control over activities of autonomous SOEs.

To address the difficulties in implementing enterprise autonomy, the WBM considered three alternative approaches to enterprise control and management: giving direct control of SOEs to their workers, giving control of SOEs to their managers, and giving strategic decision-making authority to boards of directors. The WBM clearly favoured establishing boards of directors within SOEs to exercise strategic decision-making power. However, the report noted that the mere establishment of boards of directors was not enough. The board has to be profit-oriented and free from direct intervention by state administrative organs. The WBM well realised that these goals were in direct conflict with the nature of the SOEs. This conflict has to be resolved. They suggested that:

A possible solution might be to spread the ownership of each state enterprise among several different institutions, each in some way representing the whole people, but with an interest mainly in the enterprise's profits rather than directly in its output, purchases, or employment. Examples of such institutions, in addition to central and local governments, are banks, pension funds, insurance companies, and other enterprises ... In China, such a system of socialist joint stock ownership could perhaps be created initially by suitable dispersion of the ownership capital of existing state enterprises. Over time, it could be reinforced by a more diversified pattern of investment finance, with a variety of state institutions acquiring financial interests in existing and new enterprises.⁴⁰

In its proposal to establish a socialist joint-stock ownership system in the PRC. The WBM seemed to suggest a two-stage process for securitising SOEs: in the first stage the ownership of SOE property is to be dispersed among different institutions, each of which represents the whole people. In the second stage, securitisation of SOEs would be reinforced by a more "diversified pattern of investment finance". This "diversified pattern of investment finance" in the World Bank Report context means that vertical flows of finance and compartmentalised reinvestment, as then existed, would be supplemented and eventually replaced with horizontal flows.⁴¹ These will allow SOEs to enter new kinds of activities as well as investment between economic units. To achieve efficient and large horizontal flows, the WBM further suggested that financial institutions functioning as intermediaries between the suppliers and users of investment resources.⁴² These financial institutions according to the WBM, would be similar to commercial banks, investment trusts, development finance companies, and other intermediaries in capitalist countries. However, "they would be dealing with flows of funds that were to a large extent socially owned — by government organs, state enterprises and other state institutions, or collective".⁴³ By using diversified flows of funds, enterprise ownership would also be made diversified.⁴⁴

40 Id at 166.

41 Id at 172. "Compartmentalised reinvestment" means that SOEs can only reinvest their retained profits in specified and limited areas of economic activities.

42 Id at 173.

In proposing the institution of joint-stock ownership system, the WBM did recognise that the State might wish to exercise direct control or supervision over strategic and key enterprises such as defence-related industries, basic public services and natural resources exploitation and that these enterprises be identified and exempted from securitisation.⁴⁵

The WBM also called for the Chinese Government to encourage and promote the development of collective and individual enterprises and to achieve diversification of the whole ownership system in China.⁴⁶

It appears that the World Bank sees the joint-stock system more as an alternative form of management than a direct measure of reforming the socialist ownership system. However, there can be little doubt that securitisation as proposed by the WBM has the potential to reform socialist ownership. It is also clear that securitisation is a process short of privatisation. The WBM is more concerned about the way public ownership is exercised than the public ownership system itself. In other words, what the World Bank wanted to achieve, through the use of financial institutions as intermediaries and the separation of government administrative and economic functions, was to limit direct administrative interference with SOEs' operation.⁴⁷ However, Yew-kwang Ng and Yang Xiaokai suggest that the World Bank's proposal to securitise (instead of privatising) SOEs was for SOEs to peacefully evolve (into privatised enterprises) by developing diversified ownership forms through securitisation, and by doing so, to avoid strong ideological opposition to privatisation in China.⁴⁸ Whether the WBM had such an intention is not certain but the World Bank proposal has been interpreted by many Chinese scholars as being an attempt to change the nature of the socialist public ownership system in China. It has prompted strong ideological opposition to securitisation and disagreement about what is the best business and economic form for China as well as intense debates about property rights of joint-stock companies.

IV. The Ideological and Political-Economic Debate

"The biggest obstacle to the implementation of a share system", argued Xu Jing'an of the China Economic System Reform Research Institute, Beijing, "is the resistance by traditional ideas".⁴⁹ The traditional ideas he referred to are those of socialist ideology that joint-stock is a prominent feature of the capitalist system and that ownership by the "whole people" is the essence of socialism.

43 Ibid.

44 Id at 175.

45 Id at 168-9.

46 Id at 169-170.

47 These ideas became much clearer in the 1990 World Bank report *China: Between Plan and Market* (1990) at 72-77. In this Report (at 75), the World Bank expressly admits that "[t]he role of the government as owner, ... has somehow to be maintained but separated from its role as an economic regulator with a range of other objectives".

48 Ng and Yang, above n37 at 12.

49 Xu, above n5 at 223.

Ideological opposition in China can perhaps be best understood through the Chinese perception of the joint-stock system. The share system is seen by many as a possible avenue or an attempt to reform the socialist public ownership system rather than as being an alternative operative mechanism for invigorating SOEs.⁵⁰ Even those who see securitisation as a managerial mechanism believe that the implementation of a share system would eventually change the structure of ownership in China.⁵¹ It is the significance of a "change of colour" in the socialist ownership system that has caused strong ideological opposition.

Like many other debates and discussions in China, Chinese scholars who advocate the joint-stock system started their arguments by quoting Karl Marx to build their own theory. For instance, Tong Dalin, a well known economist in China, quotes Marx as saying that the share system is private property's self-negation and a form by which capital became the property of the organised working people and argued that this statement of Marx's was therefore a theoretical starting point for securitisation of SOEs in a socialist country.⁵² In his view, securitisation of enterprises is an inevitable consequence of an advanced development of social productive forces. Since a joint-stock system meets the demand of commodity economy, Tong argues, joint-stock enterprises will also become the most vigorous economic entities in a socialist commodity economy. Tong does not ignore the issue of a possible dilution of public ownership under the stock system, but he argues that public ownership can be upheld by limiting individual shareholding. In this influential article, he also addressed the fear of possible polarisation of the rich and the poor and the concern of the capitalist practice "to each according to his capital". With respect to the former he believed that a ceiling on the rate of return from shares, as was often provided in local regulations governing the stock system, would prevent polarisation occurring, and with respect to the latter, he argues that dividends and returns from shares are a material reward for contributing capital to socialist construction and of the same nature as interests earned from banking deposits.

Tong further argues that securitisation could best serve the purpose of separating ownership from right of operation, separating the government from enterprises, separating government administrative functions from economic functions, and establishing an advanced, modern enterprise managerial system.

Another prominent economist in China, Li Yining of Beijing University,⁵³ argues strongly that ownership reform must transform the traditional public

50 See, eg, Li, above n16; "Debate about Issues Relating to Ownership Reform and Structural Adjustment" *People's Daily* 1 September 1986, at 5; Bin, M and Zhunyan, H, "Enlivening Large State Enterprises: Where is the Motive Force?", in Reynolds, op cit at 213-8; Mengkui, W, "Some Thoughts on the Share Economy" *People's Daily* 6 April 1987, at 5; and Zhiguo, H, Yongrong, C and Yong, W, "A Summary of Recent Discussions on the Share System" *Zhongguo Shehui Kexue (Social Sciences in China)* No3 (1988) at 48-58, translated in the English edition of *Social Sciences in China* (Winter, 1988) at 9-26.

