

# DIRECTOR DUTY OF CARE IN CHINA AND THE UNITED STATES: WHAT LIABILITY FOR CLIMATE CHANGE?

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*By Carissa Wong\**

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## INTRODUCTION

For the last half century, the Anglo-American model of corporate law has been vaunted as the most appropriate model for developing the global economy.<sup>1</sup> Economic development, its proponents argued, would bring greater security and improve overall human wellbeing. Corporations are now the dominant form to organize the production of goods and services in the world in terms of revenue,<sup>2</sup> many having revenues larger than nation-states.<sup>3</sup> Despite the lofty aspirations for the role of corporations and economic development in improving human wellbeing, the “asocial corporation,” geared solely at augmenting shareholder value, has become pervasive.<sup>4</sup> In the wake of the 2008 financial crisis, the Organization for Economic Cooperation and Development (OECD) developed a set of recommendations to improve corporate governance practices, covering remuneration, risk management, and board practices.<sup>5</sup> All of these recommendations bring into question the fiduciary duty of corporate directors.

During the same time period, global ecological change—including climate change—has accelerated. Humans are interfering with the climate, and “it is *extremely likely* that human influence has been the dominant cause of the observed warming since the mid-20th century.”<sup>6</sup> Today, economic activity across all sectors contributes to greenhouse gas emissions.<sup>7</sup> In light of these developments, how does liability under the corporate director duty of care in the two largest national economies, the United States and China, compare in addressing greenhouse gas pollution? This article argues that, despite divergent history and culture as well as

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1. Troy A. Paredes, *A Systems Approach to Corporate Governance Reform: Why Importing U.S. Corporate Law Isn't the Answer*, 45 WM. & MARY L. REV. 1055, 1071–72 (2004).

2. BRIAN ROACH, TUFTS UNIV. GLOB. DEV. & ENV'T INST., CORPORATE POWER IN A GLOBAL ECONOMY 4 (2007), <https://perma.cc/FP9A-A7M5>.

3. Vincent Trivett, *25 US Mega Corporations: Where They Rank If They Were Countries*, BUSINESS INSIDER (June 27, 2011, 11:27 AM), <https://perma.cc/G9B3-Z2FE> (“If Wal-Mart were a country, its revenues would make it on par with the GDP [Gross Domestic Product] of the 25th largest economy in the world, by surpassing 157 smaller countries.”).

4. Peter Muchlinski, *The Changing Face of Transnational Business Governance: Private Corporate Law Liability and Accountability of Transnational Groups in a Post-Financial Crisis World*, 18 IND. J. GLOBAL LEGAL STUD. 665, 665 (2011).

5. *See generally* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT: CORPORATE GOVERNANCE IN THE WAKE OF THE FINANCIAL CRISIS (2010) (detailing the recommendations that the UN created after the financial crisis).

6. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SUMMARY FOR POLICYMAKERS, CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY 3 n.1 (C.B. Field et al. eds., 2014).

7. JOHN BLODGETT & LARRY PARKER, GREENHOUSE GAS EMISSION DRIVERS: POPULATION, ECONOMIC DEVELOPMENT AND GROWTH, AND ENERGY USE 8, 11 (2010).

contrasting approaches to many corporate issues, the different laws in China and the United States pose insignificant, functional differences in the duty of care regarding director liability for climate change. To those striving for social change, this functional similarity suggests that the historical and cultural differences between the United States and China do not affect the potential for legal action on climate change. Instead, it creates more similar, homogenous opportunities for challenges among distinct nations. Particularly, this article looks at increasing the equity and effectiveness of public participation in climate governance. Such an increase would exploit solidarity and commonalities that individuals in the globalized, modern-industrialized economies face in making personal decisions that affect carbon emissions in their daily lives. Through value-based organizations (VBOs), such as climate “eco-teams” that include participants from both jurisdictions, individuals may connect, share their progress and challenges, and broaden their engagement with others in facing the necessary but difficult changes to the status quo.

## I. HISTORICAL DEVELOPMENTS: COMPARING WESTERN AND CHINESE CIVIL LAW

### *A. The Power of the Individual Versus Power of the State*

The Western legal tradition of civil law originated from Roman law. Roman law arose in the 4th Century B.C.E., and it focused on resolving conflicts between private individuals (e.g. tort, simple contract, or succession).<sup>8</sup> At the time, populations were small, isolated, and predominantly agricultural, and the government did not exercise strong control over local affairs.<sup>9</sup> Due to this lack of control, basic Roman law, or civil law, approached society from the viewpoint of individuals.<sup>10</sup> As a result, Western civil law is concerned at its core with the notion of a person’s individual rights.<sup>11</sup> In contrast, “by the time the legal system was formalized” in China, society was organized around a central government “headed by an absolute ruler.”<sup>12</sup> The primary objective of every Chinese person was “to fulfil the duties assigned him by the emperor.”<sup>13</sup> The law and civil codes’ primary focus was then on the activities of bureaucrats and

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8. William C. Jones, *Trying to Understand the Current Chinese Legal System*, in UNDERSTANDING CHINA’S LEGAL SYSTEM 7 (C. Stephen Hsu ed., 2003).

9. *Id.* at 11–12.

10. *Id.* at 12.

