The Chinese Legal System in U.S. Courts

Donald Clarke

Professor of Law and David Weaver Research Professor

George Washington University Law School

Testimony Before the U.S.-China Economic and Security Review Commission

Hearing on "Rule by Law: China's Increasingly Global Legal Reach"

May 4, 2023

Introduction

Chairman Bartholomew, Vice Chairman Wong, and members of the Commission:

I am very pleased to have the opportunity to address the Commission today on issues of how U.S. courts deal with China's legal system. I came to research this issue because having been studying the Chinese legal system for over forty years, I am frequently called on to offer expert testimony on various aspects of Chinese law in federal and state litigation. My experiences as an expert witness surprised me. If you were to read the mainstream serious media—the *New York Times*, the *Washington Post*, the *Wall Street Journal*, the *Financial Times*—you would get a single consistent message about China and the Chinese legal system: it is an authoritarian dictatorship, judges do as they are told if they receive instructions from political superiors, and there is no meaningful judicial independence. These characterizations could certainly be more nuanced, but they are not fundamentally wrong.

Yet in a surprising number of cases, I found that federal and state judges, who presumably read the mainstream media, did not seem to be getting the message. I found that their default presumption was that China was more or less like Canada, and that it was up to the party arguing that it wasn't to prove their point. And judges set the bar for that proof very high.

This experience prompted me to undertake a more systematic study to assess more accurately what exactly courts were doing when called on to assess the Chinese legal system.[1] In my remarks today, I will briefly describe the study and then address the specific questions the Commission has posed.

Outline of Research

My study involved looking at the two main types of cases where U.S. courts are called on to make an assessment of the Chinese legal system as a whole, as opposed to simply figuring out what Chinese law says about a particular issue.

The first type of case involves the enforcement of a Chinese judgment. A plaintiff has sued a defendant in China and won. The plaintiff then comes into a U.S. court and asks it to enforce the judgment, presumably because the defendant has assets in the U.S. The enforcement of a foreign judgments is almost always a matter of state law, regardless of whether the case is heard in federal or state court. The basic principle behind the law on enforcement of foreign judgments is that the plaintiff should not have to relitigate the case from scratch. At the same time, however, the enforcing court has to have some confidence that the foreign judgment was fairly procured. Consequently, the enforcing

[1] The study in question is being published this month as Donald Clarke, J*udging China: The Chinese Legal System in U.S. Courts*, 44 U. PA. J. INT'L L. 455 (2023), a copy of which is available at my publications page here: http://bit.ly/clarkepubs. Some sections of my testimony today are taken directly from that article.

court has to reach some conclusion about the foreign proceedings that produced the judgment, and perhaps about the foreign legal system as a whole.

The second type of case involves a judicially-created doctrine called forum non conveniens (FNC). In a typical case of this kind, a plaintiff sues a defendant in the U.S. The court has jurisdiction over the defendant, so it could proceed if it wished. But the defendant argues that for various reasons—for example, suppose the act being complained of occurred in China, the witnesses are in China, and Chinese law governs the result—it makes more sense for the case to be heard in a different jurisdiction (it could be another state or another country), and so the court should, as a discretionary matter, dismiss the suit and tell the plaintiff to try their luck in the other jurisdiction.

This doctrine also, at least formally, requires that the court satisfy itself that the plaintiff has at least a fighting chance in the other jurisdiction, and so again it must make some kind of assessment of the legal system of that jurisdiction.

I collected all China-related cases I could find involving enforcement or FNC covering all the years of the post-Mao era through mid-2022, and ended up with a dataset of 16 enforcement cases and 60 FNC cases. I did not look just at the judicial opinions. I wanted to know what kind of information courts were getting as well as how they were treating it, so I read all the relevant underlying filings as well—various motions made along the way, the briefs by the attorneys, and the expert witness statements, if there were any.

The results were troubling. I found my personal experience to be borne out: American judges, who presumably regularly read the accounts in the mainstream press, in practice generally seem to take the opposite view: they tend to be skeptical of arguments that judicial independence is seriously compromised or that due process is denied, even in the face of official U.S. State Department reports to the contrary, and have been willing to require plaintiffs to try their luck in Chinese courts even when they are suing the Chinese government or their claim would, if supported, be highly embarrassing to it.

One judge, for example, granted FNC dismissal to China, while conceding that dismissal to another country would not be appropriate where the courts of that country were "controlled by a dictatorship"[2]—thus implicitly making the startling finding either that China is not a dictatorship or that although it is a dictatorship, its government does not control the courts.

In almost all cases, I found that the evidence on which courts were making decisions was very thin. Only rarely did they hear from expert witnesses, and when they did, the presence of experts seemed to have no relation to the outcome of the case.

In general, I would characterize the results as troubling but not disastrous. Improvements can and should be made. Overall, FNC motions were granted 37% of the

[2] Group Danone v. Kelly Fuli Zong, No. BC372121, at 24 (Cal. Super. Ct. 2009).

time.[3] This is more than it should be, given that the doctrine calls for FNC dismissal to be granted only rarely, but at least it is less than half.