51 See, eg, Peidong, G and Xirong, L, "Study on Turning State-owned Enterprises into Stock Companies" *Zhongguo Shehui Kexue (Social Sciences in China)* No3 (1988) at 3-17, translated in the English edition of *Social Sciences in China* (Autumn 1988) at 25-45.

52 Dalin, T, "Securitisation Is a New Starting Point of Socialist Enterprises" *People's Daily* 18 August 1986, at 2.

ownership into a new form of public ownership.⁵⁴ According to Li stock companies are enterprises under a new type of public ownership: the working masses are the masters of production materials. He further argues that securitisation would not weaken, but only strengthen, the public ownership since the economy would control a greater amount of capital under a shareholding system. He points out that because of the dispersal of shares, the State would be able to control stock companies by holding two-fifths, one-third or even less shares, not the 51 per cent theoretically required. He calls upon the State to gradually transform existing large and medium-sized SOEs into joint-stock companies with limited liability.

Li's notion of a new type of public ownership was soon echoed by another prominent economist, Jiang Yiwei.⁵⁵ Jiang argues that public ownership means that publicly owned property has a dominant position in the totality of national property. It does not mean that the state must own 100 per cent of property of a given enterprise. In his view, the nature of ownership of securitised SOEs is co-ownership of labour (*laodong gongyouzhi*) by the people (represented by the State), the collective and the individual. It is socialist public ownership, he argues, because the co-owners are all working people. He further argues that securitisation does not directly affect the nature of ownership but recognises and delineates ownership rights.⁵⁶

Opponents of the share system have questioned the correctness of these theoretical bases and raised doubts as to the effectiveness of securitisation as a means of invigorating SOEs. The theoretical basis established by Tong Dalin was challenged by Shen Yilu and Li Jingzao.⁵⁷ Although these two authors do not oppose the introduction of the stock system in China, they believe that Tong incorrectly interpreted Marx's statement. According to them, Marx viewed securitisation in a capitalist system as a point where the climate for a proletariat revolution had been created. Furthermore, they argue that Marx did not foresee a share-holding system in a socialist country and, therefore, that it was incorrect to interpret Marx's statement as being a new starting point for socialist securitisation.

The public ownership "change of colour" has been an issue of major concern among opponents to the shareholding system. Ma and Hong present some typical arguments against securitisation in China.⁵⁸ They reject the view that securitisation as an operative mechanism could invigorate SOEs. First, in

53 Li, currently a member of the Financial and Economic Committee of the National People's Congress, is among the first to advocate the joint-stock system in China. He began to argue for this system as early as 1980: *Beijing Review* (30 March - 5 April 1992) at 7.

54 Li, above n16.

55 Jiang Yiwei, a former director of the Institute of Industrial Economics of the Chinese Academy of Social Sciences, is currently a research fellow of the Academy and editor-in-chief of *Reform*, a political-economic magazine. He has written extensively on China's industrial reform both in Chinese and in English.

56 Yiwei, J, "Research Into a New Type of Socialist Public Ownership" *People's Daily* 30 March 1987, at 5.

57 Yilu, S, and Jingzao, L, "A Discussion on the Article 'Securitisation Is a New Starting Point of Socialist Enterprises'" *People's Daily* 26 September 1986, at 5.

58 Ma and Hong, above n50. Ma Bin is from the Economic, Technical, and Social Development Research Centre, Beijing, and Hong Zhunyan is from Beijing University. For a summary of other opponents' views, see Han, Cao and Wang, above n50.

their view, there is no way to divide an SOE into shares so that one worker owns a blast furnace and another owns a steel rolling machine. Second, it is unrealistic to set up a board of directors to have the final say about the management of an SOE since an SOE by its nature needed state control and sensible intervention. Third, if shares are not allowed to be traded in the market, then shareholders do not own the SOE. If they are traded freely, it will give rise to class polarisation through the seizure by some of others' surplus labour, they believed that shareholding could only drive an SOE apart. Fourth, they argue that the fact that state-owned enterprises in a capitalist country can be sold to individual joint-stock companies does not make private ownership superior nor does it justify the sale of socialist SOEs to joint-stock companies. Fifth, with respect to the argument that shareholding pools people's saving for capital construction, they believe that people should deposit their savings in state banks which can use the savings to boost production rather than using them in investment which is already overheated. Finally, they argued that if the State was to be the majority shareholder, the State is still able to make final decisions, and therefore, market forces will not guide investment by SOEs.⁵⁹

Rejecting shareholding as an effective operative mechanism, Ma and Hong discussed the motivations for the introduction of joint stock in China:

[O]n the one hand, because they dare not negate public ownership they want to pass off the joint-stock system as public ownership of the means of production, i.e., ownership by the whole people; on the other [hand], they believe that only by putting the means of production under private ownership will people really care about production and management.⁶⁰

Although Ma and Hong conceded that the World Bank did not directly take this stance on the above view, they believe that it was in the mind of many economists.

Equating shareholding to ownership,⁶¹ they argue that:

To change state enterprises owned by the whole people into joint-stock system is tantamount to allowing private ownership to make inroads into public ownership with the motivation to gain the largest possible profits.⁶²

Thus, if these ideas were put into practice, the road to communism would be blocked.⁶³ To mobilise the enthusiasm of workers and staff in an SOE, they argue, the only thing to do is "to administer communist education and carry out the principle of 'to each according to his (sic) work'".⁶⁴

The argument that securitisation best serves the purpose of separating ownership from management and hence separating government from enterprises is doubted by some. As individual workers could not afford to buy SOEs, the State would remain the majority shareholder. The State would be in control of major policies and would determine operating measures and distribution of profits. This, it is argued, differs little from previous practice in

59 Id at 215-217.

60 Id at 217.

61 Id at 215.

62 Id at 217.

63 Id at 218.

64 Ibid.

which the State provided guidance plans and applied administrative measures in running SOEs. Further, the fact that the State remains a majority shareholder may legitimise various kinds of malpractice in the previous system by the State and local governments.⁶⁵

Many reformers now attempt to overcome ideological opposition simply by raising the banner of "using capitalism" for socialism. In rejecting ideological arguments against securitisation, Li asked: "Even if it is capitalist in essence, shouldn't we make use of it when it is good for us to promote social productivity?"⁶⁶ Despite an ideologically favourable climate in China today opponents are now drawing attention to technical difficulties and the negative side of securitisation.⁶⁷ The cautious approach taken by the central government reflects the continuing influence of opponents in policy making at a high level.

V. *The Legal Debate*

1. *An Overview*

While ideological and political-economic debates as well as debates on the economic merits of securitisation are carried out both in and outside China,⁶⁸ Chinese jurists have also been debating issues relating to property rights of SOEs after securitisation. The debate among Chinese jurists have been quite different from those in ideological and political-economic circles. Although there has been opposition to securitisation of SOEs on various grounds, such as the constitutionality of securitising SOEs,⁶⁹ jurists in general have favoured the introduction of a joint-stock system.