11. *Id.*

12. *Id.*

13. *Id.* at 13.

the performance of duties, rather than on the activities of ordinary people's private lives.<sup>14</sup> Law was not concerned with the contracts, property, or succession that did not involve the emperor.<sup>15</sup> Indeed, Chinese law dealt with subjects as opposed to the individual rights of citizens.<sup>16</sup> As it arose, the Chinese code was analogous to the Western notion of a penal code that dealt exclusively with enforcement and criminal sanctions for breaches in the performance of duties assigned by the emperor.<sup>17</sup> In China, private law was historically excluded from the notion of law.<sup>18</sup> Instead, Chinese law was built around privileging and legitimizing the power of the state.<sup>19</sup> Disputes at an individual level were resolved by mediators, village communities, and guilds but were distinct from the legal system.<sup>20</sup> In addition, the distinction between public and private law is different in the West and China. The only law that existed in China was administrative and public; however, it dealt with matters that, in Western law, would be understood as private.<sup>21</sup>

Traditionally in China, the law did not address the production and sale of goods and services.<sup>22</sup> Any commercial breach related to the quality of goods, for example, was the purview of non-legal institutions, such as village mediation; thus, there was no commercial law *per se*.<sup>23</sup> In contrast, Western civil law did cover commercial breaches related to the production and sale of goods.<sup>24</sup>

### *B. Common Core Analysis*

Although the categories in Western law are not directly analogous with their Chinese counterparts, applying a common core analysis reveals that a degree of functional similarities exist between the Chinese and Western civil systems.<sup>25</sup> Prior to the 20th century, the black-letter law belied the actual functional similarities between Western and Chinese law. Still, in Western civil law, the balance of power is given to the individual, whereas

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14. *Id.*

15. *Id.*

16. *Id.* at 14.

17. *Id.* at 12–13.

18. UGO MATTEI ET AL., SCHLESINGER'S COMPARATIVE LAW: CASES—TEXT—MATERIALS 381 (Robert C. Clark et al. eds., 7th ed. 2009).

19. *Id.*

20. Jones, *supra* note 8, at 13.

21. *Id.* at 14.

22. *Id.* at 13–14.

23. *Id.* at 13.

24. *Id.*

25. MATTEI ET AL., *supra* note 18, at 95.

in China it remains with the State.<sup>26</sup> However, a corporate director's duty of care is similar in both jurisdictions. This functional similarity creates shared opportunities for public participation in climate governance in both China and the Western world.

## II. ORIGINS AND FOUNDATIONS OF AMERICAN AND CHINESE CORPORATE LAW

### A. *Company Law*

As China developed its legal system under the communist regime and opened its economy to the West in the late 1970s, its corporate law began to reflect the spirit and the letter of Anglo-American corporate law.<sup>27</sup> Although modern Chinese corporate law, which began in 1904, consists of transplanted Western corporate law and had little impact on Chinese economic and industrial organization, today, there is much greater confluence.<sup>28</sup> The dominant model of corporate law in both countries authorizes director agency, where the right to run corporations is severed from ownership.<sup>29</sup> Today, the controlling law in China is the 2005 Company Law.<sup>30</sup> In contrast, the Delaware General Corporation Law is the leading corporate law in the United States.<sup>31</sup> Today in China and the United States, corporations share the following characteristics: (1) independent legal personality, (2) formation by the controlling domestic law, and (3) creation with the goal of monetary profit.<sup>32</sup> Additionally, they both share the benefits of incorporation, including the limited liability of shareholders and directors as well as creating capital through an initial public offering of stock.<sup>33</sup> Still, differences between the countries persist based on historical

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26. Janet E. Ainsworth, *On Seeing Chinese Law from the Chinese Point of View: An Appreciative Look at the Scholarly Career of Professor William Jones*, 74 WASH. U. L.Q. 547, 555 (1996).

27. See JAMES M. ZIMMERMAN, CHINA LAW DESKBOOK: A LEGAL GUIDE TO FOREIGN-INVESTED ENTERPRISES 51–54 (4th ed. 2014) (describing the progression of and the influences on the Chinese legal system following the communist regime in the late 1970s).

28. Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1678–79 (2000).

29. *Id.* at 1603.

30. Companies Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2005, effective January 1, 2006), arts. 1–219, 2006 P.R.C. LAWS.

31. See generally General Corporation Law, DEL. CODE ANN. tit 8, §§ 101–398 (2016) (listing the provisions under General Corporation Law in Delaware); see also *Delaware Corporate Law: Facts and Myths*, DELAWARE.GOV, <https://perma.cc/TWD7-HJNP> (last visited Nov. 30, 2016) (discussing how Delaware is the leading United States jurisdiction for publicly traded companies to incorporate in because its corporate laws provide companies with “predictability and flexibility”).

32. GU MINKANG, UNDERSTANDING CHINESE COMPANY LAW 18–22 (2nd ed. 2010).

33. *Id.* at 74, 254.

and cultural influences. These differences may play out in assigning liability for climate change damage, but it has yet to be tested. Particularly, China's collectivist orientation of corporations lead to the strong presence of State-owned enterprises, and the mandatory nature of directorship creates a potentially stronger avenue for climate-change litigation.<sup>34</sup> In contrast, avenues for climate-change litigation remain limited in the United States based on recent jurisprudence from the Supreme Court.<sup>35</sup> Despite this difference, however, the implementation of laws in China remains a critical challenge.<sup>36</sup>

### *B. Individualism and Collectivism*

As noted, the common law of the United States is based on the Western legal tradition with its primary focus on individual rights, but its distinctions between private and public law are similar to those of continental Europe.<sup>37</sup> In the modern United States legal system, the contract is the paradigmatic form of private law ordering.<sup>38</sup> Thus, corporate law is formed around the notion of voluntary contract, where a group of citizens voluntarily form and invest in a corporation.<sup>39</sup> As a form of contract, corporate law leaves the arena of inherent social responsibilities vacant. In addition, in the United States, corporate law is distinctly state-driven rather than federal.<sup>40</sup> "Each state has the right to promulgate its own corporate law,"<sup>41</sup> which reflects again the greater emphasis on the individualized and contract-based notion of corporate law. Additionally, there are a few permanent, federally-owned corporations in the United States, however, the majority of federally-owned corporations are designed to eventually become private firms.<sup>42</sup>

By contrast, traditional law in China does not address contracts,<sup>43</sup> and the "family [is] the ideological paradigm of traditional Chinese private

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34. *Id.* at 38.

