Testimony of Jacques deLisle
Stephen A. Cozen Professor of Law, Professor of Political Science
Director, Center for the Study of Contemporary China
University of Pennsylvania

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Chairman Issa, Ranking Member Johnson, and Distinguished Members of the Committee. Thank you for the opportunity to testify today.

My testimony today draws on more than thirty years of experience conducting research, scholarship, and teaching on Chinese law, Chinese politics, and China's legal interactions with the United States and the international order. My comments are also based on my experience as an expert witness in dozens of cases involving Chinese law and many of the issues of U.S. law in China-related cases that the following discussion addresses. I am the Stephen A. Cozen Professor of Law, Professor of Political Science, Director of the Center for the Study of Contemporary China, and former Director of the Center for East Asian Studies at the University of Pennsylvania. Previously, I served in the Office of Legal Council at the U.S. Department of Justice, where my work included China-related issues. I am also a member of the U.S. Department of State's Advisory Council on International Law, the International Academy of Comparative Law, and the National Committee on U.S.-China Relations.

The stated purpose of this hearing is to address how the "Chinese Communist Party" "abuse[s]" U.S. courts, including by using U.S. judicial processes to harass those whom the Chinese regime disfavors (such as critics in exile or U.S. companies), to avoid accountability under, or effective subjection to, U.S. law (including that which protects the rights of U.S. parties). Such phenomena can and sometimes do occur at the behest, or to the benefit of, the CCP and the Chinese state or party-state more generally.

Cases that might be rightly classified as CCP- or Chinese state-orchestrated abuses of U.S. legal process or attempts to subvert U.S. law often are not simply or categorically distinguishable from the many cases in which parties—including China-linked ones—bring more ordinary claims to which U.S. courts have been open and, in keeping with principles of the rule of law, should be open. U.S. courts have, and use, doctrinal and procedural tools—and could in some cases wield them more effectively—to address the relevant abuses or attempts to evade responsibility. Many of the identified concerns are best—if imperfectly—addressed and redressed through courts'

applying in individual cases the means that U.S. law does, or with minor, often judicial, adjustment, could provide.

Legislative reforms that would prohibit, restrict, or significantly chill a wide range of China-linked parties from access to U.S. courts, or that would broadly presume that decisions by Chinese courts are unfair or the product of political dictates, should be undertaken with due care and caution. Such measures may be superfluous (given the existing or potential capacity of U.S. courts to address the relevant concerns) or ineffective (missing the indirect, opaque, or informal influence on Chinese parties to litigation and courts that are often identified as sources of concern). Broad measures can create impediments to access to justice in cases beyond their stated or intended targets, with adverse consequences for the interests of parties with unobjectionable claims (including U.S. parties), other stakeholders (including Americans), American principles of fair access to justice, and even U.S. national interests on a global scale. They also risk failing to address—or focus on—trends in Chinese legal developments that pose significant threats to U.S. interests.

Abuse and Avoidance of Accountability, and Courts' Capacity to Address

Several forms of abuse of U.S. law or avoidance of subjection to accountability under U.S. law have been at issue in U.S. legal proceedings involving Chinese parties or Chinese interests in recent years.

The PRC has made requests to extradite PRC nationals in the United States for return to China to face prosecution. Where such a request targets an individual for political reasons, such as being a dissident or a critic of the regime, it would be an abuse of U.S. legal process to serve the political aims of the Chinese party-state—and to do so in ways inimical to principles reflected in U.S. law and international human rights law. Such requests are typically framed as seeking return of a fugitive to face prosecution for non-political offenses such as corruption, fraud, or disrupting public order, and so on. The United States does not have an extradition treaty with the PRC and is extremely unlikely to enter into one. U.S. authorities routinely reject PRC requests for extradition, particularly where there are suggestions of political persecution. Such cases do not reach U.S. courts and thus do not create opportunities for abuse of judicial processes.

PRC non-state parties (typically companies) bring civil lawsuits against individuals (often PRC nationals, or people of PRC origin, in the United States) or against companies (Chinese, U.S., or other) seeking remedies for ostensibly not-politically-related harms, such as fraud or breach of contract or fiduciary duties, or other matters arising (typically) from commercial activities. Defendants sometimes claim that these cases are not what they purport to be and are, instead, vexatious lawsuits brought at the behest of Chinese authorities (whether framed as the CCP, the

PRC, or the Chinese party-state).[1] When such claims are accurate, it would, of course, be a case of political abuse of U.S. courts and judicial process.

Courts have a variety of means to dispose of these types of suits—ones that are also used in cases of ordinary, non-political litigation. Parties who bring frivolous or vexatious lawsuits can have their claims dismissed and be sanctioned under Rule 11 of the Federal Rules of Civil Procedure (and state law equivalents). Rule 11 is arguably an underused tool, but truly harassment-motivated and legally unfounded claims by parties who claim to be pursuing legitimate civil claims but who are in fact following hidden directives from the CCP to intimidate or impose significant financial costs on critics of the regime or politically disfavored companies would seem to be a relatively compelling occasion for courts to use such measures.[2]

To be sure, a more liberal use of Rule 11or other measures to end proceedings in vexatious civil cases will not reliably shield defendants in such suits from having to bear the stress and costs of litigation, including beyond the preliminary phases of a lawsuit. But addressing the problem of such suits ultimately requires the skillsets and procedures of courts because of the case-specific factual determinations that need to be made. Whether a civil suit in U.S. court has the abusive features at issue here requires an inquiry into facts and motives that does not map onto any simple categorization. Chinese companies with ties to the CCP or the Chinese state often do not act at their behest or even in their interests. In many of their business dealings, Chinese state-owned or state-linked or state-invested enterprises pursue commercial goals. A vast range of enterprises in