Since the State granted autonomous powers to SOEs, Chinese jurists have engaged in broad discussion and debate about the nature of SOEs' property rights particularly their status as a legal person and the right of operation. To many Chinese jurists, the notion of "legal person" means, among other things, that SOEs must have independent property of their own. The central issue of this broad debate is whether, under public ownership, SOEs as legal persons have any property rights. Is the right of operation an administrative authority or a property right? If it is a property right, what is the relationship between

65 See, Shuqing, W, "Securitisation Is Not the Direction of Reforming Large and Medium-sized State Enterprises" *People's Daily* 16 March 1987, at 5. See also Han, Cao and Wang, above n50 at 51.

66 *Beijing Review* 30 March - 5 April 1992, at 8.

67 See "Speeches Delivered at the Symposium on Certain Important Theoretical Issues of Economics" *Jingji Yanjiu (Studies in Economics)* No6 (1991) at 7-9.

68 Economic debate on the merits and demerits of securitisation is outside the scope of this paper. For some arguments in the economic debate, see Ng and Yang, above n37; Singh, above n15; Gu and Liu, above n51; Friedman, M, "Using the Market for Social Development", in Dorn, J A and Xi, W (eds), *Economic Reform in China: Problems and Prospects* (1990) at 3-15; and Han, Cao and Wang, above n50.

69 See eg Xiaoming, L, "A Discussion on Securitising State-owned Enterprises" *Faxue Zazhi (Law Magazine)* No5 (1989) at 47. According to Li, securitisation of SOEs would destroy the dominant position of public ownership, violate principles of democratic management of SOEs, and create exploitation in the society and contravene basic principles as laid down by Articles 6, 7 and 16 of the Constitution. In his view, unless the Constitution is amended, securitisation of SOEs should not be carried out.

the property right of SOEs and the state ownership rights over SOEs' property?⁷⁰ The essential problem within the SOE system regarding property rights, as perceived by Chinese jurists, is the contradiction between the grant of property rights to SOEs and the State remaining the exclusive and sole owner of SOEs' property. Therefore, the task of economic reform and related legal reform is to clarify property relations between the State and SOEs — the existing ownership system must be reformed. To reform the public ownership system, many jurists in China believe that securitisation is the answer. It can delineate the property right relationship between the State and SOEs.

It is not surprising that central to the debate about securitisation among Chinese jurists has been the question of ownership of joint-stock companies. Throughout the debate various theories have been formulated. A discussion of some of these follows.

2. "Theory of Dual Ownership" (*Shuangchong Suoyouquan Shuo*)

Many scholars believe that securitisation will clarify property right relations between the State and SOEs. Wang Liming and Guo Feng are among the few scholars who have elaborated the property relationships in securitised companies in their paper on property relations between shareholders and the joint-stock companies after securitisation, they put forward a "theory of dual ownership right".⁷¹ According to them, in a commodity economy, attributes of ownership (that is, the right to possess, to use, to reap benefits from and to dispose of the property) are separated. More importantly, the organisations created through the separation become an independent commodity producer and operator. In their view securitisation is a form of separation that can have this effect.⁷² After securitisation the authority of a company manager is completely separated from any ownership right:

The property contributed by shareholders becomes the property of the joint-stock company, and this enables the company to have an independent legal personality. The company has independent ownership right even though the company itself is owned by shareholders.⁷³

In separating attributes of ownership in a socialist country, Wang and Guo believe that there are only two choices: either the State remains owner of the SOE's property and the SOE exercises certain ownership rights as an independent commodity producer towards a third party, or the State and other shareholders contribute through securitisation capital to form a legal person's ownership right independent from state ownership right.⁷⁴ In their view, to

70 Major articles on this broad debate have been collected in two books: Rou, T (ed) *Lun Guojia Suoyouquan (On State Ownership Right)* (1987); and The Institute of Civil and Economic Law of the China Law Society (ed), *Chengbao Yu Zulin De Falu Wenti (Legal Problems on Leasing and Contracting Systems)* (1987). For an introduction of this debate up to 1987, see Epstein, E J, "The Theoretical System of Property Rights in China's General Principles of Civil Law: Theoretical Controversy in the Drafting Process and Beyond (1989) 52 *Law and Contemporary Problems* No2 at 177-216; and Liming, W and Zhaonian, L, "On the Property Rights System of the State Enterprises in China" (1989) 52 *Law and Contemporary Problems* No3 at 19-42.

71 Liming, W and Feng, G, "Securitisation of State-Owned Enterprises and State Ownership Right" in Tong op cit at 310-341.

72 Id at 312-313.

73 Id at 312.

clarify property relations between an SOE and the State is to separate state administrative powers from state ownership right. To do so, an exclusive ownership right independent from state ownership right must be established for SOEs. This, they believe, can be done through securitisation of SOEs.⁷⁵

Wang and Guo therefore formulated a "theory of dual ownership right":

After securitisation of an SOE, a dual property relation is created. On the first level, the State and other shareholders lose their right to possess and use, and their partial right to reap benefits from and dispose of their property; these rights are enjoyed by the joint-stock company (created from the SOE) and form a legal person's ownership right for the joint-stock company. At the second level, the property of a joint-stock company as a whole is jointly owned by shareholders; and since shares between shareholders are pre-determined, the relationship among shareholders may be seen as one of co-ownership by shares (*anfen gongyou*).⁷⁶

In their view, the importance of securitisation is that the ownership right enjoyed by a joint-stock company is no longer a creation of administrative authorisation, but a result of the separation of shareholders' ownership attributes.⁷⁷

Interestingly, they ascribed their dual ownership right theory to Eörsi's description of the nature of joint-stock companies in a capitalist system: "Shares are owned by share-holders, the producing (trading, et cetera) entity and its assets are owned by the joint-stock company."⁷⁸ However, this reference to the shareholding system in a capitalist system was soon to cause an unexpected debate between the co-authors Wang and Guo; the latter later formulated a "theory of legal person's ownership" in 1988.

3. "Theory of Legal Person's Ownership" (*Faren Suoyouquan Shuo*)

In a 1988 article in *Jurisprudence in China*, Guo Feng pointed out that if individuals or enterprises other than SOEs were allowed to own majority shares and thus become owners of SOE property, the dominance of public ownership might diminish.⁷⁹ The greatest obstacle to securitising SOEs was the concern that the domination of public ownership in China's economy would be diminished. Guo argued that the key theoretical issue in establishing and developing joint-stock companies in China was to define correctly the property rights of joint-stock companies.⁸⁰ He called for a re-thinking of all previous theories including the theory of dual ownership.

Guo asserts that the subject owner of joint-stock company property has changed depending on the stage of evolution of internal separation of ownership rights and operative management rights within the joint-stock company. Quoting Adolf Berle,⁸¹ he concludes that ownership right and

74 *Id* at 313.

75 *Id* at 313-316

76 *Id* at 319.

77 *Id* at 320.

78 Eörsi, G, *Comparative Civil (Private) Law* (1979) at 310.

79 Feng, G, "On the Ownership Right of Shareholding Enterprises" *Zhongguo Faxue (Jurisprudence in China)* No3 (1988) at 3-13.

80 *Id* at 3.