35. Kirk B. Maag, *Climate Change Litigation: Drawing Lines to Avoid Strict, Joint, and Several Liability*, 98 GEO. L.J. 185, 186–87 (2009).

36. Li-Wen Lin, *Corporate Social Responsibility in China: Window Dressing or Structural Change?*, 28 BERKELEY J. INT'L L. 64, 96 (2010).

37. Ruskola, *supra* note 28, at 1605–06; *The Common Law and Civil Law Traditions*, UNIV. CAL. AT BERKELEY SCH. OF LAW, <https://perma.cc/QJ94-QUAN> (last visited Jan. 23, 2017).

38. Ruskola, *supra* note 28, at 1608.

39. *Id.*

40. MINKANG, *supra* note 32, at 15.

41. *Id.*

42. *See generally* KEVIN R. KOSAR, CONG. RESEARCH SERV., RL30365, FEDERAL GOVERNMENT CORPORATIONS: AN OVERVIEW (2011) (showing the existence of federally-owned state corporations of temporary nature).

43. Jones, *supra* note 8, at 13.

ordering.”<sup>44</sup> In China, members of a clan stayed together “not merely out of affection [for one another], but . . . to accumulate capital and pursue profit more effectively.”<sup>45</sup> In late Imperial China, many clans were commercial enterprises structured around the “idiom of family.”<sup>46</sup> Indeed, through marriage, adoption, and a strict observance of Confucian relations, which imputed that everyone share an “interest in the family’s well-being as a whole,” the ideology of kinship was often a legal fiction serving to justify and hide inequity among members of the corporation.<sup>47</sup> Still, under the legal philosophy of Confucianism, one’s role in the corporation was clan-based.<sup>48</sup> Further, this role in the family and society at large was not voluntary but highly structured and prescribed.<sup>49</sup>

“Fiduciary duty [in] Chinese family law was customary, rather than statutory,”<sup>50</sup> where the family created a simple model for joint-ownership of property and the cultivation of financial capital through the ancestral trust.<sup>51</sup> According to Confucianism, father and son are a “continuum of the same personality,” and without a son, a man lacked testimonial property.<sup>52</sup> Thus, sons were often adopted to marry daughters upon maturity.<sup>53</sup> Marriage was also the single most common means of recruiting female labor into clan corporations.<sup>54</sup> Thus, the clan corporation was the tradition of corporate law for most of Chinese history. “The Chinese view of kinship groups and the larger sociopolitical communities as interpenetrating extended families meant that the entire clan corporation owed fiduciary obligations to other groups as well and even to the empire as a whole.”<sup>55</sup> This understanding of a greater duty to society creates a foundation for a potentially more inclusive corporate duty of care than exists in the American legal tradition. The significance of this will be elaborated further in a closer look at the concept of legal personality.

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44. Ruskola, *supra* note 28, at 1608.

45. *Id.* at 1605.

46. *Id.*

47. *Id.* at 1607.

48. *Id.*

49. *Id.* at 1636.

50. *Id.* at 1628.

51. *Id.* at 1630.

52. *Id.* at 1627–28.

53. *Id.* at 1640.

54. *Id.* at 1641–42.

55. *Id.* at 1608.

### 1. Legal Personality Versus Legal Representation

Following the “Confucian view, the [family] collective was morally prior to the individual.”<sup>56</sup> Thus, the clan corporation took the legal status of a collective, not an individual.<sup>57</sup> In addition, “traditional Chinese law did not have a concept of legal personality,” and the notion of a legal person, *fa ren*, “is a by-product of the adoption of the Western commodity economy.”<sup>58</sup> This contrasts with the Western legal tradition, where the individual is paramount and creating individual legal personality for a corporation ensured consistency with liberal individualism.<sup>59</sup> For Chinese corporate law, however, the question of corporate legal personality did not arise until interactions with Western corporate law.<sup>60</sup>

The family-oriented tradition manifests itself in modern company law, under the Communist regime in China, through the presence and importance of State-owned enterprises (SOEs). “While traditional Chinese law tend[s] to analogize everything to the family in order to promote—or impose—social and political harmony,” today, under the Marxist-Leninist-Maoist epistemology, “the people” are the collective entity.<sup>61</sup> As such, the “only Communist ‘corporation’ is the State, managed by the Party,” which holds a fiduciary relationship with the people who are all owners of the corporation.<sup>62</sup> Even though state-owned enterprises operate as corporations with distinct legal personality, in reality, they have difficulty gaining true independence from the administrative bureaucracy of the state.<sup>63</sup>

The internal governance of SOEs in China function, purportedly, much like a family. Rather than create corporate legal personality, Chinese law authorizes a natural person, usually the chairman of the board, to be the legal representative of a corporation who may bind the company.<sup>64</sup> In SOEs, the State appoints the legal representative.<sup>65</sup> Thus, in order to maintain his/her position, the legal representative is ultimately responsible to the State supervisors, not the economic or financial priorities of the company.<sup>66</sup> This reflects the fact that the notion of a legal representative of

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56. *Id.* at 1606.

57. *Id.* at 1616–18.

58. *Id.* at 1616.

59. *Id.* at 1652.

60. *Id.*

61. *Id.* at 1693.