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[1] See, for example, Emily Feng, Sherry Fei Ju and Lucy Hornby, "China Turns to US Courts in Effort to Silence Exiled Businessman," *Financial Times*, June 15, 2017 (concerning Guo Wengui); "Chinese Conglomerate HNA Sues Exiled Tycoon Guo," Reuters, June 16, 2017, https://www.reuters.com/article/world/chinese-conglomerate-hna-sues-exiled-tycoon-guo-idUSKBN1970GL/ (same); Aruna Viswanatha and Kate O'Keefe, "China's New Tool to Chase Down Fugitives: American Courts," Wall Street Journal, July 29, 2020 (concerning Peng Xuefeng); Marie Tsai, "He Escaped China. Harassment Followed Him to New York," Radio Free Asia, Mar. 19, 2025.

[2] In some cases of vexatious civil litigation, especially that involving targeted persons in exile, another route to early dismissal could be available. Courts also have the ability to dismiss such suits relatively early in the process on grounds of *forum non conveniens*. Because cases of this alleged type ordinarily involve activity that occurred in China, claims for redress for actions that violate / are actionable under Chinese law, Chinese parties on at least one and often both sides, evidence and witnesses located in China, and, often, courts can find grounds for dismissal on the grounds that such factors warrant dismissal of the case, for trial in China.

This is a problematic solution. In principle, it would require the defendant to assert that Chinese courts provide an adequate and available alternative forum (which would be in tension with the defendant's claims about Chinese party-state character and behavior) and defendant would face the risk of the Chinese plaintiff's subsequent attempt to enforce a Chinese court judgment—indeed, a default judgment if defendant did not participate in the Chinese litigation—in U.S. court (and under the relatively deferential review of foreign court judgments in the recognition-and-enforcement context).

These are, of course, major problems in ordinary commercial litigation. But they should be less daunting in the truly vexatious litigation case, where the targeted dissident or disfavored company defendant likely has nothing to lose in terms of future ability to operate in China or with Chinese parties and—if the defendant's characterization of what happened in the case is trued—make a strong argument against judgment recognition and enforcement by a U.S. court (a point addressed later in this document).

China, including formally and/or functionally private ones, have significant ties to the CCP and the Chinese state, through the party committees that companies are required to establish, through industrial policy measures that provide capital or regulatory support to companies, or through company leaders who are members of the CCP or state legislative or consultative bodies for reasons that in many cases are non-political, such as the professional opportunities or chances to undertake the equivalent of "lobbying" that such positions offer.

On the other hand, as many criticisms and accounts of vexatious litigations assert, Chinese plaintiffs that are formally and often functionally private entities can be, in practice, pressured or required or otherwise enlisted to do the CCP's or state authorities' bidding. But that, of course, does not mean that they do so in every, or even many, cases.

On the other side of such litigation, claims by defendants that they are being politically targeted by CCP- or PRC-driven litigation by nominally non-CCP and non-state parties cannot be taken at face value. Persons who are experienced in or knowledgeable about China will often know how to articulate a plausible, if unfounded, tale of persecution and retribution to seek to avoid adverse legal consequences (whether losing a costly civil fraud case or being denied asylum in an immigration proceedings). Such assertions are not uncommon and not all of them will be true or withstand scrutiny in court proceedings, including during the discovery phase of litigation. Nor should such assertions, even if true, necessarily preclude findings in favor of politically-motivated plaintiffs on valid non-political claims.

Anecdotal evidence suggests that U.S. courts are capable of addressing the relevant types of behavior. U.S. courts have evaluated and credited evidence of coercive measures by CCP or Chinese state-linked actors who have sought to coerce or intimidate targeted Chinese individuals in the U.S.—including through threatened civil actions—and U.S. courts have imposed criminal sanctions on those engaged in such behavior, including for violations of FARA.[3] U.S. courts have handled several cases involving claims of vexatious litigation, undertaking fact-intensive, case-specific, and procedural context-sensitive evaluations, resulting (for example) in: enforcement of a Chinese court judgment against a defendant claiming the action was CCP-driven and targeted him for his criticism of CCP/PRC minorities policies and asserting (in a position rejected by the court) that the Chinese judgment was the product of unfair proceedings in Chinese court; rejection of a counterclaim of abuse of process by a defendant in a fraud and bribery suit who asserted the plaintiff was acting as a proxy of the CCP and PRC government but did not allege sufficient acts (including post-filing acts) by plaintiff; and dismissal of a defamation claim against a U.S. company by a Chinese competitor for failure to plead facts that would meet an "actual malice"

[3] "Federal Jury Convicts Three Defendants of Interstate Stalking of Chinese Nationals in the U.S. and Two of Those Defendants for Acting or Conspiring to Act on Behalf of the People's Republic of China," U.S. Attorney's Office, Eastern District of New York, June 20, 2023, https://www.justice.gov/usao-edny/pr/federal-jury-convicts-three-defendants-interstate-stalking-chinese-nationals-us-and;

standard.[4] In my experience as an expert witness, U.S. courts have admitted and evaluated evidence concerning claims that the real party at interest and the funder and director of the litigation was the CCP or PRC, rather than the nominally private party to the case.

PRC courts and parties to litigation can seek to use the U.S.'s broad discovery rules to gather information from persons and entities in the United States. This process for acquiring information can be abused in ways that include information that CCP or PRC authorities might use to serve their interests, or the interests of Chinese competitors of targeted U.S. (or other) parties (including concerning sensitive business information or intellectual property or companies' relations with the U.S. government).

