The (Geo)Politics of Controlling Shareholders

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Ron Gilson and participants at the TIL conference in Tel Aviv, particularly my commentator Tamar Groswald Ozery, provided helpful comments on a previous draft. Roland Chan and Peggy Xu, LL.M. and J.D. students at Stanford Law School, respectively, provided excellent research assistance. Any shortcomings are my own.

Abstract

Corporate governance scholarship on controlling shareholders has focused almost exclusively on shareholder wealth diversion (“tunneling”) and creation (“idiosyncratic vision”). This essay shifts the focus to the fusion of political and economic power inherent in corporate control, and the wide-ranging geo-strategic and domestic political implications of this fusion beyond the boundaries of the firm. The approach is illustrated with examples from a variety of corporate capitalist systems operating globally today, and a survey of the numerous policy domains in which firms with controlling shareholders are key protagonists: national security, economic sanctions, stock exchange competition, corporate influence on domestic political systems, and ESG. Particularly in a period of heightened concern for corporate externalities and non-financial interests of stakeholders, analysis of the (geo)political dimensions of corporate control should be within the purview of corporate law scholars.

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The (Geo)Politics of Controlling Shareholders

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Abstract

In this essay, I extend the analysis of controlling shareholders typically reflected in corporate governance scholarship – fundamentally framed in terms of shareholder wealth creation and diversion at the behest of the controller – to the increasing (geo)political significance of firms with controlling shareholders. This effort requires shifting the unit of analysis to the fusion of political-economic power inherent in corporate control, and examining the implications of this fusion beyond the boundaries of the firm itself. I illustrate the approach by analyzing examples from a variety of new and old corporate capitalist systems operating globally today, and by surveying numerous policy domains in which firms with controlling shareholders are key protagonists: national security and economic sanctions, stock exchange competition, corporate influence on domestic political systems, and ESG. Expanding the lens through which controlling shareholders are viewed sheds light on their considerable influence in largely unexplored realms of wide-ranging geostrategic and political importance.

INTRODUCTION

Elon Musk has been called a "geopolitical chaos agent" for inserting himself into volatile conflicts around the world, for example by providing Ukraine a satellite internet system in the midst of the Russian invasion.[1] The Chinese government launched a "detycoonification" campaign to curb the influence of billionaire founders of private firms such as Jack Ma in its domestic internet industry.[2] Lee Jae-yong, heir to the controlling patriarch of Samsung, a business group virtually synonymous with Korea's impressive economic development, was jailed for bribing his country's president in an incident leading to her impeachment.[3] In order to avoid delisting for failure to comply with audit inspection requirements, a federal statute now requires foreign firms listed on U.S. securities exchanges to provide the Securities and Exchange Commission with documentation establishing that they are not "owned or controlled by a [foreign] governmental

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[*] William F. Baxter – Visa International Professor of Law, Stanford Law School; Senior Fellow (by courtesy) Freeman-Spogli Institute for International Affairs, Stanford University; Member, European Corporate Governance Institute. Ron Gilson and participants at the TIL conference in Tel Aviv, particularly my commentator Tamar Groswald Ozery, provided helpful comments on a previous draft. Roland Chan and Peggy Xu, LL.M. and J.D. students at Stanford Law School, respectively, provided excellent research assistance. Any shortcomings are my own.

[1] How Elon Musk Became a Geopolitical Chaos Agent, New York Times, Oct. 26, 2022.

[2] China's Rulers Want More Control of Big Tech, The Economist, April 8, 2021.

[3] Questions Hover Over Samsung as Chief Returns to Prison for Bribery, NY Times, Jan. 18, 2021, https://www.nytimes.com/2021/01/18/business/south-korea-samsung-prison-lee.html. Disclosure: I served as an expert witness on behalf of a U.S. investment fund in an investor-state arbitration proceeding against the Republic of Korea, relating to a merger of two Samsung firms underlying the impeachment charges against Park Geun-hye.

entity,"[4] reflecting Congressional frustration at the Chinese government's treatment of commercial information as state secrets beyond the purview of foreign regulators.

To date, comparative corporate governance scholarship has had a blind spot with respect to the role of controlling shareholders in geopolitical affairs and domestic politics. The debate on controlling shareholders over the past two decades has taken place within the confines of agency cost analysis, framed by the overriding focus on the relationship between the founder-controller and the minority investors in the enterprise: the creation and distribution of wealth in the controlled firm.[5] Yet despite the truism that corporations are some of the most important actors in the world today, scholars have not examined the distinctive role of controlling shareholders in the exercise of corporate power and the range of policy domains in which controlling shareholders and their firms are key protagonists. Economic success, market power, and control over valuable resources generates political influence. Political connections, in turn, are often a key variable in obtaining corporate control and its accouterments. Turning the focus on this interaction highlights issues of potentially more far-reaching significance today than the problem of "tunneling" and protection of a founder's "idiosyncratic vision" that have preoccupied corporate governance scholars for a long time.[6]

In this essay, I shift attention from corporate governance scholarship's typical perspective on the economic impact of corporate control to its broader significance in geopolitical relations and domestic political systems. Doing so requires examining aspects of the power of corporate control distinct from its effects on firm wealth creation and diversion. The power of corporate control often includes the power to influence law and policy, or to affect relationships among nation states. At times, it may be virtually inseparable from the power of the state to implement governmental or political agendas. Not surprisingly then, the power of corporate control has often been coopted by governments – either through direct ownership of enterprise or via implicit arrangements with private controllers, as an engine of national economic development or in the operation of a kleptocracy. Controlling shareholders, in turn, have often managed to capture elements of the state or heavily influence patterns of state-corporate interaction. The very act of cloaking power in corporate entities and integrating them into the global economy has significant geopolitical implications. Particularly at a moment when the impact of corporations on society is receiving considerable attention,[7] it is necessary for corporate governance scholarship to grapple with the global ramifications of the power of corporate control. Expanding the lens through which controlling shareholders are viewed sheds light on their considerable influence in heretofore unexplored realms of wide-ranging geostrategic and political importance.

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[4] Holding Foreign Companies Accountable Act, Pub. L. 116-222, 134 Stat. 1063 (Dec. 18, 2020), codified at Section 104(i)(2)(B) of the Sarbanes-Oxley Act, 15 U.S.C. 7214.

[5] One exception is the work of Mariana Pargendler. See Mariana Pargendler, Controlling Shareholders in the Twenty-First Century: Complicating Corporate Governance Beyond Agency Costs, 45 J. Corp. L. 953 (2020); The Grip of Nationalism on Corporate Law, 95 Indiana L.J. 533 (2020).

[6] See infra text and notes __.

[7] See, e.g., Colin Mayer, Prosperity: Better Business Makes the Common Good (2018) (setting an agenda for establishing the corporation as a powerful force for promoting social and economic wellbeing); Martin Lipton, Corporate Governance: The New Paradigm, Harv. L. Sch. F. on Corp. Governance (Jan. 11, 2017), https://corpgov.law.harvard.edu/2017/01/11/corporate-governance-the-new-paradigm/ (arguing that "corporations and institutional investors can forge a meaningful and successful private-sector solution" to social problems that preempt regulatory responses of government).

The essay has three parts. Part I explores a gap between the way corporate control power is treated in corporate governance literature and the contemporary importance of firms with controlling shareholders in national political systems and geopolitical affairs. Part II analyzes the features of firms with controlling shareholders that amplify their (geo)political significance, and illustrates their role in a wide variety of corporate capitalist systems. Part III examines a wide range of policy domains in which controlling shareholders are key protagonists, illustrating their influence in national security regimes, stock exchange competition, economic sanctions, domestic political systems, and progress on ESG efforts.

I. THE POWER OF CORPORATE CONTROL AND ITS BROADER IMPLICATIONS

Tautologically, a controlling shareholder has the power to control a corporation,[8] subject to the regulatory capacity and inclination of the state.[9] Corporate governance scholarship has traditionally problematized a single dimension of the power of corporate control – the controlling shareholder's capacity and incentive to extract wealth ("tunnel") from the minority shareholders.[10] Scholarship in this genre reached its apotheosis in the law and finance literature, which linked patterns of ownership concentration and dispersion around the world to the "quality" of corporate law associated with different legal families. "Good" (i.e., agency cost minimizing) corporate law was said to foster the dispersion of share ownership without fear of expropriation, while "bad" corporate law leads to the concentration and ossification of corporate ownership.[11] From this agency cost perspective, the power of corporate control carries negative connotations captured by the mostly pejorative term "private benefits of control." Thus, a longstanding question for corporate governance scholars is how to "control" controlling shareholders.[12] A more positive spin on the agency relationship between controller and minority focuses on the monitoring capacity and project implementation contributions of the controlling shareholder and the private benefits required to compensate it for performing these roles for the benefit of all shareholders.[13]

More recent corporate governance scholarship has turned the focus on corporate control power in a different direction – the long-term protection it provides to the firm's founder to pursue

[8] In mechanical terms, this power arises from possession of sufficient votes to control the corporation's board, which appoints senior management and directs corporate strategy. The methods of amassing sufficient votes vary. See Lucian Bebchuck, Reinier Kraakman and George Triantis, Stock Pyramids, Cross-Ownership and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash Flow Rights, in Randall Morck ed., Concentrated Ownership 445 (2000).

[9] See Curtis J. Milhaupt, Property Rights in Firms, 84 U. Va L. Rev. 1145 (1998) (arguing that firms in a given economy are shaped by the extent to which control rights over assets are allocated to state actors rather than private agents, and the degree to which those rights are legally rather than politically or socially enforced).