When we look at dismissals by jurisdiction, however, the picture is more troubling, with state courts granting FNC dismissal (and thus implicitly finding China to be an adequate and fair forum for the hearing of the case) 58% of the time, as opposed to federal courts, which granted it only 32% of the time.[4] Moreover, although the issue of China's adequacy as a forum was not always disputed, when it was disputed, the party arguing it was adequate won (35%) more often than they lost (31%).[5] I should note, however, that there is no obvious trend over time. The number of cases has definitely increased over the years, but the grant rate has gone up and down.[6]

The details of some of the FNC cases are troubling as well. There are many cases in which courts effectively required the plaintiffs to prove that the Chinese legal system would *not* provide them with a fair trial, as well as cases in which judges accepted arguments by defendants and their experts that China has an independent judiciary and that Chinese courts could give a fair trial even to foreign plaintiffs suing the Chinese central government itself for copyright infringement.[7] The Chinese government itself openly rejects the first proposition, and the second is, to put it mildly, a minority position among scholars of the Chinese legal system.

As for enforcement cases, the picture is mixed. In terms of pure numbers, recognition was granted in six of the sixteen cases. But the numbers by themselves are unilluminating. Recognition may be granted or denied for procedural reasons that have nothing to do with the parties' arguments about, or the court's assessment of, the Chinese legal system, or the general disposition of courts toward the recognition of foreign judgments in general or Chinese judgments in particular. Thus, a close reading of the filings and the decisions is necessary.

Overall, I classify seven cases as favorable in varying degrees to those seeking recognition of a Chinese judgment, while five cases are unfavorable. Three judgments are neutral. One case, *Shanghai Yongrun*,[8] is still pending.

On the whole, despite some tendentious reasoning and inaccurate fact-finding and citation of precedents, the overall picture in the context of judgment enforcement is not particularly alarming. I found no cases in which a Chinese money judgment was

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[3] *See* Appendix A, Figure 1.

[4] *See* Appendix A, Figure 2

[5] *See* Appendix A, Table 1.

[6] *See* Appendix A, Figure 3.

[7] *See* CYBERsitter, LLC v. People's Republic of China, 805 F. Supp. 2d 958 (C.D. Cal. 2011).

[8] Shanghai Yongrun Inv. Mgmt. Co. v. Kashi Galaxy Venture Cap. Co., No. 156328/2020, 2021 WL 1716424 (N.Y. Sup. Ct. Apr. 30, 2021), rev'd, 203 A.D. 3d 495 (N.Y. App. Div. 2022).

enforced against a party who (a) contested it and (b) had not effectively crippled itself by having previously argued that the Chinese legal system provided an adequate alternative forum, or having implicitly admitted, as in the *Yancheng* case,[9] that the Chinese courts were fair by contractually agreeing to their jurisdiction. In other words, defendants who had not already in effect agreed to proceedings in China and who showed up to contest the U.S. enforcement proceedings always won, except in one case involving recognition of the Chinese judgment for the purpose of issue preclusion only.

As with the FNC cases, the enforcement cases show very little genuine inquiry into the nature of the Chinese legal system. The evidence on which courts are making decisions about recognition is very thin.[10] This is not surprising, given that courts are not well equipped to engage in this kind of inquiry. More troubling is that as a substitute for empirical inquiry, they tend to rely on precedents without inquiring too closely into what really went on in those precedents. Thus, a careless mistaken finding by one court can spread throughout the system, and even cases that are not mistaken are cited by courts and lawyers in support of findings they never made.[11]

Questions from the Commission

In the following section of my testimony, I address specific questions posed by the Commission. In some cases, I have edited the questions slightly for clarity.

1. *Why are U.S. courts increasingly facing issues of Chinese legal judgments and why would the U.S. court system be a venue to decide issues regarding Chinese law? How are Chinese legal judgments being received in the US court system? Have they escalated in scale and scope in recent years?*

This question can be answered in four parts. First, are U.S. courts increasingly being asked to enforce Chinese judgments? In a word, no. The trend line over the last ten years is pretty flat: I found only one to three cases a year.

Second, are courts increasingly being asked to dismiss litigation brought in the U.S. to China under the doctrine of forum non conveniens? In a word, yes. The trend here is unmistakable. On the other hand, the rate at which dismissal is granted does not seem to have increased, so in that sense the problem is not getting worse.

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[9] Yancheng Shanda Yuanfeng Equity Inv. P'ship v. Wan, No. 20-CV-2198, 2021 WL 8565991, at *10 (C.D. Ill. Jan. 8, 2021).

[10] No case shows anything close to the level of analysis undertaken by the New Zealand Supreme Court in Minister of Justice v. Kim, [2021] NZSC 57 (N.Z.), https://www.courtsofnz.govt.nz/assets/cases/2021/2021-NZSC-57.pdf [https://perma.cc/NV85-37UV], in which the court undertook a detailed analysis of the possibility of torture in China.