Where such discovery requests are part of litigation in U.S. courts, the courts have available to them the ordinary mechanisms of protective orders and the like to deny problematic discovery requests, including in response to arguments made by targets of discovery requests alleging the type of abuse at issue here.

Where the primary litigation is occurring in PRC courts, the principal concern is the mechanism provided by 28 U.S.C. § 1782, which permits a foreign tribunal or a party to litigation in a foreign tribunal to seek information from persons and entities in the U.S., potentially to the full extent of U.S. law's unusually (by international standards) capacious discovery rules. The statutory requirements (that the request target someone found in the requested court's jurisdiction, that the information be for use in a foreign or international tribunal's proceeding, and that the request come from an "interested person") are easily met. Such requests are often handled *ex parte.* The number of such requests from China has been rising.[5]

Here, too, the U.S. courts have the tools—ones that they might be well advised to sharpen—to address abuse and potential abuse. Under the Supreme Court interpretation of 28 U.S.C. § 1782, courts have discretion to deny such requests based on (among other grounds) the unduly intrusive or burdensome nature of the request.[6] With rising suspicion of or wariness toward China in the U.S. generally and in U.S. court decisions specifically, U.S. courts can be expected to take seriously the arguments of those resisting discovery on the grounds at issue here. For cases seeking discovery for use in Chinese proceedings, courts have available additional mechanisms to better protect U.S. parties' interests, including not granting § 1782 requests without the targeted party having an opportunity to be heard, or directing foreign requesters to go through the Hague Convention process. U.S. courts also could make more exacting use of principles developed primarily in the context of requests to order production of evidence abroad for use in U.S. courts:

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[4] See *Tianzhu Coal Co* v. *Ma Ju*, 83 Misc.3d 1270(A) (N.Y. Sup. Ct. Nassau Co., Aug. 12, 2024); *Xinba Construction Group* v. *Jin Xu, et al.,* No. ESX-L-2889-18 (N.J. Super. Ct. Law Div. Sept. 20, 2019); *BYD Co.* v. *Alliance for American Manufacturing*, 554 F.Supp.3d 1 (D.D.C. 2021).

[5] See Yanbai Andrea Wang, "Exporting American Discovery," 87 *University of Chicago Law Review* 2089 (2020).

[6] See *Intel Corp.* v. *Advanced Micro Devices,* 542 U.S. 241 (2004).

the extent to which noncompliance would undermine important interests of the United States (the state where the information is located).[7]

Very recently, Chinese courts have begun to use anti-suit injunctions (and, incipiently, anti-anti-suit injunctions), particularly in cases involving intellectual property, including especially disputes over FRAND licensing rates for standard essential patents.[8] Such injunctions can be abusive in the sense at issue here if they result in the judicially sanctioned setting of improperly low rates (in this context, for the benefit of Chinese companies at the expense of foreign competitors and counterparties), in part by denying those parties access they otherwise would have to redress in U.S. or other courts. Properly used, anti-suit injunctions (and anti-anti-suit injunctions) can help to avoid duplicative, wasteful, and confusing multiple litigations, and can accommodate—and weight appropriately—the (relative) interests of multiple interested sovereigns in regulating activity and protecting parties' rights. Such devices can be abused, of course, including by courts acting on behalf of political masters.

As is addressed in a later section, abuses in the form of anti-suit injunctions (and anti-anti-suit injunctions) are among the rising problems and may warrant solutions to supplement existing judicial tools. But no workable and desirable standard will avoid the need for courts to assess, often on a case-by-case basis, which injunctions to accept and which not to—often based on assessments and applications of somewhat flexible principles of international comity.

Chinese parties to litigation in U.S. courts sometimes seek the application in such cases of Chinese law, which can be a form of achieving the extraterritorial application of Chinese law. This process, too, can be abused by parties acting at the behest of the CCP or the PRC to extend the reach abroad of laws that serve their interests or agenda, including in ways that repress, harass, or otherwise harm parties in or of the United States. As is addressed in a later section, Chinese laws, including those that avowedly serve China's interests, increasingly assert extraterritorial reach.

Here, again, U.S. courts have means to address such abuse and to distinguish cases of abuse from the many ordinary China-involved cases that raise choice of law questions. Application of ordinary choice of law rules to arguably abusive cases—particularly where there is allegedly an egregious effort to extend the extraterritorial reach of Chinese law to parties, interests, and actions that are closely connected to the U.S. and where the U.S. has a strong interest in applying its laws—would properly lead to a rejection of calls to apply Chinese law. In cases where a U.S. court might find Chinese law to be applicable (despite claims of the type of abuse at issue here), the court has

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[7] See *Societe Nationale Industrielle Aerospatiale* v. *U.S. District Court*, 482 U.S. 522 (1987).