81 Berle, A A, and Means, G C, *Modern Corporation and Private Property* (1932); Berle,

operative management rights have been completely separated in the 20th century.⁸² As a result shareholders' meeting existed only in form and shareholders' ownership right only in name. The implication of this separation, he argued, is that traditional theories of ownership right are inappropriate for interpreting the property relations between shareholders and the company. In his view, shares in the 20th century only reflect obligatory creditors' relations, that is shares are certificates for collecting regular dividends but no longer certificates of ownership right. At the same time, directors and managers of stock companies only hold operative management rights but not ownership rights of the company's property. The owner of the company's property, he argues, is the personified company.⁸³ In summary, the development of property relations in joint-stock companies has developed in the following way: "shareholder's personal ownership — dual ownership by shareholders and the company — company ownership".⁸⁴ The company ownership right, he asserted, is the most sufficient and complete ownership right of a legal person.⁸⁵

Having analysed the property relations of joint stock companies in a capitalist system, he further claims that the legal person's ownership right theory was equally valid in analysing joint-stock companies in China. Applying this theory to the Chinese situation, he concludes that:

1. Once the State invests property in the form of State shares in a joint-stock company, the State immediately loses ownership right over this property in the legal sense; 2. Other enterprises and individuals transfer their invested property to the joint-stock company. The combination of these properties conceptually forms an independent and complete ownership right of the legal person with the joint-stock company as the subject [holder] of this ownership right.⁸⁶

Guo's article immediately drew a response from Wang Liming who continued to defend the theory of dual ownership and rejected all major arguments advanced by Guo.⁸⁷ First and also based on Berle, Wang argues that the dispersal of shares has helped to concentrate powers in majority shareholders. This means the power of control has become concentrated. Therefore, Wang argues, the separation of the two property rights (ownership and control) has only deprived small shareholders of powers of control but at the same time it has strengthened the power of majority shareholders. Cross ownership of stock companies, Wang argues, further proves that shareholders still hold ownership rights.⁸⁸ Second, Wang argues that shares and bonds are different in nature. Shares are certificates of ownership right which do not

Power without Property: A New Development in American Political Economy (1959); and Berle, *The Twentieth-Century Capitalist Revolution* (1955). The latter two books used by Guo are in Chinese translation.

82 Guo, above n79.

83 *Id* at 6-7.

84 *Id* at 9.

85 *Ibid*.

86 *Id* at 9.

87 Liming, W, "On the Dual Structure of Ownership Right of Share Enterprises — A Discussion with Comrade Guo Feng" *Zhongguo Faxue (Jurisprudence in China)* No1 (1989) at 47-56.

88 *Id* at 47-49.

change even if the holders do not actually, or are not able to, exercise control over the company. The separation of ownership and control does not according to Wang, change the nature of shares.⁸⁹ Third, Wang reiterates that shareholders lose the right of possession, use and partial disposal of the property they invest. These rights are then transferred to the company and form a commodity ownership right of the company. But, does not deny shareholders ownership rights. This ownership right is reduced to the right to reap benefits and partially dispose, and is not a complete ownership right.⁹⁰ Wang nevertheless insists that dual ownership rights, are two pillars without which the whole theoretical structure of the modern stock company will collapse.⁹¹

Wang further argues that there are several deficiencies in the theory of legal person's ownership. First this theory does not clarify, but further blurs, the already ambiguous property relations. He asks such questions as: who controls company's operators? Who owns property produced by the company? Who decides on the dissolution of the company and who owns the company's property after dissolution? Second, he argues sole ownership by legal persons destroys the mechanism for controlling company powers. He believes that dual ownership could form a control mechanism over company activities as the State and shareholders, both acting in the capacity of property owners, control the conduct of company operators. Third, if the State and shareholder lose their ownership right they will lose the right to choose company operators and to determine major policy matters; and therefore, the interests of the State will not be properly and sufficiently protected.⁹²

Despite these criticisms, the theory of legal person's ownership right now seems to espoused by many scholars in China.⁹³

4. "Theory of Shareholder's Ownership" (*Gudong Suoyouquan Shuo*)

Scholars supporting this theory started by defining the property rights of joint-stock companies in a capitalist system. One of the earliest works on the property rights of the capitalist stock company is by Li Kaiguo.⁹⁴ Li argues that a joint-stock company is only a form of raising capital. The capital raised

89 Id at 50-51.

90 Id at 51-52.

91 Id at 54.

92 Id at 54-5.

93 See eg Qinghua, D, "An Analysis on Socialist Share Rights", *Xiandai Faxue (Modern Law Science)* No4 (1988) at 20-23; Qinghua, D, "On the Nature of Property Rights in a Joint-Stock System" *Jingji Yu Fa (Economy and Law)* No5 (1988) at 18-19; Qinghua, D, "On Legal Status of Share Rights in Socialist Enterprises after Securitisation" *Jingji Yu Fa (Economy and Law)* No10 (1988) at 7-9; Shili, Z, "Several Legal Problems in Securitising Large and Medium-sized Enterprises" *Jingji Yu Fa (Economy and Law)* No1 (1989) at 13-14; Chuntang, Y, "Property Right of Joint-Stock Companies is a Combination of Legal Person's Ownership Rights and Legal Person's Right of Operation" *Zhengzhi Yu Falu (Political Science and Law)* No5 (1989) at 35-37; Qishan, L, et al (eds), *Minfa Wenti Xintan (A New Research into Civil Law Problems)* (1990) at 181; and Jianmin, Y and Yongzhen, P, "On Legal Person's Ownership Rights of Joint-Stock Companies" in Editorial Board of Law of China (ed), *Zhongguo Minfa Jingjifa Lilun Wenti Tanju (Research Into Theoretical Issues Concerning Civil and Economic Law in China)* (1991) at 176-183.

94 Kaiguo, L, "Preliminary Discussion on the Nature of Property Right of State-Owned Enterprises" *Faxue Yanjiu (Studies in Law)* No2 (1982) at 34-38.

is owned by capital contributors (that is shareholders). The fact that shareholders have no power to control the property of a joint-stock company simply means that the right to possess, use and dispose of the company's property has been separated from the ownership rights of this property. It does not mean that capital contributors have lost ownership rights over their investment.⁹⁵ Li does not anticipate that securitisation will be introduced into China; he discusses the capitalist joint-stock company for the purpose of rejecting arguments that SOEs can have ownership rights either exclusively or jointly with the State.

Sun Zhiping further elaborates this theory.⁹⁶ Sun begins his theory by rejecting the "theory of dual ownership" and the "theory of legal person's ownership". Against the former, he argues that there can be only one owner over one thing therefore ownership rights must be both independent and exclusive. Against the latter, he claims that a legal person (a joint-stock company) is itself controlled by shareholders' will and interests and a legal person does not obtain any benefits derived from the property of the company. He asserts that shares represent ownership rights in a company and the shareholders are owners of the company.⁹⁷ He concedes that ownership and control are separated from each other in joint-stock companies, but he argues that the right to reap benefits and dispose of property has not been separated from property owners (that is, shareholders). He further argues that in a capitalist shareholding company it is not ownership and rights of operation which have been separated but ownership and the function of material production. It is a separation of functions within the right of operation because shareholders do not give up final decision-making powers. In his view, a legal person's ownership right is purely a conceptual fiction which meets the desire of capitalist property owners for mass production and investment protection.⁹⁸ Sun concludes that shares in their nature are property, the right of shareholders is a property ownership right and the company's property is in truth jointly owned by shareholders.⁹⁹

5. *The Rejection of All Ownership Theories*

Professor Tong Rou and Shi Jichun,¹⁰⁰ are among the Chinese scholars who reject all three theories discussed above. First, they argue that the granting of legal person status to a company provides a convenient means to establish limited liability, reduce business risks, encourage investment and facilitate the separation of ownership and management. The status as a legal person does

95 *Id* at 34-5.