[11] The classic example is the Supreme Court case of *Sinochem*, discussed below at text accompanying notes 19-21.

Third, we have to distinguish cases where courts have to decide a particular issue of Chinese law from cases in which courts are asked to assess whether Chinese courts can deliver due process. My study is of the latter kind of case. I did not look at cases where the only issue is what Chinese law says about a given issue, and no Chinese court proceedings are involved. This might happen, for example, if an employee who was hired and worked in China for a U.S. employer is suing the employer for a severance payment. Chinese law might well govern the employment relationship, so under conflicts-of-laws principles, a U.S. court hearing the case would need to know what Chinese law said about the matter. But as the case involves no legal proceedings in China, a U.S. court has no need to understand anything about the Chinese legal *system* as such; it just needs to figure out what the rule is, which is a much less difficult undertaking.

Finally, how are Chinese judgments being received? On the whole, sympathetically. In other words, courts tend to be skeptical of arguments that defendants did not get a fair shake in a Chinese courtroom.

On the other hand, while I am troubled by the naïveté of some judges in dealing with China-related matters, it cannot be said that all decisions enforcing Chinese judgments have in fact been unfair. In some cases, there is a contract in which parties have explicitly agreed that Chinese courts shall have jurisdiction in the case of disputes.[12] In other cases, it turns out that the defendant had, in earlier U.S. proceedings, argued for dismissal to China on FNC grounds, thus implicitly arguing that the Chinese legal system was fair. It then lost the lawsuit in China, and the plaintiff came back to the U.S. to enforce the Chinese judgment. Understandably, courts are not sympathetic to pleas by the defendant at this point that they have changed their mind and the Chinese legal system is unfair after all.[13]

2. *What are the risks involved in extending judicial comity to Chinese courts? Does a pattern of undue FNC dismissal to China, or enforcement of Chinese judgments, particularly when they do not meet due process standards, create precedent for China to exploit U.S. courts that would otherwise not dismiss or enforce?*

Comity

A good definition of comity in this context is the "principle in accordance with which the courts in one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation but out of deference and respect."[14] In my

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[12] See, for example, Liu v. Guan, No. 713741/2019, 2020 WL 1066677 (N.Y. Sup. Ct. Jan. 6, 2020), and *Shanghai Yongrun*, *supra* note 8.

[13] See, for example, KIC Suzhou Auto. Prod. Ltd. v. Xia Xuguo, No. 1:05-cv-1158-LJM-DML, 2009 WL 10687812 (S.D. Ind. June 3, 2009), Liu v. Guan, *supra* note 12, and Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co., No. 2:06-cv-01798-FMC-SSx, 2009 WL 2190187 (C.D. Cal. July 22, 2009), *aff'd*, 425 F. App'x 580 (9th Cir. 2011).

[14] Bobala v. Bobala, 33 N.E.2d 845, 849 (Ohio Ct. App. 1940).

research, the problem I found with comity as practiced by U.S. courts in the China-related cases is that it was often based on simple misstatements of law or faulty factual assumptions.

The misstatement of law comes when courts make statements such as, "It is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation"[15] or "considerations of comity preclude a court from adversely judging the quality of a foreign justice system."[16] In fact, the letter of the law of FNC and judgment enforcement calls on courts in effect to do exactly that when a party raises the issue. Moreover, there are other areas of law as well where courts are called upon to make assessments of even more sensitive issues.[17] In deportation cases where the respondent raises a Convention Against Torture defense, for example, courts must assess the likelihood of the respondent being tortured upon their return to China.

The faulty assumption is that making an unfavorable assessment of the Chinese legal system could have dire foreign policy consequences. Courts are understandably wary of intruding into foreign affairs and pre-empting congressional and executive authority in that area. But the assumption is faulty for two reasons. First, in many cases Congress or the executive branch have already made unflattering assessments of the Chinese legal system, as in the State Department Country Reports. Courts would not be adding any new provocation by simply following the State Department's lead. Second, the factual premise is simply unsupported: there is just no evidence that adverse foreign policy consequences have in fact ever resulted from an unflattering assessment by U.S. courts of the legal system of China or any other country.[18]

Precedents

The danger of accumulating precedents is real. Judges are not well equipped to figure out foreign legal systems, particularly one as opaque as China's. This strain on judicial capacity leads judges to rely on holdings or even dicta in prior opinions, as courts want to see what other courts have done in apparently similar cases. This is particularly true in the China cases, with briefs and expert declarations amassing dozens of lines of string citations that seem never to be examined closely. The problem here is that unless one reads the cases very closely, it is impossible to know if a case really is similar, and

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[15] Jhirad v. Ferrandina, 536 F.2d 478, 484-85 (2d Cir. 1976). This statement shows up frequently in the China-related cases I studied.

