HEARING ON RULE BY LAW: CHINA'S INCREASINGLY GLOBAL LEGAL REACH

HEARING

BEFORE THE

U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION

ONE HUNDRED EIGHTEENTH CONGRESS
FIRST SESSION

THURSDAY, MAY 4, 2023

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U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION

WASHINGTON: 2023

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HEARING ON RULE BY LAW: CHINA'S INCREASINGLY GLOBAL REACH

THURSDAY, MAY 4, 2023

U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION

Washington, DC

The Commission met in Room 406 of Dirksen Senate Office Building, Washington, DC and via videoconference at 9:30 a.m., Commissioner Carte Goodwin and Commissioner Jacob Helberg (Hearing Co-Chairs) presiding.

OPENING STATEMENT OF COMMISSIONER CARTE GOODWIN HEARING CO-CHAIR

COMMISSIONER GOODWIN: Good morning, and welcome to the fifth hearing of the U.S. China Economic and Security Review Commission's 2023 annual report cycle.
I want to thank everyone for joining us today. I also want to thank our witnesses for all their hard work and sharing their expertise in the preparation of their testimonies this morning.

I also want to extend our appreciation to the Senate Environment and Public Works Committee for use of this hearing room today, as well as the Senate Recording Studio for their assistance in livestreaming this event.

Today's hearing will assess China's increasing use of the law to advance the CCP's goals, both domestically and internationally, and the implications of these efforts for U.S. interests. Since taking power, General Secretary Xi has overhauled China's court system to make it more responsive to central authorities and has made strengthening the effectiveness and enforcement of laws a tenet of his governance reforms.

But whereas courts and the rule of law remain the great levelers in our society, in China the rule by law is simply a tool, a tool to ensure the institutions are aligned with the party's objectives and capable of implementing the party's political agenda.

Recent trends have seen the deepening politicization of Chinese courts, with U.S. entities facing increasingly unfavorable and unfair rules often aimed to advance Chinese industrial policy objectives. Internationally, China is now seeking to export this legal model around the world, often using its growing influence to enhance global acceptance of these alternative legal models and institutions, frequently by coupling these authoritarian legal concepts with its investment initiatives around the globe.

Chinese entities are also seeking more favorable outcomes in dispute settlement mechanisms, sometimes by forcing parties to accept contractual language that requires disputes to be settled in Chinese courts, subject to Chinese law, and subject to Chinese procedures abroad. Beyond increasing China's sway in commercial disputes, Chinese representatives of international organizations are also attempting to shape the rules and norms in emerging fields of international

law, including space and cyber, often to advantage Chinese interests.

And where China cannot influence the initial shaping of international law, it attempts to subvert the norms and laws that underpin it, often simply by repudiating and violating international treaty obligations.

And not simply content to circumvent international law, China couples these violations with crafted legal justifications to support their positions. A better understanding of these efforts is critical for the ability of the United States to appropriately respond.

Throughout this hearing, we will examine how China is attempting to pair its growing political, military, and economic influence with these distinct legal strategies, and the implication of these strategies for U.S. policymakers.

More critically, we'll hear about Chinese efforts to enforce its laws beyond its borders and how the extraterritorial application of the liberal law challenges U.S. interests, values, and our court system itself.

We'll also consider how China uses its own system to influence proceedings in other jurisdictions, for instance, by preventing parallel litigation against Chinese parties through the use of anti-suit injunctions in order to seek more favorable rulings in IP-related cases.

Finally, we will address how China interacts with the U.S. court system itself. China's legal system lacks many of the fundamental cornerstones that our legal system and other legal systems share, including that judicial outcomes be based on neutral decision-making. Moreover, key Chinese legal documents contain provisions that simply are not enforced, and yet at the same time, many directives that carry the weight of binding law are presented as non-binding policy guidance or may not even be publicized, including contained in some secret party documents.

Because of these differences, U.S. courts often lack sufficient familiarity to fully assess the Chinese legal system or the Chinese judiciary, including whether those tribunals can be impartial, whether the tribunals provide sufficient procedural safeguards for litigants, and whether Chinese law affords those litigants with sufficient remedies.

Likewise, U.S. judges often do not have sufficient familiarity with the politicized and liberal nature of the legal system when considering whether to offer comity to Chinese courts or recognize judgments previously rendered in China.

As a nation founded upon the rule of law, the United States must do all that it can to uphold this principle, both at home and abroad, and understanding how the CCP views law as an instrument of its authoritarian power is crucial to managing U.S.-China competition.

I will now turn the floor over to my colleague and co-chair for this hearing, Commissioner Jacob Helberg.

PREPARED STATEMENT OF COMMISSIONER CARTE GOODWIN
HEARING CO-CHAIR

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

May 4, 2023

Opening Statement of Commissioner Carte Goodwin

Good morning, and welcome to the fifth hearing of the U.S.-China Economic and Security Review Commission's 2023 Annual Report cycle. Thank you all for joining us today. Thank you to our witnesses for sharing your expertise and for the work you have put into your testimonies. I would also like to thank the Senate Environment and Public Works Committee for allowing us the use of their hearing room and the Senate Recording Studio for their assistance livestreaming this event.

Today's hearing will assess China's increasing use of law to advance the Chinese Communist Party's (CCP) goals both domestically and internationally, and the implications of this evolution for U.S. interests.

Since taking power, General Secretary Xi Jinping has overhauled China's court system to make it more responsive to central authorities. He has also made strengthening the effectiveness and enforcement of laws a tenet of his governance reforms. But whereas courts and the rule of law remain the great levelers in our democracy, in China, rule by law is a tool to ensure institutions are aligned with the Party's objectives and can implement its political agenda. Recent trends have also seen the deepening politicization of China's courts, with U.S. entities increasingly facing unfavorable and unfair rulings aimed to advance Chinese industrial policy objectives.

Internationally, China is seeking to export this legal model, using its growing influence to enhance global acceptance of alternative legal models and institutions. China often advances authoritarian legal concepts to developing countries alongside its investment initiatives. Chinese entities are also seeking more favorable outcomes in dispute settlement mechanisms, sometimes by forcing counterparties to accept contractual language that requires disputes to be settled in Chinese court, and also by attempting to increase the application of Chinese law and procedure abroad. Beyond increasing China's sway in commercial disputes, Chinese representatives in international organizations are attempting to shape rules and norms in emerging fields of international law, such as space and cyber, to advantage China. Where China cannot influence the initial shaping of international law, it attempts to subvert the norms that underpin it, often by repudiating international treaty obligations, not content to simply circumvent international law, China simultaneously crafts legal justifications for their positions. A better understanding of these efforts is critical for the ability of the United States to appropriately respond.

Throughout this hearing, we will examine how China is attempting to pair its growing political, military, and economic influence with distinct legal strategies, and the implications for U.S. policymakers. Most critically, we'll hear about Chinese efforts to enforce its laws outside its borders, and how this extraterritorial application of illiberal law challenges U.S. interests and values. We'll also consider how China uses its own court system to influence proceedings in other courts, for instance by preventing parallel litigation against Chinese parties through global anti-suit injunctions, in order to seek more favorable rulings in IP-related cases.

Finally, we will address how China interacts with the U.S. court system. China's legal system lacks many of the institutional cornerstones other legal systems share, such as judicial outcomes based on neutral decision-making. Key Chinese legal documents contain provisions that are not remotely enforced, such as provisions of China's constitution that guarantee human rights, the inviolability of personal property, and the ability to criticize the government. At the same time, many directives that carry the weight of law in China are presented as non-binding policy guidance or may not even be publicized, including secret Party documents. Because of these differences from the U.S. system and other foreign legal systems with characteristics similar to ours, U.S. courts often lack sufficient familiarity to fully assess the Chinese legal system or the Chinese judiciary, including whether Chinese tribunals are impartial, whether Chinese courts provide sufficient procedural safeguards for all parties, and whether Chinese law affords litigants with sufficient remedies. Similarly, U.S. judges often do not have sufficient familiarity with the politicized and illiberal nature of China's legal system when considering whether to offer judicial comity to Chinese courts or recognizing judgements rendered in China.

As a nation founded on the rule of law, the United States must do all that it can to uphold this principle both at home and abroad. Understanding how the CCP views law as an instrument of authoritarian power, and shedding light on how it is using the law to extend that power globally, is crucial to managing the U.S.-China competition.

I will now turn the floor over to my colleague and co-chair for this hearing, Commissioner Jacob Helberg.

OPENING STATEMENT OF COMMISSIONER JACOB HELBERG
HEARING CO-CHAIR

COMMISSIONER HELBERG: Thank you all for joining us today. Thank you, Commissioner Goodwin, and thank you to our witnesses for sharing your expertise and the work you have put into your testimonies.

Twenty years ago this year, President Bush proclaimed in his State of the Union address that free people will set the course of history. Suppose a member of the House of Representatives had stood up that night warning us that in 20 years' time, Chinese police stations would be found in the heart of New York City, Chinese spy balloons would fly over American neighborhoods, and Chinese surveillance spyware would track dissidents across our land on 150 million American cellphones.

No one would have believed in such an outrageous erosion of our national sovereignty to a genocidal Leninist adversary, and yet that is exactly where we find ourselves today with wall to wall postmortems of how American strategy over the last 20 years has fundamentally misread the Chinese Community Party.

One has to wonder where will we be in another ten- or 20-years' time? What will future postmortems record of today's policies? Will they look back on an America that remains still too slow, too reactive, and too incremental in the face of radical changes, the likes of which the world hadn't seen in 100 years?

General Secretary Xi forecasted as much on his last visit to Moscow. I, myself, hesitate to predict how history will judge the early 2020s, but the answer depends in no small measure on the policy choices and decisions we, as a country, make today.

This hearing is about lawfare, and yet five years ago, General Secretary Xi bluntly reminded us that laws are the luxury of sovereign nations, while tributary states are law takers, not makers.

He declared, quote, a new world order is now under construction that will surpass and supplant the Westphalian system, end quote. In other words, General Secretary Xi plainly stated his intent to upend the basic concept of equal and sovereign states that is defined international politics for 400 years, and he has made alarming strides on that promise.

The rest of the world is left to ask if the Chinese Communist Party is brazen enough to attack the sovereignty of the world's largest economy, what hope of resistance and independence is there for any smaller country?

We should be clear-eyed that China's assault on American sovereignty is not just a gray zone attack on America, it's an assault on the Westphalian system and on the sovereignty of nations everywhere.

Against this backdrop, our witnesses today will examine how the CCP seeks to change, subvert, and influence the enforcement of laws beyond its shores and is seeking extraterritorial influence to advance its agenda.

Today's hearing is particularly timely as Congress rightfully considers historic measures to bolster American national security. The first responsibility of this commission is to help inform that debate with actionable policy recommendations commensurate to the threats this country faces as they relate to the Chinese Communist Party. Thank you.

PREPARED STATEMENT OF COMMISSIONER JACOB HELBERG
HEARING CO-CHAIR

Congressional Hearing on

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

May 4, 2023

Opening Statement of Commissioner Jacob Helberg

This is the 5th hearing of the US-China Economic & Security Review Commission's 2023 Annual Report cycle. Thank you all for joining us today. Thank you particularly to our witnesses for sharing your expertise and the work you have put into your testimonies.

Thank you, Commissioner Goodwin, and thank you as well for partnering with me on this hearing. I'd also like to thank our witnesses for the effort and expertise they're contributing today.

Twenty years ago this year, President Bush proclaimed in his State of the Union address that "free people will set the course of history." Suppose a Member of the House of Representatives had stood up that night warning us that in twenty years time, Chinese police stations would be found in the heart of New York City, Chinese spy balloons would fly over American neighborhoods, and Chinese surveillance spyware would track dissidents across our land on 150 million American cellphones. No one would have believed in such an outrageous erosion of our national sovereignty to a Leninist genocidal adversary.

And yet, that is exactly where we find ourselves today, with wall-to-wall post-mortems of how American strategy over the last twenty years fundamentally misread the Chinese Communist Party. One has to wonder where we will be in another ten or twenty years' time. What will future post-mortems record of today's policies? Will they look back on an America that remained still too slow, too reactive, and too incremental in the face of radical changes the likes of which the world hadn't seen in 100 years? General Secretary Xi forecasted as much on his last visit to Moscow.

I myself hesitate to predict how history will judge the early 2020's but the answer depends in no small measure on the policy choices and decisions we as a country make today.

This hearing is about lawfare. And yet, five years ago, General Secretary Xi bluntly reminded us that laws are the luxury of sovereign nations, while tributary states are law-takers, not makers. He declared "A new world order is now under construction that will surpass and supplant the Westphalian system." In other words, General Secretary Xi plainly stated his intent to upend the basic concept of equal and sovereign states that has defined international politics for 400 years. And he has made alarming strides on that promise.

The rest of the world is left to ask: if the Chinese Communist Party is brazen enough to attack the sovereignty of the world's largest economy, what hope of resistance and independence is there for any smaller country? We should be clear-eyed that China's assault on American sovereignty is not just a gray-zone attack on America, it's an assault on the Westphalian system and on the sovereignty of nations everywhere.

Against this backdrop, our witnesses today will examine how the CCP seeks to change, subvert, and influence the enforcement of laws beyond its shores and is seeking extraterritorial influence to advance its agenda. Today's hearing is particularly timely as Congress rightfully considers historic measures to bolster American national security. The first responsibility of this Commission is to help inform that debate with actionable policy recommendations commensurate to the threats this country faces as they relate to the Chinese Communist Party.

PANEL I INTRODUCTION BY COMMISSIONER CARTE GOODWIN

COMMISSIONER GOODWIN: Thank you, Commissioner. Our first panel will examine Beijing's ambitions to use law as a method of promoting the CCP's political goals domestically as well as internationally.

First, we're happy to welcome Dr. Moritz Rudolf, a research scholar in law and fellow at Yale Law School's Paul Tsai China Center, who will address the party's views on law and how it is exporting those legal concepts abroad. Dr. Rudolf has written extensively on legal developments in China under Xi Jinping.

Next, we are also happy to welcome Vivienne Bath, professor of Chinese and international business law and an associate director of the Centre for Asian and Pacific Law at the University of Sydney, who will address China's approach to international law and how it is seeking to forward its legal influence and power in venues including commercial law. Ms. Bath has published significant research on dispute resolution and arbitration with regard to Chinese commercial pursuits.

Finally, we'll hear from Attorney Dan Harris, who we're happy to welcome back to the commission, a partner at the law firm of Harris Bricken who will address how China's cyber governance, including legal regulations on data practices and cybersecurity, have impacted international firms operating in China, particularly those in the tech space. Mr. Harris has decades of experience working with U.S. firms operating in China and around the globe.

Thank you all very much for your testimony. I want to remind the witnesses to try to keep their remarks to seven minutes. Dr. Rudolf, we'll begin with you.

OPENING STATEMENT OF MORITZ RUDOLF, RESEARCH SCHOLAR IN LAW AND FELLOW AT YALE LAW SCHOOL'S PAUL TSAI CHINA CENTER

DR. RUDOLF: Thank you very much for inviting me to the hearing. In my testimony, I will focus on the CCP's promotion of the rule by law, prioritizing the international dimension and implications for the international legal order.

According to the CCP's approach and fully Marxist thinking, Beijing used the law primarily as an instrument to achieve its material development goals.

The Chinese leadership rejects the concepts of independent judiciary and checks and balances as erroneous Western thought.

The CCP acts strategic, systemic, and long-term-oriented. The law shall be utilized to achieve the so-called China Dream of great rejuvenation of the Chinese nation by 2049.

The CCP strives to build the Chinese version of the rule of law. Where it is consistent with the objectives of the CCP, Beijing draws on Western aspects of the rule of law, especially when it comes to regulating civil law matters, jurisdiction, and procedural matters.

To promote Xi Jinping thought under rule of law, the CCP prioritizes the following aspects, party control, efficient application of the law by the state, including strict law enforcement, modernization through the law by regulating and utilizing new tech, professionalization efforts, theoretical research, and educating the public.

For many people in the PRC, those efforts could lead to more legal certainty and less and less arbitrariness. At the same time, the space for opposing the party state is shrinking.
At the international level, the law serves as a tool to safeguard China's sovereignty, national security, and development interests, and the PRC has become more active and self-confident in the realm of international law.

Beijing has become more effective in promoting its position within the U.N. system or getting preferred candidates elected to crucial U.N. positions. Also, it has been gaining discourse power within the U.N. system. For instance, the PRC can rely on a majority within the U.N. Human Rights Council to defend its positions.

The PRC's declared goal is to establish the so-called Community of Shared Future for Mankind, Beijing's vision of an international order free of Western biases.

The concept was introduced to a global audience in 2015 when Xi delivered his first speech before the U.N. General Assembly, highlighting five aspects which form the core of this vision, equal partnership, a new security architecture, common development, inter-civilization exchanges, and green development.

And to implement this vision, the PRC has recently launched three global initiatives, the Global Development Initiative, GDI, the Global Security Initiative, GSI, and the Global Civilization Initiative, GCI.

And with the GDI, China streamlines its efforts to promote the notion of development over the pursuit of individual human rights at the international level.
It reaches out to states from the Global South, many of which are Beijing's human rights priorities. The GSI illustrates the PRC's idea of collective security reform.

For instance, Beijing aims to establish legitimate security concerns as a concept in international law. It has pointed to legitimate security concerns when evaluating Russia's war in Ukraine.

The GCI puts Beijing's modernization does not equal westernization narrative under a strategic umbrella. This includes a fundamental critique of Western claims of universality. And

the BRI is the most comprehensive tool for building this community of Shared Future for Mankind.

Legal cooperation soft connectivity is intended to complement the desired hard connectivity. Directed towards the Global South, the BRI legal cooperation research and training program serves to convey and disseminate China's international law practice and legal concepts.

The priorities for the CCP promoting rule by law internationally are as follows, first, building international law expertise. We are merely witnessing the first phase of a more self-confident China which utilizes the law to pursue its interests at the global level.

Second, more engagement in international norm-setting. The Chinese leadership has identified the high seas, polar regions, cyberspace, outer space, nuclear security, anti-corruption, and climate change as priority areas.

Third, promoting foreign-related rule of law. Beijing wants to increase its ability to protect Chinese citizens and entities and they call it from foreign sanctions, interference and abuse of long-term jurisdiction, and apply its laws extraterritorially.

China's trying to catch up with the United States here, but it has a long way to go. Also, it aims to increase the ability of Chinese courts to domestically apply foreign law. Furthermore, it wants Chinese jurists to better understand and apply foreign and international law at home and abroad.

Fourth, increasing international judicial cooperation. Beijing prioritizes international law enforcement cooperation to fight against terrorists, separatists, and extremist forces, drug trafficking, transnational crime and corruption.

And Beijing's capabilities to pursue its domestic security priorities through the law abroad have grown significantly, but they remain much smaller compared to the U.S.

Fifth, building international dispute resolution mechanisms. With the BRI International Commercial Court, Beijing aims to turn the PRC into an international arbitration center. Also, China wants to increase its role in facilitating conflicts between states. A key tool here could become the Hong Kong-based International Organization for Mediation.

To conclude, the international order is participatory by design and built for states to contribute to its development. China's interaction in the U.N. and other global fora are challenging, but they do not necessarily undermine the system.

The PRC acts to a remarkable degree within the system, trying to reform it from within, making it less Western and more Chinese. Decision makers should anticipate and prepare to face better-trained Chinese diplomats and international lawyers.

Concrete violations of international law by the PRC, there are many, should be firmly addressed through those same mechanisms. Otherwise, there's a risk of undermining the international rules-based order in the attempt to uphold it or becoming more like China in efforts to respond to China.

Inconsistencies of U.S. practice in international law are precisely the narrative the PRC promotes towards the Global South. While the PRC is in the process of implementing long-term agendas and international coalition building to reform the international legal order, the U.S. appears to be inward-looking. Following a democracy versus autocracy narrative will not be enough to build a broad coalition.

Merely relying on the G7 will not be enough to set future international legal standards and uphold the international legal order. Therefore, I propose reaching out to third states and to build coalitions beyond the G7. Thank you very much for your attention.

COMMISSIONER GOODWIN: Thank you very much.

PREPARED STATEMENT OF MORITZ RUDOLF, RESEARCH SCHOLAR IN LAW AND FELLOW AT YALE LAW SCHOOL'S PAUL TSAI CHINA CENTER

May 4, 2023

Written Testimony Before the US-China Economic and Security Commission Session I: CCP's Promotion of Rule by Law

Dr. Moritz Rudolf
Fellow, and Research Scholar in Law,
Paul Tsai China Center of the Yale Law School

Introduction

In my testimony I will focus on the Chinese Communist Party's (CCP) promotion of the "rule by law", prioritizing the international dimension and implications for the international legal order.

In official documents, the PRC translates "Fǎzhì" (法治) into "rule of law". This is to distinguish the term 法治, which was introduced in 1997, from the term "法制". The latter has been more closely associated with "rule by law" in China. In his reports at the 19th CCP National Congress, Xi Jinping defined "法治" (translated as "rule of law") as the principle that the constitution and the law are above everything else and that everyone is equal before the law," that "no organization or individual has the power to overstep the Constitution or the law; and no one in a position of power is allowed in any way to override the law with his own orders, place his authority above the law, violate the law for personal gain, or abuse the law."[1]

I will use the term "rule by law" in this testimony. In China, the primary function of the law is derived from Marxist thinking. Accordingly, Beijing regards the law as an instrument to achieve the development goals of the CCP.[2] There is neither an individual constitutional complaint procedure nor an independent judiciary in the People's Republic of China (PRC). In fact, the Chinese leadership rejects the concepts of independent judiciary and checks and balances as "erroneous Western thoughts".[3]

The PRC's policies are systemic, strategic, and long-term-oriented. To grasp Beijing's vision to promote "rule by law", it is essential to view it through the prism of the CCP's ambitions and development goals. When Xi Jinping assumed power in 2012/2013, he laid out long-term visions for the development of China.

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[1] Full text of Xi Jinping's report at 19th CCP National Congress, 18 October 2017, http://www.xinhuanet.com/english/special/2017-11/03/c_136725942.htm

[2] According to the logic of the CCP, after the Communist Revolution, the law was subjected to "the people" (人民). Therefore, only the CCP has the legitimacy to interpret the will of "the people".

[3] 坚持走中国特色社会主义法治道路 更好推进中国特色社会主义法治体系建设 (04/2022) http://www.qstheory.cn/dukan/qs/2022-02/15/c_1128367893.htm

Most importantly, the CCP strives to achieve the so-called "China Dream of the great rejuvenation of the Chinese nation".[4] Accordingly, by 2049 (the 100-year anniversary of the PRC) it wants to become "a fully developed nation", "building China into a modern socialist country that is prosperous, strong, democratic, culturally advanced and harmonious".[5] The law shall be utilized to achieve this goal, both at the domestic and the international level.

The most fundamental policy shift in China for decades occurred in 2017. Back then the National Congress of the CCP re-defined the so-called "principal contradiction". According to the CCP narrative, the 'principal contradiction' is what defines a society.[6] It guides the actions of CCP officials.

In 1981, the redefinition provided the ideological framework for Deng Xiaoping's reform and opening-up policy, which led to unprecedented economic growth and the international interconnectedness of China. In 2017, the CCP redefined the 'principal contradiction' from between "the ever-growing material and cultural needs of the people versus backward social production" (adopted in 1981) to "unbalanced and inadequate development and the people's ever-growing needs for a better life".[7]

The reinterpretation in 2017 marked the starting point for a re-orientation of the CCP in which 'common prosperity' trumps the focus on numbers-driven economic growth. The promotion of the law by the CCP needs to be viewed within this context. The law serves as a tool to solve the principal contradiction.[8]

With the re-interpretation of the principal contradiction, Xi Jinping Thought emerged as a guiding narrative in China.[9] As Xi pointed out in April 2023, Xi Jinping Thought covers all

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[4] Robert Lawrence Kuhn, Xi Jinping's Chinese Dream, 3 June 2013, New York Times, https://www.nytimes.com/2013/06/05/opinion/global/xi-jinpings-chinese-dream.html

[5] Xi Jinping "Achieving Rejuvenation Is the Dream of the Chinese People", 29 November 2012, https://www.neac.gov.cn/seac/c103372/202201/1156514.shtml

[6] Xinhua Insight: China embraces new "principal contradiction" when embarking on new journey, 20 October 2017, http://www.xinhuanet.com/english/2017-10/20/c_136694592.htm

[7] Ibid.

[8] According to the 19th NPC report, "Law-based governance is an essential requirement and important guarantee for socialism with Chinese characteristics. We must exercise Party leadership at every point in the process and over every dimension of law-based governance and be fully committed to promoting socialist rule of law with Chinese characteristics. We must improve the Chinese socialist system of laws, at the heart of which is the Constitution; establish a Chinese system of socialist rule of law; build a socialist country based on the rule of law; and develop Chinese socialist rule of law theory. We must pursue coordinated progress in law-based governance administration and promote the integrated development of the rule of law for the country, the government, and society. We must continue to promote a combination of rule of law and rule of virtue and combine law-based governance of the country and rule-based governance over the party. We must further reform the judicial system and strengthen awareness of the rule of law among all our people while also enhancing their moral integrity." See: Full text of Xi Jinping's report at 19th CPC National Congress (2017), available at http://www.xinhuanet.com/english/special/2017-11/03/c_136725942.htm

[9] The key message of XJP Thought is CCP leadership and the core role of Xi Jinping within the CCP. In October 2022, the 'two safeguards' (两个维护) were written into the CCP Constitution, institutionalizing (1) the 'core' status of Xi Jinping within the CCP and reiterating (2) the centralized authority of the Party. Party influence over the economy and the state has increased significantly in recent years. See: Full text of Constitution of Communist Party of China (22 October 2022), available at

realms and respects, including "reform, development, social stability, domestic affairs, foreign relations, national defense, and governance of the Party, the state, and the military."[10]

XJP Thought can be boiled down to the so-called 10 affirmations (十个明确),[11] 14 commitments (十四个坚持)[12] and achievements in 13 areas (十三个方面成就).[13] All of those terms include a reference to "rule of law" and "law-based governance", meaning that the CCP strives to govern the PRC according to the law. There are over 30 types of Xi Jinping Thought (e.g., on the rule of/by law, on diplomacy, or on economic development).[14]

XJP Thought on the rule by law is the most relevant reference point for the CCP's promotion of the rule by law domestically and internationally.[15]

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http://english.www.gov.cn/news/topnews/202210/26/content_WS635921cdc6d0a757729e1cd4.html
Also, "Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era", was added to the Preamble of the PRC's Constitution in 2018.: See Constitution of the People's Republic of China (2018), available at https://npcobserver.files.wordpress.com/2018/12/PRC-Constitution-2018.pdf

[10] [视频]学习贯彻习近平新时代中国特色社会主义思想主题教育工作会议在京召开 习近平发表重要讲话强调 扎实抓好主题教育 为奋进新征程凝心聚力, 3 April 2023, CCTV, https://tv.cctv.com/2023/04/03/VIDEZhmwS9m4F9H7ykp06Wvp230403.shtml?spm=C31267.PXDaChrrDGdt.EbD5Beq0unIQ.5&utm_source=substack&utm_medium=email

[11] The 10 affirmations are 1. CCP leadership; 2. Nat. rejuvenation through a Chinese (non-Western) modernization path; 3. Focus on solving the new principal contradiction; 4. Economic, political, cultural, social, and ecological advancement, and building a modern socialist country, deepening reform, advanced law-based governance, and strengthening CCP self-governance; 5. Develop and improve the system of socialism with Chinese characteristics and modernize China's system and governance capacity; 6. Establish a system of socialist rule of/by law with Chinese characteristics and build a socialist rule of/by law country; 7. Uphold and improve the basic socialist economic system; 8. Build a "world-class military" that is loyal to the CCP; 9. Major-country diplomacy with Chinese characteristics that "aims to serve national rejuvenation, promote human progress, promote a new type of international relations, and build a community of shared future for mankind."; 10. Self-governance of the CCP. See: 科学把握"十个明确"的重大意义和实践伟力, CPC News.com, 18 July 2022, available at: http://dangjian.people.com.cn/n1/2022/0718/c117092-32477736.html

[12] The 14 commitments are: 1. Ensuring Party leadership over all work; 2. Committing to a people-centered approach, 3. Continuing to comprehensively deepen reform; 4. Adopting a new vision for development; 5. Seeing that the people are the masters of the country; 6. Ensuring every dimension of governance is law-based; 7. Upholding core socialist values; 8. Ensuring and improving living standards through development; 9. Ensuring harmony between humanity and nature; 10. Pursuing a holistic approach to national security; 11. Upholding absolute Party leadership over the people's armed forces; 12. Upholding the principle of 'one country, two systems' and promoting national reunification; 13. Building a global community of shared future; 14. Exercising full and rigorous governance over the party. See: 十四个坚持"基本方略, 22 August 2018, available at: http://theory.people.com.cn/n1/2018/0822/c413700-30244032.html

[13] The 13 achievements are: 1. CCP leadership, 2. Self-governance, 3. Economic development, 4. Reform and opening up, 5. Advancing political work, 6. Advancing law-based governance. 7. Cultural advancement, 8. Social advancement, 9. Ecological advancement, 10. Strengthening national defense & armed forces, 11. Safeguarding national security, 12. "1 country, 2 systems" and promoting "national reunification" 13. Bolstering the diplomatic front. See: 十三个方面成就"的新概括新思考, 18 January 2023, available at: http://wcdx.net/index.php?app=Cms&m=Index&a=content&catid=32&id=556388

[14] Matt Ho, "A simple guide to Xi Jinping Thought? Here's how China's official media tried to explain it", SCMP, 18 October 2018, https://www.scmp.com/news/china/politics/article/2169151/simple-guide-xi-jinping-thought-heres-how-chinas-official-media

[15] According to a XJP speech from 24 August 2018 "Advance the Rule of Law Under Chinese Socialism", law-based governance in the PRC includes the following 10 principles: (1) Strengthen the CCP's leadership role in law-based governance. Leadership of the CCP is the most fundamental guarantee for socialist rule of law. (2) Uphold the

The function of the law in the PRC context deviates significantly from a Western understanding. There is no inherent value of the law in the PRC's "socialist rule of law with Chinese characteristics". Following Marxist legal tradition, Beijing regards the law as a tool to achieve the (material) development goals of the party.

"Socialist rule of law with Chinese characteristics" consists of several components. The CCP's focus on the strict application of rules by a strong centralized state derives from China's legalistic tradition. Also, the population and party cadres are expected to cultivate moral and virtuous behavior which resembles the teachings of Confucius. The socialist element is the instrumental function of the law as a tool to achieve the material development goals laid out by the CCP. Another modern aspect of the Chinese rule by law is the inclusion of advanced technology.[16] Within the legal realm, it includes, on the one hand, comprehensive efforts to regulate new-tech. On the other hand, the party focuses on advanced technology within the judicial system, for example in digitalized court proceedings. It is also crucial to highlight, that the PRC has incorporated and is still inspired by a significant degree by Western legal tools (theory and practice), including from the US (e.g., business law, procedural due process, or extraterritorial application of domestic law), as long as they are consistent with the objectives of the CCP.

principle that the people enjoy the principal status in our society. (3) Uphold the socialist rule of law with Chinese characteristics. Under no circumstances should we imitate the models and practices of other countries and adopt the Western models of constitutionalism, separation of powers and judicial independence. (4) Develop a system of socialist rule of law with Chinese characteristics. It is a legal manifestation of the Chinese socialist system (complete system of laws, highly efficient enforcement system, sound system of party regulations). (5) Push forward coordinated progress in law-based governance, exercise of state power, and government administration, and promote the integrated development of the rule of law for the country, the government, and society (systematic, holistic, and coordinated pursuit). (6) Govern the country and exercise state power within the framework of the Constitution (uphold constitution-based governance – led by the CCP – the CCP must confine its activities to the areas perceived by the constitution and the law). (7) Ensure sound lawmaking, strict law enforcement, impartial administration of justice, and the observation of law by all. (8) Properly handle the dialectical relationships concerning law-based governance. In implementing law-based governance we must correctly deal with the relationship between leadership by the Party and the rule of law, between reform and the rule of law, between the rule of law and the rule of virtue, and between law-based governance and rule-based Party discipline. Socialist rule of law must uphold CCP leadership, while CCP leadership must rely on socialist rule of law. Reform and the rule of law are like two wings of a bird. We must promote reform under the rule of law and improve the rule of law in the process of reform. We must integrate the rule of law with the rule of virtue so that they complement and reinforce each other. We must bring into play the complementary roles of law-based governance and rule-based Party discipline and ensure that the CCP governs the country in accordance with the Constitution and the laws and govern and discipline itself strictly with Party rules and regulations. (9) Develop a contingent of high-caliber legal personnel with moral integrity and professional competence (loyal to the Party). (10) Make sure that leading officials play key role in implementing the rule of law. See: 习近平：加强党对全面依法治国的集中统一领导 更好发挥法治固根本稳预期利长远的保障作用, 24 August 2018, available at: http://politics.people.com.cn/n1/2018/0824/c1024-30249776.html

[16] The rapid adoption of new tech can be witnessed across all areas of governance in China.

On 16 November 2020, the CCP outlined 11 key elements of Xi Jinping Thought on the rule by law.[17] The so-called "11 persistences" (十一个坚持) are as follows:

1) CCP leadership in governing the country according to law is the essential feature and inherent requirement of the socialist rule of law with Chinese characteristics. According to the CCP narrative, "Party leadership is the soul of our country's socialist rule of law and the biggest difference between Chinese and Western rule of law."[18]

2) People-centered approach is the source of strength for comprehensively advancing the rule of law. The CCP claims to have the legitimacy to interpret the will of "the people".

3) Adhering to the path of socialist rule of law with Chinese characteristics is the development path and correct direction for comprehensively advancing the rule of law. Xi stated that "under no circumstances should we try to duplicate the models and practices of other countries or adopt Western models as "constitutionalism", "separation of powers', and 'judicial independence'.[19] This underlines the CCP's search for a genuine Chinese approach to "the rule of/by law".

4) Adhering to the rule of law and governing the country according to the constitution is the focus of comprehensively advancing the rule of law. While there is no constitutional review mechanism in China, references in official documents to the Chinese constitution have increased significantly over the past couple of years.

5) Adhering to the modernization of the national governance system and governance capacity on the track of the rule of law is the only way to achieve good law and good governance. This underlines the instrumental understanding of the law but also an acknowledgment that a functioning legal system is a prerequisite for a modern state.

6) Adhering to the construction of a socialist rule of law system with Chinese characteristics is the development goal and general starting point for comprehensively advancing the rule of law. Xi stated "We need to step up legislation in key areas such as national security, technological innovation, public health, biosafety and biosecurity, eco-civilization, risk management, and law-based governance of foreign-related matters." There is also a clear acknowledgment to regulate "the digital economy, internet finance, artificial intelligence, big data, and cloud computing".[20]

7) Adhering to the joint promotion of the rule of law, the governance of the country, and the administration according to the law, and the integrated construction of a country under the rule of law, a government under the rule of law, and a society under the rule of law, is the strategic layout for comprehensively advancing the rule of law. This underlines the holistic and systemic approach of the CCP to legal reform. The whole state and population should be under the rule of the law (while the CCP maintains its interpretative

[17] 习近平法治思想"十一个坚持, 16 April 2021, http://gysj.cngy.gov.cn/new/show/20210416065221862.html
[18] Ibid.
[19] Ibid.
[20] Ibid.

superiority).

8) Ensuring sound lawmaking, strict law enforcement, impartial administration of justice, and the observance of law by all.

9) Adhering to the overall promotion of domestic rule of law and foreign-related rule of law is an inevitable requirement for building a country with a strong rule of law. Accordingly, the PRC aims to "actively participate in the reform and construction of the global governance system, strengthen the construction of foreign-related rule of law system, strengthen the application of international law, and maintain the international system with the UN at its core."[21] Besides, the PRC aims to "propose plans to reform international rules and mechanisms that are unjust, unreasonable and against positive international trends to promote reform in global governance and contribute to building a global community of shared future."[22] This underlines the PRC's goal to play an active role in reforming the international legal order.

10) Adhering to the construction of high-caliber legal personnel with moral integrity and professional competence. Regarding foreign-related matters, the PRC aims to "strengthen foreign-related legal education, with the focus on training personnel for foreign-related law enforcement, judicature, and legal services, and cultivating and recommending legal professionals for international organizations, so as to better serve the overall work on foreign affairs."[23] This underlines the PRC's ongoing capacity build-up in the realm of (international) law.

11) Adhering to the "key minority" of leading cadres is a key issue in comprehensively advancing the rule of law. In addition to the people and the state, the CCP itself shall be better governed under the rule of law.

[21] Ibid.
[22] Ibid.
[23] Ibid.

In its first "Plan on Building the Rule of Law in China (2020–2025)", Beijing laid out its vision for a coherent and genuine Chinese legal system.[24] Accordingly, by 2025, Beijing aims to "improve the socialist rule of law with Chinese characteristics".[25] By 2035, it strives to establish a "law-based country" (依法治国), meaning governing in accordance with the law.[26]

The plan focuses on utilizing the law to make the state more efficient to achieve the outlined development goals while maintaining CCP leadership. Where it serves one-party rule, the document draws on Western aspects of the rule of law, especially when it comes to regulating civil law matters, jurisdiction and procedural matters.

On 6 December 2021, Xi Jinping further substantiated the CCP's vision of "rule by law".[27] In his speech titled "Develop the System of Socialist Rule of Law with Chinese Characteristics' he stated:

- **First, follow the right direction:**
  This refers to upholding CCP leadership, the system of Chinese socialism, and the principle of "the people" as masters of the country. Also, based on China's culture and conditions, the CCP must not be "misled by erroneous Western ideas".[28]

- **Second, speed up legislation in key areas**:
  Xi listed legislation on national security, scientific and technological innovation, public health, biosafety and biosecurity, the eco-environment, and risk prevention. Also, he called for more efforts to make laws regulating the development of the digital economy, internet finance, artificial intelligence, big data, and cloud computing. Besides he urged the improvement of laws and closing loopholes to address problems of strong public concern, such as telecom and online fraud, new types of drug abuse, and those in the entertainment industry (e.g., "fanatical celebrity cults, unregulated fan misconduct and exploitation, and dual contracts for tax evasion"). He also called for a revision of the anti-monopoly law and anti-unfair competition law and efforts to guarantee that everyone is equal before the law, to safeguard the consistency, dignity, and authority of the legal

[24] China Law Translate, "Plan on Building the Rule of Law in China (2020–2025)", 10 January 2021, https://www.chinalawtranslate.com/en/%E6%B3%95%E6%B2%BB%E4%B8%AD%E5%9B%BD%E5%BB%BA%E8%AE%BE%E8%A7%84%E5%88%92%EF%BC%882020-2025%E5%B9%B4%EF%BC%89/

[25] Ibid. By 2025, the CCP aims to (a) further develop the institutional framework for the rule of law in China, (b) establish a more complete socialist legal system with Chinese characteristics (in which the constitution plays a central role), a more solid governance system with clear administrative responsibilities defined by law and a more efficient judicial system, (3) make progress on the formation of a "rule of law society" and (4) improve the application of internal party regulations.

[26] Ibid. By 2035, it aims to (a) have basically completed a state, a government, and a society under the rule of law, (b) have basically formed a socialist rule of law system with Chinese characteristics, (c) fully guarantee the people's right to equal participation and equal development and (d) modernize the national governance system and governance capabilities. See also: Moritz Rudolf, "Xi Jinping Thought on the Rule of Law New Substance in the Conflict of Systems with China", SWP Comment, April 2021, available at: https://www.swp-berlin.org/publications/products/comments/2021C28_Jinping_RuleOfLaw.pdf

[27] 坚持走中国特色社会主义法治道路 更好推进中国特色社会主义法治体系建设, April 2021, http://www.qstheory.cn/dukan/qs/2022-02/15/c_1128367893.htm

[28] Ibid.

system, and to call to account anyone who violates the Constitution or other laws.[29]

- **Third, further reform in the "rule by law":**

  This refers to
  (1) reforming of the judicial system (both, the courts and the procuratorate);
  (2) ensuring social equity;
  (3) establishing a complete, procedure-based and effective system of constraints to strengthen oversight over legislative, judicial, supervisory and law enforcement powers;
  (4) training legal personnel;
  (5) reforming the management system of judicial and law enforcement personnel.

  Xi reiterated "never should anyone defer to the Western legal system or copy Western practices in the name of reform."[30]

- **Fourth, apply legal means in international matters:**
  Xi stated that China's "capacity to defend the interests of the people and the country with legal means has grown remarkably. We must continue our efforts in this field at home and abroad. Prioritizing areas with urgent needs, we will strengthen foreign-related legislation, improve laws and regulations against sanctions, interference, and abuse of long-arm jurisdiction, and establish a legal system applicable beyond our borders. We should make cooperation in law enforcement and judicial activities an important topic on the agenda of bilateral and multilateral relations and extend the security chain for protecting our overseas interests. We should train more professionals in foreign-related legal affairs."[31]

- **Fifth, strengthen theoretical research and public education on the rule of law:**
  Xi stated that the PRC needs to sum up its experience in "developing and practicing the rule of law, elucidate our traditional culture in this area with stories and examples, and increase the international influence of our legal system and theories of the rule of law so that we can have a stronger voice on the global stage."[32]

[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] Ibid.

Domestically the key implications of the CCP promoting the rule by law under Xi Jinping are as follows:

While the PRC's judicial reform agenda dates back decades, Xi raised its significance within the development agenda of the PRC and embedded it into a strategic and ideological context.[33]

For most people in the PRC, the new push of judicial reform means less day-to-day arbitrariness. This applies above all to civil and administrative law, questions of jurisdiction and improving processes.

Judicial reform appears to be focused on pragmatically adopting tools from the West, as long as they can be embedded in the Chinese context of one-party rule. Notably, the party decides what is subject to the state legal system and what is "sensitive" and to be handled by the party.[34] Sensitive matters are defined by the CCP and assessed outside the law and are therefore not under the control of the state judiciary.[35]

There are clear efforts to cultivate a (moral) law-abiding population and CCP loyal judiciary. At the same time the PRC is increasing its ability to monitor and persecute those who break the law or who are questioning one-party rule.

Viewed objectively, the Chinese approach to integrating digital technology into the judicial process is avant-garde. For several years, the PRC has been putting processes online. Covid advanced the adoption of this by more courts.

It remains to be seen, whether China's vision will be attractive to third countries. At least when it comes to increasing the efficiency of state action and reducing arbitrariness through technology, it seems plausible.

[33] More information on China's judicial reform can be found here: Supreme People's Court Monitor, "Dean Jiang Huiling on Chinese Judicial Reform" 20 January 2022, https://supremepeoplescourtmonitor.com/2022/01/20/dean-jiang-huiling-on-chinese-judicial-reform/, and here: Supreme People's Court Monitor, Dean Jiang Huiling (蒋惠岭) on the Last 10 Years of Judicial Reform, 29 March 2023, https://supremepeoplescourtmonitor.com/2023/03/29/dean-jiang-huiling-%e8%92%8b%e6%83%a0%e5%b2%ad-on-the-last-10-years-of-judicial-reform/

[34] See for more details: Jamie P. Horsley, "Party leadership and rule of law in the Xi Jinping era" September 2019, available at: https://www.brookings.edu/research/party-leadership-and-rule-of-law-in-the-xi-jinping-era/

[35] More information on this matter can be found here: Supreme People's Court Monitor "Guidance on the Special Handling of Four Types of Cases & Its Implications" 21 February 2022, https://supremepeoplescourtmonitor.com/2022/02/21/guidance-on-the-special-handling-of-four-types-of-cases-its-implications/

International Dimension

The Chinese leadership strives to become a relevant actor in the realm of international law and redefine international rules. Since 2014, Beijing's capacity build-up in international law has become more robust and strategic, reflecting China's increasing power and global interconnectedness. According to the Plan on Building the Rule of Law in China (2020–2025), Beijing aims to promote its "rule by law" concept internationally.[36]

At the international level, the PRC also follows an instrumentalist approach of the law. The law shall serve as a tool to safeguard China's core interests and to carry out international struggles.[37] For instance, during the 4th Plenary Session of the 18th CCP Central Committee, Xi called upon the PRC to utilize international law to "safeguard China's sovereignty, national security, and development interests."[38]

In recent years, the PRC has become more active and self-confident in the realm of international law. Beijing's self-confident utilization of international legal arguments in grey areas of international law is a remarkable new development. While the PRC refused to participate in the South China Sea Arbitration (2013-2016),[39] today it confidently uses international law, to defend its political position. During the "spy balloon" affair, Beijing argued that it cannot be determined whether US law and the ICAO are superseded by outer space law (since the balloon was flying at an altitude of 18km). Also, the Chinese Foreign Ministry referred to force majeure and criticized the shoot-down of the balloon as a violation of international law.[40]

The PRC is striving for discourse power in contested areas of international law. For instance, within the UN, the PRC has become more active in reinterpreting and defining international legal termini. Also, the PRC has become more strategic to organize majorities within the UN system, for instance, when it advocated for its position or when it succeeds to get preferred candidates elected to crucial UN positions.[41]

The PRC enjoys a high degree of discourse power within the UN Human Rights Council (UNHRC). The PRC has a collectivistic understanding of human rights as opposed to a Western individual-centered approach to human rights. Beijing can rely on a majority of UNHRC members, to pass (legally non-binding) resolutions, to defend its views regarding the human

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[36] China Law Translate, "Plan on Building the Rule of Law in China (2020–2025)", 10 January 2021, (See paragraph 25) https://www.chinalawtranslate.com/en/%E6%B3%95%E6%B2%BB%E4%B8%AD%E5%9B%BD%E5%BB%BA%E8%AE%BE%E8%A7%84%E5%88%92%EF%BC%882020-2025%E5%B9%B4%EF%BC%89/

[37] 习近平谈法治最新金句 剖析高级干部走上犯罪道路原因, 15 February 2019, http://jhsjk.people.cn/article/30707597

[38] Communique of the 4th Plenary Session of the 18th Central Committee of CPC, 23 October 2014, http://www.china.org.cn/china/fourth_plenary_session/2014-12/02/content_34208801.htm

[39] The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), https://pca-cpa.org/en/cases/7/

[40] Charlie Dunlap, J.D." "The Chinese balloon shoot-down incident and the law: some observations", 5 February 2023, https://sites.duke.edu/lawfire/2023/02/05/guest-post-the-chinese-balloon-shoot-down-incident-and-the-law-some-observations/

[41] See: Rudolf, M., "The Belt And Road Initiative - Implications For The International Order" (2021) pp. 277-280.

rights situation in Xinjiang or Hong Kong.[42]

Also, the PRC has become more vocal across the entire UN system. Traditionally the PRC did not play a significant role in the sixth (legal) committee of the UN.[43] Today, Chinese officials participate in very large numbers. They come very well-prepared, take the floor, and outline the Chinese position in a well-structured manner.

For Beijing, the law shall serve as a tool to establish the so-called "Community of shared future for mankind" (CSFM). The CSFM is Beijing's vision of a reformed international order, free from the existing biases towards the West. Xi Jinping introduced the concept to a global audience in 2015, when he delivered his first speech before the United Nations General Assembly in New York.[44] Xi highlighted five aspects, which form the core of the CSFM.

- Equal Partnerships
- A new security architecture
- Common Development
- Inter-civilization exchanges
- Green Development

Building the CSFM is a key goal of the Chinese leadership. It is the most used buzzword of the Chinese leadership when referring to reforming the international (legal) order. In 2017 and 2018 respectively, the term CSFM was incorporated into the preambles of the CCP and PRC constitution, highlighting its importance within the Chinese system.

Since 2021, the PRC leadership launched three global initiatives which appear to be implementation steps of the CSFM. Those initiatives underline the PRC's efforts to reshape the international order. International law is viewed as the main tool to achieve this goal.

[42] E.g., https://www.ohchr.org/en/news/2022/10/human-rights-council-adopts-21-texts-and-rejects-one-draft-decision-extends-mandates
[43] See: Kim, "China, the United Nations and World Order," p. 110.
[44] Statement by H.E. Xi Jinping President of the People's Republic of China At the General Debate of the 70th Session of the UN General Assembly, 28 September 2015, https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/201510/t20151012_678384.html

In September 2021, Xi Jinping proposed the Global Development Initiative (GDI) at the UN.[45] The GDI projects China's prioritization of development (e.g., over the pursuit of individual human rights) to the UN level.

The GDI includes eight priority areas, namely

1. Poverty alleviation,
2. Food security,
3. Pandemic response and vaccines,
4. Development finance,
5. Climate change and green development,
6. Industrialization,
7. Digital economy,
8. Connectivity in the digital era.

Efforts to tie Beijing's development-focused approach to the UN's 2030 Sustainable Development Goals date back before the launch of the GDI. For instance, Beijing has been working on connecting the Belt and Road Initiative (BRI) with the UN's Sustainable Development Goals for several years. [46] With the GDI, those efforts are being reinforced and Beijing reaches out directly to the global south.

The Global Security Initiative (GSI) may be viewed as the PRC's vision of collective security reform. Xi Jinping proposed the GSI during the Boao Forum in April 2022.[47]
In February 2023, the PRC issued the GSI Concept Paper, which substantiates Beijing's vision of a new international approach to security.[48]

The GSI highlights six aspects, namely:

1. Common security;
2. Sovereignty and territorial integrity;
3. Focus on the UN Charter;
4. Legitimate security concerns of all countries;
5. Peaceful dispute resolution via dialogue and consultation;
6. Security in traditional & non-traditional domains.

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[45] Xi Jinping's statement at the General Debate of the 76th Session of the United Nations General Assembly, 21 September 2021, http://www.news.cn/english/2021-09/22/c_1310201230.htm
[46] UN Department of Economic and Social Affairs, "Jointly building the "Belt and Road" towards the Sustainable Development Goals" https://www.un.org/en/desa/jointly-building-%E2%80%9Cbelt-and-road%E2%80%9D-towards-sustainable-development-goals
[47] Xi Jinping Delivers a Keynote Speech at the Opening Ceremony of the Boao Forum for Asia Annual Conference 2022, 21 April 2022, https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/202204/t20220421_10671083.html
[48] The Global Security Initiative Concept Paper, 21 February 2023, https://www.fmprc.gov.cn/mfa_eng/wjbxw/202302/t20230221_11028348.html

Notably, "legitimate security concerns" have been raised by the PRC when it comes to evaluating China's position on the Russian war in Ukraine.[49]

On 15 March 2023, Xi Jinping announced the Global Civilization Initiative (GCI)[50] which incorporates the PRC's "Modernization does not equal Westernization" narrative into a strategic umbrella.

The GCI includes four elements, namely:

1. Respect for the diversity of world civilizations
2. Common values of all mankind
3. Historical and cultural values of all countries
4. International cultural exchanges & cooperation

The GCI criticizes Western claims of universality and biases of the global order, for favoring the West while discriminating against the developing world.

The Belt and Road Initiative (BRI),[51] is the most concrete and comprehensive tool for building the Community of Shared Future of Mankind. The BRI is Beijing's key foreign policy agenda item and vision of global (China-centered) interconnectedness.

It includes five key cooperation areas, namely:

1. Intergovernmental policy coordination;
2. Reduction of trade barriers;
3. (Infrastructure) connectivity;
4. Financial integration;
5. People-to-people exchanges.

Since its launch in 2013, the PRC rebranded the BRI several times. The priority cooperation areas and geographical focus have evolved in a flexible way as well.[52]

In 2017 the BRI was incorporated into the CCP's constitution. Accordingly, the CCP shall "pursue the Belt and Road Initiative."[53] Therefore, BRI is here to stay.

Legal cooperation programs under the BRI accompany China's efforts to gain international discourse power over legal issues. Beijing systematically reaches out to BRI states to promote its legal positions. Since July 2018, Beijing has been promoting this process

[49] China's Position on the Political Settlement of the Ukraine Crisis, 24 February 2023, https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/202302/t20230224_11030713.html
[50] 习近平在中国共产党与世界政党高层对话会上的主旨讲话 (全文), 15 March 2023, https://www.fmprc.gov.cn/zyxw/202303/t20230315_11042301.shtml
[51] Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road, 28 March 2015, https://www.fmprc.gov.cn/eng/topics_665678/2015zt/xjpcxbayzlt2015nnh/201503/t20150328_705553.html
[52] See: Rudolf, M., "The Belt And Road Initiative - Implications For The International Order" (2021) pp. 242-247. For instance, in 2018, international legal cooperation emerged as an official cooperation area under the BRI.
[53] See: http://www.xinhuanet.com//english/download/Constitution_of_the_Communist_Party_of_China.pdf

under the umbrella of the Belt and Road Legal Cooperation Forum.[54] Legal cooperation, as "soft connectivity", is intended to complement the desired "hard connectivity" (e.g., the development of cross-border infrastructure networks).

Beijing promotes the BRI as a mechanism to give different legal traditions and legal concepts from around the world international validity. The PRC criticizes the dominance of Western positions in the international legal discourse and offers to facilitate a "more democratic" international (legal) order. In addition to standardization efforts to promote international economic relations, China intends (with moderate success) to establish an international BRI dispute resolution mechanism. Also on the agenda is the establishment of what has been named a "Clean Silk Road", an initiative that calls for international cooperation on anti-corruption and the global fight against "terrorist, separatist and extremist forces". During the Second Belt and Road Forum for International Cooperation in April 2019,[55] the CCP's Central Commission for Discipline Inspection together with the Chinese Ministry of Foreign Affairs and the China Law Society hosted a sub-forum titled "Building a Clean Silk Road through Consultation and Cooperation for Shared Benefits".[56] This sub-forum focused on the international fight against corruption, the establishment of a network of extradition treaties and a training program for lawyers from BRI countries.

The "Belt and Road Legal Cooperation Research and Training Program" launched in the autumn of 2019 serves to convey and disseminate China's international law practice, legal concept, and the theory of "socialist law with Chinese characteristics".[57] Existing legal exchange programs with developing countries have been embedded in a strategic framework. The program is aimed at members of the (international) legal departments of the respective foreign and justice ministries. Representatives of 22 states, such as Egypt, Ethiopia, Pakistan, Serbia, and Turkey, took part in the first 11-day seminar.[58] Those seminars aim to promote the PRC's approach and practice of the law to BRI countries. While those efforts stalled during the past three years (due to the COVID-pandemic) they are likely to reemerge with more vigor in the years to come.

[54] Forum on the Belt and Road Legal Cooperation Opens in Beijing, 2 July 2018, https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zzjg_663340/tyfls_665260/tfsxw_665262/201807/t20180704_599949.html
[55] List of Deliverables of the Second Belt and Road Forum for International Cooperation, 27 April 2019, http://www.beltandroadforum.org/english/n100/2019/0427/c36-1312.html
[56] Full text: Beijing Initiative for the Clean Silk Road, 26 April 2019, http://www.chinadaily.com.cn/a/201904/26/WS5cc301a6a3104842260b8a24.html
[57] The First Session of the Belt and Road Legal Cooperation Research and Training Program Opens in Beijing, 14 October 2019, https://www.fmprc.gov.cn/mfa_eng/gjhdq_665435/2675_665437/2782_663558/2784_663562/201910/t20191016_524183.html
[58] Ibid.

At the international level, the key implications of the CCP promoting the rule by law are as follows:

First, more Chinese international law expertise:
On 6 December 2021, Xi Jinping declared that the PRC needs better-trained international lawyers and a larger number of professionals who have "a global outlook, a good command of foreign languages and understanding of international rules, as well as international negotiations skills."[59]

Also, Xi has repeatably encouraged Chinese diplomats to "participate in global governance, to make rules and to set agendas," prioritizing the areas of global security, health, climate, economics, and cyber affairs.

On February 26th, the Chinese Communist Party (CCP) issued the "Opinions on Strengthening Legal Education and Legal Theory Research in the New Era".[60] The document describes comprehensive reform plans for legal education in China. It further reiterates the goal to expand China's international law expertise and to develop a Chinese theory of international law.

It appears to be just a matter of time before large numbers of better-trained Chinese diplomats and international lawyers emerge on the global stage.

Second, more Chinese engagement in international rule-setting:

The PRC aims to play a decisive role in formulating international rules in key strategic fields. The Chinese leadership has defined the following areas: the high seas, polar regions, cyberspace, outer space, nuclear security, anti-corruption, and climate change. Also, China has determined the following domestic regulatory priorities: development of the digital economy, internet finance, artificial intelligence, big data, and cloud computing. In those areas, Beijing also wants to set international standards.[61]

This is not surprising as any emerging country has an incentive to have its interests reflected in the international order. In doing so, the PRC has been very active in reaching out to the global south to build coalitions for the future of global norm-setting (e.g., in Africa, when it comes to internet regulatory standards).

[59] 坚持走中国特色社会主义法治道路 更好推进中国特色社会主义法治体系建设, April 2022 http://www.qstheory.cn/dukan/qs/2022-02/15/c_1128367893.htm
[60] 中共中央办公厅 国务院办公厅印发《关于加强新时代法学教育和法学理论研究的意见》, 26 February 2023. http://www.gov.cn/zhengce/2023-02/26/content_5743383.htm
[61] 习近平法治思想"十一个坚持, 16 April 2021, http://gysj.cngy.gov.cn/new/show/20210416065221862.html

Third, promotion of "foreign-related rule of law" (涉外法治):
Improving the so-called "foreign-related rule of law" includes four components.

1) Beijing wants to strengthen its ability to protect Chinese citizens and entities from foreign sanctions, "interference, and abuse of long-arm jurisdiction".[62] The PRC leadership puts a lot of emphasis on this due to increasing US-China tensions. Also, Beijing has a lot of catching up to do in this area (especially compared to the US). Recent legislation in the areas underlines that China is prioritizing catching up here.[63]

2) Promoting "Foreign-related rule of law" focuses on increasing China's ability to apply its laws extraterritorially. Over the past 10 years, Chinese laws with extraterritorial clauses have increased significantly (e.g., Art. 27 of the Counter-Espionage Law (2014), Art. 11 of the Anti-Terrorism Law (2015), Art. 75 of the Cybersecurity Law (2017), Art. 82 of the Nuclear Security Law, Art. 37 and 38 of the Hong Kong National Security Law (2020), Art. 44 of the Export Control Law (2020), Art. 2 of the Data Security Law (2021), Art. 2 of the Personal Information Protection Law (2021), and the Anti-Foreign Sanctions Law (2022)).

This appears to be a normal development for a powerful and globally connected state. At this point, the PRC appears to be unable and (for the most part) unwilling to enforce its laws very efficiently abroad. Notably, the PRC appears to be striving to follow in the footsteps of the US.[64] This is a key priority area for Beijing.

3) "Foreign-related rule of law" also means that the leadership in Beijing encourages Chinese courts to increase their ability to apply foreign law. The reason for this development is the BRI, which 149 countries have joined.[65] Notably, so far there are only a few cases where Chinese courts applied foreign law.[66] Nevertheless, the Chinese leadership wants to increase this number and turn China to become an international dispute resolution center.

4) Beijing has expressed the goal to train more Chinese jurists to understand and apply foreign and international law.[67] The capacity-building process is ongoing.

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[62] 坚持走中国特色社会主义法治道路 更好推进中国特色社会主义法治体系建设, April 2022 http://www.qstheory.cn/dukan/qs/2022-02/15/c_1128367893.htm
[63] China Law Translate, "Law of the PRC on Countering Foreign Sanctions" 10 June 2021, https://www.chinalawtranslate.com/en/counteringforeignsanctions/
[64] 最高人民法院关于人民法院涉外审判工作情况的报告, 29 October 2022, https://www.court.gov.cn/zixun-xiangqing-377231.html
[65] See: https://www.yidaiyilu.gov.cn/info/iList.jsp?cat_id=10037
[66] Supreme People's Court Monitor, "Supreme People's Court's Specialized Report on Foreign-Related Adjudication Work" 8 February 2023, https://supremepeoplescourtmonitor.com/2023/02/08/supreme-peoples-courts-specialized-report-on-foreign-related-adjudication-work/
[67] 最高人民法院关于人民法院涉外审判工作情况的报告, 29 October 2022, https://www.court.gov.cn/zixun-xiangqing-377231.html

Fourth, increasing international judicial cooperation, in particular cooperation in the field of law enforcement.[68]
Beijing strives to increase its engagement in international cooperation in the fight against violent terrorist, ethnic separatist and religious extremist forces, drug trafficking, and transnational crime. The PRC also wants to expand international anti-corruption cooperation, to "increase efforts in overseas pursuit of stolen goods, repatriation, and extradition."[69] Since 2019, those efforts have been incorporated into the BRI ("clean silk road").[70] For this purpose, Beijing has been building a global network of bilateral extradition treaties. The European Court of Human Rights decision from November 2022 will prevent any extraditions from Europe to China,[71] thereby strengthening incentives for Beijing to primarily focus on the global south for those efforts. Nevertheless, Beijing appears to be willing and increasingly capable to pursue its domestic security priorities outside of its borders (notably to a much smaller degree in comparison to the US).

Fifth, building modern international dispute resolution mechanisms.
With the so-called BRI International Commercial Courts, the PRC aims to promote greater capacity of its own arbitration institutions. The Chinese leadership wants China to become an international arbitration center. Also, it aims for more cooperation between arbitration tribunals from China and BRI countries.

Beijing's successful facilitation between Saudi Arabia and Iran and its recent efforts concerning the war in Ukraine underline that China wants to assume an international role in conflict resolution. On February 16, the inauguration ceremony of the Preparatory Office of the International Organization for Mediation took place in Hong Kong.[72] It will be the first international intergovernmental institution focusing on international conflict resolution via mediation, which aims to provide a new platform for the peaceful resolution of international disputes. We can expect much more efforts by the PRC to engage in bilateral dispute resolution in the future.[73]

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[68] China Law Translate, "Plan on Building the Rule of Law in China (2020–2025)", 10 January 2021, https://www.chinalawtranslate.com/en/%E6%B3%95%E6%B2%BB%E4%B8%AD%E5%9B%BD%E5%BB%BA%E8%AE%BE%E8%A7%84%E5%88%92%EF%BC%882020-2025%E5%B9%B4%EF%BC%89/
[69] Ibid.
[70] Cui Hui, "Clean Silk Road: The key to safeguard the BRI" 26 April 2019, https://news.cgtn.com/news/3d3d674e78676a4d34457a6333566d54/index.html
[71] Vivianne Yen-Ching Weng and Yu-Jie Chen, "Liu v. Poland: A Game Changer for the Extradition Agendas of Autocracies (like China)?", 17 November 2022, https://www.ejiltalk.org/liu-v-poland-a-game-changer-for-the-extradition-agendas-of-autocracies-like-china/
[72] Int'l Organization for Mediation to facilitate dispute settlement: Chinese FM, 16 February 2023, https://english.news.cn/20230216/1a95d40e0ed8481f988586ebc4133ab1/c.html
[73] Moritz Rudolf, "Xi Jinping Thought of the Rule of Law and Beijing's goal to redefine international norms" April 2023, https://www.democraticfutures.de/policy-paper-moritz-rudolf-english

Recommendations:

Given the prioritization of the Chinese leadership to develop and promote China's approach to "rule by law", it is relevant systematically study and understand this trend. Bilateral exchanges of jurists from the PRC and the US may be beneficial for the US, since announcement and implementation tend to diverge in the PRC. Also, the PRC's incorporation of new-tech into the judicial system deserves close attention from political decision-makers.