96 See Zhiping, S, "On the Property Right of Capitalist Joint-Stock Companies" *Zhengfa Luntan (Journal of the China University of Political Science and Law)* No3 (1988) at 60-65; and Zhiping, S, "Re-thinking on Property Relations of Shares and Stock Companies" *Zhongguo Faxue (Jurisprudence in China)* No3 (1988) at 14-18.

97 Sun, in *Zhengfa Luntan*, *id* at 61.

98 *Id* at 62-64.

99 Sun, in *Zhongguo Faxue* above n96 at 16-18.

100 Rou, T and Jichun, S, "On the Property Right Structure under the 'Separation of Two Rights' within the Ownership by the Whole People" *Zhongguo Shehui Kexue (Chinese Social Sciences)* No3 (1990) at 159-174. The late Professor Tong of the People's University of China was one of the leading authorities of civil law in China. Shi Jichun was then a PhD candidate in People's University of China.

not deprive capital contributors of ownership rights or enable a company to enjoy ownership rights. The property right enjoyed by a company is not in its nature an ownership right. Second, the issue of ownership of company property is different according to the type of company. In the case of a joint-stock company, they admit that this issue is difficult to determine. They also believe that in the case of a large-sized joint-stock company, the ownership right of the company's property is controlled by majority shareholders. Minority shareholders lose their ownership rights over their capital investment. Instead they acquire an obligatory (creditors') right to claim dividends and interest as well as property interests when the company is dissolved. Third, Tong and Shi reject any attempt to devise a dual ownership right structure on the grounds that ownership rights are not simply a collection of ownership attributes. They emphasise that the company's right is to manage the company not to acquire ownership rights.¹⁰¹ To them, the property right of a company can only be defined as a new type of right in rem.¹⁰²

VI. Difficulties in Using Capitalism for Socialism

Tong Rou and Shi Jichun touched on an important issue that has not been treated seriously by Chinese jurists. Namely, is securitisation a business operation mechanism or is it a way of ownership reform? It is one thing to establish a diversified ownership system in the Chinese economy and diversified ownership forms within a joint-stock company through securitisation and cross-ownership of stocks, it is another to clarify property relations in an SOE through securitisation.

Securitisation in capitalist countries has served, among other functions, to raise capital and encourage the efficient use of assets.¹⁰³ There is no need to use securitisation to clarify property relations as ownership rights are clear under the private ownership system. To many Chinese jurists, securitisation is a means of clarifying property relations between the State and enterprises.

The divorce of ownership from control in modern corporate practice does raise questions concerning traditional concepts of property rights. But these questions are directed at the protection of various property rights, not to identifying the owner or owners of the property. In the classic formulation of the separation of ownership and control by Berle and Means,¹⁰⁴ they argue that owners of private property have three functions in an enterprise: having interests in the enterprise, having power over it, and acting with respect to it.¹⁰⁵ During the 19th century, in their view, the third function was carried out by a hired manager while the owner retained the first two functions. In the corporate system which emerged in the late 19th and early 20th centuries, the owner only had a set of legal and factual interests while a group of people called "control"

101 *Id* at 163-5.

102 For Chinese conceptions of right in rem, see Chen, J, "Conceptions of Property Rights in the PRC in Historical and Comparative Perspectives" *Bull ASLP* Vol 17 No58/59 (1992) at 199-222.

103 See Singh, above n15 at 162.

104 Berle, A A and Means, G C, *The Modern Corporation and Private Property* (rev edn) (1968).

105 Berle and Means, *id* at 112.

had legal and factual powers.¹⁰⁶ Although Berle and Means did talk about the "translation" of industrial wealth "from individual ownership to ownership by the large, publicly financed corporations",¹⁰⁷ the stockholders of a corporation were unambiguously treated as its owners.¹⁰⁸ They then raised the questions: what was the relation between the owners and the control group and how did these relations affect the conduct of enterprises?¹⁰⁹ More specifically, they saw a conflict between the "traditional logic of property",¹¹⁰ which passes all profits to stockholders, and the "traditional logic of profit",¹¹¹ which allocates only part of profits to stockholders.¹¹²

Must we not, therefore, recognize that we are no longer dealing with property in the old sense? Does the traditional logic of property still apply? Because an owner who also exercises control over his wealth is protected in the full receipt of the advantages derived from it, must it necessarily follow that an owner who has surrendered control of his wealth should likewise be protected to the full? May not this surrender have so essentially changed his relation to his wealth?¹¹³

These questions have little in common with questions raised by Chinese jurists.

The increasing participation of fiduciary institutions (for example: pension trusts, mutual funds, or insurance companies) as shareholders, owners' means that functions in enterprises are further separated. These shareholders hold legal titles to the share certificates and the rights thereunder. However, dividends or other benefits are distributed among beneficiaries according to internal arrangements. This means that even the Berle and Means first function of interest in the enterprise is separated.

divorce between the recipient of the economic profit of the corporation and the things which constitute its means of carrying on its economic function is thus complete. Management control of corporations whose stock was widely distributed accomplished a divorce nisi prius. Intervention of fiduciary institutions makes the divorce absolute.¹¹⁴

Berle also pronounced that "[t]he legal entity known as the corporation now emerges as an owner of the property".¹¹⁵ With respect to shareholders Berle argued:

Essentially these stockholders, though still politely called "owners", are passive. They have the right to receive only. The condition of their being is that they do not interfere in management.¹¹⁶

Chinese jurists believe that once an SOE is securitised, the enterprise becomes the owner of its property and the State becomes a passive recipient

106 Id at 112-3.

107 See the Preface to the 1932 edition, id at XLI.

108 Id at 113.

109 Ibid.

110 Id at 293-298.

111 Id at 299-302.

112 See also Munzer, S R, *A Theory of Property* (1990) at 320-1.

113 Berle and Means, op cit at 297-8.

114 Berle, *Power without Property: A New Development in American Political Economy* (1959) at 64.

115 Id at 61.

116 Id at 74.

of economic benefits without interfering with business operation. However, one crucial difference between the capitalist system and the socialist system seems to have been ignored. In capitalist countries, all property invested in corporations has a clear owner or owners. In contrast, socialist property "owned by the whole people" is, in theory and in practice, owned by everybody and nobody. The Chinese question is, who owns the SOEs and their property before securitisation? As pointed out by Yew-kwang Ng and Yang Xiaokai, "a reorganisation [through securitisation] of unclear property rights under the condition where private property right is not clearly defined can only create even more confusing property right relations".¹¹⁷ Assuming that the SOEs and their property are owned by the State, not by the ambiguous owner of "the whole people" as provided by the Constitution,¹¹⁸ Berle's theory does not apply because it is based on the assumption of a wide dispersal in shareholding. Securitisation in China and other socialist countries will result in the State being majority shareholder and vested with direct control over securitised companies. Furthermore in socialist countries, property rights are not generally distinguished from administrative authorisation or authority and therefore property rights are subject to administrative interference.¹¹⁹ Perhaps even more importantly, many Chinese scholars have ignored the fact that the separation of ownership from control in capitalist countries evolved over a long period of time. Tong Rou and Shi Jichun point out that:

A proper separation and balance of the two rights [ownership and control] is by no means determined by law directly, rather they are achieved through the owners' voluntary avoidance of interfering in the exercise of ownership functions, and through managers' observation of the principle of ultra vires and their dedication to profit maximisation for the enterprise. Obviously, the achievement [of a proper separation and balance] is based on a highly developed commodity economy and depends upon social and cultural elements which have developed through centuries. This means that the effective operation of a shareholding system depends upon the existence of an "entrepreneur class". It also means that it is difficult to implement a shareholding system on a large scale in our country which is relatively backward in economic culture.¹²⁰

VII. Towards a "Social Ownership" Theory?

Chinese theorists all agree on one point: the "traditional" theory of public ownership based on a Stalinist model is no longer valid in interpreting and justifying various practices brought about by economic reform programs. In fact, many Chinese theorists have long held the view that, for economic

117 Ng and Yang, above n37 at 12.

118 The Chinese Constitution is unclear whether ownership by the State is the same as ownership by the whole people: Article 6 defines public ownership to include ownership by the whole people and collective ownership by the working people, but articles 9 and 10 provide that the State owns natural resources and land in cities. Also in article 9, the Constitution speaks of that "owned by the State" as being "owned by the whole people".

119 For a discussion on the problem of mingling administrative authority with property rights in socialist countries, see Chen, above n102.

120 Tong & Shi, above n100 at 169.

reform to progress, the ownership system and related theory or theories must be reformed.¹²¹

As early as 1979, scholars began to ask questions such as whether state ownership was the same as ownership by the whole people, and whether the State should directly run enterprises.¹²² By 1986, scholars had already outlined several alternatives to ownership reform and corresponding theories had emerged. Scholars put forward three alternatives to reform ownership. The first is to "perfect" public ownership by implementing economic reform measures such as contracting, leasing and separation of ownership and right of operation. The second is to convert public ownership into enterprise ownership, or more precisely, to convert state ownership into collective ownership. The third is to securitise SOE's and make them joint ventures of the State. Enterprises and individual people working with the State as the majority shareholder.¹²³ The second alternative for reform has never been translated into practice. The first alternative is the dominant practice. Despite various efforts by scholars in China to interpret the right of operation as a property right of enterprises,¹²⁴ the second alternative is about the reform of the enterprise management system rather than a reform of the ownership system.¹²⁵ The securitisation of SOEs makes the issue of ownership reform inevitable and unavoidable. First, property rights of SOEs have to be defined before they can be translated into shares, and secondly the ownership structure of securitised SOEs would also be altered from a sole state ownership into a mixture of state, collective and individual ownership.

The dilemma Chinese theorists have to solve is how to use capitalism for socialism without changing the nature of socialism.

Unlike the final years of Gorbachev's reform which openly and directly moved towards privatisation and private ownership,¹²⁶ Chinese attempts to privatise must be carried out under the banner of socialism. Chinese theorists have to find a mid-way between capitalism and Stalinist socialism. Because of this, Chinese theorists increasingly support a "social ownership" theory¹²⁷

121 See, eg, Xiao, above n4 at 114; Zhiguo, H, "Commodity Economy: An Exploration and Selection for a New Starting Point — A Summary Report on Views Expressed at the Symposium on Theoretical Discussion on Socialist Commodity Economy", *Zhongguo Shehui Kexue (Chinese Social Sciences)* No6 (1986) at 35; and "Debate About Issues Relating to Ownership Reform and Structural Adjustment" *People's Daily* 1 September 1986, at 5.

122 See Xiao, above n4 at 112.

123 See Han, above n121 at 35-36; and *People's Daily* above n121. Interestingly, ideas for ownership reform suggested by scholars attending the Symposium on State Enterprise Reform and Theories on Managerial Mechanism, held in July 1991 in Dalian, remained the same. See "Transforming Managerial Mechanism and Deepening Enterprise Reform" *Jingji Yanjiu (Studies in Economics)* No8 (1991) at 21-27.

124 See above n70.

125 The notion of "separation of two rights" has been criticised by some scholars as being ambiguous. It can lead only to reform in managerial system if socialist public ownership is to be maintained. However, if reform is not conditioned on maintaining socialist public ownership, it can also lead to the reform in ownership system. See Guangyuan, Y, "On the Fate of State Ownership During Reform" *Jingji Yanjiu (Studies in Economics)* No3 (1988) at 30.

126 See Stephan, P B III, "Perestroika and Property: The Law of Ownership in Post-Socialist Soviet Union" (1991) 39 *The American Journal of Comparative Law* at 35-65.

127 See, eg, Yu, above n125 at 17-33; Guangyuan, Y, "On the Future Development of

which is an attempt to re-interpret the notion of public ownership and re-organise its structure of public ownership.

The starting point, which has been held by many scholars,¹²⁸ is that economic reform requires a reform in the socialist public ownership system, but this ownership reform need not abandon socialist public ownership itself. According to these scholars, the "traditional" notion of socialist public ownership, which encompasses ownership by the whole people (state ownership)¹²⁹ and collective ownership, is based on and rigidly adhered to Stalinist model and practice. This model, as put by Yu Guangyuan, has never been the reality in China both before and after the economic reform in the 1980s.¹³⁰ Scholars argue that state ownership is neither a basic system of socialism (which therefore can be reformed without affecting the nature of socialism),¹³¹ nor the only kind of socialist public ownership,¹³² nor the best choice among different kinds of socialist public ownership.¹³³ The fundamental nature of socialist public ownership is that it falls within the notion of "social ownership".¹³⁴ The central task of ownership reform is to restructure the socialist ownership system and clarify questions such as what kinds of ownership are socialist and how they fit into the system of socialist ownership.¹³⁵

The purpose of restructuring socialist public ownership is to clarify property right relationships between the State, enterprises and the individual and to gradually convert state ownership into social ownership.¹³⁶ According to Professor He Wei of People's University of China, "social ownership" can not be understood by determining who owns the means of production. "Social ownership" is a kind of ownership which excludes the "person (individual)" as an owner of means of production. Under "social ownership", the means of production are owned not by the State, members of enterprises or individuals but by social organisations or economic organisations, that is socially

Enterprise Ownership" *Jingji Yanjiu (Studies in Economics)* No6 (1988) at 17-31; Runcheng, L and Li, X, "A Legal Comparison Between Economy under the Ownership by the Whole People and Joint-Stock Economy" *Faxue (Jurisprudence)* No1 (1989) at 11-13; Qingquan, M, "On the Law and Direction of the State Ownership Reform" *Jingji Yanjiu (Studies in Economics)* No3 (1991); and views expressed by prominent scholars in a symposium on contemporary economic theories held in July 1991 in Beijing: "Speeches Delivered at the Symposium On Certain Important Theoretical Issues of Economics" *Jingji Yanjiu (Studies in Economics)* No6 (1991) at 3-20.