[16] Jiangsu Hongyuan Pharm. Co. v. DI Glob. Logistics, Inc., 159 F. Supp. 3d 1316, 1330 (S.D. Fla. 2016).

[17] For a more exhaustive discussion of all the areas of law in which U.S. courts are called upon to pass judgment on foreign legal systems, see Diego A. Zambrano, *Foreign Dictators in U.S. Court*, 88 U. CHI. L. REV. 157 (2022).

[18] This point is made in Zambrano, *supra* note 17, at 163.

whether the previous court's judgment deserves respect as a product of an adversarial process.

In the FNC context, parties moving for dismissal, and judges granting it, like to cite *Sinochem*,[19] a Supreme Court case upholding FNC dismissal to China. They will argue that the Supreme Court found China to be an adequate forum,[20] and who can argue with the Supreme Court? But if one actually reads the case, one can see that the argument is false. At the Supreme Court level, *Sinochem* involved only a technical issue of civil procedure, and the Court upheld the lower court's dismissal to China on grounds that had nothing to do with China's adequacy as a forum. It heard *no arguments or evidence* on that issue.[21] Unfortunately, busy judges don't have time to read every case cited to them.

Similarly, some of the enforcement cases are ones in which the defendant never showed up in court, and so enforcement of the Chinese judgment was granted by default. There was never any adversarial process, and so those cases should not be accorded respect as precedents. But again, it takes a professor conducting a long research project to actually read all these cases and their filings; courts are just not going to do this. Thus, one court complained that "Defendant has cited no case where an American court has refused to enforce a Chinese court judgment, let alone refused to enforce a Chinese court judgment on the basis of whether China's courts are impartial[.]"[22] When the defendant did produce such a case, the court gave it a close reading and pronounced it unpersuasive. But the court did not give a similarly close reading to the cases cited by the plaintiff in which U.S. courts had enforced Chinese judgments, and thus failed to see that all of them involved special circumstances that rendered them of little value as precedents.[23]

The very structure of common law reasoning—its path dependency—means that an ill-considered decision or principle in one case becomes stronger, not weaker, over time, and the misuse of *Sinochem* is a textbook example.

It is not clear that any of these issues create a unilateral advantage for the Chinese government in litigation. Most (but not all) of the cases are between private parties,

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[19] Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422 (2007).

[20] *See, e.g.*, Findings of Fact and Conclusions of Law, Folex Golf Indus. v. China Shipbuilding Indus. Corp., No. CV09-2248-R, 2013 WL 1953628 (C.D. Cal. May 9, 2013) (finding erroneously that the Supreme Court upheld dismissal to China "due to" the existence of an adequate alternative forum in China).

[21] I discuss the Sinochem case in more detail in Clarke, *supra* note 1, at 510-12.

[22] *Yancheng*, *supra* note 9, at *10 (citing, *inter alia*, Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co., No. 2:06-cv-01798-FMC-SSx, 2009 WL 2190187 (C.D. Cal. July 22, 2009), *aff'd*, 425 F. App'x 580 (9th Cir. 2011), and Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422 (2007).

[23] The court also cited the Supreme Court's *Sinochem* case in support of its view that Chinese courts provided fair proceedings. As noted above, *Sinochem* cannot stand for this proposition.

both of which are Chinese nationals or Chinese firms. If the Chinese government at the central or local level has an interest in the outcome of such cases, there's no reason to think it would systematically be on the plaintiff's or the defendant's side.

In some cases, of course, the interest of the Chinese government is obvious, as in the *CYBERSitter* case.[24] In that case, involving a defendant's motion to dismiss to China on FNC grounds, the court was nevertheless persuaded by the defendant's expert, Prof. Jacques deLisle, that the plaintiff, a U.S. firm alleging that the Chinese government had stolen its intellectual property, could get a fair trial in China despite the Chinese government being a defendant.[25] It found my testimony to the contrary to be "speculative."[26]

3. *In your article you discuss previous assumptions by U.S. policymakers, "That China would be integrated into a set of global rules that were essentially those of the U.S.-dominated global system: there would be convergence." Analyze the result of that assumption. particularly with an eye toward how it may have led to mistreatment or deference to Chinese legal rulings.*

I believe that the primary effect of that assumption is on the default findings that courts implicitly make when required to assess the Chinese legal system. In other words, what do they provisionally assume to be true, subject to proof to the contrary offered by a party? To take two extreme examples, courts assume that the courts of England are more or less like the courts of the United States; nobody seeking to enforce an English judgment is required to prove anything about the English legal system. In the words of Judge Richard Posner: "It is true that no evidence was presented in the district court on whether England has a civilized legal system, but that is because the question is not open to doubt."[27]

In the same case, however, Judge Posner stated that things would be different had the judgment issued from a court in "Cuba, North Korea, Iran, Iraq, Congo, or some other nation whose adherence to the rule of law and commitment to the norm of due process are open to serious question."[28]

The question is which background assumption do courts make in the case of China? Do they assume that the courts of China are more or less like those of England, or that they are more or less like the courts of Cuba, North Korea, and Iran? Regrettably, in many

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[24] CYBERSitter LLC v. People's Republic of China et al., 2010 WL 4909958 (C.D. Cal. 2010).