The effectively defend the international legal order, nuances matter when it comes to assessing the PRC's utilization of international law. The international legal order is participatory by design and built for nations to contribute to its development. China's interactions in the UN and other global fora may be challenging, but it isn't necessarily an attack on those systems. In other words, China's contributions can't be 'bad' simply because they come from China. Nevertheless, 'bad' contributions and concrete violations of international law by the PRC should be firmly addressed through those same mechanisms. Otherwise, there is a risk of undermining the so-called international rules-based order in the attempt to uphold it.

Even if the PRC challenges aspects of the so-called rules-based international order, it is impossible to wish away the PRC. We are merely witnessing the first phase of a more self-confident China which utilizes the law to pursue its interests at the global level. China is a global stakeholder and plays a determining factor in the future development of the global order.

Political decision-makers should anticipate (and prepare) to face better-trained Chinese diplomats and international lawyers, negotiating complex international legal issues (e.g., regarding the high seas, polar regions, cyberspace, outer space, nuclear security, global health, and climate change). Comprehensive knowledge of the Chinese positions is imperative for future negotiations. Therefore, a technical debate and exchanges between Washington and their Chinese counterparts on international legal issues should occur sooner rather than later.

It is also recommended to strengthen capacity-building projects for members of departments of justice, etc. in the global south. They are negotiating with Chinese parties without the requisite training.

The PRC will most likely be sitting at the table when fundamental reforms of the UN system will be up for debate. Even if the Chinese proposal to end the war in Ukraine won't solve the conflict, it has shown that the PRC is aiming for a central role in negotiations about the post-war arrangement. It is crucial to think ahead and prepare for this scenario (e.g., by building a broad global coalition).

For decision-makers in the US (and like-minded states), it is crucial to regain ground within existing international institutions. The PRC views the existing international order as the outgrowth of century-old power asymmetries favoring Western states. Many states of the global south share Beijing's view that a fundamental reform of the global order is overdue. The PRC appears to be in the process of international coalition building to reform the international legal order, while the US is more and more inward-looking. Xi has a third term and a loyal standing

committee while the US is entering the 2024 election mode. This should concern US decision-makers.

To achieve realistic political goals, the room for maneuvering a values-based foreign policy approach (following a democracy vs. autocracy narrative) appears to be rather small. To attain majorities, it is necessary to (pragmatically) reach out to "third states" and to build political coalitions beyond the G-7. Given the PRC's ambitions in the realm of international law, hubris will not be enough to uphold the international order.

Dr. Moritz Rudolf
New Haven, May 1st, 2023

OPENING STATEMENT OF VIVIENNE BATH, PROFESSOR OF CHINESE & INTERNATIONAL BUSINESS LAW AND ASSOCIATE DIRECTOR INTERNATIONAL OF THE CENTRE FOR ASIAN AND PACIFIC LAW, SYDNEY LAW SCHOOL

COMMISSIONER GOODWIN: Professor Bath. I think you may still be muted.

MS. BATH: I am indeed, sorry. Good morning. Thank you for giving me the opportunity to give testimony on the CCP's promotion of rule by law.

I have a number of comments on several aspects of the plan focusing on civil and commercial law, first, the focus on improving goals and rules for Chinese courts and arbitral institutions in order to be internationally competitive, secondly, the promotion of the use of Chinese law outside China, and similarly, promotion of Chinese dispute resolution institutions and laws to the world, and third, China's international outreach in order to promote Chinese legal, judicial, and dispute resolution expertise.

First, there are many positives in a program which aims to build up the capability and competence of Chinese courts and arbitral institutions so that they meet international criteria in order to be competitive internationally. The work of the Supreme People's Court and other agencies is, in fact, very impressive in this regard.

I also note that China is far from the only country which aims to be an international dispute resolution center and actively promotes its institutions. The success of the English courts at arbitration institutions and becoming the fora of choice in major international disputes is a good example of this.

An important issue here though is that to be a successful international center, parties must be confident, not just in the structure and efficiency of the legal system and the institutions engaged in dispute resolution, but in the neutrality and independence from government and politics.

In the case of China, this requires not only the creation of the institutions and the legal frameworks supporting them, but a well-founded belief by the parties using them that they will operate efficiently, consistently, and neutrally in accordance with the terms on which they're created.

Chinese arbitration institutes have made significant progress in attracting cases and building confidence. Notwithstanding improvements in capability and procedures, however, Chinese courts still fail the basic test of independence given requirements by the CCP that judges pledge loyalty to Xi Jinping and the party, and the ability of the party higher-level judges and officials to interfere in court decisions.

The fiction that business and politics can be separated so as to create a neutral system is surprisingly persistent, but is, I think, not sustainable.

Secondly, the idea of promoting the use of Chinese overseas has attracted considerable attention. However, it's difficult to tell how effective the promotion of Chinese law as a governing law in international commercial contracts and transactions has been in practice. Generally, the choice of law for major cross-border projects of the kind that China pursues along the Belt and Road correlates with the choice of the dispute resolution forum and is primarily driven by the financiers and by their lawyers. Other factors are language familiarity, confidence, accessibility of law, and availability of legal advice.

Anecdotally, it appears that Chinese law and Chinese dispute resolution is used in loan contract with Chinese lenders such as Chinese Ex-Im Bank, and I note that this is something

which is quite consistent with international practice.

It's also probably used in large infrastructure projects involving Chinese companies, and possibly in related contracts, as well as contracts between Chinese subsidiaries and subcontractors.

In terms of dispute resolution, both Chinese courts and arbitration institutions record an increase foreign-related cases over the last number of years.

Cases where there is no Chinese party, however, are few, suggesting that although Chinese fora may be accepted for disputes involving Chinese companies or one Chinese party, they are still not regarding as locations of choice for the purpose of international dispute settlement generally.

In addition, Hong Kong, Singapore, and other international arbitration institutes are also receiving substantial numbers of cases with Chinese parties, although it's not clear what systems of law are involved.

I also note that there's been a rapid increase in the number of investor state cases brought by Chinese companies under Chinese bilateral investment treaties, which is consistent with recommendations from the Supreme People's Court and the Ministry of Commerce, and many of these have been brought against developing countries along the Belt and Road.

None of them are, of course, being heard in China, but consistent with the China Ex-Im Bank's loan contracts which require Chinese law and CIETAC arbitration when the other party is a sovereign state, Chinese arbitral institutions have been preparing to accept investor state arbitrations.

In my view, an arrangement pursuant to which governments of developing countries agree to Chinese law in dispute resolution, waive sovereign immunity, and have a case against a Chinese government bank or state-owned enterprise heard under the auspices of a Chinese institutions is very problematic.

Finally, where China has been effective is in its investment and outreach aid and assistance and other arrangements pursuant to which Chinese courts and arbitral institutions have been promoting the smart courts, Chinese advances in online arbitration, and other aspects of legal and structural reform.

This highlights, I think, the very real need to assist developing countries to build up and improve their own legal and judicial capacity.

The recommendation that I would make to the Commission therefore, is that the U.S. should make it a priority in responding to China's internationalization project to engage with developing countries in improving their laws, judiciary, and dispute settlement mechanisms, and in training young scholars, judges, and lawyers in order to assist them to improve their domestic capability to negotiate and deal with major investments with international parties. I think developed countries have been unnecessarily absent from this particular space. Thank you.

COMMISSIONER GOODWIN: Thank you very much. Mr. Harris?

PREPARED STATEMENT OF VIVIENNE BATH, PROFESSOR OF CHINESE & INTERNATIONAL BUSINESS LAW AND ASSOCIATE DIRECTOR INTERNATIONAL OF THE CENTRE FOR ASIAN AND PACIFIC LAW, SYDNEY LAW SCHOOL

Testimony

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

Vivienne Bath

Testimony presented before the U.S.-China Economic and Security Review Commission on May 4, 2023

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

Vivienne Bath

Professor of Chinese and International Business Law

Sydney Law School, University of Sydney[1]

Thank you for offering me the opportunity to present my views to the Committee on the question of the expansion of Chinese law and dispute resolution at this hearing. A number of specific issues were raised by the Committee on the internationalization of Chinese law and Chinese dispute resolution which I have addressed below.

1. Introduction

I have focused my remarks on the Chinese project on the internationalization of Chinese law and dispute resolution on civil and matters. However, there are also an increasing number of Chinese laws which are expressly extraterritorial in their application, such as the Chinese Criminal Law, the Export Control Law, the Hong Kong National Security Law and the Anti-Monopoly Law,[2] while other laws and regulations, such as the Provisions on the Unreliable Entity List,[3] provide for retaliatory measures in cases of sanctions and other activities.

. In addition to these laws, the Communist Party of China (CCP) also has considerable power and authority in relation particularly to the overseas operations of state-owned enterprises and CCP members.

[1] The opinions and conclusions expressed in this testimony are the author's alone and should not be interpreted as representing those of Sydney Law School or the University of Sydney.

[2] The Chinese Criminal Law (1997, as revised) permits the prosecution in China of acts of – and against- Chinese citizens outside China, as well as acts committed outside China which have an effect in China. The 2020 Export Control Law imposes penalties on "any organization or individual outside the territory of the PRC" which violates provisions on export control under the law and endangers the national security and interests of the PRC. The 2020 Hong Kong National Security Law penalizes certain acts committed in Hong Kong; applies to Hong Kong permanent residents (which includes not just Chinese citizens but many other long-term expatriates) and Hong Kong incorporated companies who commit an offence under the law outside Hong Kong, as well as to offences under the law "against the Hong Kong SAR" from outside Hong Kong committed by a person who is not a permanent resident of Hong Kong. The Anti-Monopoly Law extends to conduct outside China which may have the effect of eliminating or restricting that eliminates or restricts competition in China's domestic market.

[3] The Provisions on the Unreliable Entity List allow the Chinese government to take measures against acts of foreign entities in international, economic, trade and related activities that endanger China's national sovereignty, security and development interests or violate normal principles of market transactions (Art 2). The Anti-Foreign Sanctions Law 2021 is directed against use of sanctions and enforcement by foreign governments and the 2019 International Criminal Judicial Assistance Law imposes controls on Chinese cooperation with foreign criminal investigations.

These laws have real impact. Yang Hengjun, an Australian citizen, was arrested in 2019 and tried for unspecified national security offences, which were presumably committed outside China.[4] Lockheed Martin Corporation and Raytheon Missiles & Defense were put on the Unreliable Entity list in early 2023.[5] A Hong Kong student has been arrested in Hong Kong for inciting sedition on the basis of social media posts made while studying in Japan.[6]

2. *Chinese government policies on promoting Chinese law and dispute resolution internationally.*

The Chinese government (in which I include the Communist Party of China (CCP)), supported by multiple institutions, including the Supreme People's Court (SPC), have engaged in a concerted program over the last five years or so to promote the use of Chinese law and Chinese dispute resolution internationally. This is reflected in the Central Party Committee Plan on Building the Rule of Law in China (2020 – 2025), which sets out as an objective:

25) Strengthen rule of law work involving foreign interests. To meet the high-level needs of opening to the outside world, improve the system of laws and rules related to foreign interests, compensate for shortcomings, and raise the level of bringing efforts involving foreign interests under rule of law.

Actively participate in the formulation of international rules and promote the formation of a fair and reasonable international rule system. Accelerate the advancement of the construction of a legal system applicable outside the jurisdiction of our country…[7]

The program also calls for the construction and improvement of international commercial courts, the promotion of dispute resolution in Chinese courts and arbitral institutions, as well as the encouragement of foreign arbitration institutions to operate in China, and the improvement of rules relating to litigation in Chinese courts in order to facilitate foreign-related disputes. This includes improving mechanisms for the ascertainment of foreign law so as to increase Chinese court

[4] The charges and the evidence are undisclosed; no verdict has been announced, although Yang has spent four years in prison. Reuters, "Australian government 'deeply troubled' by delays to writer Yang Hengjun's espionage trial verdict in China," 19 January 2023, https://www.abc.net.au/news/2023-01-19/australia-troubled-writers-espionage-trial-verdict-delayed-china/101873180

[5] DavisPolk, "Chinese Ministry of Commerce places two companies on its Unreliable Entity List for the first time," 22 February 2023, https://www.davispolk.com/insights/client-update/chinese-ministry-commerce-places-two-companies-its-unreliable-entity-list.

[6] Peter Lee, "Japan voices concern after Hong Kong student arrested over speech whilst abroad; Beijing blasts 'intervention'," 27 April 2023, Hong Kong Free Press, https://hongkongfp.com/2023/04/28/japan-voices-concern-after-hong-kong-student-arrested-over-speech-whilst-abroad-beijing-blasts-intervention/?utm_source=substack&utm_medium=email .

[7] English version available at China Law Translate, https://www.chinalawtranslate.com. Other relevant material s found in the Supreme People's Court (SPC), Opinions on the Supply of Judicial Services and Safeguards by the People's Courts for "'Belt and Road"' Construction, Fa Fa [2015] No. 9 (16 Jun. 2015) (First BRI Opinion); SPC, Opinions on Further Supply of Judicial Services and Safeguards by the People's Courts for the "'Belt and Road"' Construction, Fa Fa [2019] No. 29 (9 Dec. 2019) (Second BRI Opinion). See also Vivienne Bath, 'Recent Developments in China in Cross-Border Dispute Resolution: Judicial Reforms in the Shadow of Political Conformity,' Chapter 8 in Nottage, Ali, Jetin and Teramura (eds), *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution* (Wolters Kluwer 2021) 189.

capability to hear foreign-related disputes governed by foreign law. These policies in relation to Chinese law and Chinese dispute resolution mechanisms are implemented through changes in laws and regulations; SPC Opinions and regulations; changes to arbitration rules; the establishment, in some cases, of new institutions, and extensive outreach activities by Chinese arbitration institutions, courts and others in the form of international conferences, training, and other promotion exercises, to promote Chinese dispute resolution institutions and laws to the world (with a particular focus on countries on the Belt and Road).[8]

3. *Dispute resolution in China - internationalization*

Arbitration An integral part of the project of internationalization is the improvement and expansion of dispute resolution options within China in order to build China up as an international dispute resolution centre. There have been a number of steps to do this: the China International Commercial Court (CICC), a branch of the SPC entrusted with international commercial disputes, started hearing cases in 2019,[9] followed by the establishment of eight more international commercial courts in major cities. Ad hoc foreign-related arbitration conducted in China can now be enforced[10] and the foreign arbitral institutions are to be encouraged to establish case management offices in China.[11] Chinese arbitral institutions are attempting to promote themselves as qualified, quicker and more effective institutions for international commercial arbitration. More recently, some of them have issued rules for investor state arbitration, with a seat either inside or outside China.[12] The China International Economic Arbitration Commission (CIETAC) has branch offices in Hong Kong, Europe and Canada (although it appears that only the Hong Kong branch administers arbitrations) and has, according to its annual report, entered into cooperation agreements with a number of overseas arbitration institutions.

Government and court support is provided for China-based arbitration by court opinions (policy documents) designed to improve and facilitate the arbitration system. In the context of foreign-related matters, this includes facilitating enforcement of foreign arbitral awards by preventing lower level courts from refusing to enforce them and revising the judicial review process for arbitral awards.[13] At the government level, this includes the proposed amendments to the Arbitration Law, which are described as bringing Chinese arbitration law up to international standards by, among other things, allowing a tribunal to determine its own jurisdiction, allowing foreign-related ad hoc arbitration in China and allowing international arbitration bodies to conduct

[8] See, for example, the China International Economic Arbitration Commission (CIETAC) Report 2022 on their extensive program of outreach and training. http://cietac.org.cn/index.php?m=Article&a=index&id=38&l=en; Report of the Supreme People's Court on Foreign-related Trial Work of the People's Courts (2022), English version available at https://cicc.court.gov.cn/html/1/219/208/210/2326.html.

[9] CICC website, https://cicc.court.gov.cn/html/1/219/index.html.

[10] Ibid.

[11] Hongwei Dang, "Foreign Arbitration Institutions in China: the latest development," 21 September 2021, https://www.qmul.ac.uk/euplant/blog/items/foreign-arbitration-institutions-in-china-the-latest-development.html.

[12] Bath, note 7. Chi Manjiao, The ISDS adventure of Chinese arbitration institutions: towards a dead end or a bright future? (2020) 28 Asia Pacific Law Review 279.

[13] Ibid.

arbitration in China.[14] This acknowledges that an important part of the process of attracting dispute resolution to China is offering institutions and institutional rules that are internationally acceptable.

The courts On the judicial front, Chinese courts have developed from a slow start to a structured system with a fully qualified judiciary. In terms of foreign dispute settlement, Chinese courts have always been at a disadvantage due to the fact that the choice for foreign investors under joint venture laws was either litigation before the then undeveloped (and untrusted) court system and arbitration, inside or outside China. Even when the courts improved, arbitration was still favoured due mainly to the fact that China was a party to the New York Convention and arbitral awards were, at least in theory, enforceable in China, while foreign court judgments were not. Chinese courts have also traditionally taken a protective view of their own jurisdiction, with a corresponding reluctance to accord comity to other courts (based on a concept of "judicial sovereignty").[15]

Recent criticisms of the court system arose from a number of aggressive Chinese court decisions in relation to Chinese court jurisdiction over the licensing of patents under FRAND rules and the issue of injunctions by certain Chinese courts ordering foreign parties not to pursue or not to enforce patent litigation overseas, which attracted considerable international attention and commentary.[16] Although there have been no recent examples of this kind, proposed amendments to the Civil Procedure Law would have the effect of considerably expanding the jurisdiction of Chinese courts in foreign-related cases, as well as increasing the matters which are under the exclusive jurisdiction of the Chinese courts. A draft State Immunity Law (which would diverge from China's current stance of absolute state immunity, at least for foreign states in Chinese litigation) has been put before the National People's Congress, and would facilitate enforcement of judgments or awards made against foreign states (for example, under loan agreements or infrastructure contracts to which a state is a party, or investor-state arbitration awards).[17]

In conjunction with the proposed amendments to the Civil Procedure Law, however, the SPC has been working to deal with a number of problems associated with foreign-related matters, including making it easier for foreign court judgments to be enforced and assisting to resolve some ongoing issues with parallel litigation.(where Chinese courts accept cases concurrently being heard by foreign courts or institutions). [18]

[14] See summary, HerbertSmithFreehills, "Inside Arbitration: Proposed Amendments to China's Arbitration Law – a Sign of Internationalisation?" 22 February 2022 https://www.herbertsmithfreehills.com/insight/inside-arbitration-proposed-amendments-to-chinas-arbitration-law-a-sign-of.

[15] See Vivienne Bath, "Overlapping Jurisdiction and the Resolution of Disputes before Chinese and Foreign Courts," (2015-2016) 17 Yearbook of International Private Law 111-150 (November 2016). China (like the US) has signed, but not ratified, the Hague Convention on Choice of Court Agreements, which would facilitate the recognition and enforcement of exclusive jurisdiction agreements. https://www.hcch.net/en/instruments/conventions/full-text/?cid=98

[16] Zhongren Cheng, "The Chinese Supreme Court Affirms Chinese Courts' Jurisdiction over Global Royalty Rates of Standard-Essential Patents: Sharp v. Oppo," 3 January 2022 https://btlj.org/2022/01/the-chinese-supreme-court-affirms-chinese-courts-jurisdiction-over-global-royalty-rates-of-standard-essential-patents-sharp-v-oppo/

[17] China Law Translate, https://www.chinalawtranslate.com/en/PRC-Foreign-State-Immunity-Law-(Draft)/.

[18] See note 15.

However, there are several fundamental roadblocks to attracting foreign-related disputes to Chinese courts which are not resolved by any of these reforms. These are the subjection of the courts to Xi Jinping and the CCP, and the strengthening of Party leadership in the courts through, for example, the involvement of judges other than those who initially heard a particular case.in the final outcome.[19] Despite the improvements made in order to pursue the "rule of law," there is an ongoing risk of intervention (both political and otherwise) in court decisions which will continue (in my view) to undermine the credibility of Chinese courts as an international dispute resolution venue. The long-standing theory that China draws a distinction between business (which is not political and therefore less subject to interference) and the political is, in my view, unfounded.[20]

4. *Use of Chinese law and procedure outside China*

The expansion of Chinese law in civil and commercial matters outside China occurs in a number of ways. The first relates to legal issues arising in relation to Chinese trade, investments or operations. Chinese law has always been required to be the governing law in investment and natural resource transactions in China.[21] This was enforced by provisions in the Civil Procedure Law, which grant exclusive jurisdiction to the Chinese courts in relation to those disputes, as well as disputes relating to Chinese land. (Proposed amendments to the Civil Procedure Law would further expand those areas to include bankruptcy and winding up of entities established in China and the validity of Chinese intellectual property rights.) Disputes over these matters could, however, be heard by arbitral institutions inside or outside China, even though they involved issues of Chinese law.

Secondly, as the Chinese diaspora has expanded, issues relating to Chinese law now frequently fall to be resolved outside China. These include succession, divorce, marital and commercial disputes, as well as attempts to enforce Chinese court judgments, all of which raise issues of Chinese law for consideration by foreign courts.

Thirdly, the parties to commercial contracts could select Chinese law as the governing law for the dispute. For disputes where the parties are outside China, the parties may have considerable freedom under the doctrine of autonomy and local principles of private international law to designate a chosen system of law to govern their contracts, subject to local law requirements which may require the use of local law, in relation, for example, to investment, land, labour and other issues). Generally, although there are of course exceptions, the choice of law will correspond with the place of dispute resolution. In my view, this is particularly the case for Chinese law, which not well known or readily assessable and requires familiarity with Chinese language and the need for

[19] Susan Finder, "Guidance on the Special Handling of Four Types of Cases & Its Implications," Supreme People's Court Monitor, 21 February 2022, https://supremepeoplescourtmonitor.com/2022/02/21/guidance-on-the-special-handling-of-four-types-of-cases-its-implications/

[20] See, in this regard, Clarke, Donald C., Order and Law in China (August 25, 2020). GWU Legal Studies Research Paper No. 2020-52, GWU Law School Public Law Research Paper No. 2020-52, Available at SSRN: https://ssrn.com/abstract=368279; Li, Ling, Order of Power in China's Courts (March 31, 2023). Asian Journal of Law and Society, Available at SSRN: https://ssrn.com/abstract=.

[21] Now reflected in Civil Code of the PRC 2020, Art 467.

translation (even in institutions where proceedings may be conducted in English or another language), as well as the need to locate and find a Chinese law expert in proceedings outside China.

It is difficult to obtain information on the content of Chinese international contracts to determine how widespread the choice of Chinese law is in these contracts. One study on China's loan agreements with foreign governments indicates that China Eximbank – in common with other bilateral creditors in the study - prefers to designate its home law, that is, Chinese law, and CIETAC Arbitration, and - like lenders from other countries - is in a position to enforce this preference.[22] At the commercial level, it is quite common for foreign parties to commercial contracts to designate the law and courts or tribunals of their home country if they can persuade the other party to agree to it. Certainly, this has been the practice of many companies doing business in or with China. There appears to be some anecdotal evidence that Chinese law and dispute resolution has been and is being used in Africa in some infrastructure contracts (where the financiers often drive the choice of law and forum).[23] It may in some cases also be used between a Chinese contractor and a supplier (even if local law might require local governing law), or between Chinese-owned subsidiaries acting as sub-contractors on major projects.[24]

As noted above, this choice will, it seems to me, for the reasons above, generally be associated with choice of a Chinese forum, or a centre competent to deal with Chinese law and Chinese language, such as Hong Kong or Singapore.

Chinese arbitral institutions have also been actively engaged in international outreach with an emphasis on the Belt and Road. Matthew Erie's article[25] provides some interesting insights on both the process of outreach and the limitations on its success in incorporating Chinese procedures and rules into joint Chinese-African arbitral centres.

5. *Effectiveness of China's attempts to become a competitive venue, particularly along the Belt and Road*

It is difficult to assess the success of this project, although statistics issued by some of the dispute settlement systems may be relevant. First, in the context of the Belt and Road, however, there are now 149 countries which are considered to be countries of the Belt and Road, with substantial differences in development levels and many different systems of law, which makes it impossible to generalize.[26] Secondly, international dispute resolution is a competitive field, so while the constant expansion of outbound investment and construction activity by Chinese companies may also increase the number of international disputes, there is strong competition for the dispute

[22] Anna Gelpern, Sebastian Horn, Scott Morris, Brad Parks, and Christoph Trebesch, "How China Lends: A Rare Look into 100 Debt Contracts with Foreign Governments," March 2021 Peterson Institute for International Economics, Kiel Institute for the World Economy, Center for Global Development, and AidData at William & Mary, https://www.aiddata.org/publications/how-china-lends

[23] Won L. Kidane, "Agreements and Dispute Settlement in China-Africa Economic Ties," Ch 11 in Arkebe Oqubay and Justin Yifu (eds) *China-Africa and an Economic Transformation* Oxford University Press 2019.

[24] Susan Finder, "Invisible Belt & Road Disputes," 22 June 2021, Supreme People's Court Monitor, https://supremepeoplescourtmonitor.com/2021/06/22/invisible-belt-road-disputes /.

[25] Erie, Matthew Steven, "The Soft Power of Chinese Law" (2023) 60(1) Columbia Journal of Transnational Law 1.

[26] Green Finance and Development Center, Countries of the Belt and Road Initiative, https://greenfdc.org/.

resolution work. There are, for example, numerous newly International Commercial Courts (or commercial divisions) in Singapore, New York, Kazakhstan, Brussels, Paris and others (with Germany soon to enter the market), despite the very mixed success of this model of dispute resolution. [27] Major international arbitration institutions including the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC) and the International Centre for Dispute Resolution (ICDR) all actively promote their services across the world.

The SPC Report indicates that the number of foreign-related cases has increased significantly (from 14,800 in 2013 to 27,300 in 2021), and involves new types of disputes, more states, more foreign law and more cases where parties voluntarily choose Chinese jurisdiction, but there is no break-down of the cases and type. (In particular, statistics issued by the courts and arbitral tribunals do not explain what "foreign-related" cases are. They generally include cases involving parties from Hong Kong, Macao and Taiwan but probably do not include disputes between foreign subsidiaries of Chinese entities.) CIETAC statistics[28] from the 2022 Work Report state that the number of foreign-related disputes (642 out of 4086) has been increasing, and the number of disputes with no Chinese party increased by 36% to 83 cases. The range of countries, governing laws and languages has also increased, including 32 countries along the Belt and Road and all 10 ASEAN countries. However, the ten countries or regions most frequently involved in foreign-related cases were Hong Kong (the largest country or region involved), the US, Germany, Korea, Singapore, the British Virgin Islands, United Kingdom, the Cayman Islands, Canada and Japan. Of these, only Korea and Singapore (and Hong Kong) have signed up to the Belt and Road, and their companies are certainly able to defend their own positions in international negotiations.

Both the Singapore International Arbitration Centre[29] and the Hong Kong International Arbitration Centre[30] are substantially smaller than CIETAC. However, the percentage of their cases which are international is substantially higher than CIETAC and the dollar value of foreign-related cases is very similar. In both cases, cases with Chinese parties play a significant role, accounting for more than 50% of all arbitrations in Hong Kong in 2022 and the third largest number in the case of the SIAC. This suggests that CIETAC is a relatively trusted arbitral venue, but mainly for disputes which involve a Chinese (or Chinese-related) party. Even for these cases, other alternatives in the Asian region are also trusted and available.

In summary, foreign-related arbitration in China is thriving, but mainly due to cases where a Chinese (or Hong Kong) party is involved. International arbitrations involving Chinese parties are also by no means limited to Chinese institutions.

It is also worth noting that Chinese authorities have for some time been encouraging Chinese companies to take advantages of China's extensive investment treaty network. Although cases

[27] Giesela Ruehl, "International Commercial Courts for Germany?" 27 April 2023 https://conflictoflaws.net/2023/international-commercial-courts-for-germany/

[28] There are of course many other arbitration institutions in China, but CIETAC is still the largest.

[29] SIAC, SIAC: Where the World Arbitrates, Annual Report 2022, https://siac.org.sg/wp-content/uploads/2023/04/SIAC_AR2022_Final-For-Upload.pdf, pp 12 -13.

[30] HKIAC, 2022 Statistics, https://www.hkiac.org/about-us/statistics.

against China itself are limited (eight, excluding Hong Kong)[31] of which none have so far been successful, there are at least 17 recorded cases brought by Chinese investors (with mixed success), including cases against a range of developing states, including Mongolia, Yemen, Mongolia, Ukraine, Cambodia, Ghana, Viet Nam and Ecuador.[32] These would normally involve public international and domestic law of the host state.

6. What is the strategic basis and policy intent behind China's pursuit of greater influence in international law? How effective has China been so far, and how do you appraise the likely trajectory of its efforts in the next five to ten years?

This is a very broad question and I do not feel able to answer it fully. In the commercial context, China is a very active participant in negotiations and discussions in the United Nations Commission of International Trade Law[33] and the Hague Conference of Private Law.[34] It has a mixed record in terms of accessions to the resulting instruments, however. It is a party to the New York Convention on the Recognition and Enforcement of Arbitral Awards, as well as the Convention on International Contracts for the Sale of Goods. It has signed but not ratified the Singapore Convention on International Settlement Agreements Resulting from Mediation and the Convention on Choice of Courts Agreements and has not signed up to the Judgments Convention or any conventions on carriage of goods by sea, despite its participation in negotiations.

I also note that China's compliance with existing rules is inconsistent. For example, although China is a member of WTO, openly supports a rule-based international trade system and participates in WTO proceedings as claimant, respondent and third party, this does not stop it (directly or indirectly) engaging in informal trade sanctions or other ways of interfering with trade for what are clearly political reasons. The disputes with Australia over coal, barley, wine and other products during the pandemic are an example of this (although the current WTO dispute over wine has been suspended for three months in view of improved relations between the two countries).[35] In the case of the South China Sea, China is a party to the United Nations Treaty on the Law of the Sea[36] but persists in pursuing a claim which is unsustainable under international law but which may succeed *de facto*, if China succeeds in establishing control over the South China. In my view, China's aim -both long term and short term - is to shape international law in accordance with its own interests and its ever-expanding concept of national security.

6. Recommendations

[31] UNCTAD, Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/investment-dispute-settlement/country/42/china/respondent.
[32] Ibid. https://investmentpolicy.unctad.org/investment-dispute-settlement/country/42/china/investor
[33] UNCITRAL, https://uncitral.un.org/.
[34] Hague Conference on Private International Law, Status Table, https://assets.hcch.net/docs/ccf77ba4-af95-4e9c-84a3-e94dc8a3c4ec.pdf
[35] .Minister for Foreign Affairs, "Step forward to resolve barley dispute with China," 11 April 2023, https://www.foreignminister.gov.au/minister/penny-wong/media-release/step-forward-resolve-barley-dispute-china.
[36] United Nations, United Nations Convention on the Law of the Sea of 10 December 1982, https://www.un.org/depts/los/reference_files/Los106UnclosStatusTableEng.pdf

It is clear from both the CIETAC Report and the Report of the SPC that Chinese institutions are actively engaged in outreach all around the world, both to promote their own interests and to sign up to judicial assistance and cooperation agreements, engage in education and training, discuss issues of national and international interest and so on, all with the full support of the government (financial and otherwise). This is particularly true of Africa.[37] Developed countries seem to me to be missing many opportunities here and my recommendation is that this Committee should support the need for the US to return to, or start, engaging in these exchanges, providing assistance where needed, educating and offering research opportunities to promising young scholars and officials, setting up joint research projects and other steps in order to promote international law, international rules on trade and investment and neutral systems of dispute settlement. One specific recommendation would be to strengthen training of government lawyers of BRI jurisdictions, so that they are better able to review and monitor agreements with Chinese and other foreign parties.

[37] See, for example, Forum on China-Africa Cooperation, http://www.focac.org/eng/ltjj_3/ltjz/.

OPENING STATEMENT OF DAN HARRIS, PARTNER AT HARRIS BRICKEN

MR. HARRIS: Thank you. I am an international lawyer who has, for the last 20 years, been helping American and European companies navigate China's legal landscape. I mention this because much of what I am going to tell you today is based on what I have seen while representing companies that do business in or with China.

I will mostly be talking about how the Chinese Communist Party utilizes laws and regulations to maximize its power and control to the detriment of American companies. This is the tactic known as lawfare.

I have seen firsthand how China employs lawfare to harm American businesses, and I have also seen how China's lawfare against American companies increased when Xi Jinping became the CCP's highest ranking officer in 2013, and again when he came president for life earlier this year.

The global humiliation China suffered from its botched spy balloons, coupled with our government's efforts to deny China access to leading-edge chip technology, make me confident that China's lawfare against American companies will continue to increase.

My clients often ask me about the fairness of China's courts and my answer has always been the same. If you are suing a Chinese company for breaching a contract to make rubber duckies, you likely will get a fair trial. If you are suing a Chinese company for stealing cutting-edge semiconductor intellectual property, good luck.

Many China lawyers call this the 90-10 rule. Ninety percent of the time, the Chinese courts rule fairly because that allows China's economy to function and that ultimately benefits the CCP, but if a case is critical to CCP power and control, fairness gets tossed out the window. That ten percent is lawfare.

Xi Jinping often makes clear that China's national security interests are broader and more important than they once were, and that China's economic and investment interests are now narrower and less important.

Reading the writing on the wall, writing that in large part has been propagated by state-owned media outlets, the Chinese courts have acted accordingly. This means that the number of cases Chinese judges see as implicating China's national security interests have increased and this has been to the detriment of American companies.

Under China's cybersecurity law, the CCP has legal access to any data stored in China. This law also gives it legal access to data held by any company or individual in China, wherever that data may be stored. This has essentially always been true, but with each iteration in the law, access has become more explicit.

China has enacted these laws and regulations so the CCP can monitor pretty much everything in China. The CCP only rarely uses its power to mandate that a foreign company turn over its data, but this is because it already has ready access to all data in China.

The CCP controls China's internet, its communication systems, and its server farms. The CCP has pushed nearly everything from utility bills to daily communication into WeChat so it can monitor what everyone does in China. It has done much the same thing with company data. Multinationals sometimes file IP theft cases in Chinese courts. If that lawsuit involves rubber duckies, they can prevail, but if their case involves semiconductor technology, they rarely can prevail. The more cutting-edge and important the technology, the less likely the multinational will prevail in an IP case in a Chinese court.

Multinationals often can sue a Chinese company outside of China, but if a multinational secures a judgment or award outside China and that judgment or award needs to be enforced in China, which is often the case, that enforcement will occur only if it is in the CCP's interest. China's new counter-espionage law expands the definition of espionage to include any items related to national interests without any parameters for what constitutes national interests.

This vagueness in the law is intended to allow the CCP to arrest anyone at any time. The CCP will use this law against foreigners and against Chinese citizens that are seen as getting too close to foreigners.

This will make it difficult and expensive for foreign companies to hire and retain employees in China. In turn, this will reduce foreign company competitiveness in China. China excludes foreign companies from many industries. While we debate banning TikTok, all major U.S. social media platforms are essentially banned from operating in China.

If the CCP or the Chinese people are angry with a particular country, you can expect the CCP to crack down on companies from that country. The CCP does not randomly choose the companies on which it cracks down. It chooses companies based on the message its crackdown will send.

The recent raids against The Mintz Group and Bain & Company were to send the message that the CCP controls information about China and it will punish those who seek to reveal information the CCP does not want revealed.

The CCP will harass and discriminate against American companies until there are no more American companies in China. The best way for the U.S. government to reduce CCP's strong-arming against American companies is to help those companies leave China.

The U.S. government should provide loans and grants to American companies that move their operations or manufacturing from China to the U.S. or to an allied country. Australia and Japan have done this and we should too, maybe somewhat along the lines of what we are doing with the semiconductor industry.

The U.S. government should also enact legislation that encourages imports from countries that share our values, and we should be doing more to stop American funding of Chinese companies that operate against our security interests. Thank you.

COMMISSIONER GOODWIN: Thank you very much. We will begin the question and answer period going in alphabetical order starting with Commissioner Borochoff.

PREPARED STATEMENT OF DAN HARRIS, PARTNER AT HARRIS BRICKEN

PREPARED STATEMENT OF DAN HARRIS, PARTNER AT HARRIS BRICKEN

My name is Dan Harris. I am an international lawyer who has for the last 20 years been helping American and European companies navigate China's legal landscape. I mention this because what I am going to tell you today is based largely on what I have seen while representing companies that do business in or with China.

I will mostly be talking about how the Chinese Communist Party (CCP) utilizes laws and regulations to maximize its power and control, to the detriment of American companies—a tactic known as lawfare.

I have seen firsthand how China employs lawfare to harm American businesses, and I have seen how China's lawfare against American companies increased when Xi Jinping became the CCP's highest ranking officer in 2013, and again when he became "president for life" earlier this year. The global humiliation China suffered from the spy balloon incident, coupled with our government's efforts to deny China access to leading-edge chip technology, make me confident that China's lawfare against American companies will continue to increase.

> **1. How is the CCP's political influence increasingly shaping legal rulings in domestic Chinese courts? What is the experience of U.S. firms in Chinese courts on issues that are influenced by nationalism or Party objectives? How have these conditions changed under Xi Jinping?**

My first involvement with a China lawsuit was in 2000, a little more than a year before China was admitted to the WTO. I was in Qingdao, China, seeking a court order and the judge treated me as though I were a guest in his home, bending over backwards to make everything fast and easy for me. My local lawyer told me that the judge had previously told him that he wanted me to "feel good" about China to help China get admitted to the WTO. My client got absolutely everything it sought.

From the day I started representing companies in China to today, the role of China's courts has always been to serve the CCP's interests.

In this week's edition of *The Economist*, the magazine's reliably excellent China columnist wrote, how "under Mr. Xi, the party and state have dramatically increased their reach into every corner of society and the economy. . . . Mr. Xi has made 'governing the country according to law' a pillar of his first decade in power. That does not involve allowing the rule of law to act as a check or balance on the party's authority. Mr. Xi has explicitly condemned the idea of an independent judiciary as a dangerous Western notion. Instead, in directives and amendments to administrative laws, officials have sought to increase support for the party by delivering strict but effective government." As per a 2017 Reuters article, Zhou Qiang (who was Chief Justice of China's Supreme Court until March, 2023) made clear that China's "courts at all levels must disregard erroneous Western notions, including constitutional democracy and separation of powers."

My clients often ask me about the fairness of China's courts and my answer has always been the

same. If you are suing a Chinese company for breaching a contract to make rubber duckies, you likely will get a fair trial. If you are suing a Chinese company for stealing cutting-edge semiconductor intellectual property, good luck.

Many China lawyers call this the 90-10 rule. Ninety percent of the time the Chinese courts rule fairly because that allows China's economy to function and that ultimately benefits the CCP. But if a case is critical to CCP power and control, fairness gets tossed out the window. That ten percent is lawfare.

President Xi often makes clear that China's interests are broader and more important than they once were, and that China's economic and investment interests are now narrower and less important. Reading the writing on the wall – writing that has in large part been propagated by state-owned media outlets – the Chinese courts have acted accordingly. This means that the number of cases Chinese judges see as implicating China's national interests have increased. This has been to the detriment of foreign companies.

2. What key industries has China been seeking to protect and promote through its legal system? How does this impact rulings involving U.S. and other foreign multinational enterprises that work in these industries within China?

Advanced manufacturing, high tech, mining, farming, energy, rare earths, education, content/media/entertainment. In other words, pretty much anything related to national security, the military, critical industries, critical technologies, and the thoughts of Chinese nationals. As I discuss above, decisions related to these industries that involve a foreign company are likely to be based on China's national interests, rather than on law or equity. Foreign companies in legal disputes involving China's national interests are more likely to lose.

3. Discuss the design and implementation of China's cybersecurity law. What prompted its introduction and what sectors is it geared towards? Is it equally enforced for domestic and foreign firms? How is it shaping the commercial behavior of foreign firms operating in China or doing business with Chinese companies?

Under China's cybersecurity law, the CCP has legal access to any data stored in China. This law also gives them legal access to data held by any company or individual in China, *wherever that data may be stored*. This has essentially always been true, but with each iteration in the law, access has become more explicit.

China has enacted these laws and regulations so the CCP can monitor pretty much everything in China. The law permits the CCP to demand any person or company turn over whatever data the CCP wants to see.

The CCP does not regularly *ask* foreign companies for data because it *already has ready access to all data in China*. The CCP controls China's internet, communication systems, and server farms. The CCP has pushed nearly everything from utility bills to daily communication into WeChat so

it can monitor what everyone does in China. It has done much the same thing with company data.

My law firm used to have a thriving movie and entertainment business in China, representing U.S. and Australian movie studios. When we discussed China's limitations regarding moviemaking in China, these companies would often say that "the Chinese government sure does hate foreign movie companies." To which, I would usually say, "the CCP hates all movie companies." Back then, I would have said the CCP hated foreign and domestic movie companies equally. Today, because the CCP has subjugated its domestic companies it now views foreign companies as a bigger threat.

4. How are multinationals being constrained in their data practices in China by laws such as the Data Security Law and Personal Information Protection Law and related regulations? Discuss how this is impacting how firms in China compile and secure their data and interact with Chinese firms. Does China's application of these rules set up the country to have a strategic advantage in access to data resources?

My clients' China data security concerns usually involve data they gather from Chinese customers. The issues and constraints they face with this data are not too different from those they face in the U.S. or the EU.

I have a friend who works for an international risk consultancy. He summarizes U.S., EU, and China data privacy rules by saying that the impacts of their rules on companies tend to be similar in all three places. However, the goals of these three places differ. The U.S. seeks to protect big companies, the EU seeks to protect its people, and China seeks to protect the CCP.

One of the biggest data issues my clients face in China is the requirement that they store data in China and not transfer it across the border. By forcing foreign companies to store data in China the CCP is better able to acquire and use that data to its own advantage and to the benefit of Chinese companies.

5. What legal recourse do multinationals have when they feel that their proprietary technology or cybersecurity has been compromised? Discuss the experience of firms seeking to protect sensitive technologies in Chinese courts, with a focus on firms creating technology useful to the CCP.

Multinationals sometimes file IP theft cases in Chinese courts. If that lawsuit involves rubber ducky technology, they can prevail. But if their case involves cutting-edge semiconductor technology, they rarely can prevail. The more cutting-edge and important the technology, the less likely the foreign company will prevail in an IP case in a Chinese court.

Multinationals often can sue a Chinese company *outside* China. But if a multinational secures a judgment or award *outside* China that needs to be enforced *in* China, that enforcement will occur only if it is in the CCP's interest.

6. What are other major laws, such as the anti-monopoly law, or enforcement patterns, such as China's tendency toward regulatory crackdowns, that China uses to tilt the playing field in favor of its own firms or advance policy goals? How do these laws and their implementation impact U.S. interests, and what can the United States do to mitigate or prevent this impact?

China's new counter-espionage law expands the definition of espionage to include any "documents, data, materials or items related to national security and interests," without providing parameters for how these terms are defined. The CCP will use this law against foreigners and Chinese citizens that are seen as too close to foreigners.

This will make it difficult and expensive for foreign companies to hire and retain employees in China. In turn, this will reduce foreign company competitiveness in China.

China excludes foreign companies from many industries. While we debate banning TikTok, *all* major U.S. social media platforms are essentially banned from operating in China.

Even LinkedIn, a business-focused "social media" platform, decided it could not operate in China given CCP constraints. U.S. trade policy mostly leaves market access lobbying to individual companies and trade associations. But China uses state power to support their national industries. The Chinese state is very powerful and it has spent decades bolstering support among client states in multilateral forums, including the W.T.O., W.I.P.O., Interpol, the WHO, and the UN.

If the CCP or the Chinese people are angry with a particular country, you can expect the CCP to crack down on companies from that country. The CCP does not randomly choose the companies on which it cracks down. It chooses companies based on the message the crackdown will send. The recent raids against The Mintz Group and Bain & Company were to send a message that the CCP controls information about China and it will punish those who seek to reveal information the CCP does not want revealed.

7. 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?

China will harass and discriminate against American companies until there are no more American companies in China.

The best way for the U.S. government to reduce CCP strong-arming against U.S. companies is to help those companies leave China. The U.S. government should provide loans and grants to American companies that move their operations or manufacturing from China to the U.S. or to an allied country. Australia and Japan have done this and we should too—maybe somewhat along the lines of what we are doing with the semiconductor industry. The U.S. government should also enact legislation that encourages imports from countries that share our values.

COMMISSIONER BOROCHOFF: Thank you very much. First, let me say that as a business owner and I'm actually primarily a business investor, not an operator, but for 45 years an operator, it's really delightful for me to have an opportunity to question the lawyers as opposed to being on the other side of the table.

Listening to the three of you, who have all given just great analysis of what's happening, there's a slight difference, maybe a fairly large difference, between each of your recommendations depending on what you focused on, and so I have a question for all three, but I'm going to make a comment about each of them quickly.

So, Mr. Harris, you mentioned that one of your friends said, and I think you might agree with it or you wouldn't have mentioned it, the U.S. seeks to protect big companies, talking about the courts and how they operate in the countries, the EU seeks to protect its people, and China seeks to protect the CCP, and then you wrap up effectively saying at least as it pertains to certain industries, eventually we're going to have to see our companies leave China.

Dr. Rudolf, you talk more about working within the system and, you know, if we do a little better job of that, perhaps we can make it work. That's my perception. And then Professor Bath, I think you said we should spend a lot of our time teaching other countries how to do a better job.

So, my question is, as a guy who has been on the receiving end, not from China, and no involvement with China, but as a business owner, there's a lot of litigation that goes on in any business. In fact, since 1987, not a single day has gone by in my life that either an entity I own or invest in is being sued.

I'd like to hear each of your, how you would respond. Do you agree or disagree, starting with you, Dr. Harris, you might expand on it a little, that depending upon the industry, we should be encouraging our government to help people just not do business in China?

MR. HARRIS: First, I would like to clarify. I think that I said that quote about the U.S., the EU, and China, I believe that was with respect to data protection and data privacy, not the courts. I am not slamming the courts, the U.S. courts here today in any way.

COMMISSIONER BOROCHOFF: Okay.

MR. HARRIS: Well, as I was listening to Dr. Moritz talk, what popped into my head is I believed every word he said because I've seen it, but if I hadn't seen it, I would think he's a crazy conspiracy theorist.

You really -- people often compliment me on being able to predict what China will do and I say it's actually very easy. I just look at the worst thing possible.

And so, and you're hearing this from someone who, back in 2010, 2005, was a big believer in China, but I've seen a big shift there and I do not see things ever getting better. I see things only getting worse.

And that is why I think that the threat is so dire and I do not think this idea that we can work with China to get them to change their views, that's not going to happen. That's just my view.

COMMISSIONER BOROCHOFF: Thanks. Dr. Rudolf?

DR. RUDOLF: Thank you so much. Well, I think that it is important -- like my approach is like this. I read what the official documents say and I think it is important to explore the rationale where another country is coming from, and if it is like a party state with a Marxist tradition, then it makes sense to brush up on this approach as well, because otherwise, it will be

just words and you will be only able to interpret them once they are effects.

And I think this is, and this applies, I think, for the, well, for other Western democracies as well. So, I just wonder, for instance, if we say that we want to uphold the rules-based international order, and part of the rules-based international order is the WTO, so there is an idea behind U.S. or European approach how to deal with other countries.

And, of course, if one party of this breaks it, this order, does the order itself disintegrate or this a violation of this and then you should seek for mechanisms to fight against this? So, the WTO is actually a mechanism where this could make sense.

And I wonder, if you were promoting like a more Chinese response to what China is doing, whether you would not just become more China yourself, you know.

If you want to have more incentives from free market participants, I know it's a difficult environment, but wouldn't it make more sense to just work within the system? Because otherwise, I don't think that, what we have now, we will ever get anything as good and as much accommodating U.S. or European interests as this existing order.

The other one that's building around at the moment will be a much tougher, more difficult environment, so it's just in the pure basic interests of the United States itself to work in the system and not, well, draw out of it, looking for other countries which already share the same vision, and surrounding it, everybody else is already building different standards, which in the long term, will harm the U.S. interests as well.

COMMISSIONER BOROCHOFF: Thank you. Professor Bath, we're running out of time, but I do want to hear your answer. You're on mute, mute. You're on mute.

MS. BATH: There are so many facets to these various questions. I mean, I was practicing a long time working in China and I believed for all of that time that if we had continued to engage with China, that China would become more outreaching and more open to the world.

And, in fact, the advent of Xi Jinping meant really that my expectations were disappointed in that regard. It's become increasingly tied up in its own concerns and looking inwards.

In response to your question, it's difficult for me to say because, of course, a lot of Australian investors have pulled out of China, and we never had the sort of investment in China that the U.S. did.

However, our own experience of being the target of Chinese trade sanctions has taught Australian businesses that it's a big mistake to depend entirely upon China. You always have to have your alternatives and you have to have your alternative markets lined up because certainly, the Chinese government has shown that notwithstanding WTO, it can and will impose unofficial sanctions if it feels so inclined for political reasons.

In relation to your question of whether governments should be helping companies pull out of China, I mean, on the one hand, that's a business decision.

On the other hand, I agree actually with Dan Harris that, in relation to anything that involves high and sensitive technology, China is a very risky place to be and it's going to be a risky place for some time in the future, and that's the sort of sector which should probably be considering whether they would be better off elsewhere.

COMMISSIONER BOROCHOFF: Excellent answers by all three. Thank you very much.

COMMISSIONER GOODWIN: Thank you. Next, we'll turn to Commissioner Cleveland joining us virtually.

COMMISSIONER CLEVELAND: Carolyn was -- no? Okay, I'm sorry. So, if I heard the testimony correctly, systems are broken like the WTO, Law of the Sea, and there should be some effort to work within those systems, but recognize they're broken.

Mr. Harris, I heard you say in essence the Bain case is indicative of the fact that, in essence, China wants all companies out, and so we should support that process.

And Professor Bath, I heard you say that China has been expanding in the world, engaging in lending practices that are, to simplify, dangerous because they in essence waive sovereign interests by virtue of the fact that it's Chinese law, Chinese arbitration, Chinese interests that are imposed in these BRI contracts.

So, it sounds like a pretty broken system. I'd like to start with you, Professor Bath, and ask how transparent are the terms of these loans? We've talked about it in the past, but transparency feeding into the conversation about trying to beat China at its own game, what are the seniority status of loans?

How does it work within the context of, you know, usually the World Bank and IMF has seniority? How would you characterize these loans in terms of transparency and fairness against an international standard?

Mr. Harris, I'd like to know from you, in the context of helping all U.S. companies get out, is that decoupling? Because that seems to be the word of the day.

And then if I could also hear about when institutions fail, and I think most of us agree the WTO has failed, we went to court on the South China Sea, and the South China Sea, everybody agreed, but China has been ignoring the results. What do we do when institutions fail? That's for Mr. Rudolf.

So, Professor Bath, Dr. Bath, if you'd like to go first and talk about the transparency and these countries know what they're getting into, and then is there anything we can do to remedy that?

MS. BATH: I'd like to start by saying that actually I wasn't saying the loans themselves were necessarily dangerous, but I was commenting --

COMMISSIONER CLEVELAND: Right, I understood that.

MS. BATH: What I was commenting on was the aspirations of Chinese arbitral tribunals to actually have those cases heard, investor state cases heard in Chinese arbitration institutions instead of a foreign neutral forum.

In fact, first, as far as I can see, there's not a lot of public information out there in relation to loans, but there is a study which was done in relation to lending practices by state banks, and they managed to locate a whole lot of loans by China Ex-Im Bank, Export-Import Bank, made to various sovereign states. The one I was sort of recalling was a loan made to Kenya.

Now, it is not -- it seems to be quite standard practice in that sort of bilateral loan for the law of the lender to apply. That's not just a Chinese thing.

And similarly, in terms of the waiver of sovereign immunity, that's actually quite standard too, and in fact, it's something which there's a World Bank document which recommends that you should be very careful to make sure that your sovereign state borrower gives a very comprehensive waiver of sovereign immunity.

So, it's not something which is just done by Chinese banks. It's probably something which we should be looking at in relation to banking practice generally.

But apart from that, finding out exactly what is in all of these Chinese contracts is not something which is easy at all. They're commercial contracts. They're confidential and the Chinese are not particularly transparent about what they're actually doing on the lending front.

If they were, we might find that actually they got less criticism in some respects instead of being always told that they are actually deliberately entering into what are going to be bad loans.

But I think you're right that it would be very advantageous if the loans were transparent and if we could be confident that, in fact, they were up to international standards in terms of the provisions that they impose.

But there's certainly a certain amount of commentary which says that in Chinese loans, the banks and the other parties are very careful to require very strict levels of confidentiality, and therefore, it makes it difficult to work out what's in them and actually what's happening to them.

COMMISSIONER CLEVELAND: Thank you. Mr. Harris?

MR. HARRIS: In response to your question about decoupling, that's not a word I like because I don't really know what it means either.

Because decoupling, I forget what kind of verb it is, but it ends in I-N-G, and in my view, decoupling is already happening in the sense that American companies are leaving China and China is, in certain respects, encouraging them to leave, but slowly.

Very quickly, I will say that about a year ago, I asked a large number of our clients who manufacture in China for shipment to the United States whether they would be interested in moving their production to Mexico if it cost ten percent more, and every single one of them said yes.

And when I tell people that, they say, well, that can't be. Why haven't they done it? The reason companies haven't moved their manufacturing out of China is because they're paralyzed. It's very difficult figuring out the country. It's not an easy process.

COMMISSIONER CLEVELAND: Thank you.

DR. RUDOLF: Thank you very much for the questions. So, I think it's, well, we have to define what it means when a system is broken. So, if you violate a regulation, if you violate law, that doesn't necessarily mean that the system itself is broken. Like in the criminal legal system, for instance, if I violate the law, that doesn't lead to the whole criminal system being broken. So, I think what we see is we have a lot of examples where, for instance, China, but also other major powers violate international law, and this is a problem, but this is nothing new to international law or to the international legal order.

But what we can see is when there is, for instance, when it's difficult to work within the system, like when there are stalemates, then the development is usually that you have like parallel structures that emerge. In the WTO, for instance, where you don't have a functioning dispute resolution mechanism right now, you just like move, create a -- a parallel structure, which a lot of countries have joined so far, so maybe the U.S. will join it at some point too because it's just, it's an international organization that is a mechanism that is being built. And in the U.N. Security Council, for instance, it is blocked, so a lot is moving down to the U.N. General Assembly.

So, what China has been doing, and this is, I think, interesting here, is like in areas where they were unable to reform the system from within, they have been reaching out to other countries and forming their own global initiatives where they gain discourse power and where they're able to project their own ideas and their own visions.

So, for instance, when you have the debate about how regulate cyberspace, cyber sovereignty, so China is looking for other like-minded states that share its vision.

If you're looking for the global development, security, or civilization initiative, it's the same thing. It's reaching out to other countries trying to build a coalition as big as possible to

have a system that they could be powerful as a norm setter in the future.

So, that's, again, the point. So, if the United States, if you just point to saying there are violations, the system is broken, that doesn't help because the system will be built in another way at the same point in time and you're just losing time.

COMMISSIONER CLEVELAND: Thank you.

COMMISSIONER GOODWIN: Thank you, Commissioner Cleveland. Commissioner Friedberg?

COMMISSIONER FRIEDBERG: Thank you very much. Dr. Rudolf, I want to put to you the proposition that what we may be witnessing is a decoupling in the legal domain. We've talked about in the economic domain.

You make the point that for the CCP, the law is intended to serve the purpose of helping to establish this Community of Shared Future for Mankind.

So, my first question is what exactly do you think that means? What is the goal? Do you think the CCP imagines that it can overturn and transform the entire existing system of international law and replace it with something that it prefers or are they trying to carve out a sphere, presumably consisting largely of developing countries, in which their vision of the law prevails?

And then the second question is what are the implications of your answer to that question for how you think the West should respond?

In one way, we should try harder to persuade the CCP of the wisdom of our way of thinking, although we seem to have failed in that. The other would be that we need to strengthen our sphere in which our vision of law prevails, strengthen and try to expand it where possible. I wonder how you would respond to that?

DR. RUDOLF: Thank you very much. So, like the term Community of Shared Future of Mankind, like in the domestic, like within the Chinese space, this has been a term that dates back, I think, to 2011.

So, the Chinese state used to describe this first in its relationship vis-a-vis Taiwan, and later in its relationship vis-a-vis the Asian region, and then it became like a global thing and like a buzzword of Xi Jinping to use in a lot of international forums since, I think the starting point was in 2015.

It was his first speech at the United Nations and it was pretty much China going to the global stage and saying, well, we actually have this global vision that we would like to put forward, and there were five points that they mentioned.

And a lot of them, I think, it works towards like sowing doubt in the like universal claims that we would have or like how the system, there's a lot of absolute assumptions that we would have, and just like saying that no, in the end, it's just a power projection of Western states and it doesn't reflect reality any longer.

And this is in line with the Chinese approach to the law because it's an instrument and there's no absolute inherent value. It's more about like if the material circumstances change, like it's Marxism, sorry, but then in the end, the function of the law and how it's applied also changes, so it's quite flexible. You don't have this absolute truth and then you just like have to build your legal system surrounding it.

But then, so the five points, it's equal partnership. So, they say that the existing order with the United States is the main force. It's not equal partnership. So, they say they want to do something else.

You can make the point, of course, like China is not doing that, but then they say, well,

so does the United States, but we build the road, so in the end -- and we don't have any conditions, so in the end, it's easier. They just like sow doubts in this regard.

Then you have like the global security architecture, the new security architecture. So, you have like a new Chinese approach to security in part of this, and I think this is the most interesting point because it hits the core of the international legal order, is like the promotion of legitimate security concerns as an argument why big states could actually violate the sovereignty of other state or use force.

And it is interesting because big countries in the past, they have violated international law because of national security concerns, and China is trying to legalize this, making this not just a violation of the law, but this actually being part of this order that they are proposing, like it's really wild from if you look at the U.N. Charter, of course, but this is what they are pushing forward.

The third part is like this common development notion. So, this is for the Chinese Community Party, of course, like this is about the development goals, and since 2017, you have a new principal contradiction, like a new goal for the party.

It used to be catching up under Deng Xiaoping, like just to boil it down, and then since 2017, it's more about like redistribution and having like more of this like common prosperity, albeit domestically, but also internationally.

And this includes like a critique of the, like the focus that we would, like in the United States, you'd have about like the core value of the individual, and of individual pursuits and individual liberties.

But in China, the goal for human development is more about you need the development, and like the core individual stuff, this is not the priority in their approach toward human rights.

And this is being promoted through the world, through other countries. They say, well, in the end, if we have to make a choice, then what is more pragmatic? What actually helps? What is easier for those countries to move forward?

And then the other part if the civilization, inter-civilization dialogue, and this is quite interesting as well. So, all of this is coming out in the past three years, so it's really new, sort of the implementation documents of this global community of common destiny.

And there, the goal is pretty much to have like this narrative like the Chinese development path was a modernization without Westernization. So, everything, what you read about Chinese approach, rule of law, Xi Jinping's speeches, there are many references of do not follow Western approaches to the rule of law. They are wrong. This is the narrative.

And this is being projected to an international level through this Global Civilization Initiative saying like you have claims of universality in the West, but in the end, they are just like Western ideas, but you have other countries in the world which will be much more populous and will be more relevant in the future, and why not second-guess every single thing that you have from those Western ideas that are an outgrowth of the period of enlightenment? Like, this is a Western idea, so this is -- it goes towards questioning this.

And the fifth part is like the green development, and this is an area, of course, it's in the interests of China particularly --

COMMISSIONER GOODWIN: Dr. Rudolf?

DR. RUDOLF: -- but you also see it in the interests of other countries.

COMMISSIONER GOODWIN: I'm sorry. We have a lot of other folks to get in a limited time, so I hate to cut you off, but we need to move on. Apologies, Commissioner Friedberg. Commissioner Glas, also joining us virtually?

COMMISSIONER GLAS: Apologies I couldn't be there in person today. I want to start off with Professor Bath. Based on the research that you've done and you noted in your oral testimony as well about the investor state dispute settlement and the targeting of essentially opaque predatory loans to developing countries from the Chinese and the Chinese Ex-Im Bank, as Congress is contemplating a number of measures right now that have been introduced by members of Congress on both sides of the aisle around financing, nearshoring, onshoring, what --

Beyond educating the developing world related to what's really happening here, are there -- do you have any advice about how the United States should adjust our financing based on what little we know about the Chinese process and the opaqueness of it?

And then both for you and Mr. Harris, you know, what would -- do you have a wish list of what you think would help companies move production out of China into other areas of the world to de-risk, I'm not going to use decoupling, Mr. Harris, but de-risk? Because I think Congress is kind of grappling with that now and, you know, looking for ideas.

MS. BATH: Okay, in terms of the loans, I mean, I don't know how much evidence we've got to say that the loans can actually be described as predatory, right? It's clear that some of the interest rates are not as low as they're advertised as being, and because the terms are not transparent, we don't know exactly what's in them.

I think the thing is that China was there offering the loans when other states were not, and, of course, because they were doing it on a normal basis initially, this made them a lot more attractive because they weren't imposing a lot of the conditions which the World Bank, which the international organizations were requiring in terms of loan finance. So, that made it quicker, it made it easier, and it made it available.

And so, I suppose the first question is there needs to be a more concerted effort to provide finance, on concessional terms I would say, to countries that actually need it, and to find some way in which to provide it without having too much red tape attached to it, but yet not in such a way that the money is dissipated because it disappears into people's hands all because it's tied to particular companies or contractors actually moving in there and constructing infrastructure which may not be sustainable and may not actually be useful.

And I think the thing is China has made a lot of progress by virtue of the fact that where no one would put stuff into countries that probably couldn't pay back the debt. They were there offering debts, and I don't know whether you respond to that properly by just saying, okay, I know you can't repay it, but I'm just going to lend you the money anyway.

But an answer to that has to be found and I think that really the developed world has a responsibility to be in there and to find out a way in which to assist with development in developing countries in such a way that they don't end up deep in debt, but they also don't find it so arduous and so difficult to deal with that they'd prefer not to accept it in the first place.

Now, as for offshoring, I think I will leave that to Dan Harris, who knows a lot more about it than I do.

MR. HARRIS: So, I divide companies between those that make money from China and those that save money by manufacturing in China, and those companies that are making money in China are -- they don't need help. They can de-risk by leaving when they're no longer making money, or they can de-risk by hiring lawyers who help them figure out how to lighten their footprint in China and thereby reduce their risks in China.

On the manufacturing side, it's more difficult. My excuse for not having any great

recommendations is that I'm a lawyer, not a policy person.

What I see is that manufacturing in China is super easy. You go to Alibaba. You find 50 companies. There are tens of thousands of good people to help you, but if you need help deciding where do I make my widget outside of China, there is nobody who can tell you, well, Mexico is better than Vietnam because of this and Indonesia fits here.

So, companies get paralyzed and it becomes very expensive, and how the government can help with that, I don't know other than to suggest that they do so, and that involves money and organizations.

COMMISSIONER GOODWIN: Thank you. Thank you, Commissioner Glas. So, I'm up next and I want to pose a question to the panel. When we're engaging in trying to understand Chinese legal theory and China's legal system, are we playing on their terms by letting them use our legal terms without pushing back?

A panelist that we'll hear from later today talks about this within the context of anti-suit injunctions, describing it and the use of that phrase as somewhat of a linguistic sleight of hand which is intended to normalize what they're doing and their bad behavior by using Western legal terms of art and Western nomenclature.

So, are we letting them do that and is it a matter of will or, Dr. Rudolf, to your point earlier this morning, is it more a lack of fundamental understanding of their legal system and the traditions upon which their judicial system is based? And I suppose I'll open it up with you.

DR. RUDOLF: Thank you very much. Sorry for the long answer last time. My clock isn't working and I just saw this here now, okay, but sorry about this.