128 See *ibid.* See also *Law Yearbook of China* (1988) at 770; (1989) at 970; (1990) at 927-8; and (1991) at 844.

129 Many economists have insisted that the term "state ownership" was more accurate than the term "ownership by the whole people". See Yu, above n127 at 28. The term "ownership by the whole people" is criticised as vague both in scope and in contents: "Speeches Delivered at the Symposium On Certain Important Theoretical Issues of Economics" above n127 at 3.

130 Yu, above n125 at 28.

131 *Id* at 17.

132 "Speeches Delivered at the Symposium on Certain Important Theoretical Issues of Economics" above n127 at 3.

133 Ma, above n127 at 11.

134 See eg, Yu, above n127 at 26.

135 Yu, above n125 at 27; and Xiao, above n4 at 113.

136 See "Speeches Delivered at the Symposium On Certain Important Theoretical Issues of Economics", above n127 at 3-5.

owned.¹³⁷ Professor He proposes a three-stage process to convert "state ownership" into "social ownership". First, the value of the state assets is to be determined by valuation over five years. Secondly, state investment in enterprises (through fund allocation) is to be replaced by state loans to enterprises. This second stage would last for ten years. Thirdly, enterprises are to repay the state loans. This again would take another ten years. For some enterprises, the second stage may take the form of securitisation instead of "loans replacing investment".¹³⁸

Chinese scholars claimed the development from "state ownership" to "social ownership", is a natural evolutionary process of socialist public ownership system.¹³⁹ According to Ma, socialist ownership evolves through the following stages: direct state ownership — contractual state ownership — indirect state ownership — matured social ownership.¹⁴⁰ Direct state ownership means the State owns the means of production and also exercises the right of operation. This kind of socialist ownership is necessary during the transition from private ownership to socialist ownership. Once the transitional role is accomplished, direct state ownership must be converted into contractual state ownership. Otherwise, this ownership will make enterprises administrative appendages of the State and therefore become an obstacle to further development of productive forces.¹⁴¹ Under contractual state ownership, the state exercises the right of ownership while enterprises exercise right of operation and certain rights to benefit from the property according to contracts. The enterprise contracting system implemented during the economic reform in the 1980s belongs to this kind of ownership.¹⁴² At this stage the State still exercises, in the capacity of owner of enterprises' property, various attributive rights of ownership. The next stage of development is to limit the role of the State to that of a beneficiary (collecting taxes and property interests or dividends) and only give the exercise of ownership attributive rights to specialised property management organisations independent from state administrative organs. This is what Ma called "indirect state ownership". The ownership of securitised state-owned enterprises belongs to this category.¹⁴³ The final stage of development is what Ma called "matured social ownership" under which the State no longer owns any property. Property is owned by the whole people. Enterprises are the possessors and operators of people's property, but not owners. Under this "matured social ownership", there will be no "property owners" but only "ownership rights" exercised by enterprises.¹⁴⁴ Ma, however, points out that contractual state ownership will exist in China for a relatively long period of time and indirect state ownership should only be pursued as a long-term development goal.¹⁴⁵

137 Id at 3.

138 Id at 4.

139 See Id at 3-5; and Ma above n127.

140 Ma, above n127 at 11.

141 Id at 11-12.

142 Id at 12.

143 Id at 13-16.

144 Id at 16-18.

145 Id at 16.

Scholars apparently use the term "social ownership" in different senses. However, the majority of scholars use the term to mean that property is owned neither by the State predominantly nor by individuals totally, they are jointly owned by the State, economic organisations and individuals. In the context of securitisation, they are owned by these entities jointly by shares.¹⁴⁶ This usage of the term of "social ownership" (or "indirect state ownership" by Ma as discussed above) is close to the way the World Bank use the term. The World Bank's notion of "social ownership" is that property is owned jointly by government organs, state enterprises and other institutions or collectives.¹⁴⁷

At this stage, one may ask whether the Chinese notion is the same as the innovative notion of "social ownership" used in Yugoslavia since the 1950s. There is no doubt that Chinese reformers were first attracted by reform experience in other socialist countries such as Yugoslavia, Hungary and Romania.¹⁴⁸ Among these countries, Yugoslavia was the first country visited by delegations organised by the Chinese Communist Party. "Social ownership" and "workers' self-management" were among the Yugoslav notions that impressed the delegations.¹⁴⁹ Jurists in China were also attracted to the Yugoslav notion of "social ownership" in the early years of reform.¹⁵⁰ There is no evidence, however, that Chinese theorists have developed their notion of "social ownership" along the Yugoslav line.

In Yugoslavia, the notion of "social ownership" began to emerge with the adoption of the Law Relating to Management by Workers' Collectives of State Economic Enterprises in 1950, and was firmly established by the Constitution of 1963 and 1974.¹⁵¹ "Social ownership", as a socio-economic notion, was seen as direct social ownership without the State as intermediary.¹⁵² As a legal notion, it was derived from state ownership. "Social property" stood "between state property and private property, being in fact neither, but partaking in some measure of both".¹⁵³ The right of ownership over the socially owned means of production was vested in nobody.¹⁵⁴ It is therefore said that "[t]he essence of social property may be

146 See above n127.

147 See World Bank (1985) op cit at 164-173.

148 See Guangyuan, Y, *On Our Economic Structural Reform (1978-1985) (Lun Wuguo De Jingji Tizhi Gaige)* (1985) at 1-5.

149 Id at 7-19.

150 See Yaming, S, "A Brief Introduction to Economic Legislation and Judicial Administration in Yugoslavia and Romania" *Faxue Yanjiu (Studies in Law)* No3 (1979) at 41-44; "Yugoslavia Is a Socialist Country Rule by Law" *Faxue Yanjiu (Studies in Law)* No3 (1980) at 55-61. See also Epstein, above n70 at 186-7.

151 Eörsi, op cit at 206-8; Hazard, J N, *Communist and Their Law: A Search for the Common Core of the Legal Systems of the Marxian Socialist States* (1969) at 51-2; and Coronna, M E, "The Concept of Social Property and the Rights of the Foreign Investor in Yugoslavia" (1985) 11 *Rev Soc L* 227 at 228.

152 See Knapp, V, "Socialist Countries" *International Encyclopedia of Comparative Law* Vol VI at 44-48.

153 Chloros, A G, *Yugoslav Civil Law* (1970) at 163.

154 Paragraph 4, point III, *Fundamental Principles of the Yugoslav Constitution* (1974) provides: "Since no one has the right of ownership over the social means of production, nobody — not socio-political communities, nor organisations of associated labour, nor groups of citizens, nor individuals — may appropriate on any legal-property grounds the product of social labour or manage and dispose of the social means of production and

best explained in negative terms, that is, that it is neither State nor private personal property".¹⁵⁵ Great difficulties and controversies arose, however, when Yugoslav jurists attempted to explain the notion in positive terms.¹⁵⁶ In short, these theories either interpreted "social ownership" as state ownership or group ownership, or as non-ownership but a system of relations, rights, and responsibilities both of public law and private law. Conclusions that one may draw from these theories are that, first, the concept of "social ownership" does not recognise private ownership, and secondly, there is no agreed subject (owner/owners) of property under "social ownership".