[25] "Deslisle [sic] further asserts that a fair trial would occur regardless of the fact that the PRC is a named Defendant." *CYBERSitter*, *supra* note 24, at *4.

[26] The court also stated incorrectly that the Supreme Court in *Sinochem* had "ruled" that China presented an adequate alternative forum. As I have discussed above, the Supreme Court made no such ruling.

[27] Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000).

[28] *Id.*

cases it seems they are making the former assumption. This means that the burden of proof is on the party who wishes to argue that China is *not* like England. And the very opacity of the system can make this difficult to do.

4. *Where are the knowledge and information gaps that exist in the U.S. courts' approach to confronting issues of Chinese law and how do they lead to "questionable" conclusions? Are these gaps more evident at the state level or concerning certain issues? How may the U.S. move to close these gaps so as to better face questions of Chinese law?*

There are several problems with the ways U.S. courts inform themselves about Chinese law issues. Let me emphasize again that I am speaking here about assessments of the Chinese legal system as a whole and specifically whether courts can be counted on to provide due process, and not about inquiries into what Chinese law says about a particular issue.

The first problem is lack of reliable information supplied by the parties. This is not something courts can fix by themselves; in an adversarial system, it is up to the parties to find and present evidence to the court. Very often all courts have is tendentious statements by the lawyers for each party made in their briefs, unsuported by outside evidence. Having experts testify might help, but experts are of course expensive, and will offer conflicting testimony.

The real problem I noticed in the cases was how courts chose to deal with this lack of information. In other words, given a paucity of information on either side of an issue, what should the default finding be? Who should have the burden of proof? Specifically, should it be job of the party arguing that Chinese courts do provide due process to prove it, or the job of the party arguing that they don't provide due process to prove that?

In the case of FNC, the doctrine as a formal matter is clear: it's up to the party arguing that Chinese courts are fair to prove it. This makes sense. But in practice, courts often seem to put the burden on the party trying to *prevent* FNC dismissal to prove that they could *not* receive a fair hearing in China.[29] In one case[30] that did not even make it into my data set because the defendant did not propose dismissal to China, the court nevertheless remarkably found China, as well as Singapore and Taiwan, to be adequate alternative fora despite literally not having heard a single word of argument or evidence about them. This practice means that the more opaque a legal system is—and China's is pretty opaque—the more likely it is that a court will find it to be adequate. This is getting things exactly backwards.

In the case of judgment enforcement, it is almost always a matter of state law, even if federal courts are hearing the case. Here the default rule is the opposite of the formal

[29] *See* Clarke, *supra* note 1, at 514-15.

[30] Quanta Comput. Inc. v. Japan Commc'ns Inc., No. BC629858, 2016 WL 11620515 (Cal. Super. Ct. Dec. 1, 2016), aff'd, 21 Cal. App. 5th 438 (2018).

rule in FNC: state law puts the burden on the party *resisting* enforcement to show that the foreign proceedings were unfair.[31] In effect, all the party seeking enforcement has to do is produce a piece of paper showing that they won their case in China. After that, it is the defendant's job to provide reasons and evidence for not recognizing and enforcing the judgment. Again, this gives an advantage to opaque legal systems. How could anyone show anything about the courts of North Korea, for example? Yet state law would enforce their judgments if defendants could not produce evidence of unfairness, either systematic or in the specific proceeding.

A second problem is a shortage of official, informed, and disinterested information on the Chinese legal system. Especially given the courts' traditional deference to Congress and the executive branch on matters of foreign affairs, they might welcome guidance. At present, the chief official and semi-official sources of information about the Chinese legal system available to courts are the annual reports issued by the Congressional-Executive Commission on China, which cover rule of law issues, and the annual State Department Country Reports on human rights conditions.

Both of these sources tend to be cited by parties arguing that Chinese courts do not provide due process, but they are not ideal. Neither is designed to provide the kind of information specifically of interest to courts trying to make decisions about FNC or judgment enforcement, and so parties must glean what they can from what are often tangential observations in the report.

Finally, a third problem is the uncritical reliance on apparent precedents without closely examining the cases to see how much reliance they deserve. I have discussed this problem above.[32]

5. Other Problems

In addition to answering the questions posed by the Commission, I would like to note other problems my research uncovered.

Lack of Cooperation by Chinese Embassy

In some cases, foreign-sourced evidence in Chinese litigation needs to be authenticated by the local Chinese embassy. If the embassy declines to do so, the party who wants to introduce the evidence simply cannot do so. The court won't accept it. This gives the Chinese government the opportunity to favor a particular party in litigation. In one case, the defendant, a U.S. corporation, wished to introduce evidence into Chinese proceedings against it, but could not because the Chinese Embassy failed, without explanation, to authenticate critical evidence. The U.S. court, in recognizing the judgment, ignored the defendant's arguments in this matter.[33]

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[31] *See* Clarke, *supra* note 1, at 524-26.