[10] Corporate governance literature on tunneling is voluminous. The term originated with Simon Johnson et al., Tunneling, 90 Am. Econ. Rev. 22 (2000) (defining tunneling as "the transfer of assets and profits out of firms for the benefit of controlling shareholders"). Tunneling may take the form of ongoing related-party transactions that transfer value over time or a fundamental corporate change such as a merger that results in a large, one-time transfer of value. See John Armour et al. eds., The Anatomy of Corporate Law 145-242 (3rd 3ed. 2017).

[11] See, e.g., Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert W. Vishny, Law and Finance, 106 J. Pol. Econ. 1113 (1998).

[12] Ronald J. Gilson and Jeffrey N. Gordon, Controlling Controlling Shareholders, 152 U. Pa. L. Rev. 785 (2003).

[13] Ronald J. Gilson, Complicating the Taxonomy, 119 Harv. L. Rev. 1641 (2006); Ronald J. Gilson and Allan Schwartz, Contracting About Private Benefits of Control, 169 J. Inst. Theoretical Econ. 160 (2013).

an "idiosyncratic vision," a strategy s/he believes will generate an above-market rate of return. From this perspective, "[c]ontrol matters because business ideas take time to implement."[14] This view holds that controlling shareholders exercise their power in order to "increase the pie's size (pursue idiosyncratic vision) rather than to dictate the pie's distribution (consume private benefits)."[15] Proponents of this view argue that legal policy should relax its single-minded concern for minority shareholder protections and grant controlling shareholders "greater freedom of action."[16]

Grappling with the role of controlling shareholders in the creation and diversion of wealth is undeniably an important task of corporate governance scholarship. But this inquiry fundamentally interrogates only a narrow subset of the full dimensions of corporate control. As will be explored in the next section of the Essay, this is particularly true in the current era,[17] characterized by the splintering of the "varieties of capitalism" into a wide array of systems that feature the corporation as the key player in the economy: developmental state capitalism, Chinese party-state capitalism, Russian oligarchic-klepto capitalism, and high-tech surveillance capitalism – each of which has produced distinctive, globally active firms with controlling shareholders. The activity of these firms has generated many thorny policy dilemmas, both for their home governments and foreign policymakers.

But why should *corporate governance* scholars extend the reach of their analysis of controlling shareholders and controlled firms to these much broader (geo)political questions? Because the power of corporate control is a product of basic corporate law and governance principles, with implications extending well beyond the firm itself. Although the channels and forms of influence depend on the nature of the controlling shareholder, the power to control a corporation is a *fusion* of economic and political power. This fusion can extend the power of the state in corporate form, amplify corporate influence over the state, and sometimes have both effects simultaneously.[18] Why shouldn't corporate governance scholarship engage with all of the resulting dimensions of corporate control, rather than only a subset thereof? Particularly in a period of heightened concern for corporate externalities and non-financial interests of stakeholders, examination of the political-economic dimensions of corporate control should be within the purview of corporate law scholars.[19]

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[14] Zohar Goshen and Assaf Hamdani, Corporate Control and Idiosyncratic Vision, 125 Yale L.J. 560, 565 (2016).
[15] Id. at 560.
[16] Id. at 595-605.
[17] The (geo)political dimensions of corporate control are of course not new. A famous example is the Dutch East India Corporation, which was granted the power to colonize, mint coinage, and wage war. Today, these dimensions have been amplified by technology, instantaneous media attention, vast amounts of capital, and the truly global reach of many corporaitons.
[18] Chinese SOEs are an example of how this fusion can have both effects simultaneously. "If state capitalism allows politicians to shape companies, it also allows companies to shape politicians." Theme and Variations: State Capitalism is Not All the Same, The Economist, Jan. 21, 2012. See Curtis J. Milhaupt and Wentong Zheng, Beyond Ownership: State Capitalism and the Chinese Firm, 103 Geo. L.J. 665 (2015) (explaining Chinese state capitalism as a product of state capture).
[19] This admonition is (unintentionally) consistent with the spirit of a new, self-styled "Law and Political Economy (LPE)" approach advocated by a group of legal scholars. The LPE approach seeks to recenter legal scholarship around questions of power rather than economic efficiency, asking how law creates, protects and reproduces political-economic power, for whom and with what results. Jedidiah Purdy et al., Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis, 129 Yale L.J. 1784, 1820 (2022).

Consider some brief illustrations, starting with the most straightforward case in which the government is the controlling shareholder of a state-owned enterprise (SOE). ("State-owned" is often a misnomer, because often state equity ownership is mixed with non-state share ownership in publicly listed SOEs). In this case, while shareholder value maximization is the goal of the non-state shareholders, the state may use the corporation (effectively or otherwise) to serve public policy objectives – a strategy co-authors and I have called "policy channeling."[20] These objectives might include pursuing industrial policy goals, increasing employment, or securing state control over the "commanding heights" of the economy. States may engage in policy channeling via corporate ownership for a number of reasons: for example, state ownership might substitute for regulating private enterprises in weak institutional environments, for ideological reasons such as maintaining state ownership of the means of production, or because an SOE insulates government action and distributive decisions from public scrutiny and participation.[21] In these instances, the power of corporate control extends the power of the state (and those who control the state).

Next, consider private controlling shareholders and their interactions with the home country government. Concentrated control, typically using controlling minority share structures (pyramidal and circular ownership patterns) provides coordination benefits for a growth-minded government that facilitate economic development. It is probably not coincidental that a number of developmental "miracles" have featured close, lasting interactions between private business groups under the control of their founders and their growth-minded home governments, where the relationship between controller and government takes on characteristics resembling a bilateral monopoly.[22] Long-term, stable relationships among a small number of players reduces uncertainty and increases incentives to cooperate. High switching costs make alternative strategies unworkable or unattractive. The state and the business groups become locked in a mutually interdependent – *symbiotic* – relationship, for which continued growth is essential to both sides. But the symbiosis can also have a dark side: corruption and the retardation of institutional development. Korean economic development driven by the *chaebol* corporate groups demonstrates both the bright and dark sides of this type of symbiosis.[23]

Or consider an individual (human) controlling shareholder (e.g., Elon Musk) whose firms operate in advanced realms of technology such as space exploration, satellite communications, and autonomous vehicles. The fusion of economic and political power in such an individual arises not simply as a result of his status as a controlling shareholder of leading firms in an industry or as result of market power, but also through a combination of attributes such as enormous wealth, mastery of social media influence, and vast ambition to create enterprises that "change the world" (and in Musk's case, to occupy a new one). In this sense, a controlling shareholder and his or her controlled corporation can exemplify what Max Weber called "charismatic authority." This is a value-neutral term referring not to a personal characteristic of the leader, but to the power a leader

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[20] Curtis J. Milhaupt & Mariana Pargendler, Related Party Transactions in State-Owned Enterprises: Tunneling, Propping and Policy Channeling, in Luca Enriques and Tobias Troeger eds., The Law and Finance of Related Party Transactions 245 (2019); Ronald J. Gilson and Curtis J. Milhaupt, Shifting Influences in Corporate Governance: Capital Market Completeness and Policy Channeling, 12 Harv. Bus. L. Rev. 1 (2022).
[21] See id.
[22] See Ronald J. Gilson and Curtis J. Milhaupt, Economically Benevolent Dictators: Lessons for Developing Democracies, 59 Am. J. Comp. L. 227, 246-47 (2011).
[23] See infra text at notes __.

(whether brilliant or misguided) possesses by symbolizing a revolutionary mission and building an organizational structure reflecting that mission.[24]

Recently, private technology firms under the control of individual founders have claimed ownership over vast quantities of data – assets of enormous, dual commercial-public significance. The influence of these firms and their controlling shareholders (recently dubbed "surveillance capitalists") on domestic politics and public discourse has generated major backlash. A prime example of course is Facebook, which has been described by Mark Zuckerberg as "more like a government than a traditional company."[25] Criticism of Facebook/Meta and other data-driven tech firms under the control of their founders has led to calls for their breakup and ignited a debate about reorienting the goals of antitrust law to address excessive concentrations of political power. Across the Pacific in a radically different political-economic environment, Chinese political leaders have grown increasingly wary of the accumulation of wealth and data in the hands of individual controlling shareholders such as Jack Ma of Alibaba and Ant Group, and have embarked on what *The Economist* calls a move to "detycoonify" the domestic internet industry.[26] The political systems in the U.S. and China are very different and the mechanisms used to retain founder control may differ,[27] but the point is the same: private controllers in the tech industry have outsized influence in the political economy that their home governments find threatening.

The fusion of political-economic power inherent in corporate control takes on geopolitical dimensions when firms with controlling shareholders are integrated into the global economy. The rise of party-state capitalism in China is the most powerful example of this phenomenon, with suspicion that Chinese firms are controlled by the Communist Party or the military sparking a bilateral confrontation with the United States over the listings of these firms on U.S. capital markets. The weaponization of Russian energy companies under the ultimate control of Vladimir Putin in Russia's oligarchic-klepto variant of state capitalism is another prominent example.