COMMISSIONER GOODWIN: That's okay.

DR. RUDOLF: Well, I think when it comes like to the practical dealings, in many cases, it really doesn't matter what the function of the law is because it's an abstract thing. So, there are many cases where it is -- you can still have a good working relationship.

Like in the 80s and the 90s when a lot of companies were making a lot of money, they were to some extent also relying on the law. And the difference is that with the change of the principal contradiction and like with the change of the overall environment, the function of the law changes as well.

So, I think to be aware of this and to understand this is something of key importance for U.S. decision makers. And you need to see that Chinese lawyers, they are building their capacity and their knowledge of their own system, but also the knowledge of other systems, and this makes sense.

So, in return, it would make sense to have maybe some kind of dialogue or some kind of technical exchanges just to generate more knowledge that would be useful in the future. Without dialogue, there will be more surprises.

MR. HARRIS: What I have seen is that American courts and Americans in general tend, and actually people in general tend to think that the world is similar to them, and American judges tend to believe that Chinese courts are similar to American courts and they're not, and that is due to a lack of knowledge on the part of American judges.

And I would recommend an article, a Wall Street Journal article written by, I believe her name is Kate O'Keeffe. It is regarding Operation Foxtrot, which I'm sure you'll hear a lot about later today. That's where China uses American courts to go after what they would call Chinese dissidents in U.S. courts.

They might sue them claiming that they owe $80 million in China and the whole thing might be a scam, and it would never occur to a U.S. judge to believe that a government

somewhere is bringing a fraudulent case, yet they very well might be.

COMMISSIONER GOODWIN: Professor Bath, anything to add?

MS. BATH: I'm not quite sure how to answer that one. I mean, going back to the anti-suit injunctions, I think the point there is that we call those orders anti-suit injunctions because that's what our own courts issue, but in fact, they're not an injunction, nor are they an anti-suit injunction.

They're a completely different thing based on civil law, and that's not even so much a Chinese difference. It's the fact that the Chinese Civil Procedure Code actually draws very heavily upon German law, and German lawyers would probably understand it much better.

I think there is a general point though, and I agree with Dan there, that judges or Western judges do actually assume that Chinese courts operate in the same way that they do because our courts are very reluctant to actually criticize foreign courts no matter where they are.

They could be in China. They could be in Afghanistan. They could be in Kazakhstan. And our courts are generally going to, as a matter of courtesy and of comity, assume that they operate in the same sort of way that our own courts do.

And this is a really big problem because if what you've got is one of these commercial disputes, we've had several of these, where essentially the Chinese courts have colluded with one of the parties to cheat someone of their investment, then it's almost impossible to actually prove that in a Western court because you can't get the actual evidence and the court won't make an adverse finding on the basis of inference and hearsay.

And unless you actually change the whole approach of the courts to say actually you can look behind these decisions and you're entitled to look behind these decisions, then they're not going to do that because that doesn't actually agree with the view which we have of the world, which is a world in which we have honest judges giving fair decisions.

COMMISSIONER GOODWIN: Thank you. Commissioner Helberg?

COMMISSIONER HELBERG: Thank you, Commissioner Goodwin.

My question is addressed to all of the panel starting with Mr. Harris. In 2020, the DOJ indicted an individual by the name of Julien Jin who was an executive at the software platform called Zoom.

Mr. Jin passed along -- illegally passed along information of U.S. individuals to the Chinese Communist Party without the knowledge of Zoom CEO -- of the Zoom CEO or Zoom -- or other Zoom executives. As a result of this, the Chinese Communist Party then took action against relatives of individuals based in the U.S. engaging in normal activities that the CCP regarded as a breach of their censorship laws discussing Tiananmen Square, discussing human rights atrocities against Uyghurs.

This was a blatant example of how China is using technology platforms and specifically its National Intelligence Law to export its domestic surveillance and censorship laws to our land.

Doesn't this risk apply to any Chinese software platform in the U.S.? Would you recommend a ban of Chinese software platforms like TikTok in the U.S.?

And if your answers to the latter question is no, can you describe examples, concrete examples, of when the benefits of having Chinese software platforms in the U.S. might outweigh the cost of us forfeiting our intellectual property, privacy, and freedom of speech in the U.S.?

MR. HARRIS: I don't know that I would recommend banning all Chinese software in the United States, but I would recommend banning any Chinese software that could implicate national security and privacy. And that's probably everything.

I don't think the U.S. has any idea how much spying goes on through software. And I have gotten calls from serious people at good-sized American companies, people, computer people, engineers at those companies, who have told me things that go on at those companies. I have run them down. I have worked with class action lawyers regarding the possibility of bringing lawsuits. I have heard so many rumors that are -- actually, a lot of them are more than rumors about what companies do with the data.

And I've seen evidence of good-sized companies in the financial sector that send information to China. And I also have had clients who make Internet of Things devices, smart devices, who have been convinced that the devices that they have from China are sending things back to China. Does my Nest thermostat tell people in China what's going on in my house? I don't know. The access is incredible, and a lot of it is happening by American companies, like Zoom, that are, essentially -- or like TikTok.

And I don't know what's going on internally at TikTok or Zoom, especially today, but these are American companies that are run by Chinese people, a lot of whom have backgrounds in the Chinese military, et cetera. And I have no idea the scope of that problem, but I am convinced, based on what I've seen, that it is huge and not well known.

There were articles written about pregnancy tests where some of that information was being sent to China. It's very scary.

COMMISSIONER HELBERG: Thank you. Dr. Rudolf.

DR. RUDOLF: Thank you. I'm not an expert in this field at all, so I think Vivienne has more to contribute to this.

The only thing I can say is that the academic literature in China about, like, the extraterritorial application of its domestic law, which goes into this category, it's pretty much a view of how to copy the United States' approach to extraterritorial application of Chinese law. So, I think studying this, what the Chinese side is doing there, is definitely of interest.

COMMISSIONER HELBERG: Dr. Bath.

MS. BATH: I think there are a couple of questions here. I mean, one is extraterritoriality. One thing I wanted to say but didn't have the time to actually say is that in terms of overt extraterritoriality, Chinese laws, which extend beyond China, are actually expanding in scope.

The Hong Kong National Security Law is a particularly good example of this where, essentially, you can be prosecuted for a breach of the Hong Kong National Security Law even if you're not in Hong Kong, if you're a permanent resident, which I am myself, and even if you're not a permanent resident. So, certainly, they're becoming a lot more open about this sort of extraterritorial reach.

The National Intelligence Law, I think, was -- it was actually a very clever sort of -- there was a lot of discussion with the Chinese saying no, no, no, we couldn't use the National Intelligence Law to do anything overseas, when, in fact, I think it's clear that they don't really need the National Intelligence Law to do things overseas as we've already seen from this discussion.

I mean, I, like, Moritz, I'm not an expert at all in technology, but it does seem to me that it's not just a problem of whether Chinese companies own particular platforms -- TikTok. It seems to me that there are very big problems across the world in terms of the security of our information and the data.

And part of it is the fault of our own companies, which ask for and retain a whole lot of data, which they shouldn't have and which they don't actually need to have, leaving them open to

big data breaches by criminals and by spies.

And the other problem is that we've never been particularly careful about the data which our companies hold, and which then sell on to other sources. But if you start banning companies like TikTok or other social media companies, you would, I think, get a lot of kickback. And also, you're essentially taking away one of the things which makes us what we are as opposed to a country like China which has such strict controls over information.

So, I don't know where you actually strike the balance there, but I think you start, actually, with a good deal -- paying a lot more attention to the question of the security of data generally, not just for TikTok but for companies generally.

COMMISSIONER HELBERG: Thank you.

COMMISSIONER GOODWIN: Commissioner Mann.

COMMISSIONER MANN: Thank you. I have a quick specific question for Dr. Rudolf and then a couple of broader ones for Mr. Harris.

You referred, Dr. Rudolf, in your testimony, to inconsistencies in U.S. practice. And the answer may be obvious to you, but could you give me a couple of examples? Are we talking about something big like WTO or --?

DR. RUDOLF: Well, when it comes to instance to the high relevance of the sovereignty of other states?

COMMISSIONER MANN: Yes.

DR. RUDOLF: So, in the past, when it was in the interest of like one of us in line with U.S. security interest after 9/11, there are various examples of the sovereignty of other countries being broken as well.

So, I think there's a -- one of the examples the Chinese scientist is referring to the same goes to, like, human rights violations.

Like the Chinese side there, they're pushing out so many white papers, just like listing those inconsistencies, and they're just being put out right now. But I think there's a side, the sovereignty to the human rights debate is pretty much like a double standards debate is what -- is usually the more specific.

COMMISSIONER MANN: Thanks.

Mr. Harris, you wrote -- in your written testimony, you said that foreign companies tend to be shockingly naïve. And then you said I have several theories as to why this is the case, and I would be happy to expound on this if asked, so I'm asking.

MR. HARRIS: Well, I think one theory is similar to the courts. We tend to view other countries as being like ours. That's number one.

Number two, under President Trump, the China issue was viewed as a Trump issue, and I would always tell people it's not a Trump issue, whether you like Trump or not, and frankly, I'm a lifelong Democrat. Even President Trump can be right sometimes, and he's right on this. And so, a lot of people, especially in places like Seattle, do not want to hear about China because they view that as a far-right issue. That's another issue -- another theory.

A third theory, which is really not a theory, is that a lot of the people that Americans send to China have deep connections with China. They studied there. Perhaps their spouse is Chinese. And they make their money there.

And many times, probably 25 times, I've had someone -- either jokingly or not jokingly -- call me up and, essentially, tell me to shut up because what I'm saying could send them home and cost them their job. And these are sometimes people in China who work for companies that I represent. They don't like me giving advice to their home office that no, this is not a good idea

to do this sort of deal in China.

Now, as a lawyer, you get that a lot in everyday transactions. The salespeople, they always want to make the sale. They don't want the lawyer to say this isn't safe. But the problem is American companies tend to believe what they're hearing from their China experts sitting in China, and they don't realize how biased they are.

Also, there's the issue of money. This isn't really an issue of naiveté, but if things are going okay for you in China, if your widgets are being delivered at a great price and on time, then everything you're reading about Bain & Co. or the Mintz Group, that has nothing to do with you, and they can and will distinguish it.

But I will say that American companies started getting a lot less naïve when Russia invaded Ukraine. That was a big moment where people started thinking Russia's doing these things to American businesses. China could also.

COMMISSIONER MANN: Thanks. I have another question on decoupling, but I don't know if there's time. Maybe I should wait for another round.

COMMISSIONER GOODWIN: Commissioner Price.

COMMISSIONER PRICE: Thank you and thank you all for your excellent testimony. So, Mr. Harris, I was going to ask you the same question that Commissioner Mann just asked you. But can you just follow on on that? If the companies are naïve, as you suggest, and your examples are good ones, then how realistic is it to think that any kind of disengagement and companies leaving, how realistic is that, really, as a recommendation?

MR. HARRIS: I think it is realistic because the bigger companies are not naïve. They have people internally who tell them what is going on. And, as the big companies start leaving, like Apple moving a lot of its production to India, smaller companies will follow.

COMMISSIONER PRICE: Thank you. And, also, thank you for the rubber duckie doctrine. Now I'll have that image in my head all day.

To Dr. Rudolf and to Professor Bath, in your recommendations, you talk about engagement. Do you have good examples of where engagement has worked in pushing back on lawfare or engagement has pushed back or education of folks in other country has worked?

DR. RUDOLF: Well, I think you just need to look into the past of educating of lawyers from developing countries. So most of the lawyers that you see were educated and are still educated in French universities and British universities and in U.S. universities. And this, when it comes to having an idea about the Rudolf Law, this is relevant, and this matters a lot.

So, with China reaching out with its legal training programs, having people from the treaty-making departments from foreign offices, from several developing countries, so this, of course, has an impact.

And so, the training could be either having -- because there's existing frameworks -- and all the German cases, that's the case in the U.S., I'm quite sure it is the same. So, having those training seminars with the representatives that will be dealing with China in the future, that don't have the legal tools, that don't have the legal knowledge, this is something, if you don't do it, then you're just losing so much of an edge that you have at this point. This is a concrete -- like, this is a systemic, concrete advantage that United States, especially through its universities, still has.

COMMISSIONER PRICE: What about engagement in international organizations?

DR. RUDOLF: Well, I think, when it comes to having an international standard set, you can do it by yourself, or you can do it without a country.

So, let's go to the digital sphere for instance. Like, you have the -- like, in Europe, you

have the data security regulation, Data Protection Regulation, which is really complex. It was so complex that the German government wasn't even able to have it on its own website once it was launched because we were violating it.

You have a Chinese version of that. And the question is: What kind of law will you be promoting? What will be the international ascent? What is more operable in the future? So, if you reach out to other countries in the Global South, and if you're trying to get, like, a discussion of operationalizing it and getting this into practice, this is an issue.

Another concrete example is, for instance, when it comes to getting majorities in the Human Rights Council in the U.N. General Assembly, like, those things matter. If there's something like when the National Security Law in Hong Kong was passed, like, western states didn't have a majority of countries denouncing it. So, this is a problem. Like, you need to be, at least on this -- the core of this international system, like, those majorities, the discourse part that revolves around this, this is relevant.

COMMISSIONER PRICE: Thank you.

Professor Bath, do you want to add anything?

MS. BATH: Well, Moritz has actually said a lot of things that I was going to say.

I mean, certainly, in terms of engagement at the international level, I think we suffered a great deal from, essentially, the U.S. pulling back during the Trump era. I mean, China has a lot of people that are all running around. They participate in everything, and so you really have to push back on that by being there yourself. So, you really have to send more diplomats and more people, and it's not just the U.S. Australia and other countries have to do that too.

I mean, I think, myself, that engagement with China has actually had a number of productive things. I was first in China when I was a student there at the end of the Cultural Revolution when there were no lawyers, and there was no law. And for a lot of the time when I was practicing there, nobody understood anything about law because they didn't know what it was.

And now, even though obviously there are lot of problems with the law, there is a legal system. There are judges. There are Western-trained lawyers and people working in the judiciary and so on. And I think that they have, actually, had an impact. It's certainly better than being the sort of cultural revolution, lawless place that it was before.

I mean, the point of my recommendation in terms of training, as Moritz sort of really covered it there, the thing is if you're looking at developing countries along the Belt and Road -- and China has been promoting Chinese law, as we've seen from the rule of law in trying to promote China as a dispute resolution center -- the answer is not to get in there and say oh, well let's have U.S. law or U.K. law or whatever it is. The answer is to have a whole lot of lawyers and judicial people and laws whereby the country can actually build up its own domestic capability and have its own negotiators and people who can negotiate with whoever comes along offering them finance or offering them major infrastructure contracts and the rest of the things that they need to actually develop.

And so, the point is the Chinese are out there, actually, promoting in some excellent initiatives that they have like they're very well heading to terms in, say, online arbitration and online litigation.

But the rest of us should be out there as well sort of engaging in training and assisting them to build up their own domestic capability along the Belt and Road so there's not a choice between Chinese law or U.K. law. It's their own law.

COMMISSIONER PRICE: Thank you so much.

COMMISSIONER GOODWIN: Commissioner Schriver.

COMMISSIONER SCHRIVER: Thank you, Mr. Chair.

And thank you to our witnesses. Really fascinating discussion. I have a couple unrelated questions if there's time.

First, I'm always interested in how the Chinese are organized to do things. And sometimes understanding how they organize to accomplish things helps us come up with ways to deal with that or counter that or whatever the case may be.

And so, if we're talking about a legal system and a judicial system that is to understand this 90-10 split you described has to make some assessment of which cases fall into that category of this is not going to be a straight interpretation of a law. This is going to be promotion of national interest, national security.

So, can you talk a little bit about -- I mean, are these judges that are sort of trained and expected to make that assessment? Or is there a political commissar system that are into the courts? Or how are they organized to accomplish this?

MR. HARRIS: Okay. I'm going to answer this from my own practical real-life experience.

Generally, the judges know because there are certain ways they're supposed to rule, so they generally know. But if a lower court judge gets it wrong, then a judge above them will say hey, you've gotten this wrong; you need to revise your ruling.

And my understanding -- and this is based on what Chinese lawyers tell me -- is that if it's a sensitive matter, they will consult with higher-ups on how to rule.

COMMISSIONER SCHRIVER: So, higher-ups in the -- is there a party entity, or is this something --

MR. HARRIS: Well, the whole -- when you were saying court system, to me, you can call it the government. You can call it the CCP. It is, essentially -- you can call it the judicial system. It is all one thing. It is not an independent judiciary. The judges are under the CCP/the government.

COMMISSIONER SCHRIVER: Okay. Thank you.
Were you going to add or -- no. Okay.

As I said, a second question, which is unrelated. Several comments about assisting in the developing world and engaging in the developing world, and while I think that makes a lot of sense, that's a pretty big task, extraordinary task, when you think of what that could look like in practice. And so, I'm wondering, you know, the recommendation -- I think it was Professor Bath -- Congress should be funding more of this type of engagement, my guess is that even successful initiative, it's still going to be somewhat limited resources. Is there a way to understand prioritization?

And you mentioned Belt and Road and what the Chinese are doing, but that strikes me if we sort of go there, that's a little bit of whack-a-mole approach. Is there a way to -- if you had additional resources, but limited, how would you prioritize this engagement?

MS. BATH: I would think that's actually something which you probably have all sorts of people in your diplomatic service. You could probably make very good recommendations on that in the U.S. government as to where money would be best spent if you were trying to build up people's capability.

I think the countries which are going to need it are probably the less-developed countries, possibly those with natural resources, which are ripe for people to come in and exploit them, countries where they need develop the form of infrastructure and other projects, but they also

need the capability to negotiate the sort of contracts and the deals which will be the best for them in the context.

The World Bank, actually, does quite a bit of work on this in terms of how to teach people, really, to enter into some of your public-private partnerships and so on. So, it's not as though it's an area which is totally empty, but it does seem to me to be an area in which the developed states have absolutely stepped back and really done it on ad hoc basis or perhaps not really thought through where the best places would be. But as for saying what a particular country would be, I couldn't answer that.

MR. HARRIS: I'm going to pop in here and say that Latin America -- China is pushing hard in Latin America. The U.S. needs to also push hard in Latin America.

DR. RUDOLF: Thank you. I just want to add something briefly on the judges in the judicial system in China because I think sometimes, we -- to some extent, I agree, but to some extent, I think it makes it -- it underestimates a little bit what China is doing when it comes to its -- the professionalization efforts.

So, there is some studies of people who analyze, like, the entry exams of Chinese judges, and, like, there's a socialist non-concrete stuff. It's like it used to be easier than it is now. Like, now there are tough tests. So, to become a judge in China, it's not an easy task.

There's also work on, like, in the rulings because a lot of the records, you can watch it. You have the records of judges referring to core socialist values, and there are very few cases of this.

So, within the system itself there are incentives of applying the law. Like, because the systems that they know, if it is just like an arbitrary system, it won't work in the long run. It is most strategic, and of course, there's always like this -- it's a socialist system. You don't have an independence of a judiciary. But, like, when it comes, like, to the efficiency of the system, professionalization measures, they are very high on the agenda, and you're dealing with very well-educated judges there.

COMMISSIONER GOODWIN: Vice Chair Wong.

VICE CHAIRMAN WONG: I don't really have a question. It's more of an observation and perhaps more of a musing. You know, I look at the Communist Party here and the Chinese government and these legal reforms, which they seem to be undertaking with greater rapidity and, well, have, I guess, spent decades trying to bolster their legal structure. And this was a Marxist-Leninist party. And under Marxist-Leninist legal theory, in essence, all law is illegitimate that it is a reflection of a power base, a superstructure that is meant to entrench the power of the owners of the means of production, bourgeois society, imperialists, whether it's domestic law or international law.

And under the progress of society at some point, law as a concept should wither away in place of perfect scientific administration, but the Communist Party's not seeing that happen, so instead of letting law wither away, they're trying to wrest control of it. They're trying to play the same game buying into the idea that, yes, law is illegitimate, but you might as well use it if it is a space for power, struggle. You might as well be the one who's winning the power struggle.

In doing that, however, I have to think they're very frustrated. They still have to use these Western terms, these concepts: rule of law, constitutionalism, due process. I mean, these terms, which just don't mean anything under a Marxist-Leninist theory. But they still try to use them and fit them into what is, essentially, a party power play at many different levels.

To borrow another kind of Marxist term, that's an internal contradiction, and one that I just don't think in the long term is sustainable.

In any case, I'm at, like, a 10,000-foot level here, and it's more of a musing, but just

listening to all your testimony, I can't help but have that general feeling.

DR. RUDOLF: Yeah. Thank you very much. But to some extent, I slightly disagree because I think that the legitimacy of the law, like, one of this -- before the Communist Revolution, yes, but there are writings to after, once the Party has taken over, and then you just, like, this Hegelian idea of the world and this Marxist thinking, it still applies. So, what you're describing is before.

But since you have the CCP in power -- CCP in power -- they utilize the law to achieve their development goals. And this is -- there are writings about this. So, it is not, I guess, what you describe is a very narrow part of this.

And the Chinese side -- like, the interesting thing about this is that they utilize the law and all of those terms. Like, they mean not what they mean to us. They mean something different. There's an instrumental value to them. But this is part of the thinking that you just -- you don't have those absolutes.

And it creates a certain degree of flexibility because, after the complexities of the world, you have interconnectedness. You have AI, and you don't need to look into an absolute. And then you have to build your legal system surrounding it. You just have your development goals, and to some extent, the law can help you to achieve those goals.

And, of course, you train the judge, just because it just -- it makes sense to have a functional legal system that deletes the gateway of less and less day-to-day arbitrariness.

1.4 billion people, I live in a rural area. Something happens to me, oh, I can use an app, and I can seek some kind of resolution to this, and I don't have to go to an elder. I have the process. And building this process by itself creates value for the people.

It is not the rule of law, as you would define it in the U.S., but the function of it going by your way, doing your stuff, this is something that the CCP understands. You need to build this somehow without -- you don't need to believe in this, but if this works, then it's a thing.

And in order to work it, you need people who are professional in this regard. You need laws. You need a legal system. You need a structure. And it is -- it's not completely arbitrary there. This has been going for decades, but now it's a priority because it's for the global ambitions. And that's why I would take it serious.

Thank you.

MR. HARRIS: I agree with what Dr. Rudolf said. I remember many, many years ago, one of our lawyers who lived in an apartment building in Qingdao was touting the fact that there was a dispute between two of the neighbors, and one sued the other. And they both thought that they would get a fair hearing in a court. And my guess is that they did. And the CCP likes that because it's a tamper on anger.

And what they don't like is a lawsuit where they're suing the government or complaining about something that the government did or an important company in, like, razing their land to build a factory or something like that. This really does get back to the 90-10 rule, which really is probably more like 95-5. It's just easier to say 90-10. And for most disputes, the CCP likes having the courts there.

COMMISSIONER GOODWIN: Chairwoman Bartholomew.

CHAIRMAN BARTHOLOMEW: Thank you very much.

And thank you to our witnesses. And my apologies for not being there in person.

I, at first -- Mr. Harris, the word you were thinking about with -ing is gerunds. I'm sure you knew that. You just forgot.

But I guess I want to take it up another level and follow up on Commissioner Friedberg's

question, which is what does the world look like if we move from a system of rule of law to a system of rule by law, right?

We know that laws are supposed to, frankly, shape behavior as well as providing recourse. And, you know, I'll just preface it by saying that I think, for me at least, the question about the whole international legal system is the fact that Russia is, you know, just destroying Ukraine as much as it can and the global legal community is -- there isn't anything that they can do to stop it, so there's a question about the utility of international law.

But if the CCP succeeds in sort of displacing the system that we have, not of individual laws, but of the concept of rule of law with rule by law, what does that look like?

This is for any of our witnesses.

DR. RUDOLF: Well, I think the first point is like, if you have a war, this is a violation of international law. And international law is once the war is over, then you have like -- then you can work through the process. And the people and the states that have violated what international law, they will be held accountable in the best case of this of this, you know? So, this is the same thing. If you violate a rule, it doesn't mean that the rule itself is meaningless, otherwise you wouldn't have any criminal law.

In addition to that, the difference between rule of law and rule by law, the definition of what is rule of law, there is none. This is really difficult. So, the rule of international law, there were debates at the U.N. I think it was -- I think it was initiated by India in the '50s, and so in the end, this is a discussion that we should have, I think, because it's relevant. There are different approaches.

So, if you define it from Germany and United States and other countries, I think it will be quite interesting if we would come up with the same definition because it has different legal traditions and different values and different approaches to this.

So, the U.N. system by itself, it can accommodate different approaches to the function of the law because, when it was founded, the U.N. -- this was already part of the reality because you have the Soviet Union sitting at the table, and this is why they also had a socialist approach to the rule by law. So, in the end, this is the system can deal with this. It is about to operationalize the relationship between states that have a different view of this.

This is precisely what the international rules-based order is about. It's not about having one idea, and everybody follows suit. Then it would be -- just doesn't reflect the reality and the intentions of the U.N.-based system.

CHAIRMAN BARTHOLOMEW: But, Dr. Moritz, don't you think that the -- perhaps I'm -- that it is the goal of the CCP to displace that system completely, not to work within it to make it more amenable to its own viewpoint -- to displace it?

DR. RUDOLF: I think they know that they can't do it because look at the reality of China's approach as to using -- they're trying to emulate it. They're trying to do it how the U.S. does it to some extent, especially when it comes to the extraterritorial application of the law. So, they know. They are not there yet.

And so, like this idea of this China is getting to the center and replacing everything and then we are, like, in a -- a comical version of a tribute system. This is not the reality, I think, that we are moving towards to be more moving towards to a situation where you have other countries, which have a different opinion on fundamental issues, challenging the assumptions of a country like the United States. And they're not alone there.

So, finding some kind of common ground with us I think this is more practical and more close to the reality than just a light switch. And then we are in the world where the nation-state

doesn't matter.

Like, this is a process, and their international order is evolving all the time. So, it's -- even if it -- and I don't -- they do not say that it's their intention, and I don't think they're capable of doing it. And I think they know they're not capable of doing that in this way that you describe it. It would be scary, but I just don't see this happening.

CHAIRMAN BARTHOLOMEW: Do our other witnesses agree with that interpretation?

MS. BATH: I would say in relation to, at the international level, I mean, international law is always evolving, and it certainly means that you can undermine, or you can change laws, which we've already -- which we thought were generally accept (audio interference) no longer generally accepted, but China's not the first to do that. You have the (audio interference) '77 and all these other people trying to change (audio interference) with some success.

I think China, in the international sphere, is more interested in particular laws. So, undermining, for example, the regime of the Law of the Sea in relations to the South China Sea, undermining the international consensus with some success in relation to human rights law, for example. So not actually destroying the entire system, but actually sort of having its input in how it has shaped the -- to shape international law going forward.

And going back to your question to what does rule by law look like, I think China and Russia give us a good example of what rule by law looks like. That is, do you have a legal system, but, essentially, the people aren't top or in charge of it, so that you dissidents and other people can be put away without any particular difficulty or any trouble.

CHAIRMAN BARTHOLOMEW: Thanks.

Mr. Harris, any closing?

MR. HARRIS: I agree with what both Dr. Bath and Dr. Rudolf said.

CHAIRMAN BARTHOLOMEW: Thanks. Thanks very much.

COMMISSIONER GOODWIN: Well, thank you all very much for your time. We're going to take a quick break and come back for our second panel at 20 after the hour. Thank you.

(Whereupon, the above-entitled matter went off the record at 11:13 a.m. and resumed at 11:23 a.m.)

PANEL II INTRODUCTION BY COMMISSIONER JACOB HELBERG

COMMISSIONER HELBERG: Our second panel will describe specific case studies of China's violation of international legal rules and norms that was attempted to distort international law to justify its actions and the consequences for the international legal system.

First, Isaac Kardon, senior fellow for China studies at the Carnegie Endowment for International Peace, will address how China uses international law to assert its maritime policies.

Second, Brian Weeden, director of program planning for the Secure World Foundation, will address how China interacts with international space governance.

And our third panelist, Paul Scharre, vice president of the Center for a New American Security, will also provide a case study on how China interacts with international law in the cyber domain and report on China's attempts to set norms related to artificial intelligence.

Our final panelist, Ms. Chen, assistant professor at Academia Sinica and affiliated scholar at the U.S.-Asia Law Institute of New York University School of Law, will address how China has used lawfare to target Taiwan.

Thank you all very much for your testimony, and I'd like to remind you to keep your remarks to seven minutes.

Mr. Kardon, we'll begin with you.

OPENING STATEMENT OF ISAAC KARDON, SENIOR FELLOW FOR CHINA STUDIES AT THE CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE

DR. KARDON: Thank you to the Commission for inviting me to speak with you again. It's an honor and a great opportunity to share my research and analysis with the legislature and the general public.

I'm going to concentrate my delivered remarks on my policy recommendations and just briefly highlight some of the major elements of

PRC influence on international maritime law and order. I just refer you to a long book that I've just written on it for more details on these specifics as well as what I've put in the testimony. It's China's Law of the Sea.

So, on the question of whether China's trying to change the rules or make new rules and how they're going -- how they do it, I argue that the PRC's domestic law enforcement and policy implementation in disputed maritime zones is a practical method by which China seeks to change maritime rules. And here I'm talking about the Law of the Sea as the primary body of international rules. They're affected by these Chinese maritime practices.

These maritime disputes demonstrate where China's Law of the Sea diverges from that of other states. And so briefly on the major rulesets that are implicated in China's practice, maritime boundaries and baselines and entitlements are quite a significant area where China has no fully settled maritime jurisdictional boundaries with any of its littoral neighbors. And this is sort of the starting point for what I'm describing as an overall effect of the Law of the Sea not being applied in East Asian littoral nearly as much effect as we might like to see.

So, it starts with the boundaries and the baselines and move on to marine resources and sovereign rights over them. And lacking agreed boundaries, regional states are contesting China's asserted jurisdiction and sovereign rights over resources. And what we see in practice is China exercising what we might call veto jurisdiction. Nobody's exploiting the resources in all these disputed zones across the East Asian littorals. It's not just the South China Sea. Talking about the Yellow Sea and the East China Sea as well.

And then as we look into navigation, we start to touch on issues that bear on -- more directly on U.S. interests -- and I'll get into this in a bit -- but as a general principle, what we see is Beijing asserts broad discretion for coastal states, the sovereign who's claiming jurisdiction to regulate navigation of any foreign vessel, to include military vessels.

And I want to focus the Commission and the legislature's attention on a particular rule in this navigation ruleset on innocent passage through territorial seas, which I think is one rule where China genuinely has some scope for potentially changing a broader rule in international law.

But that's an exception. Rather than changing the rules, what I see is China's gradually making the international environment, in which those rules take effect -- or rather, it's changing that environment rather than the rules themselves. It's narrowing the scope in which the U.N. Convention on the Law of the Sea applies as well as the Law of the Sea in general.

So, moving on from that to policy recommendations. I'm happy to discuss any of those specific rules and the practices implicated in them in Q&A, but I urge the Senate, in particular, to ratify the United Nations Convention on the Law of the Sea as well as the newly open for ratification High Seas Treaty in order to augment American power and leadership standing in the rules-based international order.

If the United States is to succeed in maintaining a stable maritime order, we will have to invest in the Law of the Sea. The current policy of adherence to customary international law does not meet the challenge posed by China in the present competitive international environment. Our self-exemption from certain binding rules is too legalistic to provide any leadership to the international community.

Senate advice and consent on UNCLOS, as well as the new High Seas Treaty, would signal renewed American capability to bolster and rejuvenate the rules-based international order against cynical appeals to sovereign self-interest from China and Russia.

China, despite it all, is a state party in good standing in the UNCLOS treaty framework. This status remains intact even after Beijing's brazen disrespect for the Philippines' 2013 UNCLOS arbitration. Until the United States joins that same treaty framework and becomes subject to the same risk of unwanted arbitration, we will lack legitimate standing to criticize the PRC. The audience for that foreign policy choice should be the wider international community.

The U.S. message that China is violating UNCLOS simply does not resonate with many vital nations, which have hardly failed to recognize that America has not even ratified the instrument. Indeed, critical foreign observers perceive the United States as serially violating those elements of the treaty we do not accept or like. This is an unfortunate and unnecessary liability for U.S. power, which can be exercised more effectively over the long term within multi-lateral institutional restraints like UNCLOS.

Exceeding to the mild discipline of the Law of the Sea would cost little and achieve significant momentum and long-term strategic competition with China. The PRC has proven adept at achieving paper compliance with its various legal obligations. And its championed majoritarian organizations like the United Nations General Assembly and multilateral treaties like UNCLOS that the United States now shuns.

However, China's rapid industrialization, rapacious demand for ocean resources may push China out of step with new developments in the international Law of the Sea regime. The PRC's distant water fishing fleet, its deep-sea bed mining industry, and, of course, its blue water navy risk reenacting of some of the maritime hegemony that an earlier generation of Chinese diplomats reviled.

Beijing's post-colonial branding may not survive its desire for minerals and hydrocarbons from the seabed, fish from the water column, and access to strategic maritime areas. All of those issues are implicated under the Law of the Sea as well as the new High Seas Treaty. China is running some risk of falling out of step with that and having less influence on the rules, but the United States is not going to be effective in shaping that international environment without exceeding to the legal instruments that govern it. The United States can seize the high ground in this emerging competitive arena by ratifying both UNCLOS and the High Seas Treaty at the earliest opportunity.

I have some further remarks about how we should scope our policy and de-emphasize freedom of military navigation and focus on the marine resource rights and interests of states that are in dispute with China, but I will withhold those comments as my time is running to a close. But I thank you for this opportunity to testify and look forward to our discussion.

COMMISSIONER HELBERG: Thank you.

Mr. Weeden.

PREPARED STATEMENT OF ISAAC KARDON, SENIOR FELLOW FOR CHINA STUDIES AT THE CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE

4 May 2023
Isaac B. Kardon
Carnegie Endowment for International Peace, Senior Fellow for China Studies
Testimony before the U.S.-China Economic and Security Review Commission
Hearing on "Rule by Law: China's Increasingly Global Legal Reach"

1. "How is China trying to change the rules or make new rules for maritime issues, in particular regarding boundaries and entitlements, access to resources, navigation, and dispute resolution?

People's Republic of China (PRC) domestic law enforcement and policy implementation in disputed maritime zones are the practical methods by which China seeks to change maritime rules. These organized assertions of China's claimed maritime rights are effective mainly in maritime East Asia, where we can observe: (1) PRC maritime law enforcement (MLE) vessels (2) enforcing PRC maritime law and regulations and (3) implementing maritime and boundary policies issued by the state bureaucracy (including executive, legislative, and judicial organs) (4) under the political direction of central Chinese Communist Party (CCP) leadership. Collectively, these patterns of PRC practice can be understood as "China's law of the sea," a creeping process that is transforming regional maritime order.[1]

The law of the sea is the primary body of international rules affected by China's maritime practices. Legally meaningful changes may arise through (a) revised interpretation and application of the United Nations Convention on the Law of the Sea (UNCLOS) in East Asia, and/or (b) formation of new regional or local customary international norms relating to maritime jurisdiction and territorial sovereignty. Empirical analysis alone cannot determine whether legal rules have formally changed.[2] Nonetheless, we can consider the stated intent of China's party-state leadership to change (interpretations of) several specific rules. We can further analyze how effectively those preferred rules are put into practice, operationally and diplomatically.

Maritime disputes involving the PRC demonstrate where China's desired law of the sea rules diverge from those of other states. These disputes give rise to PRC efforts to "manifest" (显示) or "embody" (体现) its sovereign rights and jurisdiction through deliberate, repetitive acts in disputed maritime space.[3] Analysis of PRC state practice to prescribe, enforce, and adjudicate domestic law in contested waters, airspace, and seabed reveals certain preferred norms that distinguish elements of China's law of the sea from that practiced by other states:

[1] This testimony draws primarily from the author's book, *China's Law of the Sea: The New Rules of Maritime Order* (Yale University Press, 2023). Unless otherwise indicated, that volume is the source of arguments and evidence presented below.
[2] Only sovereign states and authorized international organizations like courts and tribunals may render authoritative judgments about the international law governing any particular situation.
[3] See, e.g., PRC State Council, "Summary of China's Maritime Industries" [中国海洋事业综述]" (July 2005), http://www.gov.cn/test/2005-07/01/content_11653.htm.

Maritime boundary, baseline, and entitlement rules. China has no fully settled maritime jurisdictional boundaries with any of its littoral neighbors. Despite a remarkable record of resolving territorial boundary disputes (often on terms favorable to the other party),[4] China has negotiated only one, partial maritime boundary (with Vietnam in the Gulf of Tonkin). The rest of the East Asian maritime littoral – the East China Sea, Yellow Sea, South China Sea, and Taiwan Strait – remains undelimited. No agreed line separates China's claimed maritime jurisdiction from that of Japan, North and South Korea, Taiwan, the Philippines, Malaysia, Brunei, Indonesia, and Vietnam. In general, these regional disputants object to PRC practices that (a) enclose disputed "island groups" within straight territorial sea baselines, (b) project entitlements from artificial and submerged features, (c) deny other states' lawful maritime claims from their mainland coastlines, truncating foreign exclusive economic zone (EEZ) and continental shelf entitlements, and (d) assert an undefined "dashed line" as a provisional boundary or historically-based jurisdictional claim. (These elements of China's boundary, baseline, and entitlement claims are represented in the appendix, titled **Map 1**.)

Marine resource rules. Lacking agreed boundaries with China, regional states also contest China's putative rules for developing (and conserving) marine resources across the Yellow, East China, and South China Seas. PRC domestic law claims sovereign rights and jurisdiction in undefined "other" jurisdictional sea areas,[5] and further asserts indeterminate "historic rights" associated with its nine-dashed line map.[6] In general, China's disputed resource claims remain unrealized. However, China has come to exercise what might be called "veto jurisdiction" in much of the East Asian littoral. China's enforcement of its claims has amounted to an effective veto over the activities of other states to utilize, lease, survey, explore, and exploit marine resources in disputed waters and seabed. By mobilizing the world's largest fishing and MLE fleets in tandem,[7] China has denied foreign fishing in disputed areas while facilitating its own exploitation of this scarce resource. While bilateral fisheries agreements are in effect between the PRC and Japan, South Korea, and Vietnam, these arrangements govern only a small portion of the disputed waters and seabed, and regulate only a narrow range of maritime activities. Oil and gas resources in disputed areas have not been comprehensively surveyed, explored, or developed due to persistent and increasingly effective PRC objection. Employing offshore oil and gas survey vessels and production platforms, law enforcement vessels, and persistent diplomatic objection, China has effectively curtailed other littoral states' rights to develop hydrocarbon resources in their jurisdictional waters. (See **Map 2** depicting China's resource claims).

[4] M. Taylor Fravel, *Strong Borders, Secure Nation: Cooperation and Conflict in China's Territorial Disputes* (Princeton University Press, 2008).
[5] See, for example, a Supreme People's Court "judicial interpretation" finding that China has jurisdictional waters beyond those described under the UNCLOS treaty, but failing to specify what those should be: Supreme People's Court of the PRC, "Supreme People's Court Issues Judicial Interpretation for Trial Of Cases Related to Sea Area's Under National Jurisdiction" [最高法院发布审理我国管辖海域相关案件司法解] (2 August 2016) <https://archive.ph/HbjY6>.
[6] See U.S. Department of State, "People's Republic of China: Maritime Claims in the South China Sea," *Limits in the Seas* no. 150 (January 2022). For a quasi-authoritative PRC rendering of the possible international legal implications of the line, see Gao Zhiguo and Jia Bingbing, "The Nine-Dash Line in the South China Sea: History, Status, and Implications," *American Journal of International Law* 107, no. 1 (2013): 98–124.
[7] For sound analysis on these forces and their integration, see Ryan Martinson, "Echelon Defense: The Role of Sea Power in China's Maritime Dispute Strategy," *CMSI Red Book*, no. 15 (May 2018); Ryan Martinson, "Catching Sovereignty Fish: Chinese Fishers in the Southern Spratlys," *Marine Policy* 125 (March 2021).

Navigation rules. China's boundary and resource claims generate further disputes over the nature of navigational freedoms in its jurisdictional waters. As a general principle, Beijing asserts broad discretion for "coastal states" to regulate the navigation of foreign "flag state" vessels in their jurisdictional waters. In practice, this entails ad hoc judgments about whether and when to enforce PRC authority – especially concerning military activities in its claimed EEZs and territorial seas. Navigation is the rule-set that has most directly engaged U.S. interests to date, drawing routine assertions of navigational rights and freedoms. China's "countermeasures" are somewhat less routine, asserting shifting legal bases for restricting a range of foreign activities.[8] China's navigational rules limiting innocent passage, however, are more consistent and uniform in its state practice. PRC innocent passage restrictions are also not directly contested by regional states, and therefore reflect an emerging regional customary norm that could be recognized as international law. America's persistent objections alone appear insufficient to check this trend. (See **Map 3** representing PRC navigational rules, highlighting the locations of key incidents involving U.S. vessels and aircraft).

Dispute resolution rules. China's practices also challenge the compulsory dispute resolution mechanism (DRM) of UNCLOS. The PRC's proposed rules radically limit the scope of disputes that can be submitted for binding, third-party dispute resolution. The PRC's rejection of the Philippines' UNCLOS (Article VII) arbitration (the "SCS Arbitration") is a vivid illustration of this rule in practice.[9] However, that choice also reflected a longer-standing, categorical PRC objection to any DRM regarding matters that can be construed to touch upon its territorial sovereignty. During the UNCLOS negotiations (1973-1982), PRC delegates opposed the creation of any compulsory or mandatory mechanism, and the PRC government later ratified the treaty with a restatement of its objection. However persistent the other claimant states objections to China's application of its preferred rules on boundaries, resources, and navigation, their recourse to resolving their maritime disputes with China through the law of the sea's rules on dispute settlement is severely constrained. Beijing consistently permits only "dialogue and consultation" (协商对话) on politically sensitive matters. This circumstance could be recognized as an emerging regional norm related to the maritime disputes, hindering formal legal resolution to any of the disputed rules. By sharply restricting formal dispute resolution under the treaty, China's practice is probably not making the rules – but it is likely making them less effective.

Rather than changing the rules, China is gradually changing the international environment in which those rules take effect. The effective scope of UNCLOS is observably narrower where China is involved. Especially within maritime East Asia, the agreed rules of the international law of the sea simply have less bearing on what states actually do in practice. Claimant states cannot draw normal maritime boundaries; they struggle to exploit resources and navigate freely within those undelimited boundaries; they are systematically denied legal avenues for resolving these disputes. In general, China's practices have not altered these rules in a way that other states will accept – rather they have undermined their application and narrowed their functional scope. China's law of the sea is still evolving – especially the navigational regime in the Taiwan Strait – but its overall effects are to dilute public international law across the East Asian littoral.

[8] For example, attempting to regulate U.S. military surveys as "marine scientific research" (MSR) is one way that creeping PRC jurisdiction has been applied to navigation in EEZs.
[9] For detailed analysis of China's position on the arbitration, see Isaac Kardon "China Can Say 'No': Analyzing China's Rejection of the South China Sea Arbitration," *Asian Law Review* 13, no. 2 (2018).

2. "Describe how China's view of its sovereignty vis-à-vis its international treaty obligations poses challenges for the integrity of international law and treaties. How do its assertions and behavior make relevant international law less applicable and effective?"

The PRC's treaty practice is characterized by a general resistance to binding norms. Its official interpretations of international treaty obligations are often ad hoc and selective.[10] However, that evident selectivity is the product of a more fundamental and systematic method of international legal interpretation. Unfettered by domestic legal constraints, Chinese diplomats and international lawyers nearly always construe the *discretion of the sovereign state* in its broadest terms. In the context of the law of the sea, this means granting coastal states wide latitude to decide whether and how they will assert their maritime jurisdiction.

Regarding the sovereign state as the fundamental subject of international law, Beijing resists all of the swirling normative currents that may challenge the inviolability of its claimed sovereign sphere. This "hyper-sovereigntist" response to the many transnational, universalizing, seemingly invasive elements of contemporary international law is not unique to the PRC.[11] Authoritarian governments are generally hostile to international legal norms that purport to override their exclusive domestic authorities (human rights law is perhaps the starkest example).[12]

Ratified treaties do not necessarily create legal obligations within Chinese law. The PRC Constitution does not define "treaties" nor differentiate them from other "important agreements."[13] It was not until 1990 that the PRC adopted a Law on the Procedure for the Conclusion of Treaties (after four decades of PRC practice within bilateral and multilateral treaty regimes). The PRC's sitting judge on the International Court of Justice herself observed that "[a]lthough the Chinese Constitution and laws do not set forth a general provision on the status of treaties in the domestic legal system, China implements its international obligations in good faith."[14] Lacking formal mechanisms by which those treaties bind domestic actors, good faith is not sufficient in cases where treaty obligations are at odds with important CCP political interests.

The UNCLOS treaty is problematic for CCP leadership. The urgency of China's perceived "core interest" in sovereignty over disputed islands (and sovereign rights in disputed maritime space) perhaps displaces the requisite good faith. Chinese leaders tend to apply the fullest measure of sovereign discretion. This practice frustrates the direct application of UNCLOS in respect of anything with some nexus to "PRC sovereignty" – that is, the waters of the Yellow Sea, East China Sea, Taiwan Strait, and South China Sea, which wash the shores of disputed territories.

[10] See, for example: Congyan Cai, *The Rise of China and International Law* (Oxford University Press, 2019); Samuel S. Kim, "The Development of International Law in Post-Mao China: Change and Continuity," *Journal of Chinese Law* 1, no. 2 (1987): 117-160; Pitman B. Potter, "China and the International Legal System: Challenges of Participation," *The China Quarterly*, no. 191 (2007): 699–715.
[11] Alastair Iain Johnston, *Social States: China in International Institution 1980-2000* (Princeton University Press, 2008).
[12] See Tom Ginsburg, "Authoritarian International Law?" *American Journal of International Law* 114, no. 2: 221-260; Anthea Roberts, *Is International Law International?* (Oxford University Press, 2017).
[13] Constitution of the PRC, Adopted Dec. 4, 1982, Amended Mar. 11, 2018.
[14] Xue Hanqin and Jin Qian, "International Treaties in the Chinese Domestic Legal System," *Chinese Journal of International Law* 8, no. 2 (2009), 322.

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

1) **Ratify the United Nations Convention on the Law of the Sea in order to augment American power and leadership standing in the "rules-based international order."**

If the United States is to succeed in maintaining a stable maritime order, we will have to invest in the law of the sea. The current policy of adherence to customary international law does not meet the challenge posed by China in the present, competitive international environment. Our self-exemption from certain binding rules is too legalistic to provide leadership to the international community. Senate advice and consent on UNCLOS – as well as the new High Seas Treaty – would signal renewed American capability to bolster and rejuvenate the "rules-based international order" against cynical appeals to sovereign self-interest from China (and Russia).

China, despite it all, is a State Party in good standing in the UNCLOS treaty framework. This status remains intact even after Beijing's brazen disrespect for the Philippines 2013 UNCLOS arbitration. Until the U.S. joins that same treaty framework and becomes subject to the same risk of unwanted arbitration, we will lack legitimate standing to criticize the PRC. The audience for that foreign policy choice should be the wider international community. The U.S. message that China is "violating" UNCLOS simply does not resonate with many vital nations, which have hardly failed to recognize that America has not even ratified the instrument. Indeed, critical foreign observers perceive the U.S. as serially "violating" those elements of the treaty we do not accept. This is an unfortunate and unnecessary liability for U.S. power, which can be exercised more effectively over the long term within multilateral institutional restraints like UNCLOS.[15]

Accepting the mild discipline of the law of the sea would cost little and achieve significant momentum in long-term strategic competition with China. The PRC has proven adept at achieving "paper compliance" with various legal obligations,[16] and has championed majoritarian organizations (like the UNGA) and multilateral treaties that the U.S. now shuns. However, its rapid industrialization and rapacious demand for ocean resources may push China out of step with new developments in the international law of the sea regime. The PRC's distant-water fishing fleet, deep seabed mining industry, and blue water navy risk re-enacting the "maritime hegemony" that that an earlier generation of Chinese diplomats reviled.[17] Beijing's post-colonial branding may not survive its desire for minerals and hydrocarbons from the seabed, fish from the water column, and access to strategic maritime areas.

The U.S. can seize the high ground in this emerging competitive arena by ratifying both UNCLOS and the High Seas Treaty at the earliest opportunity.

[15] G. John Ikenberry, *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order* (Princeton University Press, 2012).
[16] Timothy Webster, "Paper Compliance: How China Implements WTO Decisions," *Michigan Journal of International Law* 35 (2014): 548-562;
[17] PRC delegates denounced American and Soviet maritime hegemony throughout the United Nations Conference on the Law of the Sea (1973-1982). Records of these meetings and Conference documents are available and searchable in full-text here: UN Codification Division, "Third United Nations Conference on the Law of the Sea (1973-1982)," <https://legal.un.org/diplomaticconferences/1973_los/dtSearch/Search_Forms/dtSearch.html>.

2) **Forget the FONOPs and focus on the maritime rights and interests of Japan, South Korea, Taiwan, the Philippines, Malaysia, Brunei, Indonesia, and (especially) Vietnam.**

American policy in the South and East China Seas has become one-dimensional and ill-suited to our broader national interests in maritime East Asia. Freedom of navigation operations (FONOPs) are the poster-child for an ineffective policy that prioritizes our narrow self-interest in military navigation over a strategic interest in maintaining good order and access to the region. Even as U.S. allies like Japan, Australia, the United Kingdom, France, and Germany cautiously volunteer to commit their vessels to limited navigational actions in disputed regions, these modest naval forces confer few operational advantages. Meanwhile, foreign forces only augment China's counter-narrative of "American-led militarization" of the South China Sea.

American military access will not be denied by PRC domestic law. Quiet assertions of U.S. rights on a regular but infrequent basis are enough to sustain a legal objection.[18] Such FONOPs are necessary but insufficient to the actual strategic purpose of sustaining a credible, deterrent force in the region. Greater U.S. focus on non-navigational rules is long overdue – especially because regional states are generally not interested in challenging China in its territorial seas, nor capable of projecting power from its EEZs.

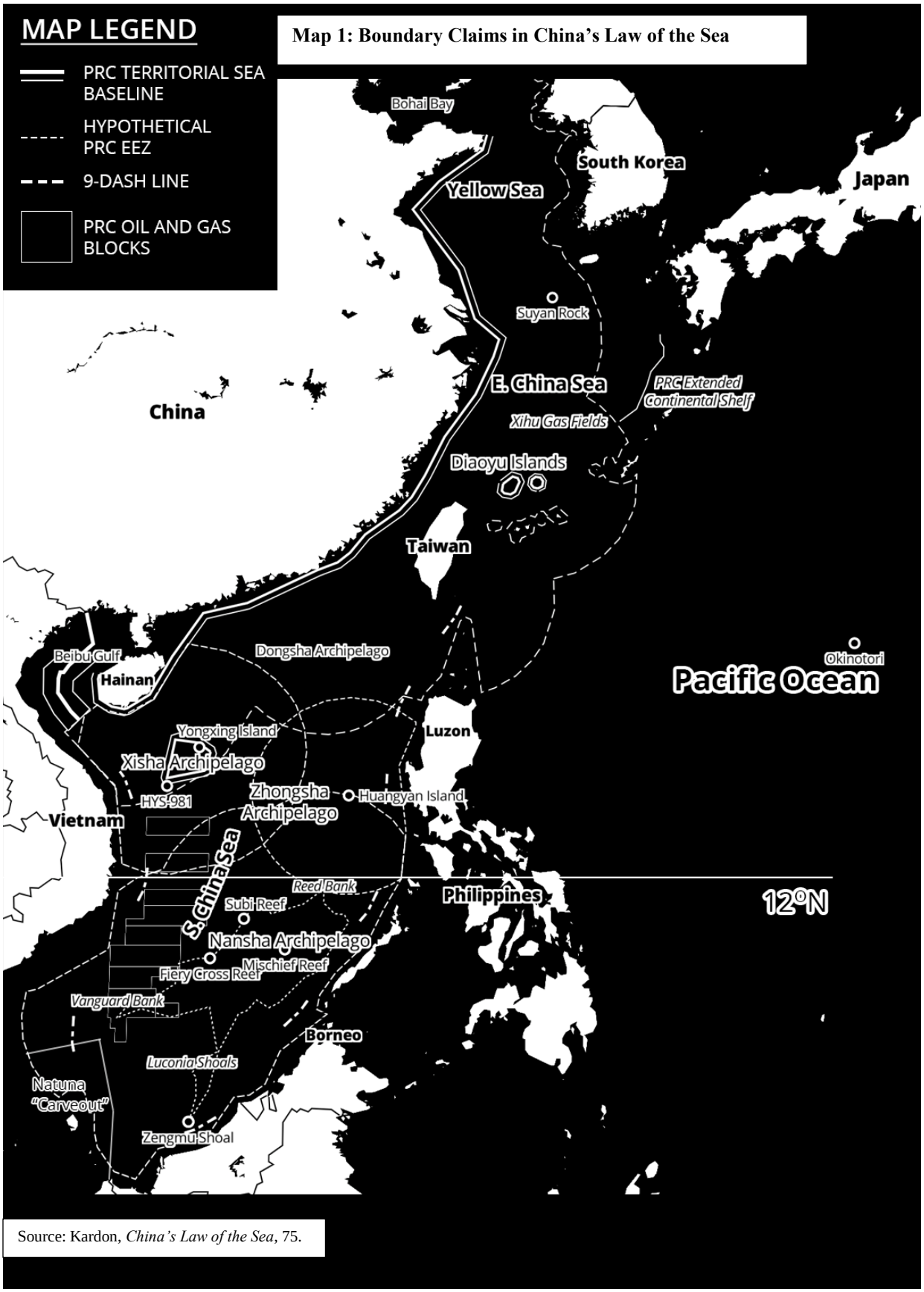
Resource rights are the basic political and economic motivations for states pursuing their claims in maritime disputes with China. China's law of the sea is most detrimental to these states because it is non-military coercion designed to "veto" their rights to exploit valuable marine resources. For China these resources are relatively insignificant, but for the smaller regional states they are clearly the main stakes under dispute. Aligning U.S. policy more closely with the interests of these regional allies and partners will position us to be more effective in maintaining a free and open maritime order in East Asia and beyond.

China's maritime policy has exploited the clear asymmetries between American interests and those of regional states. The U.S. fixation on freedom of military navigation in a region where commercial navigation is not clearly threatened is a misalignment. PRC forces challenge the genuine interests of claimant states without using military vessels and aircraft. This "gray zone" operational package is quite effective without any symmetric American and allied counterweight. The PRC has stayed below the threshold of conflict, and showed the limitations of U.S. regional power to uphold the resource rights of coastal states promised by UNCLOS.[19]

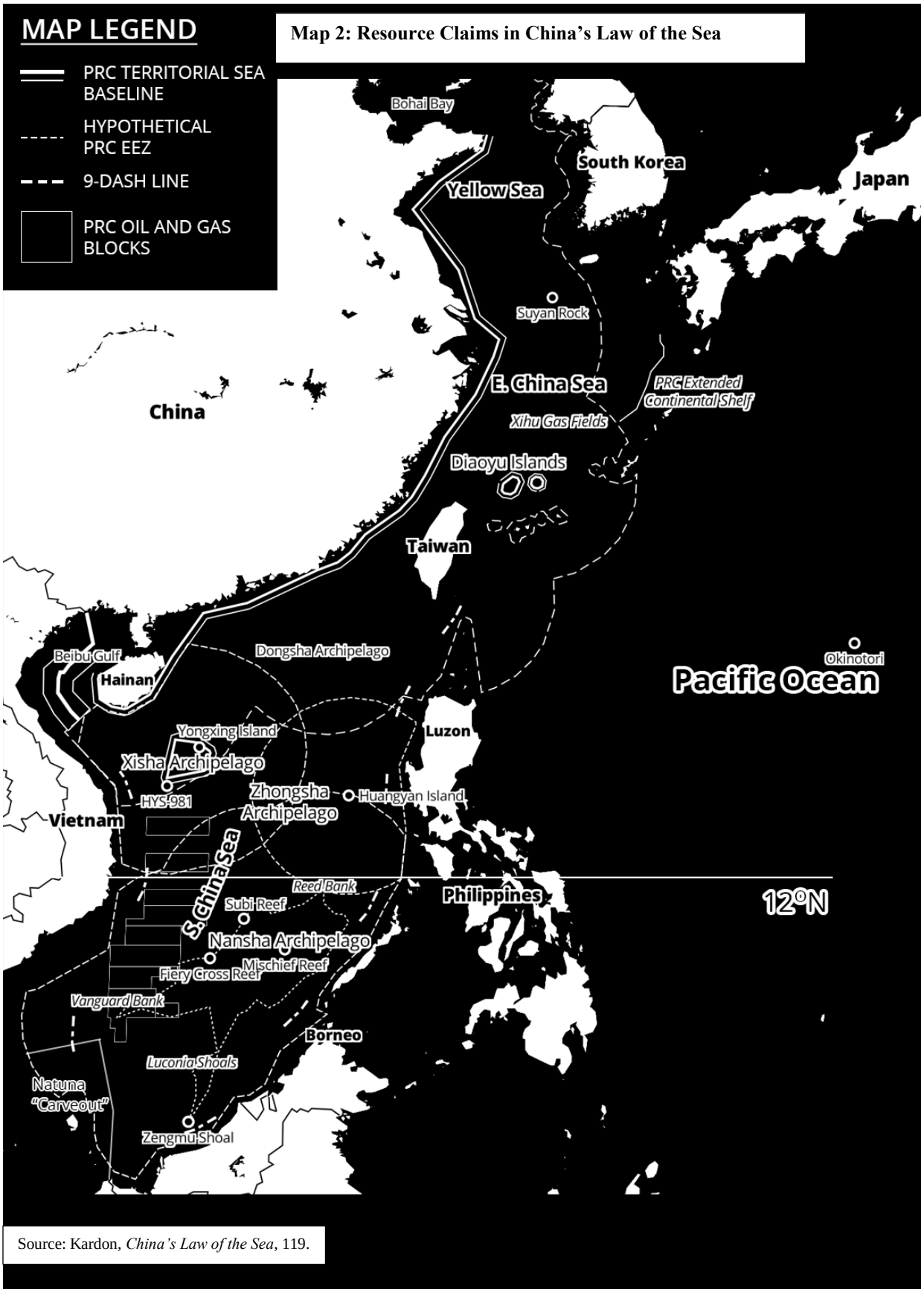
The Congress should encourage full-spectrum cooperation with regional states on issues related to upholding *their* maritime rights and interests under international law. The U.S. navy cannot serve as the main instrument of that integrated diplomatic, economic, and informational effort.

[18] For a brief discussion of the narrow legal purposes of the FON program and its strategic limitations, see Peter Dutton and Isaac Kardon, "Forget the FONOPs – Just Fly, Sail, and Operate Wherever International Law Allows," *Lawfare* (10 June 2017).

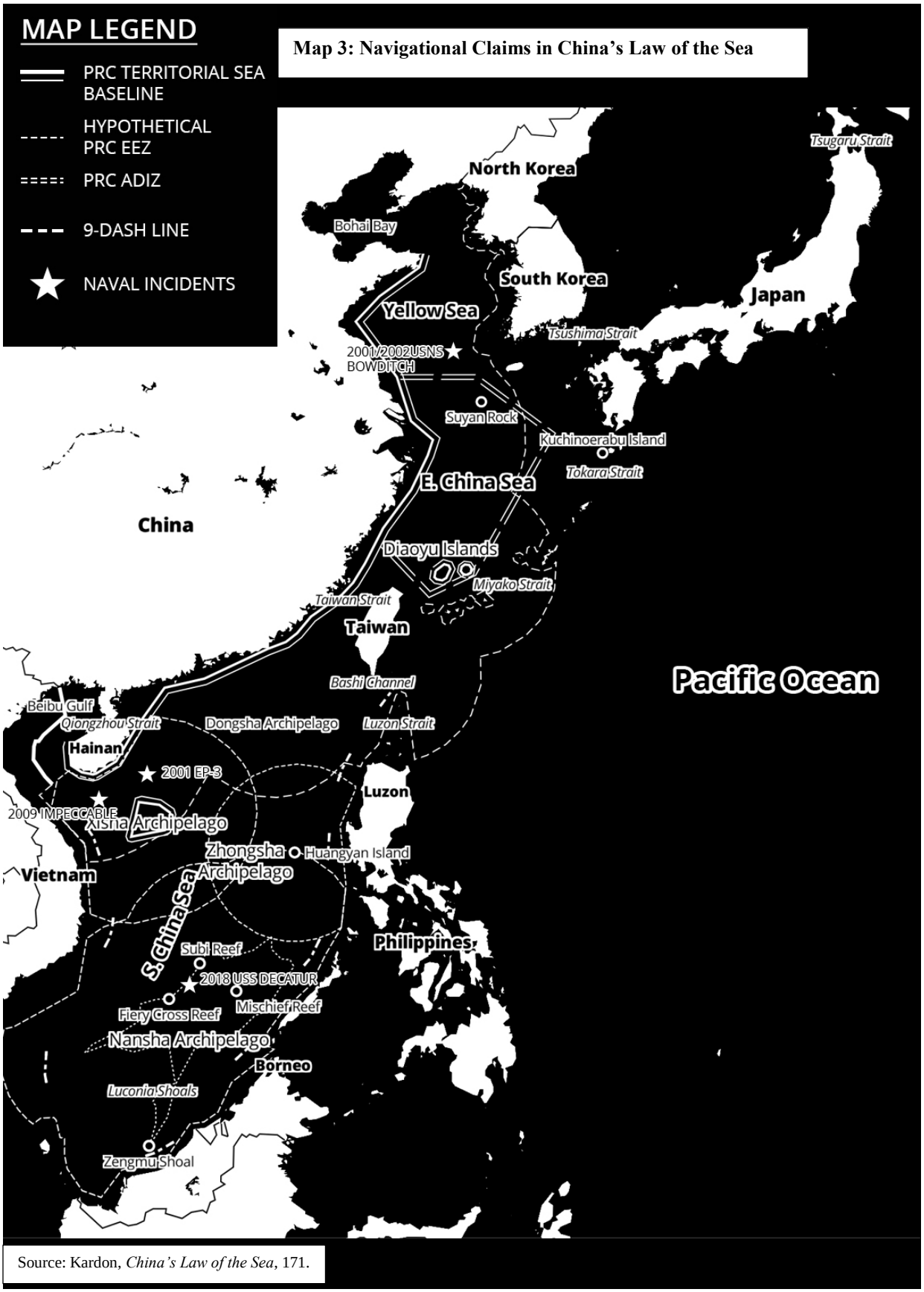
[19] Chinese officials have written extensively on the role of maritime law enforcement as an alternative to the navy. One PRC Maritime Safety Administration officer wrote that "[t]o avoid escalation, frontline law enforcement is usually carried out by maritime law-enforcement ships and aircraft." Wu Qiang [吴强] and Zhao Shngru [赵胜汝] [Zhao Shengru], "An Analysis of Measures for Law Enforcement to Safeguard Maritime Rights and Interests" [海洋权益维护执法对策分析], *Ocean Development and Management* [海洋 开发与管理], no. 6 (2004): 41.



Source: Kardon, *China's Law of the Sea*, 75.



Source: Kardon, *China's Law of the Sea*, 119.



Source: Kardon, *China's Law of the Sea*, 171.