62. *Id.*

63. *Id.*

64. MINKANG, *supra* note 32, at 199.

65. *Id.*

66. *Id.* at 199–200, 202.

an SOE arose in China at the same time as the planned economy.<sup>67</sup> This State-supervisor relationship also creates a tension that does not exist in Western corporate law between a legal representative's loyalty to the shareholders' financial needs and the State supervisor's non-market objectives. In contrast, following the individualistic tradition, American corporations are an aggregate of individuals in a contractual nexus.<sup>68</sup> Further, the owners of an American company are the shareholders, whose financial interests are the company's primary concern.<sup>69</sup>

In addition, under Chinese Company Law, the legal representatives of SOEs are usually appointed by the government organ in charge and are responsible to this organ.<sup>70</sup> In SOEs, the legal representative has almost absolute power over the enterprise.<sup>71</sup> SOEs fulfil the mandatory plans of the government rather than follow the market rules or serve their own financial interests as private companies do.<sup>72</sup> By giving the State authority to determine the corporate legal identity of SOEs, the law creates a body of directors that is not bound by pure fiscal and financial goals the way that private companies are. This creates an arena in which directors of SOEs are held responsible for mandates outside of pure economic interests. Theoretically, these mandates could include reductions in pollution and greenhouse gas emissions. Thus, in modern SOEs, under the guise of family affection, traditional kinship metaphors and family rhetoric still permit subordination of economic priorities<sup>73</sup> and of overall possible environmental consideration.

## 2. Duty of Directors: Voluntary Versus Mandatory Agency

Both European common and civil law recognize directors as agents of a company, through whom the artificial personhood of a company can act.<sup>74</sup> In contrast to the mandatory theory of continental jurisdictions, the common law system of the United States relies more on a pure agent or trust theory.<sup>75</sup> The trust theory helps to fully explain the duty of loyalty and to avoid conflicts of interest, while the agent theory helps explain why a

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67. *Id.* at 199.

68. Ruskola, *supra* note 28, at 1694.

69. See John C. Carter, *The Fiduciary Rights of Shareholders*, 29 WM. & MARY L. REV. 823, 823–24 (1988) (citing four recent cases and the general idea that American companies prioritize shareholders' interests).

70. MINKANG, *supra* note 32, at 205.

71. *Id.* at 206.

72. *Id.*

73. Ruskola, *supra* note 28, at 1711.

74. MINKANG, *supra* note 32, at 177.

75. *Id.* at 180.

board of directors must act on behalf of its company rather than for itself. Additionally, everyone from the chairman to the lowest-ranking employee agrees to take his/her position in the corporation voluntarily, with no obligation to a higher society structure.<sup>76</sup>

In contrast, China's model is closer to the civil-law system in continental Europe.<sup>77</sup> China adopts the civil-law approach of Japan and Taiwan, and applies the principle of agency "to explain the director's position in a company."<sup>78</sup> The agent theory, however, is understood as establishing a mandatory relationship in which a person, upon appointment by supporters at an inaugural meeting, promises to be the director and to manage the affairs of the company.<sup>79</sup> The obligatory relationship resembles the non-profit tradition, where the director legally takes the position without requiring a fee or authorization of the managed person (similar to the status of parents as legal agents of their children).<sup>80</sup>

The mandatory relationship of a director in China may create a greater sense of responsibility in the care of a company and its role in society with regard to greenhouse gas emissions. If the duty of care is owed to the greater society, the legal structure of mandatory directorship may create greater impetus for mandatory action on climate-change mitigation than under the American agent theory. The trust model of agency in the United States would provide a sense of responsibility that is not as great as that in a relationship of mandatory nature.

### 3. Honesty: A Feature of Chinese Corporate Law

Article 148 of China's 2005 Company Law requires directors to be honest in exercising their duties.<sup>81</sup> This is a passive duty where one need not volunteer information, unlike the fiduciary duty found in United States law.<sup>82</sup> The fiduciary duty in United States law is a higher standard because the director must not wait to be confronted, for example, about potential conflicts of interest, but must declare these up front.<sup>83</sup> Due to the director's fiduciary duty to the larger community fabric, however, the duty of a director to be honest in China may be greater in scope than that of American corporate law.

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76. Ruskola, *supra* note 28, at 1608.

77. MINKANG, *supra* note 32, at 180.

78. *Id.* at 179.

79. *Id.*

80. *Id.*

81. *Id.* at 180.

82. Ruskola, *supra* note 28, at 1608.

83. MINKANG, *supra* note 32, at 180.

In China, “the secularization of Zen Buddhism and Taoism combined with Confucianism in the 16th and 18th centuries” spawned “a culture of diligence, honesty, and charity among businessmen” who realized their social significance by contributing to society.<sup>84</sup> Further, with the legitimacy of business based on the ideology of kinship, businesses possessed inherent social responsibilities.<sup>85</sup> These extended to not only family members but also to the broader social community and the State (political family).<sup>86</sup> The fiduciary-duty statement in the Chinese Company Law suggests that “corporate officers owe a fiduciary duty to manage the corporation not only in the interests of the owners but also other constituencies.”<sup>87</sup> In particular, directors owe their duties to the State, shareholders, employees, creditors, and communities.<sup>88</sup> Article 148 of the 2005 Company Law states that directors owe duties to the company and shareholders.<sup>89</sup> But many “Chinese scholars argue that directors may owe duties to other subjects.”<sup>90</sup> “This broad scope of responsibilities” resembles the main premise of modern Corporate Social Responsibility (CSR), that “corporations [must] be accountable not only to shareholders but also [to all] stakeholders” in the local community.<sup>91</sup>

In Article 5 of the new Company Law, China legislated for the first time that companies shall undertake social responsibility.<sup>92</sup> This builds on the 1993 Company Law of China, which does not use the term corporate social responsibility, although Article 14(1) states that “a company engaging in business operations must abide by the law and uphold professional ethics and strengthen the construction of the socialist spiritual enlightenment under the supervision of the government and the public.”<sup>93</sup> Thus, even before 2005, Article 14 of the 1993 Company Law provided that “companies should go beyond” mere legal compliance, as is commonly required in definitions of CSR.<sup>94</sup> Additionally, this article requires public supervision, which may include supervision by consumers, community members, and other stakeholders.<sup>95</sup> Thus, Chinese CSR, which aligns with greater director duty of care concerning greenhouse gas emissions, has

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84. Lin, *supra* note 36, at 85.

85. *Id.*

86. *Id.*

87. Ruskola, *supra* note 28, at 1692.

88. MINKANG, *supra* note 32, at 188–92.

89. *Id.* at 188.