[32] See pp. 6-7 above.

[33] Glob. Material Techs., Inc. v. Dazheng Metal Fibre Co., No. 12 CV 1851, 2015 WL 1977527 (N.D. Ill. May 1, 2015). I discuss this case at length in Clarke, *supra* note 1, at 533-38.

Courts Ignoring Relevant Evidence

In some cases, courts simply seem determined to grant enforcement of the Chinese judgments, despite apparently being under no illusions about how Chinese courts operate. In the *Yancheng* case, the court enforced a Chinese judgment despite explicitly finding that "China . . . is not a representative democracy, but rather is dominated by the Communist Party of China, to whom the courts are beholden, and those courts are subject to various external and internal influences[.]"[34] It criticized law review articles cited by the defendant on the grounds that they were over ten years old, although it did not explain why an article about the Chinese legal system written before 2011 would be inaccurate.[35]

6. *The Commission is mandated to make policy recommendations to Congress based on its hearings and other research. What are your recommendations for Congressional action related to the topic of your testimony?*

A number of commentators have been generally sanguine about the capacity of courts to figure out foreign legal systems. An amicus brief filed by a number of law professors in a China-related enforcement case stated, "[C]ase-specific grounds give courts sufficient tools to police against unfairness[.]"[36] My research into the China cases leads me to a more pessimistic conclusion.[37] Courts have sufficient tools to police against unfairness only when they have adequate information. My research suggests that at least in China-related cases, it is a fantasy to think that courts will, in more than a very few cases, have anything close to adequate information. Making case-by-case judgments is unexceptionable in theory, but it is just not going to work in practice with opaque and very different legal systems. It assumes a richness of information that is not present.

A more perplexing problem is that courts sometimes seem unable or unwilling to apply information that is readily available to them. As mainstream media reports and a mountain of scholarship show, there is no serious question that China's political system is a one-party dictatorship that rejects the separation of powers and demands Communist Party leadership in everything. Its judges have no security of tenure or

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[34] *Yancheng*, *supra* note 9, at *10.

[35] It must be noted that despite the apparent unfairness of the result, the defendant had agreed contractually to dispute resolution by Chinese courts.

[36] Brief for Amici Curiae George Bermann et al. in Support of Plaintiff-Appellant, Shanghai Yongrun Inv. Mgmt. Co. v. Kashi Galaxy Venture Capital Co., 160 N.Y.S.3d 874 (App. Div. 2022) (No. 2021-01637), at 5, https://perma.cc/J9LP-ZABK (hereinafter *Yongrun Amicus Brief*).

[37] For a discussion between one of the authors of the amicus brief and me about our different views, see William S. Dodge, *Enforcing Chinese Judgments*, TRANSNAT'L LITIG. BLOG (July 19, 2022), https://tlblog.org/enforcing-chinese-judgments/ [https://perma.cc/P26T-7QG5]; Donald Clarke, *Enforcing Chinese Judgments: A Response*, TRANSNAT'L LITIG. BLOG (Oct. 10, 2022), https://tlblog.org/enforcing-chinese-judgments-a-response/ [https://perma.cc/N85C-JPM9].

other kind of meaningful independence. While one could disagree with the proposition that courts in such a system should be automatically disqualified as adequate alternative fora, it is hard to see how one could, as did the court in the *Group Danone* case, *agree* with that proposition and yet still dismiss to China.[38]

The "dictatorship exception" in FNC doctrine cited by the *Group Danone* court does not appear to be controversial. The court there sourced it from a previous California case, which stated that FNC dismissal shall be denied "where the alternative forum is a foreign country whose courts are ruled by a dictatorship, so that there is no independent judiciary or due process of law."[39]

For example, in *Phoenix Canada Oil Co. v. Texaco, Inc.*, the court found Ecuador to be an inadequate alternative forum, stating:

> Plaintiff has represented by affidavit that Ecuador is presently controlled by a military government which has "assumed the power of the executive and legislative branches and rules by fiat," "has specifically retained the right to veto or intervene in any judicial matter which the Military Government deems to involve matters of national concern," and "has absolute power over all branches of government." The status and powers of the judiciary are thus allegedly "uncertain."[40]

Yet courts that accept this doctrine seem unable to see the relevant facts where China is concerned. Replace "a military government" in the passage above with "the Communist Party" and this is a good description of the Chinese political system.[41] Yet what is obvious in small countries of which we know little seems hard for judges to see in large countries of which we know a great deal.

What solutions are there, then? Although judgment enforcement and FNC issues are often heard by state courts or at least governed by state law, it seems clear that the

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[38] *See* text accompanying note 2 above.

[39] Shiley Inc. v. Super. Ct., 4 Cal. App. 4th 126, 133-34 (Cal. Ct. App. 1992).