OPENING STATEMENT OF BRIAN WEEDEN, DIRECTOR OF PROGRAM PLANNING FOR SECURE WORLD FOUNDATION

DR. WEEDEN: Thank you to the Commission, the Commissioners, and the staff for the opportunity to participate in this very important hearing today.

My oral testimony today and the written testimony provided earlier addresses the current governance framework in institutions for outer space and China's views on them. It focuses on how that framework enables or constrains China's space activities where China's interests and those of the United States align or differ and provides policy recommendations for Congress to address these issues.

My testimony reflects the aggregate knowledge and insights from across Secure World Foundation's staff. Our perspective in this matter is informed by two main bodies of evidence.

The first is China's actions and statements in multilateral diplomatic space fora, primarily United Nations Committee on the Peaceful Uses of Outer Space, COPUOS, and the Conference on Disarmament, or the CD.

As a nongovernment organization, we are permanent observers of these bodies and have either observed or, in these cases, participated in many of these discussions over the last decade giving us firsthand experience on how China views issues related to space law and norms.

We also have had direct experience partnering with Chinese academic institutions and NGOs to organize workshops and discussions on topics ranging from space debris and space sustainability to space security and more recently commercial space.

Based on this evidence, our conclusion is that China has not sought to wage the same lawfare against the international space law framework and institutions as it has in the other domains, such as maritime. We assess this is likely because China perceives the current space law framework in institutions to not be hostile to its interests and because it is able to play an active role in helping shape that framework.

While it is possible that China may choose to break from those legal principles and norms in the future, we do not see strong evidence to support that at this time in part because doing so would contradict the diplomatic positions China has established over several decades.

The existing framework of laws and norms in space constrains China's behavior to the same amount they do the United States or other spacefaring countries. That is to say to a very limited degree. This is because while there are long-standing international legal principles on space activities, there has not been much agreement on how to interpret or implement those principles over the last several decades. That lack of agreement in part stems from the unwillingness of major space powers, including the United States and Russia to place more restraints on their own space activities because they have prioritized freedom of action in space instead.

China is conducting or planning to conduct many of the same activities in space as the United States across civil, commercial, and national security sectors. China and the United States share some of the same concerns on issues such as deconfliction of space activities and frameworks for how to extract and utilize space resources on the moon and other celestial bodies.

There are areas where the United States and China are pushing different agendas, however, and this is mainly in the discussions on space security issues. China continues to push for a new legally binding treaty on space arms control as it has since 2008 in cooperation with Russia.

The United States, meanwhile, has opposed any new legally binding measures on space

security since 1980 and has, instead, pushed for voluntary guidelines and norms of behavior. While the specific draft treaty that China and Russia have been pushing has not gained significant traction among the international community, there is a general shared concern among many states that a norms-alone approach is insufficient to resolve the many issues and concerns regarding space threats and the potential for conflict on Earth to extend into space.

Twelve countries have now followed the United States lead in pledging a voluntary moratorium on destructive anti-satellite testing. In a 2002 U.N. General Assembly resolution supporting the testing moratoriums gained overwhelming support. However, many countries feel that moratoriums are only the first step and that legally binding measures must follow. And there are other security concerns including uncoordinated close approaches between satellites that remain unaddressed.

Our main policy proposal was for the United States to continue its recent efforts to lead in space governance discussions and help shape their development in a way that benefits U.S. national interests. Recent efforts, such as the Anti-Satellite Testing Moratorium proposed by the Biden administration and the Artemis Accords developed by Trump administration are positive steps in that direction and should continue to have bipartisan support.

However, in its efforts to compete with China, the United States should not actively try to exclude China from discussions on space governance. Doing so is only likely to encourage China to shift toward a more hostile stance towards the existing space law framework and institutions or efforts to develop new frameworks and institutions.

The United States should also take steps to directly engage with China on space issues with the following goals: exchanging views on principles and interpretations on key areas of outer space law; developing a better understanding of each other's space sectors, including private sector space activities; and creating mechanisms to deconflict space activities and minimize risks of misperceptions and mistakes that could heighten tensions or spark conflict.

Thank you for this opportunity. I look forward to the questions and further discussion.

COMMISSIONER HELBERG: Thank you.

Mr. Scharre.

PREPARED STATEMENT OF BRIAN WEEDEN, DIRECTOR OF PROGRAM PLANNING FOR SECURE WORLD FOUNDATION

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

Hearing on China's Increasingly Global Legal Reach

May 4, 2023

Submitted by Dr. Brian Weeden

Director of Program Planning, Secure World Foundation

Executive Summary

As the last two U.S. Administrations have laid out in their National Defense Strategies, the United States and China are engaged in a long-term strategic competition across diplomatic, information, military, and economic dimensions. The United States needs to focus on this challenge across all those avenues of competition and take a long-term perspective. The United States also needs to decide how best to work with allies and partners to promote its vision of the future while also dealing with shared global threats. While not the only domain for that competition, outer space is an important part of delivering capabilities and benefits to the world that can help grapple with those shared threats and also provide opportunities for a new vision of what is possible in the future.

This testimony addresses the current governance framework for outer space and China's views on that framework and existing institutions. It focuses on how that framework enables or constrains China's space activities, how China is using that framework to advance its space activities, where China's interests and those of the United States align or differ, and provides policy recommendations for Congress to address these issues.

My oral and written testimony today reflects the aggregate knowledge and insights from across Secure World Foundation's staff. Our perspective on this matter is informed by two main bodies of evidence. The first is China's actions and statements in multilateral diplomatic space fora, primarily the United Nations Committee on the Peaceful Uses of Outer Space (COPOUS) and the Conference on Disarmament (CD). As a non-governmental organization, SWF has been an observer and participant at many of these discussions over the last decade, giving us first-hand perspective on how China views issues related to space law and norms. We also have had direct experience partnering with Chinese academic institutions and NGOs to organize workshops and discussions on topics ranging from space debris to space security to commercial space.

Based on this evidence, our conclusion is that China has not sought to wage the same "lawfare" against the existing international legal framework and institutions in the space domain as it has in other domains, such as maritime. We assess this is likely because China perceives the current framework and institutions to not be hostile to its interests, and because it is able to play an active role in shaping the current space law framework. While it is possible that China may choose to break from those legal principles and norms in the future, we do not see strong evidence to support that conclusion, and doing so would contradict the diplomatic positions China has established over the last few decades.

The existing framework of laws and norms in space constrains China's behavior to the same amount they do the United States: that is to say, to a very limited degree. This is because while there are long-standing international legal principles on space activities, there has not been much agreement on how to interpret or implement those principles over the last several decades. That lack of agreement in part stems from the unwillingness of major space powers, including the United States, to place more restraints on space activities, because they have prioritized freedom of action.

As a result, China is conducting or planning to conduct many of the same space activities as the United States across civil, commercial, and national security sectors. China and the United States share some of the same concerns on issues such as deconfliction of space activities and frameworks for how to extract and utilize space resources on the Moon and other celestial bodies.

There are areas where the United States and China are pushing different agendas, however, and this is mainly in the discussions on space security issues. China continues to push for a new legally binding treaty on space arms control, as it has since 2008. The United States, meanwhile, has opposed any new legally binding measures on space security since 1980, and has instead pushed for voluntary guidelines and norms of behavior.

While the specific draft treaty that China and Russia have been pushing has not gained significant traction among other States, there is a general shared concern among many States that a norms-alone approach is insufficient to resolve the many issues and concerns regarding space threats and the potential for conflict on Earth to extend into space. Twelve countries have now followed the United States' lead in pledging a voluntary moratorium on destructive anti-satellite testing, and a 2022 UN General Assembly resolution supporting the moratoriums gained overwhelming support. However, many countries feel that these moratoriums are only the first step and that legally-binding measures must follow, and there are other security concerns, including uncoordinated close approaches between satellites, that remain unaddressed.

Our main policy proposal is for the United States to continue recent efforts to lead in space governance discussions and help shape their development in a way that benefits U.S. national interests. Recent efforts, such as the Artemis Accords developed by the Trump Administration and the anti-satellite testing moratorium proposed by the Biden Administration, are positive steps in that direction that should continue to have bipartisan support.

However, in its efforts to compete with China, the United States should not actively try to exclude China from multilateral discussions on space governance. Doing so is only likely to encourage China to shift towards a more hostile stance towards the existing space law framework and institutions.

The United States should also take steps to directly engage with China on space issues with the following goals:

- Exchanging views on principles and interpretations of key areas of outer space law
- Developing a better understanding of each other's space sectors, including private sector space activities
- Creating mechanisms to deconflict space activities and minimize the risks of misperceptions and mistakes that could heighten tensions or spark armed conflict

The Current International Space Law Framework And Its Impact on China

The current framework of international space law draws primarily from a set of core international treaties that were negotiated and drafted by the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS), a standing body of Member States of the United Nations that has considered the political, legal, and scientific aspects of space activities since the beginning of the space age. (See Appendix 1 for a list of treaties, dates of adoption, and number of ratifying states).

The Outer Space Treaty outlines the core set of principles, rights, and obligations for international space activities. Three main principles lie at the heart of the international framework for space activities: freedom of exploration and use of space, peaceful purposes, and state responsibility.

Outer space is free to be explored, and no nation or state can restrict another state's legitimate access to space. Outer space, including the Moon and other celestial bodies, shall be free for exploration and use by all states without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies. The activity of exploring and using outer space is the "province of all mankind."

The caveat to this freedom of exploration is that it shall be done for peaceful purposes. Since the treaty entered into force, there has always been a debate about the definition of peaceful purposes, with two main interpretations arising: one says that peaceful purposes means "non-military" in any regard; the other holds that peaceful merely means "non-aggressive." The latter interpretation has gradually gained broader acceptance and today many countries conduct military space activities for a variety of missions, including intelligence collection, communications, early warning, and navigation.

However, the Outer Space Treaty does place some explicit restrictions on certain types of military space activities. Article IV requires that states refrain from placing nuclear weapons or other weapons of mass destruction into Earth orbit or installing or stationing them on celestial bodies (including the Moon). It further requires that the Moon and other celestial bodies be used for exclusively peaceful purposes; forbidding the establishment of military bases, installations, or fortifications on celestial bodies, and also forbidding testing weapons and conducting military maneuvers on celestial bodies.

One area where outer space law differs from much of terrestrial law is on the topic of state responsibility. In the usual dealings between people and foreign governments, people are not the responsibility of their governments. This is not the case in outer space activities. Under Article VI of the Outer Space Treaty, states are directly responsible for all their national space activities, whether that activity is conducted by the government itself or by any of its citizens or companies, and whether launching domestically or possibly even when its nationals are conducting space activities abroad. States are also required to authorize and continually supervise their national space activities, including by their private entities.

The other three main treaties largely elaborate upon and refine provisions of the foundational Outer Space Treaty. The 1968 Astronaut Rescue and Return Agreement refines and expands on the protection given to astronauts, while the 1972 Liability Convention similarly expands the provisions for liability for damage incurred in the launching and operation of space objects. The Liability Convention establishes absolute

liability for physical damage suffered on the surface of the Earth, or to aircraft in flight, and establishes a fault-based liability regime for space objects in outer space. The 1975 Registration Convention makes mandatory both international registration and the establishment of national registries of space objects.

In addition to these space-specific treaties, much of the existing body of international law also applies to space through Article III of the Outer Space Treaty, which incorporates space law into the larger body of international law. Consequently, other sources of public international law, including the UN Charter and International Humanitarian Law (also known as the Law of Armed Conflict), also apply in outer space. The practices of states, along with general principles of law, are also valid and often applicable to space activities.

The fifth major space treaty, the Moon Agreement, is in force for those countries who have ratified it. It places additional restrictions and requirements on space activities on the Moon and creates a framework for oversight and supervision of those activities, including commercial space activities and extraction and use of resources. However, only a small number of states have ratified the Moon Agreement, and most of the states with the capability of lunar space exploration are not states parties.

There has not been any new formal international space law since the drafting of the Moon Agreement in 1979. There has been, however, significant discussion on how to interpret and implement the provisions and principles contained in the core space treaties. These include significant debates within COPUOS, United Nations General Assembly resolutions, and other non-binding mechanisms by which states communicate their perspective on the interpretation and implementation of international space law.

Over the last twenty years, the main efforts within COPUOS have been towards developing voluntary guidelines for space activities. In 2008, COPUOS endorsed a set of orbital debris mitigation guidelines, which were originally developed by several national space agencies through the Inter-Agency Debris Coordination Committee (IADC). While the guidelines are voluntary at the international level, a growing number of countries have put in place national policy and regulatory frameworks to implement them in national space activities.

In 2010, COPUOS began a formal process to develop a new set of voluntary guidelines for the long-term sustainability of space activities (LTS). In 2019, COPUOS reached consensus and adopted a preamble and set of 21 LTS guidelines that cover the policy and legal framework for space activities, safety of space operations, international cooperation capacity-building, and awareness, and scientific and technical research and development.[1] Like the debris mitigation guidelines, the LTS guidelines are voluntary at the international level, but a growing number of countries are reporting on how they are being implemented nationally.

Another UN-related body, the Conference on Disarmament (CD), is a major forum where security and arms control issues are discussed. Created in 1980 as a forum directly purposed on international disarmament negotiations, the CD and its predecessors were instrumental in drafting numerous arms control agreements, including the Treaty on the Non-Proliferation of Nuclear Weapons (1968), the

[1] See the SWF Fact Sheet on the LTS guidelines at https://swfound.org/media/206891/swf_un_copuos_lts_guidelines_fact_sheet_november-2019-1.pdf

Biological Weapons Convention (1972), the Chemical Weapons Convention (1993), and the Comprehensive Nuclear-Test-Ban Treaty (1996).

In 1985, the CD established an ad hoc committee to identify and examine issues related to the Prevention of an Arms Race in Outer Space (PAROS), due to strong concerns from many states about the weaponization of space.[2] The United States opposed giving the committee a negotiating mandate. The committee convened each year through 1994, with no further meetings occurring as a result of the objections made by the United States. Since 1994, the CD has co-mingled PAROS with the elimination of nuclear weapons, fissile material controls, and negative security guarantees, and struggled to reach consensus on an agenda of work due to objections from one or more countries on at least one of those topics.

The Republic of China (Taiwan) signed the Outer Space Treaty on January 27, 1967, the first day it was opened for signature. Subsequently, the People's Republic of China (PRC) became a successor state party to the Outer Space Treaty. China, like the United States, is a party to all four major space treaties and neither are parties to the 1979 Moon Agreement.

As a result, international space law restricts China's space activities to the same degree it restricts the space activities of the United States. Both enjoy the freedom of exploration and use of space for peaceful purposes, both have the same restrictions against the placement of weapons of mass destruction in space or on celestial bodies, both have the same prohibitions on military activities on the Moon or other celestial bodies, and both bear responsibility for their national space activities (both governmental and private sector).

There are many situations where China does generally abide by the obligations and prohibitions established by international space law, voluntary guidelines such as orbital debris mitigation, and the broader set of norms of international behavior for space. These include providing prior notifications to aircraft and ships of ballistic missile and space launches, disposing of satellites at the end of life, and registering its space objects with the United Nations.

There are no known instances where China has violated international space law, although determining a violation is difficult due to the broad nature of international space law principles and obligations, and the lack of international consensus on their interpretation and implementation. For example, China has recently had several large rocket stages that re-entered the Earth's atmosphere in an uncontrolled manner that violated international guidelines and norms for orbital debris mitigation and created significant risks to life and property. However, these voluntary guidelines are not legally binding on China or any other state and China is not the only country to violate them, although its recent transgressions are among the most serious. Furthermore, while the Outer Space Treaty and Liability Convention specify that China would be absolutely liable for any physical damages such a re-entering space object would cause to people or structures on the Earth, there has never been a liability case brought to court under these

[2] See "Proposed Prevention of an Arms Race in Space (PAROS) Treaty," *Nuclear Threat Initiative*, https://www.nti.org/learn/treaties-and-regimes/proposed-prevention-arms-race-space-paros-treaty/

treaties, and there remain significant ambiguity as to what constitutes negligence in determining liability for damage to other space objects.

Registration is another example of the difficulty of determining whether or not a state has violated international law. While states parties to the Registration Convention are required to maintain a national registry of space objects and provide basic orbital parameters and other identifying information to the United Nations on a regular and voluntary basis, there is a wide range of differences in compliance. An analysis of decades worth of data on states' filings under the Registration Convention reveals a wide disparity in timeliness and accuracy.[3] The United States, for example, has not always registered its X-37B spacecraft with the United Nations. Similarly, neither of China's two reusable spaceplanes, including the one currently in orbit, have been registered with the UN. It is also common practice for states to register payloads and large rocket bodies but not any of the many thousands of small pieces of orbital debris that exist in Earth orbit.

Anti-satellite testing is a third example of the lack of definition on application of international space law. Article IX of the Outer Space Treaty requires states parties to avoid harmful contamination of outer space, and if a state party to the treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space would cause potentially harmful interference with activities of other states parties, it is required to undertake appropriate international consultations before proceeding. Many outside observers would conclude that the deliberate destruction of a space object that creates significant orbital debris would fall under such an activity. However, to date no country has taken the official position that deliberate destruction of satellites, including the more than 70 anti-satellite tests conducted in space since 1959, constitutes "harmful contamination of outer space" or that giving or requesting prior consultations of such activities is required under the law.[4]

Much of this ambiguity on the application and enforcement of international space law stems from the reluctance of many states to further clarify the space governance framework. In particular, the United States has taken an approach to international space law since the 1980s that maximizes freedom of action in space, particularly for national security space activities. This approach includes arguing against setting a hard delimitation between the air and space regimes;[5] creating exceptions for the testing of nuclear-armed ballistic missiles, hypersonic glide vehicles, and fractional orbital bombardment systems that

[3] See the dataset of national space registries compiled and maintained by the University of Texas:: https://doi.org/10.18738/T8/NBWWWZ

[4] A history of anti-satellite tests in space, the debris they created, and debris still on orbit can be found here: https://docs.google.com/spreadsheets/d/1e5GtZEzdo6xk41i2_ei3c8jRZDjvP4Xwz3BVsUHwi48/edit#gid=0

[5] For example, see the United States statement on the agenda item on "Definition and Delimitation of Outer Space" given at the COPUOS Legal Subcommittee in on March 21, 2023, https://www.unoosa.org/documents/pdf/copuos/lsc/2023/Statements/21_PM/06a_USA_21_March_PM.pdf

traverse space;[6] and arguing that the deliberate destruction of space objects does not require international consultations under Article IX of the Outer Space Treaty.[7]

China's Advancement of Space Activities and Approach to Commercial Space

China's space program dates back to 1958, with an initial early focus on ballistic missile and space launch technologies as well as satellite development. Since the 1990s, China has expanded its space activities and given them new emphasis for their role in demonstrating China's growing technological capacity and prestige as an emerging space power. This expansion includes human spaceflight, robotic space exploration of the Moon and Mars, and a growing set of national security space capabilities. Since the mid-2010s, China's space program has become a central part of what the Chinese Communist Party calls the "China Dream."[8] President Xi has set an explicit policy goal of making China a global leader in space technology by 2045, which includes a significant focus on space for economic benefits and growth.

China is leveraging the existing international space law framework to advance its economic and commercial objectives in space to the same degree as many other countries, including the United States. The principle of freedom of action and the current interpretation of peaceful uses as "non-aggressive" has enabled China to develop and operate many of the same types of space capabilities as the United States, albeit not quite to the same degree of qualitative excellence.

For example, China operates its own global satellite navigation systems, BeiDou or "Compass", that looks and operates in a similar fashion to the U.S. Global Positioning System (GPS), although with some technical and operational differences. While the United States and China have agreed to broadcast compatible civil signals from GPS and BeiDou (along with several other global and regional GNSS systems), they also operate different military navigation signals. China has a significant and growing number of satellites for intelligence, surveillance, and reconnaissance (ISR) that give it significant global coverage and temporal resolution,[9] but individually China's ISR satellites are not of the same quality as the most advanced ISR satellites operated by the National Reconnaissance Office and other U.S. government and commercial entities.

In our experience, we see China as having similar concerns about the uncertainty of the space law framework for its planned future space activities as we see in the United States. For example, Chinese experts participating in the Global Expert Group on Sustainable Lunar Activities (GEGSLA), a discussion

[6] See DOD Law of War Manual, section 14.10.3.1, that states, "the Outer Space Treaty does not ban the use of nuclear or other weapons of mass destruction that go into a fractional orbit or engage in suborbital flight" https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf

[7] See transcript from DoD News Briefing with Deputy National Security Advisor Jeffrey, Gen. Cartwright and NASA Administrator Griffin, February 14, 2008, pg 52, https://airandspacelaw.olemiss.edu/pdfs/usa193-selected-documents.pdf

[8] Kevin Pollpeter, Timothy Ditter, Anthony Miller, and Brian Waidelich, "China's Space Narrative," *China Aerospace Studies Institute*, October 2020, https://airuniversity.af.edu/Portals/10/CASI/Conference-2020/CASI%20Conference%20China%20Space%20Narrative.pdf

[9] For a recent survey of this topic, see Henk H.F. Smid, "An analysis of Chinese remote sensing satellites," *The Space Review*, September 26, 2022, https://www.thespacereview.com/article/4453/1

body created by the international non-profit organization the Moon Village Association,[10] expressed concerns about interoperability and environmental management for future lunar space activities. Chinese participants engaged positively and constructively in working towards consensus outcomes within GEGSLA, which in turn makes recommendations to bodies such as COPUOS for future areas of work.

China has reacted to the growth of the private space industry in the United States primarily by attempting to foster a similar industry within China. Chinese space scholars and industry figures have held up leading U.S. space companies as role models and have urged China to develop its own commercial space industry.[11] There is one area where China has been antagonistic to U.S. private sector space activities, and that is use of commercial space capabilities in an armed conflict. China has raised concerns within COPUOS about the role of SpaceX's Starlink constellation in providing military capabilities to Ukraine, and has specifically stated that such commercial satellites may become legitimate military targets.[12]

China's private space industry is a complicated subject to try and understand. In part, this is due to the challenges around defining what is meant by "commercial space".[13] Additionally, within China there are multiple competing views on the proper role for the private sector, and also different efforts underway at the national and provincial levels. Many Chinese "commercial space companies" are owned or controlled by the state owned enterprises (SOEs) and serve more as vehicles to broaden the market or find other applications for technologies developed as part of government-funded programs.[14] However, there are at least a few Chinese companies that largely fit the American definition of "commercial" and exist as private entities operating with private capital.

Despite these challenges, China has put increased focus on its own commercial space sector since 2014. However, this focus has so far yielded mixed results, in part due to pushback from some of the SOEs, China's own national security concerns, and challenges in accessing the global space market due to U.S. and allied export control restrictions.

China's Legal Approaches to Space and International Institutions

In general, China has played a constructive role in the discussion and debate about space governance, largely through its participation in COPUOS. For example, China was an active participant in the LTS effort with COPUOS, with experts serving in each of the Expert Groups that began the process and then

[10] For more information about the GEGSLA, see https://moonvillageassociation.org/gegsla/about/
[11] Pollpeter et al, pg. 29
[12] See Working Paper Submitted by China to the Third Session of the UN Open-Ended Working Group on Reducing Space Threats Through Norms, Rules and Principles of Responsible Behaviours, https://docs-library.unoda.org/Open-Ended_Working_Group_on_Reducing_Space_Threats_(2022)/202301~1.PDF
[13] Kathryn Walsh, Ian Christensen, and Rob Ronci, "Lost Without Translation: Identifying Gaps in U.S. Perceptions of the Chinese Commercial Space Sector," *Secure World Foundation and the Caelus Foundation*, February 2021, https://swfound.org/media/207116/swf_caelus_lost_without_translation_identifying_gaps_in_us_perceptions_of_the_chinese_commercial_space_sector_2021.pdf
[14] For a more detailed analysis, see Irina Liu, Evan Linck, Bhavya Lal, Keith W. Crane, Xueying Han, Thomas J. Colvin, "Evaluation of CHina's Commercial Space Sector," *Institute for Defense Analysis Scientific and Technical Policy Institute*, September 2019, https://www.ida.org/-/media/feature/publications/e/ev/evaluation-of-chinas-commercial-space-sector/d-10873.ashx

the subsequent political discussions. China's role in the process was in stark contrast to that of Russia. From 2014 until the end of the LTS effort, Russia sought to undermine, delay, and obstruct the LTS discussions in response to the U.S. and European sanctions following Russia's aggression in Crimea and Ukraine. Notably, China (along with Brazil) broke from Russia during a key moment in the LTS discussions when Russia tried to halt the entire effort. China reaffirmed its support for the LTS discussions and in doing so assured their continuation despite Russian objections.

In more recent discussions within COPUOS, China has participated constructively in discussions ranging from implementation of the LTS guidelines, transparency mechanisms for utilization of space resources, and coordination of lunar activities. China has not joined with or supported on-going Russian efforts to obstruct discussions within COPUOS.

One of the most critical areas of discussion and debate is on the legal framework for extraction and use of space resources, including on the Moon and other celestial bodies such as asteroids. This is a critical question in space law, as many future space activities hinge on whether or not space resources, including regolith, water, and other minerals or elements, can be utilized in-situ or can be used to generate significant economic value. While Article I of the Outer Space Treaty states that outer space, including the Moon and other celestial bodies, shall be free for exploration and use by all states, Article II states that the outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

The United States has adopted the position that the current legal framework does not allow for states to claim territory on the Moon, but does allow for governments and private actors to extract and use any resources they find.[15] This position also appears to have growing support from other countries, as it is part of the Artemis Accords which currently has 23 signatories.[16] While some have argued that the Artemis Accords are in opposition to the Moon Agreement, two of the states parties to the Moon Agreement (Australia and Mexico) are also signatories to the Accords. Saudi Arabia withdrew from the Moon Agreement shortly after signing the Accords.

While China has not said so explicitly, it is our impression that China's interpretation of the existing international law on the extraction and utilization of space resources is similar to that of the United States and what is expressed in the Artemis Accords. China is planning on the same wide range of government and commercial lunar space activities as the United States, including those that involve the extraction and use of lunar ice and other resources, which necessitates a similar interpretation. However, in its official statements, China has emphasized equitable access and space as the province of all humankind and reinforced the need for an international coordinated framework for governance of space resource

[15] See H.R.2262 - U.S. Commercial Space Launch and Competitiveness Act of 2015, https://www.congress.gov/bill/114th-congress/house-bill/2262; EO 13914, "Encouraging International Support for the Recovery and Use of Space Resources, April 6, 2020, https://www.federalregister.gov/d/2020-07800
[16] https://www.nasa.gov/specials/artemis-accords/img/Artemis-Accords-signed-13Oct2020.pdf

utilization to avoid gaps or contradictions from domestic regimes.[17,18,19] Thus, China has positioned itself firmly in the camp of most developing countries who are concerned about "rich" states being able to access space resources to the exclusion of less advanced states.

China's expressed approach to international space law is different from that of the United States in one key aspect: its focus on legally-binding agreements and apparent disdain for purely "soft law" approaches such as norms of behavior. China has repeatedly expressed its view that many of the unanswered questions on space governance should be addressed through negotiation of legally-binding agreements, and not solely through creation of voluntary norms or guidelines. While China has expressed some support for norms, such as the LTS Guidelines, this support is generally tied to guidelines that implement existing international treaties and legal principles. For areas where there is no or unsettled international law, China has consistently called for new instruments to be created.

For example, China has consistently argued for the creation of new legally-binding agreements to address the weaponization of space and PAROS. In 2008, China and Russia presented a draft Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force against Outer Space Objects (PPWT) to the CD. The PPWT sought to define "space weapons' and to prohibit their deployment into outer space, but was silent on the development, testing, and deployment of ground-based anti-satellite weapons. Over the last fifteen years, China's statements and contributions in space security discussions have been remarkably consistent in promoting the PPWT and linking it to the broad concerns of the international community over the weaponization of space.

Most outside experts assess the PPWT as an attempt to limit a potential future U.S. space-based missile defense program, which China and Russia believe would undermine their nuclear deterrent. While many countries within the UN have expressed similar concerns as China about PAROS, few have expressed outright support for the PPWT as it currently stands. The United States for its part has consistently dismissed the PPWT and characterized it as "a diplomatic ploy by the two nations to gain a military advantage." However, until recently the United States has not offered any alternative proposals that address the issues and concerns raised by PAROS.

In December 2020, the United Kingdom led a coalition of countries (including the United States) as sponsors of UN General Assembly Resolution 75/36. The resolution, which passed resoundingly, called for national submissions to the UN Secretary General by May 2021 that would clarify how countries see threats to space security, identify responsible behavior in space, and suggest possible paths forward. The goal was to find commonalities that could break the impasse that for decades essentially had stopped

[17] Statement of the G-77 and China during the Fifty-sixth session of the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space, 27 March - 7 April 2017, delivered by H.E. Ambassador Pilar Saborío de Rocafort, Permanent Representative of Costa Rica, https://www.g77.org/vienna/OOSAAPR17.htm.
[18] G-77 and China statement during the Fifty-seventh session of the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space, from 9-20 April 2018, delivered by H.E. Ambassador H.E. Ms. Vivian N.R. OKEKE, Permanent Representative of Nigeria, https://www.g77.org/vienna/OOSAAPR18.htm.
[19] G-77 and China Statement during the Fifty-eighth session of the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space, from 1-12 April 2019, delivered by H.E. Mr. Omar Amer Youssef, Ambassador, Permanent Representative of Egypt, https://www.g77.org/vienna/OOSAAPR19.htm.

progress in space security discussions in the Conference of Disarmament. Around 30 countries submitted responses, reflecting some convergence around the idea that the deliberate creation of space debris and the uncoordinated close approach to another country's satellite are irresponsible.[20] However, there was no agreement on how to address these issues.

In December 2021, UK officials, again with a strong coalition of co-sponsors, secured adoption of Resolution 76/231, which called for establishing an open-ended working group (OEWG) that would work on "reducing space threats through norms, rules and principles of responsible behaviour." The OEWG on Space Threats (as it's commonly known) was tasked to meet twice each in 2022 and 2023 and given the mandate to examine the existing legal and normative framework regarding space threats arising from behavior, discuss threats to space systems and irresponsible actions, and recommend norms, rules, and principles of responsible behavior in space.

While the three meetings of the OEWG so far have had some challenges, mainly stemming from obstructionist behavior by Russia, the discussions have been a productive departure from the traditional PAROS deadlock. Multiple states are exchanging perspectives on what they see as the most pressing threats to space activities as well as potential ideas. This is likely due to the remit of the OEWG on Space Threats being different from the previous decades of debate on PAROS within the CD in two important aspects. One, it focuses on identifying and controlling behaviors in space, instead of focusing on objects and capabilities. Two, it includes both voluntary norms of behavior and legally binding rules and principles in the potential solution set, allowing participating countries to avoid the previous conundrum of having to choose between soft law and hard law approaches to space security.

For its part, the United States has abandoned its previous "just say no" strategy and has put forward a concrete proposal within the OEWG: it has asked countries to join with its recently declared moratorium on destructive anti-satellite testing in space that creates orbital debris. Twelve more countries have now done so, and many more countries have expressed support for the concept, as shown by the overwhelming vote by the UNGA (155 countries voting yes, nine voting no, and nine nations abstaining) in support of a resolution calling on states to commit to a moratorium on testing of destructive anti-satellite missiles.[21]

China has reacted mostly negatively to the ASAT testing moratorium concept. China welcomed any arms control initiative that contributed to PAROS but also expressed concern about the narrow scope of the testing moratoriums and suggested that they were a means of seeking advantage under the guise of arms control.[22] China maintained that efforts to reduce space debris would be in vain if the weaponization of space were not prevented, and has continued to call for a legally binding space arms control agreement.

[20] UN Office for Disarmament Affairs (UNODA), "Report of the Secretary-General on Reducing Space Threats Through Norms, Rules and Principles of Responsible Behaviors (2021)," n.d., https://www.un.org/disarmament/topics/outerspace-sg-report-outer-space-2021/.
[21] Theresa Hitchens, "US call for halting kinetic anti-satellite tests gets boost from UN vote," *BreakingDefense*, December 9, 2022, https://breakingdefense.com/2022/12/us-call-for-halting-kinetic-anti-satellite-tests-gets-boost-from-un-vote
[22] Jessica West, "The Open-Ended Working Group on Space Threats: Recap of the first meeting, May 2022," *Project Ploughshares*, September 6, 2022, https://www.ploughshares.ca/reports/the-open-ended-working-group-on-space-threats-recap-of-the-first-meeting-may-2022

The discussions within the OEWG have also revealed one area where China's opinion on international space law differs dramatically from the United States. China (with support from Russia) has stated that International Humanitarian Law does not apply to space.[23] The substance of this position appears to be that China believes that international space law prohibits armed conflict in outer space, and thus acknowledging that IHL applies to space means permitting armed conflict to exist in outer space. To quote the Chinese representative to the OEWG, "support for IHL [in space] will result in the acknowledgement of space as a domain for war." It is unclear how much this position relies on deeply-held legal beliefs versus diplomatic positioning in reaction to recent U.S. policies publicly declaring space as a warfighting domain.

Overall, China has generally been supportive of the existing space law framework and institutions. We have not seen the same sorts of attacks on and undermining of the existing international legal framework and institutions for space that we have seen in other domains such as maritime. In our opinion, this is because China does not perceive the existing space law framework and institutions to be adversarial to China's ambitions and interests. This perception is likely based on a combination of China's long standing role in helping shape the international space legal framework and the lack of conflict between that framework and China's interests and activities in space.

Our assessment is that this support may change if China sees the existing space law framework or institutions evolve to become hostile to its interests, or if there are efforts to exclude China from participating in space governance discussions. In particular, we see the development and promotion of the Artemis Accords as a potential area that could create competing legal frameworks. Although we feel China likely agrees with the legal interpretations contained within the Accords, as explained earlier, China has not expressed public support for the Accords or its principles. Some Chinese experts have expressed concern about the Accords being developed outside of the UN framework.[24] We believe China's lack of support for the Accords is because China was excluded from the negotiations that led to the Accords and they, and the broader Artemis Program they support, have been pitched publicly as part of the U.S. competition with China.

China has recently announced a partnership with Russia in developing an International Lunar Research Station (ILRS). Although not explicitly described as an alternative to the Artemis Accords, the public branding of the ILRS and its documentation bears a strong resemblance to the Accords.[25] China and Russia have stated that the ILRS is open to international cooperation and participation by other countries, although none have yet to formally join. China and Russia have also announced that they will be developing a set of principles for the ILRS, but have not yet announced a timeframe for when the principles will be completed. It is an open question whether the ILRS principles will be similar to or different from those in the Artemis Accords, and the latter outcome could lead to a situation where there are competing frameworks for lunar space activities.

[23] Ibid.
[24] Guoyu Wang, "NASA's Artemis Accords: the path to a united space law or a divided one?" *The Space Review*, August 24, 2020, https://www.thespacereview.com/article/4009/1
[25]"International Lunar Research Station (ILRS) Guide for Partnership," *Chinese National Space Agency*, June 2021, http://www.cnsa.gov.cn/english/n6465652/n6465653/c6812150/content.html

China's National Space Law Framework

While all states parties to the core space treaties share the same freedoms and obligations, they often differ significantly in how those principles are implemented nationally due to wide differences in national legal and political frameworks. China and the United States are no different in this regard, in that each has their own unique set of national institutions and legal frameworks, just like every other country that implements international law.

China, like many other countries, lacks a comprehensive and uniform national space legislation, but is putting in place various elements of a national policy and regulatory regime for space activities. China has enacted two administrative regulations addressing the issues of launching and registration of space objects: the 2001 *Measures for the Administration of Registration of Objects Launched into Outer Space* (Registration Measures) and the 2002 *Interim Measures on the Administration of Licensing the Project of Launching Civil Space* (Licensing Measures).[26] Additionally, China has also enacted the *Interim Instrument of Space Debris Mitigation and Management* (Space Debris Interim Instrument). The Registration and Licensing Measures have been enacted in the form of departmental regulations, which constitute one of the lowest levels of laws in China.

Over the past twelve years, China has issued a series of policy documents, the "white papers" on space activities, to complement the existing regulatory framework. The white papers are issued every five years by the Information Office of the State Council, and while they are not legally binding, they are significant because they reflect the growing size of Chinese space activities and the more active role played by China at the international level. The importance of the white papers is threefold: 1) they promote transparency over the nature of the Chinese space program and facilitate acceptance of China as a reliable partner for international projects; 2) they reinforce China's position of promoting the peaceful uses of outer space and respecting international obligations; and 3) they demonstrate that Chinese authorities are aware of the importance of giving a formal and consistent framework to the Chinese space program. Relatedly, Chinese authorities appear to be aware of the need for a structured national legal regime for space; as stated by the Secretary-General of the CNSA in 2014, national space law has been listed in the national legislation plan, and the CNSA is directly engaged in the process of working towards enacting the legislation.

It is unclear whether China's national legal and policy framework gives any significant advantages to its private space sector. China's private space sector is still tiny compared to that of the United States, which has by far the largest global share of both revenues and investment. China's space industry does enjoy significant political and financial support from both the federal and several provincial governments. China's commercial space sector may also benefit from China's civil-military integration policy. The massive state-owned enterprises (SOEs) that run China's government space programs have been encouraged to integrate private companies into military supply chains in an effort to boost innovation and reduce prices, and ensure better civil-military integration.[27] China has also included its space industry as

[26] https://www.unoosa.org/oosa/en/oosadoc/data/documents/2023/aac.105c.22023crp/aac.105c.22023crp.28_0.html
[27] Liu et al (2019), pp. 74

part of its Belt and Road Initiative (BRI) in an attempt to broaden the global market for its products and services. However, it is unclear how much success the space component of BRI is having at this point.

An example of these various initiatives at work can be seen in China's push for its Guo Wang constellation, which is its entry in the emerging low Earth orbit (LEO) satellite broadband market. China feels that it is far behind the leader in this sector, U.S.-based SpaceX and their Starlink constellation. Starlink currently operates more than 3,800 satellites in orbit providing broadband internet service in more than 32 countries. China has recently announced the creation of a new company called SatNet to develop and manage the Guo Wang constellation. SatNet exists at the same administrative level as the primary state-owned telcos as well as the two primary SOE aerospace companies, which is evidence of China's identification of satellite networks as a strategic infrastructure area. But the success of Guo Wang depends on negotiating market access in every country where it wants to provide services.

China's Position on Mechanisms for Moderating Relations in Space

Because China is conducting or planning to conduct in the future many of the same space activities as the United States, there are several areas where both the United States and China share similar concerns about gaps in the existing space governance framework.

There are several areas where China has expressed concerns about shortcomings in the existing space governance framework. A significant one previously mentioned is coordination of future lunar space activities. At the end of this year's meeting of the COPUOS Scientific and Technical Subcommittee in February, China gave a statement indicating that it would be open to formal discussion of coordinating lunar space activities within COPUOS. The mechanism of this coordination is unclear at this time, but one potential model is the International Committee on Global Navigation Satellite Systems (ICG). The ICG was established in 2005 under the umbrella of the UN and serves as a standing body where States can share perspectives and voluntarily coordinate on matters of mutual interest related to civil satellite-based positioning, navigation, timing, and value-added services. The ICG is the forum where the United States, China, Russia, Europe, India, and other countries have developed an interoperable set of civil navigation signals that are planned to be broadcast by all the major satellite navigation constellations.

On security issues, as noted earlier China continues to express significant concern about the weaponization of space, including the deployment of space-based weapons. These concerns seem to stem from its long-standing concern about the potential for a U.S. space-based missile defense system to undermine China's nuclear deterrent. China has repeatedly called for a new legally binding instrument to control arms in outer space. China has continually opposed a strict focus only on voluntary norms – or what it has referred to as a "code of conduct" – as it is concerned that this approach will result in the domination of outer space by one state.[28]

Another area where both the United States and China have an interest in developing guardrails is on close approaches between satellites. The formal term for these activities are rendezvous and proximity

[28] Jessica West, "The Open-Ended Working Group on Space Threats: Recap of the Second Meeting, September 2022," *Project Ploughshares*, January 2023, https://uploads-ssl.webflow.com/6285a140011bc6d7812a34ea/63bef1b78655c6e6474c8b59_OEWGSecondSessionJan2022.pdf

operations (RPO) and they generally involve a satellite altering its trajectory to come close to another space object. RPO are not new to space: they have been around since the Gemini 8 mission in 1966 and used extensively for human spaceflight since then. Over the last 20 years, the technology for doing RPO between robotic spacecraft has improved significantly and is now being explored and demonstrated on orbit by commercial firms, civil government organizations, and militaries for a wide variety of applications. Chief among these are the emerging field of satellite servicing, which includes the capability to approach, grasp, manipulate, modify, repair, refuel, integrate, and build completely new platforms and spacecraft in orbit. Some of these RPO capabilities and technologies could also be used to support national security space activities such as surveillance, intelligence collection, and even co-orbital anti-satellite weapons.

Over the last several years, both the United States and China have increased their RPO activities in space for civil, commercial, and national security programs. China has conducted multiple RPO between its own satellites in LEO and geosynchronous orbit (GSO), and has a pair of satellites in GSO, SY-12 (01) and SY-12 (02), that appear to be conducting a similar situational awareness and intelligence collection mission as the four GSSAP satellites operated by the U.S. military in GSO. In January 2022, there was a close approach between one of the U.S. GSSAP satellites and the two Chinese SY-12 satellites. In early 2022, China also used its SJ-21 satellite to dock with and remove one of its dead BeiDou satellites from GSO to the disposal graveyard. While on its face this was positive for the space environment and conducted in accordance with existing international law, the lack of transparency and communication about the SJ-21 created concerns about its activities in orbit.

Several countries, including the United States and China, have expressed concerns about uncoordinated RPOs during discussions at the OEWG on Space Threats. However, to date, there have been no explicit agreement for how to deal with them, aside from calls to "maintain safe separation and trajectory" without specifying how to define those terms. One concept for how we might approach the issue can be found in the maritime domain, and specifically the Incidents at Sea Agreement (IncSea) reached between the United States and the Soviet Union in 1972.[29] IncSea was driven by concerns that more frequent and dangerous encounters between U.S. and Soviet ships and aircraft in international waters could leak to a mistake that increased the risks of accidental war. The IncSea Agreement contained specific norms for how to avoid collisions, provide clarity of intentions, and refrain from aggressive actions that could be misperceived. A similar agreement for space could provide important guardrails and confidence-building measures as both countries increase their national security presence in space.

Another area where China has expressed support for mechanisms for moderating relations in space relates to the use of space assets and data, specifically that of open geospatial and in-situ data. They are an active member of the Group on Earth Observations (GEO), an intergovernmental partnership that improves the availability, access and use of Earth observations for a sustainable planet. This organization seeks to better integrate observing systems and share data by connecting existing infrastructures using common standards. China has often contributed resources and served in various leadership positions. This engagement is similar to their involvement in the United Nations Group Committee of Experts on Global Geospatial Information Management (UN-GGIM). In both fora, China has worked with the United States

[29] Michael Listner, "A Bilateral Approach From Maritime Law to Prevent Incidents in Space," The Space Review, February 16, 2009, https://www.thespacereview.com/article/1309/1

and others to improve global access to environmental and other data needed for sustainability, humanitarian, and other global activities.

Policy Recommendations for the United States

The United States is in the midst of a long-term strategic competition with China that encompasses economic, political, and national security challenges across all domains, including outer space. Yet while recognizing the reality of this competition, we must not lose sight of the incredibly devastating consequences that an armed conflict with China will have for both countries and the entire world. Thus, while the United States should pursue policies and strategies that give it an advantage in that competition, it should be wary of taking steps that increase the risk of the competition escalating into armed conflict.

Space activities represent a particularly complex and challenging area for the U.S.-China relationship. While both the United States and China have long been significant space actors, there is not a prior track record of cooperation or collaboration between them on space activities. This is largely due to the domestic fears within the United States over China's space program. China's space program was founded by Qian Xuesen, a Manhattan Project scientist who was persecuted and eventually emigrated to China and helped found their nuclear weapons and space programs. This is consistent with how the United States has viewed China's space program: with great suspicion and responses that often exaggerated the threat while simultaneously creating the exact circumstances they were trying to prevent.

The United States and China will be operating in the shared domain of space for the foreseeable future. While direct cooperation on space activities is unlikely given the broader political issues surrounding the U.S.-China relationship, there are still important areas where the two countries need to explore and develop mechanisms to enable each to undertake their national space activities while minimizing the chances of direct conflict.

To that end, we believe that the United States should take steps to directly engage with China on space issues with the following goals:

- Exchanging views on principles and interpretations of key areas of outer space law
- Developing a better understanding of each other's space sectors, including commercial space activities
- Creating mechanisms to deconflict space activities and minimize the risks of misperceptions and mistakes that could heighten tensions or spark armed conflict

Bilateral exchanges with China. The Obama administration started two sets of bilateral exchanges with China, one on space safety and one on security. Space was also included in recent iterations of the bilateral Economic and Security Dialogue. The Trump administration largely continued these dialogues, although they were halted due to the travel restrictions imposed by the COVID-19 pandemic. We believe the U.S. should resume these bilateral exchanges as soon as possible.

As part of this, Congress should consider revising the Wolf Amendment to allow the Executive Branch to conduct limited space engagement with China without prior permission from Congress. Congress should modify the Wolf Amendment to allow NASA to engage in space activities with China that support U.S.

national interests. Priority areas for engagement include basic space science and research, robotic space exploration, and increased data sharing on space weather and orbital debris. More substantive engagement with China, to include cooperation on human spaceflight, should remain an area where Congress is involved.

Increase understanding of the Chinese space sector. Congress should work with the Administration to fund and carry out studies that systematically document and understand the structure and nature of the Chinese space ecosystem, how the industry is structured, the true relationships between the central government, the state-owned enterprises, and the private companies, the role of the provincial governments, how private capital operates in the Chinese space sector and how all of this relates to the space program priorities of the Chinese Communist Party.

Include China in multilateral discussions on space law principles, including those contained in the Artemis Accords. We recommend that the United States include China in discussions on space law principles, as attempting at exclusion is likely to result in China developing its own alternative interpretations that create a more uncertain legal environment for U.S. companies and potentially becoming hostile to those institutions. While it is likely too late to get China to sign on to the Artemis Accords, the United States should engage with China through COPUOS to try and reach broad international agreement on topics such as extraction and use of space resources and safety and deconfliction of lunar space activities.

Find common ground on uncoordinated RPOs. The United States, Russia, and China should discuss definitions of agreed behavior for military activities in space, in particular the interactions between their military satellites in space, akin to the discussions that led to the Incidents at Sea Agreement during the Cold War. As in the case of maritime operations, clarifying norms of behavior for noncooperative rendezvous and proximity operations and, where possible, providing notifications of upcoming activities can help reduce the chances of misperceptions that could increase tensions or spark conflict. As part of these discussions, the main space powers need to share their perspectives on how the existing laws of armed conflict apply to military space activities.

Finally, the United States needs to be open to legally-binding agreements on space activities, in addition to voluntary norms. U.S. insistence on voluntary guidelines and norms as the only approach to dealing with space governance challenges has limited international support for its proposals. Many countries have expressed their desire for rules-based approaches to dealing with space sustainability and security challenges in addition to voluntary norms. Part of the success of the anti-satellite test moratorium effort led by the United States is that it acknowledges that the moratoriums may eventually lead to a legally-binding instrument, assuaging concerns of countries who ultimately prefer the latter. In the end, the United States must decide whether the trade-off of limiting the possibility of some actions in the future is worth the benefits to space security and stability that the agreements bring now. Given how much the United States depends on space for enabling national security and furthering its economic development, proposing legally-binding instruments that are equitable, verifiable, and in the interest of the United States are likely to boost international support for U.S. diplomatic proposals versus those pushed by China.

Appendix 1 – International Space Treaties

Treaty	Adoption by General Assembly	Entered into Force	Number of Ratifying States as of January 2023[30]
Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty)	1966	1967	113
Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (Astronaut Agreement)	1967	1968	99
Convention on International Liability for Damage Caused by Space Objects (Liability Convention)	1971	1972	98
Convention on Registration of Objects Launched into Outer Space (Registration Convention)	1974	1976	75
Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Agreement)	1979	1984	18[31]

[30] United Nations Committee on the Peaceful Uses of Outer Space, *Status of International Agreements Relating to Activities in Outer Space as at 1 January 2023, A/AC.105/C.2/2023/CRP.3* (2023), available at https://www.unoosa.org/oosa/oosadoc/data/documents/2023/aac.105c.22023crp/aac.105c.22023crp.3_0.html and see latest depository notifications at https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/status/index.html

[31] Saudi Arabia withdrew from the Moon Agreement on 5 January 2023, with withdraw taking effect as of 5 January 2024, https://treaties.un.org/doc/Publication/CN/2023/CN.4.2023-Eng.pdf

OPENING STATEMENT OF PAUL SCHARRE, VICE PRESIDENT AND DIRECTOR OF STUDIES AT THE CENTER FOR A NEW AMERICAN SECURITY

DR. SCHARRE: Thank you. Vice Chairman Wong, Commissioner Goodwin, Commissioner Helberg, distinguished Commission members, thank you so much for inviting me to testify today.

China's pioneering a new brand of digital authoritarianism at home and abroad, which poses a profound threat to global freedoms. The United States must work with other democratic nations to push back on these illiberal uses of technology and develop an alternative vision for digital technologies that preserves personal privacy and individual freedom.

The Chinese Communist Party is building a vast surveillance network to monitor its citizens and control their behavior. These include surveillance cameras; artificial intelligence tools, such as facial, voice, and gait recognition; biometric databases; police cloud computing centers; and a national social credit system.

The most extreme version of this techno-authoritarianism exists in Xinjiang where the Chinese Communist Party is carrying out a brutal campaign of genocide and repression against the ethnic Uyghur population. But many of these tools are used nationwide. Many of China's surveillance systems today are fragmented and imperfect. But the Chinese Communist Party is working to improve them.

China's initial efforts to control the internet 20 years ago were similarly imperfect, yet the Party has done what many believed impossible and today exercises an incredible degree of control over the information environment inside China through censorship and propaganda. And the Party is working now to extend that same degree of control to physical space.

Of course, under Chinese system of rule by law, there are no legal constraints on the Chinese Communist Party's ability to surveil its citizens. While China has passed several laws and regulations pertaining to cybersecurity, data, and artificial intelligence, the law serves a different purpose in China than in democratic states and exist to aid the Party in governing.

This new techno-authoritarianism is a threat to global freedoms because it does not stop at China's border. At least 80 countries have adopted Chinese police and surveillance technology. Even more troubling is the export of Chinese-style laws and norms for governing cyberspace and digital technologies, the social software that underpins this new model of digital authoritarianism.

The Chinese Communist Party spreads its model through multiple vehicles, including Chinese ownership over critical digital infrastructure, other countries adopting Chinese-style norms and laws, and Chinese involvement in technical standards and advice.

Chinese ownership of critical digital infrastructure presents opportunities for Chinese government surveillance and manipulation of foreign countries. Several countries, including the United States, have banned Huawei equipment because of concerns about spying. Yet, Huawei is not unique in these concerns. Any Chinese company can be compelled to aid the government in spying abroad.

The Chinese-owned social media platform TikTok presents a threat to U.S. national security because of the risk of U.S. person's data being exfiltrated to China and because of the potential for TikTok to manipulate content on the platform.

On numerous occasions, TikTok has appeared to censor political content. In 2019, in fact, TikTok's leaked moderation guidelines included censorship of political content such as that related to Taiwanese or Tibetan independence or the Tiananmen Square massacre.

The Chinese Communist Party knows the power of controlling information. Just as it has controlled information inside China, Chinese ownership over global social media and information platforms allows the Party to extend its reach outside of China censoring content that it deems offensive or against the Party's interests.

Chinese ownership of a major U.S. social media platform poses unacceptable risks to the U.S. national security. Congress should pass legislation giving the Executive Branch the authority to address threats from foreign ownership and critical information in telecommunications technologies.

China has also been active in promoting its norms for governing cyberspace and surveillance technologies. China has held training seminars in over 30 countries on cyberspace information policy. In Tanzania, Uganda, Vietnam, and Zimbabwe, restricted media in cybersecurity laws followed Chinese engagement.

China has also began playing a more active role in international technical standard-setting bodies using them as another vehicle for exporting China's vision of digital authoritarianism. Technical standards are an important avenue for shaping global technology development. China's influence in technical standard-setting bodies threatens to spread standards that would enable Chinese-style surveillance and repression worldwide.

Congress should increase funding for the National Institute of Standards and Technology, NIST, to ensure it's adequately funded to engage in intentional standards-setting discussions. It is not enough to push back on the spread of China's model of digital repression. The United States and other democratic nations must work together to present an alternative vision for using digital technologies that preserves privacy and individual freedom.

The U.S. Congress has considered but not passed a comprehensive federal data privacy law. The United States currently has a patchwork of laws at the state and sometimes local level governing digital technologies, including consumer data privacy and law enforcement use of facial recognition. This patchwork approach impedes innovation.

Congressional leadership is needed to create nationwide rules governing digital technologies. Congress should pass a comprehensive federal data privacy law.

Additionally, Congress should pass legislation governing AI-generated synthetic media requiring disclosure to users when content such as text, voice, images, or video is generated by artificial intelligence.

Congress should also work with social media companies to establish common standards for combatting disinformation, manipulative content, and inauthentic behavior informed by industry best practices.

The United States must also work with its allies and partners to shape global norms and standards. The U.S. State and Commerce Department should work with allies to lead the establishment of a new group of democratic technology-leading states, a G7+, sometimes called a Tech 10 or T14. These steps are important to push back against China's spread of its model techno-authoritarianism and help ensure that digital technologies are used consistent with democratic values.

Thank you.

COMMISSIONER HELBERG: Thank you.

Ms. Chen.

PREPARED STATEMENT OF PAUL SCHARRE, VICE PRESIDENT AND DIRECTOR OF STUDIES AT THE CENTER FOR A NEW AMERICAN SECURITY

MAY 4, 2023

TESTIMONY BEFORE THE U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION

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

The Dangers of the Global Spread of China's Digital Authoritarianism

BY

Paul Scharre

Vice President and Director of Studies
Center for a New American Security

I. China's Digital Authoritarianism

Chairman Bartholomew, Vice Chairman Wong, Commissioner Goodwin, Commissioner Helberg, and distinguished Commission members, thank you for the opportunity to testify on the important topic of the Chinese Communist Party's increasingly global legal reach.

China is pioneering a new brand of digital authoritarianism at home and abroad, which poses a profound threat to global freedoms. The United States must work with other democratic nations to push back on these illiberal uses of technology and develop an alternative vision for using digital technologies that preserves personal privacy and individual freedom.

The Chinese Communist Party is using technology to build a dense web of digital and physical surveillance to track and monitor its citizens.[1] Over half of the world's one billion surveillance cameras are in China.[2] Elements of this technology-enhanced authoritarianism in China include:

- Artificial intelligence tools such as facial, voice, and gait recognition;
- Biometric databases consisting of fingerprints, blood samples, voiceprints, iris scans, facial images, and DNA;
- Facial recognition scanners in airports, hotels, banks, train stations, subways, factories, apartment complexes, and public toilets;
- Physical security checkpoints that include searching cell phones for unauthorized content;
- Wi-Fi "sniffers" to gather data from nearby phones and computers;
- License plate readers to identify and track vehicles;
- Police cloud computing centers to churn through data;
- Police software that tracks individuals' movements, car and cell phone use, gas station and electricity use, and package delivery;
- "Minority identification" facial recognition systems that deliberately target minority groups, specifically China's Uighur population; and
- A national "social credit system" consisting of a series of different databases, scores, and blacklists to enhance social and political control over Chinese citizens.[3]

The most extreme version of this techno-authoritarianism exists in Xinjiang, where the Chinese Communist Party is carrying out a brutal campaign of genocide and repression against the ethnic Uighur population. However, many of these tools are used nationwide. COVID-related measures have further enhanced the Chinese Communist Party's control over citizen movements.

Unlike in the United States and other democratic societies, there are no legal constraints on the Chinese Communist Party's ability to surveil its citizens. While China has passed a number of laws and regulations pertaining to cybersecurity, data, and artificial intelligence, the law serves a different purpose in China than in democratic states. Unlike the democratic concept of "rule of law," where the law constrains even the government, China has a system of

[1] Portions of this testimony are drawn from Paul Scharre, *Four Battlegrounds: Power in the Age of Artificial Intelligence*, (New York: W.W. Norton & Company, 2023).

[2] Liza Lin and Newley Purnell, "A World with a Billion Cameras Watching You Is Just Around the Corner," *Wall Street Journal*, December 6, 2019, https://www.wsj.com/articles/a-billion-surveillance-cameras-forecast-to-be-watching-within-two-years-11575565402.

[3] Kendra Schaefer et al., *Understanding China's Social Credit System* (Trivium China, September 23, 2019), http://socialcredit.triviumchina.com/wp-content/uploads/2019/09/Understanding-Chinas-Social-Credit-System-Trivium-China-20190923.pdf.

"rule by law."[4] The Chinese Communist Party stands above the law, and the law is a vehicle to aid the Party in governing.

Many of China's surveillance systems today are fragmented and imperfect. However, the Party is working to improve them. China's initial efforts to control the internet twenty years ago were similarly imperfect. Yet the Chinese Communist Party has done what many believed impossible and today exercises an incredible degree of control over the information environment inside China through censorship and government propaganda.

China is building the foundation today for an unprecedented system of technology-enhanced repression and control. General Secretary Xi Jinping has said the goal of China's social credit system is to ensure that "Everything is convenient for the trustworthy, and the untrustworthy are unable to move a single step."[5]

II. The Global Spread of China's Model

China's model of digital authoritarianism is spreading abroad, in part due to active promotion by the Chinese Communist Party. At least 80 countries have adopted Chinese police and surveillance technology.[6] Even more troubling is the export of Chinese-style norms and laws for governing cyberspace and digital technologies, the "social software" of this new model of techno-authoritarianism.

Left unchecked, the spread of China's model of technology-enhanced repression poses a profound challenge to global freedoms and individual liberty. The Chinese Communist Party spreads its model of digital authoritarianism through multiple vehicles, including Chinese ownership over critical digital infrastructure, other countries adopting Chinese-style norms and laws, and Chinese involvement in technical standard-setting bodies.

Critical Digital Infrastructure

The global adoption of Chinese surveillance technology facilitates Chinese control over critical digital infrastructure, such as telecommunications networks and social media platforms. Chinese ownership of critical digital infrastructure provides data for Chinese companies to improve their algorithms and opportunities for Chinese government surveillance.

Several countries, including the United States, have banned Huawei equipment because of concerns about spying. In 2018, the French paper *Le Monde* revealed that data was being secretly transferred from the African Union's new headquarters building in Ethiopia, which was financed by the Chinese government and built by Huawei, every night between midnight and 2 a.m. to servers in Shanghai.[7] A subsequent sweep for bugs found hidden microphones under desks and in the walls.[8] Huawei technicians have also reportedly helped the governments of Uganda and Zambia spy

[4] " 'Rule of Law' or 'Rule by Law'? In China, a Preposition Makes All the Difference," *Wall Street Journal*, October 20, 2014, https://www.wsj.com/articles/BL-CJB-24523.

[5] "Component 3: Rewards and Punishments," in Schaefer et al., *Understanding China's Social Credit System*.

[6] Sheena Greitens, " 'Surveillance with Chinese Characteristics': The Development & Global Export of Chinese Policing Technology" (paper presented at Princeton University's International Relations Faculty Colloquium, Princeton, New Jersey, October 7, 2019), 2, http://ncgg.princeton.edu/IR%20Colloquium/GreitensSept2019.pdf.

[7] Danielle Cave, "The African Union Headquarters Hack and Australia's 5G Network," *The Strategist*, July 13, 2018, https://www.aspistrategist.org.au/the-african-union-headquarters-hack-and-australias-5g-network/; Ghalia Kadiri and Joan Tilouine, "A Addis-Abeba, le siège de l'Union africaine espionné par Pékin [In Addis Ababa, the headquarters of the African Union spied on by Beijing]," *Le Monde*, January 26, 2018, https://www.lemonde.fr/afrique/article/2018/01/26/a-addis-abeba-le-siege-de-l-union-africaine-espionne-par-les-chinois_5247521_3212.html; Karishma Vaswani, "Huawei: The Story of a Controversial Company," BBC News, March 6, 2019, https://www.bbc.co.uk/news/resources/idt-sh/Huawei; Huawei, "Statement on Huawei's Work With the African Union," 2021, https://www.huawei.com/us/facts/voices-of-huawei/statement-on-huaweis-work-with-the-african-union.

[8] Aaron Maasho, "China Denies Report It Hacked African Union Headquarters," Reuters, January 29, 2018, https://www.reuters.com/article/us-africanunion-summit-china/china-denies-report-it-hacked-african-union-headquarters-idUSKBN1FI2I5.

on political opponents.[9] Huawei is not unique in these concerns. Any Chinese company can be compelled to aid the government in spying abroad.

The Chinese-owned social media platform TikTok presents a threat to U.S. national security because of the risk of U.S. persons' data being exfiltrated to China and TikTok manipulating content on the platform.[10] On numerous occasions, TikTok has appeared to censor political content, including:

- Posts uploaded using #BlackLivesMatter and #GeorgeFloyd;[11]
- A viral video criticizing the Chinese government's treatment of Muslims;[12]
- Clips of "tank man" (the unknown protestor who stood in front of a column of tanks in Tiananmen Square in 1989);[13]
- Videos of Hong Kong pro-democracy protestors;[14] and
- Content relating to the Houston Rockets basketball team, whose general manager had publicly sided with Hong Kong protestors.[15]

In addition to these apparent censorship incidents, independent researchers have found a glut of pro-Chinese Communist Party propaganda videos about Xinjiang on TikTok.[16]

Leaked documents have demonstrated TikTok's systemic manipulation and censorship of political content. In 2019, *The Guardian* newspaper revealed TikTok's leaked moderation guidelines, which included censorship of political content. The bans included prohibiting videos of "highly controversial topics, such as . . . inciting the independence of . . . Tibet and Taiwan," "demonisation or distortion of local or other countries' history such as . . . Tiananmen Square incidents," and "criticism/attack towards policies, social rules of any country, such as . . . socialism system".[17]

The Chinese Communist Party knows the power of controlling information. Just as it has controlled information within China, Chinese ownership over global social media and information platforms allows the Party to extend its reach outside of China, censoring content that it deems offensive or against the Party's interests.

[9] Joe Parkinson, Nicholas Bariyo, and Josh Chin, "Huawei Technicians Helped African Governments Spy on Political Opponents," *Wall Street Journal*, August 15, 2019, https://www.wsj.com/articles/huawei-technicians-helped-african-governments-spy-on-political-opponents-11565793017.

[10] Fergus Ryan, Danielle Cave, and Vicky Xiuzhong Xu, *Mapping More of China's Technology Giants* (report no. 24/2019, Australian Strategic Policy Institute, 2019), https://www.aspi.org.au/report/mapping-more-chinas-tech-giants; Fergus Ryan, Audrey Fritz, and Daria Impiombato, *TikTok and WeChat* (report no. 37/2020, Australian Strategic Policy Institute, 2020), https://www.aspi.org.au/report/tiktok-wechat.

[11] Vanessa Pappas and Kudzi Chikumbu, "A Message to Our Black Community," Tiktok news release, June 1, 2020, https://newsroom.tiktok.com/en-us/a-message-to-our-black-community.

[12] Brenda Goh, "TikTok Apologizes for Temporary Removal of Video on Muslims in China," Reuters, November 27, 2019, https://www.reuters.com/article/us-bytedance-tiktok-xinjiang/tiktok-apologizes-for-temporary-removal-of-video-on-muslims-in-china-idUSKBN1Y209E.