90. *Id.*

91. Lin, *supra* note 36, at 85.

92. MINKANG, *supra* note 32, at 192.

93. *Id.*

94. Lin, *supra* note 36, at 69.

95. *Id.*

foundations in the orientation toward the family and particular geographic community from which businesses arose.

Additionally, in January of 2008, the State-owned Assets Supervision and Administration Commission of the State Council (SASAC) published the Guide Opinion on the Social Responsibility Implementation for State-owned Enterprises Controlled by the Central Government.<sup>96</sup> Prior to this, the legal effects of the CSR language, whether binding or simply advisory, were often unclear.<sup>97</sup> For example, some scholars view Article 5 of the 2005 Company Law mandate that companies “shall undertake social responsibility” as “exhortatory rather than mandatory,” while others “interpret it as a component of fiduciary duties under company law.”<sup>98</sup> Now, the 2008 Guide is an “important legal document explaining the Chinese central government’s attitude toward CSR.”<sup>99</sup> It includes fundamental principles for implementing CSR, such as complying with the law honestly when conducting business, upgrading resource efficiency, protecting the environment, and actively engaging in charity.<sup>100</sup> Importantly, this interpretative guide creates an understanding that the SOE director’s duty of care includes the environment and greater community.

Overall, the contrasting approaches to legal personality and representation, voluntary and mandatory agency, and the feature of “honesty” make the foundations of Chinese and American corporate law very distinct while still gradually more convergent since the 1970s through statute.

### III. CORPORATE LAW INTERACTIONS WITH TORT LAW IN THE UNITED STATES AND CHINA

#### *A. Director Duty of Care*

In the United States, the director duty of care is essentially a tort law concept. The plausible theories of liability in climate-related claims include: negligence, product liability, nuisance, and public nuisance.<sup>101</sup> Followed in most United States jurisdictions, the director duty of care states that a

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96. *Id.* at 72.

97. *Id.* at 96.

98. *Id.*

99. *Id.* at 72.

100. *Id.* at 73.

101. David Hunter & James Salzman, *Negligence in the Air: The Duty of Care in Climate Change Litigation*, 155 U. PA. L. REV. 1741, 1752 (2007).

“director owes a duty to his or her company to exercise proper care in managing the corporation’s affairs.”<sup>102</sup> In United States tort law,

[t]he word “duty” is used . . . to denote the fact that the actor is required to conduct [her/]himself in a particular manner at the risk that if [s/]he does not do so [s/]he becomes subject to liability to another to whom the duty is owed for any injury sustained by such other, of which that actor’s conduct is a legal cause.<sup>103</sup>

In negligence cases, the defendant owes a duty to “act reasonably under the circumstances (i.e. not to create unreasonable risk[s] [of harm]), and that duty is owed to those who are foreseeably at risk from the defendant’s behavior.”<sup>104</sup> To meet the duty of care requirements, the defendant’s action must not be negligent in and of itself, or alternatively, the plaintiff must not be in the zone of foreseeable risk.<sup>105</sup> Thus, to prove negligence in meeting this duty of care, the plaintiff must show that the defendant acted unreasonably based on an objective standard and a suite of factors.<sup>106</sup>

In addition, under United States tort law, the burden of proof is on the plaintiff rather than on the defendant.<sup>107</sup> The breach of duty for public nuisance is easier to prove than negligence. Under “nuisance, the obligation is not to interfere unreasonably or knowingly with the use and enjoyment of another’s property.”<sup>108</sup> For public nuisance, the obligation “is not to contribute unreasonably or knowingly to an interference with the public’s resources.”<sup>109</sup> Reasonableness is determined in terms of risk-utility and cost-benefit through an analysis of public conduct and the foreseeable harms.<sup>110</sup> Unreasonableness is thus demonstrated, not by an objective standard, but in terms of whether the defendant had knowledge that his/her actions would contribute to public nuisance—such as climate change.<sup>111</sup> Here, a plaintiff need only prove intentional activity (e.g. pollution) leading to nuisance (e.g. interference with enjoyment of property). Thus, public nuisance offers a lower burden of proof for climate change litigants to overcome than negligence.

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102. MINKANG, *supra* note 32, at 183.

103. Restatement (Second) of Torts § 4 (1965); Hunter & Salzman, *supra* note 101, at 1745.

104. Hunter & Salzman, *supra* note 101, at 1746.

105. *Id.* at 1747.

106. *Id.* at 1746.

107. *See, e.g.*, State v. Tippetts-Abbott-McCarthy-Stratton, 527 A.2d 688, 691–92 (Conn. 1987) (stating that the plaintiff has the burden of proof in a nuisance action).

108. Hunter & Salzman, *supra* note 101, at 1749.

109. *Id.*

110. *Id.*

111. *Id.* at 1792.

As a result, several climate change public nuisance cases have been brought against corporations in the United States, but with little success. In *Connecticut v. American Electric Power*,<sup>112</sup> the city of New York filed a suit against five large fossil-fuel-burning utilities, but the claim was dismissed as a “nonjusticiable” political question.<sup>113</sup> As long as the Environmental Protection Agency has authority to regulate greenhouse gas emissions, the federal court does not have jurisdiction to decide common law public-nuisance, climate-change claims.<sup>114</sup> In *Comer v. Murphy Oil*, Ned Comer and thirteen other individuals harmed by Hurricane Katrina filed nuisance claims against 31 oil companies and four chemical companies in 2006.<sup>115</sup> Ultimately, the United States Supreme Court refused to grant the plaintiffs standing on such nonjusticiable political claims.<sup>116</sup> Finally, in *California v. General Motors Corp.*, the California Attorney General charged General Motors and five other major automobile manufactures with public nuisance.<sup>117</sup> Relying on the District Court’s 2005 *Connecticut v. American Electric Power* decision, the District Court of Northern California dismissed the plaintiff’s claim for lack of jurisdiction, finding that the balancing of competing interests of reducing global warming emissions and advancing the interests of economic and industrial development is a “policy determination to be made by the political branches.”<sup>118</sup> Thus, for different reasons, both common law public-nuisance claims and state-statute-based public nuisance claims failed to raise justiciable issues. These cases demonstrate the difficulty of successfully winning climate-change suits against corporations under current United States tort law.