Of course, many multinational firms, including ones without controlling shareholders, have (geo)political influence.[28] And many CEOs of large public firms with dispersed share ownership are rich, well known, and powerful. But as the previous examples have attempted to show, there is something distinctive about controlled firms and controlling shareholders that merits special attention. State-owned enterprises present the most obvious distinction compared to private multinational firms, given their direct links to the state. Even at the individual (human) level,

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[24] See, e.g., Stefan Link, The Charismatic Corporation: Finance, Administration, and Shop Floor Management under Henry Ford, 92 Bus. History Rev. 85, 88 (2018) (explicating the Weberian notion of charismatic authority).

[25] Henry Farrell et al., Mark Zuckerberg Runs a Nation-State, and He's the King, Vox, April 10, 2018, https://www.vox.com/the-big-idea/2018/4/9/17214752/zuckerberg-facebook-power-regulation-data-privacy-control-political-theory-data-breach-king.

[26] The Economist, supra note __.

[27] Dual-class stock is the favored mechanism of founder control in U.S. high-tech companies, including Facebook/Meta. Control over Alibaba is vested in Jack Ma despite his small equity ownership in the firm principally via his effective control over the membership of a partnership committee that controls Alibaba. See Jesse Fried & Ehud Kamar, Alibaba: A Case Study of Synthetic Control, Aug. 11, 2020, https://corpgov.law.harvard.edu/2020/08/11/alibaba-a-case-study-of-synthetic-control/.

[28] For an early, influential exploration of the subject, see Joseph S. Nye Jr, Multinationals: The Game and the Rules: Multinational Corporations in World Politics, Foreign Affairs (Oct. 1974), https://www.foreignaffairs.com/articles/1974-10-01/multinationals-game-and-rules-multinational-corporations-world-politics.

controlling shareholders typically have vastly more wealth and considerably more influence over their firms than even the most highly paid and powerful CEOs. In contrast to a CEO, controlling shareholders exercise absolute control over the firm's formal corporate governance machinery (the shareholders meeting and the board), and can steer corporate strategy in their desired direction, subject only to the informal constraints imposed by public relations considerations or minority shareholder pressure. Moreover, individual controlling shareholders present an enduring and concentrated focal point for political influence – running from the state to the firm and vice versa – in a way that is very difficult for a typical CEO of a large, widely held firm to match.

II. VARIETIES OF CORPORATE CAPITALISM AND THE POWER OF CORPORATE CONTROL

Over the past two decades, the varieties of capitalism have expanded well beyond the binary taxonomy ("liberal market economy" versus "coordinated market economy") that proved so trenchant at the start of the twenty-first century.[29] In the global economy today, "corporate capitalist" systems exist in distinctive national political-economies ranging (when presented in ideal-types) from democratic and market-oriented to authoritarian and state-centered. Each of these systems merit characterization as "corporate capitalist" because the corporation is a central actor in an economic environment influenced to varying degrees by capital market forces, firm-level incentives, state capture, and state regulation, influence or ownership.

The mélange of forces driving the proliferation of varieties of corporate capitalism has produced distinctive firms with controlling shareholders. The precise dimensions of the power of corporate control varies with each distinctive controlling shareholder. I begin with an example from a long-extant variety of corporate capitalism practiced by developmental states – a symbiotic relationship between the state and business groups under the control of their founding families. The Korean *chaebol* corporate groups have long served as Exhibit A for the "tunneling" (expropriation) risk faced by public minority shareholders in controlling minority share ownership structures.[30] But they also illustrate the fusion of political and economic power inherent in this form of corporate control and the consequences of its exercise that extend well beyond tunneling. Next, I take up two forms of state capitalism, as practiced by China and Russia, respectively. Together, they demonstrate how state capitalism has contributed to the "(geo)political reorganization of global capitalism."[31] China's contribution is the resuscitation of the SOE as a viable economic actor, particularly when exposed to capital market discipline and infusions of private capital.[32] Russia's more dubious contribution is the reification, in corporate form, of the "grabbing hand"[33] in an oligarchic-klepto form of corporate capitalism that fuels the Kremlin's

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[29] Peter A. Hall and David Soskice, Varieties of Capitalism: The Institutional Foundations of Comparative Advantage (2001).
[30] See, e.g., N. Choi and S.Y. Kang, Competition Law Meets Corporate Governance: Ownership Structure, Voting Leverage, and Investor Protection of Large Family Corporate Groups in Korea, 2 Peking U. Trans. L. Rev. 411 (2014).
[31] Ilias Alami et al., Geopolitical Forum: Geopolitics and the "New State" Capitalism, 27 Geopolitics 995, 996 (2020).
[32] See Curtis J. Milhaupt, The State as Owner – China's Experience, 36 Oxford Rev. Econ. Pol'y 362 (2020) (noting China's role in the revival of the SOE); Gilson & Milhaupt, supra note __ (examining the importance of the capital markets and "corporatization without privatization" to Chinese SOEs).
[33] Andrei Shleifer & Robert W. Vishny, The Grabbing Hand: Government Pathologies and their Cures (1998) (presenting a "grabbing hand" model of government economic policy driven by politics, self-interest, and corruption rather than social welfare considerations).

geostrategic ambitions. I conclude with the newest form of capitalism, "surveillance capitalism," practiced most prominently by U.S. and Chinese tech firms with individual founder-controlling shareholders using dual class and analogous governance devices to amplify their voting power.

This survey is not intended as an exhaustive account of controlling shareholders in every modern form of capitalism. Rather, it aims to underscore the expansive, policy-relevant terrain exposed when analysis of controlling shareholders, operating in a variety of contemporary political economies, is expanded beyond a narrow focus on agency problems.

Developmental State Capitalism: The *chaebol* business groups have a distinctive history closely linked to the development of the Korean economy.[34] They were fostered and flourished under the authoritarian rule of President Park Chung-hee (president from 1963-1979) and his state-orchestrated development strategy. Park's government worked with the *chaebol* founders to rebuild an economy devastated by the Korean War, in what has been described as a "big-push partnership."[35] Korean economists have concluded that the formation and growth of the *chaebol* were a result of the interaction between the government's industrial policies and the *chaebol's* responses to them.[36] This partnership required the government to share the investment risks inherent in its development strategies and to intervene in the investment decisions of private firms. Exclusive licenses to invest in important sectors of the economy and funding allocated by the government, the principal source of capital accumulation in this period, were secured by persuading government officials and the president himself that commercial risks were worth taking; thus, political connections were an important resource for the *chaebol's* growth.[37]

The relationship between the *chaebol* and the Korean government that emerged out of this partnership for economic growth is best described as "symbiotic."[38] Korea's economic success has served to validate the government's reliance on the *chaebol* as engines of growth, exports, and employment. At the same time, the *chaebol* benefitted from a host of preferential government policies, low interest loans, protection from bankruptcy, and limited competition.[39]

While the symbiosis between the government and the *chaebol* produced significant economic benefits, it also delayed Korean institutional development. As an OECD Economics Department working paper notes:

> The legacy of the partnership between government and the groups, which proved successful in accelerating economic development, has impeded the transition to a full-fledged market economy. . . . As emerging economies have improved their economic institutions, the role of large business groups in many emerging

[34]*See, e.g.,* OECD Economic Surveys: Korea, June 2018, available at https://read.oecd-ilibrary.org/economics/oecdeconomic-surveys-korea-2018_eco_surveys-kor-2018-en#page1, at 76.
[35] Wonhyuk Lim, Chaebol and Industrial Policy in Korea, 7 Asian Econ. Pol. Rev. 69, 70 (2012).
[36] *See, e.g.*, Sung-Hee Jwa, The Evolution of Large Corporations in Korea: A New Institutional Economics Perspective of the Chaebol 19-27 (2002).
[37] *See* Yeon-Ho Lee, The State, Society and Big Business in South Korea 19-20 (1997).
[38] Eleanor Albert, South Korea's Chaebol Challenge, Council on Foreign Relations Backgrounder, https://www.cfr.org/backgrounder/south-koreas-chaebol-challenge 9 (emphasis added).
[39] *See* Lim, *supra* note __, at 80-81. To a limited extent, these economic benefits may have been moderated by the "Korea discount" which raised the cost of capital for *chaebol* firms. The Korea discount refers to the lower share price of *chaebol* listed firms compared to their global peers, reflecting both a generic conglomerate discount and a market-specific risk of minority shareholder expropriation in Korea's distinctive corporate governance environment.

economies has been reduced. However, in Korea, large business groups continue to play a dominant role.[40]

Successive governments have attempted to transition from "patron" to "regulator" of the *chaebol* groups.[41] This transition has proven difficult, however, because the *chaebol* also exercise outsized influence in Korea's *political* economy, shaping policymaking and influencing media coverage to their benefit. Over several decades, prominent *chaebol* leaders convicted of white-collar crimes have received presidential pardons "in the national interest" on the grounds that their service was critical to the economy.[42] As one commentator notes, "[t]he chaebol may unduly concentrate and entrench economic and political power, and use this power to extract rents and influence policymaking in ways that favor the large-firm sector at the expense of the economy as a whole."[43]

Outsized *chaebol* influence on Korean institutions created a pattern in which repeated government and legislative attempts to address problems endemic to the large business groups and establish an efficient market-oriented state have had limited success.[44] The close, collaborative relationship between the government and the *chaebol* in Korea's industrialization process fostered a climate of corruption in the country.[45] Corrupt big business support for political leaders has been pervasive under a succession of Korean presidents, most recently contributing to the impeachment of President Park Geun-hye, the daughter of Park Chung-hee.[46] Repeated problems stemming from the powerful position of the business groups have contributed to the deterioration in their social acceptance and called into question the government's continuing dependence on *chaebol*-led economic growth.[47]