[40] Phoenix Canada Oil Co. v. Texaco, Inc., 78 F.R.D. 445, 455-56 (D. Del. 1978).

[41] In a 2017 speech, for example, Xi Jinping declared, "Party leadership in all matters must be upheld. In the Party, in the government, in the military, in civil society, in education; north, south, east, west, and center—the Party is to lead everything." Xi Jinping (习近平), Juesheng Quanmian Jiancheng Xiaokang Shehui, Duoqu Xin Shidai Zhongguo Tese Shehuizhuyi Weida Shengli—Zai Zhongguo Gongchan Dang Di Shijiu Ci Quanguo Daibiao Dahui de Baogao (决胜全面建成小康社会 夺取新时代中国特色社会主义伟大胜利—在中国共产党第十九次全国代表大会上的报告) [Decisively and Completely Establish a Moderately Prosperous Society, Seize a Great Victory for Socialism with Chinese Characteristics in the New Era—Report at the Nineteenth National Congress of the Communist Party of China], Renmin Wang (人民网) [PEOPLE'S NET] (Oct. 18, 2017), http://politics.people.com.cn/n1/2017/1028/c1001-29613514.html [https://perma.cc/PHF2-J94H].

federal government would have the constitutional power, as part of its foreign affairs powers, to dictate a solution. Both Congress and the executive have far greater resources and institutional competence than any individual court to reach an informed understanding of the legal system of any other country, let alone China. Moreover, any federal solution would automatically vitiate any concerns about intruding on the foreign affairs authority of the federal government in general and of the executive in particular, especially in light of the executive's institutional capacity to make assessments about foreign affairs matters. At the same time, of course, a one-size-fits-all solution necessarily means ignoring the details of any particular case, which could result in injustice.

FNC cases are a hard nut to crack. One plausible solution is simply to abolish FNC dismissal to foreign jurisdictions entirely. This is not an outlandish proposal; it is backed by serious scholars.[42] It has the virtue of simply eliminating the task of evaluating the foreign legal system, as well as the virtue of not singling out China or any other country. It will do no constitutional injustice; the only parties to be disadvantaged will be those over whom a court's exercise of personal jurisdiction passes constitutional muster, but who will no longer be able to argue that the court should nevertheless decline to exercise it.

Solutions short of across-the-board abolition also exist. For example, FNC could be limited to cases where all parties are citizens and residents of the alternative jurisdiction proposed by the movant. Alternatively, similarly to what might be proposed for judgment enforcement cases below, FNC dismissal could be prohibited to countries that show up on a list of jurisdictions prepared by the executive branch. The main point in all cases is to take the decision as to the adequacy of a foreign jurisdiction—at least when that jurisdiction is profoundly different—out of the hands of courts, who appear incapable of making it in an informed and consistent way.

A different approach applicable to both FNC and judgment enforcement cases is to have the executive branch—perhaps the State Department—prepare reports on the legal systems of various countries that specifically have in mind the issues of FNC and judgment enforcement. Another candidate in the case of China would be the Congressional-Executive Commission on China, which as the name suggests is a joint body and could thereby alleviate concerns over excessive power being lodged in the executive. One critique of courts' use of the State Department Human Rights reports is that they are written with a specific purpose in mind, and that purpose is something other than to provide courts with guidance on these issues.[43] A set of reports written with these issues specifically in mind would solve both that problem and the concern

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[42] *See* Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 414-15 (2017).

[43] *See Yongrun Amicus Brief*, *supra* note 36, at 11-12. On the other hand, the Second Circuit, after an extended discussion, concluded that the State Department reports were both relevant and trustworthy. *See* Bridgeway Corp. v. Citibank, 201 F.3d 134, 143-44 (2d Cir. 2000) (assessing the Liberian legal system in an action to enforce a Liberian judgment).

courts have with appropriating to themselves decisions that could have foreign policy implications and properly belong to the executive branch. The State Department has, or can call on, the resources to prepare these reports in a thorough and accurate way.

The State Department's findings need not be, or even purport to be, binding on courts, and a non-listing need not forestall a court inquiry into the specific foreign proceedings. But they would provide guidance to courts that desired it, while still leaving the decision in any individual case in the hands of the institution most familiar with the specific details. Moreover, the absence of a blanket rule would give the executive branch plausible deniability with respect to its responsibility for any specific outcome, given the independence of federal and state courts from the federal executive branch. Other solutions, such as a federal statute that would at least bring consistency to the field,[44] are no doubt possible, limited only by the imagination.

[44] For a concrete proposal, see John B. Bellinger III & R. Reeves Anderson, *Tort Tourism: The Case for a Federal Law on Foreign Judgment Recognition*, 54 VA. J. INT'L L. 501, 537-43 (2014).