The Yugoslav notion of "social ownership" is apparently in direct contradiction to and in conflict with Chinese theorists' attempts clearly to define and delineate property right relationships between the State and enterprises. In fact, Chinese theorists use the notion of "social ownership" in the political-economic sense but not in a legal sense. In the political-economic sense Chinese theorists use the notion to argue that the existence of diversified ownership forms (including private ownership) can be justified in a socialist society and that the State need not to be the sole and exclusive owner enterprise property. They argue that economic organisations and individuals can share the ownership of enterprises property with the State without changing the nature of socialism. Further, there is a clear owner (or owners) of property under the Chinese notion of "social ownership" and rights and duties of the owner are to be determined by the Roman-Civil Law notion of "ownership".

These differences between Yugoslav and Chinese notions make the Chinese notion of "social ownership" significant and vital in paving the way for ownership reform: by devising a theory of "social ownership", Chinese theorists are able to justify the end of monopoly of state ownership and the use of capitalist measures while maintaining a course of socialist construction. Their theories clear the way for further economic reform and capitalist practices such as the introduction of market mechanisms and securitisation of SOEs.

VIII. Conclusion

Theories in China justify the use of capitalist practice for building socialism and clarify many ambiguities in reform policies and point out practical problems. To some extent, they guide and direct economic reform policies.

Chinese theorists can claim credit for recent policy development and measures by the State regarding SOEs reform. In 1988, a National Administrative Bureau of State-owned Property (NABSP) was established under the Ministry of Finance.¹⁵⁷ Although this Bureau is yet to become independent from state administration and have its roles defined, there is little doubt that the aim of establishing this bureau is to separate economic regulation functions from the administrative functions of the State. In 1990,

labour, or arbitrarily determine conditions for distribution." (See also article 12 of the Constitution). In Simons, W B (ed), *The Constitutions of the Communist World* (1984) at 432.

155 Chloros, op cit at 161.

156 For various Yugoslav theories explaining the notion in positive terms, see Chloros, op cit at 161-181; and Coronna, above n151 at 230-235.

157 See World Bank (1991), op cit at 75; and Mu, Z, "Several Problems Relating to the Practice of Securitisation" *Jingji Yu Fa (Economics and Law)* No10 (1988) at 4.

the State Council provided that functions of managing state-owned property would be exclusively exercised by the NABSP and the Ministry of Finance as well as corresponding organs at local levels.¹⁵⁸ In 1991, the State Council issued detailed measures for the administration of state asset valuation,¹⁵⁹ and a Leading Group on State Asset Valuation and Verification (*Qingchan Hezi Lingdao Xiaozu*) was established under the State Council.¹⁶⁰ In May 1992, the State Council decided that ownership rights of state assets were to be registered and the registrations inspected annually from 1992.¹⁶¹ These measures are clearly designed to clarify property rights between the State, enterprises and institutions. They are the first moves towards instituting a diversified ownership system — a “social ownership”.

In March 1992, the Shenzhen Municipality issued Tentative Provisions Regarding Companies Limited by Shares.¹⁶² It is provided by the Tentative Provisions that “shareholders shall be the owners of the company and shall have rights and bear obligations in accordance with the classes and amounts of the share they hold”.¹⁶³ These rights including the right to attend or appoint a proxy to attend shareholders’ meetings and to exercise voting rights.¹⁶⁴ The shareholders’ meeting is defined as the highest institution of authority in the company,¹⁶⁵ and each share will give the holder one vote.¹⁶⁶

Various measures advocated by theorists are now being taken towards the restructuring of socialist public ownership. If these measures are implemented strictly the implications and ramifications for ownership reform will be tremendous. Whether it is called “social ownership”, “indirect state ownership” or something else, a strict implementation of these measures will end the monopoly of socialist public ownership based on a Stalinist model in China. The next question China must face and answer is: will property rights, held by economic organisations or individuals, be respected as rights recognised by law rather than as administrative powers authorised by the State, and will these property rights be enforceable and maintainable against the State and various bureaucratic interference? In other words, will the Party allow challenges from a “property-class” in economic and possibly political arenas?

These questions are yet to be answered. More urgently, the government must address the crucial question of the protection of minority shareholders’ rights and interests. Recently, there have been reports of “share frenzy” in which thousands of Chinese residents rushed to Shenzhen and Shanghai Exchanges to buy shares.¹⁶⁷ The reason for this “craze”, as reported by the

158 Item 7 of State Council Notice Regarding the Strengthening of Administration and Management of State-owned Property (July 1990), in *Law Yearbook of China* (1991) at 292-3.

159 *Administrative Procedures for State Asset Valuation*, issued by the State Council on, and effective from 16 November 1991. An English translation of the Procedures can be found in *China Law and Practice* (January 1992) at 22-29.

160 See *Zhonghua Renmin Gongheguo Guowuyuan Gongbao* (*Gazette of the State Council of the People's Republic of China*) No10 (1991) at 334-5.

161 *People's Daily* 20 May 1992, at 1.

162 An English translation can be found in *China Law and Practice* (May 1992) at 12-51.

163 Article 95.

164 Article 96.

165 Article 98.

166 Article 106.

Beijing Review, is an over-demand for the limited number of shares available in Shenzhen and Shanghai. The boost of share values is attributed primarily to short supply rather than to the underlying strength and business performance of the companies concerned. To ease the market demand the government is trying to increase stock share supplies.¹⁶⁸ The crucial question of shareholding risks has been ignored by investors.¹⁶⁹ The PRC Government is yet to address the issue of protection of minority shareholders' rights and interests. A national law on securities and a national company code are still absent from the Chinese legal system. Some companies which issued shares to the public lack even a shareholder meeting, a board of directors or a supervisory committee.¹⁷⁰ By diverging public savings of up to 1,200 billion yuan¹⁷¹ to enterprise share investment, the government is able to avoid an inflation crisis while also increasing enterprise assets without contributing any capital from the state treasury. The fear of some economists in China of a "black Friday" is not unfounded in the current legal and policy environment.¹⁷² Should a "collapse" occur, one wonders whether the Chinese would just sit there watching their money being washed away.

167 See, eg, "Chinese Investors Flock to Market" *The Australian* 12 August 1992, at 31; "More Firms Pledge Eases Share Frenzy" *The Sydney Morning Herald* 13 August 1992, at 9; and "Stocks: New Excitement in China's Economic Life" *Beijing Review* 10-16 August 1992, at 14-17.

168 *Beijing Review*, id at 16.

169 One stock buyers in Shanghai was reported as saying that "The price of stocks is rising every day. Buying stocks can make money, I don't care how things will stand in the future, I'll just wait and see." *Beijing Review*, id at 15.

170 Id at 17.

171 Id at 15.

172 Some economists in China are calling for the government to take steps to prevent a "black Friday" in China. Id at 16.