These dynamics are, of course, not limited to Korea or to private corporate control structures. In Brazil as in Korea, the institutional environment for corporate law and governance has been heavily influenced to the benefit of controlled firms (SOEs in Brazil; family-founder controlled firms in Korea). And as in Korea, connections between the political establishment and

[40] Randall Jones, Reforming the Large Business Groups to Promote Productivity and Inclusion in Korea, OECD Economics Department Working Papers No. 1509, Oct. 5 2018, at 17 (internal citation omitted).
[41] Lee, *The State*, supra note __, at 1-2.
[42] Examples include Chey Tae-won of SK Group, Lee Geon-hui of Samsung (pardoned twice), and most recently, his son Lee Jae-yong. According to the Korean government, Lee Jae-yong was reinstated as vice-chairman of Samsung despite a ban on convicted criminals holding corporate office "[i]n a bid to overcome the economic crisis by revitalizing the economy." Christian Davies and Song Jung-a, Samsung Heir Lee Jae-yong to Win Presidential Pardon, Financial Times, Aug. 12, 2022.
[43] Lim, supra note __, at 84.
[44] Yong-Ho. Lee, Participatory Democracy and Chaebol Regulation in Korea: State-Market Relations under the MDP Governments, 1997–2003, 45 Asian Survey 279, 286-87 (2005).
[45] *See* I. Jun et al., Business Groups and Regulatory Institutions: Korea's Chaebols, Cross-company Shareholding and the East Asian Crisis, 9 Asian Bus. and Mgmnt 499, 500 (2010). The OECD's Economic Survey of Korea concludes that "[t]he concentration of power and wealth in the business groups has led to corruption based on their links to political leaders." OECD Economic Surveys, Korea 16 (2018).
[46] GlobalSecurity.org. Korean Corruption, available at https://www.globalsecurity.org/military/world/rok/corruption.htm, at 2.
[47] See, e.g., Council on Foreign Relations, South Korea's Chaebol Challenge, May 4, 2018, https://www.cfr.org/backgrounder/south-koreas-chaebol-challenge (noting that "the cozy relationship between the chaebol and the government has increasingly raised the public's ire" and that "Chaebol, once seen as instruments of growth, have become financiers for the government and 'contributed more to social inequality than to society.'").

a controlled firm vital to the national economy created an environment rife with favoritism and economic distortions, culminating in the impeachment of a president.[48]

Chinese Party-State Capitalism: The governance characteristics of Chinese SOEs generate an unusually potent fusion of economic and political power. This fusion makes the SOE a convenient instrument of policy channeling for the party-state.

The creation of China's modern stock markets in 1990 provided access to private capital as a means to fund SOE restructuring and facilitated a measure of external discipline on their managers. State-run businesses were hived off of government bureaus, cloaked in corporate form with the standard set of attributes provided by a newly adopted Corporate Law, and packaged for listing on the stock exchanges.[49] The outcome of this process was a large number of publicly listed mixed ownership companies over which the party-state retained effective control or influence – a process of *corporatization without privatization*.[50]

The structure of the SOE regime that emerged in the early 2000s reveals its policy orientation. On one hand, the formal organizational transformation and public listing of the SOEs lends these firms outward resemblance to publicly listed companies everywhere. China's holding company for central government SOEs (SASAC)[51] is the sole shareholder of about 90 parent holding companies of business groups containing several hundred publicly listed subsidiaries in total, many of which are Fortune Global 500 companies. A single SOE business group under SASAC's control may have a labyrinthine network of over 100 subsidiaries, several of which may be linked through equity ownership to firms in other SOE business groups.[52] The ownership structure of China's central SOEs might be loosely analogized to a single massive, diversified Korean *chaebol* business group, where the party-state (acting ostensibly through SASAC) plays the role of founder and controlling shareholder, together with public (nonstate) minority shareholders.

But control over the SOEs has remained with the party-state principally through political mechanisms rather than as a result of its equity ownership.[53] Institutionalized party penetration of corporations mirrors the Leninist practice of creating a parallel party governance structure vis-à-vis the organs of the state. Party committees operate within each SOE group member corporation. A dual corporate and party personnel system in SOEs ensures that senior SOE managers show fealty to the party. Overlaps between the two systems are rather uniform, such that a corporate manager of a given rank typically holds a position of equivalent rank in the party system. Within

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[48] The sprawling *lava jato* corruption scandal in the mid-2010s was centered around Petrobras, a majority state-owned oil company.

[49] *See* Carl E. Walter and Fraser J.T. Howie, Red Capitalism: The Fragile Financial Foundations of China's Extraordinary Rise (2011) for a critical account of this process.

[50] Nicholas Howson, China's "Corporatization without Privatization" and the Late Nineteenth Century Roots of a Stubborn Path Dependency, 50 Vand. J. Int'l L. 961 (2017).

[51] The State-Owned Assets Supervision and Administration Commission (SASAC) is an agency formed under the State Council (cabinet) ostensibly acting as an investor on behalf of the Chinese people.

[52] For a startling visual presentation of a single SOE business group under SASAC control, see Li-Wen Lin and Curtis J. Milhaupt, We are the (National) Champions: Understanding the Mechanisms of State Capitalism in China, 65 Stan. L. Rev. 697, 733, fig.5 (2013).

[53] See id.

this system, the party, working through SASAC and the company-level party committees, is able to influence boards of directors in the appointment, removal, remuneration and supervision of senior managers, and with respect to major business decisions.[54]

As is apparent from these regime design features, maximizing private investor value has never been the ultimate goal of this state system of corporate ownership. China's leaders view the SOEs as a means of maximizing the state's utility in nonpecuniary, as well as pecuniary ways, and at the *country*, rather than the corporate, level. In Chinese SOEs, as well as strategically important privately controlled firms,[55] some of the broadest political and social implications of the power of corporate control are visible.

Russian Oligarchic-Klepto State Capitalism: The Russian economy is dominated by firms with controlling shareholders – state-owned enterprises managed by close associates of President Vladimir Putin and individuals in Putin's inner circle.[56] Controlled firms in Russia generate cash flow to support Putin's autocracy and finance his geostrategic ambitions, including the disastrous invasion of Ukraine. As one commentator notes, "[t]he problem is not only state capitalism but how the Kremlin pursues it. It ignores competition, investment, technological development, and entrepreneurship. The state enterprises have many other purposes – political control, social mitigation, and personal enrichment of the Putin elite…"[57] In this oligarchic-klepto variant of state capitalism, the "Russian state has regained control of the 'commanding heights' of the economy ….Yet the state control of these big enterprises is illusory because a small group of men loyal to Putin personally exercises this control."[58] Thus, Putin may be described with minimal hyperbole as the "controlling shareholder of all of Russia."[59]

Russia's contemporary variety of oligarchic-klepto state capitalism emerged in several steps.[60] The first step was private accumulation of wealth as Putin's coterie, having tamed the Yeltsin-era oligarchs, emerged from St. Petersburg and moved into positions of power. The second step began with the takedown of Mikhail Khodorkovsky in 2003 and the effective re-nationalization of Yukos,[61] which re-emerged as Rosneft, under Putin's deputy Igor Sechin. In this

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[54] The role of the party in Chinese SOE governance was elevated and formalized in a "party-building" policy launched in 2015. The policy required adoption of a series of amendments to SOE corporate charters ranging from purely symbolic to highly intrusive, including a requirement that major corporate decisions be reviewed by the party committee before they could be adopted by the board or management. See Lauren Yu-Hsin Lin and Curtis J. Milhaupt, Party Building or Noisy Signaling? The Contours of Political Conformity in Chinese Corporate Governance, 50 J. Legal Stud. 187 (2021).

[55] See infra text at notes __.

[56] Karen Dawisha, Putin's Kleptocracy: Who Owns Russia 331 (2015) ("The capture of the state and its financial reserves by the cronies around Putin has been a distinguishing feature of his entire rule.").

[57] Anders Aslund, Russia's Crony Capitalism: The Path from Market Economy to Kleptocracy 99-100 (2019).

[58] Id. at 129.

[59] Catherine Belton, Putin's People: How the KGB Took Back Russia and Then Took on the West 393 (2020) (quoting a "Russian tycoon" interviewed by the book's author).

[60] Dawisha, supra note __, at __.