APPENDIX A

Figure 1: Result of FNC Motions

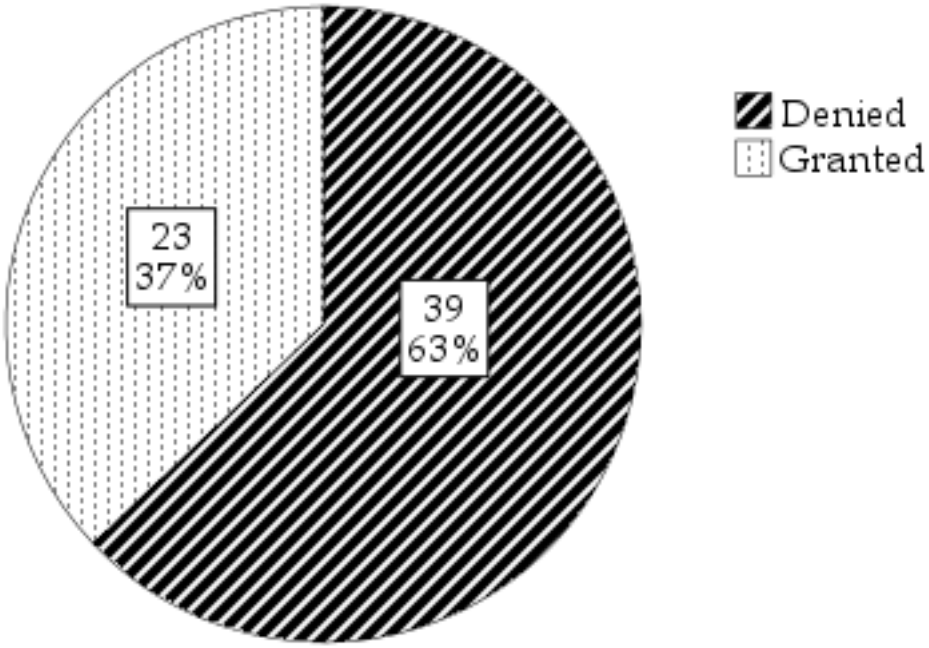

Figure 2: Result of FNC Motions by Jurisdiction

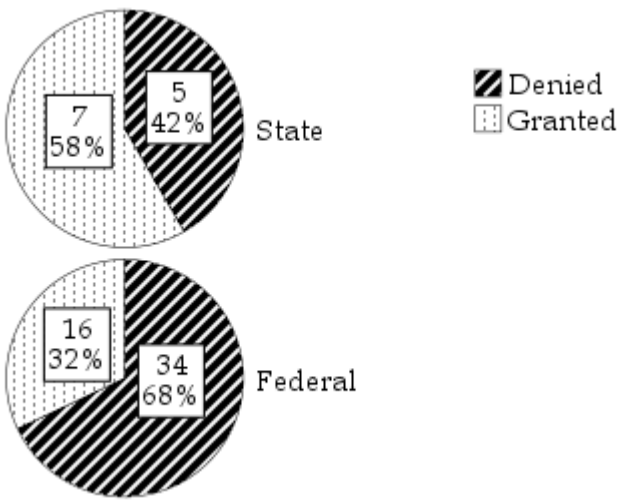

Figure 3: Result of FNC Motions over Time

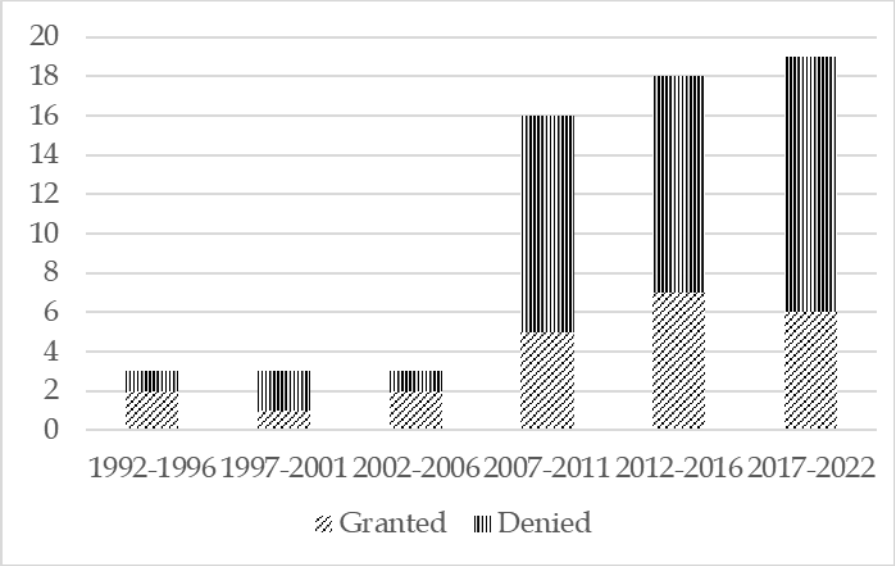

Table 1: Adequacy Findings

	China found adequate: disputed	*China found adequate: undisputed*	*China found inadequate: disputed*	*Adequacy issue unclear*
No. of decisions	22	11	19	10
Percent	35%	18%	31%	16%