[13] Yaqiu Wang, "Targeting TikTok's Privacy Alone Misses a Larger Issue: Chinese State Control," Human Rights Watch, January 24, 2020, https://www.hrw.org/news/2020/01/24/targeting-tiktoks-privacy-alone-misses-larger-issue-chinese-state-control.

[14] Drew Harwell and Tony Romm, "TikTok's Beijing Roots Fuel Censorship Suspicion as It Builds a Huge U.S. Audience," *Washington Post*, September 15, 2019, https://www.washingtonpost.com/technology/2019/09/15/tiktoks-beijing-roots-fuel-censorship-suspicion-it-builds-huge-us-audience/.

[15] Ben Thompson, "The China Cultural Clash," *Stratechery* (blog), October 8, 2019, https://stratechery.com/2019/the-china-cultural-clash/.

[16] Ryan, Fritz, and Impiombato, *TikTok and WeChat*, 15–17.

[17] Alex Hern, "Revealed: How TikTok Censors Videos That Do Not Please Beijing," *The Guardian*, September 25, 2019, https://www.theguardian.com/technology/2019/sep/25/revealed-how-tiktok-censors-videos-that-do-not-please-beijing.

Chinese ownership over a major U.S. social media platform poses unacceptable risks to U.S. national security. Congress should pass legislation giving the Executive Branch the authority to address threats from foreign ownership in critical information and telecommunications technologies.

Norms and Laws

China has been active in promoting its norms for governing cyberspace and surveillance technologies. According to Freedom House, China has held training sessions and seminars with over thirty countries on cyberspace and information policy.[18] Examples include a two-week "Seminar on Cyberspace Management" held in 2017 for officials from countries participating in China's Belt and Road Initiative. In 2018, journalists and media officials from the Philippines visited China to learn about "socialist journalism with Chinese characteristics." Similar Chinese media conferences have brought in representatives from Egypt, Jordan, Lebanon, Libya, Morocco, Saudi Arabia, Thailand, and the United Arab Emirates. At the government-run Baise Executive Leadership Academy in southern China, over 400 government officials from southeast Asian countries have been trained in "China's governance and economic development model," including how to "guide public opinion" online.[19]

Other countries have begun adopting Chinese-style laws for digital technologies. In Tanzania, Uganda, and Vietnam, restrictive media and cybersecurity laws closely followed Chinese engagement.[20] Zimbabwe's government, whose officials have attended Chinese seminars, has been enthusiastic about following China's lead.[21] In 2018, Zimbabwe signed a strategic partnership with the Chinese company CloudWalk to build a mass facial recognition system consisting of a national database and intelligent surveillance systems at airports, railways, and bus stations.[22] Former Zimbabwean ambassador to China Christopher Mutsvangwa said the deal would help "spearhead our AI revolution in Zimbabwe."[23] In 2021, Zimbabwe's government adopted a new cybersecurity law modeled on China that has been criticized for undermining human rights.[24] Many authoritarian states are all too eager to learn from China's model of surveillance, censorship, and repression.

Technical Standards

China has also begun playing a more active role in international technical standard-setting bodies, using them as another vehicle for exporting China's vision of digital illiberalism. Technical standards are an important avenue for shaping global development of technology. International standards organizations include the International Organization for Standardization (ISO), the International Electrotechnical Commission (IEC), and the UN International Telecommunication Union (ITU). Since 2018, the Chinese government has been increasingly active in international standard-setting bodies, along with major Chinese tech firms such as Huawei, ZTE, Tencent, SenseTime,

[18] Adrian Shahbaz, *Freedom on the Net 2018* (Freedom House, 2019), https://freedomhouse.org/report/freedom-net/2018/rise-digital-authoritarianism.

[19] He Huifeng, "In a Remote Corner of China, Beijing Is Trying to Export Its Model by Training Foreign Officials the Chinese Way," *South China Morning Post*, July 14, 2018, https://www.scmp.com/news/china/economy/article/2155203/remote-corner-china-beijing-trying-export-its-model-training.

[20] Shahbaz, *Freedom on the Net 2018*.

[21] David Gilbert, "Zimbabwe Is Trying to Build a China Style Surveillance State," *Vice*, December 1, 2019, https://www.vice.com/en_us/article/59n753/zimbabwe-is-trying-to-build-a-china-style-surveillance-state.

[22] Shan Jie, "China Exports Facial ID Technology to Zimbabwe," *Global Times*, April 12, 2018, http://www.globaltimes.cn/content/1097747.shtml.

[23] Problem Masau, "Zimbabwe: Chinese Tech Revolution Comes to Zimbabwe," *Herald* (Zimbabwe), October 9, 2019, https://allafrica.com/stories/201910090185.html.

[24] Council of the EU, "Zimbabwe: Declaration by the High Representative on behalf of the European Union," press release, February 21, 2022, https://www.consilium.europa.eu/en/press/press-releases/2022/02/21/zimbabwe-declaration-by-the-high-representative-on-behalf-of-the-european-union/; MISA Zimbabwe, "Analysis of the Data Protection Act," December 6, 2021, https://zimbabwe.misa.org/2021/12/06/analysis-of-the-data-protection-act/.

iFLYTEK, Dahua, and China Telecom.[25] The Chinese government released a "White Paper on Artificial Intelligence Standardization" in 2018 and a national strategy for technical standards in 2021.[26]

Technical standards can affect how technology enables or undermines personal privacy and individual freedoms. In 2019, leaked documents from the United Nations ITU standards process, which covers 193 member states, showed delegates considering adopting rules for facial recognition tech that would help facilitate Chinese-style norms of surveillance.[27] For example, requirements in the draft rules included storing a person's race in a database, enabling the kind of technology-enhanced racial profiling that China has adopted. China's influence in technical standards-setting bodies threatens to spread standards that would enable Chinese-style surveillance and repression worldwide.

III. A Democratic Alternative

The spread of China's model of digital repression intersects with a troubling global rise in authoritarianism. Since the mid-2000s, the world has been experiencing a "wave of autocratization," with authoritarian leaders tightening their grip and democracies experiencing "democratic backsliding," such as reduced checks on executive authority.[28] "Digital dictators" are on the rise, leveraging social media, censorship, and surveillance to enhance control over their population.[29] The United States and other democratic nations must work together to push back against these trends and present an alternative model for using digital technologies in a way that preserves personal privacy and individual freedom.

[25] Jeffrey Ding, Paul Triolo, and Samm Sacks, "Chinese Interests Take a Big Seat at the AI Governance Table," *DigiChina* (blog), NewAmerica.org, June 20, 2018, https://www.newamerica.org/cybersecurity-initiative/digichina/blog/chinese-interests-take-big-seat-ai-governance-table/; Justus Baron and Olia Kanevskaia Whitaker, "Global Competition for Leadership Positions in Standards Development Organizations," SSRN, March 31, 2021), https://ssrn.com/abstract=3818143; Marta Cantero Gamito, "From Private Regulation to Power Politics: The Rise of China in AI Private Governance Through Standardisation," SSRN, February 28, 2021, https://ssrn.com/abstract=3794761; U.S.-China Economic and Security Review Commission, *2021 Report to Congress,* November 2021, https://www.uscc.gov/sites/default/files/2021-11/2021_Annual_Report_to_Congress.pdf; U.S.-China Economic and Security Review Commission, Chapter 1, Section 2, "The China Model: Return of the Middle Kingdom," in 2020 Annual Report to Congress, December 2020, 80–135, https://www.uscc.gov/sites/default/files/2020-12/Chapter_1_Section_2--The_China_Model-Return_of_the_Middle_Kingdom.pdf; "Will China Set Global Tech Standards?," ChinaFile, March 22, 2022, https://www.chinafile.com/conversation/will-china-set-global-tech-standards; "Chinese Involvement in International Technical Standards: A DigiChina Forum," DigiChina, December 6, 2021, https://digichina.stanford.edu/work/chinese-involvement-in-international-technical-standards-a-digichina-forum/; Daniel R. Russel and Blake H. Berger, *Stacking the Deck: China's Influence in International Technology Standards Setting* (Asia Society Policy Institute, November 2021), https://asiasociety.org/sites/default/files/2021-11/ASPI_StacktheDeckreport_final.pdf; Bradley A. Thayer and Lianchao Han, "We Cannot Let China Set the Standards for 21st Century Technologies," *The Hill*, April 16, 2021, https://thehill.com/opinion/technology/548048-we-cannot-let-china-set-the-standards-for-21st-century-technologies/; Alexandra Bruer and Doug Brake, "Mapping the International 5G Standards Landscape and How It Impacts U.S. Strategy and Policy," Information Technology & Innovation Foundation, November 8, 2021, https://itif.org/publications/2021/11/08/mapping-international-5g-standards-landscape-and-how-it-impacts-us-strategy; Jacob Feldgoise and Matt Sheehan, "How U.S. Businesses View China's Growing Influence in Tech Standards," Carnegie Endowment for International Peace, December 23, 2021, https://carnegieendowment.org/2021/12/23/how-u.s.-businesses-view-china-s-growing-influence-in-tech-standards-pub-86084.

[26] "中共中央国务院印发《国家标准化发展纲要》[The Central Committee of the Communist Party of China and the State Council issued the "National Standardization Development Outline"], Central Committee of the Communist Party of China—State Council, October 10, 2021, http://www.gov.cn/zhengce/2021-10/10/content_5641727.htm; English translation here: "Translation: The Chinese Communist Party Central Committee and the State Council Publish the 'National Standardization Development Outline'," Center for Strategic and Emerging Technology, November 19, 2021, https://cset.georgetown.edu/publication/the-chinese-communist-party-central-committee-and-the-state-council-publish-the-national-standardization-development-outline/; Matt Sheehan, Marjory Blumenthal, and Michael R. Nelson, *Three Takeaways From China's New Standards Strategy* (Carnegie Endowment for International Peace, October 28, 2021), https://carnegieendowment.org/2021/10/28/three-takeaways-from-china-s-new-standards-strategy-pub-85678.

[27] Anna Gross, Madhumita Murgia, and Yuan Yang, "Chinese Tech Groups Shaping UN Facial Recognition Standards," *Financial Times*, December 1, 2019, https://www.ft.com/content/c3555a3c-0d3e-11ea-b2d6-9bf4d1957a67.

[28] Anna Lührmann and Staffan I. Lindberg, "A Third Wave of Autocratization Is Here: What Is New About It?" *Democratization* 26, no. 7 (2019), https://doi.org/10.1080/13510347.2019.1582029; Nancy Bermeo, "On Democratic Backsliding," *Journal of Democracy* 27, no. 1 (January 2016): 5–19, https://www.journalofdemocracy.org/articles/on-democratic-backsliding/.

[29] Andrea Kendall-Taylor, Erica Frantz, and Joseph Wright, "The Digital Dictators: How Technology Strengthens Autocracy," *Foreign Affairs*, March/April 2020, https://www.foreignaffairs.com/articles/china/2020-02-06/digital-dictators.

Our work begins at home. The United States government has taken a largely laissez-faire approach to digital governance, deferring regulating tech companies. This has enabled the growth of "surveillance capitalism" in which U.S. companies hoover up massive amounts of personal data. The U.S. Congress has considered, but has not passed, a comprehensive federal data privacy law. The United States has a patchwork of laws at the state and sometimes local level governing digital technologies, including consumer data privacy and law enforcement use of facial recognition. Without regulation, corporate policies vary widely. Social media companies, for example, have varying approaches to regulating disinformation and AI-generated synthetic media, such as deepfakes.

One of the challenges in developing a democratic alternative to digital governance is that the U.S. process for developing new laws involves a messy give-and-take among a diverse array of stakeholders: federal, state, and local governments, businesses, academia, the media, civil society, and grassroots movements of concerned citizens. Input from diverse stakeholders will lead to a better outcome in the long run, leading to rules that balance the interests of different elements of society. But is a slower process. The Chinese Communist Party can simply dictate by fiat how China will govern new digital technologies. In democratic societies, the process of establishing rules for governing new technologies can be slower but will lead to better outcomes overall. It is vitally important that the United States accelerate this process of developing rules governing digital technologies, both to ensure that these technologies are used for beneficial purposes in American society and to help shape emerging global norms.

IV. Recommendations

Key steps the U.S. government can take to address the growing dangers of the spread of China's model of digital authoritarianism include:

- **The United States must accelerate legislation governing digital technologies.** Congressional leadership is needed to create nationwide rules governing digital technologies. Congress should pass a comprehensive federal data privacy law. Additionally, Congress should pass legislation governing AI-generated synthetic media, requiring disclosure to users when content such as text, voice, images, or video is generated by artificial intelligence. Congress should also work with social media companies to establish common standards for combating disinformation, manipulative content, and inauthentic behavior, informed by industry best practices.

- **The U.S. Congress must take steps to protect critical U.S. digital infrastructure from Chinese ownership.** The U.S. government has been active in addressing the risks from Huawei in 5G telecommunications networks. However, TikTok's Chinese ownership remains a continued concern. Chinese ownership of a major U.S. social media platform is an unacceptable threat to U.S. national security. Congress should pass legislation giving the Executive Branch the authority to address threats from foreign ownership in critical information and telecommunications technologies.

- **The U.S. government should become more engaged in shaping emerging global norms for digital governance.** Technical standards are an important vehicle for shaping how technology is used globally, and the U.S. government should become more engaged in supporting technical standard-setting bodies to ensure the integrity of the standard-setting process.[30] Congress should increase funding for the National Institute of Standards and Technology (NIST) to ensure it is adequately funded to engage in international standard-setting discussions.

[30] James Olthoff, "Setting the Standards: Strengthening U.S. Leadership in Technical Standards," NIST, March 17, 2022, https://www.nist.gov/speech-testimony/setting-standards-strengthening-us-leadership-technical-standards.

- **The United States must work with democratic allies to present a shared vision for governing cyberspace and artificial intelligence.** The U.S. State Department and Commerce Department should work with allies to lead the establishment of a new grouping of technology-leading democratic states. Sometimes referred to as a "Tech 10," "T-12," or "T-14," such a grouping would consist of the G7 nations (Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States) plus other technology-leading democracies, such as Australia, the European Union, Finland, India, Israel, the Netherlands, South Korea, and Sweden.[31] The United States has already taken steps to increase collaboration with allies in Europe and the Indo-Pacific region through the U.S.-EU Trade and Technology Council (TTC) and the Quad. The United States should double-down on these efforts while expanding cooperation to include additional like-minded countries to shape global norms and standards for digital technologies.

Appendix

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[31] Anja Manuel, "How to Win the Technology Race with China," Freeman Spogli Institute for International Studies, June 18, 2019, https://fsi.stanford.edu/news/how-win-technology-race-china; Anja Manuel, Pavneet Singh, and Thompson Paine, "Compete, Contest and Collaborate: How to Win the Technology Race with China," Stanford Cyber Policy Center, October 17, 2019, https://fsi.stanford.edu/publication/compete-contest-and-collaborate-how-win-technology-race-china; Martijn Rasser et al., *Common Code: An Alliance Framework for Democratic Technology Policy* (Center for a New American Security, October 21, 2020), https://www.cnas.org/publications/reports/common-code; Jared Cohen and Richard Fontaine, "Uniting the Techno-Democracies: How to Build Digital Cooperation," *Foreign Affairs*, November/December 2020, https://www.foreignaffairs.com/articles/united-states/2020-10-13/uniting-techno-democracies; David Howell, "It's Time to Replace the Outmoded G7," *Japan Times*, February 15, 2021, https://www.japantimes.co.jp/opinion/2021/02/15/commentary/world-commentary/g7-g20-d10-uk-russia-us-boris-johnson/; Marietje Schaake, "How Democracies Can Claim Back Power in the Digital World," *MIT Technology Review*, September 29, 2020, https://www.technologyreview.com/2020/09/29/1009088/democracies-power-digital-social-media-governance-tech-companies-opinion/; Joe Biden, "My Trip to Europe Is About America Rallying the World's Democracies," *Washington Post*, June 5, 2021, https://www.washingtonpost.com/opinions/2021/06/05/joe-biden-europe-trip-agenda/.

OPENING STATEMENT OF YU-JIE CHEN, ASSISTANT RESEARCH PROFESSOR AT INSTITUTUM IURISPRUDENTIAE OF ACADEMIA SINICA AND AN AFFILIATED SCHOLAR AT NYU LAW'S U.S.-ASIA LAW INSTITUTE

DR. CHEN: Distinguished members of the Commission, thank you for inviting me to this hearing. In response to the Commission's questions, my testimony today will mainly address China's deployment of legal warfare as a coercive tool to compel Taiwan into compliance. I will focus on three aspects of China's legal warfare against Taiwan; international, domestic, and within Taiwan, respectively.

The first aspect is international. That is, China's efforts to isolate Taiwan within international organizations. The CCP government has been manipulating its own One China principle which asserts that Taiwan is part of China.

Beijing has sought to conflate this assertion with international norms. This approach aims to exclude Taiwan from the international system thereby creating the impression that questions regarding Taiwan are solely China's domestic affairs.

China's push to confuse its own claim on Taiwan with international law is successful would be useful to Beijing in the event of conflicts across the Taiwan Strait which China would almost certainly claim to be an internal war rather than an invasion to annex Taiwan. The most striking example of this tactic is Beijing's campaign to conflate UN General Assembly Resolution 2758 with Beijing's own One China principle.

For example, after Speaker Nancy Pelosi visited Taiwan last August, China issued a White Paper on Taiwan asserting that Resolution 2758 is a political document encapsulating the One China principle whose legal authority leaves no room for doubt and has been acknowledged worldwide.

Such claims are false, as discussed in my written testimony. Yet, Beijing continues to propagate its misinterpretation of the resolution. This persistent practice verging on misinformation and disinformation, renders the UN and its specialized agencies, such as the WHO, more susceptible to Chinese legal influence.

The second aspect is Chinese domestic lawfare initiatives targeting Taiwan. China's most notable domestic lawfare against Taiwan was the 2005 Anti-Secession Law, which authorizing the government's use of force against Taiwan under the law's vaguely defined circumstances. Suppose any further move is made in China towards conducting legal warfare against Taiwan. In that case, it's more likely to be done through punishing those deemed unwelcomed by Beijing. In fact, since 2021 the Chinese government has published lists of so-called Taiwan independence diehards and their affiliated organizations.

The current sanctioned list cover prominent Taiwan officials of the ruling DPP. These lists seem to be aimed at creating deterrents and a chilling effect within the broader Taiwanese society.

This brings me to the third aspect of my presentation which is China's attempts to employ lawfare within Taiwan. Taiwan has maintained its rule of law, as it remains beyond the reach of China's law enforcement. However, Beijing can still pressure Taipei politically and economically by breaking by bi-lateral agreements

Since 2016 Beijing has deviated from or bluntly violated multiple cross strait agreements when it appeared politically convenient to do so. For example, China has unilaterally terminated the communication tunnels specified in these agreements making it challenging to resolve disputes arising from them. In light of Taiwan's upcoming presidential and legislative elections

in January of next year, we should anticipate an escalation of such tactics.

In conclusion, I would like to highlight a number of recommendations. First, China's misinterpretation, misinformation, and disinformation regarding its one China principle must be countered. Resistance against Beijing's campaign would be more effective if it were initiated by influential democracy such as United States and its allies, rather than solely by Taiwan.

These endeavors would be useful if they concentrate on international organizations that Taiwan aspires to join as an observer but have been rejected for its meaningful participation based on the international organization's false premises.

Second, Beijing's resurgence of economic coercion by way of violating cross strait agreements, indicates an intention to influence the political choices of the Taiwanese people in the upcoming elections. Taiwan has sought to diminish China's economic leverage against Taiwan.

Such efforts to enhance Taiwan's economic resilience can be bolstered by countries signing trade agreements with Taiwan and advocating for Taiwan's involvement in multi-lateral economic institutions.

Lastly, enhancing the understanding of Taiwan and its unique perspectives would ensure that U.S. policy is thoroughly informed and well rounded. Therefore, I thank the Commission for this opportunity and look forward to the questions.

COMMISSIONER HELBERG: Thank you.

PREPARED STATEMENT OF YU-JIE CHEN, ASSISTANT RESEARCH PROFESSOR AT INSTITUTUM IURISPRUDENTIAE OF ACADEMIA SINICA AND AN AFFILIATED SCHOLAR AT NYU LAW'S U.S.-ASIA LAW INSTITUTE

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

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Panel II: The CCP's Violation of International Laws and Norms

Co-Chairs Commissioner Carte Goodwin and Commissioner Jacob Helberg, distinguished Members of the Commission, thank you for inviting me to participate in this hearing.

My testimony today will primarily address the People's Republic of China's (PRC or China) deployment of "legal warfare" or "lawfare" (法律戰) as a coercive tool to compel Taiwan into compliance. In response to the Commission's inquiries, I will specifically focus on three key aspects: 1) China's efforts to isolate Taiwan within international organizations, 2) Chinese domestic lawfare initiatives targeting Taiwan, and 3) China's attempts to employ lawfare within Taiwan.

I will begin by examining the Chinese Communist Party (CCP) government's strategic manipulation of its own "one China principle" to conflate it with internationally accepted norms. This approach aims to exclude Taiwan from international organizations, thereby creating the impression that questions regarding Taiwan are solely China's "domestic affairs" and that any external interference would be unwarranted. Subsequently, I will delve into Beijing's current contemplation of enacting additional coercive legislation aimed at Taiwan. This includes an analysis of China's existing sanctions lists, which target a number of Taiwanese officials and organizations, labeling them as so-called "Taiwan independence diehards" (台獨頑固分子). Moreover, I will address China's violations of cross-strait agreements intended to serve as political leverage against Taiwan. In conclusion, I will explore the implications of Chinese lawfare on cross-strait stability and propose appropriate responses for both Taiwan and the United States to effectively counteract these tactics.

I. Chinese attempts to isolate Taiwan in international organizations

In 1971, the United Nations General Assembly (UNGA) passed Resolution 2758, recognizing the PRC as the sole legitimate representative of China in the United Nations and its Security Council, while simultaneously expelling representatives of Chiang Kai-shek. Since then, the PRC has been persistent in its efforts to prevent the Republic of China (ROC)—which has come to be known as "the ROC on Taiwan," "the ROC (Taiwan)," or Taiwan—from participating in most international organizations and treaties, including economic institutions.

Over half a century later, Taiwan has experienced remarkable transformations, transitioning from an authoritarian regime under the rule of Chiang Kai-shek and his successor, Chiang Ching-kuo, to a flourishing democracy. Despite these significant changes, Taiwan's isolation in international organizations continues due to China's obstruction. Taiwan remains excluded from the United Nations and its specialized agencies and legal institutions, such as the World Health Assembly (WHA) and the International Civil Aviation Organization (ICAO). Non-UN-affiliated intergovernmental organizations (IGOs), like the International Criminal Police Organization (INTERPOL), have similarly denied Taiwan access. Even Taiwanese civilians holding Taiwan passports have been barred from entering U.N. buildings.

Taiwan's exclusion from international institutions not only disenfranchises the island's 23 million population but also hinders global governance, which could benefit significantly from Taiwan's contributions as a valued partner. While Taiwan's democratic government, unlike during the Chiang era, no longer claims to represent China in the international system, challenges to Taiwan's "international participation" (國際參與) have lasted for decades. The primary source of this challenge stems from political pressure exerted by Beijing. However, when advocating for Taiwan's exclusion, Beijing's position often relies on an unquestioned and misguided normative basis within the international institution in question.[1]

[1] *See* Jerome A. Cohen & Yu-Jie Chen, *Taiwan's Meaningful Participation in the World Health Organization Would Implement, not Violate, UN Principles*, THE CHINA COLLECTION (May 14, 2020), https://thechinacollection.org/taiwans-meaningful-participation-world-health-organization-implement-not-violate-un-principles; Jessica Drun & Bonnie S. Glaser, *The Distortion of UN Resolution 2758 and Limits on Taiwan's Access to the United Nations*, GERMAN MARSHALL FUND (Mar. 24, 2022), https://www.gmfus.org/news/distortion-un-resolution-2758-and-limits-taiwans-access-united-nations; Madoka Fukuda, *China Is Using a UN Resolution to Further Its Claim Over Taiwan*, THE DIPLOMAT (Aug. 26, 2022), https://thediplomat.com/2022/08/china-is-using-a-un-resolution-to-further-its-claim-over-taiwan; Chien-Huei Wu & Ching-Fu Lin, *Taiwan and the Myth of UN General Assembly Resolution 2758*, VERFASSUNGSBLOG (Apr. 14, 2023), https://verfassungsblog.de/taiwan-and-the-myth-of-un-general-assembly-resolution-2758.

The most striking example of this tactic to exclude Taiwan is Beijing's campaign to conflate UNGA Resolution 2758 with its own "one China principle," which asserts that Taiwan is part of China. Plenty of instances exist in which Chinese diplomats have claimed that Beijing's "one China principle" represents an international consensus or embodies the "basic norms governing international relations."[2] After Speaker Nancy Pelosi visited Taiwan in August 2022, China issued a White Paper on "The Taiwan Question and China's Reunification in the New Era," asserting that "Resolution 2758 is a political document encapsulating the one China Principle whose legal authority leaves no room for doubt and has been acknowledged worldwide."[3]

Such claims are false, as many countries have their own policies that do not accept Beijing's "one China principle."[4] Beijing's intensified efforts are not only aimed at isolating Taiwan but also at promoting the "one China principle" internationally, so as to create the appearance that Taiwan is a matter of China's internal affairs. This confusion would be particularly useful to Beijing in the event of conflicts across the Taiwan Strait, which China would almost certainly claim to be an "internal war" (内戰), rather than an invasion to annex Taiwan.

Invoking General Assembly Resolution 2758 to deny Taiwan's international participation is also misleading. When U.N. member states adopted the resolution in 1971, they only voted on one issue:[5] which government should represent China in the United Nations—the ROC government in Taiwan or the PRC government on the mainland? As member states could not reach a consensus on other issues including the question of Taiwan, the resolution that passed "recognize[d] that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations." In essence, UNGA Resolution 2758 (and similar resolutions that followed in the U.N. system) solely addressed the question of China's representation. They did not tackle other questions, such as Taiwan's representation, nor did they—nor could they—determine issues related to Taiwan's sovereignty, which remains a fiercely debated topic under international law. Ultimately, the issues

[2] *See, e.g., Foreign Ministry Spokesperson Wang Wenbin's Regular Press Conference on August 8, 2022*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (Aug. 8, 2022), https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/202208/t20220808_10737507.html.
[3] *The Taiwan Question and China's Reunification in the New Era (台湾问题与新时代中国统一事业)*, TAIWAN AFFAIRS OFFICE OF THE STATE COUNCIL (国务院台湾事务办公室) (Aug. 10, 2022), http://www.gwytb.gov.cn/zt/zylszl/baipishu/202208/t20220810_12459866.htm.
[4] Ja Ian Chong, *The Many "One Chinas": Multiple Approaches to Taiwan and China*, CARNEGIE CHINA (Feb. 9, 2023), https://carnegieendowment.org/2023/02/09/many-one-chinas-multiple-approaches-to-taiwan-and-china-pub-89003.
[5] *See* note 1.

of Taiwan's representation and sovereignty are beyond the scope of UNGA Resolution 2758 and similar resolutions based on it in U.N. specialized agencies.

Not only were the member states that cast their votes in 1971 cognizant of the limited scope of UNGA Resolution 2758, but then Chinese leader Prime Minister Zhou Enlai also made it clear that the PRC understood as much. Zhou noted that, if the Albanian Resolution (which later became UNGA Resolution 2758) passed, "the status of Taiwan is not yet decided."[6] Despite this, Beijing continues to propagate its misinterpretation of UNGA Resolution 2758.

This persistent practice of misinterpretation, verging on misinformation and disinformation, renders the United Nations and its specialized agencies more susceptible to Chinese legal influence. It seems to have influenced the positions of some leaders and legal advice in these organizations.

For example, in 2007, when Taiwan's diplomatic ally attempted to submit Taiwan's ratification of the Convention on the Elimination of All Forms of Discrimination Against Women to the United Nations, then United Nations Secretary-General Ban Ki-Moon responded, under the terms of UNGA Resolution 2758, "the United Nations considers Taiwan for all purposes to be an integral part of the People's Republic of China."[7] The United States and other democracies later objected to this incorrect statement, prompting Ban Ki-Moon to backtrack and "confirm that the UN would no longer use the phrase 'Taiwan is a part of China.'"[8]

Controversy and confusion also surround Taiwan's participation in the world's top health organization. In 2005, China reportedly signed a secret Memorandum of Understanding (MOU)[9] with the WHO Secretariat. Although the MOU has not been made public, reports indicate that the document demanded Taiwan's application for the WHO's technical assistance must go through China and that all exchanges between Taiwan and the WHO must be approved by Beijing.[10] Subsequent WHO

[6] *Memorandum of Conversation, Beijing, October 21, 1971, 4:42-7:17 p.m.*, OFFICE OF THE HISTORIAN, FOREIGN SERVICE INSTITUTE, https://history.state.gov/historicaldocuments/frus1969-76ve13/d41; this point is also highlighted in Drun & Glaser, *supra* note 1.
[7] John Tkacik, *Taiwan's "Unsettled" International Status: Preserving U.S. Options in the Pacific*, THE HERITAGE FOUNDATION (June 19, 2008), https://www.heritage.org/asia/report/taiwans-unsettled-international-status-preserving-us-options-the-pacific.
[8] J. Michael Cole, *UN Told to Drop 'Taiwan Is Part of China': Cable*, TAIPEI TIMES (Sept. 6, 2011), https://www.taipeitimes.com/News/front/archives/2011/09/06/2003512568.
[9] Ping-Kuei Chen, *Universal Participation Without Taiwan? A Study of Taiwan's Participation in the Global Health Governance Sponsored by the World Health Organization, in* ASIA-PACIFIC SECURITY CHALLENGES 263, 271 (Anthony J. Masys & Leo S.F. Lin ed., 2018).
[10] *Id.* at 276; Melody Chen, *China Tries to Explain Memorandum,* TAIPEI TIMES (May 10, 2011),

internal memorandums in 2005 and 2010 further labeled Taiwan as part of China.[11]

While there is reporting on the content of these documents, the fact that they are not available for public view raises questions about the transparency and accountability of global governance. In addition, the aforementioned documents considering Taiwan as part of China and thereby restricting Taiwan's participation are unfounded.

When Taiwan's President Ma Ying-jeou of the Kuomintang (Nationalist Party) was in office, the CCP cooperated with his government. Consequently, from 2009 to 2016, with Beijing's approval, the WHO's Director-General invited Taiwan to participate in the WHA as an observer. However, since Taiwan's President Tsai Ing-wen of the Democratic Progressive Party (DPP) took office in 2016, with whom Beijing refuses to cooperate, Taiwan's request for WHA observer status has been denied.

To justify Taiwan's exclusion, the WHO relies on UNGA Resolution 2758 and WHA Resolution 25.1, which reiterated the UNGA resolution. But in fact, according to Article 3 of the WHA Rules of Procedure and the 2009-2016 practice, the WHO Director-General has the discretionary power to invite Taiwan as an observer. Particularly in light of the COVID-19 pandemic, Taiwan's participation as an observer should have been welcomed. However, in 2020, the WHO's principal legal advisor, ignoring the organization's rules, claimed that the Director-General's invitation to observer status requires the support of WHA member states—an assertion without legal basis. Neither the WHO Constitution nor the WHA Rules of Procedure necessitate the Director-General waiting for the WHA's decision to invite Taiwan as an observer.[12]

Taiwan's pursuit of engagement with the International Civil Aviation Organization (ICAO) has faced significant challenges too. Since 2009, the Taiwanese government has persistently sought meaningful participation in the ICAO. The Taiwan Flight Information Region is a critical airspace, with Taoyuan International Airport ranking

https://www.taipeitimes.com/News/taiwan/archives/2005/05/17/2003255172.

[11] Sigrid Winkler, *Taiwan's UN Dilemma: To Be or Not to Be,* BROOKINGS (June 20, 2012), https://www.brookings.edu/opinions/taiwans-un-dilemma-to-be-or-not-to-be; Vincent Y. Chao, *Memo says Taiwan not a party to IHR*, TAIPEI TIMES (May 10, 2011), https://www.taipeitimes.com/News/taiwan/archives/2011/05/10/2003502869; *President Ma holds press conference to explain government's position on WHO name issue*, OFFICE OF THE PRESIDENT, ROC(TAIWAN) (May 10, 2011), https://english.president.gov.tw/NEWS/3632.

[12] Yu-Jie Chen, *Taiwan and the World Health Assembly: The Politics of Invitation*, THE CHINA COLLECTION (May 11, 2020), https://thechinacollection.org/taiwan-world-health-assembly-politics-invitation.

as the 4th busiest airport in handling international freight over the past two years.[13] Despite being a vital aviation hub, Taiwan's Civil Aeronautics Administration was granted only a single invitation to the ICAO General Assembly in 2013, attending as a guest under the moniker "Chinese Taipei"—an invitation contingent upon Beijing's approval. Regrettably, Taiwan has not been invited again.

The absence of direct communication between the ICAO and Taiwan has forced the latter to acquire or purchase technical and operational information on air navigation through unofficial channels. This reliance on alternative means often results in considerable delays and suboptimal implementation.[14] This issue becomes particularly concerning when China conducts military exercises in the vicinity of Taiwan. For example, in the wake of Speaker Pelosi's visit, Taiwan's aviation authorities were forced to rapidly develop and execute plans to guide all affected flights and mitigate potential danger. Timely information exchange within the ICAO is of paramount importance to Taiwan's ability to maintain the airspace safety.[15]

Even Taiwanese citizens are not spared from political controversies. The United Nations has denied entry to those holding Taiwan passports. As Drun and Glaser note, "A memorandum featured in the 2010 UN Juridical Yearbook, with redacted dates, indicates that the policy of restricting Taiwan passport holders has been in place since at least 2009."[16] The 2010 UN Juridical Yearbook states, "The United Nations considers 'Taiwan' for all purposes to be an integral part of the People's Republic of China—The United Nations cannot accept official documentation issued by the 'authorities' in 'Taiwan,' as they are not considered a Government."[17]

Historically, Taiwanese NGOs were able to participate in UN conferences in the 1990s, but this changed in 2007 when Chinese diplomat Sha Zukang became UN Under-Secretary-General for Economic and Social Affairs. A later improvement in cross-Strait relations allowed holders of R.O.C. (Taiwan) passports and other IDs issued by Taiwanese authorities to regain access to U.N. spaces. However, deteriorating relations in 2014 reversed the trend a second time, resulting in denials of

[13] *International Travel Returns: Top 10 Busiest Airports in the World Revealed*, AIRPORT COUNCIL INTERNATIONAL (Apr. 5, 2023), https://aci.aero/2023/04/05/international-travel-returns-top-10-busiest-airports-in-the-world-revealed.
[14] Ram S. Jakhu & Kuan-Wei Chen, *The Missing Link in the Global Aviation Safety and Security Network: The Case of Taiwan, in* ASIA-PACIFIC SECURITY CHALLENGES 243 (ANTHONY J. MASYS & LEO S.F. LIN ED., 2018).
[15] Kwo-tsai Wang, *Why ICAO Needs Taiwan*, THE DIPLOMAT (Sept. 14, 2022), https://thediplomat.com/2022/09/why-icao-needs-taiwan.
[16] Drun & Glaser, *supra* note 1, at 19.
[17] UNITED NATIONS, UNITED NATIONS JURIDICAL YEARBOOK 539 (2010).

both UN grounds passes and visitors' passes for Taiwanese.[18]

Taiwan's participation in regional economic agreements has also been challenging. Take as an example the Regional Comprehensive Economic Partnership (RCEP) initiated by ASEAN;[19] China, as one of the original parties, has been able to block Taiwan's admission.[20] China insists that Taiwan accept the "one China principle" in order to join and might also demand additional political concessions from Taipei, such as expanded cross-Strait economic ties under the ECFA.[21] As Richard Bush noted, "Beijing was in a blocking mode for a very political reason. It wished to leverage any additional greater access for Taiwan to bilateral and multilateral trade and investment agreements to press the Taipei government to make more concessions on defining the island's legal and political relationship with the mainland and thus move one step closer to unification."[22]

Both China and Taiwan want to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), but China aims to join before Taiwan.[23] It is observed that pro-China Latin American countries are unlikely to admit Taiwan while keeping China out.[24] Once China becomes a member of the organization, it may be able to exert more influence to block Taiwan's entry and dictate terms.

While Taiwan has not made significant progress in joining the aforementioned institutions, the Global Cooperation and Training Framework (GCTF) appears to be charting a new path by serving as an innovative model that provides space for Taiwan's participation in discussing global issues. Initiated in 2015, the GCTF was based on an MOU signed by the United States semi-official proxy (American Institute in Taiwan) and Taiwan. Its full partners have since expanded to include Japan (Japan-Taiwan Exchange Association) and Australia (Australian Office in Taipei). Through

[18] *Briefing Note: China and the UN Economic and Social Council*, INTERNATIONAL SERVICE FOR HUMAN RIGHTS (July 2021), https://ishr.ch/wp-content/uploads/2021/07/final_proofed_formatted_-_china_and_ecosoc_0.pdf.
[19] Grace Ho, *A Trade Pact Nearly 10 Years in the Making: 5 Things to Know about RCEP*, THE STRAITS TIMES (Nov. 15, 2020), https://www.straitstimes.com/asia/a-trade-pact-nearly-10-years-in-the-making-5-things-to-know-about-rcep.
[20] Mareike Ohlberg, *Taiwan Tensions and Deepening Transatlantic Cooperation*, GERMAN MARSHALL FUND (Jan. 10, 2022), https://www.gmfus.org/news/taiwan-tensions-and-deepening-transatlantic-cooperation.
[21] Kristian McGuire, *Taiwan Expands Its Cross-Border E-Commerce and Digital Trade*, 7(7) GLOBAL TAIWAN BRIEF (2022), https://globaltaiwan.org/2022/04/taiwan-expands-its-cross-border-e-commerce-and-digital-trade.
[22] RICHARD C. BUSH, DIFFICULT CHOICES: TAIWAN'S QUEST FOR SECURITY AND THE GOOD LIFE 64 (2021).
[23] Thitinan Pongsudhirak, *The Geopolitics of CPTPP Enlargement*, GIS REPORTS (Jan. 7, 2023), https://www.gisreportsonline.com/r/china-cptpp-membership.
[24] *Id.*

this platform, which invites experts from an increasingly diverse range of countries, Taiwan gains access to essential cooperation on pressing global challenges. The platform also empowers Taiwan to play a more substantial role in regional and international exchanges on public health, humanitarian assistance, technology, economy, and energy cooperation, among other areas. While this platform cannot replace existing international institutions, its contribution to Taiwan's outreach is helpful as long as Taiwan remains excluded from the international regime.

II. Chinese domestic lawfare aimed at Taiwan

It is essential here to explain the term "Three Warfares" (三戰) and its component "legal warfare" from the Chinese official perspective. The Regulations on the Political Work of the Chinese People's Liberation Army (PLA) promulgated in 1963 already discussed the need to strengthen grassroots ideological construction in PLA's political work, but a more systematic Chinese discussion on what is later known as cognitive domain warfare only appeared in the late 1990s. And it was not until 2003, when China reissued the Regulations on the Political Work of the PLA, that the Three Warfares made their debut in the PLA official regulations. Article 18 of the Regulations on "Wartime Political Work" includes "public opinion warfare," "psychological warfare," and "legal warfare."[25] All three can fall within the scope of "cognitive warfare" in contemporary discourse.[26]

The Regulations do not offer definitions for the Three Warfares, but their typical definitions can be found in Chinese academic discussions and are summarized as follows: Public opinion warfare refers to "the use of media to disseminate social information, purposefully generate and control public opinion, and actively influence the beliefs, views, emotions, and attitudes of the public in political warfare actions."[27] Psychological warfare is "the use of information to exert influence on the target's

[25] Regulations on the Political Work of the Chinese People's Liberation Army (中国人民解放军政治工作条例) (2003).

[26] The "Regulations on the Political Work of the PLA" promulgated by China in 2010 retained the "Three Warfares" in Article 18, aiming to "disintegrate the enemy's army, carry out counter-psychological warfare and counter-strategy work, conduct military judicial and legal service work, manage the political work of participating militia and civilian workers, and collaborate with the masses in the war zone, maintain battlefield discipline and mass discipline, and honor the memory of the martyrs." *See* Regulations on the Political Work of the Chinese People's Liberation Army (中国人民解放军政治工作条例) (2010).

[27] Yan-zi Kong & Pei-lin Sheng (孔燕子、盛沛林), *Some Basic Questions on Public Opinion Warfare (论舆论战的几个基本问题)*, 21(6) JOURNAL OF PLA NANJING INSTITUTE OF POLITICS (南京政治学院学报) 115 (2005).

psychology in warfare."[28] Legal warfare is "the use of legal means and mechanisms by a country to define the behavior of the target subject as illegal, forcing it to submit by using legal coercion and sanctions to achieve diplomatic, political, or economic goals."[29]

China's most notable instance of lawfare against Taiwan was the 2005 Anti-Secession Law, which aimed to unify Taiwan through peaceful negotiation or, under the law's vaguely defined circumstances, by means of force.[30] However, this coercive element seems to have failed in achieving the CCP's objectives, leading to current discussions in China regarding the potential enactment of more deterring legislation against Taiwan. As of now, no such legislation is on the horizon, except for the newly enacted Counter-Espionage law,[31] which primarily targets "foreign forces" but could also apply to Taiwan's companies, organizations, and individuals operating in China.

Nevertheless, the Chinese government has made it clear that it will not exclude options mentioned on various official occasions as possibilities, including introducing a "Motherland Unification Law" or "National Unification Law."[32] It remains uncertain whether such a law will be passed in the foreseeable future, and if so, what it would entail. Nonetheless, we can examine discourse in China for insight. For instance, in March 2022, Zhang Lianqi, a member of the Standing Committee of the National Committee of the Chinese People's Political Consultative Conference, remarked that the Anti-Secession Law focused on "anti-independence," while a Motherland Unification Law would concentrate on "promoting reunification." He recommended passing a Motherland Unification Law, which would stipulate the legal obligation of all Chinese citizens, including Taiwan residents, to promote national reunification and clearly define the legal responsibility for violating the obligation of national reunification.[33] If adopted, such a suggestion may likely entail punishment

[28] Jun-cang Wu & Cheng-fei Ji (武军仓、纪程飞), *A Comprehensive Review of Psychological Warfare Research under the Conditions of Informatization (信息化条件下心理战研究综述)*, 19(3) JOURNAL OF XI'AN POLITICS INSTITUTE (西安政治学院学报) 38 (2006).

[29] *See* Wei Shen (沈伟), *Legal Warfare in the US-China Trade Friction: Understanding the Unreliable Entity List System and Blocking Regulations (中美贸易摩擦中的法律战——从不可靠实体清单制度到阻断办法)*, 1 JOURNAL OF COMPARATIVE LAW (比较法研究) 180 (2021).

[30] Yu-Jie Chen, *"One China" Contention in China–Taiwan Relations: Law, Politics and Identity*, 252 CHINA Q 1025 (2022).

[31] Counter-Espionage Law of the People's Republic of China (中华人民共和国反间谍法) (2023).

[32] Other possibilities raised by scholars or the media cover: adding "Implementation Rules" to the "Anti-Secession Law," making a legislative interpretation of Article 8 of the "Anti-Secession Law," and enacting the "Basic Law of the Taiwan Special Administrative Region," which appears to model the Hong Kong Basic Law.

[33] Global Times (环球时报), *National Committee of the Chinese People's Political Consultative Conference member Zhang Lianqi: Conditions for formulating the "Motherland Unification Law" are*

for those who fail to comply with the "national reunification obligation."

Suppose any move is made towards conducting legal warfare against Taiwan. In that case, it is more likely to be done through imposing criminal punishment on those deemed unwelcome by Beijing. In addition, the Chinese government began publishing lists of so-called "Taiwan independence diehards" and their affiliated organizations in 2021. Those included in the list and their supporters will be sanctioned by the PRC. The individuals sanctioned and their families would be prohibited from visiting China, Hong Kong, and Macau. Cooperation between the sanctioned organizations and organizations or individuals in mainland China is also forbidden. Furthermore, firms and investors connected to the sanctioned parties would not be allowed to profit in China. Most importantly, the consequences include criminal punishment and potentially life imprisonment under the PRC Criminal Code and National Security Law.

The current sanction lists[34] cover Taiwan officials of the DPP, including Taiwan's

Gradually Maturing (全国政协常委张连起：制定《祖国统一法》的条件渐趋成熟), WEIBO (微博) (Mar. 3, 2022), https://weibo.com/1974576991/Li3mnk4yr. On the other hand, Li Yihu, a member of the Foreign Affairs Committee of the National People's Congress and director of the Taiwan Institute at Peking University, stated that given the current situation, conditions are not yet ripe to introduce a "National Unification Law." However, he suggested that a legislative interpretation should be made to provide more concrete meaning to the "Anti-Secession Law," for example, by listing events that might constitute "major incidents leading to Taiwan's secession from China." *See Formulating a National Unification Law? Director of Peking University's Taiwan Research Institute: Conditions Are not yet Met (制訂國家統一法？北大台研所長：還不具備條件)*, CNA (中央通訊社) (Mar. 11,2022), https://www.cna.com.tw/news/acn/202203110239.aspx.

[34] *State Council Taiwan Affairs Office: Severely Punish "Taiwan Independence" Diehards Like Joseph Wu and Hold Them Accountable for Life in Accordance with the Law (国台办：严惩吴钊燮这类"台独"顽固分子并依法终身追责),* TAIWAN AFFAIRS OFFICE OF THE STATE COUNCIL (国务院台湾事务办公室) (May 12, 2021), http://www.gwytb.gov.cn/xwdt/xwfb/wyly/202105/t20210512_12351725.htm;
State Council Taiwan Affairs Office: Legally Punish a Handful of "Taiwan Independence" Diehards like Su Tseng-chang, You Si-kun, and Joseph Wu (国台办：依法对苏贞昌、游锡堃、吴钊燮等极少数"台独"顽固分子实施惩戒), TAIWAN AFFAIRS OFFICE OF THE STATE COUNCIL (国务院台湾事务办公室) (Nov. 5, 2021), http://www.gwytb.gov.cn/xwdt/xwfb/wyly/202111/t20211105_12389168.htm;
State Council Taiwan Affairs Office Announces Punishment for Organizations Associated with "Taiwan Independence" Diehards (国台办宣布对"台独"顽固分子关联机构予以惩戒), TAIWAN AFFAIRS OFFICE OF THE STATE COUNCIL (国务院台湾事务办公室) (Aug. 3, 2022), http://www.gwytb.gov.cn/xwdt/xwfb/wyly/202208/t20220803_12457720.htm;
Spokesperson of the Taiwan Affairs Office of the CPC Central Committee Is Authorized to Announce Sanctions Against a Group of "Taiwan Independence" Diehards and Other Individuals on the List (中共中央台办发言人受权宣布对列入清单的一批"台独"顽固分子等人员实施制裁), TAIWAN AFFAIRS OFFICE OF THE STATE COUNCIL (国务院台湾事务办公室) (Aug. 16, 2022), http://www.gwytb.gov.cn/xwdt/zwyw/202208/t20220816_12462610.htm;
Spokesperson of the Taiwan Affairs Office of the CPC Central Committee Is Authorized to Announce Sanctions Against "Taiwan Independence" Diehard Hsiao Bi-khim (中共中央台办发言人受权宣布对"台独"顽固分子萧美琴实施制裁), TAIWAN AFFAIRS OFFICE OF THE STATE COUNCIL (国务院台湾事务办公室) (Apr. 7, 2023), http://www.gwytb.gov.cn/xwdt/zwyw/202304/t20230407_12524423.htm;

Legislative Yuan Speaker You Si-kun, former Premier Su Tseng-chang, Foreign Minister Joseph Wu, Taiwan's Representative to the United States Hsiao Bi-khim, and National Security Council Secretary-General Wellington Koo, etc.[35] As China's law enforcement cannot operate in Taiwan, the likelihood of actually imprisoning sanctioned individuals in China is remote (although the possibility of China using extradition to pursue these individuals cannot be entirely ruled out). However, this list seems to be aimed at creating deterrence and a chilling effect within the broader Taiwanese society, discouraging the people of Taiwan from expressing opinions that Beijing considers threatening.

III. China's lawfare within Taiwan

Taiwan has maintained its rule of law, as it remains beyond the reach of China's law enforcement and legal institutions. Unlike in Hong Kong, China cannot impose legal coercion in Taiwan. There is also no evidence suggesting that Taiwan's judiciary has been infiltrated by the CCP or is subject to Beijing's influence.

However, Taiwan, like other countries, is not immune to China's attempt to exercise long-arm jurisdiction through the National Security Law for Hong Kong,[36] which covers offenses committed against Hong Kong outside of Hong Kong by non-Hong Kong citizens. While it would be extremely difficult for China to enforce this jurisdiction, the law may not be intended for complete implementation; rather, its design aims to suppress dissent around the globe, including in Taiwan.

Another crucial aspect of Chinese lawfare within Taiwan involves using cross-strait agreements to exert pressure on the island. Between 2009 and 2014, China and Taiwan signed no fewer than 23 valid agreements through their proxies, i.e., Taiwan's Straits Exchange Foundation (SEF) and China's Association for Relations Across the Taiwan Straits (ARATS). The agreements that have come into force resemble bilateral treaties and should be treated as legally binding. The principle of *pacta sunt servanda* should be applied, meaning that parties should not unilaterally revise or withdraw

State Council Taiwan Affairs Office Announces Punishment for Organizations Promoting "Taiwan Independence" (国台办宣布对宣扬"台独"的有关机构予以惩戒), TAIWAN AFFAIRS OFFICE OF THE STATE COUNCIL (国务院台湾事务办公室) (Apr. 7, 2023), http://www.gwytb.gov.cn/xwdt/xwfb/wyly/202304/t20230407_12524480.htm.

[35] Other Taiwanese organizations listed encompass the Taiwan Foundation for Democracy, the International Cooperation and Development Fund, the Cross-Strait Interflow Prospect Foundation, and the Council of Asian Liberals and Democrats.

[36] Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (中華人民共和國香港特別行政區維護國家安全法) (2020).

from agreements without valid justification or adherence to termination or amendment procedures.[37]

However, since the ruling party transitioned from the KMT to the DPP in 2016, Beijing has strategically deviated from or outright violated multiple cross-strait agreements when it appeared politically beneficial to apply economic and political pressure on Taiwan.

For instance, in 2017, China detained Taiwanese NGO worker Lee Ming-che, who was later sentenced to five years imprisonment for subverting state power.[38] Lee's detention appears to have been prompted by his advocacy in China, which included discussing human rights, democracy, and Taiwan's experience on Chinese social media. In this case and a series of subsequent detentions, Beijing violated the cross-strait agreement[39] requiring prompt notification of such detentions and facilitation of family visits for the detained.[40]

The most recent example is the detention of Taiwan-based Gūsa Publishing founder Li Yanhe (also known as Fu Cha), who has reportedly been detained in China since March 2023. Chinese authorities confirm that Li is under investigation for "suspected activities endangering national security."[41] This case, along with the ongoing case of pro-Taiwan independence activist Yang Chih-yuan, raises concerns of chilling effects in Taiwan. Beijing's denial of notification and family visits may also be intended to create the impression that the DPP, as the ruling party, is unable to help Taiwanese citizens detained in China.

Economic connections can also lead to unwarranted influence and interference. Since 2016, China has reduced the number of Chinese group tourists and banned individual tourist visits to Taiwan in 2019, violating the agreement concerning tourism[42] and

[37] Yu-Jie Chen, & Jerome A. Cohen, *China-Taiwan Relations Re-examined: The "1992 Consensus" and Cross-Strait Agreements*, 14 U. PA. ASIAN L. REV. (2019).
[38] Jerome A. Cohen & Yu-Jie Chen, *How China's Trial of Lee Ming-che Is a Warning to Taiwanese Activists Inspired by Freedoms and Democracy*, SOUTH CHINA MORNING POST (Oct. 2, 2017), https://www.scmp.com/comment/insight-opinion/article/2113665/how-chinas-trial-lee-ming-che-warning-taiwanese-activists.
[39] Cross-Strait Joint Crime-Fighting and Judicial Mutual Assistance Agreement (海峽兩岸共同打擊犯罪及司法互助協議) (2009).
[40] Jerome A. Cohen & Yu-Jie Chen, *A Taiwanese Man's Detention in Guangdong Threatens a Key Pillar of Cross-Straits Relations*, CHINAFILE (Apr. 20, 2017), https://www.chinafile.com/reporting-opinion/viewpoint/taiwanese-mans-detention-guangdong-threatens-key-pillar-of-cross-straits.
[41] *Press Conference of Taiwan Affairs Office of the State Council (国台办新闻发布会辑录),* TAIWAN AFFAIRS OFFICE OF THE STATE COUNCIL (Apr. 26, 2023), http://www.gwytb.gov.cn/xwdt/xwfb/xwfbh/202304/t20230426_12530249.htm.
[42] Cross-Strait Agreement Signed Between SEF and ARATS Concerning Mainland Tourists Traveling

apparently using tourism revenue as leverage to pressure Taiwan.

In addition, starting in 2021, Beijing has banned imports of many Taiwanese agricultural, fishery, and various products, which were previously allowed into China under the Cross-Strait Economic Cooperation Framework Agreement.[43] Although the bans were ostensibly based on unsatisfactory safety standards or incomplete registration information, Beijing offers no communication channel for the Taiwan government to address these issues.

A few weeks ago, China's Ministry of Commerce announced that it had opened an investigation following World Trade Organization (WTO) procedures into tariffs and other unilateral restrictions on Chinese items banned by Taiwan. Beijing appears strategic in the timing of this investigation, which ends the eve before Taiwan's presidential election.[44] This provides Beijing with room to impose pressure before and immediately after Taiwan's election. While China's resort to WTO rules may suggest a willingness to comply with international law, when considered alongside its other actions, it indicates a campaign aimed at placing economic stress on Taiwan rather than genuinely pursuing WTO dispute resolution in this case.

Lastly, China has unilaterally terminated the communication channels specified in these agreements, making it challenging, if not impossible, to resolve disputes arising from them. Beijing's severing of communication between its proxy, ARATS, and Taiwan's SEF is also counterproductive in addressing conflicts within an already tense relationship.

Cross-strait agreements aim to enhance economic cooperation and exchanges between China and Taiwan. However, Beijing has opted to use them to wield political influence when hostilities intensify. This strategy appears shortsighted, as Beijing's breaches diminish its own credibility and undermine trust across the Strait. As a result, the prospects for future agreements could be negatively impacted, even if Beijing's preferred KMT party were to regain power in Taiwan.

IV. Recommendations

My analysis of China's international strategy uncovers at least five lessons for Taiwan

to Taiwan (海峽兩岸關於大陸居民赴台灣旅遊協議) (2008).

[43] Cross-Straits Economic Cooperation Framework Agreement (海峽兩岸經濟合作架構協議) (2010).

[44] Zhiqun Zhu, *Is Beijing 'Internationalizing' Cross-Strait Trade?*, THE DIPLOMAT (Apr. 26, 2023), https://thediplomat.com/2023/04/is-beijing-internationalizing-cross-strait-trade.

and countries supporting Taiwan's meaningful international participation, including the United States as a primary ally.

First, Beijing's misinterpretation, misinformation, and disinformation regarding its "one China principle" must be countered. By asserting that the "principle" represents an international consensus or serves as the "basic norms governing international relations," Beijing aims to create the impression that Taiwan is merely an internal Chinese affair. This is particularly concerning given the potential for conflicts across the Taiwan Strait. The notion that the "one China principle" is a universally accepted international norm must be dispelled.

Second, resistance against Beijing would be more effective if it were initiated by influential democracies such as the United States and its allies, rather than solely by Taiwan. These endeavors should concentrate on organizations that Taiwan aspires to join as an observer but have rejected Taiwan's meaningful participation based on false premises, including the WHA and ICAO. Protests against incorrect interpretations of questions concerning Taiwan within international organizations should be lodged, and information regarding any clandestine arrangements between China and international organizations must be sought.

Third, depending on a specific organization's charter and rules, there may be normative foundations for Taiwan's meaningful participation. These norms should be emphasized when discussing Taiwan's representation in global governance.

Fourth, Taiwan has sought to diminish its economic dependence on China by entering regional economic agreements and establishing and enhancing economic relations with other countries. Such efforts can be bolstered by countries signing trade agreements with Taiwan and advocating for Taiwan's involvement in multilateral economic institutions.

Fifth, I wish to highlight the Global Cooperation and Training Framework (GCTF), an innovative, flexible institution that serves as a multilateral platform allowing Taiwan to expand its transnational networks and enhance its international presence. This model offers inspiring lessons for breaking Taiwan's isolation and should continue to be expanded.

Regarding Chinese domestic lawfare targeting Taiwan, Beijing appears to be testing the waters by releasing information about potential enactment of a Motherland

Unification Law, National Unification Law, or other similar legislative measures. However, based on publicly available information, it remains uncertain if and when such a law would be passed and what it would entail. More research should be directed to this area to better anticipate the future.

It is evident that Beijing has the capacity to penalize individuals within its jurisdiction, including the hundreds of thousands of Taiwanese individuals who travel to or reside in mainland China, Hong Kong, and Macau. For Taiwanese individuals and organizations beyond Beijing's reach, it employs sanctions as a deterrent. Clearly, Taiwan is out of reach of Beijing's legal coercion, but these attempts generate animosity across the Taiwan Strait, making it increasingly challenging for the Taiwan government to engage with China. Moreover, these sanctions lists may create chilling effects on the broader Taiwanese population. The Taiwan government should raise awareness among its citizens about the risks of going to China, while carefully avoiding inadvertently helping China spread fear. Striking the right balance is indeed a difficult task.

Beijing's recent resurgence of economic coercion, which involves violating cross-strait agreements, indicates an intention to influence the political choices of the Taiwanese people in the upcoming presidential and legislative elections. It is reasonable to anticipate a further intensification of such strategies. As mentioned, Taiwan has been working to reduce its economic dependence on China; this requires seeking alternative options, such as forging free trade agreements with other countries or participating in regional trade organizations to redirect Taiwan's economic pursuits. Countries that support Taiwan's economic resilience can collaborate with Taiwan in this regard.

Lastly, there is an impressive array of world-class experts specializing in the China field in the United States. However, research regarding Taiwan remains comparatively limited. Expanding and deepening the understanding of Taiwan and its unique perspectives in policy considerations would be highly beneficial. This approach will ensure that U.S. policy is thoroughly informed and well-rounded. Therefore, I thank the Commission for this opportunity, and I look forward to the questions.

COMMISSIONER HELBERG: We'll start in reverse alphabetical order with Vice Chairman Wong.

VICE CHAIRMAN WONG: Thank you.

Dr. Kardon, you used the phase to describe China as being a state party to UNCLOS that is in good standing in UNCLOS. Is good standing a status under UNCLOS that is actually in the convention?

DR. KARDON: Not formally but they ratified the treaty. They haven't been ejected from the treaty. You'll note that the U.N. Convention on the Law of the Sea process encompasses much more than individual arbitrations and even China's maritime disputes.

This High Seas Treaty I mentioned, for example, is under that framework. China was a leader in the development of that treaty which is now open for ratification. What I was trying to emphasize is that despite from our perspective them disrespecting the Law of the Sea arbitral mechanism, they remain within the treaty, and the irony is we are not subject to that same discipline.

We couldn't be sued under the Law of the Sea arbitration -- excuse me, dispute resolution mechanisms. There couldn't be an arbitration against us. I think that is the key observation that I want to leave with you.

VICE CHAIRMAN WONG: But let me put a finer point on it. Are there any party states or state parties to the Convention that are not in good standing?

DR. KARDON: No. I chose that rhetorically which is to say they are a member of the treaty organization having been ejected from it and, yeah.

VICE CHAIRMAN WONG: Is there a process for ejection?

DR. KARDON: I don't believe so.

VICE CHAIRMAN WONG: So, no matter what anyone who has signed and ratified the treaty is in good standing. There is no such thing as not good standing. Right?

DR. KARDON: I suppose not in a formal sense, no.

VICE CHAIRMAN WONG: I make this point to say it is odd to me -- I understand the focus on UNCLOS, but the fact that China can be in good standing, there is no official line between that.

It makes me question the value of UNCLOS if China with its violations and its disrespect and the number of efforts that you list in your fine testimony to undermine the customary international legal rules that are acknowledged by the international community that it can remain in good standing. I just find it somewhat ironic.

Moving on to another topic, I agree with your recommendation that we have to -- not just you, FONOPs. I think FONOPs are important. We should do that. We should do it in conjunction with our allies where possible. They are resource heavy and they can't be the only effort.

As far as joining with our partners, and even non-partners in their maritime claims that we find meritorious, are there specific examples of that taking up actual legal arguments and certain arbitrations and absorbing it into our policy? Are there specific claims that you think are very meritorious that we should join up with?

DR. KARDON: Thank you, Vice Chairman. Just briefly on that last point, I think you're right to say this is the fact that China can engage in what we could characterize as violations of rules and norms written down in black letters in the treaty and yet remain in that framework is

problematic, but I would just put the question to the United States generally as a matter of strategy as if we're investing in rules-based order. Are we more effective within or without that treaty framework? I would argue we certainly are.

On this question of de-emphasizing FONOPs and focusing on some of the resource claims in particular of claimant states, again, this would be done much more effectively from within the UNCLOS framework which is to say under UNCLOS let's take a very specific example.

Mischief Reef, where China has built significant military and Coast Guard facilities, is under basically any reasonable interpretation of the Law of the Sea Treaty. It's on the Philippines continental shelf. It's a submerged part of the sea bed and it's well within the continental shelf.

Any activities around it should be governed by exclusive economic zone rules to include fishing, oil and gas exploration, et cetera. We could be quite specific on that count and it would be more effective in making that argument, again, if we were making that argument from a position of strength within the treaty.

VICE CHAIRMAN WONG: When did UNCLOS come into force?

DR. KARDON: Sorry. Say again?

VICE CHAIRMAN WONG: When did UNCLOS come into force?

DR. KARDON: It came into force in 1994.

VICE CHAIRMAN WONG: And how old is customary international Law of the Sea?

DR. KARDON: Arguably, it's the earliest form of international law. I think it tends to be dated to the Roman Empire.

VICE CHAIRMAN WONG: Back into antiquity? So, a body of law of antiquity you feel there are no mechanisms for us to lodge our disagreement with Chinese claims and support the claims of other parties because we're not within a roughly 30-year-old Law of Sea Treaty?

DR. KARDON: I don't believe there are no mechanisms for it. What I would argue is that we're much less effective without it. Our voice is less meaningful because it comes off as cynical and self-interested and selective, the same things that we assign to China or Russia and their treatment of international laws.

I think, again, it's a mild discipline that we accept by joining the U.N. Convention on the Law of the Sea, and I think it pays major dividends over the long term strategically.

VICE CHAIRMAN WONG: Thank you. I do want to follow up on the specific claims that we think are meritorious because those would be very good recommendations for us to absorb. Thank you.

COMMISSIONER HELBERG: Thank you very much.
Commissioner Schriver.

COMMISSIONER SCHRIVER: Thank you, Mr. Chairman. And thank you to our witnesses.

Dr. Kardon, I also wanted to follow up on your comment about de-emphasizing freedom of navigation and prioritizing protection of resources. It doesn't occur to me, or it's not obvious to me that those are mutually exclusive. In fact, I would actually link of freedom of navigation with the protection of resources.