[61] Following the dissolution of the Soviet Union, Khodorkovsky emerged as one of Russia's richest people through control over oil company Yukos, one of the major firms created in the privatization of state assets. In 2003, Khodorkovsky was jailed and stripped of control over Yukos on dubious tax evasion charges after founding a reform-oriented civil society organization. See Curtis J. Milhaupt & Katarina Pistor, Law and Capitalism: What Corporate Crisis Reveal about Legal Systems and Economic Development Around the World 149-169 (2008) (examining the "renationalization" of Yukos).

phase, Putin's allies in the government took positions on the boards of the SOEs they supervised. This secured funding for the SOEs, and impunity from the legal process for the government officials. In this way, by the first decade of the 2000s "a mutant had evolved that is neither socialism nor capitalism, but some hitherto unknown creature. Its defining features are the merging of money and political power; the institutionalization of corruption; and the domination of the economy by major corporations, chiefly trading in commodities, which flourish thanks to public resources."[62] After Putin had resumed the presidency and beaten back Dmitry Medvedev's apparent support for modernization during the latter's stint as president,[63] "Putin moved robustly to implement his third phase: direct control of the economy by his cronies… Finally, we had a definitive answer to the question 'Who owns Russia?'"[64]

In a loose parallel with developments in China, even listed firms with controlling shareholders who are outside the close Kremlin circle have pursued a strategy of becoming "junior partners of the state" in the 2010s with the tightening grip of the state on private business.[65] As Russian scholars have noted,

> The Russian state considers big private business as its order-taking partner and this makes the state very much interested in preserving high concentration of ownership of major Russian companies. It is much easier for the state to deal with a limited number of controlling shareholders rather than with a large number of portfolio investors, especially with politically influential Western institutional investors.[66]

Beyond the deleterious effects of this variant of state capitalism on the rule of law in Russia and the domestic economy, the near-complete fusion of political and economic power in this system has significant geopolitical implications because Russia is an energy superstate, as long as fossil fuels remain critical to the world economy. Western demand for Russian oil and gas, as well as other commodities, connects firms subject to Putin's ultimate control to global markets and investment, providing them with protection and legitimacy, and imbuing them with considerable geopolitical significance.[67] Most importantly, Russia's virtual monopoly on the supply of natural gas to central and eastern Europe gives the Kremlin a uniquely powerful tool of unilateral economic sanctions, because it does not have to coordinate implementation with other states and targets of the sanctions cannot easily circumvent them.[68]

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[62] Id. at 335 (quoting Andrei Piontkovsky, The Dying Mutant, 20 J. Democ. 52 April 2009).
[63] Dmitry Medvedev served as president of Russia from 2008 to 2012 and prime minister from 2012-2020. As president, Medvedev promised modernization and reform, but his stint as president is now widely seen simply as a placeholder for Putin, who was required to wait out a constitutionally mandated term limit.
[64] Id. at 337.
[65] Igor V. Belikov and Alla G. Dementieva, Russian Listed Companies: Controlling Shareholders and their Conduct, 17 Russian Mngmt J. 427, 440 (2020). See also Belton, supra note __, at 483-84 (discussing how even private businessmen became agents of the state in the years following Khodorkovsky's arrest).
[66] Belikov and Dementieva, supra note __, at 427.
[67] See Daniel Treisman, Putin's Sylovarchs, 51 Orbis 141, 152 (2007) ("Such moves [Putin's associates metamorphosing into international businessmen] have obvious geopolitical significant in addition to commercial rationale.")
[68] Alexander Ghaleb, Natural Gas as an Instrument of Russian State Power 5-6 (2011).

Gazprom, a publicly listed but majority state-owned firm, is the prime example of how the Kremlin uses major commercial firms as geopolitical tools.[69] Through control of Gazprom, Putin has weaponized the flow of gas to Europe in response to western support for Ukraine during the current conflict. But this is not a new tactic, and analysts have long cautioned the EU and NATO about the strategic vulnerabilities inherent in dependence on Russian energy sources, particularly natural gas.[70] Gazprom has long been the hub of a network of gas trading intermediaries in Europe, some of which are linked to Russian intelligence and organized crime.[71] Beginning well before the present conflict, the Kremlin leveraged Gazprom as a tool of coercion against Ukraine and its neighbors.[72] Gazprom may be an extreme example of the geopolitical ramifications of corporate control, but it is one of many.

High Tech Surveillance Capitalism: The centrality of data to all aspects of contemporary life, combined with the business models of some of the world's largest private tech companies involving the accumulation and analysis of user data, have given rise to what has come to be called "surveillance capitalism." Surveillance capitalism may loosely be defined as the use of data on human behavior as raw material for a new form of market exchange.[73] In surveillance capitalism, the "behavioral surplus" generated by user interactions with an internet platform or app is claimed as the property of private firms for the generation of profits; and thus, the power over this data, along with its potential manipulation for behavior modification, is held by "surveillance capitalists" such as Facebook and Alibaba.[74]

The most important practitioners of surveillance capitalism in the U.S. and China are tech firms under the control of their founders: Facebook/Meta, Alphabet/Google, Alibaba and Tencent, to name only the most prominent in both countries. In each case, the founders have used dual class capitalization structures or analogous governance techniques such as Alibaba's partnership committee to ensure perpetual, or at least long-term, control over their firms.

Given the "private" ownership of the data they generate, the controlling shareholders of these firms wield outsized influence across a range of domains of great concern to the state and public, including speech and assembly, data privacy, technological development, and national security. Thus, in a parallel with the relationship between business groups and the state in systems of developmental state capitalism, a symbiotic relationship exists between surveillance capitalists and their home governments. The limits of governmental willingness or capability to impose constraints on surveillance capitalists is illustrated in the U.S. by the dilemmas facing Congress over content moderation and liability of social network platforms, and in China by the restrained (by authoritarian standards) "rectification campaign" to reign in the operations of founder-

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[69] See e.g., Dawisha, supra note __, at 326; Aslund, supra note __, at 115 ("Gazprom is probably Russia's foremost geopolitical tool in the former Soviet Union and Eastern Europe.").
[70] See, e.g., Galeb, supra note __.
[71] Belton, supra note __, at 313-36.
[72] Aslund, supra note __, at 130-31. The Merkel government's approval of the Nord Stream pipeline project appears stunningly naïve in its failure to appreciate the strategic implications of Putin's control over the supply of gas to Europe via Gazprom.
[73] Shoshana Zuboff, The Age of Surveillance Capitalism (2019).
[74] Id.

controlled, data-rich companies in high tech (most prominently Jack Ma-controlled Ant Group), gaming and online education.[75]

The mutually reinforcing relationship between technology firms and the U.S. government had its origins at the dawn of Silicon Valley. The government saw the military potential of the technology being developed by Silicon Valley's pioneers and provided a major source of product demand. Tech firms received government support and enjoyed a favorable legal environment in which to develop their business models.[76] The relationship tightened further as government, along with every other facet of society, became heavily dependent on the internet, data, and cyber security. Today the U.S. government has not only restricted the export of advanced semiconductors (critical components in high-tech military and civilian electronics) to China and Russia, but has embarked on an industrial policy of ensuring continued superiority in this technology.

The basic dynamics of the relationship are similar in China, although the authoritarian nature of the regime adds additional, more ominous incentives to cooperate. As in the U.S., controllers of Chinese technology firms benefit from the support and protection of the government, and the government relies upon the private firms as sources of innovation and to provide the military and public sector with advanced technology, data, and cyber security. But the symbiosis is even more critical in China given the nature of the regime. The party-state relies on data and technology (for example, facial recognition technology to identify protesters) as a vital means of modern behavioral control and regime protection.[77] Contracts to supply local governments and police with surveillance technology are a major source of revenue and incentives to continue innovating in the fields such as facial recognition and surveillance AI.[78] At the most fundamental level, the Chinese Communist Party needs innovation to fuel the economic growth and social stability essential to its legitimacy, while the tech firm controllers' personal liberty and security depends upon the continued support of the party-state.

III. Controlling Shareholders and (Geo)Political Policy Domains

Firms operating in the global economy today face a highly complex geopolitical environment – involving big power rivalry, potential technological "decoupling," economic sanctions, and trade and investment frictions. This environment is not simply the corporate water

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[75] After Jack Ma publicly criticized China's financial regulatory regime, the government forced the cancellation of the initial public offering of Ant Group, the fintech firm Ma controls. A prolonged regulatory crackdown on internet platform companies ensued. Ma disappeared from public view for months and Ant Group was ultimately forced to undergo a major restructuring. Europe has been somewhat more pro-active in the regulation of data and content, at least as compared to the U.S. But Europe is not home to any internet platform companies that come close to rivalling Google, Facebook or Amazon in size or influence. The tech/data regulatory dynamic is thus far different in the EU as compared to the U.S.

[76] Shoshana Duboff, The Threat of Surveillance Capitalism and the Fight for a Human Future, Aug. 20, 2019, https://www.abc.net.au/religion/shoshana-zuboff-threat-of-surveillance-capitalism/11433716 (noting that surveillance capitalism is an "unprecedented market form that roots and flourishes in lawless space").

[77] Mercy A. Kuo, Surveillance State: Social Control in China, The Diplomat, Oct. 3, 2022, https://thediplomat.com/2022/10/surveillance-state-social-control-in-china/ ("With enough data and the right tools, Chinese leaders believe they can predict threats and problems before they even arise."); CSIS, The AI-Surveillance Symbiosis in China: China Big Data Event, https://www.csis.org/analysis/ai-surveillance-symbiosis-china-big-data-china-event (discussing the importance of facial recognition technology to autocrats).

[78] Id.

to be navigated – a given set of risks and constraints within which firms operate. Globally active corporations, many of which have controlling shareholders, have themselves contributed to the complexity of the current environment, acting as key protagonists in contemporary geopolitical contests and policy dilemmas. This section explores a range of important policy domains deeply connected to questions of corporate control and the actions of controlling shareholders.

National Security: The most acute geopolitical implications of controlling shareholders and corporate control lie in the realm of national security, together with the closely related fields of data protection and technological innovation.