[8] See Josh Zumbrun, "China Wields New Legal Weapon to Fight Claims of Intellectual Property Theft," *Wall Street Journal*, Sept. 26, 2021; Yang Yu & Jorge L. Contreras, Will China's New Anti-Suit Injunctions Shift the Balance of Global FRAND Litigation?, PATENTLY-O BLOG (Oct. 22, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id= 3725921; "SPC Issues China's First Anti-Anti-Suit Injunction (AASI) in IP Case," NPC Observer, Apr. 24, 2025, https://www.chinajusticeobserver.com/a/spc-issues-china%E2%80%99s-first-anti-anti-suit-injunction-%28aasi%29-in-ip-case.

a well-established option in U.S. law to refuse to apply foreign law because it is inconsistent with the forum jurisdiction's public policy.[9]

Parties who have obtained favorable judgments in Chinese courts can, and do, seek to have U.S. courts recognize and enforce such judgments. Such recognition and enforcement cases have been challenged on grounds akin to the "vexatious litigation" matters addressed above, with targets of enforcement proceedings in U.S. courts claiming that these cases in which awards based on the adjudication of nominally commercial disputes and the like are not what they purport to be but are, instead, the product of Chinese courts acting unjustly under the direction of Chinese authorities (whether framed as the CCP, the PRC, or the Chinese party-state) for political ends. When such claims are accurate, it would, of course, be a case of abuse of U.S. courts and judicial process. And the risk of such abuse is potentially greater because of the generally deferential review by U.S. courts of foreign court judgments in recognition and enforcement contexts.

U.S. court enforcement of Chinese court judgments has been very rare,[10] which has limited any potential for abusive use of the process, and such cases generally have not involved allegations of the types of abuse at issue here. U.S. courts, moreover, have the authority and, in some contexts, the obligation not to recognize or enforce Chinese court judgments where typically alleged abusive features. Recognition is not permissible for judgments rendered by a system that does not provide impartial tribunals or comport with due process. U.S. courts have not found Chinese courts generally to have these characteristics, and rightly so (for reasons both principled and pragmatic). Against this background, challenges to recognition and enforcement must turn on assessments specific to the Chinese judicial proceeding in question, including: the Chinese court lacked jurisdiction; the defendant received inadequate notice; the judgment was obtained by fraud; the judgment conflicts with another final and conclusive judgment; the judgment was based on a legal claim repugnant to the public policy of the recognizing / enforcing state; or the particular judgment was the result of a proceeding that lacked fairness / due process.[11] Such case-specific inquiries are within the institutional competence of U.S. courts and not amenable to more "wholesale" approaches. To the extent that such abuses are a concern, closer scrutiny and a more expansive interpretation of the public policy exception are potential responses.

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[9] See generally Symeon Symeonides, "The Public Policy Exception in Choice of Law: The American Version (April 6, 2025),http://dx.doi.org/10.2139/ssrn.5207438.

Cases in which choice of law analysis points toward applying Chinese law will, sometimes, be cases in which a U.S. court would have the option, and reasons, to grant a motion to dismiss on *forum non conveniens* grounds, given the lesser interest of the U.S. in interpreting and applying Chinese law. Such a motion would ordinarily be problematic for the defendant for reasons similar to those addressed in connection with fnc and vexations litigation discussed above. As with those cases, however, the downside for the defendant would be less in abusive cases of the type addressed here.

[10] See Donald Clarke, "Judging China: The Chinese Legal System in U.S. Courts," 44 *University of Pennsylvania Journal of International Law* 455 (2022-2023).

[11] These factors, among others, are found in the Uniform Foreign Money Judgments Recognition Act, which has been adopted, or adapted, in most states. See also Ronald A. Brand, "Recognition and Enforcement of Foreign Judgments," Federal Judicial Center (April 2012), https://www.fjc.gov/sites/default/files/2012/BrandEnforce.pdf.

Many of the concerns raised about China-related cases in U.S. courts involve not abusive (or repressive, or exploitative) measures of the types considered above but, instead, assert problematic efforts to avoid accountability under U.S. law, including (but not only) by depriving U.S. (and other) parties of remedies to which they are entitled.

Anti-suit injunctions by Chinese courts of the abusive sort described above would have this type of preclusive effect on parties who ought to be able to seek remedies against, and hold to account, Chinese defendants. A somewhat related, also newly emerging concern is Chinese civil procedure laws that assert exclusive jurisdiction for Chinese courts over a widening range of cases, including disputes related to the creation or dissolution or PRC legal persons and the validity of intellectual property rights granted through examination in Chinese territory. These have yet to produce much litigation in Chinese courts.[12]

Chinese defendants relatively often seek to avoid accountability or attempts by plaintiffs to seek legal redress by seeking dismissal of claims on grounds of *forum non conveniens.* Here, too, courts have tools to prevent inappropriate dismissals and attendant denials of remedies or plaintiffs seeking remedies in U.S. courts, and the reasonableness of such a decision generally turns on case-specific factors, such as the relative ease and burden on the parties of access to evidence and of litigating in either forum, and whether a Chinese forum would be available to the plaintiff and would be adequate—a question which often turns on the degree of similarity of Chinese law to U.S. law concerning the claims at issue in the case, and the likely quality and fairness of the particular Chinese tribunal that would hear a case of the type in question between the types of parties involved in the case. Where there is a U.S. interest in having the case heard in a U.S. court and where the case involves application of U.S. law, U.S. courts can, and do, deny fnc motions on the grounds of such "public interest" factors.[13]

To be sure, such assessments may be challenging for U.S. courts. But courts are often aided by expert testimony on Chinese law and courts. Courts can, of course, require parties to offer evidence on such issues. As China-related cases have become more common and relevant case law has accrued, courts are increasingly capable of addressing the relevant issues of adequacy and availability of Chinese forums and the weighing of public and private interest factors. To the extent that concerns remain, offering background training to U.S. judges on issues in Chinese law and courts could help address those concerns.

U.S. courts have mitigated the consequences of possibly overly generous fnc dismissals by granting conditional dismissals, allowing plaintiffs to return to U.S. court if a Chinese forum turns out not to be available or adequate. U.S. courts also can police such decisions at the back end in

[12] See Civil Procedure Law of the People's Republic of China, art. 279. These issues are addressed in the final section of this document.
[13] See Clarke, supra note 10.

many cases because the efficacy of a Chinese court judgment may depend on recognition and enforcement by a U.S. court.