I wanted to press you just a bit on your identifying a need to de-emphasize. That would suggest you think our freedom of navigation program is causing us some problems or creating issues that we would be better positioned, more optimally positioned if they were de-emphasized. I would like to just press you on that a little bit more and get your thoughts.

DR. KARDON: Thank you, Commissioner Schriver. I think you captured the essence of what I was trying to say. I don't think they are mutually exclusive. It's a matter of emphasis and I do tend to agree there is some complementarity. I think our interest in maintaining free navigational norms has broader structural effects on maritime order.

My argument is that as a matter of effective diplomacy and foreign policy, that's not an interest that is broadly shared. One of the things that I learned in doing the research for my book is that the United States really is the only one asserting most of these rights, especially in East Asia. The regional states are not --

COMMISSIONER SCHRIVER: But isn't that a public good? I mean, who else has the capability to do that?

DR. KARDON: Well, I suppose we could have a discussion but who has the capability to do a FONOP? Anybody with a boat frankly. It's not a very high intensity operation, but it's not in the interest of most of our partners because they are not exercising globally this freedom of maneuver and freedom of action.

It's not their strategic priority. It's our long-term strategic priority appropriately. The question is what can we do to bring along the other states, especially the regional states, whose support and I would say active engagement in corroboration with the United States and maritime affairs.

In order to engage them, we need to focus on their interest and those are primarily resource rights. I think that is actually low-hanging fruit for us from a foreign policy standpoint. I believe the FON program should be continued in a low-key fashion. I wrote in the testimony American military access will not be denied by PRC domestic law. There are supposed violations of the Law of the Sea. The practical reality is we'll maintain that access. We can persistently object in a legally meaningful way.

The last thing I'll say on this is that it's quite notable that the PRC, their Ministry of Foreign Affairs, as well as some of their organs of the PLA, their public affairs organs, often publicize FONs before we do. I think there are a number of ways to interpret that.

The one I would offer is they are quite happy with this as part of the regional narrative about what's going on because they reinforce the Chinese argument that it's the United States and its allies that are militarizing the region.

This is unfortunate. We don't want that much emphasis on this particular aspect, but we want to focus on is those issues that other states are also interested in which is to say their own rights under international law.

COMMISSIONER SCHRIVER: Thank you.

Dr. Weeden, you made a comment I thought was interesting about they haven't waged -- the Chinese haven't waged lawfare in the space domain with respect to the negotiations under way because -- now these are sort of my words -- because they are part of a process.

There is a theory. The Chinese feel less bound to a lot of these international agreements because, you know, they were essentially promulgated to them by Western powers who created them, et cetera.

But I would still -- I'm wondering are you making the leap then to, you know, they haven't revealed these tactics and the negotiations to date and, therefore, we can expect better adherence? I question whether that would necessarily result in adherence between, again, our whole understanding, our whole discussion about how they approach the law and obligations related to the law.

DR. WEEDEN: Good question. I'll address it in two ways. One, yes, we are not seeing

them -- we're not seeing China actively trying to undermine or push back against the existing international space law framework in part because it's very broad. Right? We don't have the same level of specificity and definitions like we have under UNCLOS for all these kinds of issues. We just don't have that yet. Right?

China is actively participating in those discussions about how do we define what those interpretations are, how do we apply those broad international space law principles, how do we establish norms of behavior.

I mean, I would say they are being mostly constructive in how they participate in that in direct opposition to Russia who for the last, you know, several years since 2014 when they first invaded Ukraine has been very disruptive and very antagonistic in these same discussions.

I take your point, you know. That does not mean China is going to follow international space law and not try to undermine it in the future. I'm just saying that at this point in time where there's open questions about how to interpret, about how to apply it. There is very broad freedom of action for pretty much all space faring countries. They are not being antagonistic.

COMMISSIONER HELBERG: Thank you.

Commissioner Price.

COMMISSIONER PRICE: Thank you, Mr. Chairman. Thank you all for your testimony. Each one of your case studies has offered some chilling warnings.

For all of you my question is as you each gave your recommendations, they each dealt with engagement and engagement in international forum in one way or another. Are there examples in each of your areas of where the Chinese government has been successful in influencing international forums that we should be lifting right now in this discussion?

We can start anywhere. Mr. Scharre.

DR. SCHARRE: Yes, thank you. There are several. I think a few that are concerning. One is the spread of Chinese style laws or norms for cybersecurity government and monitoring information and surveillance inside countries which are problematic. I also think Chinese engagement in technical standard-setting bodies has been very concerning. Standard-setting bodies such as the ISO, IEC, ITU.

There was an incident a few years ago where draft standards coming out of the ITU had Chinese-style standards for facial recognition technology that would include technical standards of things like race and ethnicity in terms of how the facial recognition technology was constructed which then is enabling the use of the technology to repress minorities as Chinese do domestically. I think that's a concerning example of the way in which China's engagement can sort of spread some of these creeping norms globally.

COMMISSIONER PRICE: (Off microphone.)

DR. SCHARRE: Right, absolutely, that's a place where engagement by --

CHAIRMAN BARTHOLOMEW: Reva, we couldn't hear your question.

COMMISSIONER PRICE: I apologize. My question was is that an example of where if the United States and others were more engaged it would have changed the outcome?

DR. SCHARRE: That's right. So, in this case these were draft rules but this is a great example where engagement by the United States and other democratic countries on shaping those kind of standards is vitally important to changing what the outcome will be.

COMMISSIONER PRICE: Thank you.

Mr. Weeden.

DR. WEEDEN: Yeah. So, turning to the space context, you know, off the top of my head I can't think of any Chinese proposals that gained significant tractions were adopted, but I

want to highlight quickly three kind of themes I think they have been successful in.
I mentioned in my oral testimony this treaty on the placing weapons in space they've been pushing. While the treaty itself does not have a lot of steam behind it or countries rushing to support it, the theme of some sort of legally binding restriction does have a significant amount of support among the G-77, among the Global South.

I would say more support than the traditional U.S. approach of we don't need anything on here because there's not a problem here. So, in that sense, China's approach has garnered a little more acceptance among other countries than the U.S. position even if their specific proposal has not yet gained acceptance.

The second thing, as I mentioned, the Artemis Accords, which are a set of principles that the Trump Administration put together in discussions with eight other countries to go along with our program to return to the moon. Those countries that want to participate and return to the moon have to sign on to the principles, but you can also just sign on the principles themselves. There are now 23 countries as of yesterday that have signed on, the latest being the Czech Republic. They include countries like Rwanda and Nigeria and the UAE and Saudi Arabia and Mexico. Definitely some non-traditional U.S.-based partners.

China and Russia have since created what they call the International Lunar Research Station, ILRS, which they are intending to have kind of their own separate program. They are in discussions with other countries about joining that. So far none have publicly joined.

We've heard rumors about Venezuela, maybe a couple of others are discussing it. They've talked about creating their own set of principles to go along with their lunar program but they have not yet made those public. At least on that part of it, the U.S. proposal has gained significantly more traction.

COMMISSIONER PRICE: Mr. Kardon, anything to add?

DR. KARDON: Mindful of the time, I'll just briefly I think that High Seas Treaty that just opened for ratification in March is a very clear illustration of precisely the phenomenon that you're interested in.

I call attention to one particular norm in that and it's convergence with a Chinese preferred norm that we see across the board. I heard it discussed in the panel this morning, this community of common destiny.

(Foreign language spoken) is a Chinese ideological position about international order, rules, and norms. I believe it's quite similar in substance to this idea of the common heritage of mankind which is enshrined in the Law of the Sea Convention, as well as in the new High Seas Treaty and has implications for space and for cyber domains.

I think if we're not in the room shaping how those norms are interpreted, because they are quite indeterminate, we're going to be losing a very important opportunity to be shaping future regimes and, in fact, the practice of these rules in maritime space, as well as outer space and cyber space.

COMMISSIONER PRICE: Thank you.

Ms. Chen.

DR. CHEN: I'd like to -- sorry. I'd like to -- I'm sorry. The question, if there is still time, very quickly about Taiwan's case study.

COMMISSIONER HELBERG: Very brief.

DR. CHEN: Thank you -- about Taiwan case study. I think China has been pretty successful in its lawfare in the international system in terms of keep Taiwan out and starting as a gatekeeper of Taiwan's participation either as a server or as a full member.

Even if we are just talking about Taiwan's meaningful participation that doesn't involve the question of statehood, China has been very successful in serving the gatekeeper role in the U.N. and its specialized agencies such as the WHA and ICAO. I think there's a lot of misguided legal opinion in these organizations that must be corrected so as to allow Taiwan more space to participate. Thank you.

COMMISSIONER HELBERG: Thank you.
Commissioner Mann.

COMMISSIONER MANN: Thank you. My first question is for Yu-Jie Chen. I'm interested in the experience. There have been so many people and companies from Taiwan operating on the mainland. What has been their experience overall with the court system?

And there was a recent highly-publicized case of a Taiwan publisher arrested in Shanghai. I don't know whether that was a first-of-its-kind case or whether there have been many others like that.

DR. CHEN: Thank you, Commissioner Mann. So, I don't think we have a full understanding of what's happening to Taiwanese people and businesses operating in China currently, but we do know that the space is constricting.

The case that you mentioned is just one of a series of cases of Taiwanese people detained in China. I think we can trace this tightening censorship of Taiwanese people back to the case more than five years ago.

NGO worker in Taiwan, Lee Ming-che, when he went into China in 2017, he disappeared from the public view. Days later we only knew that from the televised announcement in China that Mr. Lee was already under detention for suspecting of engaging in activities endangering national security.

This case, the current case of the publisher, Gusa founder Li Yanhe, he was also detained under suspicion of endangering national security. We don't have a lot of information about this case because China has, as I mentioned in my testimony, cut off the communication channels in cross strait agreements.

Even if we do have agreement with Beijing that says Beijing should notify the Taiwan authorities of such detentions and facilitate family visits, such things did not happen in Lee's case or the current case of the publisher and a series of other cases of Taiwanese people detained in China including a pro-Taiwan independence activist.

We are concerned that the new case would create a chilling effect among the broader Taiwanese society and I do think these cases are designed strategically to show that the current ruling DPP cannot help Taiwanese because the communication channel has been cut off. Therefore, we do not have further information about these cases.

COMMISSIONER MANN: Thank you very much.

Very different kind of question for Mr. Scharre. I don't know the issue. You spoke of China's efforts in the field of technical standards and you mentioned the NIST case. Can you give an example of what you mean? How is China trying to change things through technical standards?

DR. SCHARRE: Sure. Thank you. So, there are two kinds of ways that China is throwing its weight around the technical standard setting bodies that can be problematic. So, we see the Chinese become much more involved in these technical standard setting bodies, working with Chinese companies behind the scenes, getting all of the Chinese companies on the same page.

These are intended to be technocratic bodies where companies get together, and they

decide on the best standard for something like, you know, wireless networking, so all these different devices are interoperable.

Well, the Chinese government has been working with Chinese companies to get them all to work together to then have a coherent voting bloc partly for economic advantage, to give economic advantage to Chinese firms, but also in some cases to push their sort of expectations or norms about how to use the technology, for example, to facilitate surveillance.

COMMISSIONER MANN: Thank you. That's all I have.

COMMISSIONER HELBERG: Thank you. My question is for Mr. Scharre. I have a few rapid-fire questions for you. We all know that China has been using technology to export its norm and values and laws abroad. So, my first question is, should the United States consider a full ban on TikTok in the United States?

DR. SCHARRE: Yes, I do think that the United States government should either ban TikTok or ideally force a sale to a U.S. company to resolve the concerns about Chinese ownership over TikTok.

COMMISSIONER HELBERG: Should the U.S. government consider restricting outbound capital flows to China in highly sensitive technology verticals, particularly in venture capital where we have seen firms like Sequoia Capital invest in Chinese artificial intelligence?

DR. SCHARRE: There should be some controls. And there are some that come on the heels of the CHIPS Act, for example, for companies that are taking subsidies there. I think there certainly should be controls surrounding end user and end use restrictions so things like we've had examples. Unfortunately, over the last several years, investments from the United States has gone into Chinese firms that are then implicated in human rights abuses. And that is certainly a problem.

COMMISSIONER HELBERG: Given that Chinese technology is end deploying back to the PLA, what would be a use case of where an American investment in a Chinese artificial intelligence company would actually be a valid use case in the interest of the U.S. government?

DR. SCHARRE: Yeah. I certainly don't think that we should cut off all entanglement between the United States and China on technology. I think that, you know, we need to have restrictions surrounding military and users or end-use and connections to human rights abuses.

But for things like basic research that is beneficial and in part because a lot of the talent flows the U.S. benefits disproportionately from. China's best and brightest AI scientists and engineers actually don't stay in China. They come to the United States for graduate studies. And then they tend to stay here after graduation.

Ninety percent of Chinese students that come to the U.S. for their Ph.D. in computer science stay here in the U.S. afterwards. And so, facilitating research relationships and partnerships can be beneficial as well as China has a very vibrant tech ecosystem. And so, getting some of those ideas out of China, you know, the development that China is doing in AI could also benefit U.S. companies.

COMMISSIONER HELBERG: I guess I am referring specifically to venture capital deals and sensitive technologies like artificial intelligence. Is there an example where it would be in the interest of the United States to allow an American venture capital firm to take American dollars and invest it in a Chinese AI company?

DR. SCHARRE: There might be. There might be circumstances. I mean, there might be for applications that don't directly have military, human rights applications. Things like say self-driving cars where you can see that there is a significant return.

I do think we should be looking closely at what is the balance here of the interest and does it disproportionately benefit the U.S. if we are going to permit some of those transactions.

COMMISSIONER HELBERG: Can you think of any example?

DR. SCHARRE: I think self-driving cars could be a place where having those ties between the U.S. and China could be beneficial.

COMMISSIONER HELBERG: Is there an example of a company that has benefitted the U.S.? I guess, I'm trying to think, are there concrete examples where it has benefitted the U.S. to invest because the United States was one of the first countries to actually get the self-driving technology --

DR. SCHARRE: Right

COMMISSIONER HELBERG: -- with Waymo and so forth. So, are there examples where allowing American venture capital firms to invest in highly sensitive technology verticals in China has benefitted the U.S.?

DR. SCHARRE: I'm sure there are. Most of the examples that I know are ones that have been on the front page because they were investments in some company that was then committing human rights abuses, which unfortunately there are many.

COMMISSIONER HELBERG: Okay. So, would you compare -- some researchers have compared the development of AGI, generative artificial intelligence, as tantamount to the invention of the atomic bomb. Would you think that is a fair analogy?

DR. SCHARRE: I mean, any analogy is, you know, kind of fraught. But I do think that the place where we are right now with artificial intelligence is pretty significant. We have seen really tremendous gains in just the last year. And it is unclear how capable AI systems will be even 12 months from now much less a few years from now.

So, I would say that in the sense that it is a strategically relevant technology, absolutely.

COMMISSIONER HELBERG: And would you have considered that it be the right answer for the United States to co-develop a previously highly strategic technology like the Manhattan Project in collaboration with a foreign government like the Soviet Union?

DR. SCHARRE: No, certainly not.

COMMISSIONER HELBERG: So, do you think it would be appropriate for the U.S. to essentially restrict co-development in highly strategic technologies between the U.S. and China today, like AGI?

DR. SCHARRE: I think it depends on the technology. But certainly, for some that has strategic relevance, yes. And so, for example in AI, the export controls that went into effect in October effectively do this for the most capable AI systems, like large language models like ChatGPT or GPT-4, because they restrict chips that are used to make these most capable systems.

Not every use of AI is going to be that significant and that powerful. But for the most capable systems, yes, I don't think we should be enabling that inside China.

COMMISSIONER HELBERG: So that includes co-development because right now the rules don't prohibit companies from allowing AI centers in China to co-develop advanced AI systems with engineers in the U.S.

DR. SCHARRE: That's right. So, the restrictions that are currently in place on the chips from October are very comprehensive on the chip manufacturing side, including restrictions on U.S. persons and then, of course, on the exports of the chips themselves. But there are definitely holes in that arrangement. It is leaky. There are not restrictions on, for example, Chinese

companies using cloud computing services as well as collaboration on say algorithms to design better AI systems.

So, there are probably other places where for the most cutting-edge AI systems, additional controls would make sense.

COMMISSIONER HELBERG: And, I guess, and I know we're running up on time, but just to get a little bit more tactical, what I am referring to is specifically a company using Chinese engineers, pairing those engineers with American engineers to co-develop AGI technologies that are by American companies.

DR. SCHARRE: Right. So, I'm not aware of any situation where that's occurring today because the leading frontier labs at Google and OpenAI, for example, are not, to my knowledge, working with Chinese counterparts on some of these most capable models. But I would not think that is in the U.S. strategic interest to do that.

COMMISSIONER HELBERG: So, you would agree that some restrictions might be applicable?

DR. SCHARRE: Yes.

COMMISSIONER HELBERG: Thank you. Commissioner Goodwin.

COMMISSIONER GOODWIN: Thank you, Commissioner Helberg and my appreciation to the witnesses. I want to talk a little bit about the Chinese domestic audience here. So in addition to trying to shape international law, especially in emerging fields like space and cyber, and also trying to advance arguments in discrete legal disputes, how much of this construction of legal narratives is designed for Chinese domestic consumption in the sense that in the arbitration case with the Philippines, when they advance that legal argument, or when they advance arguments regarding Taiwan, is it really designed to win a case before the International Court of Justice or to shape consensus of international law or is it designed, as some commentaries have suggested, for the Chinese people to say that what our government is doing, what the party is doing, is justified to create legal sounding arguments, legally plausible arguments, to the ears of the Chinese domestic audience that suggested what the party is doing to justify it?

And I'll open it up to the panel. Maybe, Dr. Chen, start with you with regard to the conversation on Taiwan.

DR. CHEN: Sure. Thank you. This is a good question. And I think both. In Taiwan's case, I think China is pushing its agenda internationally and also for the domestic audience as well.

Taiwan is a very important issue, we all know, to Chinese. And so, winning in terms of the public opinion internationally is also a win for Chinese government in the eyes of the domestic audience.

I have already talked about small cases in my original testimonies, including China being able to manipulate the One China principle and then making a lot of leaders in international organizations make wrong statements, inaccurate statements, that sort of confuse international law with One China principle.

And that also is a good show for a domestic audience. So, for example, we see last year China's white paper issued both in English and Chinese talking about how One China principle is an international consensus. So, I do think there is some traction there.

COMMISSIONER GOODWIN: Anyone else?

DR. KARDON: I will just offer, I think, the intended office for a lot of China's international legal practice and maybe specifically the South China Sea arbitration which you

mentioned is not so much the domestic audience. I think that it is quite easy for Chinese central leadership to mobilize its domestic public opinion behind its maritime policy. The legal elements of that, I think, are not quite salient.

I think that the most salient audience is the region and other states that are calculating whether or not they will be able to enforce their rights under the law of the sea with respect to the PRC. And they are signaling some scope for that, but drawing some very firm limits around what they define as their sovereign sphere. And that is a point I make in detail in the testimony as well as my book.

So, I don't think their domestic audience, maybe with the exception of one man sitting at the very center, Xi Jinping, where I think a lot of the policy and rhetoric is conformative for, I don't think that there is much of an interest in at least describing China as being a member in good standing of the international legal community. I think that's a relatively minor public relations issue for Beijing.

I think they are focused much, much more on this relevant community of states. And I really want to urge us to think about who they are. To American ears or to Western European ears, I don't think the Chinese arguments resonate. But when you start to look around the developing world, it is quite notable how few states are willing to say anything explicitly critical of China's unwillingness to participate in this arbitration.

I think we should not miss that fact. Even though it outrages our legalistic sensibility, it's not the case with the majority of countries in the world. Thanks.

DR. WEEDEN: Yeah, so quickly I will say first, I mean, the Chinese space program enjoys significant support from the Chinese public. They are extremely proud of China's accomplishments. You know, Chinese astronauts are rock stars in China, just like they are in -- you know, South Korean astronauts are in South Korea, UAE and elsewhere. And they do a lot of promotion of their space activity to the public.

But I think in a similar manner, I think a lot of the legal aspects are more directed at other countries within the multilateral system, kind of engender support. Particularly, you know, China's stances on militarization, weaponization of space is absolutely tailored to speak to the G-77 and the Global South, although there is also an element of that that is used publicly to characterize American efforts as hegemonic and as, you know, pushing American dominance. That certainly goes to domestic audience as well.

On space resources, again, China diplomatically talks about the common heritage of mankind, talks about, you know, kind of we have a global discussion about how to use these resources. So, I think that speaks much more towards gaining more diplomatic support than sort of domestic support.

DR. SCHARRE: I'm mindful of time. Do you want to take this time for --

COMMISSIONER GOODWIN: Sure. If you can do it quick.

DR. SCHARRE: So, I'll be fast. So, I see some of both on digital technologies. Most of China's laws on digital technologies seem really focused on just implementing CCP governance internally, more of the rule by law kind of framework.

On the norms and standards of how China has talked about, particularly AI principles or AI for good, those seem to be things that have both a domestic and international audience.

So, for example, a few years ago the Ministry of Science Technology put out a whole list of AI principles, listing sort of ways to use artificial intelligence, like being harmonious with society and advancing a community of common destiny, some of which are actually reasonable, some of which are notable for how degradant they are from what China is doing internally in

terms of using AI for oppression. And some of those efforts seem to be very clearly aimed at legitimizing China's uses of AI both domestically and internationally.

COMMISSIONER GOODWIN: Thank you very much.

COMMISSIONER HELBERG: Thank you. Commissioner Glas.

COMMISSIONER GLAS: And thanks to you all. I'm going to pass.

COMMISSIONER HELBERG: Commissioner Friedberg.

COMMISSIONER FRIEDBERG: Thank you very much. Mr. Kardon, if I could start with you. It seems like there are at least two sets of issues, those involving littoral waters and then those more broadly on a global basis.

And closer in, if I understand you correctly, your argument is the United States should place less emphasis on advocating for our military navigation rights and more on essentially helping regional states push back against China's, what you describe as, veto jurisdiction. And first of all, is that correct? Okay.

So, what would that mean? We're helping, I assume helping regional states exercise their rights to make use of the resources in these waters. How do we do that from a great distance?

MR. KARDON: As I emphasized in the testimony in the book, China is primarily using its domestic law enforcement, its domestic policy implementation to do things like deny resources to coastal states. And this puts both those littoral states as well as the United States in an uncomfortable position that is often called gray zone coercion or any number of things. It is a mismatch.

And I would be wary of playing their game. But I think there are ways that we can think about using regional states' law enforcement supported by perhaps United States Coast Guard, capacity support technical training, maybe some vessels -- I don't know what the scope for this is -- to enforce their domestic law for their resource rights. Not to meet a Chinese fishing vessel with a gray-hulled U.S. Navy vessel, which is a huge problem strategically for the United States, but rather to think about how do we create some competitive edge in this particular dispute over resources?

COMMISSIONER FRIEDBERG: Okay. So, this is really more a matter of power than it is norms?

MR. KARDON: Well, they are quite closely related as you will understand probably far better than anyone in this room. The Chinese theory of the case, such as it is, is that their power applied purposefully in practice to, you know, assert Chinese sovereignty and sovereign rights will become normal, you know, in the common sense version of it.

It is the normal pattern of practice. And customary international law is effectively that. There is a legalistic patina around it, but it really has to do with power fundamentally.

COMMISSIONER FRIEDBERG: But our assistance to these regional states in resisting has more to do with bolstering their ability to stand up to China's forces basically.

MR. KARDON: That's right, in non-escalatory or less escalatory ways. I think that is the key.

COMMISSIONER FRIEDBERG: So, as we move outwards, outwards from the littoral waters to the global seas, you make this very interesting observation that China's post-colonial branding will be at risk as it goes further outwards. I assume you mean because they are going to be exploiting the waters of other countries. They are going to be maneuvering their naval vessels. They are going to be doing all of these things they complained about with respect to us, themselves, on a global scale. Is that what you are getting at here?

MR. KARDON: Yes. I think that China's views on these norms and rules are out of step

with its practice in the global sphere, particularly in these areas beyond the national jurisdiction. That's what all the high seas fisheries and the deep-sea bed mining is about. Their interest dictated that they are going to be doing things that are contrary to developing world interest.

COMMISSIONER FRIEDBERG: Okay. It seems inevitable that that's going to happen because of their needs for fish, minerals and so on. So, what are the implications for the United States and for U.S. strategy? Are there ways in which we can help others resist that and/or, they are not mutually exclusive, are there ways in which we can gain some kind of advantage and discursive struggle with the PRC by calling attention to their practices and the contradictions between what they say and what they do?

MR. KARDON: Well, I think the developing states who are going to be most harmed by China's practices are the ones that are most often in part of China's constituency in a lot of important international organizations and other multilateral settings.

And so, to the extent that China is undermining that, we need to take advantage of that and be in this discussion about what are the appropriate norms such that -- what is the meaning of the common heritage of mankind? It really is quite indeterminate. And there is a lot of scope for that to mean a lots of different things in practice. And I think we need to be in that process in a way that we have not been to date.

COMMISSIONER FRIEDBERG: So, this could be an opportunity for us and other advanced industrial democracies to drive wedges between China and some of its --

MR. KARDON: Exactly.

(Simultaneous speaking.)

COMMISSIONER FRIEDBERG: -- clients in the Gulf. Okay. Thank you.

COMMISSIONER HELBERG: Thank you. Commissioner Cleveland.

COMMISSIONER CLEVELAND: Thank you. Mr. Scharre, I want to thank you for addressing Commissioner's Mann's question and describing the behind the scenes efforts at these technical institutions to develop a coherent and solid voting bloc.

Commissioner Goodwin a couple of years ago chaired a hearing on this very issue. And I think the outcome of that was recognition in the Congress and the administration that we should be much more active in backing leaders at these organizations to ensure that we are fully prepared to deal with these Chinese voting blocs.

And Mr. Scharre, I would like to focus on something that Commissioner Helberg has raised, and I have mixed feelings about it. I mean, I think we can talk about blocking Chinese activities when it comes to AI and suggesting that it is like working on atomic weapons.
I think it is also important to point out that when we addressed AI and autonomous vehicles a couple of years ago, we found out that California is allowing Baidu and other Chinese companies to drive on its roads and develop data in a completely unregulated way. And we encouraged an approach that wasn't just state by state in terms of letting China collect data. That went nowhere noticeably.

In your testimony, Mr. Scharre, you say the Chinese owned social media platform, TikTok, presents a threat to U.S. national security because of the risks of a U.S. person's data being exfiltrated to China and then TikTok manipulating content on the platform, including censorship, and you provide examples of the censorship.

I think that the second part is understandable in terms of censorship. I would like to understand as explicitly as you can offer what the implications are of exfiltrating a U.S. person's data to China. Because I think that is something that the Congress continues to labor with in terms of why should it matter?

DR. SCHARRE: Okay. Thank you very much, Commissioner. I think you are thinking about two different kinds of data coming off of Chinese apps.

So, one would be the data that is specific to the use of that app. So, in the case of TikTok, you know, what are people watching and what are they liking and the content that they are interested in?

And then the second one, which is also going to consume with TikTok, is the ability of some of these apps to then gather other information that's on the mobile device. And, you know, as we are all aware, you get these popups on your phone, and you hit accept. And oftentimes these apps then are gathering other information, whether it is geolocation data, the use of other apps, contact information, which is far more sensitive than even just which TikTok videos you are watching and could be very problematic. And --

COMMISSIONER CLEVELAND: How? I really would like you to be specific on how. Because I think this is central to the debate and saying that, you know, because my contact list -- I don't have TikTok on my phone, but my contact list is non-accessible to TikTok. Okay. I'm 14 years old, and I'm shopping on Shein. Why does it matter?

DR. SCHARRE: So, I think, you know, if a Chinese company and therefore the government is able to access, for example, things like contact lists, geolocation data, that could be used to build information about networks of people.

You could use that, for example, in Washington, to map connections between people, certainly combining that with other data sources that have come from things like the OPM hack. You could imagine uses going after people for espionage purposes, trying to target them, searching geolocation data, where people are going, what activities they are doing. You can connect individuals. You can look for ways to exploit individuals, going after them, you know, for blackmail. There are a lot of sort of nefarious things that you could do if you have information that is on people's phones about how people live their lives.

COMMISSIONER CLEVELAND: Can't they do it now?

DR. SCHARRE: Excuse me?

COMMISSIONER CLEVELAND: Can't they do this now without TikTok?

DR. SCHARRE: In terms of -- by what means?

COMMISSIONER CLEVELAND: Other platforms.

DR. SCHARRE: Well, it would be a lot harder. I mean, certainly, if you have apps that are going to give access to that information on a mobile device, that is creating a door that makes it possible for people to maybe unlock or hack or open that door.

COMMISSIONER CLEVELAND: So, what I was thinking of is I think you made comments on cloud computing and servers. I appreciate the fight about TikTok. I just think that there is a bigger concern.

And so, we can ban it. We can sell it. I think that there is a bigger concern in terms of access to information and what -- there are two parts to it. What is that nature of that access, how extensive is it? And then the second part of it is what is the data that is of interest?

The shopping habits of 14-years-olds doesn't strike me a national security risk. But I'm hearing you say that it is somehow. So, I think I would like to develop this for the record and have a more extensive answer because I think it is -- we're operating in the space of generalities of risk and threat. And I just don't feel I fully appreciate it.

I would like to ask a question on space. In your testimony you say that the Chinese -- we are interested in adopting a framework that has to do with claims and extraction. Do you think that the Chinese are more interested in establishing claims or looking at extraction and use of

resources? Which is the priority?

DR. SCHARRE: So that is, as far as we can tell off of all the discussions that have happened, it is on use of resources. So just to recap the law, the Outer Space Treaty, which both U.S. and China are both parties as pretty much every space bearing country, places a prohibition on national appropriation, i.e. declaring planting a flag, declaring sovereignty over celestial bodies and the moon. There is other language that talks about the ability to extract and use resources.

The United States' position is that while you cannot plant a flag and claim territory on the moon, individuals, companies who go there can extract regolith, water, whatever they find and then sell it, use that however they may so choose. And the 22 countries that signed the Artemis Accords agree with our interpretation. That's part of that.

China, it is interesting because they are planning to do a lot of the same missions that we are that will require extraction and use of resources, including for commercial activities. But they have not come out and stated explicitly that they endorse that definition or that interpretation.

They still, in their most diplomatic language, are sort of on the side of, well, we need to abide by non-appropriation. We have concerns about the U.S. position. And that is an interesting dichotomy there because on the one hand, I sense they probably agree with our interpretation and are planning to do that in terms of not ownership, but the ability to extract, but they are not quite yet willing to come out and say that explicitly in their statements, in their diplomatic language.

COMMISSIONER CLEVELAND: Thank you. At the risk of the patience of the chairs, I think it is interesting -- your testimony is interesting because it says that China is going to do on the moon what China has done in Latin America and elsewhere. That they have an approach when it comes to resources. The moon is just the new domain. Thank you.

COMMISSIONER HELBERG: Thank you. Commissioner Borochoff.

COMMISSIONER BOROCHOFF: I first want to say thank you to Commissioner Cleveland for setting me up perfectly for what I wanted to ask, and I'm going to extend a little bit. I have watched the progression of individual data, which began with aggregate data to where we are today with tremendous alarm. And I am just going to paint you a quick picture of that.

In 2000, I was very involved in the redistricting in the State of Texas where I live. And as a result, I was invited to go help in another state three years later in 2003 where they were considering a redistricting mid-term.

And during that time, I became aware that the credit card companies were selling information to the political parties, not just aggregate what was being purchased but by address of people's homes. And they had already done studies about how people were registering, whether they were independent, Democrat, Republican, which things they were buying. And it felt like that was cheating. But, you know, the team I was on knew the other team was doing it. So, everybody is doing it, 2003.

In 2006, I was approached by the second largest credit card company in the United States in my business, and I was doing, you know, in the millions of customers a year. And they said, hey, we can tell you in aggregate what your customers are buying in grocery stores and from that we can distill that and tell you what you ought to be selling in your business. And I thought, gee, that's a great thing. It felt a little bit like not fair, but I didn't see it as an aggregate problem. In 2013, they came and said, we can tell you what your competitors are doing and better than that, we can tell you by neighborhood what they are buying.

Along about that time, maybe a little bit before that, but certainly before where we are right now, cookies still meant something you ate. But now cookies to me are part of an evil thing that is invading our lives. You alluded to it a moment ago.

You are recommending, Mr. Scharre, a federal data privacy law. And I am in total agreement with that because the information that occurs in 2000 -- I'm going to take it to '20 and then let you respond, 2020, I acquired and also invested in a small company that was putting Wi-Fi devices in my businesses.

And every person who came in with their cell phone that wanted to use my Wi-Fi had to agree to my terms of service, which not only gave me a few things about their information, it told me their Mac address on their phone. It told me all of their contacts on Facebook, their contacts on their phone. It told me all kinds of things. Indeed, somebody walking by my place of business, it snatched their information, too.

That company later got purchased for a huge amount of money by one of the big social media firms because they had figured out how to collect this data.

So, there is this insidious collection all the way down to the person level now. And that can be used in a positive way with AI for medical. It can be used in positive ways for many things.

Do you have specific things you would like to see done in a federal data privacy law?

DR. SCHARRE: I mean, I think one of the most important things is transparency that one of the situations that you are describing is a market breakdown because there is this information asymmetry that when you are hitting -- you know, except even if you read through all the terms of service, you still don't really understand what information you are giving up, how it is being sued, where it is going. And consumers should have the ability to make intelligent choices about how they use their data. But we need to find ways to increase that transparency to make it simpler.

Clearly, you know, the situation with cookies now, when you just get this button you have to click to accept on, that doesn't really create transparency. And so, you know, I think getting there is going to be challenging, but I think that is the goal so that consumers can be more informed.

COMMISSIONER BOROCHOFF: So, we're running out of time. And a follow-up on that would be I am really asking you do you favor -- I'm not comfortable that transparency is enough. Do you favor some restrictions on online businesses being able to collect specific kinds of data?

DR. SCHARRE: There are probably going to have to be some restrictions or at least on ways that they can do it without consumers being like well informed and giving informed consent behind that. Absolutely.

COMMISSIONER BOROCHOFF: Thank you for that answer.

COMMISSIONER HELBERG: Thank you. Chairwoman Bartholomew.

CHAIRMAN BARTHOLOMEW: Thanks very much and thank you to all of our witnesses and forgive me if there is a lot of background noise. My cat is screaming.
Dr. Chen, I guess I want to start with you because I think that this whole issue of Taiwan's international organizations is something that Congress has thought a lot about, successive administrations have tried to do something about. And it certainly seems to me that the decisions that are being made in the institutions are political decisions that they are then trying to justify through legal interpretations.

But what more could we be doing to actually increase the ability of Taiwan to participate

in these international organizations?

DR. CHEN: Yes. That's a very good question. I think from Taiwan's perspective, I think consistent push is necessary. So even though Taiwan has been rejected time and time again into these international organizations, I think it is still important to keep up the momentum. And when China exerts political pressures, it often has to rely on some justifications. So that is why it has to lodge a legal warfare against Taiwan to convince other members in international organizations that it is the right thing to do although it is not.

So, I think the first thing is to correct those false premises as I discuss in my written testimony. So, for example, the U.N. General Assembly Resolution 2758 is obviously a huge question. But I think a lot of -- not a lot of attention has been paid to it.

And the interpretation of this resolution gives China some leverage to talk to international organizations and say, look, this is, just an extension of One China principle and therefore Taiwan should be banned. But as I said in my testimony, this resolution is only about Chinese representation in the international system.

So, I think we should begin to talk about Taiwan's representation. It is not about China's representation in the international system. We are talking about Taiwan's representation and the representation of Taiwan's 23 million people. And we are not even talking about Taiwan's sovereignty because this resolution does not reach this question, does not cover this question at all.

So, I think there are indeed a need -- there is indeed a need to address the very first beginning premises from which we can then build more consensus and momentum with other Democratic countries. Thank you.

COMMISSIONER CLEVELAND: You're muted, Carolyn.

CHAIRMAN BARTHOLOMEW: Sorry. Thank you. Thank you, Dr. Chen. A lot of -- I guess what I struggle with is activities and technology are outpacing legal systems. And so, I'm curious in terms of the surveillance technologies that other countries are buying from China. Are you aware -- is anybody aware that there are any violations of laws within the countries where that equipment is being acquired and used?

DR. SCHARRE: In most of the cases that I am aware of, the government is purchasing surveillance technologies that then it can use to establish a kind of mass surveillance systems. So, for example, Zimbabwe has bought Chinese cameras and facial recognition technology to put in bus stations and train stations and other public areas to track and monitor their systems.

And rather than, you know, that being counter existing laws, in fact what we will often see what the government is doing is passing new laws that then give that government some sweeping authorities to collect and surveil its citizens, to gather data and information to further enable the sort of end goal they are trying to achieve, which is to monitor and track their citizens.

CHAIRMAN BARTHOLOMEW: Thank you. I guess it is that issue of passing new laws. One might go back to thinking about what we were talking about in the first panel, right, this idea of China exporting rule by law instead of rule of law. And I am just struggling with seeing that, right?

I mean, if what is happening is governments are surveilling and tracking opposition in a lot of these countries and then implementing laws, that is essentially, I guess, a Chinese approach to the law that they are doing. So, what's happening is it is happening from both the ground up and institutionally from the top down. That is more of an observation than anything else. Does anybody have any thoughts about that?

DR. SCHARRE: I mean, I think, yes, I think it is a good characterization that what we

are seeing is the export of not just the technology and the ways of using it, but also these legal structures of rule by law that other countries -- Zimbabwe is a good case. They had a cybersecurity law passed in 2021 that has been criticized by human rights organizations for enabling this kind of surveillance and repression internally.

CHAIRMAN BARTHOLOMEW: Thanks. Anybody else have anything?

DR. KARDON: I would just add to this idea of what is the potential for export of Chinese rule by law and suggest there is a more general principle underlying it, which is they prize the discretion of sovereign states to determine whether and when and how international law is going to penetrate into their domestic sphere.

And that is the key export. It is not the substantive stuff because that is going to vary a lot over time. I think it will be very difficult to target. And this is an appealing stance for many countries in the world.

China is basically you have the authority as a sovereign to interpret these international legal obligations as you see fit, not as the Americans and the Europeans interpret them and courts in The Hague, et cetera. And I think that is the vehicle for exporting any number of these different types of potentially legally significant types of exports. Thanks.

CHAIRMAN BARTHOLOMEW: I think the challenge is really going to be trying to counter that. It is going to be a very difficult thing. Thank you to our witnesses.

COMMISSIONER HELBERG: Thank you. Commissioner Wessel.

COMMISSIONER WESSEL: Good afternoon. Yes, good afternoon. I apologize. I jumped in late to this session so I don't want to repeat -- I hope I don't repeat any questions. And I did hear the questions of Commissioner Mann, Helberg and Cleveland who addressed in part what I would like to raise, which is the issue of standards and how we look at frameworks going forward.

And as Congress and policymakers are looking at the question of what the future path of engagement should be with China, there are efforts to try and find areas of cooperation. And that has been true for a while. Health care is one, and climate is another, supply chain resilience as well.

But as I look at many of those issues, it appears that China is seeking advancement or advantage for the CCP rather than advantage for all. And as it relates to the standard setting approach, and we saw this with the ITU and the development of 5G standards, it was clear that the standards were being developed, again, with Chinese leadership and involvement to advantage Huawei.

We are now seeing in transportation infrastructure, and our staff to the great paper on LOGINK and the technology platform being offered free of charge that CCP sponsored, that would try and develop common standards and platform for logistics and transportation where the back end could provide enormous economic and national security intelligence benefits.

My question is do any of our panelists, and I will start with you, Mr. Scharre, see areas of cooperation where it will be for the common good rather than for advantage? Are there guardrails, guiderails, et cetera, that can be put in so we actually can find, you know, sort of the common good approach or are we on a path where there are going to have to be separate protective norms. We are seeing that in the U.S.-EU Trade and Technology Council, et cetera. So, are you optimistic or pessimistic about what can be done to find cooperative areas and should any guardrails be put into place?

DR. SCHARRE: Well, thanks so much for that question, Commissioner. I do think there is an important difference in cooperation and engagement. So, for on these technical standard

setting bodies, for example, we need to be engaging in these bodies, including with Chinese counterparts.

That doesn't mean we are necessarily cooperating with them to try to achieve the same standard, particularly if they are engaging in such a way that is trying to bias what should be a technocratic body, coming up with the best technical standards, and they are trying to bias in a way that is going to benefit Chinese companies. Then we should be cooperative with them. We are going to be cooperative with other partners to push back on what they are trying to do. But we don't want to be disengaged because we do want to be engaging in that process of setting these standards, working with others. We have certainly a vested interest in what are the standards that others adopt?

There was this incident several years ago in the Trump Administration when the Commerce Department first put Huawei on the entity list where very briefly, and the Commerce Department corrected this, a lot of U.S. companies that were engaging in these technical standard setting bodies said we can't go because their interpretation of the entity listing was they couldn't be in the same room with Huawei just talking with them. And so, like that is the kind of thing we want to avoid. That has been corrected. But I think we want to be active and engaged with them.

And I don't want to imply that in every instance they are biasing these standards in a class. It is not true. The 5G case is a classic case where they very much were. It's not true across the board. But we want to make sure that we are engaged and make sure these standards bodies do stay fair, and we can push back if we begin to see them putting their thumb on the scale in an unhelpful way.

COMMISSIONER WESSEL: Do you think there is enough expertise and continuity within the U.S. government to be able to pursue our interest there? You mentioned the ITU and the concerns about engagement.

I have often seen in terms of the review and engagement as Robin indicated in terms of our hearing that many of our participants came in with sort of a neutral scientific approach, a standards-based approach rather than an advantage-based approach. Has OSTP, NIST -- are OSTP, NIST and other entities up to the task in terms of pursuing our interests?

DR. SCHARRE: Well, there is a new -- my understanding is there is a new White House strategy on standards. It came out this morning. I have not had a chance to read it yet. But I think that is encouraging that there is energy coming out of the White House to do more. I wouldn't suggest that we are there yet. I don't think we should be trying to politicize the standard setting bodies. We want to keep them fair. But it is going to require additional engagement from the U.S. government, additional resources to make that happen.

A consistent concern that I have heard from people in industry is that the U.S. government has just not been engaged. And they want the U.S. government to be helping to support them as they are engaged in these standard setting bodies.

So, I do think that we are going to have to see NIST and OSTP do more on these types of engagements.

COMMISSIONER WESSEL: And just as a quick follow-up any comment on the TTC, the Trade and Technology Council, and, you know, your thoughts as to whether that is a productive enterprise and can be a counterweight going forward?

DR. SCHARRE: Well, the U.S. has had a number of these sort of unilateral groupings, the TTC, the Quad, which has a, you know, sort of tech component. I think they are good. We should double-down on them. I don't know that we have seen out of the TTC yet all of the

potential for what we could be doing.

There are meaningful differences between us and our European allies on a lot of these tech governance issues. But I think it is an important vehicle. We want to stay engaged with our allies in Europe and look for areas of common ground.

COMMISSIONER WESSEL: Thank you.

COMMISSIONER HELBERG: Thank you. So, we are now going to adjourn for an hour. And we will be back at 2:05 for our third panel. Thank you to our witnesses for sharing their expertise.

(Whereupon the above-entitled matter went off the record at 1:01 p.m. and resumed at 2:05 p.m.)

PANEL III INTRODUCTION BY COMMISSIONER CARTE GOODWIN

COMMISSIONER GOODWIN: Welcome back. For our third and final panel today, we will address Chinese law and parties in the U.S. court system and how Chinese courts seek to influence U.S. proceedings.

The panelists will discuss issues with the U.S. judicial system's treatment of Chinese judicial rulings, the extension of judicial comment into Chinese courts and CCP attempts to advance liberal values and non-market practices through U.S. judicial proceedings.

First, we are glad to welcome Don Clarke, David Weaver Research Professor of Law at George Washington University Law School, who will address the U.S. court systems domestic treatment of China's laws.

Second, we are glad to welcome Diego Zambrano, Associate Professor of Law at Stanford University, who will address how the party has used the U.S. court system to target dissidents and critics around the world.

And our final panelist, Mark Cohen, Asia IP Project Director at the Berkeley Center for Law and Technology, will address how U.S. firms are treated by China's court system in issues relating to anti-suit injunctions and Chinese IP litigation.

Thank you again for your testimony. And I want to remind everyone to keep their remarks to seven minutes, and Mr. Clarke, we will begin with you.

OPENING STATEMENT OF DONALD CLARKE, DAVID WEAVER RESEARCH PROFESSOR OF LAW AT GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

MR. CLARKE: Thank you, Commissioner Goodwin. I am very pleased to have the opportunity to address the Commission today.

If you were to read the mainstream news media, you would get a consistent message about China and the Chinese legal system. It is an authoritarian dictatorship. Judges do as they are told. They receive instructions from political superiors, and there is no meaningful judicial independence.

But in my experience as an expert witness in U.S. litigation, I found that a surprising number of federal and state judges, who presumably read the mainstream media, are not getting the memo. 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 was not to prove their point and then the judges set the bar for that proof very high.

And so, this experience prompted me to undertake a systematic study just to try to figure out more accurately what courts were actually doing. And in so doing, I looked at the two main types of cases where U.S. courts have to make some kind of judgment about the quality of the quality of the Chinese legal system.

The first kind is enforcing a Chinese judgment. So, a plaintiff sues a defendant in China. They win. And then they come to the U.S. court with this judgment in hand and say, please enforce the judgment, presumably because the defendant has assets in the U.S. And then the enforcing court has to have some confidence that the Chinese judgment was fairly procured and so they have to come to some conclusion about how the Chinese court system operates.

And then the second type of case involves a judicially created doctrine called forum non conveniens, which I am going to call FNC. And in a typical case of this kind, it is a plaintiff suing a defendant in the United States. And the defendant says for various reasons that it would make more sense for this case to be heard in China. Maybe the tort occurred in China. Maybe all the witnesses are in China. And under this doctrine the court may, at its discretion, decide to dismiss to China and tell the plaintiff to go try its luck there.

And so, of course, in this case also the doctrine requires that the court satisfy itself that the plaintiff has at least some kind of a fighting chance in China or whatever the other jurisdiction may be.

And so, I collected all of the China related cases I could find regarding judgment enforcement or FNC in the whole post-Mao era through mid-'22 and ended up with a data set of about 16 enforcement cases and 60 FNC cases. And I looked at all of the underlying filings as well as well as just the judicial opinions to get a sense of what kind of information were the courts getting and how were they using this information. So, I was looking at the briefs by the attorneys, expert witness statements, if any, and other papers like that.

So here are my bottom line findings. So first of all, I found my personal experience to be borne out. American judges do tend to be skeptical of arguments that judicial independence is seriously compromised or that due process is denied even though parties have raised these official U.S. State Department human rights reports showing the contrary.

One judge, for example, this is my favorite example, granted a forum non conveniens dismissal to China while conceding that dismissal would not be appropriate where the courts of that country were controlled by a dictatorship thus implicitly making the somewhat startling finding either that China is not a dictatorship or that although it is a dictatorship, its government

does not control its courts.

Second, in FNC cases dismissal to China was granted 37 percent of the time. So, this is way more than it should be given that the applicable doctrine calls for FNC dismissal to be granted only rarely. And you should almost always let the plaintiff sue where they bring suit. But, you know, at least it is less than half.

Somewhat more troubling is when you look at it by jurisdiction, federal versus state courts. And I found that state courts granted FNC dismissal, thus implicitly finding that the Chinese court system was an adequate forum in 6 out of 10 cases. Federal courts granted it in only 3 out of 10 cases.

Moreover, although the issue with China's adequacy as a forum was not always disputed, when it was disputed those who argued it was adequate won more often than they lost.

In enforcement cases, the picture is a little more mixed. So, in terms of pure numbers, the recognition was granted in 6 out of 16 cases, but the numbers themselves are not very illuminating because recognition might be granted or denied for reasons that have nothing to do with the court's assessments about the Chinese legal system. For example, one party doesn't show up.

Overall, I guess I would class 7 of the 16 as favorable in theory or in principle to those seeking recognition, 5 are not favorable, 3 are neutral and 1 is still pending.

On the whole though, I guess I would say in terms of results, the overall picture in the context or judgment enforcement isn't especially alarming at present. But I do have concerns about the future because of the way things are going.

So basically, the defendants who lost in these judgment enforcement cases, with only one exception, were defendants who had in some way already really implicitly or in effect voluntarily agreed to jurisdiction by Chinese courts or else they just simply failed to show up.

The problem really that both the FNC and the enforcement cases show is that there is very little genuine inquiry into the nature of the Chinese legal system. The evidence on which courts are making decisions is very thin. And thus, as a substitute for empirical inquiry, what they are doing is relying on precedents without inquiring into what really went on in those precedents.

And therefore, one careless mistake in finding by one court can spread quickly throughout the system. And even cases that aren't mistaken tend to get cited by courts and lawyers in support of findings they never made. And in my written testimony, I refer specifically to a Supreme Court case called Sinochem, which is the poster child for a case that is always cited for something it doesn't actually stand for.

And it is the effects of these unexamined precedents that concern me the most. So, as they build up in the absence of any countervailing authority, they will encourage the creation of even more precedents in a vicious cycle and that will have an increasingly pernicious effect.

So, my conclusion is that any doctrine that requires courts to assess the Chinese legal system for themselves really makes impossible demands on the court system and can't function as intended. It would be an appropriate exercise of Congressional or executive power in foreign affairs to provide specific guidance to the courts in these areas. Thank you.

COMMISSIONER GOODWIN: Thank you very much. Professor Zambrano.

PREPARED STATEMENT OF DONALD CLARKE, DAVID WEAVER RESEARCH PROFESSOR OF LAW AT GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

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

[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.

[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

[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

[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,

[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

[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]

[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

[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

[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

[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).

Figure 1: Result of FNC Motions

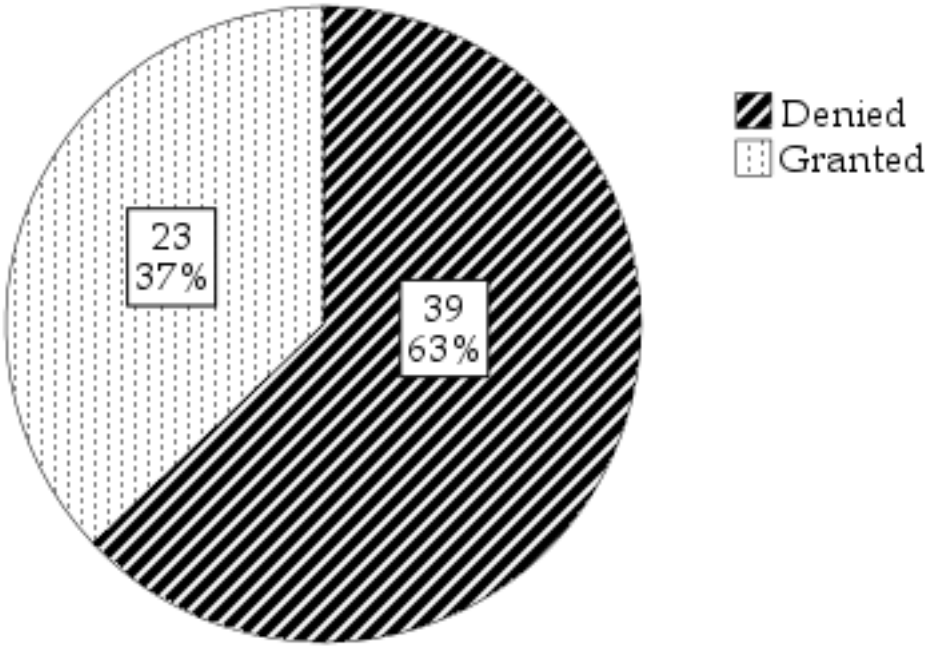

Figure 2: Result of FNC Motions by Jurisdiction

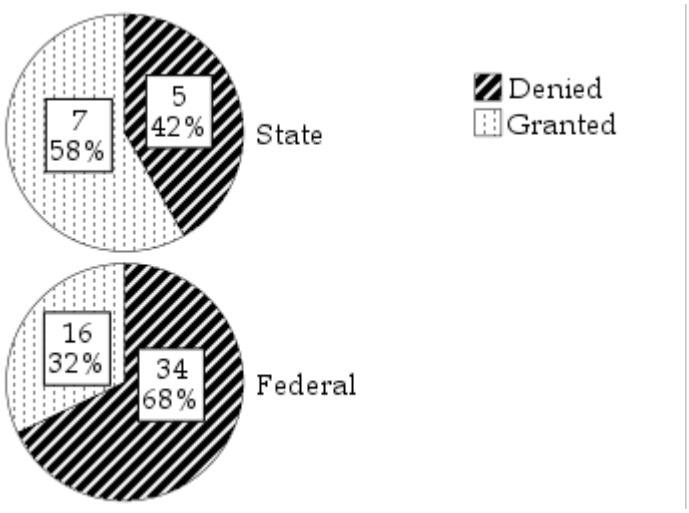

Figure 3: Result of FNC Motions over Time

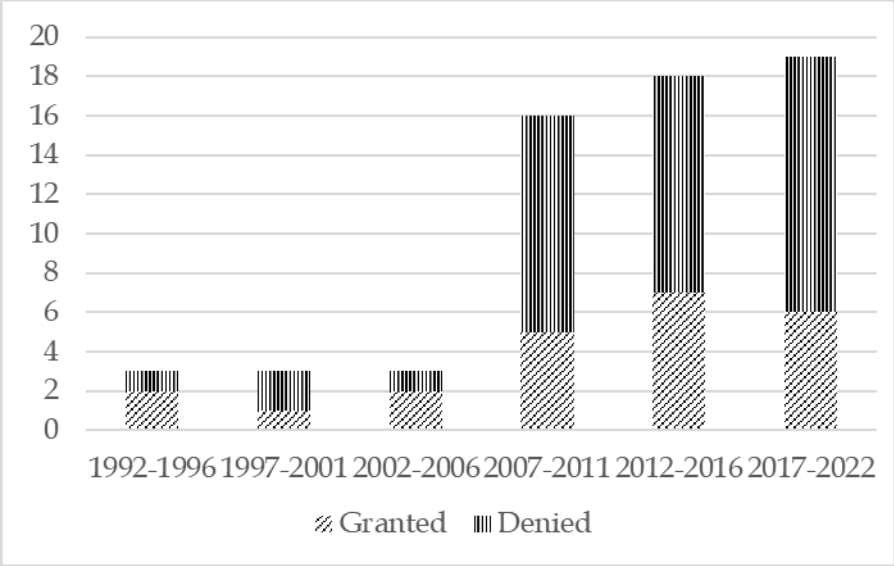

Table 1: Adequacy Findings

	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%

OPENING STATEMENT OF DIEGO ZAMBRANO, ASSOCIATE PROFESSOR OF LAW AT STANFORD UNIVERSITY

MR. ZAMBRANO: Thank you to the Commission for the opportunity to provide views on the influence of the Chinese government in U.S. courts.

The main point of my presentation today is to explain that foreign authoritarian governments, including China, have relatively easy access to our courts and in some instances have abused that access to go after political dissidents or newspapers in the United States. But there is no need to allow this. As I will recommend later, Congress can adopt a straightforward fix that will help defendants beat back these political harassment claims.

Stepping back, I am a scholar of civil procedure and transnational litigation. My research focuses on the legal rules governing cases in U.S. federal courts. So, my focus today is on U.S. courts and not foreign policy.

Much of my testimony will address the problem of foreign authoritarian governments filing civil cases in U.S. courts. So, in basic terms, there is evidence that authoritarian regimes from Russia, Venezuela, Turkey (Türkiye) and China are filing frivolous cases in our courts with the sole goal of imposing legal costs on their targets, be it political dissidents or newspapers. And sometimes they want to force those targets to return to their home countries.

So, this means if a political activist or a journalist runs afoul of the Chinese or Russian governments, those regimes are exporting their oppression to our courts. The Chinese government can do this because U.S. procedural rules are permissive. They make it very easy for foreign governments and companies to file claims in our courts.

So, my testimony, I want to cover three parts. First, I will explain the legal rules that govern the presence of foreign governments in U.S. courts. Second, I will discuss how China seems to be taking advantage of these rules. And finally, I will offer a recommendation for actions that the Commission ought to consider, including a congressional statute.

So, let me begin with two basic points about our legal framework. First, the Foreign Sovereign Immunities Act provides that foreign countries enjoy immunity from suit in U.S. courts. That means it is very difficult to file a claim against any foreign government. If you do so, it will be immediately dismissed.

The FSIA, the Foreign Sovereign Immunities Act, does provide a few exceptions, including for claims over commercial activity or terrorism. But those are very narrow.

Second, foreign sovereigns enjoy the privilege of access to U.S. courts as plaintiffs, either directly or indirectly through state-owned companies or proxies. There are no barriers. The Chinese government can file any case they want. A state-owned company can do that. The Supreme Court recognized this in a canonical 1867 case involving the rights of the French emperor to file suit in our courts.

So, the combination of these two features, immunity as defendants but limitless access to courts as plaintiffs creates an asymmetry. Foreign dictators and their proxies can exploit access to our courts to harass any opponents in the United States, but their regimes are in turn immune from lawsuits here.

Now you may wonder whether any of our laws single out foreign authoritarian governments for different treatment. And it turns out that they don't. Both the Foreign Sovereign Immunities Act and the privilege of bringing suit apply equally to democracies and dictatorships.

The Supreme Court has implied that courts should not draw distinctions between government types when it comes to immunity and access to courts. Because of this equal treatment principle, courts have long accepted foreign authoritarian governments as litigants.

In my study looking at post-1945 cases, I found more than 100 cases in U.S. courts involving more than 20 dictators. You see names like Mao Zedong, Fidel Castro, Augusto Pinochet, Ferdinand Marcos, Saddam Hussein. Sometimes they are defendants. Sometimes they are plaintiffs. And more recently, you observe official parties that are proxies of a government, a state-owned company, lower level officials or cronies.

So, focusing specifically on the topic of discussion today, China has been one of the worst offenders. In 2014, a Chinese anti-corruption program announced a legal war against corruption suspects around the world.

In this war, Chinese companies filed tort, breach of contract claims. Claims that looked like any other type of claim against dissidents who have recently fled to the United States. And they do so with the goal of not only imposing costs on them but also to try to force them to return to China.

The use of proxies, or state-owned companies, conceals the involvement of the Chinese Community Party. But some Chinese officials have actually acknowledged that this is a strategy. Some of them have admitted in publications that the lawsuits are manufactured and have celebrated when the pressure worked to force a dissident to return to China.

This was the case of Peng Xufeng, who claims that he fled China after he refused to testify against enemies of the Chinese premier Xi Jinping. In response, Chinese officials allegedly harassed him in California, smashed his windows, arrested his family in China and eventually used a state-owned company to file a civil claim against him in U.S. courts. We have observed this with other political dissidents in the U.S. as well.

Now to be sure, China claims that these defendants violated criminal law in China and they were not persecuted because they were dissidents or refugees. But that is irrelevant. China is violating basic norms of diplomacy when it uses bogus U.S. civil lawsuits to pressure these defendants rather than rely on traditional negotiations with the State Department or the Department of Justice.

And it is difficult to overstate how difficult it can be for a political dissident to deal with these claims. Legal costs, discovery obligations, court dates, traveling to court, securing an attorney, et cetera, et cetera. These are serious impositions.

It is also difficult to measure the scale of harm to democracy and political dissidents. We can identify dozens of such claims in U.S. courts, but most cases are going to remain hidden because these governments are using proxies.

Moreover, the most important effect is that this can have a chilling effect on other dissidents, even one successful claim tells any political opponent in the U.S., you are not out of our reach. We can still get you by filing these claims in U.S. courts.

There are currently no straightforward legal tools for defendants to quickly dismiss these claims. And that is why my proposal is that Congress should make it easier for these defendants to file a motion to dismiss, a special motion to dismiss, so that these claims can be dismissed immediately before costs and legal proceedings.

And the best way to do that is to adopt a statute that subjects the privilege of bringing suit to the robust procedural protections of an anti-SLAPP provision. I am happy to talk more about that. Thank you.

COMMISSIONER GOODWIN: Thank you very much. Mr. Cohen.

PREPARED STATEMENT OF DIEGO ZAMBRANO, ASSOCIATE PROFESSOR OF LAW AT STANFORD UNIVERSITY

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

Diego A. Zambrano[1]
May 4, 2023

Introduction

Thank you to the Commission for the opportunity to provide views on the influence of the Chinese government on U.S. courts. The main point of my presentation today is that foreign authoritarian governments, including China, have relatively easy access to our courts and, in some instances, have abused that access to go after political dissidents or newspapers in the U.S. But there is no need to allow this—Congress can adopt a straightforward fix that would help defendants beat back these political harassment claims.

Stepping back, I am a scholar of civil procedure and transnational litigation. My research focuses on the legal rules governing cases in U.S. federal courts. The transnational part of my research studies cases in U.S. courts involving foreign parties, foreign laws, and foreign nations.[2] My focus today is on U.S. courts and not foreign policy: what is happening in U.S. court cases involving foreign governments? How do the rules of civil procedure interact with cases involving the Chinese government or proxies? As my focus is not on analyzing foreign policy or the internal goals of the Chinese Community Party, I will leave it to the other distinguished experts on the panels to answer your questions about those topics.

Much of my testimony will address the problem of foreign authoritarian governments filing civil cases in U.S. courts in order to pursue political ends. There is evidence that authoritarian regimes from Russia, Venezuela, Turkey, and China, are filing frivolous civil cases in our courts with the goal of imposing legal costs on their targets, be it political dissidents or newspapers. This means that if a political dissident or newspaper runs afoul of the Chinese or Russian governments, those regimes are exporting their oppression to our courts by imposing potentially crippling legal costs. One surprising aspect of all of this is that you might expect these authoritarian countries to mostly be present in U.S. courts as defendants in human rights or expropriation cases. But, it turns out, these countries are surprisingly filing claims *as plaintiffs* either directly or through proxies.

The Chinese government has been one of the worst offenders. An investigation by the Wall Street Journal, relying on sources in the FBI and State Department, found that China has used legal claims to go after Chinese dissidents who fled to the U.S. And we have solid evidence that this is part of a plan orchestrated by the CCP's—in the words of a Chinese official—multidimensional "legal war" against Chinese emigres. In this war, Chinese companies file tort and breach of contract claims against dissidents who have recently fled to the United States to pressure them to return to China. While the use of proxies conceals the involvement of the CCP in political harassment lawsuits, some Chinese officials have acknowledged using U.S. litigation to intimidate Chinese

[1] Associate Professor, Stanford Law School. Most of the content in this written testimony comes directly from my article, Diego Zambrano, *Foreign Dictators in U.S. Court*, 88 U. CHI. L. REV. 157 (2022).
[2] *See e.g.*, Diego A. Zambrano, *How Litigation Imports Foreign Regulation*, 107 VA. L. REV. 1165 (2021).

dissidents. Some Chinese officials have even admitted that the lawsuits are manufactured and seek only to drain defendants' financial resources.[3]

The Chinese government can do this because U.S. procedural rules are permissive: they make it very easy for foreign governments and parties to file claims in our courts.