The rise of China under its system of party-state corporate capitalism poses major challenges to the United States and other western countries. U.S. policy is increasingly influenced by suspicion that the Chinese Communist Party and miliary exercise influence over Chinese firms operating globally, particularly those listed on U.S. stock exchanges. These suspicions have been fueled by Xi Jinping's economic strategy, focused on SOEs, and his emphasis on loyalty to the party in all aspects of Chinese society, including the corporate realm. Suspicion is playing out today in what has come to be known as the US-China Tech War.[79]

Questions about the Chinese party-state's influence over firms began in earnest with global telecom equipment maker Huawei. The military background of its founder and suspected controller Ren Zhengfei, murkiness of the firm's governance structure, and extensive support Huawei receives from the Chinese government led the firm to be banned from U.S. networks and subjected to expansive export controls.[80] The treatment of Huawei became the template for the Biden administration's 2022 order imposing extraterritorial limits on the export to China of advanced semiconductors, chip-making equipment, and supercomputer components.[81] These export controls extend to all Chinese firms a set of sweeping restrictions originally applied specifically to Huawei.[82] These restrictions presumptively ban exports not only to specified technologies originating from U.S. firms, but also to any non-U.S. items using U.S technology.

The Biden administration order is only the most recent policy directed at Chinese government influence over its corporate sector. In 2020, Congress passed the Holding Foreign Companies Accountable Act ("HFCAA"), which requires the delisting from U.S. stock exchanges of companies whose auditors fail to submit to legally mandated inspections by the Public Company Accounting Oversight Board for three consecutive years. After a single year of non-compliance, a company must certify to the SEC that it is not "owned or controlled by a [foreign] governmental

[79] See, e.g., Michael Callahan and Curtis J. Milhaupt, The Rule of Law in the U.S.-China Tech War, in Center for Strategic and International Studies, Chinese State Capitalism: Diagnosis and Prognosis (2021).
[80] Investigative Report on the U.S. National Securities Issues Posed by Chinese Telecommunications Companies Huawei and ZTE, U.S House of Representatives, 112th Congress, Oct. 8, 2012, https://republicans-intelligence.house.gov/sites/intelligence.house.gov/files/documents/huawei-zte%20investigative%20report%20(final).pdf.
[81] U.S. Department of Commerce, Bureau of Industry and Security, Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification, 87 Fed. Reg. 26186 (Oct. 13, 2022).
[82] John Bateman, Biden is Now All-In on Taking Out China, Foreign Policy, Oct. 12, 2022, https://foreignpolicy.com/2022/10/12/biden-china-semiconductor-chips-exports-decouple/.

entity."[83] The statute reflects frustrations over Chinese government assertions that its State Secrets Law prevents access to the audit reports of Chinese companies, and Congressional suspicion that U.S. investors are funding Chinese companies carrying out Beijing's technology strategy.

Other measures seek to deny U.S. sources of funding or access to U.S. capital markets to Chinese companies that allegedly promote the interests of the Chinese Communist Party. The Department of Defense maintains a list of "Chinese military companies" operating directly or indirectly in the United States.[84] Aimed at blunting China's military-civil fusion strategy, the DoD's list identifies ostensibly civilian companies suspected of being linked to China's military. All financial transactions between U.S. persons and a company placed on the list must cease within sixty days. Out of the sixty companies on the list, 55 have controlling shareholders: 42 SOEs and 13 private companies.[85]

Excavating the backgrounds of the "Chinese military companies" on the DoD list highlights the diversity of controlling shareholder types among firms linked to the Chinese party-state, ranging from SOEs to private, founder-controlled firms with state backing and those without obvious state backing. An SOE on the list is Hangzhou Hykvision Digital Technology Co. Ltd., whose controlling shareholder is China Electronics Technology HIK Group Co. Ltd., a division of CETC, an SOE formed in 2002 with "the professed goals of producing advanced electronics for China's military and leveraging civilian technology in order to do so."[86] An ostensibly private company with extensive state support is CloudWalk Technology Co., a supplier of facial recognition technology to Chinese SOEs and public security installations. The first of the so-called "AI dragons" to go public in 2021, CloudWalk was incubated at the Chinese Academy of Social Sciences (CASS) and backed by a number of state investors, including the Shanghai City government and local government funds. The firm is controlled by its founder Zhou Xi, originally a professor at CASS, through a dual class structure giving him 60% of the voting rights compared to 20% of the cash flow rights.[87]A private firm without obvious state backing is Fujian Torch Electronic Technology Co., Ltd., a manufacturer of capacitors used in aviation, aerospace, electronic warfare and medical devices. The company is controlled by self-made billionaire Cai Mintong, who worked as a high school teacher and factory technician before founding the predecessor of Fujian Torch.[88] The diversity of these controlled firms and the backgrounds of their controllers illustrates the difficulty, in many cases, of drawing regulatory lines between corporations and the state.

U.S. tightened the Committee on Foreign Investment in the U.S. ("CFIUS") regime, a long-standing interagency national security screening process for foreign investment, expanding its

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83 Holding Foreign Companies Accountable Act, *supra* note __.

84 Available at https://media.defense.gov/2022/Oct/05/2003091659/-1/-1/0/1260H%20COMPANIES.PDF.

85 Author's calculations.

86 China Brief: A Model Company: CETC Celebrates Ten Years of Civil-Military Integration, Jamestown Brief, Vol. 12(4), https://jamestown.org/program/a-model-company-cetc-celebrates-10-years-of-civil-military-integration/. In addition to the DoD list, Hangzhou Hikvision Digital Technology Co., Ltd. was added to the Biden administration's broader sanctions list in 2022 – the first Chinese high-tech company to be included.

87 https://kr-asia.com/cloudwalk-to-be-the-first-of-chinas-4-ai-dragons-to-go-public.

88 https://www.forbes.com/profile/mingtong-cai/?list=rtb&sh=5b63075c6b5a. A website promoting the founder notes "Cai Mintong believes doing a good job of ceramic capacitors is a matter of benefitting the country and the army…" https://inf.news/en/economy/8ab924e5b05a7a02d616a13a097c9a90.html.

scope and strengthening its review powers with passage in 2018 of the Foreign Investment Risk Review Modernization Act ("FIRRMA"). Prior to FIRRMA, CFIUS review was triggered only by foreign acquisitions of *control* of U.S. entities or critical infrastructure. Under FIRRMA, CFIUS review reaches acquisitions of control or *investments giving access* to critical technology, critical infrastructure or sensitive personal data; or where the investment gives a foreign person access to information about or involvement in decision making of a U.S. business. The expanded scope of the CFIUS review process is a concession to the reality that measuring the extent of corporate control by equity ownership or board representation alone is a highly imprecise. The expansion of CFIUS also reflects a prominent U.S. national security concern over the Chinese government's ability to access U.S. user data for use in intelligence or espionage against U.S. citizens and interests.

The Chinese government has data-related national security concerns of its own, reflected in its handling of controlled firm Didi Chuxing's listing on the New York Stock Exchange in 2021. Didi, a ride-hailing platform that purchased Uber's China business, is controlled by three founders in a dual class capitalization structure which collectively gave them 52% of the voting rights (10% of the cash flow rights) of the firm as of the listing date. Didi had initially planned to list in Hong Kong, but abandoned those plans due to potential compliance problems posed by its collection of user data. After rejecting entreaties from Chinese regulators to list closer to home and a compromise offer from the Hong Kong Stock Exchange, Didi listed on the NYSE on June 30 2021.[89] Just days later, the Cyberspace Administration of China (CAC) launched an investigation into potential violations of China's National Security Law and Cybersecurity Law, banned Didi from signing up new users on its platform and ordered it to remove its app from stores.[90] The CAC review was undertaken to "guard against national data security risks, to safeguard national security and the public interest."[91] Chinese authorities subsequently asked the controlling shareholders to delist Didi from the NYSE, a move Didi's shareholders approved in May 2022. In July 2022, the Cyberspace Administration announced a $1.2 billion fine for multiple legal violations relating to Didi's collection and analysis of user data without authorization and beyond the scope necessary for its operations.[92] Didi is currently not listed on any mainland or Hong Kong exchange.

As this discussion indicates, vital foreign policy concerns have bled into the traditionally more economically oriented and seemingly arcane realm of corporate governance. Scholars have recently described what they view as "national security creep" in the United States – the expansion of national security's impact on corporate transactions.[93] But the analysis offered here indicates that causation actually runs in the opposite direction. The importance of corporations to national security interests has expanded exponentially with the increasing role of national champions and the rise of technological innovation, cyber security, and supply chain resiliency as key determinants of a nation's economic prowess and military strength. National security policy is

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[89] Jing Yang, et al., Didi Tried Balancing Pressure from China and Investors. It Satisfied Neither, Wall St. J., July 9, 2021, https://www.wsj.com/articles/didi-ipo-china-regulators-investors-trouble-11625873909.
[90] See, e.g., Arendse Huld, How did Didi Run Afoul of China's Cybersecurity Regulators, China Briefing, Aug. 2, 2022, https://www.china-briefing.com/news/didi-cyber-security-review-which-laws-did-didi-break/.

[92] Id.;Julie Zhu, et al., China fines Didi $1.2 Billion but Outlook Clouded by App Relaunch Uncertainty, Reuters, July 20, 2022, https://www.reuters.com/article/china-regulation-didi-global-idTRNIKBN2OW0BN.
[93] Kristen Eichensehr and Cathy Hwang, National Security Creep in Corporate Transactions, 123 Colum. L. Rev. (forthcoming 2023).

only catching up with the reality that the power of corporate control has vast implications for the acquisition, extension and exercise of state power.