"Blocking statutes"—defined broadly as (in this context) Chinese laws that are claimed to prohibit disclosure of information by PRC-based witnesses—can pose challenges of avoidance of accountability and denials of proper redress as well. In litigation in U.S. courts, often over claims of intellectual property infringements by Chinese parties, Chinese parties and witnesses have sometimes asserted that they are precluded by Chinese laws from disclosing information sought by U.S. parties in discovery. Examples include invocations of Chinese laws concerning the disclosure of state secrets (broadly construed to include information relating to the operations of state-owned enterprises, or enterprises' interactions with state regulatory authorities in China and so on), bank confidentiality laws (framed as broadly prohibiting disclosure of client information), archives laws, and cybersecurity, data security, and personal information protection laws (which prohibit the disclosure of information or its transfer abroad for use in foreign judicial proceedings, at least absent approval by Chinese state authorities, who have substantial discretion to refuse to grant such approvals).

In these contexts, too, the credibility of such claims and the importance to discovery-seeking parties of the information sought involves case-specific determinations of the sort that courts are equipped to make. U.S. courts have been willing—and increasingly so—to reject such invocations of blocking statutes, sanctioning Chinese parties and witnesses for non-compliance with discovery orders, or deciding substantive issues related to the non-provided evidence adversely to the Chinese party, or determining that Chinese blocking statutes do not apply to the request at issue. Such decisions limit the concerns otherwise raised by blocking statutes.[14]

Issues of true conflicts of law (that is, where a foreign party's compliance with applicable forum state law would require violation of the foreign party's home state's applicable law) and (in the context of U.S. proceedings) the related issue of "foreign sovereign compulsion" defenses are another source of concern about Chinese parties avoiding accountability under U.S. law or depriving parties the benefit of U.S. law and undermining the U.S. interest in the applicability of its laws. In the most noted recent China-related case of this general type, plaintiffs alleged harm due to price-fixing by Chinese producers and sellers of Vitamin C. Defendants asserted that they were required by Chinese law—in the form of relatively informal directives from Chinese state authorities—to engage in the challenged anti-competitive behavior, and offered a statement to that effect from China's Ministry of Commerce (MOFCOM).[15]

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[14] See, e.g., *Gucci v. Li,* 2011 WL 6155936 (SDNY 2011), vacated on other grounds, 768 F.3d 122 (2021); "SEC Resolves China Audit Case with Deloitte, *New York Times*, Jan. 28, 2014; In re Sealed Case, 932 F.3d 915 (D.C. Cir. 2019); *In re Valsartan, Losartan, and Irbesartan Products Liability Litigation*, 2021 WL 6010575 (D. N.J. 2021).

[15] *Animal Science Products, Inc.* v. *Hebei Pharmaceutical Co.*, 585 U.S. 33, 138 S.Ct. 1865 (reversing *In re Vitamin C Antitrust Litigation*, 837 F.3d 175 (2nd Cir. 2016). See also, Eleanor M. Fox, "China, Export Cartels and Vitamin C: American Second?" *Competition Policy International* (March 2018).

Whatever one's views of the outcome in the Vitamin C case or other similar cases, the relevant inquiries, again, are often if not always relatively granular, involving the specific actions by parties and by Chinese state authorities. Indeed, the Supreme Court characterized the inquiry as case-specific and not readily susceptible to a general rule. U.S. law after the Vitamin C case gives U.S. courts significant discretion to reject such defenses. Such defenses are ultimately rooted in flexible principles of comity and the (limited) deference such principles mandate. Courts need not take as determinative submissions from Chinese (or other foreign state) authorities about the content of relevant foreign law (including whether it compels the action in question)—a rule that rejects both thoroughgoing claims that foreign states are judges of the meaning of their own law and sharp complaints from PRC sources about the affrontery of that U.S. legal position.[16]

Chinese entities subject to U.S. law and regulation sometimes object to U.S. laws and regulations and their application and sometimes do (or contemplate doing so) through challenges in U.S. courts. In recent years, controversies have included: U.S. requirements (under Sarbanes-Oxley and the supplemental Holding Foreign Companies Accountable Act) of accounting disclosures by U.S.-listed Chinese firms that Chinese parties claimed were prohibited by Chinese law (and that U.S. law deemed important for the protection of U.S. investor interests); prohibitions on sales and use of Huawei equipment for certain U.S. uses on the grounds of national security threats—along with broader, related issues arising from U.S. moves to put Chinese firms on "entities lists"; CFIUS (as enhanced by FIRRMA) determinations prohibiting investments by Chinese companies in the US; and the "TikTok ban" passed by Congress.

In such settings, there has been little apparent reason to try to keep such cases from adjudication by U.S. courts. In this area, the patterns are ones primarily of coordination among the coordinate branches. The accounting disclosure issues were addressed initially by negotiations between U.S. and Chinese authorities in the shadow of enforcement actions that could and would have been decided by U.S. courts and achieved outcomes adverse to Chinese parties (as well as actions that have led to the mandatory or voluntary delisting of Chinese companies from U.S. exchanges).[17]

The U.S. court handling the Huawei case upheld the FCC's ban on the asserted national security grounds, in part because of the rulemaker's reliance on the expertise of national security-related departments of the U.S. government.[18] One troubling caveat is in order here: the decision was based on *Chevron* deference to the expertise and reasonable interpretation of executive branch

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[16] MOFCOM's amicus brief to the Supreme Court asserted that rejecting "a foreign sovereign's explanation of its own law can imply only two things: that a U.S. court knows a country's laws better than its own government, or that the foreign government is not being candid"—positions that were "profoundly disrespectful" and risked creating "international discord."