But our procedural system does not have to work this way and we need not lend our courts to Chinese oppression. The final part of my testimony offers a series of recommendations for actions that the Commission ought to consider. In short, Congress should adopt a statutory fix that would increase the burden on foreign government plaintiffs (or proxies) to demonstrate that their case has merit before they can impose crippling legal costs on the defendants. There would be nothing innovative or out of the norm in this statute because it would resemble what more than twenty states already do in their Anti-SLAPP statutes. I call it a Foreign Sovereign Anti-SLAPP law.

My testimony today will divide into three parts. First, I will explain the legal rules that govern the presence of foreign governments in U.S. courts, either as defendants or as plaintiffs. I'll explain the role of the Foreign Sovereign Immunities Act and the so-called foreign privilege of bringing suit. Second, I will discuss how China seems to be taking advantage of the U.S. legal system to pursue political goals and suppress dissidents. Finally, I will lay out my proposal for a Congressional fix: a Foreign Sovereign Anti SLAPP statute.

I. Foreign Governments in U.S. Civil Cases

Let me begin with the basic legal framework that governs the relationship between foreign countries and U.S. courts: the Foreign Sovereign Immunities Act. I will then explain why foreign sovereigns can file cases in U.S. courts. But, in basic terms, I will lay out two findings. First, foreign sovereigns enjoy immunity from suit in U.S. courts. That means that it is very difficult to file claims against any foreign government in U.S. court. Second, foreign sovereigns enjoy the privilege of access to U.S. courts as plaintiffs, either directly or indirectly through state-owned companies or proxies. This, in contrast to their role as defendants, means that it is very easy for foreign governments to access our courts. The combination of these two findings creates an asymmetry: foreign dictators and their proxies can exploit access to our courts as plaintiffs to harass their opponents, but their regimes are, in turn, immune from lawsuits here.

A. Foreign Sovereign Immunities Act

Congress adopted the Foreign Sovereign Immunities Act in 1976, codifying the doctrine that foreign sovereigns are immune from suit in U.S. court. In basic terms, the FSIA grants all foreign sovereigns a baseline immunity from suit. Unless it fits into an exception, an American company or individual cannot sue a foreign sovereign like China. If you tried to sue China, a U.S. court would immediately dismiss your claim as barred by the FSIA.

[3] Aruna Viswanatha & Kate O'Keeffe, *China's New Tool to Chase Down Fugitives: American Courts*, WALL STREET JOURNAL (July 29, 2020).

The FSIA is rooted in principles of reciprocity and international comity. The idea is that the U.S. government grants respect and dignity to foreign sovereigns in U.S. courts by shielding them from legal claims and, in return, expects that foreign governments will similarly give the U.S. immunity in their courts.

But the FSIA embraces only a restrictive version of immunity, providing that while foreign sovereigns enjoy a baseline of immunity there are also important exceptions. These include cases where the foreign sovereign contractually waives immunity, participates in commercial activity in the United States, takes property in violation of international law, sponsors terrorism, or causes tortious acts in the U.S.[4] Other than the state-sponsored terrorism exception, the FSIA does not draw distinctions among regime types, be it democracy or dictatorship.

The FSIA is in line with international practice and also with other U.S. doctrines that shield foreign sovereigns when they are defendants in U.S. courts. For example, under the act of state doctrine, U.S. courts refuse to judge the validity of a foreign government's official act "done within [their country's] own territory."[5] In other words, if a plaintiff sues a foreign government in U.S. court over an act performed in a foreign country, U.S. courts refuse to inquire into the validity of the foreign sovereign's act. The Supreme Court has justified this doctrine as avoiding threats to "the amicable relations between governments and vex[ing] the peace of nations."[6] Courts have stuck to this doctrine regardless of the government in power. In addition to these foreign or external considerations, there are also concerns with separation of powers built into the doctrine.

Before moving on, notice that the FSIA mostly addresses the relationship between U.S. courts and foreign governments as *defendants*. It has very little to say about foreign governments as plaintiffs.

B. Foreign Sovereigns as Plaintiffs

Setting aside the FSIA, U.S. courts have long recognized that foreign countries can also file cases as plaintiffs in U.S. courts. Under the so-called "privilege of bringing suit," the Supreme Court long ago recognized that "sovereign states are allowed to sue in the courts of the United States."[7] In a canonical 1867 case, an American ship collided with a French transport ship named *The Sapphire* near San Francisco. The French government—in the name of the emperor—then filed suit in a U.S. district court to recover damages for the crash. With a monarch as plaintiff, the question presented to the U.S. Supreme Court was whether "the French Emperor [could] sue in our courts."[8] The Court held that foreign sovereigns were allowed to "prosecute [cases] in our courts," because to deny them that privilege "would manifest a want of comity and friendly feeling."[9] The Court rooted this privilege, among other areas, in Article III of the U.S. Constitution, noting that "[t]he Constitution expressly extends the judicial power to controversies between a

[4] DAVID P. STEWART, FEDERAL JUDICIAL CENTER, THE FOREIGN SOVEREIGN IMMUNITIES ACT: A GUIDE FOR JUDGES 41 (2013), https://www.fjc.gov/sites/default/files/2014/FSIAGuide2013.pdf. The FSIA draws on a long common law tradition of immunity that goes back to a case called The *Schooner Exchange*. That case first established the basic rule that foreign sovereigns enjoy blanket immunity from process in U.S. courts.
[5] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964).
[6] *Id*. at 418.
[7] *Id*. at 408–09 (citing The Sapphire, 78 U.S. (11 Wall.) 164, 167 (1870)).
[8] *The Sapphire*, 78 U.S. at 164.
[9] *Id*. at 167.

State, or citizens thereof, and *foreign States*, citizens, or subjects."[10] Importantly, the Court explicitly refused to distinguish between Napoleon as emperor and his potential successors in France, noting that "[t]he reigning Emperor, or National Assembly, or other actual person or party in power, is but the agent and representative of the national sovereignty."[11] The privilege of suing in our courts, the Court affirmed, was given to the foreign sovereign, regardless of who was officially in power.

With that said, keep in mind that foreign companies are independently given access to U.S. courts. To file a lawsuit in U.S. federal courts, a foreign company just needs to satisfy basic subject matter jurisdiction requirements—mostly that it is suing under federal law or diversity jurisdiction. This means that foreign governments can enter U.S. courts through state owned companies or even proxy companies that they indirectly control.

C. Foreign Authoritarian Governments

With the basic legal framework established, let's now move on to the case of foreign authoritarian governments in U.S. courts. As I mentioned before, both the FSIA and the privilege of bringing suit apply equally to democracies and dictatorships. The Supreme Court has implied that courts should not draw distinctions between government types when it comes to immunity and access to courts. I call this an "equal treatment" principle. Lower courts have repeatedly declined to distinguish between foreign government types, instead embracing regime-neutral doctrines. This principle traces back to *The Sapphire*, where the Court refused to distinguish between "[t]he reigning Emperor, or National Assembly, or other actual person or party in power."[12] And this approach resembles the domestic "equal sovereignty" principle.

Because of the equal treatment principle, courts have long accepted foreign authoritarian governments in our courts. Indeed, the first landmark case involving a foreign autocrat was filed in 1811, when two boat owners sought to reclaim a ship that, allegedly, was "violently and forcibly taken by certain persons, acting under the decrees and orders of Napoleon." So began two hundred years of interactions between our courts and foreign authoritarian governments.

It is quite easy for foreign dictators or their proxies to access our courts. Foreign governments can thus exploit this access, benefiting from the privilege of bringing suit for any purpose, legitimate or illegitimate.

Looking specifically at post-1945 cases, dictators have been common litigants in U.S. courts. In a previous study focusing on just twenty dictators in the past few decades, I found more than one hundred cases across U.S. district courts. These include names like Mao Zedong, Fidel Castro, Augusto Pinochet, Ferdinand Marcos, and Saddam Hussein. Usually, the official party named in the suit was the country's government or an instrumentality like a central bank. Many claims against foreign dictators were based on the Alien Tort Statute and Torture Victim Protection Act;

[10] *Id*. (emphasis in original).
[11] *Id*. at 168.
[12] *Id*.

some involved torts, extradition, and criminal prosecutions; others were about disputes over sovereign funds; and, of course, a few involved expropriations disputes.[13]

More recently, official parties tend to be proxies, lower-level officials, or cronies. As I will discuss in a moment, the Chinese Communist Party has filed civil cases in U.S. courts through proxy companies or agents, potentially to conceal its involvement in harassment lawsuits. Other cases included countries like Venezuela, Cuba, Iran, the Philippines, Russia, Turkey, and China. Sometimes, however, the dictator was named in his individual capacity, including cases against Ferdinand Marcos, Jiang Zemin, and Radovan Karadžić.

That foreign governments can indirectly file claims through proxies means that it is difficult to quantify their true involvement in our courts. Consider that the CCP can simply ask a state-owned company to file a claim against a political target in the U.S. As I mentioned before, foreign companies have easy access to U.S. courts through diversity or federal question jurisdiction. Absent specific intelligence, we would never know if this was a legitimate claim or government harassment. This means that the CCP, Putin, or Maduro can engage in harassment campaigns against opponents, using U.S. discovery and other procedures to their advantage.

Even if the number of claims was small, litigation can have an outsized chilling effect on opponents. Even a single case is enough to cause concern. At the same time, victims have a difficult time suing foreign dictators. Even just in theory, these rules and statutory provisions provide cover for the most egregious acts.

D. Foreign Authoritarian Governments as Plaintiffs

Setting aside cases in which foreign authoritarian governments are defendants, there do appear to be a sizable number of cases involving dictators as plaintiffs in the past few decades. From Mao Zedong's fight with the Kuomintang in a 1952 Northern District of California case to Fidel Castro's 1964 attempt to enforce expropriations in the Southern District of New York, dictators have become a recognizable presence in U.S. courts. Notably, in a 1960s case, *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court firmly established the principle that foreign authoritarian governments can file cases in U.S. courts. The Court allowed Fidel Castro's government to file suit in U.S. court and to benefit from U.S. comity doctrines. The Court explicitly rejected the argument that Cuba "should be denied access to American courts because Cuba is an unfriendly power and does not permit nationals of this country to obtain relief in its courts."[14] *Sabbatino* rested on two pillars: the potential harm to the nation's foreign relations and the difficulty of assessing which foreign regimes deserve different treatment. By treating Cuba's dictatorial regime like any other sovereign, *Sabbatino* reinforced the equal treatment principle I mentioned before.

Foreign dictators litigate a variety of cases in U.S. courts as plaintiffs. Sometimes there are disputes over sovereign funds deposited in U.S. banks. Typically, foreign countries deposit funds in U.S. financial institutions to conduct sovereign transactions. These funds become a source of litigation when democratic opponents contest a dictatorial regime's power, both claiming to represent the

[13] Some of these claims involve the application of foreign authoritarian law in our courts. Mark Jia, *Illiberal Law in American Courts*, 168 U. PA. L. REV. 1685, 1691 (2020).
[14] *Sabbatino*, 376 U.S. at 408.

country. These cases are, at bottom, about executive recognition of foreign regimes. To name a few, Venezuela, China, Iran, Chile, Nicaragua, and Panama have all had dictators litigate against competing leaders over funds that nominally belong to their respective countries. For example, in 1988, Panamanian President Eric Arturo Delvalle dismissed the then-reigning dictator Manuel Noriega from his military post in Panama. But Noriega refused to step down, setting up a parallel administration to govern the country. This turmoil pushed Delvalle to file a case in U.S. court, seeking to freeze all Panamanian funds deposited in several bank accounts. This, in turn, prompted Noriega's regime to file motions to intervene in the case. Ultimately, the court deferred to the U.S. president's recognition of Delvalle as the representative of "the only lawful government of the Republic of Panama," freezing the funds and putting them at the order of the Delvalle administration. The Panama cases closely resemble cases involving the Shah of Iran, Augusto Pinochet, and Tachito Somoza.

Foreign dictators have also filed cases in the United States to enforce property expropriations. Although expropriations typically take place in a foreign country, they can often have ramifications for U.S. individuals, companies, and funds. Notably, communist regimes—including those in Cuba, Nicaragua, Venezuela, and the Soviet Union—initiated prominent expropriation cases in U.S. courts. And, on closer inspection, many of these cases resulted from dictators' attempts to consolidate power. For instance, when Fidel Castro gained power in 1959, he selectively expropriated strategic businesses to neutralize potential opposition. As I mentioned above, this led to a legal dispute between Cuba and a U.S. company.

E. The Asymmetry of Foreign Authoritarian Governments

The doctrines I have laid out above—the FSIA, the privilege of bringing suit, and courts' refusal to distinguish between democracies and dictatorships—create a problematic asymmetry: foreign dictators and their proxies can access our courts as plaintiffs to harass their opponents, but their regimes are, in turn, usually immune from lawsuits here. For example, in 2016, a top-ranking Venezuelan official sued the *Wall Street Journal* for defamation over an article linking him with drug trafficking. But if the *Wall Street Journal* had tried to sue a Venezuelan official for harassment of its journalists, the case would likely have been dismissed under common-law immunities. Or, for example, consider that the DNC sued Russia for its cyberattacks during the 2016 election. While Russia has pursued dissidents in U.S. courts in a variety of ways, a judge recently held that Russia was itself immune under the FSIA.[15]

Our legal system, then, seems to insulate dictators from the downsides of U.S. law while allowing them to reap the benefits of access to court. This asymmetry makes foreign sovereigns—and specifically foreign dictators who are willing to exploit access to U.S. courts—a unique kind of litigant, worthy of special attention.

The most worrisome cases involve efforts by foreign dictators to exploit the U.S. judiciary to their advantage. Regimes dress up these cases as run-of-the-mill claims: defamation, contract claims, enforcement of foreign awards, 1782 discovery requests, or bankruptcy disputes. Sometimes state-

[15] *See* Sam Kleiner & Lee Wolosky, *Time for a Cyber-Attack Exception to the Foreign Sovereign Immunities Act*, JUST SECURITY (Aug. 14, 2019), https://www.justsecurity.org/65809/time-for-a-cyber-attack-exception-to-the-foreign-sovereign-immunities-act/.

affiliated companies—like China's Huawei or Russia's Kapersky Lab—sue in U.S. courts to pursue seemingly commercial interests that are, on closer look, aligned with an authoritarian regime's goals. Notable cases involve dictatorships in China, Venezuela, Russia, and Turkey. While many cases have been successful, some of these claims have been dismissed at early stages.

To be sure, this asymmetry applies to all foreign states, regardless of regime type. But the asymmetry has particularly worrisome consequences in dictator-related cases because foreign authoritarians go on the offense against democratic opponents, newspapers, and dissidents in the United States. There appear to be no cases of democracies taking advantage of our courts this way. And, importantly, democracies usually give Americans access to foreign court systems. Dictatorships, by contrast, generally block any cases that have political implications. This lack of reciprocal access and willingness to exploit our courts is what makes foreign dictators unique kinds of litigants. Setting aside the FSIA and other immunities, doctrines that benefit dictators, like act of state and the privilege of bringing suit, are based on shaky premises that open them up to abuse or manipulation.

II. China's Use and Abuse of U.S. Courts

China has been one of the most prolific foreign authoritarian governments to take advantage of U.S. courts. In 2014, a Chinese anti-corruption program announced a "multidimensional legal war" against corruption suspects around the world.[16] As part of this plan, the Chinese government decided to "sue fugitives in American courts" with the goal of harassing defendants, draining their financial resources, and forcing them to return to China.[17] But instead of filing those cases in China's sovereign capacity, the program recruited state-owned businesses to do its bidding. This has resulted in several civil cases in state and federal courts, on claims ranging from breach of fiduciary duty to fraud. Surprisingly, Chinese officials have called "the lawsuit strategy a success, publicly citing one of the suits as helping to force one of their most-wanted home."[18] U.S. officials, however, have called the lawsuits an "effort to pursue political targets rather than just criminal ones."[19] The Chinese suits have apparently been paired with physical harassment, stalking—including by Chinese agents dressed as "fake FBI officials"—and outright threats.[20] All of this appears to be an organized attempt by a foreign dictatorship to use U.S. civil lawsuits for political ends. The most galling aspect of this is that Chinese officials have admitted that the lawsuits are manufactured and seek only to drain defendants' financial resources.

Take the case of Peng Xufeng, who claims he fled China after he refused to testify against enemies of the Chinese Premier, Xi Jinping. In response, Chinese officials allegedly harassed him in California, smashed his windows, arrested his family in China, moved his child to an orphanage, and, finally, used a state-owned company to sue him in U.S. court.

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[16] Aruna Viswanatha & Kate O'Keeffe, China's New Tool to Chase Down Fugitives: American Courts, WALL ST. J. (July 29, 2020, 10:29 AM), https://www.wsj.com/articles/china-corruption-president-xi-communist-party-fugitives-california-lawsuits-us-courts-11596032112.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*

Or consider Xiao Jianming, a Chinese businessman who fled to the United States. In 2019, a Chinese state-owned company sued Xiao and his daughter in U.S. courts, alleging that Xiao diverted to his daughter hundreds of thousands of dollars in company funds. Facing this costly lawsuit, Xiao returned to China. Immediately thereafter, the company dismissed its U.S. claim and, simultaneously, a Chinese anticorruption entity called the Central Commission for Discipline Inspection celebrated the success of the litigation pressure.

To be sure, China claims that these defendants violated criminal law in China and were not persecuted because they were dissidents or refugees. But this is irrelevant. China is violating basic norms of diplomacy when it uses bogus U.S. civil lawsuits to pressure these defendants, rather than rely on traditional negotiations with the State Department or the Department of Justice.

Let me say a few words about the potential success of these lawsuits. It is hard to overstate how difficult it can be for a political dissident to deal with these claims. To begin, of course, a simple case has the potential to impose high legal costs. When a Chinese dissident faces a lawsuit in U.S. court, they must retain legal counsel, a task that may be routine for sophisticated entities but can be difficult for individuals and especially recent immigrants. If there are language barriers, the defendant has to determine a way to communicate with their lawyer. The target must then prepare legal documents and stay on top of a developing case in a legal system that may be totally foreign. And if the case continues, the defendant must comply with discovery requests that can seek a wealth of documents or can force the defendant to sit down for a deposition.[21] The litigation process can pile on more burdens, court dates, traveling to distant fora, communicating with and supervising an attorney, and costly motion practice. These difficulties will be even heavier for a recent immigrant with few connections, piling on anxiety and legal and psychological costs. If you then combine this with explicit threats from China against family members who are still abroad, no wonder, then, that some dissidents have returned to China.

The complete scale of harm to political dissidents and democracy is also hard to measure. Although we can identify dozens of claims across U.S. courts, most cases likely remain hidden because authoritarian governments use proxies to file them. Moreover, these claims may be most significant because of litigation's chilling effect on other dissidents and journalists. Even a single claim sends a powerful message to would-be critics: if you are in the United States, we can bring our harassment to U.S. courts. Comply with the CCP's demands or else.

As if this were not difficult enough, consider that pesky asymmetry I mentioned earlier: when the Chinese government is a defendant in U.S. courts, they can take advantage of the FSIA and other doctrines like head-of-state immunity and act of state to avoid liability and quickly dismiss cases. For example, in 2004, a group of unidentified plaintiffs belonging to the Chinese group Falun Gong filed a claim against China's former premier, Jiang Zemin, while he traveled through the United States. Plaintiffs' alleged that Jiang "organize[d] and direct[ed] the suppression of Falun Gong throughout China," leading to a series of human rights violations, rape, execution, disappearances, and torture.[22] The U.S. government, however, filed an amicus brief suggesting that

[21] For a broader discussion of discovery, *see e.g.*, Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71 (2020).
[22] Plaintiffs A, B, C, D, E, F v. Jiang Zemin, 282 F. Supp. 2d 875, 878 (N.D. Ill. 2003), *aff'd but criticized sub nom.* Wei Ye v. Jiang Zemin, 383 F.3d 620 (7th Cir. 2004).

Jiang was "immune from the jurisdiction of the Court because he is China's former head of state."[23] The court accepted the executive's suggestion and dismissed the claim.[24]

To be sure, China's aggressive use of our courts is not unique—it is part of a pattern of abuse also perpetrated by Turkey, Venezuela, and Russia:

- Turkey's dictator, Erdogan, used government lawyers to go after his main opponent, Muhammed Fethullah Gülen, a cleric who lives in Pennsylvania. But instead of filing the case in the name of Turkey, it appears that Erdogan's regime recruited regular citizens as proxies to file a seemingly private case. The complaint alleged that Gulen engaged in religious persecution against plaintiffs within Turkey. But, in fact, the litigation coincided with a broader effort by Erdogan to purge the Turkish opposition and weaken Gulen's status as his most important political opponent. Moreover, the fact that Turkish government lawyers represented these supposed individual plaintiffs suggests a broader government plan. Not only did the Turkish government hire the law firm, the main plaintiffs' lawyer admitted that the lawsuit "represents a legal battle as well as a political battle and an investigation targeting the Gülen Movement" that would show Gulen is "not untouchable in the United States."[25] Even though the district court dismissed the case early on, it appears that Erdogan decided to use the U.S. legal system to harass Gulen in his home state of Pennsylvania. And Turkey seems to be using other types of claims to pursue its interests.

- Or take, for example, claims by Venezuela in U.S. court. In 2016, the second most powerful official in Venezuela's dictatorship, Diosdado Cabello, sued the *Wall Street Journal* over an article that suggested he was linked to narcotrafficking. Although the district court dismissed the claim, Cabello appealed to the Second Circuit and pursued his claim for nearly two years. This case involved Cabello's individual interests in his reputation but, importantly, also the broader dictatorship's political goals to push back against U.S. pressure. Another notorious regime crony also sued the U.S. network Univision for defamation on similar grounds. In 2019, disputes between dictator Nicolas Maduro and his opponent, Juan Guaidó, triggered another series of cases. Guaidó, as opposition leader and President of the Venezuelan legislature, assumed the Venezuelan Presidency in 2019 after Maduro refused to hold free and fair elections. The United States recognized Guaidó, leading to two separate regimes both claiming to represent Venezuela in many contexts. This situation resulted in legal disputes over Venezuelan property in the U.S., including ownership over oil-distributor CITGO, which is based in the United States. And cases have proliferated, with nearly half a dozen claims filed in Delaware, Texas, and Louisiana. These cases have put U.S. courts in the difficult position of deciding whether Guaidó or Maduro has standing to sue. But despite U.S. action to recognize Guaidó and even to issue indictments against Maduro, Venezuela's dictatorial regime continues to litigate across the country and in other foreign courts.

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[23] *Id*. at 879.

[24] Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 917 (2011).

[25] Defendant Muhammed Fethullah Gülen's Memorandum of Law in Support of His Motion for Rule 11 Sanctions Against Plaintiffs & Their Counsel at 3, 13, Ateş v. Gülen, 2016 WL 3568190 (No. 15-cv-2354).

- Importantly, Russia has been one of the most prolific foreign authoritarian governments to take advantage of U.S. courts.[26] Since around 2004, Russian proxies have filed several cases against dissidents and Putin critics. Some of these cases involve enforcement of foreign awards against dissident politicians, bankruptcy disputes, and discovery requests for foreign proceedings that "[w]ere part of a coordinated effort to use the US courts to harass and further extort assets" from opponents.[27] In one case, Putin's attempt to expropriate a Russian alcohol manufacturer included "fabricated criminal charges" against the owner, extradition requests, and trademark infringement cases filed in U.S. court.[28] The Atlantic Council called some of these cases an orchestrated Russian effort to "exploit[] US courts by pursuing superficially legitimate lawsuits with a two-part purpose: perpetrating global harassment campaigns against the Kremlin's enemies, while seeking to enrich themselves through bad faith claims made possible by the Russian state's abuse."[29] Some of these cases have led to protracted struggles in both federal and state court, including extensive discovery and claims by a state judge that there was a "blatant misuse of the federal forum."[30] Two cases involved defamation claims by three Russian oligarchs against BuzzFeed News and Christopher Steele over the Steele Dossier.

Again, it's difficult to measure the importance of these cases but their potential impact cannot be overstated. The fact that there are dozens of such claims likely hides their impact on defendants and other related parties. These claims may be most significant not because of each case's outcome on the merits, but because of litigation's chilling effect on dissidents and journalists. Even a single defamation claim against the *Wall Street Journal* or a tort suit against a dissident in U.S. court sends a powerful message to all would-be dissidents or journalists: even if you flee to the United States we can continue to harass you or sue you there. And that is why it also does not matter whether these foreign dictators are winning these claims on the merits or not. The fact that they have easy access to court is itself a victory for their regimes and a defeat for their opponents.

III. Foreign Dictators as Plaintiffs and Solutions that Would not Work

There are currently no straightforward legal tools for defendants to quickly defeat claims by foreign dictators. First, the Foreign Sovereign Immunities Act does not address the context of foreign governments as plaintiffs. It provides only for a counterclaim exception so that defendants can file claims against a foreign country. But it otherwise provides no help at all for defendants.

Second, current tools in the judicial arsenal are insufficient and often inapplicable to these cases. The main instrument to deter and punish frivolous suits comes from Federal Rule of Civil Procedure 11, which allows a federal judge to sanction attorneys that bring harassment claims. But the standard for Rule 11 violations is too high and the rule is not fit for a situation when a foreign country is involved because judges may not want to punish foreign sovereigns without explicit

[26] *See* ANDERS ÅSLUND, ATL. COUNCIL, RUSSIA'S INTERFERENCE IN THE US JUDICIARY 24 (2018), https://perma.cc/9RVS-32UZ.
[27] *Id*. at 18.
[28] *Id*. at 17.
[29] *Id*. at 23–24.
[30] Avilon Auto. Grp. v. Leontiev, No. 656007/16, 2017 WL 4422593, at *4 (N.Y. Sup. Ct. Oct. 05, 2017), *rev'd*, 91 N.Y.S.3d 379 (N.Y. App. Div. 2019).

Congressional authorization.[31] Moreover, these sanction requests often come at too late a stage in litigation, they force defendants to incur substantial legal costs, and they do not sufficiently penalize plaintiffs. Because these tools are part of the judicial arsenal, they also lack the Congressional and executive imprimatur necessary for a situation in which foreign sovereigns are involved.

Third, courts cannot easily discriminate against dictatorships because of judicial administrability and separation of powers pressures. Courts may need to decide on a case-by-case basis whether a dictatorship deserves equal treatment or not, bumping heads against the State Department. Courts may also be forced to evaluate foreign policy consequences of dictator-related decisions, weakening deference to the executive. There is simply no easy way for courts to administer a categorical anti-dictatorship standard. Even setting aside fundamental concerns with separation of powers, dictatorships may not be the right category to target. The problem with dictatorial acts is that they fundamentally challenge basic human rights and liberties. But democratic governments can do that too. That is why U.S. courts have previously refused to enforce libel awards from the United Kingdom. Judging all dictatorships as different from democratic governments for purposes of all claims would also be substantively overinclusive. There is no need to prevent dictatorships from litigating nonpolitical claims like contract disputes or embassy hit-and-run accidents. Lastly, forcing U.S. courts to distinguish between friendly and unfriendly dictatorships, as well as among the different shades of authoritarian governments (e.g., hybrid, semiauthoritarian, or competitive authoritarian), would be unfeasible.

These and other functionalist problems discussed below make one conclusion clear: it would be infeasible to categorically discriminate against foreign dictatorships. We should instead judge dictatorships by the types of cases they file and related doctrines.

IV. A Proposed Fix: Foreign Sovereign Anti-SLAPP Statute

To resolve the problem of dictators-as-plaintiffs Congress should make it easier for defendants to dismiss those claims immediately, before costly legal proceedings get underway. The best way to do this is to adopt a statute (or amendment to the FSIA) that subjects the privilege of bringing suit to the robust procedural protections of a federal Anti-SLAPP provision so that defendants can quickly dismiss oppressive political claims.[32]

The fundamental problem with the privilege of bringing suit is that foreign dictators and their proxies can access our courts to harass opponents: Cuba can enforce expropriations; Panamanian and Venezuelan dictators can sue democratic challengers and newspapers; the Chinese communist party, Turkey's Erdogan, and Russia's Putin can file claims against dissidents; and Iran can pursue a variety of objectives in our courts. These claims are often illegitimate because they use judicial

[31] There is also a strong norm in the judiciary against Rule 11 sanctions. *See* Diego A. Zambrano, *The Unwritten Norms of Civil Procedure*, __ NW. U. L. REV. __ (forthcoming 2024).

[32] While current anti-SLAPP statutes in many states could apply to these cases, there is a circuit split over whether a federal court can apply a state anti-SLAPP statute. *See e.g.*, La Liberte v. Reid, 966 F.3d 79 (2d Cir. 2020); U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999); Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328 (D.C. Cir. 2015). For a further discussion of state and federal interactions in this and other contexts, *see e.g.*, Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101 (2019).

methods and manufactured claims to exercise sovereign control beyond national borders, engage in harassment, and pursue purely political aims.[33]

But it turns out that state governments have dealt with an analogous problem in the free speech context: anti-Strategic Lawsuits Against Public Participation statutes. In the 1990s, a few scholars and legislators noticed a worrying trend of lawsuits against private individuals "for speaking out politically."[34] In the most worrisome cases, large organizations seemed to be suing individuals for exercising their freedom of speech in contexts like "testifying against real estate development at a zoning hearing, complaining to a school board about unfit teachers, or demonstrating peacefully for or against government actions."[35] These so-called strategic lawsuits against public participation ("SLAPP") claims are fundamentally about intimidating and imposing costs on defendants. Superficially, the claims vary in their substance, dressed up as defamation, business torts, or civil rights suits. But the proliferation of SLAPP claims present a significant challenge to the First Amendment and political speech. This is true even if plaintiffs lose most cases because they impose significant litigation costs on defendants. As Professor Pring noted, "SLAPPs send a clear message: that there is a 'price' for speaking out politically. The price is a multimillion-dollar lawsuit and the expenses, lost resources, and emotional stress such litigation brings."[36]

The potential for SLAPP chilling effects forced state legislatures into action. States like California, Washington, Oregon, Texas, and Nevada quickly enacted so called anti-SLAPP statutes to provide a "quick and inexpensive" way for defendants to move to dismiss claims before protracted litigation sets in.[37] Most of the statutes allow defendants to demonstrate that they are being sued for "exercising . . . constitutional right[s]," usually freedom of speech, political participation, or petitioning.[38] If defendants meet this standard, they trigger an array of procedural protections and shift the burden onto plaintiffs to prove that they will prevail on the merits. The statutes expedite judicial considerations of anti-SLAPP motions (usually within 30 or 60 days), stay all discovery, provide "attorney's fees for prevailing defendants," allow for immediate appeals, and even provide for penalties for filing the claims as well as "any additional relief to deter repetition of the conduct and comparable conduct."[39] And these statutes are widely used, including in at least 300 to 450 filings per year in the state of California alone.[40]

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[33] This is analogous to what used to be known as "lawfare."

[34] Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Participation*, 35 SOC. PROBS. 506 (1988); Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 L. & SOC'Y REV. 385 (1988); George W. Pring, *Intimidation Suits Against Citizens: A Risk for Public Policy Advocates*, 7 NAT'L L. J. 16 (1985).

[35] Laura Long, *SLAPPing Around the First Amendment: An Analysis of Oklahoma's Anti-SLAPP Statute and Its Implications on the Right to Petition*, 60 OKLA. L. REV. 421 (2007).

[36] George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation* 7 PACE ENV'T L. REV. 3, 6 (1989).

[37] Jerome I. Braun, *California's Anti-SLAPP Remedy After Eleven Years*, 34 MCGEORGE L. REV. 731, 735 (2003). Thirty states now have some form of anti-SLAPP statute. *See State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT (2017), https://www.anti-slapp.org/your-states-free-speech-protection/.

[38] Braun, *supra* note 53, at 735.

[39] Tom Wyrwich, *A Cure for A "Public Concern": Washington's New Anti-SLAPP Law*, 86 WASH. L. REV. 663, 674 (2011).

[40] *See* Thomas R. Burke, *The Annual Roundup of California Anti-SLAPP Appellate Decisions*, DAVIS WRIGHT TREMAINE LLP (Feb. 28, 2020), https://www.dwt.com/blogs/media-law-monitor/2020/02/the-annual-roundup-of-california-antislapp-appella.

Congress should draw on the experience of the states and enact a Foreign Sovereign Anti-SLAPP statute.[41] This statute would mirror state anti-SLAPP laws and would work in two steps.

First, if a defendant is a victim of a political harassment lawsuit by the Chinese government, then the defendant can file a special motion to dismiss the claim. The defendants would allege that a foreign government or its proxy has sued them for political purposes or for exercising rights protected by the U.S. Constitution, either at home or abroad.

Second, if defendants can meet this initial threshold, the burden would shift to the foreign plaintiff to demonstrate that they will prevail on the merits, that they are not attempting to abuse legal process, and, in the case of individuals, that they are not a proxy for a foreign dictatorship. In the meantime, anti-SLAPP procedural protections would kick in.

The statute must address two main definitional problems: (1) what counts as a "political" lawsuit? and (2) what counts as a proxy of a foreign government? On the first question, the statute can draw from current anti-SLAPP standards, the political exception to extradition, and the immigration law standards for political asylum.

Courts in the extradition context consider whether a foreign government has charged a defendant with a crime that is "political in nature."[42] So called "pure political" offenses involve crimes "like treason, sedition, and espionage, acts directed against the state but which contain none of the elements of ordinary crime."[43] "Relative" political offenses involve common crimes that are "so connected with a political act that the entire offense is regarded as political."[44] This latter offense, in turn, depends on the existence of a "political disturbance" and an offense that was incidental to it.[45] This standard is still overly narrow and hinges on "violent" uprisings.

An even better model is the political asylum standard, where an applicant "must demonstrate that he faces persecution on account of . . . political opinion."[46] Applicants satisfy this by showing that a foreign government harmed them for holding a political opinion, including by participating in "act[s] against the government" or protests.[47] And applicants only have to show that holding a political opinion was "one central reason" for the mistreatment or persecution.[48] There are thousands of asylum decisions expounding on this standard, showing that courts are comfortable defining the existence of "political" acts and subsequent persecution.

These doctrines and case law provide a good starting point for a foreign sovereign anti-SLAPP statute. A pure political lawsuit in the United States results when the defendant is simultaneously sued civilly in U.S. courts *and* prosecuted abroad for alleged crimes directed against the foreign state. But the statute should go much further. In dictatorships, political dissidents can oppose the

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[41] Such a statute would, in effect, be the civil equivalent to the political exception to extradition discussed above. A few groups, including the ABA, have proposed a federal anti-SLAPP for all claims. *See, e.g.*, AMERICAN BAR ASSOCIATION RESOLUTION 115 (August 6–7, 2012), http://www.anti-slapp.org/wp- content/uploads/2012/08/aba.pdf.
[42] Venckiene v. United States, 929 F.3d 843, 855 (7th Cir. 2019).
[43] *Id*. at 854.
[44] *Id*. at 854.
[45] *Id*. at 854–56.
[46] Kumar v. Sessions, 755 F. App'x 610, 611 (9th Cir. 2018).
[47] Zhiqiang Hu v. Holder, 652 F.3d 1011, 1017 (9th Cir. 2011).
[48] *Id*.

ruling regime through public acts that are closer to the political asylum standard of persecution based on a "political opinion." Therefore, relative political lawsuits in the United States result when there is evidence that the defendant opposed a foreign regime through a legitimate public act—an exercise of free speech under the U.S. Constitution, including petitions, peaceful protests, commercial decisions, or statements to local and foreign press—and was thereafter sued in U.S. courts. Crucially, just like in the asylum context, a defendant would only need to show that a political opinion was "at least one central reason" for the civil lawsuit in the United States.[49] This standard would resolve the problem of proxy plaintiffs filing facially legitimate complaints that are also partially motivated by political persecution abroad.

The statute should also explicitly address the problem of proxies suing to promote the interests of foreign governments. The statute here can draw on analogous inquiries that courts conduct when they pierce the veil of corporate structures, analyze who the "real party in interest" is in a federal case, or scrutinize whether a legal party is merely an agent for someone else.[50]

Defendants would first have the burden to show that a foreign individual is merely a proxy of a foreign government. The statute should err on the side of a broad definition because, at worst, even if it is overinclusive it is merely raising the standards on innocent foreign plaintiffs to file lawsuits in U.S. courts. So there should be a presumption that state-owned entities and government officials (current or former) are proxies of a foreign government, even if they claim to be suing in their individual capacity. Same, too, for foreign oligarchs closely linked to autocratic regimes. For entities that appear independent, courts should focus on whether a foreign country is the primary beneficiary of the lawsuit or exercises ultimate control over the plaintiff, lawyers, or the legal claim. If met, the burden would shift to plaintiffs to prove otherwise, by presenting evidence that they are not a proxy for a foreign government.

Congress should legislate a few other important additions to the statute to adapt it to the foreign sovereign context. First, the statute should explicitly disable the benefits provided by comity doctrines like act of state. Without such a provision, foreign dictatorships could still enforce their objectives in U.S. court. Second, the statute should explicitly apply to extraterritorial conduct in order to comport with recent case law. Third, Congress should explore the possibility that if a foreign sovereign is found to have abused access to U.S. courts to pursue political dissidents, a regime loses the privilege of bringing suit for a specified period of time.

A Foreign Sovereign Anti-SLAPP statute would prevent many of the most egregious cases filed by foreign authoritarian governments. It would have stopped Castro's case against the sugar company in *Sabbatino*, China's array of cases against corruption suspects, Turkey's claim against Gulen, Russia and Venezuela's many claims against dissidents, and Noriega's claims. Such a statute would be a boon for democracy around the world.

But even if Congress does not adopt such a statute, courts can still take smaller steps to move towards such an approach. In the face of political lawsuits by foreign authoritarian governments or proxies, U.S. courts could use existing tools—from inherent authority, forum non conveniens,

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[49] *Id.*

[50] *See, e.g.*, 6A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1554 (3d ed. 2002) (describing how to raise an objection to plaintiff's status as the real party in interest).

malicious prosecution or abuse of process claims, all the way to international comity abstention—to avoid these cases. Courts should focus on the problem of abuse of process and analogize to the political exception to extradition and political asylum.

Conclusion

Ultimately, the problem I highlight is a pragmatic one: the manipulation or abuse of our legal system. Dictators are using their privileges—as recognized by our democratic institutions—to advance their authoritarian agendas. It is self-evident that U.S. courts should not serve the interests of foreign dictatorships if they can avoid it. Liberal theorists from Karl Popper to John Rawls have defended a democracy's right to resist having its institutions employed for illiberal purposes.[51] Indeed, under a Kantian view of international law, democracies are not obligated to extend comity to tyrannical states because dictators do not represent their people so "they cannot create obligations for their subjects."[52] Without necessarily embracing that view, the problem is that the foreign relations doctrines mentioned above—the privilege of bringing suit, act of state, FSIA, and related immunities—benefit all sovereigns equally, including those governed by dictatorships. So then the question becomes whether domestic law requires extending wide access to court to foreign dictators. If it does not, courts can and should discard it.

Suffice it to say, for now, that foreign dictators challenge the goals and foundations of both a democratic polity (and its courts), and the underlying justifications for international comity. In the United States, our courts have defended international comity to foreign sovereigns because it strengthens a community of nations that wish to promote cooperation, free commerce, and reciprocal treatment. But even if most modern autocracies are not autarkic, authoritarian governments are not reliable promoters of reciprocal judicial access. Dictators often bar our citizens from their court systems and treat U.S. companies unfairly vis-a-vis their domestic companies.

While foreign dictators (or monarchs) have been litigants in our courts since the beginning of the Republic, there is no need to grant them the current level of access. Foreign dictators have no right to benefit from access to U.S. courts in order to pursue political goals. Doctrines like act of state, the privilege of bringing suit, or official immunity can adapt to a modern world under threat from democratic regression. U.S. courts and Congress should take up the baton and, in a careful and targeted way, recalibrate international comity in these cases.

[51] JOHN RAWLS, A THEORY OF JUSTICE 217 (1971); Karl Popper, THE OPEN SOCIETY AND ITS ENEMIES (Ed. 1995); Karl Loewenstein, *Militant Democracy and Fundamental Rights*, 31 AM. POL. SCI. REV. 417, 638 (1937); Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405 (2007).
[52] Fernando Teson, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 89 (1992).

OPENING STATEMENT OF MARK COHEN, ASIA IP PROJECT DIRECTOR AT THE BERKELEY CENTER FOR LAW & TECHNOLOGY

MR. COHEN: Thank you very much. Members of the Commission, it's an honor to testify again before you. I congratulate the Commission on choosing an important topic and for convening the experts assembled here today.

I begin with a general observation. This moment presents an unparalleled opportunity on intellectual property-related reform to improve national competitiveness because of the fear of China. I hope we can seize it.

China's increasing technological competitiveness and its incorporation of IP into industrial planning over the past two years have highlighted many of the deepening weaknesses of our own IP system.

My hope is that our concerns will drive reforms in our system. These include proposed reforms in such areas as the availability of injunctive relief, the scope of patent-eligible subject matter in emerging technologies, limitations on non-compete agreements to high-tech workers, handling of patent-related anti-suit injunctions from foreign courts, how to handle a flood of low quality trademarks from China and other countries, the development of more data-driven approaches to competitive threats, and increasing the disclosure of foreign involvement in our IP system, among other reforms.

In terms of overall policy, to be effective we also need a whole-of-government approach. Our trade agency, USTR, must reengage in IP issues. Science and tech agencies have to begin to work together.

We should be looking to DOJ to help better anticipate technological threats to the U.S. on trade secret matters, and I believe the SG, Solicitor General, can also assist our courts on some of the complex questions involving Chinese law or foreign policy of the type that have already been alluded to by my co panelists.

I will spend the balance of my time addressing specific concerns raised in your questions about anti-suit injunctions, or ASIs. During 2020, China became the leading issuer of ASIs involving patents that read on technical standards, or SEPS, standards essential patents. Recent ASI controversies in China involve SEPs for such technologies as 5G, IOT, Wi-Fi, and other areas. These areas all demand a unified standard to promote innovation and interoperability. During 2020, China briefly emerged as the largest issuer. China, however, has stopped using ASIs since about 2021.

An important caveat to all of that is China's system is not transparent, and many SEP cases, particularly those involving foreigners, are not published.
In a typical ASI, a Chinese court orders a party appearing before it to cease litigation overseas and threatens to impose a heavy penalty for violation of the order. In some cases, a national court, such as perhaps a U.S. court, will issue an anti-anti-suit injunction, which orders that party to cease pursuing the ASI.

One can see the potential for an injunction pile up; that is, ASIs, anti-ASIs, anti-anti-ASIs, et cetera.

China's courts have also issued ASIs without adequate notice to the affected parties prompting strong reactions for foreign judges. SEP cases have also been tending to spill over into the developing world, and I would not be surprised if we see more ASI or AASI cases coming from jurisdictions such as Colombia, Brazil, and India.

SEP and ASI cases present challenges to our courts, including issues regarding how we

handle legal decisions from autocratic legal systems of the types just mentioned. Even if China didn't issue an ASI, however, its fast track litigation system enables its courts to issue final decisions, set rates, and enjoin an infringer in nine months, including appeals.

China has long used the strategic discretionary advantage that can be applied against foreigners in IP litigation in order to stop parallel litigation in patents and trade secrets.

Chinese ASIs accomplish nationalistic tasks. They center global litigation in China, which is an explicit goal of the party in Chinese courts. ASIs stir up nationalism. They weaken the role of U.S. courts. They support China's goals of reducing foreign dependence on technology, of becoming a leader in patent filings, and becoming a leader in standardization efforts. I recall the hearing -- the immediately prior hearing on those topics.

They also strengthened China's approach of recognizing SEPs as national assets and not merely private rights, which further erodes the global market-based IP system and strengthens China's role as a global norm setter.

Regrettably, ASIs are also a tool that reflects an inherent contradiction in our global IP system. Rights are territorial, defined by a country, but standards are transnational. In a sense, they exploit some of the lacunae in our global IP regime.

The global system of technical standards and commitments to license patents on fair, reasonable, and non-discriminatory terms, FRAND terms, has enabled China to become the world's largest manufacturer of high-tech goods for products it did not invent.

What is not working as well is that Chinese companies should be paying royalties, and they should have been paying them for some time on these products that they did not invent. China's historic share of royalty payments to the U.S. is a fraction of the shares paid by countries in the developed world.

If the Chinese government can drive down the royalties its companies pay, or if Chinese companies can drive down the royalties that they pay, the costs of production will be lowered. This could enable more funds for R&D or increased global sales or provide a strategic competitive advantage.

As patent rich companies such as Huawei lose their markets due to export controls in the U.S. and other places, their patent portfolio also becomes increasingly important, indeed perhaps the sole revenue source. ASIs have become a tool for protecting national champions.
One group of academics -- I should mention here that Song Ray Lin (phonetic), the former -- the current general counsel of Huawei, in discussing the role of transnational litigation, has said that U.S. patents are diamonds while Chinese patents are cabbages. Who wouldn't prefer suing for diamonds?

One group of academics recall China's use of ASI as a ping pong system of court cases and ASIs. This is not merely ping pong. It involves key technological assets and the quest for domination of the next generation of standardized technologies.

We should let the SEP licensing system be governed by market principles and not let techno-nationalist aspirations lead to control of litigation and rate setting in this key area.
Thank you for your time and attention.

COMMISSIONER GOODWIN: Thank you very much.

PREPARED STATEMENT OF MARK COHEN, ASIA IP PROJECT DIRECTOR AT THE BERKELEY CENTER FOR LAW & TECHNOLOGY

TESTIMONY OF MARK A. COHEN

BEFORE THE US ECONOMIC AND SEECURITY REVIEW COMMISSION

HEARING ON "RULE OF LAW: CHINA'S INCREASINGLY GLOBAL REACH"

PANEL III: "THE CCP AND FOREIGN LEGAL SYSTEMS"

ON CROSS-BORDER INTELLECTUAL PROPERTY LITIGATION

MAY 4, 2023

Members of the Commission, it is an honor and a privilege to appear before you again on the important topic of China's Global Legal Reach. This is indeed the season of hearings on China, and I have been especially privileged to have been afforded an opportunity to address China IP issues before the House Judiciary Committee, Subcommittee on the Courts, Intellectual Property and the Internet, Intellectual Property and Strategic Competition with China: Part I on March 8, 2023, where I spoke on Optimizing US Government Engagement on Chinese IP and Tech Issues[1] and before the Senate Judiciary Committee, Subcommittee on Intellectual Property on Foreign Competitive Threats to American Innovation and Economic Leadership, where I spoke on Engaging and Anticipating China on IP and Innovation on April 18, 2023.[2]

I have had the privilege of appearing before the Commission several times in recent years, including: on April 14, 2022, on "US Responses to China's Changing IP Regime";[3] on June 18, 2018 on "How to Engage on China's IP Regime"; and on January 28, 2015, on "The Foreign Investment Climate in China: Present Challenges and Potential for Reform."[4] I also testified before your sister Commission, the US China Congressional Commission on "Ownership with Chinese characteristics: Private Property Rights and Land Reform in the PRC" on February 3, 2003.[5]

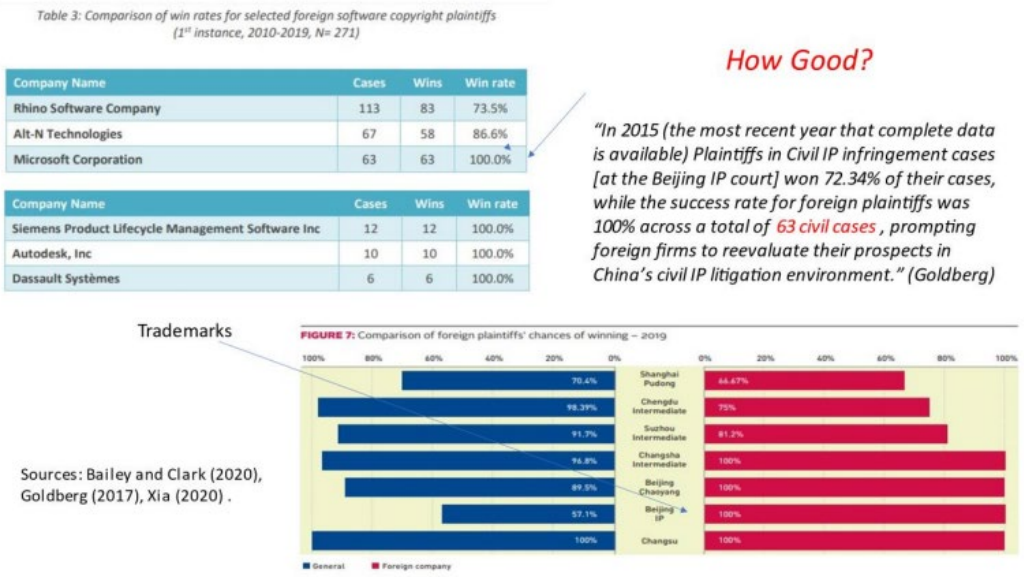
The topic of this hearing is particularly germane to the work that I have done at Berkeley Law. For the past five years, we have conducted a joint program with Tsinghua Law School on

[1] https://judiciary.house.gov/committee-activity/hearings/subcommittee-courts-intellectual-property-and-internet-intellectual .
[2] https://www.judiciary.senate.gov/committee-activity/hearings/foreign-competitive-threats-to-american-innovation-and-economic-leadership .
[3] https://www.uscc.gov/sites/default/files/2022-04/Mark_Cohen_Testimony.pdf .
[4] Hearing on the Foreign Investment Climate in China: Present Challenges and Potential for Reform" (January 28, 2015), https://www.uscc.gov/sites/default/files/Mark%20Cohen_testimony.pdf. Note all links to web pages in this testimony were viewed during May 2018.
[5] Mark Cohen, "Ownership with Chinese characteristics: Private Property Rights and Land Reform in the PRC" (February 3, 2003), https://www.cecc.gov/sites/chinacommission.house.gov/files/documents/roundtables/2003/CECC%20Roundtable%20Testimony%20-%20Mark%20Cohen%20-%202.3.03.pdf.

transborder IP litigation. The next such program is scheduled for May 22-23 in Beijing. I hope that members of the Commission and its staff can attend this program, as it will be available virtually the evenings of May 21-22 Eastern Standard Time.

A. Background to Cross Border IP Litigation

Cross-border IP litigation affords an important window into how the intellectual property rights of our country are protected in China and how Chinese IP rights are protected in the United States. In the US system, foreign rights have historically been protected fairly and without discrimination. Thoughtful observers have found, *based on available data,*[6] that foreigners are treated fairly in IP-related cases adjudicated in China.[7] Patent win rates for foreigners in China have been documented to show little relationship with local economic influences.[8] Chinese courts are also more likely to grant injunctive relief in a patent dispute than United States courts.[9] Moreover, the courts are also often inclined to render expert, well-reasoned opinions and can decide cases and resolve appeals quickly. Here is a graphic depiction of the conclusions drawn from a range of relatively recent studies, in such areas as business software piracy litigation, trademark litigation and litigation at the Beijing IP Court for 2015:[10]



[6] https://www.iam-media.com/article/chinese-patent-litigation-data-what-it-tells-us-and-what-it-doesnt. In this study that this author conducted with the IP consulting firm Rouse, we estimated that about 50% of the patent case decisions in China are published.

[7] https://chinaipr.com/2020/07/13/an-update-on-data-driven-reports-on-chinas-ip-enforcement-environment/ .

[8] Brian Love, Christine Helmers, and Markus Eberhardt, *Patent Litigation in China: Protecting Rights or the Local Economy?* (2016). Available at: https://digitalcommons.law.scu.edu/facpubs/918 .

[9] https://btlj.org/data/articles2018/vol33/33_2/Bian_Web.pdf.

[10] https://elischolar.library.yale.edu/cgi/viewcontent.cgi?article=1005&context=ceas_student_work .

As I noted in my recent hearings, these analyses are based on available data from a government curated database. We can guess, but do not know for certain, what is in the unpublished cohort of cases. I personally know of several cases where foreigners lost major disputes to Chinese litigations. The curated data, while useful in developing strategies, is not comprehensive.

There is also a compelling body of literature that points to the risks that foreign companies may encounter when they litigate in areas of concern to the local government or national interests. The U.S. International Trade Commission ("ITC") has noted that "some non-Chinese firms reportedly find it more difficult to obtain patents in sectors that the Chinese government considers of strategic importance."[11] As all patents are published, patent prosecution data suffers from fewer selection biases than data drawn from the Chinese courts.[12] Three European scholars, Dr. Gaetan De Rasenfosse, Emilio Raitieri and Ruddi Bekkers, have documented bias in the examination by China's patent office of high value standards essential patents (SEPs) by analyzing several thousand of Chinese and foreign SEP applications and grants. They noted that foreign SEP applications disclosed as such before the entrance into substantive examination phase at the Chinese patent office are significantly less likely to receive a grant than a domestic applicant. In addition, if such foreign-owned applications do receive a grant, the grant decision arrives substantially later and the scope of the grant is significantly reduced from the original application. They came to these findings after controlling for several alternative explanations, including year effects, firm fixed effects, and patent attorney agency fixed effects, etc.[13] Profs. Rasenfosse and Emilio Raiteri have also separately noted bias in targeted industrial sectors in Chinese patent prosecution practices.[14]

The Example of ASIs

Attached to this testimony, I have also included a copy of a forthcoming article that I wrote on China's use of anti-suit injunctions (ASIs) to compel settlements in Chinese courts for licensing of SEPs Because of their close relationship and integration with Chinese industrial policy both SEP patent grants and SEP litigation can provide a useful window into how politics may affect IP protection outcomes in China.

When a court issues an ASI, it seeks to prevent or curtail litigants in a foreign country from pursuing legal remedies in that country through imposition of fines and other sanctions. While China's ASI practice generally paid lip service to notions of comity or minimizing friction with

[11] USITC Inv. No. 332-514, "China: Intellectual Property Infringement, Indigenous Innovation Policies, and Frameworks for Measuring the Effects on the U.S. Economy" (2010) at p. xviii, https://www.usitc.gov/publications/industry_econ_analysis_332/2010/china_intellectual_property_infringement.htm.

[12] https://chinaipr.com/2016/03/10/patent-litigation-local-protectionism-and-empiricism-data-sources-and-data-critiques/

[13] "Discrimination in the Patent System: Evidence from Standards-Essential patents" (2017), https://www.oecd.org/site/stipatents/IPSDM17_6.4_bekkers-et-al.pdf.

[14] https://onlinelibrary.wiley.com/doi/10.1111/joie.12261.

foreign courts, in fact these cases often were highly intrusive of the sovereignty of foreign courts to adjudicate patent claims granted in their respective jurisdictions. As patents are territorial, only national courts generally adjudicate local patent claims, unless the parties have otherwise consented, which is rare. Beginning approximately three years ago, Chinese courts issued a spate of ASIs against foreign litigations, including a US district court case, Ericsson v Samsung. Judge Gilstrap in *Ericsson v. Samsung* imposed an indemnity on Samsung for any fine imposed by a Chinese court for Ericsson seeking relief in a US court.[15]

Many of the Chinese decisions in those cases have not been published. The EU has filed a WTO case involving China's non-transparent practices in granting these ASIs.

Not only courts in the United States, but also courts and officials in third countries have raised serious objections to China's lack of transparency in its ex parte ASI decisions and intrusions into their sovereign jurisdictions, including the failure to advise counsel of pending decisions. As one example, the Delhi High Court in *Interdigital Technology v. Xiaomi Corp & Ors*. (May 3, 2021), after reviewing six separate times when counsel for Xiaomi had appeared before the court without revealing that it was undertaking steps to take away the court's jurisdiction, stated that "the manner in which the defendants have acted borders on fraud, not only with the plaintiffs, but also towards this Court."[16] The Court also imposed a fine in the form of an indemnity against any penalty imposed by the Chinese court.[17]

Foreign counsel may also bear some responsibility for this lack of transparency and unwillingness to inform foreign courts of pending ASIs. In another U.S. case, Judge Sleet, in Delaware, on hearing that he had been misled by ZTE into granting an ex parte ASI against Vringo's global patent campaign by not being informed of an ongoing SEP case in the Southern District of New York in violation of the Federal Rules of Civil Procedure, R. 65, noted that Vringo could have been within its rights to "lay [the judge] low" for granting that motion based on these misrepresentations of counsel. Judge Sleet promptly retracted his prior ASI.[18]

Because of the complexity of these disputes and the manner in which they inevitably involve judges in issues of foreign policy, I believe that the Solicitor General should begin exercising a more active role in US domestic litigation that involves Chinese patent IP assertions, particularly

[15] Ericsson Inc. v. Samsung Elecs. Co., No. 2:20-CV-00380-JRG, 2021 U.S. Dist. LEXIS 4392, at *23-24 (E.D. Tex. Jan. 11, 2021)
[16] Interdigital Tech. Corp. v. Xiaomi Corp., High Court of Delhi, I.A. 8772/2020 in CS(COMM) 295/2020 (May 3, 2021).
[17] *Id.* ¶ 119.
[18] Official Transcript of Teleconference held on Feb. 10, 2015, ZTE Corp. v. Vringo Inc., No. 1:15-cv-00132, ECF 29 (D. Del. Feb. 11, 2015).

in issues that implicate the jurisdiction of our courts (such as ASIs)[19] or the fairness of the Chinese legal system.

I appreciate the attention that the Commission paid to these ASI issues in its last report to Congress of November 2022.[20] Fortunately, China's granting of ASIs appears to have been suspended, perhaps due to the WTO case.

One of my reasons for discussing ASIs is that I believe that I share similar observations with Prof. Clarke and other testifying today that China's ASI practice is a kind of linguistic "false friend" intended to normalize bad behavior by adopting western nomenclature. [21] There are several key differences between Chinese ASIs and similar Western ASIs. Unlike common law countries, Chinese ASIs are exclusively extra-territorial in nature. Common law ASIs originated as a method of dealing with jurisdictional conflicts among courts of law in the United Kingdom. Chinese ASIs are part of a national effort to increase the role of Chinese courts in establishing global judicial norms that have been promoted and endorsed by the highest levels of China's political and judicial leadership. Western ASIs are rarely intended to promote the role of the courts in international disputes. Chinese ASIs have also precipitated other changes in the adjudication of SEPs to accommodate this more aggressive posture through creation of new causes of action, adoption of unique conflicts of law rules, etc., while the disruption caused by Western ASIs on domestic legal systems has been relatively minor.

Chinese ASIs are also an important of Chinese national goals to increase the influence of Chinese courts in international IP disputes, through China's International Commercial Court and other mechanisms, including legislative changes. Most importantly, Chinese ASIs are also part of long-term efforts by the Chinese government to increase the value of Chinese technology and decrease the value of foreign technology "monopolies." One such goal in information technology was to decrease "dependence on imported technology … to 30% or below" in the recently completed Medium and Long Range Scientific and Technology Plan (2006- 2020).[22] The

[19] See Mark A. Cohen, *China's Practice of Anti-Suit Injunctions in SEP Litigation: Transplant or False Friend?*, forthcoming in Jonathan Barnett, ed, INTELLECTUAL PROPERTY AND INNOVATION POLICY FOR 5G AND IOT (2023), available at https://ssrn.com/abstract=4124618 or http://dx.doi.org/10.2139/ssrn.4124618
[20] https://www.uscc.gov/annual-report/2022-annual-report-congress .
[21] See Mark Jia, *Illiberal Law in American Courts*, 168 U. PA. L. REV. 1685 (2020).
[22] https://www.itu.int/en/ITU-D/Cybersecurity/Documents/National_Strategies_Repository/China_2006.pdf , at p. 11. See also https://www.uspto.gov/about-us/news-updates/statement-mark-cohen-house-committee-judiciary.

National Informatization Plan (2021) calls for increasing the number of patents per 10,000 people in *"new-generation information technology industry"* from 2.7 patents in 2020 to 5.2 in 2025.[23] This would result in a national patent portfolio in these SEP-intensive areas of approximately 728,000 patents.

We should look at Chinese ASIs exclusively in functional terms. Using Western nomenclature to describe unfair practices can lead to normalization and inappropriate acceptance of such practices.

What the Future Holds

To be candid, I believe that the United States and China are today embarked on a downward spiral in terms of how our courts and agencies protect each other's nationals.

There are currently several laws, bills and agency actions that demonstrate this downward spiral. Today, I would like to single out here just one: the Protecting American Intellectual Property Act, of 2022 (Public Law 117-336). This law imposes sanctions upon foreign persons that are accused of stealing American trade secrets. Sanctions similar to export and foreign assets control measures are imposed upon those companies found in violation of the Act. If a company is found in violation, the President must impose at least five sanctions from a comprehensive menu. The menu of sanctions includes property blocking sanctions, export prohibitions, the prohibition of loans from U.S. and international financial institutions, procurement sanctions, and prohibition of banking transactions. For any individual identified in the report to Congress, the President must also impose property blocking sanctions and must prohibit the individual's entry into the United States.

I completely sympathize with the view that if a company has been unfairly treated by the courts or agencies of a foreign country and if legal redress is not available, the government of the United States should consider addressing it through other means. As such, this law should be a last resort and part of comprehensive strategies to address these concerns. For example, I don't think that we should very carefully minimize violating any other international norms in using trade laws to address civil intellectual property concerns.

Importantly, this law does not require that a victim of trade secret misappropriation should first exhaust reasonable legal remedies before turning to the President for an administrative, export control-type sanction. The Act does not, for example, require that the President make his determination through any kind of judicial process. Nor does it provide rights of appeal. It would appear to violate our WTO obligations by suspending the type of due process obligations

[23] https://digichina.stanford.edu/wp-content/uploads/2022/01/DigiChina-14th-Five-Year-Plan-for-National-Informatization.pdf, (DigiChina - 14th Five-Year Plan for National Informatization [stanford.edu]), at p. 14. The Chinese original is available at: 任务一： (www.gov.cn)

required by the TRIPS Agreement for IP enforcement. By exclusively targeting foreign nationals, it also appears to violate national treatment obligations.

I am also concerned that this and other laws that are unilateral in nature, may cause retaliation and threaten to undermine over 150 years of reciprocal national treatment in intellectual property through international conventions such as the Paris Convention (1883), the Berne Convention 1996) and the TRIPS Agreement (1995) and others. I am also concerned that the law does not encourage United States companies to first exhaust available legal remedies in the United States, China or elsewhere. Currently, foreigners constitute about 1% of the Chinese civil trade secret docket. We do not yet know if the recent trade secret reforms implemented by China in response to the US-China Phase 1 Trade Agreement are being implemented. By creating a political remedy in lieu of a legal remedy, we are inviting a 'short-circuit' of legal process. Are we suggesting that they should stop litigating in China entirely because of this new political remedy?

I believe that a better approach with respect to trade secret protection and similar sources of frustration would be to encourage utilization of available legal remedies in China (including the improvements mandated by the US-China Phase 1 Agreement), closely monitor the outcome of these cases by the US government as well as non-governmental actors (such as a Track II Dialogue), require publication of decisions (which the Phase 1 Agreement does not explicitly require), provide for more effective US legal remedies, and encourage consultation with the Chinese government or the bringing of a WTO case when there is a miscarriage of justice. If the issue that concerns us is state-sponsored industrial espionage, we might file a WTO case under the TRIPS agreement. WTO members are required "to protect" trade secrets pursuant to Article 39 of the TRIPS Agreement, which is uniquely worded to impose an affirmative protective obligation on its members.

I similarly believe that the US de facto abandonment of the WTO on intellectual property matters was premature. We had initiated only two cases against China on IP issues at the WTO since China became a WTO member in 2001. One of them, filed during the Trump Administration, was a 100% success. The case was long overdue, involving a technology transfer regulation that successive Democratic and Republican administrations had refused to pursue for 17 years. There were many other cases that could have been filed and still might be filed.[24] Rather than blaming the WTO, we should recognize that we failed to pursue cases at the WTO. If the right cases were filed and we still failed, only then would we be justified in backing away from the WTO and using these extraordinary remedies.

