Testimony

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

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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]

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[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

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[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/.