[17] See Robin Hui Huang, "The U.S.-China Audit Oversight Dispute: Causes, Solutions, and Implications for Hong Kong," 54 *International Lawyer* 151 (2021); Rebecca Parry and Qingxiu Bu, "The Future of China's U.S.-Listed Firms: Legal and Political Perspectives on Possible Decoupling," 14 *William and Mary Business Law Review* 641 (2023).

[18] *Huawei Technologies* v. *FCC*, 2 F.4th 421 (5th Cir. 2021).

agencies. With the Supreme Court's overturning of *Chevron*, this tool in courts' toolkits to consider and reject challenges to U.S. regulation by Chinese entities, including closely state-linked ones, has been weakened.

Although a U.S. entity owned by Chinese investors prevailed in challenging an adverse CFIUS order rejecting a purchase of ostensibly sensitively located property, it proved to be short-lived and Pyrrhic victory for similarly situated claimants. In response to the successful due process challenge by the plaintiff in the case (Ralls), CFIUS began issuing "Ralls Letters" or "Due Process Letters" providing the unclassified evidence upon which CFIUS relied and, it appears, satisfying courts' due process concerns.[19]

Legislation (the Protecting Americans from Foreign Adversary Controlled Applications Act) that required TikTok, in effect, to shut down in the U.S. unless its Chinese corporate owner sold the company, was upheld by the U.S. Supreme court against a First Amendment challenge, with the Court accepting the government's argument (under an intermediate, rather than strict, scrutiny test) that the law was adequately tailored to serve the important government interest of protecting against a national security threat from the PRC (posed by the prospect of China's capture of personal data of U.S. users).[20] Whatever the wisdom or lack of wisdom of the TikTok ban as a matter of national security, any assertedly problematic "pro-China" or "pro-CCP" effects of the law's non-implementation are attributable to the decisions of the executive branch, not the courts.

Finally, U.S. immunity doctrines have limited some forms of holding PRC state actors to account for actions that have effects on the U.S. and on U.S. persons. Whatever one thinks of the wisdom of these limitations, sovereign immunity per se is of less consequence than sometimes imagined. The U.S. has long adopted, and China has recently accepted, the so-called restrictive theory of sovereign immunity, which renders foreign states and their instrumentalities subject to the jurisdiction of foreign courts for a wide range of commercial and tortious activities that occur or have sufficient effects in a forum state.[21] Those principles, as well as applicable doctrines of waivers of sovereign immunity, render such sovereign and sovereign-linked entities vulnerable to counterclaims when they bring suit in U.S. court (a pattern alleged to be the reality behind the formality in the "vexatious litigation" cases discussed earlier). Many of the Chinese actors alleged to abuse, or to seek to avoid accountability under, U.S. law are exceedingly poor candidates for sovereign immunity, given their indirect ownership and informal (or concealed) links to the Chinese state and the fact that their alleged or self-described actions that are the subject of litigation in the U.S. often would fall easily within exceptions for actions that are commercial activity or

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[19] See *Ralls Corp.* v. *CFIUS*, 758 F.3d 296 (D.C. Cir. 2014). See also Qingxiu Bu, "Ralls Implications for the National Security Review," 7 *George Mason Journal of International Commercial Law* 115 (2016); James Brower and Nicholas Weigel, "Are CFIUS Decisions Legally Vulnerable?" *Lawfare*, Jan. 16, 2025, https://www.lawfaremedia.org/article/are-cfius-decisions-legally-vulnerable.

[20] *TikTok* v. *Garland*, 604 U.S. __, 145 S.Ct. 57 (2025).

[21] See Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*; Foreign State Immunity Law of the People's Republic of China (2024).

relatively ordinary torts (if they were found to be sovereign entities or instrumentalities potentially entitled to immunity).

Many, but not all, actions by Chinese state authorities and party authorities, often acting through the state, that cause harms with effects in the U.S. and on persons in the U.S. are beyond redress in U.S. courts. For example, the commercial activity exception has been construed to exclude arguably commercial transactions related to the proceeds of a quintessentially sovereign, non-commercial act of a Chinese local government expropriating the property of a Chinese plaintiff who brought suit in a U.S. court.[22] For another example, the act of state doctrine often precludes review in U.S. courts of actions taken by a foreign sovereign—including China—in its own territory. But there are exceptions, and the doctrine is grounded in judicial principles of comity and thus potentially subject to reinterpretation that would weaken protections for foreign states from U.S. litigation.[23]

The Alien Tort Statute once offered a seemingly promising route to U.S. judicial recourse for foreign (including Chinese) victims of abuse by those exercising state power (including of the Chinese state), but a series of Supreme Court decisions has severely limited its reach. The Torture Victims Protection offers somewhat similar redress in a narrow range of circumstances. Official immunity broadly protects heads of state, former heads of state, and other senior officials of foreign governments (including China) from suit in U.S. courts. Such immunity has blocked suits against Chinese officials, including by plaintiffs asserting claims based on harms due to Chinese authorities' repressive actions, including in the suppression of Falun Gong. In many cases, U.S. courts defer to executive branch recommendations in favor of immunity.[24] U.S. Supreme Court decisions expanding presidential immunity would be hard to square, as a matter of legal principle, with any prospective judicial moves to contract head-of-state immunity for foreign (including Chinese defendants).