In China, the duty of care is also a tort-law concept. The 2005 Company Law does not articulate a specific duty of care, even though Article 148 mentions the term “duty of loyalty and diligence to the company.”<sup>119</sup> However,, Article 106 of the 1986 General Principles of Civil Law in China addresses a breach of duty of care.<sup>120</sup> In particular, Article 150 provides that if directors violate laws, administrative rules and regulations, or the corporate articles of association in performing their

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112. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 267, 274 (S.D.N.Y. 2005).

113. *Id.* at 267.

114. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011).

115. Hunter & Salzman, *supra* note 101, at 1754.

116. *In re Comer*, 562 U.S. 1133, 1133 (2011) (mem.).

117. *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 U.S. Dist. LEXIS 68547, at \*2 (N.D. Cal. Sept. 17, 2007).

118. *Id.* at \*12.

119. MINKANG, *supra* note 32, at 185.

120. *Id.*

duties, thus causing damage to the company, they shall be liable to pay compensation for this damage.<sup>121</sup> Thus, in situations where the director is at fault and the company is successfully sued, the owners of the company may collect compensation directly from the director.<sup>122</sup> In practice, however, courts have not held directors who have violated the rules and articles of association personally liable.<sup>123</sup> Further, under the 1986 General Principles of Civil Law, a director in China is free from any personal or company tort liability caused by his or her negligence as long as he or she does not breach the duties imposed by the Company Law, administrative law, or the company's articles of association.<sup>124</sup> This is demonstrated in the case of Jin Hua Department Store Joint Stock Company, in which the chairman of the board of directors breached his responsibility to the company by arbitrarily offering a very large capital guarantee in the company's name for another party's debts.<sup>125</sup> Although the chairman was held personally liable and faced several years in prison, directors under the authority of the chairman were not held liable.<sup>126</sup> Thus, under the General Principles of Civil Law,<sup>127</sup> director duty of care is also a difficult cause to litigate.

### *B. New Climate Change Liability in China?*

In 2010, China revised its tort law to clarify obligations under the General Principles of Civil Law. The revision is one step closer to China's realization of a civil code, following the enactment of the 1999 Contract Law and 2007 Real Property Law, which guarantee broader protections for personal and property rights of citizens in China.<sup>128</sup> Following the German model of Allgemeiner Teil zum BGB, Article 124 of the 1986 General Principles of Civil Law in China created general civil liability for environmental pollution.<sup>129</sup> Building on this, China's 2010 Tort Law of the People's Republic of China creates strict, no-fault liability, reverses the burden of proof, and creates a cause similar to private nuisance for

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121. *Id.*

122. *Id.* at 186.

123. *Id.* at 185.

124. *Id.*

125. *Id.* at 185–86.

126. *Id.* at 186.

127. General Principles of the Civil Law of the People's Republic of China (promulgated by Order No. 37 of the President of the People's Republic of China, April 12, 1986, effective Jan. 1, 1987), arts. 117–33, 1987 P.R.C. LAWS.

128. Barbara Pozzo & Lebing Wang, *Liability for Environmental Pollution with the Framework of the New Chinese Tort Law*, 19 EUR. REV. PRIV. L. 87, 87 (2011).

129. See Jones, *supra* note 8, at 357–59 (explaining the German model of the “General Part” civil code, a non-ideological pandectic code, with a focus on “individual responsibility”).

environmental damage.<sup>130</sup> Currently, the interpretation of the 2010 Tort Law in the context of environmental torts is under deliberation.<sup>131</sup> If pollutants include greenhouse gases, this would create a stronger cause of action in litigation than what exists in basic United States tort law, which thus far in climate-change suits has focused on negligence and public nuisance.<sup>132</sup> The American Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) creates a strict-liability regime for hazardous pollutants that is similar to that of China's new Tort Law.<sup>133</sup> CERCLA, however, does not apply to greenhouse gases because they are not currently defined as hazardous.<sup>134</sup>

### 1. Strict Liability and Reverse Burden of Proof

The 2010 Tort Law of the People's Republic of China states that "[a]nyone who assume[s] tort liability for infringing the civil right or interest of another person, regardless of whether that person is at fault or not as provided for by law, shall be subject to the tort liability inherent in these legal provisions (Article 7)."<sup>135</sup> This strict-liability principle means that the plaintiff need only prove damage and causation without being required to prove evidence of the defendant's negligence.<sup>136</sup> Further, according to Article 66, polluters bear the burden to prove non-liability or mitigation of liability as well as no causal relationship between their actions and the harm.<sup>137</sup> Defendants may be held liable for pollution damage even when they are within permitted pollution discharge limits. The law treats

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130. Pozzo & Wang, *supra* note 128, at 89 (explaining strict liability provisions and the law's protection of civil rights and interests, including property, health, and privacy, making it similar to protection against nuisance); *id.* at 97 (explaining burden of proof).

131. Karl Bourdeau et al., *Supreme People's Court Issues Judicial Interpretation Addressing Environmental Civil Public Interest Litigation*, BEVERIDGE & DIAMOND (Jan. 28, 2015), <https://perma.cc/L478-CJFG>; *Supreme Court Draft Interpretation Clarifies Environmental Public Interest Litigation*, CONG.-EXECUTIVE COMMISSION ON CHINA (Nov. 25, 2014), <https://perma.cc/E3JJ-QUUC>.

132. Hunter & Salzman, *supra* note 101, at 1752 (explaining that nuisance, negligence, and products liability are the most plausible climate-related claims).

133. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 107, 42 U.S.C. § 9607; *see e.g.*, Lynda J. Oswald, *Strict Liability of Individuals Under CERCLA: A Normative Analysis*, 20 B.C. ENVTL. AFF. L. REV. 579, 583 (1993) (stating that CERCLA is a strict liability statute); *see* WANG XI, ENVIRONMENTAL LAW IN CHINA 200 (2012) (citing article 66 and explaining that the polluter bears the burden of showing non-liability); *see also* ZHU XIAO, ENVIRONMENTAL LAW 287 (2014) (citing article 65 and its provision of no-fault liability).

134. Ira Gottlieb et al., *Natural Resource Damages for Climate Change—An Idea Whose Time Is Not Yet Come, Part I: NRD Claims Are Not Currently Viable Under CERCLA*, 20 ENVTL. CLAIMS J. 256, 264 (2008).

135. Pozzo & Wang, *supra* note 128, at 89.

136. *Id.* at 90.

137. *Id.* at 97.

pollution similarly to other special ultra-hazardous torts, such as product liability and high risk and dangerous activities, including explosives, poisons, and radioactive material.<sup>138</sup> China's strict, no-fault liability and defendant burden of proof contrasts with United States tort law, where negligence must be demonstrated and the burden of proof lies with the plaintiff.<sup>139</sup> As we see from the United States, proving negligence in climate-change litigation has been difficult. Thus, China's tort law is a potentially strong step in the direction of director liability for climate change under the breach of duty of care.

In China, judicial interpretations are a key source of law in the Chinese civil system.<sup>140</sup> However, they have not yet applied the 2010 Tort Law's no-fault liability provision in environmental cases; to date, this law has only dealt with no-fault liability in relation to bodily injury.<sup>141</sup> There are many environmental cases, however, in which the general principle of no-fault liability has been invoked.<sup>142</sup> For example, the Supreme People's Court of China in 2009 recently decided that, after 14 years of litigation, five factories involved in chemical dyes must pay damages (equivalent to U.S. \$75,000 plus U.S. \$15,000 in interest) to a farmer who lost his entire stock of 2.7 million tadpoles as a result of upstream pollution.<sup>143</sup> Cases such as this set a strong precedent for future no-fault liability pollution litigation.

Chinese tort law creates strict liability for environmental pollution damage similar to CERCLA. Article 107(a) of CERCLA imposes strict, no-fault-based liability, which could be used to pierce the corporate veil and impose personal liability on company directors, corporate officers, lenders, and shareholders for corporate environmental damage.<sup>144</sup> In interpreting environmental laws, "courts have not dismissed the general principles of corporate law."<sup>145</sup> The Supreme Court in *United States v. Bestfoods*, for example, is careful to allow the corporate veil to be pierced under CERCLA only when directors are mismanaging their duties under corporate law.<sup>146</sup> Although environmental negligence need not be found, fault under corporate law is thus required. In general, however, although the scope of

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138. *Id.* at 90.

139. Charles McElwee II, *Who's Cleaning Up This Mess?*, CSRCHINA.NET, <https://perma.cc/L9EQ-339K> (last visited Jan. 23, 2017).

140. Pozzo & Wang, *supra* note 128, at 87.

141. Email from Xiaoqing Xiong, Vermont Law School (April 2012) (on file with author).

142. Pozzo & Wang, *supra* note 128, at 90.

143. *Eight Cases That Mattered*, CHINA DIALOGUE (July 26, 2011), <https://perma.cc/YP9D-LQNT>.

144. David Ong, *The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives*, 12 EUR. J. INT'L L. 685, 702 (2001).

145. *Id.* at 703.

146. *United States v. Bestfoods*, 524 U.S. 51, 62–64 (1998).

corporate environmental liability has expanded under CERCLA, United States courts “have not held corporate officers, individual shareholders, or parent corporations liable for cleanup costs.”<sup>147</sup> Ultimately, in the United States, the wrongful act and the actor’s involvement are critical to impose liability.<sup>148</sup>

Thus, by applying strict liability, where the polluter bears the burden of proof and liability is apportioned between and among polluters, China’s tort law provides great potential for litigating pollution damage.<sup>149</sup> The remedies laid out in the 2010 Tort Law in China include removing the hazard and providing compensation for losses.<sup>150</sup> The lack of reliance on proving negligence for environmental liability in China is a benefit for claimants.

## 2. Comparing the Privilege of Power Between the Individual and the State in the United States and China

In China, environmental tort legislation creates a potential private cause of action for climate change similar to public claims in the United States under CERCLA.<sup>151</sup> Thus, private claims, rather than public claims, may be more common in China. This is an interesting contradiction to China’s tradition of law, which has been historically public in nature, rather than private. It does make sense, however, that if the State is the understood authority over public resources, it would not be left to the citizen to litigate offenses that are public in nature. In China, the relevant tort subject matter is not the environment per se, but the loss of rights for other people, not the rights of natural resources.<sup>152</sup>

Similarly, where in the United States the individual is seen to have a larger role in ensuring justice by protecting his or her rights through litigation, with a less active state, the public’s natural resources (such as the air or climate) would fall more under the authority of individuals through public interest claims.<sup>153</sup> Instead of encouraging individuals to take action in pursuing public-interest claims, cases like *Connecticut v. American*

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147. Ong, *supra* note 144, at 703.

148. *Id.*

149. Tseming Yang & Adam Moser, *Environmental Tort Litigation in China*, 41 ENVTL. L. REP. 10895, 10896 (2011).

150. Pozzo & Wang, *supra* note 128, at 96.

151. WANG, *supra* note 133, at 199–200 (2012) (translating and summarizing the Tort Liability Law of 2009, especially article 2, on personal rights, and article 68, on environmental liability); *see infra* pp. 15–17.