Economic Sanctions: Russia's invasion of Ukraine in February 2022 highlighted the importance of economic sanctions in the arsenal of responses to state aggression and violations of international law. Yet controlling shareholders complicate the efficacy of economic sanctions. An example is provided by an earlier instance of Russian "malign activities:" U.S. sanctions against Oleg Deripaska in 2016 along with companies he controlled, including Rusal, one of the world's largest aluminum producers. The sanctions, imposed in response to Russian interference in the 2016 U.S. presidential election, created turmoil in the global aluminum market as prices rose and companies scrambled to secure supplies of the commodity. The EU pressured the Trump administration to lift the sanctions, and Trump granted waivers to many companies so that they could purchase Rusal aluminum. In an apparent fig leaf arrangement resulting in the lifting of the sanctions in 2019, Deripaska agreed to reduce his voting power in Rusal to 0.01 percent,[94] although he continued to hold a significant stake in En+, Rusal's controlling shareholder. Following Russia's invasion of Ukraine in 2022, Deripaska was sanctioned individually, but not Rusal, despite indications that Deripaska continues to exercise effective control over the company.[95]

A side effect of economic sanctions is that they reinforce state and/or concentrated corporate control in the target country. Longstanding U.S. and EU sanctions against Russia, for example, have actually worked to tighten the state's grip on the economy. Restrictions on foreign lending and investment increased corporate reliance on state funding, and led to the creation of new SOEs.[96] It is likely that delisting of Chinese firms from U.S. exchanges pursuant to the HFCAA and the inclusion of Chinese firms on the list of "Chinese military companies," as well as the enforcement of sanctions in the event of an invasion of Taiwan, will have a similar effect, boosting listings of Chinese firms in Hong Kong and mainland stock exchanges, increasing state funding for innovation, amplifying the trend toward an SOE-centered economy, and increasing state investment in private companies.

Stock Exchange Competition: Controlled firms are frequently the targets of competition and controversy as the world's major stock exchanges vie for listings. The drivers of this competition are diverse. Some episodes are fueled by unalloyed economic nationalism. For example, in 2022 Singapore admonished locally founded technology firms (typically controlled by their founders) that is it their "national duty" to list on the Singapore Stock Exchange.[97] Others, such as Didi's listing travails and the HFCAA's enactment, also reflect concerns over data protection or national security, as well as bilateral geostrategic competition. Other examples

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[94] "Rusal was the first major concern that was blocked and what the Trump administration did as soon as they saw the consequences of that, they gave a free pass to Rusal and Deripaska." (quoting Edward Fishman, former Russia and Europe sanctions lead at the US State Department.) "Why the US has hit some Russian oligarchs with sanctions but not others," Financial Times, April 12, 2022.

[95] The U.S. Office of Foreign Asset Control (OFAC), which enforces economic sanctions, does not consider an entity over which a blocked person exercises control, but of which they do not own 50% or more in the aggregate, to be blocked. OFAC simply "urges caution" when considering a transaction with such an entity. U.S. Department of the Treasury, Office of Foreign Asset Control, FAC No. 398, https://ofac.treasury.gov/faqs/398.

[96] Roza Nurgozhayeva, Corporate Governance in Russian State-Owned Enterprises: Real or Surreal?, 17 Asian J. Comp. L. 24, 32-33 (2022).

[97] "Singapore Courts Local Tech Giants," Financial Times, July 24, 2022.

expose the prosaic financial motives of stock exchanges and their impact on the self-regulatory functions of the exchanges. For example, the New York Stock Exchange, which permits listing of companies with dual class share structures, secured the IPO of Alibaba because its distinctive partnership governance structure was not consistent with the Hong Kong Stock Exchange's "one share, one vote" policy.[98] Losing the IPO to a rival foreign exchange spurred a change in HKSE's listing rules to permit dual class shares.[99] In an unsuccessful bid to lure the enormous IPO of state-owned Saudi Aramco, the London Stock Exchange proposed the creation of a new "premium" listing category for SOEs under which the rules on related-party transactions would be dramatically weakened.[100]

Domestic Political Influence: The "nonpecuniary private benefits of control" enjoyed by controlling shareholders include elevated socio-political status in their home countries. This influence carries potentially significant consequences for domestic political systems and institutional development. Naturally, the forms of influence can vary widely, but all political systems are vulnerable to such influence.[101]

In the United States, there is an anomalous disconnect between rising concerns over outsized political influence of the tech industry among some antitrust thinkers and politicians on one hand,[102] and discussions of dual class capitalization structures in the corporate governance literature on the other. The fact that dual class shares are the *underlying mechanism* by which tech company founders obtain the concentration of corporate power that generates elevated political influence has never, to my knowledge, been addressed in legal scholarship. The only oblique nod to this connection was made by Robert Jackson, a former commissioner of the SEC, in arguing that U.S founding principles counsel against perpetual dual class capitalization structures because they create "corporate royalty," although his stated concern was with their impact on financial markets, not the political system.[103] Complete analysis of dual-class shares and analogous control structures must take account of their political implications, a subject that has been completely neglected in scholarly literature and policy debates.[104] Adding the potential for enduring domestic

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[98] Elzio Baretto and Denny Thomas, U.S. to Get Coveted Alibaba IPO after Hong Kong Talks Founder, Reuters, Sept. 24, 2013, https://www.reuters.com/article/alibaba-ipo/update-3-u-s-to-get-coveted-alibaba-ipo-after-hong-kong-talks-founder-idUSL4N0HL10H20130925.

[99] Jennifer Hughes, Hong Kong to Push Ahead with Controversial Dual-Class Shares, Reuters, Dec. 15, 2017, https://www.reuters.com/article/us-hkex-regulation/hong-kong-to-push-ahead-with-controversial-dual-class-shares-idUSKBN1E90UR.

[100] London Reforms Set to Open Door for Listing of Saudi Aramco, Financial Times, July 13, 2017 (under the proposal, the sovereign shareholder would not have been treated as a related party).

[101] A few examples, limited to some of the protagonists in this article: corrupt interactions with political leaders (the Lee family of Samsung); extensive lobbying efforts and personal audiences with Congress (Mark Zuckerberg of Facebook/Meta); voicing public criticism of regulators in a country where few people have a platform to express dissent against the government (Jack Ma of Alibaba and Ant Group).

[102] See, e.g., Lina M. Khan, Amazon's Antitrust Paradox, 126 Yale L.J. 710 (2017) (arguing that antitrust law's current focus on consumer welfare fails to account for digital/platform-based forms of anticompetitive conduct, and that historically, antitrust law was animated by the concern that concentration of economic power also consolidates political power); Lina M. Khan, The End of Antitrust History Revisited, 133 Harv. L. Rev. 1655 (2020) (discussing Neo-Brandeisian antitrust goals of rebalancing power and checking private domination of public governance).

[103] Robert J. Jackson, Jr., Perpetual Dual Class Stock: The Case Against Corporate Royalty (Feb. 15, 2018), https://www.sec.gov/news/speech/perpetual-dual-class-stock-case-against-corporate-royalty.

[104] A related concern, the economic externalities generated by firms with dual class structures, has been discussed by scholars. See Vittoria Battocletti, Luca Enriques and Alessandro Romano, Dual Class Shares in the Age of Common

political influence by corporate founders to agency-based critiques further strengthens the case against perpetual dual-class shares.[105]

As previously noted, Chinese policymakers have done some rethinking of their own regarding the political implications of the concentration of power in the country's tech titans. Most famously, the IPO of Ant was cancelled after its controlling shareholder Jack Ma publicly criticized his government's approach to the regulation of financial innovation. Ma disappeared from public view for several months after this episode, which triggered severe regulatory scrutiny of the internet industry. In response, public displays of fealty to the party and adherence to Xi's "common prosperity" policy by founder-controllers of internet firms increased significantly.

ESG: There is a complex, but to-date understudied, relationship between controlling shareholders and the effort to make corporations more accountable for addressing environmental, social and governance (ESG) issues.

Concentrated corporate ownership structures patently shape the quest for more responsible capitalism around the world. Fully or partially state-owned oil companies, for example, account for half of all global oil production and a disproportionate share of greenhouse gas emissions.[106] Saudi Arabia, home to state-owned oil giant Aramco, promotes clean energy at home but fights to prevent a decline in the consumption of fossil fuels globally.[107] Similar issues are raised by private controlling shareholders, particularly in economies where the influence of institutional investors who might press boards of directors to pursue ESG objectives is muted. Korean scholars, for example, have emphasized the importance of convincing the family *chaebol* controllers that ESG is in their private interest.[108] At the same time, however, some controlling shareholders may have significant non-pecuniary interests (such as family reputation/legacy) in using the power of corporate control for the benefit of a broad range of stakeholders. An SOE may be an effective means of implementing state policy to reduce carbon emissions or to improve an aspect of social relations in the domestic economy. Thus, the degree to which controlled firms commit to ESG may have a significant impact on the global success of the movement.

Ownership, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4046244 (arguing that the use of dual class shares should be limited in "systemically important" firms because their controllers lack incentives to internalize the firm's externalities and have "unfettered ability to inflict systemic harm on society").

[105] See Lucian A. Bebchuk and Kobi Kastiel, The Untenable Case for Perpetual Dual-Class Stock, 103 Va. L. Rev. 585 (2017) (arguing that the potential costs (benefits) of dual-class stock increase (decrease) over time; underscoring entrenchment and low equity holdings by controller as disadvantages).

[106] Ben Pincombe, Saudi Armaco and the Need to Engage with State-Owned Enterprises, PRI, Nov. 11, 2020, https://www.unpri.org/pri-blog/saudi-aramco-and-the-need-to-engage-with-stated-owned-enterprises/6722.article.