On these questions of immunity and related issues, there is, thus, some limited potential room for the judiciary to expand mechanisms for holding Chinese party and state actors to account and there may be plausible reasons (including reasons of justice) for doing so, but the impediments to doing so are formidable and may not serve the foreign policy interests of the United States, the determination of which is generally left to the president and, to a degree, Congress, rather than the judiciary.

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[22] *Yang Rong et al* v. *Liaoning Province Government*, 452 F.3d 883 (D.C. Cir. 2006).

[23] See generally Anne-Marie Burley, "Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine," 92 *Columbia Law Review* 1907 (1992); John Harrison, "The American Act of State Doctrine," 47 *Georgetown Journal of International Law* 507 (2016).

[24] On these issues in the context of litigation involving CCP or PRC state actors, see generally Jacques deLisle, "Human Rights, Civil Wrongs and Foreign Relations: a 'Sinical' Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad," 52 *DePaul Law Review* 473 (2002-2003). On the shrinking ambit of the ATS, see, e.g., Edward T. Swaine, "*Kiobel* and Extraterritoriality: Here, (Not) There, (Not Even) Everywhere," 69 *Oklahoma Law Review* 23 (2016-2017).

Potential Collateral Damage from Attempted Solutions

As addressed in the preceding section, many of the types of abuse or potential abuse or avoidance or potential avoidance of accountability by or on behalf of the CCP or PRC state authorities are or can be handled effectively—and often are best handled—by U.S. courts using existing procedural and doctrinal means, perhaps enhanced by more energetic use of some mechanisms or relatively marginal reinterpretations of existing doctrine. More "wholesale" solutions often come with significant downsides and risks.

First, legislative (or other) solutions that would broadly bar arguably CCP- or state-linked parties from access to U.S. courts could come perilously close to embedding in U.S. law the problematic proposition that because certain types of abuse, interference, and manipulation by CCP or Chinese state authorities in, or with an indirect impact on, U.S. judicial proceedings can, and sometimes do, occur, U.S. law—and therefore U.S. courts—must, in effect, assume that it has occurred in any case within the scope of such law's reach. Simply, "could" would be take to imply "does" or "did." Down that path lies disregard for principles of due process, fair access to justice, and more.

Second, such attempted solutions could harm significant interests of U.S. parties and stakeholders—the protection of which would be the ostensible goal of such Chinese party-restricting measures. Complex transnational litigation over claims that involve U.S. and Chinese actors and actions often does not have simple or clear alignments of parties and interests, in the case or more broadly. Formally Chinese entities often are significantly invested in by U.S. entities or individuals or have interests that are aligned with interests of U.S. parties. Claims brought, or opposed, by Chinese parties, or regulations or enforcement actions challenged by them, sometimes provide public goods or perform, in effect, a private attorney general function, aligning with U.S. parties and non-parties interests, as well as systemic U.S. interests in the rule of law.

Third, some specific measures that have been suggested to address relatively specific problems or potential problems risk creating additional complexity in litigation and related costs and indirect consequences. If, for example, civil claims by certain Chinese parties are barred, are they to be precluded from raising otherwise proper counterclaims if they are sued in U.S. court and, if so, may or must the principal litigation against them proceed?

A foreign sovereign anti-SLAPP law targeting CCP- or Chinese state-linked abuses has evident appeal, but it comes bundled with difficulties beyond those found in domestic law.[25] They include addressing questions about the extent to which non-citizens—a category that typically would include defendants in relevant China-related suits—enjoy the same constitutional rights that U.S. citizen plaintiffs may invoke in SLAPP suits. The claims of improper, political motivation at issue in China-related anti-SLAPP litigation would be easy to assert and relatively challenging for courts to evaluate. Plaintiffs (whether Chinese, American, or other) with legitimate claims could

[25] See Diego A. Zambrano, "Foreign Dictators in U.S. Court," 89 *University of Chicago Law Review* 157 (2022).

face significant costs and uncertainty—and difficulty in obtaining important evidence—to meet the burden of proof of that such laws would impose on them.

Laws that would require disclosure of, or prohibit, funding or direction of litigation by foreign non-parties to a case, including (and perhaps limited to) foreign state actors or sovereign wealth funds (perhaps limited to designated states, including China) may appealingly resonate with norms of transparency and laudable goals such as countering politically motivated vexatious lawsuits masquerading as commercial or other civil disputes.[26] But such requirements, too, could lead to complex and costly mini-trials on litigation-funding. In the China-related context, it would raise vexing questions about whether, for example, some percentage of state ownership or indirect corporate control (including via party committees that are found in many enterprises of many types) would sufficient to trigger disclosure requirements or prohibitions. Non-narrow readings of such provisions could deter or impede ordinary, apolitical claims by some China-linked parties from proceeding, denying them equal or fair access to U.S. courts in such cases.