152. Pozzo & Wang, *supra* note 128, at 95.

153. Stephen M. Johnson, *Sue and Settle: Demonizing the Environmental Citizen Suit*, 37 SEATTLE U. L. REV. 891, 895 (2014).

*Electric Power* afford greater responsibility to the states to address these public issues.<sup>154</sup> In contrast, depending on the outcome of China's 2010 Tort Law interpretations in responding to environmental harms, China may be moving closer to placing the burden of liability for climate change in the hands of private actors to pursue claims against corporate directors. The question remains whether power concentrated in the hands of the State or in the individual is more effective in fighting climate change.

#### IV. PARTICIPATION IN CLIMATE GOVERNANCE IN THE UNITED STATES AND CHINA

The functional similarity in the privilege of power between the state and the individual and challenges to public-interest litigation based on corporate-director liability in both countries suggests that great opportunity for public participation in climate governance may exist in these similarities and outside the realm of litigation. Both China and the United States consist of large populations with globalized, modern-industrial, mostly urban lifestyles that, through the ineffectiveness of litigation, may share individual feelings of disempowerment and disengagement in climate-change governance.<sup>155</sup> Regardless of contrasting democratic and legal traditions, the functional similarity in the opportunities for public participation in climate governance in the United States and China, however, suggests an underlying, untapped solidarity among individuals in both societies in relation to climate change.

For example, the "New Sustainability" scenario envisions a revolution in values and consciousness, where society turns to "dimensions of fulfillment [encompassed in] the quality of life, the quality of human solidarity and the quality of the earth."<sup>156</sup> The New Sustainability vision recognizes this human solidarity and identifies the framework in which it can be activated.<sup>157</sup> In this, the "equal participation movement . . . contribute[s] . . . to openness and accountability of political

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154. *Am. Elec. Power Co.*, 406 F. Supp. 2d at 274.

155. *Id.* at 19–22; cf. Shawn M. LaTourette, *Global Climate Change: A Political Question?*, 40 RUTGERS L.J. 219, 240 (2008) (listing a few successful climate-change suits); cf. Tan Kai Ling, *From Koyoto to Post-2012: The Implications of Engaging China for Environmental Norms and Justice*, 17 U. BALT. J. ENVTL. L. 33, 62 (2009) ("[C]limate change victims should consider their legal strategies successful if they contribute to *reframing* the political problem in a way that fosters more popular support.").

156. PAUL RASKIN ET AL., GREAT TRANSITION: THE PROMISES AND LURE OF THE TIME AHEAD 42 (2002).

157. *Id.* at x.

and institutional processes,” but is fundamentally built on the globalization of civil society in which networks and alliances across traditional boundaries, known as VBOs, proliferate.<sup>158</sup> Importantly, “VBOs dedicated to action . . . provided the staying power for permanent change . . . [by harnessing] the willingness of people, individually and in groups, to take responsibility for solving problems themselves.”<sup>159</sup>

One model of climate governance is the creation of VBO climate eco-teams, each comprised of citizens of both the United States and China. Through regular, biweekly or monthly exchanges, facilitated by translation and, as necessary, neutral guidance, climate eco-team members would discuss the challenges and opportunities in their respective communities, share resources, and find inspiration and support from others who are tackling surprisingly similar problems across the globe. Through dialogue, brainstorming, and growing trust, climate eco-team members would create a psychological and emotional platform for individuals from different countries to enunciate first that they care, and secondly, articulate what adaptation and mitigation efforts they can reasonably make in their respective lives. This initiative could be expanded, where transboundary teams compete against other similarly comprised teams. Because making incremental changes in lifestyle is critical but difficult, by improving the sense of human connection in embarking on this change, climate eco-teams would facilitate this transition to climate sustainability and help people see this abstract problem in more meaningful, manageable, and positively reinforcing terms.

#### CONCLUSION

The legal tradition in China dictates that corporations are based on kinship and a sense of collective duty, which extends to the wider community and even the entire empire. Modern SOEs in China maintain the theoretical framework of family. Also, in all forms of corporation (public and private) in China, the notion of mandatory directorship creates an impetus under current law, for greater director duty of care for social concerns than would be found in the United States. In the United States and China, corporate law relies on tort law for director-duty-of-care liability for environmental damages. The new tort law in China enables plaintiffs to circumvent the often-difficult task of proving negligence in pollution and climate-change cases and has made important headway on the ground. In

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158. *Id.* at 87.

159. *Id.*

fact, China's 2010 Tort Law creates a claim of action similar to public statutory claims in the United States. Interestingly, Chinese tort law places potential climate-change litigation more in the sphere of private rights of nuisance. This contrasts with United States tort law, where public rights over nuisance have been more commonly the subject of climate litigation in the United States. This difference between the United States and China is not surprising because, to the Chinese, public matters are the responsibility of the State, whereas in the United States, the individual is empowered to engage in the legal forum to protect what is public. The implementation of China's 2010 Tort Law remains a notorious challenge, however. And, despite the law's strict liability regime, the Supreme People's Court has not ruled on whether its interpretation includes environmental pollution.

Despite the power of the State in China to create a greater duty of care for the environment, the political will for this is mixed. Corporate law in both the United States and China creates functionally similar barriers and opportunities for public participation in climate governance in both countries. Greater solidarity may be possible through other forums of public participation. With the corporation and its concept of agency as the dominant model for organizing resources, the differences between nation states are radically less apparent in determining the production of goods, services, and resulting waste. In fact, the most powerful venue for public participation may be through new VBOs, such as climate eco-teams, in which people facing similar challenges on opposite sides of the globe may be motivated to reduce their carbon emissions, adapt to climate change, and share their experiences, resources, and ideas in an open and unjudgmental environment. This value-based, team-oriented process of creative problem solving to meet the personal challenges in making a shift toward a more carbon-neutral lifestyle is a model of participation in climate governance that needs more attention.