Concrete Short and Mid-Term Steps

In the twenty years that I have been testifying on China's intellectual property regime before Congress, the Chinese IP system has become vastly more complicated in both its formal aspects

[24] https://chinaipr.com/2020/12/11/the-wto-ip-cases-that-werent/; https://chinaipr.com/2020/12/14/some-additional-possible-trips-claims/.

and in the external industrial policy pressures and incentives that affect the implementation of its laws. China's increasingly complex IP regime demands concomitant changes from the US government in our laws and government structures.

In addition to the suggestions previously noted, including (a) ensuring that our courts can tackle the complex foreign policy issues raised by ASIs; (b) careful consideration of rule of law issues in our own trade remedies, and (c) filing WTO disputes, I have compiled here a supplemental list of action items to better support cross-border IP litigation involving Chinese parties:

1. We need to clear up the interagency alphabet soup.

Currently, intellectual property involving China is handled by several agencies, many of which have overlapping mandates and all of which have limited resources. These agencies include USTR, ITA, USPTO, the Copyright Office, USDOJ, and the State Department. Absent effective cooperation and coordination, each agency is not only condemned to redundancy but also, considering the increasingly complex environment of China, to superficiality.

2. We Need to Make the Necessary Appointments

We urgenly need an IP Enforcement Coordinator in the White House. We also need a Deputy USTR for Innovation and Intellectual Property. When I testified before the House and Senate on these long overdue appointments, I believed members of Congress from both sides of the aisle were in full support. These positions are waiting to be filled. I urge the Commission to weigh in as well.

I believe that we also need to create a new position of Deputy Director for International Affairs to assist the Director of the USPTO and elevate the importance of the USPTO in international negotiations involving intellectual property. Currently, the PTO Director is assisted by only one Deputy Director, which is not enough for the front office to focus on international concerns and to interact with the interagency at a sufficiently high political level. The position is critical as USPTO resources on Chinese IP issues far exceed those of other agencies, with staff in three Chinese cities and Alexandria, Virginia, and with a team of US- and China-admitted lawyers with collective experience of over 200 years. However, the individuals working on those issues are often not given an effective means to voice their concerns over emerging policy issues.

The administration should also promptly establish protocols for developing more informed assessments of the technology threats that China poses. I believe that USPTO, with its vast database and resources, is well positioned to assist other agencies in such a task.

3. We Need Better Data Tools

The US government should develop and implement tools, like those that our competitors are using, and that the Office of Technology Assessment (OTA) pioneered, to improve innovation

governance with regard to emerging technologies.[25] The adoption of Future Oriented Technology Analyses and related tools as applied to civil technologies can be especially critical where possible security threats are posed to the United States by the compressed development time frames of civil technology to a military application, or "civil-military fusion." These analytical tools can also assess competitive risks from China in emerging technologies that are of concern to US economic and national security. USPTO, with the most extensive human and physical resources of any agency on all varieties of civil technology, is well positioned to make a significant contribution to such an effort.

If the Administration refuses to act in developing more informed technology policy, I believe that Congress itself should also reconstitute OTA, which operated in these halls from 1974 - 1995. OTA was created in 1972 by the U.S. Congress specifically to "provide early indications of the probable beneficial and adverse impacts of the applications of technology." We continue to need that kind of support for our increasingly complex and important technology decision making.

Additional disclosure requirements regarding foreign government involvement in our IP system would be helpful in better addressing risks posed to our IP agencies and courts. I appreciate the Commission's prior support for this suggestion and I believe it still needs to be driven home. Congress should direct the USPTO to require any applicants for patents or trademarks to disclose if they are receiving government subsidies or grants for the underlying R&D for the patent or the application itself. We currently require such disclosure of recipients of US government grants under the Bayh-Dole Act. We should require the same for foreign applicants. We also need to require disclosures for trademark applications due to their demonstrated ability to disrupt US government operations through subsidized applications.[26] This information is essential to anticipating threats posed by subsidization and other distortionary programs of foreign governments, including China.

Congress might also wish to consider requiring disclosures of foreign government involvement in IP litigation through declarations of real parties in interest and third-party litigation financing.[27]

4. We Need to Support Our Courts

Due to difficulties in securing evidence from China, US courts should be able to make adverse inferences if there are unnecessary delays in collecting evidence overseas through judicial channels. Responses to Hague Convention requests from China can taken a year or more.

[25] Jeanne Suchodolski, Suzanne Harrison and Bowman Heiden, *Innovation Warfare*, 22 N. C. J. L. & TECH. 175 (2020).
[26] U.S.-China Econ. Sec. Rev. Comm'n, 2022 Report to Congress, at 177.
[27] Bob Goodlatte, *State Attorneys General Raise Concerns About Threats Raised by Litigation Funding,* Patent Progress (Jan. 18, 2023), https://www.patentprogress.org/2023/01/state-attorneys-general-raise-concerns-about-threats-posed-by-litigation-funding/.

However, in most cases China will have completed a domestic IP litigation within six months.[28] These expedited time frames in China provide a strategic advantage for Chinese litigants and can impair the effectiveness of a United States litigation. Chinese judicial rushes to judgment have often undermined the jurisdiction of the US courts, which take far longer to decide cases, as was the issue in Huawei v. Samsung (N.D. Cal. Apr. 13, 2018).

The United States should address non-reciprocal extensions of benefits to Chinese courts., including evidentiary assistance provided to Chinese courts, which threatens to expose US trade secrets overseas (28 USC Section 1782).

5. We Need to Strengthen our IP System

As I wind down on this three-part series of testimonies before Congress, I am encouraged to see that both the Senate and House are looking at the significant advances that China has made to its IP system and are considering whether additional reforms are necessary to ensure our domestic competitiveness. During recent years when the United States sought to better "balance" our IP system through restricting patent-eligible subject matter, China was taking nearly contemporaneous steps to strengthen its system through amendments to its examination guidelines and expand the scope of patents that it could grant. Patent applications have been refused by the USPTO but granted in China and/or Europe.[29] We need to have a better understanding on how the declining scope of patent eligible subject matter has affected US competitiveness with other countries, including China, by analyzing the impacts of those changes in US policy on entrepreneurialism, new product developments, technology licensing and labor mobility. Our complaints about Chinese "IP Theft" often ring hollow in the face of the obstacles that we have inserted into our own system.

We also need to seriously look at the impact of the declining available of injunctive relief in IP infringement cases, which compares to a nearly 100% rate of injunctive relief in Chinese IP infringement cases

We also need to address the increasing potential for fraudulent, short-term or low-quality trademark and patent filings from China. Trademark applications have been filed with fraudulent proof of use, or through use of fraudulent addresses and USPTO accounts. The trademarks appear to be primarily intended to satisfy e-commerce brand registry programs. Chinese applicants have occasionally appointed deceased or non-existent attorneys to prosecute these marks. Many of these trademarks benefited from trademark applications subsidies given by the Chinese government. Currently, USPTO appears to be primarily relying upon attorney discipline to deter this activity. USPTO needs a comprehensive program to

[28] See MINNING YU, *Benefit of the Doubt: Obstacles to Discovery in Claims Against Chinese Counterfeiters*, 81 FORDHAM L. REV. 2987 (2013).
[29] KEVIN MADIGAN AND ADAM MOSSOFF, *Turning Gold to Lead: How Patent Eligibility Doctrine Is Undermining U.S. Leadership in Innovation*, 24 GEO. MASON L. REV. 939 (2017).

address these problems as they arise, which may also involve deeper cooperation with the Chinese government to address cross-border malevolent actors.[30]

Congress should encourage the USPTO to become more actively involved in assisting on trade and economic sanction determinations. As I previously noted, the USPTO is the only comprehensive civil technology agency in the US government. It is well staffed with STEM-educated and multilingual examiners, as well as a team of officials involved in international IP policy. Yet there are many areas where PTO is not consulted. Moreover, there is an increasing number of trade sanction matters where intellectual property knowledge is critical, such as in assessing proposed CFIUS decisions and understanding competitive threats from emerging technologies.

For the record, I would like to specifically note the potential for harm to the protection of US trade secrets that could be caused by adoption by the FTC of the proposed rule banning non-compete agreements in the FTC Notice of Proposed Rulemaking (the "NPRM").[31] The NPRM properly focused on the domestic impact of non-compete agreements, including their impact on poor and minority communities. However, the NPRM also completely ignores the impact this would have on protecting our technology from trade secret theft by other countries. Indeed, words such as "CHIPS Act", "international" or "China" do not appear in the NPRM. If implemented, this rule would legalize large-scale Chinese poaching of employees of US companies working in high tech industries, including the semi-conductor sector, by invalidating their existing non-compete agreements. US investment in new semiconductor fabs would become even more vulnerable to legalized Chinese poaching of US employees. It would also weaken the ability of US companies to protect themselves though the Chinese courts.[32] Why are we seeking to undermine the ability of our companies to protect their trade secrets

[30] See my forthcoming article in the AKRON LAW REVIEW, *Parallel Play: How the United States and China Engaged in Simultaneous Professional Responsibility Campaigns Against Unethical IP Lawyers and Agents and What Lessons Can Be Learned* (2023).

[31]Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 5, 2023) (to be codified at 16 C.F.R. § 910).

[32] Chinese data demonstrates that a party seeking relief from trade secret misappropriation is more than twice as likely to win if the employee has signed a non-compete agreement. Success rates for enforcing non-compete clauses are 66% to 90%, while success rates for trade secret misappropriation cases were 32.4% and 44.3% of the cases decided, respectively, by first instance and appellate courts. *Compare* HUI SHANGGUAN, *A Comparative Study of Non-Compete Agreements for Trade Secret Protection in the United States and China*, 11 WASH. J. L. TECH & ARTS 405 (2016) (This article looked at all final judgments on non-compete cases decided by intermediate or higher courts from March 2014 to February 2015. It found that "[t]hirty-six of these cases were related to the validity of the non-compete; twenty-four of which were regarded by courts as 'valid and enforceable.' In other words, two out of three non-compete cases were held to be 'valid and enforceable' by Chinese courts.) ; "in nearly all of the cases where the plaintiff prevailed (89% [in trade secret litigation in China], … there [were] one or more protective agreements in place, such as NDAs and confidentiality clauses in employment contracts." CIELA, *Trade Secret Litigation in China*, Rouse, https://rouse.com/media/n5uadjtn/ciela-trade-secret-litigation-in-china.pdf; and Jyh-An Lee, Jingwen Liu and Haifeng Huang, *Uncovering Trade Secrets in China: An Empirical Study of Civil Litigation from 2010 to 2020*, 17 J. INTELL. PROP. L. & PRACTICE, Iss. 9, 761 (2022).

overseas, especially in China and also undercut our significant investment in semiconductor manufacturing?

6. We Need a Task Force

Chinese IP issues are now implicated in areas of increasing concern to the government and American people, including economic espionage, China's increasing role in our courts and IP system, the role of export controls and CFIUS in addressing technology transfer, China's use of civil technological developments in advancing military technology, and the challenge of navigating China's complex IP environment.

Through my work with the Day One Project,[33] which is now a part of the Federation of American Scientists, I urged the Biden Administration to take broad steps to improve our strategies and understanding on China and intellectual property by establishing an interagency China task force.[34] In closing, I repeat the recommendations that were made in the 2021 report of the Day One Project, which I believe still have the same urgency:

Reorganize China IP Engagement for Greater Depth, Coherence and Efficiency

There is a broad consensus that US-China relations cannot and should not return to their pre-2017 form. At the same time, in dealing with China, the next administration has to show both strength and more intelligent strategies.Intellectual property and innovation policy hold both the prospect for cooperation and the need to address Chinese initiatives that negatively impact US interests. Currently, engagement with China on IP and innovation is spread over several agencies, including State, USTR, ITA, DOJ (Antitrust/Counterintelligence/CCIPS), FTC, ITC, USPTO, OSTP, NIST, DOD (including the Defense Innovation Unit), CFIUS, BIS and the White House "IP Czar." Most of these offices lack the staff and resources needed to address increasingly complex and cross-disciplinary issues. While the USPTO "China Team" is the most deeply resourced (between 20-25 people in three Chinese cities, including several China-admitted attorneys and STEM-educated officials), the agency has often been excluded from the US-China negotiating table – and even clearance chains on tech issues.

An executive order should establish an inter-agency "task force" to address China in intellectual property and innovation policy, with the understanding that this task force will be long-term, if not permanent. The task force should include State/various Commerce constituent agencies/USTR and representatives of the various science agencies, DoD, as well as CFIUS and BIS. The task force should have concrete mandates on seconded staff from other agencies, and the percentage of task force staff who have Chinese language skills, STEM background and ideally, Chinese legal experience. The task force staff should leverage extensive database and analytic tools, currently housed in a China Resource Center at USPTO (but also found in our

[33] https://www.dayoneproject.org/.

[34] Day One Project, *Transition Document for the United States Patent and Trademark Office* (Jan. 15, 2021) https://www.dayoneproject.org/ideas/transition-document-for-the-united-states-patent-and-trademark-office/.

intelligence and other agencies) to provide active support for other agencies, such as law enforcement, BIS/CFIUS, and DHS. The task force should develop coordinated USG responses to China's model of state-dominated IP planning, anticipated disruptions caused by China's intervention in technology and IP markets, Chinese efforts to dominate global standards setting bodies, state-sponsored economic espionage or technology misappropriation, and even bad faith applications from China in both patents and trademarks.

Thank you for your invitation to speak here today, and I look forward to your questions.

COMMISSIONER GOODWIN: We will go back to alphabetical order and begin with Chairwoman Bartholomew.

CHAIRMAN BARTHOLOMEW: Thank you. I have to say this really is wow, this testimony. First, the ignorance of our judges, ignorance or naivete of our judges, Mr. Clarke, is really quite astonishing. And as somebody who has had to sit through hours and hours and hours of continuing legal education, do you know if there is any CLE that actually covers what authoritarian or the Chinese legal systems are like?

MR. CLARKE: No, I -- the short answer is no, I don't know if there is any CLE program that covers that. It's maybe something I should suggest to our law school.

CHAIRMAN BARTHOLOMEW: I think, actually, that might be a good idea. And I'm wondering whether we should make taking that course a mandatory course.

I am presuming that it is U.S. law firms that are representing these companies in U.S. courts, and that somehow, they fall outside of the Foreign Agents Registration Act. Is that correct?

MR. CLARKE: That's a good question. I am not sure what the -- what FARA requires. If you are a U.S. law firm representing a, you know, foreign company, typically the Chinese companies involved in these cases or the Chinese parties involved in these cases are not -- it's not the Chinese government we're talking about. And they may not even be plausibly state connected.

So even if FARA did cover that, in the case of representing the government, I'm not sure it would extend to these cases. And of course, it's not improper for parties to litigation, you know, to have legal representation.

So, I don't want to be understood as saying that these lawyers are doing something unethical by representing Chinese companies in litigation. You know, they are bound to make the best arguments they can, and if there is a bunch of U.S. cases that support their claim, you know, it's their job to cite them.

My complaint is more about the judges who are, as you say, it seems quite bafflingly naïve, given the actual wealth of information that's out there, you know, in the mainstream media about the Chinese legal system, which is of course, you might ask for a little more nuance, but it is not basically incorrect. It's basically correct.

CHAIRMAN BARTHOLOMEW: And can I ask our other witnesses if they have any thoughts on extending FARA to law firms that are representing Chinese companies?

MR. COHEN: My recollection may be a little dated, but I think if you're, you know, registered as counsel in a litigation, you don't trigger FARA. But if you started lobbying on behalf of your client before government agencies of various kinds, that would trigger FARA.

Nonetheless, I think the use of, you know, when -- when companies act as agents for the Chinese government, or if in fact they are subsidized by the Chinese government, it's certainly a concern. It certainly appeared in my recent testimony before the Senate and House -- concern about Chinese support for litigation groups.

CHAIRMAN BARTHOLOMEW: Mr. Zambrano, can I just ask in terms of who -- who is it who is suing these dissidents that you're talking about?

MR. ZAMBRANO: These are typically state-owned companies. It is not the Chinese government itself. It is not a government agency or instrumentality. It is a company that the Chinese government has influence or some ownership stake in.

CHAIRMAN BARTHOLOMEW: Or control of, right? I mean, we've talked a fair amount over the years about how independent these state-owned enterprises are. Again, I recognize that U.S. law firms do what they do, and they have a right -- you know, everybody has a right to counsel. I just wonder if there is something we can do about the exploitation of what they're doing, and one of the first steps of that might be transparency.
Thank you.

COMMISSIONER GOODWIN: Thank you. Commissioner Borochoff.

COMMISSIONER BOROCHOFF: Thank you very much. Listening to the three of you, in my mind what I categorize as there's a problem with our companies being able to sue for loss of IP, and then there's a problem with when they do sue, the judges just throw it back to China. And then, lastly, we have given an open door, this incredible, incredible opportunity for the Chinese government to punish people that don't speak highly of them or do something else. So, there are two different problems that both have to do with the fact that our courts don't work well with the Chinese system.

So, I want to start with you. First, I want to say thank you to Mr. Cohen for the last time he was here enlightening me. We aren't going to spend any time on it today, but I'm still amazed that there is such a thing as an anonymous patent, which apparently China has. It just blows my mind.

Mr. Zambrano, I didn't know about anti-SLAPP. Everything I have learned about the law -- and I know a fair amount -- has been from defending myself against civil suits in my business. I could probably write a book and call it Mr. Defendant. It's not fun. It's expensive.
The common thread through everything you say is that the judicial system can be used as a weapon, and I have experienced that and have utilized it. It's a legal thing that happens in America. It's not pleasant. All lawsuits are expensive, very, very expensive.

They should never be used to silence people who have a right to speak, and they should never be used if one side has a tremendous advantage over the other.

So, I would like you to expound a little bit on how you envision -- I don't know enough about -- I had to look it up and read a little -- strategic lawsuits against public participation. So, I understand they prevent speech and assembly and other things. How would that work federally? I don't understand how somebody would prove that that was the reason for the lawsuit.
You know, a state-owned enterprise sues you, you know, so you go in and say oh, they're only suing me because I said I don't like China. How do you prove something like that?

MR. ZAMBRANO: Thank you. So, the good thing is that there is a lot of experience with SLAPP lawsuits at the state level. So, in the early 1990s, a lot of scholars and observers noticed that there was a proliferation of lawsuits by companies sometimes against regular citizens for speaking out against a construction project. And the concern was that these defamation lawsuits often were only for purposes of harassment and for imposing costs.

So, a series of states -- California, Texas, Washington -- adopted what they called anti-SLAPP suits. And, as you mentioned, strategic lawsuits against public participation. And the goal was that, well, we're not going to stop you from suing. That would be very difficult to do. You can still file such a suit, but we're going to let the defendant file a special motion to dismiss telling the judge I am being sued only because I exercised my First Amendment rights at a public meeting. And this lawsuit is frivolous and being imposed on me only to harass me.

All right. So, you do have to meet an initial threshold. Now, there are more than 20 of these laws around the country. They're not all the same. But often what they do is say the defendant files a special motion to dismiss, and they show in that motion to dismiss that they,

you know, spoke at a public meeting, for example, and that then the lawsuit was filed against them, and that there is no sufficient evidence that the lawsuit is bogus in a certain sense.

If the judge thinks that initial threshold is satisfied, then the burden shifts to the plaintiff to show that actually they have a high likelihood of prevailing on the merits, that they are filing the suit for proper purposes. And what anti-SLAPP suits -- anti-SLAPP statutes do is they impose a quick 60-day limit, so that this whole process does not extend, does not impose legal costs.

These decisions can also be immediately appealed, right? So, they can also end up imposing punitive damages against the plaintiff for filing such a claim. So, it's all designed to simplify, speed up the process, and allow the defendant to quickly dismiss that claim.

COMMISSIONER BOROCHOFF: Thanks for that answer. I didn't understand at all that there was a lose or pay aspect to it, which I really, really like.

Thank you.

COMMISSIONER GOODWIN: Commissioner Cleveland.

COMMISSIONER CLEVELAND: Thank you. I'm not a lawyer, so these questions may be oversimplified. But, Mr. Cohen, I think we will all appreciate going forward the diamonds and cabbages concept.

I'd like to understand -- if I heard you right, you said China is the largest manufacturer of products they don't invent and upon which they don't pay royalties. Could you address how we might better enforce the last part of that in terms of paying royalties?

And then you also mentioned that you thought the Solicitor General had a role in assisting courts. Could you elaborate on that, please?

MR. COHEN: Let me come to the second question first, because it kind of sheds light on the first as well.

There was a case in the Eastern District of Texas Judge Gilstrap handled. It involved an anti-suit injunction from Wuhan. And Judge Gilstrap, rightly so, issued a -- what he called an anti-interference order. He said that U.S. citizens, U.S. companies, have a constitutional right to litigate U.S. patent infringement claims before a U.S. judge in the United States, and he wasn't going to take no from a Wuhan court.

What he did not do was address the residual very big issue -- is that the Wuhan court now had jurisdiction of the whole world except the United States. So that to me was a huge error, and I think it has something to say about judicial conservatism about not interfering in other courts' jurisdictions, something along the lines I think that Don and Diego have spoken to.

The way around that, the only way around that I could think of would be if the Solicitor General stepped in, or some other authority, and said well, no. That's not really the way we view things. We think it's equally wrong for a Chinese court to be tasked with global rate setting. And if you wanted to go a step further, even the U.S. could do that or the whole -- the structure of an anti-interference order could be of a broader nature.

The fact is that China has this goal of not only resolving disputes -- getting to your second question -- but also setting global rates. In a case called Conversant -- I think against Huawei -- the rate set by a German court was 18.3 times higher than the Chinese rate. Some foreign courts have said well, you know, the Chinese rate is maybe half of what a U.K. rate might be for setting a royalty.

I don't know how we come up with these numbers other than it seems like a tremendous act of judicial magnanimity to say that Chinese courts and Chinese companies who dominate the landscape, producing 80 to 90 percent of the cell phones, are somehow entitled, because they

have such a dominant monopsonistic role in setting prices is somehow entitled to a lower price.

So, what can we do about this? Well, first of all, we need better information. We should not be so timid I think about filing WTO disputes. I know there was a discussion in the last session about WTO disputes. I think WTO disputes, even with the dispute settlement body paralyzed, still have a very beneficial function of disclosing a matter to the global trading community and at least making the U.S. or other players look like a rational actor.

And in the case of the EU case that was brought against ASIs, it appears to have had an effect -- we can't say this for certain -- of stopping China's ASI practice while the case was pending.

So, I think there are international remedies. There is also addressing the problem of Chinese subsidization of patents and a participation in standards bodies that can be addressed through, for example, energizing NIST a good deal more, or simply getting our agencies to work together.

When NIST, PTO, and DOJ came out with a proposed policy on standards-essential patents, the word China did not appear in that policy. The word international did not appear in that policy.

The failure to consider the international consequences of actions that occurred domestically but may principally affect China or our trading partners or even allies is really shocking, and it really needs to be -- our agencies need to do better in addressing these things.

COMMISSIONER GOODWIN: All right. Commissioner Friedberg.

COMMISSIONER FRIEDBERG: Thank you very much. I am also not a lawyer, and I want to thank our panelists for such clear papers and explaining to non-lawyers what some of these rather complex issues are.

Professor Zambrano, I want to start with you. Your discussion of the use of U.S. courts by Chinese litigants seems to focus exclusively on cases in which the plaintiffs in those cases are also Chinese nationals. Is that correct?

MR. ZAMBRANO: Both the plaintiff and the defendant in those cases, yes, they are Chinese nationals. That's right.

COMMISSIONER FRIEDBERG: Okay. Are you familiar with instances in which the targets of these suits have been American citizens? So, I'm familiar with one such case where it was obvious that a Chinese entity -- I believe it was a state-owned enterprise -- was suing -- I forget what the allegation was -- it might have been slander or something like that -- against a U.S.-based analyst of Chinese policy, and it was clearly an attempt to harass this person, impose legal fees on them, and so on. How widespread is that practice? Do you know?

MR. ZAMBRANO: I am familiar with many cases where other authoritarian governments have sued U.S. newspapers. So, for instance, Venezuela's vice president sued the Wall Street Journal -- allegations of defamation -- because they linked them to narcotrafficking. Russian oligarchs have sued BuzzFeed. And I am aware of lawsuits involving U.S. citizens. Now, specifically with regards to China, I don't think -- the six or so cases that I specifically looked at the defendant was typically a Chinese national as well. I don't know if they were dual citizens potentially, but I'm not sure.

COMMISSIONER FRIEDBERG: Okay. It seems like this is one area where -- and I know, for example, after this case the word sort of went around the China-watching community in the United States, and people, particularly those who are working on Chinese influence operations, became very anxious about the possibility the things that they wrote might expose them to this kind of suit. I just don't know whether that has become more widespread.

MR. ZAMBRANO: I'm sure it is. The difficulty is that some of these cases will remain hidden from us. We'll never know, in a sense, especially if the parties settled quickly, right? So, this is one of the main difficulties with these kinds of cases.

By the way, I should also mention Turkey was involved in one of these political lawsuits as well against a cleric who lives in Pennsylvania who is a U.S. citizen. But I think that this is widespread. I am sure it's happening, and my guess would be that it does involve U.S. citizens on the defendant side as well.

COMMISSIONER FRIEDBERG: Okay. Thank you.

Professor Clarke, your proposal for taking the determination about the status or capacity of a foreign legal system out of the hands of courts and putting it in the hands of the executive branch seems eminently sensible. But what would be the basis for a judgment on which category a certain country should be put into?

How would you expect that the assessment would be made that this country has a legal system that's compatible with ours or meets up to our standards and this country doesn't have such a system?

MR. CLARKE: Yeah. That's hard to answer specifically, because it really is a question of kind of judgment ultimately by experts in the system of that country, you know, trying to look at the whole system and, you know, come to some holistic view about whether on the whole it is fair for U.S. courts to be enforcing judgments from that system or to be dismissing cases to that system.

So, I mean, surely one thing one would want to look at would be, you know, is the judiciary actually independent, you know, in some meaningful sense? Is there political interference that occurs in some, you know, unpredictable way?

How opaque is the system? One thing that really struck me in looking at these cases was that the sorts of demands that judges were making on parties arguing that China was not fair were -- would advantage opaque legal systems because they wanted evidence. And if that's the case, then of course North Korea scores very high, if you have to come up with evidence of unfairness or political influence in the legal system.

So, really, my thought was that the executive branch -- perhaps the State Department is really the best place to come up with sort of an authoritative statement saying -- and specifically addressing the issues that courts are concerned with in judgment enforcement and forum non conveniens cases and to say it is our judgment -- it is our view, you know, the official view of the executive branch that, for example, China or, you know, Venezuela or some other country does not constitute an adequate forum for the hearing of U.S. cases or does not regularly grant due process.

And even if that is not -- I think that would be very hard to make mandatory on state courts, but the way litigation goes, I think if they -- if an attorney comes up with that statement and says here is the, you know, executive branch officially making this finding, it's going to be very hard for a judge to say well, I think I know better.

And so, I'm thinking the way litigation would go that even kind of an advisory opinion would be useful.

COMMISSIONER FRIEDBERG: Thank you very much.

COMMISSIONER GOODWIN: Commissioner Glas.

COMMISSIONER GLAS: I'm going to pass. Thank you.

COMMISSIONER GOODWIN: Very good. Then it's my turn.

Professor Zambrano, I want to talk a little bit about the state anti-SLAPP goals that you referenced in your testimony and how that actually ties into your recommendation for the need of a federal anti-SLAPP bill.

It's my understanding that there is a split among federal circuit courts with regard to whether some of the state anti-SLAPP statutes can apply to proceedings brought in federal court. Talk a little bit about that to set up what that means and why would it be important to have federal legislation.

MR. ZAMBRANO: This is a very tricky area of law that I teach my first-year students every year. It's called the Erie doctrine. So typically, the federal courts have their own procedures, the Federal Rules of Civil Procedure. The state courts also have their own procedural rules.

So, what happens when you have a state law claim, like a defamation claim, breach of contract tort, but in federal court?

The federal court then has to decide what kind of procedure to apply, and there is a complicated test. Generally, if the question is procedural, the federal court will apply federal procedural law. If it's substantive, it will apply state substantive law.

The difficult thing is whether an anti SLAPP statute is procedural or substantive. And there is a split among the circuit courts on this question. Some courts have found that an anti-SLAPP statute is inextricably tied to the substantive claim, so you have to apply it in federal court because it's substantive, while other courts have said no, this is procedural, and the Federal Rules of Civil Procedure are incompatible with state anti-SLAPP statute. And, therefore, we cannot apply California's or Texas' or Washington's state anti-SLAPP statute.

So, what is needed here is a federal anti-SLAPP provision, so that federal courts will consistently apply it. Moreover, I really do think that in this context judges, courts generally, are uncomfortable with making judgments against foreign countries.

And I think we've touched a little bit on this with my co-panelists. I don't think that judges are ignorant or naïve. I think they're uncomfortable with getting involved in cases that affect foreign policy. And what you need is Congress to make a clear statement, we want you to get involved in this. We are authorizing you to get involved in this.

And the only way to do that would be a clear, simple, congressional federal anti-SLAPP provision.

COMMISSIONER GOODWIN: Well, let's talk about that provision a little bit. You touched on some other aspects of how you would envision the legislation working. It seems to me a critical aspect would be how you determine who is a proxy for foreign government. So how would that work? Who bears the burden of proof on establishing that? And what is the framework for rendering that sort of determination on the front end?

MR. ZAMBRANO: Yeah. I do think that there are a couple of tricky aspects to what the statute would have to do. One, what kind of political lawsuits are covered, right? When the defendant -- say a Chinese dissident living in the United States gets a lawsuit and they file this special motion to dismiss and they say I'm being harassed. This is not a real lawsuit. It's a frivolous lawsuit. What would the statute cover? I'll talk about that and then move on to the proxies.

I think here courts and Congress can draw on analogous circumstances. For instance, in the refugee context, when a refugee is claiming that they are victims of political persecution, they have to show that one central reason for why a foreign country went after them is political.

So, we do that quite often in other contexts, and we should encourage the courts to draw

on that experience. It is possible -- for instance, if there is an easy, straightforward connection between publication in a foreign country or an event, a political protest, and then a foreign country prosecuting someone, quickly followed by a civil lawsuit in the U.S., you can see how that would meet an initial threshold that this is a political lawsuit.

Now, second, and to your question, what about proxies? A lot of these cases, again, are not filed in the name of the actual foreign country. It's a state-owned company. Sometimes it's regular citizens. That's the way Turkey did it.

How did we know that it was Turkey? Turkey was paying for the law firm representing the plaintiffs, and the lawyers were very clear that this was a political lawsuit. They just told us.

So how about more difficult cases when they don't tell us? Well, there are analogous inquiries that courts conduct when they pierce the veil of corporate structures, trying to determine what company is really involved in this case. If there are multiple shells, courts have developed tests to figure out who the real party in interest is.

Moreover, you can scrutinize who is in control of the lawsuit, who is paying the lawyers. You can require disclosures. We talked about this earlier in the first question. If you have disclosures of who is paying the lawyers, that would help a lot.

And so, I think that there are a lot of other contexts where Congress and the courts could draw guidance to do this. I think it would be very straightforward. And the fact that anti-SLAPP statutes are successfully being used in more than 20 states tells us that.

COMMISSIONER GOODWIN: Thank you.

Commissioner Helberg.

COMMISSIONER HELBERG: I'll pass. Thank you.

COMMISSIONER GOODWIN: All right. Commissioner Mann.

COMMISSIONER MANN: Mr. Clarke, you said in passing in your testimony that it would be useful to have congressional guidance. I didn't know if you were talking about a law. What would the guidance be? Would it take -- what would you recommend? Is there a law that should be passed for FNO and enforcement of judgment?

MR. CLARKE: Yeah. So, my experience my I guess expertise is more in suggesting what should be done than in suggesting how to do it, because that involves, you know, a lot of complex constitutional questions about, you know, what should be the division of labor in Congress and the Executive, and then between the Federal Government and the states.
So, the thing that -- so I'm not -- I'm not sure that Congress could do much by way of a law. That's my short answer, but it's not an authoritative answer because I could be wrong.

My kind of -- I tend to gravitate more towards the idea of executive branch solutions. And, again, I think sort of authoritative statements upon the specific issues that courts are facing by an executive branch agency would do two things.

One, it would be extremely difficult for a court to hold to the contrary. And, second, it would, you know, eliminate these concerns that courts often have, as Professor Zambrano has stated, about kind of infringing on the foreign affairs power of the Executive and of Congress. You know, they are very concerned that if we say something, you know, disrespectful about the Chinese government, this is going to cause a diplomatic crisis, even though this has, you know, never happened, as Professor Zambrano points out in his testimony. So, it's kind of an unfounded fear, but it's, nevertheless, there.

I think in terms of, you know, rules, sort of mandatory rules that could be passed, you know, one thing I suggest in my testimony is just abolishing forum non conveniens dismissal at least to foreign jurisdictions. And that might be constitutionally within, you know, Congress'

power, you know, under its, you know, power to regulate the economy. But that's not a subject that I'm an expert in.

COMMISSIONER GOODWIN: Thanks.

Mr. Zambrano, when you talk about harassment of dissidents, of course we all form in our mind the image of some Tibetan or Uyghur protestor in the United States. But what if it's someone who is very wealthy and high powered? What do we do with a messy case like Guo Wengui where the guy comes out, claims he's a dissident, funds other dissidents, and then there -- it appears that maybe he is an agent of the government that he claims is harassing him. I don't know what the law can do on cases like that, and, you know, what happens when that ends up in court?

MR. ZAMBRANO: I think in those cases clearly the Chinese government should be negotiating with the State Department and Department of Justice. But what happens if one of these sophisticated defendants who may actually be really criminal in that country takes advantage of the statute.

I'm not too worried about having the statute be overinclusive because all that it is doing is shifting the burden to the plaintiff. Ultimately, this is not telling you you can't bring these lawsuits. All that it is doing is allowing the defendant to quickly shift the burden if they show an initial threshold, that they are a political victim.

Then the plaintiff has to come forward with some evidence. And if they have evidence that this is a real case, that they have a substantial likelihood of winning on the merits, the case will go forward. No problem. But I'm sure that many cases, if the statute were enacted, will involve sophisticated defendants who have the lawyers to take advantage of this kind of statute. But I think it's -- I'm very comfortable with this being overinclusive, because the plaintiff can still go forward with their claim.

COMMISSIONER MANN: Thanks. Thank you very much.

COMMISSIONER GOODWIN: Commissioner Price.

COMMISSIONER PRICE: Thank you. And thank you all for your excellent testimony. I'm in the situation where most of my questions have already been asked. But, Mr. Cohen, there is one more. You were talking in terms of a task force in your recommendation. Can you talk a bit about ideas on what the responses that a task force would be tasked to put together would look like?

MR. COHEN: Thank you very much. This is a big topic and an extremely important question. But to give you one sense it -- of the problem is you have asymmetry between agencies in the U.S. Government that have resources, whether human or physical resources, to deal with some of the challenges from China technology and other agencies that have more power but fewer resources.

The classic example is a comparison of USTR and the USPTO on IP-related trade issues where you have -- I led a team of 20 people in four cities. There may be one person in USTR who deals with China IP issues, or maybe two, one on the China team and one on the IP team. How do you drive in foreign policy when you have this disequilibrium? And only way to do it is if folks are encouraged to cooperate across agencies and you minimize redundancy. If you don't minimize redundancy, you are compelled, condemned to superficiality, which is basically what we have in a large part of our China trade policies.

In IP, it's not only USPTO, and it's not only USTR, it's DOJ, it's the Copyright Office, it's ITA, and several other agencies that have different folks sitting in on IP and IP committees.

So, you have to really -- absent a massive reorganization, which is probably too large an

undertaking, you have to create incentives for people to collaborate, and you have to maximize the available resources.

In the example of PTO, you have the largest -- I think it's the second largest database in the United States on technology and science issues. We're all struggling here about where to impose export controls, how to deal with investments -- outbound or inbound -- involving China, where the emerging technological threats are.

We need to reengage on forward-oriented technology analyses, which was actually something pioneered here in Congress under the Office of Technology Assessment, which regrettably was disbanded, but these are analyses that would aggregate scientific publications, patent data, talent flows, et cetera, to try to anticipate where the next technological challenges are.

China does these. Taiwan does these. Korea does them. Japan does them. Some of them even have obtained patents and novel ways of analyzing technological threats. We don't do them at all, at least in the government, as far as I know.

So, what a task force does is cleans up a mess and creates structures where agencies can work together and are incentivized to do so.

COMMISSIONER PRICE: Thank you. That's all I have.

COMMISSIONER GOODWIN: Commissioner Schriver.

COMMISSIONER SCHRIVER: Thank you, Mr. Chair. Thank you to our witnesses. A really fascinating and troubling discussion.

Mr. Zambrano, you indicated that there is a lot of underreporting because cases can be settled, et cetera. I would submit that even short of a case that gets to the point where it needs to be settled, a cease and desist letter can also resort in organizations and individuals having to expend resources for the potential defense, which I am familiar with a research organization that received such a letter, and in fact my organization had to hire somebody just to sort through the potential vulnerability of a cease and desist letter.

So, I think it's a pretty big problem, but -- which leads to my question. Are you familiar -- you've done excellent research in this area, but are you familiar with any inventorying -- inventory work that is as comprehensive as could be in terms of collecting all this -- you know, the actual cases, cases that may have been settled, other instances of legal harassment? Does somebody have the comprehensive inventory of this?

MR. ZAMBRANO: Not that I'm aware. I tried to do my best in finding these claims, but the only way to find them for a researcher like me is to look at when the defendant claims in a motion to dismiss or an answer that they are being persecuted and that this is a frivolous lawsuit. If they haven't claimed that, I can't tell.

COMMISSIONER SCHRIVER: Sure.

MR. ZAMBRANO: The State Department, FBI, were quoted in the Wall Street Journal story involving this declaration from an organization in China that there was a legal war against corruption suspects, so they might have more information about these claims.
It looks like they were contacted in some of these cases, so I think they could have more information. But, otherwise, no, there is no inventory of these claims.

COMMISSIONER SCHRIVER: Well, that's exactly what I was wondering. If Congress were to direct some part of the executive branch to either themselves or contracts with a capable research team to develop that inventory, would that be a useful thing to have in your opinion?

MR. ZAMBRANO: Absolutely. I think that would be great. And, more generally,

going back to some of the questions before about how we figure out who is a proxy, guidance from the State Department, guidance from the Executive, would help the courts in these cases. And the Executive does file amicus briefs.

And as my co-panelist discussed earlier, the State Department has developed a lot of tools to evaluate foreign government's authoritarian nature and involvement in our courts.

COMMISSIONER SCHRIVER: Yeah. And, actually, that led me to -- I was going to ask Mr. Clarke -- I mean, it seems to me your instinct of looking toward the State Department is a good one. It strikes me that in our annual Human Rights Report normally there is a section that talks about rule of law, equality of the judiciary, et cetera.

Would you favor in the annual Human Rights Report, where we talk about rule of law, an explicit recommendation on FNC or some of these other issues you raised?

MR. CLARKE: Yeah.

COMMISSIONER SCHRIVER: We do travel advisory. We do a lot of things out of the State Department to protect American citizens, like travel advisory, health care, you know, so why not actually have the State Department put in this annual report that they're already doing an explicit assessment?

MR. CLARKE: Right. I'm glad you asked that question, because that comes up a lot. And I would not recommend that anything like this be included in the Human Rights Report, that it be in a separate one, because what happens -- and I see this all the time in these cases -- is that when a party says look, the State Department in this Human Rights Report said, you know, China doesn't grant due process, yada, yada, yada, the other party says well, that's just on these political cases.

This is a civil case. This involves breach of contract, you know, in a manufacturing situation, and so that has nothing to do with this. Chinese courts -- you know, we concede that there is problems in these political cases involving dissidents, but this is a civil case, you know, totally different.

And if the court wants to dismiss the case, then they can just say right. You know, they can buy that argument or even -- you know, even if they're not predisposed to dismiss the case, they will buy that argument.

And I have just seen that argument made and accepted in so many cases that I think it should be in a separate, you know, document that says we're not talking about human rights in particular. This is a general assessment of the Chinese legal system, specifically for courts that are looking at issues of FNC dismissal or that are looking at enforcement of judgment cases. I don't want to make that argument available to parties to say well, this is just a political case.

COMMISSIONER SCHRIVER: Okay. That makes sense, but Congress could direct the State Department to produce such a report.

MR. CLARKE: I think they could. They directed it to produce the Human Rights Report. So, they could ask the State Department to produce it in some other -- for some other purpose as well.

COMMISSIONER SCHRIVER: Thank you.

COMMISSIONER GOODWIN: Thank you. Commissioner Wessel.

COMMISSIONER WESSEL: Thank you to all our witnesses, to our co-chairs for setting this up and initiating this hearing.

And, Mr. Clarke, thank you for returning.

Mr. Cohen, Mark, I think this is your third appearance before us over the years, and your scholarship and advice has always been helpful.

And to all of our witnesses, thank you for your -- the thoroughness of your work.

I have questions for Mr. Zambrano and Mr. Cohen. And, Mr. Zambrano, following up on Chairman -- our Chairman's question regarding the anti-SLAPP in federal statute, and there have been efforts I think most recently by Chairman Raskin to have an anti-SLAPP -- a federal anti-SLAPP statute -- isn't there still the problem of dismissal without prejudice that allows many of these parties, you know, multiple bites at the apple, and that allows for a foreign plaintiff here, let us say a Chinese-associated entity, to, you know, SEP the economic resources of a defendant here in the U.S.?

MR. ZAMBRANO: Yeah. Absolutely. If a claim were dismissed without prejudice, then the plaintiff would be allowed to come back and refile the claim, and that would be a problem.

So, I think it's important to look at how punitive the anti-SLAPP dismissal would be. And as we mentioned earlier, if it involves not only paying legal costs, but beyond that, that would be enough punishment, I would think, to even deter some of these claims.

But, yes, that's part of a provision that would need to be examined closely, what kind of legal costs or more punitive damages you impose on these plaintiffs, if there is a finding by the court that this was a SLAPP lawsuit.

COMMISSIONER WESSEL: Right. In California, they allow -- I think if they're a repeated -- I've seen cases where there are repeated dismissals without prejudice, again, that just rack up the bills, and often a wealthy plaintiff can, you know, again, undermine the resources, get away with -- I don't want to say murder, but significant harm.

Are you aware of that? And are there provisions in any of the, what is it, I think you mentioned 20 states that have provisions you think we should look at as the Congress potentially examines legislation?

MR. ZAMBRANO: Yes. So, there are broad -- broader and narrower anti-SLAPP statutes. California is an example of a broad one, not only in that it can include attorney's fees and legal costs, but also in the amount of lawsuits that are covered by the anti-SLAPP statute.

Arizona has a narrower version of an anti-SLAPP statute that's really concerned only with First Amendment-style exercises of speech and retaliatory lawsuits coming out of that.

On the costs, I'm happy to look more at that. Actually, I'm not -- I don't have a complete understanding of what these 20-plus statutes do with regard to costs and whether some of them exceed, again, attorney's fees and legal costs, and go beyond that. And I would be happy to look at that question.

COMMISSIONER WESSEL: Okay. Thank you. That would be helpful.

And to sort of take a jump off of Chairman Bartholomew's question regarding FARA, but apply it to the question you said where there was the ability to pierce the veil and find out that Turkey was paying the costs, what kind of discovery -- is discovery adequate here? Or if there was a federal anti-SLAPP statute, is there -- are there some specific provisions we need to address, adopt?

MR. ZAMBRANO: Yeah. I love that question, because I've written a lot about discovery. So, there are going to be a lot of easy cases, and I should have mentioned that earlier. But, look, if you're a state-owned company, you should be covered, right? Any kind of company where a foreign government has a stake should be covered, right? So, they will fall under the umbrella of this anti-SLAPP statute.

If you are on any lists either sanctioned -- for example, Russian oligarchs, we have long lists of individuals who are linked to the Russian government. If you are on any such lists, you

are covered. That's an easy case.
If you are on any lists produced by the State Department, FBI, that's covered. Right?

So, the trickier cases are going to be when a regular citizen was drafted by a foreign government to file this lawsuit, and then the question is, who is paying for that? But here is another angle. Who is the beneficiary of this lawsuit?

COMMISSIONER WESSEL: Right.

MR. ZAMBRANO: If this lawsuit goes forward and we think the foreign government is the main beneficiary, and not this plaintiff, that's a reason to cover that lawsuit as well under the anti-SLAPP statute. And, yes, you're right, in that inquiry, there may need to be some court power to look into these questions, including something like jurisdictional discovery.
And I should say, you know, courts do have the power, at the jurisdictional stage, to order discovery. So, this would be analogous to that.

COMMISSIONER WESSEL: That would be great.
I see my time is up. Let me -- Mark, if for the record you could give us an answer to two issues. One, have you seen any specific targeting of technologies within lawsuits, filings, et cetera, that would give us somewhat of a roadmap of Chinese priorities -- AI, quantum, whatever it might be -- number one.

And, number two, what is the current state of affairs with regard to foreign persons being able to have access to the PTO database that, you know, can provide enormous opportunity to -- visibility in the U.S. patents, understanding there is a lot of trade secrets and other things, et cetera.

So, if that can be provided for the record, it would be very helpful.

COMMISSIONER GOODWIN: And, Mr. Cohen, we are actually doing pretty well on time if you would want to answer now.

MR. COHEN: Yeah. I can answer them briefly. As far as I know, I know this was a discussion of some a few years about China accessing the USPTO database --

COMMISSIONER WESSEL: Right.

MR. COHEN: -- what they wanted at that time was the CDs or the physical media, since they could have gotten online and had the same access, like anybody else has from anywhere else in the world. And I think the data was provided at that time, so they had easier access. You know, the problem is patents are published. I know that CNKI is talking about not releasing its patent data, and I have spoken to a former director of the USPTO who thought that that somehow violated TRIPS or other obligations. I suspect it would, but it's fundamental to the patent system that it's published. What shouldn't be published, and it's not publicly available, are trade secrets, other confidential information, notes perhaps of the examiner and the like. But, in general, this stuff is publicly available.

What the PTO has said is not publicly accessible -- I don't think it's even accessible to other agencies -- are certain tools to assess whether there is prior art that could be used to invalidate a patent. And this involves searching through scientific literature, patents from other countries, and the like.

And that's the kind of data that I think could be extraordinarily useful to the interagency community in drafting up a better export control regime, CFIUS regime, and coming up with good technology policies, and that's what I was partially referring to.

In terms of targeting technologies, I think what we're primarily looking at -- and I'm saying this kind of instinctively, not based on any research, but that I think most of the litigation, at least the high-profile litigation, is in consumer technology where the money is.

People are bringing cases largely to recover or achieve some of that diamond promise of the U.S. patent system. So, you're looking at, you know, 5G technologies, IOT. The automobile sector has also become quite hot of late, and not anything much beyond that, really.

And I think you've seen also Chinese companies that have been joining patent pools that are being asserted against big U.S. tech companies, along with other countries. Some people find that offensive. I don't necessarily find it offensive, but I do think there is a problem with low quality Chinese patent assertions and also the way China will sometimes ramp up on declaring patents as standards-essential.

Typically, a U.S. company will declare a patent is standards-essential for two to three technical standards. China will do it for six or seven. Part of that is responsive to subsidies. That also makes China look like it's a bigger standards power than it otherwise would be. You have the same problem with patent subsidies.

So, I think this is largely commercial technology that we're looking at, not areas that necessarily represent a distinct or a new threat.

COMMISSIONER WESSEL: Great. Thank you.

COMMISSIONER GOODWIN: Vice Chairman Wong.

VICE CHAIRMAN WONG: Professor Clarke, you have collected cases, examples, going back to the post-Mao era. The post-Mao era is roughly 47 years, almost 50 years, and you indicate you found 60 cases of forum non conveniens and 16 enforcement cases.

Are you comfortable that that's basically the universe of cases, or is this much larger, you just haven't been able to find it? Because that's a long time for so few cases.

MR. CLARKE: Right. So, you know, the post-Mao era, I'm basically talking about the era of economic reform from 1979 on. There were not a lot of cases until basically the 2000s. So, I'm not sure if there were -- do I dare say none, but basically those cases are every case I could find. And I'm pretty confident that I found them.

So, they're not supposed to be a representative sample. That's supposed to be the universe of all cases.

VICE CHAIRMAN WONG: But it's more like 60 cases of FNC in roughly more of like a 25-year period, not an almost 50-year period.

MR. CLARKE: Yeah. That's correct. So that's, in fact, less than -- more like over 20 years perhaps, yeah.

VICE CHAIRMAN WONG: Okay. I don't know if you were here for the first panel, but one of the -- our witnesses, Dan Harris, no friend of the Chinese legal system or no fan of it, you know, he had something he called the 90-10 rule. 90 percent of cases, particularly in the commercial area, generally adjudicated roughly fairly. In China, 10 percent were with strategic industries or politically sensitive.

It's not -- if we're in a situation, I'm a court, and I'm looking -- and I'm absorbing and taking us back to the 90-10 rule, don't you think that's pretty reasonable for them, therefore, in kind of an adequacy inquiry under FNC to be deferential? How would you respond to that?

MR. CLARKE: Sure. So, my response to that is that you can't -- so even if that's true as a statistical measure, you cannot tell in the context of any particular case whether it's going to be true.

So, I don't agree with the distinction that many, you know, people I respect make, which is that there are sort of political cases on the one hand, and then there is -- you know, which are subject to interference, and then there is non-political cases on the other hand, because you just cannot tell.

So, for example, there is a -- let's suppose we have a case of, you know, workplace injury. This is an actual case -- workplace injury, somebody is injured in a factory accident, you know, in some small town somewhere, and the factory owner, you know, is on the local people's congress.

You know, that case -- this, as I say, is an actual case. That case never goes anywhere, because it becomes a political case.

So, to me the question is, do the channels exist in any particular case for interference should some suitably senior or powerful person want to interfere? And the answer is, yes, all those channels always exist.

So we just cannot tell beforehand, and, therefore, when a party comes to an American court and says this case is going to be subject to this type of interference, or in an enforcement case, this case has been subject to that type of interference, for the court to say well, you know, that's 90 percent probably wrong, because it's a civil case or something like that, or to say it's 100 percent not going to happen because it's a civil case, you know, that to me is not a correct assessment of the Chinese legal system.

And the very opacity of the system makes it impossible for the court to figure out just how -- you know, whether it did actually happen in a case that has already occurred. So that's my answer.

VICE CHAIRMAN WONG: Just a clarification point. You mention in your testimony essentially what you cite is bad precedent. You know, one bad decision has a systemic effect, given our, you know, precedential common law system under these rules.

Is your -- are you citing decisions on the legal inquiry that were not supposed -- or courts say they are not supposed to inquire about the nature of a government, so basically is it a precedent on the question in the inquiry under an FNC decision? Are you citing precedent where they say the Chinese government or the Chinese court systems generally fare? Which seems more fact-based to me.

MR. CLARKE: Right. So, well, there is both kinds. I mean, there are cases which have produced quotes that get produced and reproduced throughout the system where it says, you know, U.S. courts should not cast aspersions on foreign legal systems, which are -- you know, those are just misstatements.

The U.S. courts have to do that, for example, if they're making a judgment about whether a person is likely to be tortured if they go back to China. You know, their torture convention requires you to make that, possibly a very insulting, you know, judgment about the Chinese legal system.

But there are -- you know, I have in mind -- in particular, in forum non conveniens cases there is a Supreme Court case called Sinochem which is cited by every defendant that wants to get a case dismissed to China. And I won't go into the details, but in that case, we have a district court decision, and which did dismiss to China.

And that was appealed, but on a -- on the grounds that it had nothing to do with the dispute over whether China was an adequate forum. It was a completely different --

VICE CHAIRMAN WONG: But what was the actual holding -- what's the actual misstated holding there, that China's legal system is fair or that you're not supposed to inquire about it? Like what --

MR. CLARKE: No. The holding of the Supreme Court was on a completely different technical issue. The holding -- I mean, if you want to know, the holding of the Supreme Court was on the issue of whether the Court had to determine that it had personal jurisdiction over the

defendant --

VICE CHAIRMAN WONG: Right.

MR. CLARKE: -- before it decided to dismiss on FNC grounds or after.

VICE CHAIRMAN WONG: But what's the

MR. CLARKE: They heard not a single word of evidence that --

VICE CHAIRMAN WONG: What's the misapprehended?

MR. CLARKE: Pardon me?

VICE CHAIRMAN WONG: What's the misapprehended holding, that people --

MR. CLARKE: So, the misapprehension is to say that the Supreme Court ruled or found or held that China constituted a fair, you know, and adequate --

VICE CHAIRMAN WONG: It's a factual --

MR. CLARKE: -- forum.

VICE CHAIRMAN WONG: I mean, you're not supposed to -- anyway, okay, that answers my question.

MR. CLARKE: Right. Which they did not do. They didn't hear any argument about that.

VICE CHAIRMAN WONG: Right. Okay. Interesting.

MR. CLARKE: I'm sorry for the --

VICE CHAIRMAN WONG: No, no, no. I want to just get that it's a -- I mean, in my view, you can't have a factual precedent. That doesn't make any sense. The facts change. Anyway, so --

MR. CLARKE: The District Court found that China was an adequate forum.

VICE CHAIRMAN WONG: Right.

MR. CLARKE: Nobody above the District Court found -- but because that wasn't the defendant's -- you know, that wasn't the dispute that went on appeal --

VICE CHAIRMAN WONG: I've read many bad district court opinions in my time. So, I totally believe that that's the district court holding.

Quickly, Mr. -- or Professor Zambrano, toward the end of your written testimony, you lay out some smaller steps courts can take under current law in the absence of an anti-SLAPP statute. And I think you give a pretty persuasive case for federal anti-SLAPP statute, but I notice you don't mention -- or maybe I'm misreading it -- oh, I noticed you drop a footnote here to my old classmate, Maggie Gardner. That's great. Great job, Maggie, if you're listening. Sorry. You don't mention Rule 11 sanctions which my understanding is judges, even on their own motion, can impose. Is that an option here? Are there downsides to that? Should this be used more? You know, essentially Rule 11 sanctions are frivolous lawsuits.

MR. ZAMBRANO: Yeah. I think it is an option, but courts have refused to apply them in these cases. So, one of the parties -- and I may be misremembering, but maybe the Turkey case they filed for Rule 11 sanctions and the court did not grant them.

Generally speaking, I have argued that there is a norm in the federal judiciary against sanctions. And so, Rule 11 gives the Court the power to sanction attorneys for filing, in other words, harassment lawsuits, frivolous claims.

But judges are very reluctant to do that. There is a norm in the federal judiciary and among lawyers that this isn't the kind of thing that you do in the federal courts. You don't move for sanctions because you don't want to chill zealous advocacy. Okay? And that norm, I have argued in other research, comes out of the 1990s of a reform effort of the language of Rule 11.

And because of that, I think judges are not only, you know, reluctant to grant Rule 11

sanctions, but when you add on top of that a foreign sovereign, even more reluctant because of this problem that we've been talking about today that judges are wary of disturbing the Executive's and Congress' foreign affairs powers. And so, they walk very carefully whenever a foreign sovereign is involved.

And for that reason, unless we had a complete norm change in the federal judiciary, Rule 11 sanctions are not the right tool at the moment.

VICE CHAIRMAN WONG: And you say that norm came down in the '90s with a revision of FRCP, which came about from a committee of judges, right? Or, actually, I don't know how the --

MR. ZAMBRANO: Yeah. The Advisory Committee, the Rules -- the Civil Rules Advisory Committee, appointed by the Chief Justice --

VICE CHAIRMAN WONG: Right.

MR. ZAMBRANO: -- they are generally in charge of offering reforms to the Federal Rules of Civil Procedure. And, in the 1980s, there was a reform that made the rule much harsher, and then the Advisory Committee backed off in the early '90s and returned to a less harsh language.

And in that debate, it was -- it was quite common for judges to express kind of dissatisfaction with a harsh rule. They felt uncomfortable with --

VICE CHAIRMAN WONG: Is there any reconvening, reconsideration of the rules, on the horizon?

MR. ZAMBRANO: Not on Rule 11, as far as I'm aware. I don't think there have been any attempts to reform Rule 11 in the past 20 years.

VICE CHAIRMAN WONG: If that's the way you change the norm, maybe -- maybe it's something the Chief Justice -- the Chief Justice should think about.
Anyway --

MR. ZAMBRANO: Thank you.

COMMISSIONER GOODWIN: Well, let me jump in on that because that's a fascinating exchange there, and I think it also speaks to the scale of harm that you described earlier in your testimony.

Our system does have in place rules and procedures for sanctioning frivolous filings by attorneys, and dismissing lawsuits that cannot articulate the claim for relief. But that would not remedy the harm that your proposed legislation seeks to remedy, which is the harassment, the expense, the chilling effect. Correct?

MR. ZAMBRANO: That's right. I mean, if you look at the Venezuelan claim against the Wall Street Journal, it was extremely frivolous. There was no chance that that lawsuit would succeed on a defamation claim. And the Venezuelan plaintiff continued an appeal to the Second Circuit after it was dismissed, because, again, they -- all they want is to impose costs.

So even if they are sanctioned and just have to pay a little bit of money, these are deep-pocketed plaintiffs. So, they don't mind that.

COMMISSIONER GOODWIN: Well, switching gears for kind of a broader question, we've been exploring here today and throughout the entire hearing on how our system and our courts engage with, apply, and interpret illiberal laws from authoritarian regimes like China, and legal actions brought by authoritarian entities, and what deference or recognition to lawsuits should be afforded to judgments rendered in those jurisdictions or to representations by those countries and those regimes as to what their law is and the adequacy of their system. And that is difficult enough as it is for our courts to navigate.

I want to ask a question where the asymmetrical nature of this conflict between the two systems is brought to bear in somewhat -- in somewhat of a more indirect manner.

Using the example of the Huawei Executive who the U.S. sought to extradite to face trial here in the U.S. on fraud charges, she was detained in Canada, took full advantage of the protections afforded to her under that process, which would be a relatively routine process for determining whether the request was valid under the extradition treaty between the U.S. and Canada, had counsel, which is her right, and if extradition would have been granted, it simply would have sent her to the United States to face trial where she would have been afforded all of the protections, procedural safeguards, that any criminal defendant has.

Two days -- or I shouldn't say that -- soon after the extradition request came in, two Canadian nationals are detained in China on a very unclear -- on very unclear grounds and held for years without charges being announced, and to make a long story short, used to pressure the Canadian government and the U.S. government to drop that request and drop the extradition proceeding.

In the Chinese Communist Party, they have a leverage in pressure, Western democracies, and judicial systems like ours, because of their ability to rule by law, to influence their judicial proceedings without constraint, and a very thorny issue for us to navigate where China uses its party-controlled judicial system in a manner that had an impact on our independent judiciary. So, what do we do? I'll open it to the panel.

MR. ZAMBRANO: I do think that there is -- you are totally right to point out that there is a complete lack of reciprocity here. Often a lot of these doctrines in U.S. courts are based on the idea, not just of -- on international comity, that we should give respect and deference to foreign sovereigns, but also reciprocity, that we treat other countries with respect and dignity because they will treat us with respect and dignity.

Well, it turns out that they don't. I mean, just looking at access to court, right, we give foreign countries, as I mentioned earlier, limitless access to court. We impose no barriers on it. But these countries don't give us the same access to their courts, and they certainly don't give our citizens the same access to our courts.

There was an idea floated in the 1800s that access to courts should be reciprocal, that U.S. courts would refuse to give access to a national of a country that didn't give equal access to American plaintiffs. But that idea was dismissed -- was rejected by the Supreme Court. And part of the concern is that while we would be punishing nationals for what their foreign governments do, and that's not fair either, another -- yeah.

COMMISSIONER GOODWIN: Plaintiffs would be confronting a very liberal system by becoming more like them.

MR. ZAMBRANO: Right. Exactly.

COMMISSIONER GOODWIN: Do we want to do that?

MR. ZAMBRANO: Exactly. Right. And we benefit from a lot of these claims in U.S. court, because they are disciplining our companies, right? So, if you have -- there's a famous 1960s case involving the Cuban dictatorship where Fidel Castro's government sued an American sugar company to collect on a sugar shipment.

And the Supreme Court had to deal with this problem of, do we give them access to court or not? But if it is a legitimate claim, it's disciplining an American country -- company that is misbehaving. We want that. We want a better market here. We want our companies to not engage in crimes abroad either, right? We have the FCPA for that reason, too.

So, you could make a lot of arguments for why we don't have to rely on reciprocity, but I

do think more broadly Congress should -- and I think it has considered what they call the True Reciprocity Act of 2020, I believe was the bill, of trying to ground the relationship with China on more reciprocal terms. I do think that makes sense.

COMMISSIONER GOODWIN: Mr. Clarke, or Mr. Cohen, anything to add? No?

MR. CLARKE: I'm sorry. Were you asking for --

COMMISSIONER GOODWIN: No. Just if you had anything to add.

MR. CLARKE: Oh. Yeah. So, I guess true reciprocity would mean that the United States, or in this case Canada, would be able to go grab a random Chinese citizen, you know, just depending -- you know, we can get Xi Jinping's daughter, if she is at Harvard, something like that, you know, and I think that's -- I think we'd probably all agree that's a non-starter.

The difficulty in that particular case I think was just an inadequate reaction on the part of the international community and -- to this, you know, completely outrageous behavior of hostage-taking, which is what it amounted to. And I don't think it's something that can be fixed within the U.S. judicial system. I don't think it's a flaw in the U.S. judicial system.

It's a flaw on the part of the international community that they are unwilling to -- or that they are willing to kind of put up with this kind of behavior by China.

MR. COHEN: I just might add one observation. It's not exactly germane to your question about Meng Wanzhou and Huawei, but I think there is this temptation to look for something quick and dirty, so to speak, that we can impose reciprocal pressure for something unfairly imposed on our citizens. And that temptation, if we exercise it at all, has to be narrowly tailored.

So, we saw in the Protect American IP Act that was signed into law I think early January where there is a measure in place, if a foreign person steals U.S. trade secrets, where they will be subject to a range of U.S. export control-type sanctions.

There is no requirement that the person first had exhausted legal remedies in the U.S., China, or any other -- any other jurisdiction, nor is there any kind of requirement that it's narrowly tailored or that the decision is somehow adjudicated by a U.S. judge or even an administrative law judge, perhaps from the ITC. It just doesn't exist.

It's simply I guess if the executive branch found that you did something bad, these are the consequences. Nor is there an effort to exploit, again, you know, WTO remedies, which are very clear in Article 39 uniquely for trade secrets that a member -- a member has an obligation to protect trade secrets, which seems to deal with these kind of economic espionage type cases.

So just kind of overly broad tailoring, even if it's in the name of national security, is a WTO violation, unless it's on the narrowest grounds possible. And, in many cases, we're responding on this very broad ground that really threatens to undermine some of the other commitments that we would like to see in the global trading system.

COMMISSIONER GOODWIN: Thank you. Well, gentlemen, thank you all for your time today and your excellent testimony.

All the testimonies, as well as a recording of the hearing, is available on our website. I'd like to note that the Commission's next hearing will take place on Thursday, June 15th, focusing on Europe-China relations and trans-Atlantic cooperation.

We stand adjourned. Thank you.

(Whereupon, the above-entitled matter went off the record at 3:34 p.m.)