[107] Hiroko Tabuchi, Inside the Saudi Strategy to Keep the World Hooked on Oil, New York Times, Oct. 21, 2022, https://www.nytimes.com/2022/11/21/climate/saudi-arabia-aramco-oil-solar-climate.html. The Saudi state and its sovereign wealth fund own over 95% of Aramco's shares.

[108] See Joon Hyug Ching, Law Still Matters—ESG in a Corporate Landscape Controlled by Chaebols, ECGI Blog (April 26, 2022), https://ecgi.global/blog/law-still-matters-—-esg-corporate-landscape-controlled-chaebols ("Unless the controlling families are thoroughly convinced that ESG management will ultimately benefit their wealth and sustainability, ESG may become at best a marketing instrument to promote the firm's image, or at worst a disguise for managerial failure or private benefit extraction by controlling shareholders."). Korean family-controlled *chaebol* corporate groups, for example, are less active in corporate social responsibility than Korean family firms that are not part of *chaebol* groups. Haeyoung Ryu and Soo-Joon Chae, Family Firms, Chaebol Affiliation and Corporate Social Responsibility, 13 Sustainability (2021), available at https://www.mdpi.com/2071-1050/13/6/3016.

A threshold question is whether controlled firms demonstrate improved ESG performance as compared to non-controlled firms. As a theoretical matter, this general question has no obvious answer. Controlling shareholders may devote more, or less, attention to corporate externalities than the managers of firms with dispersed ownership, depending on their individual characteristics/preferences and the devices used to maintain corporate control.[109] A first step is to disaggregate controlling shareholders into their various types: state versus private controllers; founder- versus non-founder controllers; family controllers versus individual controllers. The mechanisms of control must also be distinguished: dual class versus controlling minority shareholding structures, versus control based on majority share ownership. Rigorous empirical testing can begin to provide answers on the impact of controlling shareholders on ESG performance only after they have been sorted according to this taxonomy.[110]

A second question, related to the issue of domestic political influence of controlling shareholders, is the role of ESG movements and stewardship codes in markets where controllers dominate. Stewardship codes are intended to invigorate institutional investor engagement with portfolio firms to advance long-term corporate sustainability goals and inclusive practices. The original Stewardship Code adopted in the UK, which propelled the global proliferation of such codes, fit a corporate governance environment of dispersed ownership and strong institutional investors.[111] These codes are an awkward fit in most of the rest of the world, where controlling shareholders are prevalent.[112] Their adoption in controlling shareholder regimes may risk diverting attention from more difficult legal reforms that would actually serve to enhance the protections of minority shareholders vis-à-vis controllers and to make controllers more responsive to social welfare concerns.[113]

The interaction between ESG, (geo)politics and corporate control raises a number of significant questions for boards of directors. For example, in addition to managing an already daunting list of stakeholder interests, are boards of globally active firms prepared to grapple effectively with geopolitical risk – ESG*G*?[114] Who do the independent directors of geopolitically

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[109] Controlling shareholders may be *more* concerned with their firm's ESG performance as a matter of personal preference (or government policy in the case of an SOE), in order to burnish their reputations, or because the costs of the firm's ESG-related actions are disproportionately borne by minority shareholders. They may be *less* concerned with ESG as a matter of personal preference (or government policy in the case of an SOE), or because they own a sufficiently large portion of the firm's cash flow rights that they are unwilling to bear the cost of the firm's ESG-related actions.
[110] For an early attempt at this form of testing, see Barry Hettler et al., Excess Insider Control and Corporate Social Responsibility: Evidence from Dual-Class Firms, 40 J. Accounting & Pub. Pol. 106877 (2021) (finding a negative association between "excess insider control" via dual-class structures and CSR ratings).
[111] Dan W. Puchniak, The False Hope of Stewardship in the Context of Controlling Shareholders: Making Sense Out of the Global Transplant of a Legal Misfit, Am J. Comp. L. (forthcoming).
[112] Hiroko Tabuchi, Inside the Saudi Strategy to Keep the World Hooked on Oil, New York Times, Nov. 21, 2022, https://www.nytimes.com/2022/11/21/climate/saudi-arabia-aramco-oil-solar-climate.html.
[113] Puchniak et al., supra note __.
[114] As the World Economic Forum notes,

> The growing multipolarity of international relations and return of overt great power rivalry are contributing to a pluri-lateralization of the world economy – a fragmentation of international trade and investment driven by politics. Uncertainty and complexity are on the rise, requiring multinational firms to take a more deliberate approach to assessing geopolitical and policy risks,

important controlled firms represent and what interests should they safeguard? Might boards be subject to *Caremark* oversight liability[115] for failing to appreciate and mitigate the geopolitical risks facing their companies, for example, the possibility of supply chain failures caused by economic sanctions or bilateral economic friction?

Even more broadly, the ESG movement represents a call for the expansion of corporate influence over many domains of *public* governance in response to real and perceived failures of governments to address pressing environmental and social problems. If the ESG movement is successful (a question well beyond the scope of this essay), the political-economic implications of corporate control will inevitably increase even further, drawing corporations, and their controllers, even more deeply into the realms of domestic politics, national security, and geopolitical rivalry.

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This brief sketch of a wide range of policy domains suggests that increased scholarly attention to the political-economic effects of corporate control can sharpen thinking about the impact and regulation of controlled firms in the global economy. For example, academic work can clarify the precise channels of (geo)political influence of controlled firms, a first step in seeking to understand whether and how to curb their influence in U.S. markets.[116] Scholarship might offer corporate governance tools as private responses to at least some of the geopolitical concerns involving SOEs.[117] For example, corporate governance devices such as independent director certification might alleviate suspicions that SOEs have non-financial motives for acquisitions of foreign companies.[118] Stewardship codes can be tailored to the specific type(s) of controlling shareholder(s) prevalent in a given country.[119] And as geopolitical issues increasingly occupy the

> including the threat of finding themselves caught in the middle of trade, investment and migration disputes or technological competition between major countries and trading blocs.

World Economic Forum, Integrated Corporate Governance 10 (2020).

[115] *In re Caremark International Inc. Derivative Litigation* (698 A.2d 959 Del. Ch. 1996) is a seminal Delaware Chancery Court decision establishing the standard for director liability for damage caused to the corporation as a result of failure to establish and maintain a functional compliance and reporting system. (The standard is "sustained or utter failure" of the board to establish or update the system in the presence of "red flags" indicating risk.) Recent decisions of the Delaware judiciary appear to have relaxed the demanding *Caremark* standard somewhat, potentially exposing boards of directors to greater risk of liability for failure to monitor than was generally thought possible in the past.

[116] One illustration is a comment letter Lauren Yu-Hsin Lin and I provided to the SEC explaining why its proposed disclosure requirements under the HFCCA would fail to reveal the extent of Chinese Communist Party influence in a U.S.-listed Chinese firm's corporate governance, and thus are of little benefit to U.S. investors or policy makers. See https://www.sec.gov/comments/s7-03-21/s70321-8587637-230902.pdf.

[117] For example, Ronald Gilson and I have proposed suspending the voting rights of portfolio company shares held by sovereign wealth funds and restoring those rights when the shares are transferred to a non-sovereign wealth fund buyer. This would limit voting influence of foreign-government-controlled investment funds, while maintaining their economic incentive to invest, since the value of the shares is unchanged for the next owner. Ronald J. Gilson and Curtis J. Milhaupt, Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Merchantilism, 60 Stan. L. Rev. 1345 (2008).

[118] See, e.g., Jeffrey N. Gordon and Curtis J. Milhaupt, China as a "National Strategic Buyer:" Toward a Multilateral Regime for Cross-Border M&A, 2019 Colum. Bus. L. Rev. 192 (2019) (proposing that independent directors of state-owned enterprises be required to publicly certify and document that the SOE has a financial (non-state, non-geostrategic) motivation for an acquisition of a foreign company).

[119] The only extant example of this form of tailoring is Singapore's Family Code, in recognition of the fact that family controlled firms without significant institutional investor influence are prevalent in that country. See Dan

attention of boards of directors, corporate governance insights can contribute to the design of corporate compliance and reporting systems to reduce risks related to geopolitical tensions and events.[120]

Conclusion

This essay has advocated in favor of greatly widening the lens through which controlling shareholders are viewed by corporate governance scholars. Doing so prompts new thinking about the power of corporate control and its implications well beyond the boundaries of the firm itself – shifting the focus to the corporate protagonists who feature prominently in contemporary geopolitical tensions and corporate influence in domestic political systems. Globally, the wide-ranging political-economic effects of corporate control are, at the very least, as consequential as the economic implications of a controlling shareholder's propensity to tunnel minority shareholder wealth, a preoccupation of corporate governance studies for the past two decades. Expanding the lens through which controlling shareholders are viewed exposes a rich, policy-relevant terrain worthy of sustained analysis by corporate governance scholars.

Puchniak and Samantha Tang, Singapore's Puzzling Embrace of Shareholder Stewardship: A Successful Secret, 53 Vand. J. Trans. L. 989 (2020).

[120] See e.g., Ziad Heider et al., Geopolitical Resilience: The New Board Imperative, McKinsey, Aug. 8, 2023, https://www.mckinsey.com/capabilities/risk-and-resilience/our-insights/geopolitical-resilience-the-new-board-imperative (emphasizing that boards of directors need to understand, monitor, and mitigate geopolitical risk, and promoting the adaptation of standard corporate governance mechanisms such as diverse board membership and specialized committees to accomplish this objective).

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