Fourth, broad, especially high-visibility legislative, attempts to address problems or perceived problems of abuse of U.S. law and courts or evasion of legal accountability in U.S. courts by various categories of Chinese parties could exacerbate a tit-for-tat dynamic in U.S.-China legal relations, the costs of which might—or might not—exceed the benefits. In both U.S. and PRC law and courts, principles of reciprocity and comity play a very large role in determining whether to give effect to the other side's court judgments, grant various forms of judicial cooperation, and so on. Measures that do, or that seem to, or that can relatively easily be construed as, cutting of Chinese actors' access to justice in the U.S. risk mirror-image reaction from Chinese courts and PRC authorities. To be sure, existing limits to what Chinese law, courts, and practice do provide (including challenges with judgment enforcement, evidence acquisition, and access to courts) limit the risks, and U.S. law should not be unduly constrained by implied threats of retaliation. But restrictive Chinese measures may well prove more flexible and expansive in practice than those adopted or implemented by the U.S. and in U.S. courts.[27]

Such developments could contribute to a more general spiral of restrictions that would exacerbate restrictions and challenges on both sides—arguably a "race to the bottom." Features of Chinese law that are often the focus of U.S. complaints are often lifted from the U.S. playbook and are framed by China as responses to U.S. measures that harm Chinese interests. Examples include China's adoption of national security review of inbound investment, putting U.S. firms and individuals on "unreliable entities lists" (with attendant sanctions and prohibitions on activities in China), an anti-foreign sanctions law and regulations, and the adoption and implementation of laws with expanding extraterritorial reach.[28]

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[26] Proposed legislation of this general type includes the Protecting Our Courts from Foreign Manipulation Act.
[27] See the discussion in the final section of this document and sources cited therein.
[28] See the discussion of the Anti-Foreign Sanctions Law and issues of extraterritorial reach in the final section of this document. See also Zhengxin Huo, "Creating an Extraterritorial Application System of Chinese Law," 18 *Frontiers of Law in China* 531 (2023); Songling Yang, "China's Approach to the Anti-Foreign Sanctions Mechanism and Its

Fifth, measures, especially high-profile legislative ones, that explicitly target Chinese actors and actions or that are clearly designed to do so, or presented as doing so (even when the texts do not refer explicitly to China), risk feeding—and making more credible to audiences in China and abroad—a long-running official and orthodox Chinese narrative that U.S. law and U.S courts are weapons that Washington wields to political ends, including to attempt to prevent China's rise. In this account, the legislation embodying the TikTok ban and proposals to amend the FSIA to permit COVID-related suits against the PRC or the CCP are striking examples of a pervasive pattern, and U.S. courts are among the means of implementing this anti-China agenda.

We should not be quick to dismiss the possibility that such an account of politicized U.S. law and justice gains traction (in part thanks to China-targeting U.S. measures) around the world, particularly in the Global South (where China's influence is considerable and growing) but also in the Global North (where U.S. secondary sanctions, including those targeting China are part of a broader complaint about U.S. legal overreach). Chinese denunciations of US China-targeting legal measures and legal overreach can resonate with and reinforce broader perceptions that U.S. courts are political actors or do the bidding of political actors. All of this risks worsening an already-serious erosion of U.S. "soft power" and claims to the normative high ground in a sharpening competition with China for international influence.[29]

Finally, if much more narrowly, the U.S. adoption of measures that broadly presume thoroughgoing unfairness of Chinese law and courts, and that invite charges of China-targeting unfairness and politicization of U.S. law and courts, would be a disheartening message to the many Chinese lawyers, legal scholars, judges, and legal activists who have worked hard, with some hard-fought success and often at great risk, to advance access to justice, legal fairness, and rule-of-law values in China—not infrequently inspired by values learned from or attributed to the United States.[30]

Coda: Emerging/Growing Challenges from Legal Change in China

Recent and ongoing trends in Chinese law and legal policy pose challenges for U.S. interests that are not so amenable to management by U.S. courts using currently available means, or by proffered or contemplated solutions addressed in earlier sections of this document. I will note two significant areas here.

International Legality," 58 *Vanderbilt Journal of Transnational Law* 157 (2025); Meirong Jin and Qian Li, "China's Anti-Monopoly Merger Control and National Security," 13 *Journal of National Security Law and Policy* 471 (2023).

[29] See Jacques deLisle, Rethinking a Liberal International Order for Asia?: The United States and the Impact of the Ukraine War" in 1 *Korea Policy* 22 (2023) and "The Chinese Model of Law, China's Agenda in International Law, and Implications for Democracy in Asia and Beyond" in Gilbert Rozman, ed. *Democratization, National Identity, and Foreign Policy in Asia* (2021).

[30] See Jacques deLisle, "The Chinese Legal System" in William A. Jospeh, ed. *Politics in China* (4th ed. 2024), at 278-285; Hualing Fu and Maggie Lewis, "From Reform and Opening to Opening without Reform: Lessons from the Ford Foundation's Law Program in China," Ford Foundation, June 22, 2023, https://www.fordfoundation.org/work/learning/learning-reflections/from-reform-and-opening-to-opening-without-reform-lessons-from-the-ford-foundation-s-law-program-in-china/.

One cluster of developments threatens to impede U.S. parties' access to justice in non-China tribunals that would otherwise be open to them. Chinese courts have begun to issue global anti-suit injunctions (as well as at least one anti-anti-suit injunction), including against U.S. tech companies seeking legal redress against Chinese counterparts. If accepted and effective, such U.S. parties could pursue their claims only, if at all, in Chinese courts. In a related vein, reforms to China's Civil Procedure Law have expanded the range of cases over which Chinese courts purportedly have exclusive jurisdiction.[31]

Another, broader development is the expanding extraterritorial reach of Chinese law, creating—among other things—mounting problems of conflicts of laws and challenges to other states' (including the U.S.'s) regulation of behavior of their own nationals and in their own territory. Examples of this pattern are diverse and wide-ranging. Blocking statutes have been a growing issue for some time (and are addressed earlier in this document), and have grown with the adoption of Chinese laws addressing data security, cybersecurity, and more. Chinese authorities have become more insistent that Chinese laws apply to the behavior of Chinese firms and individuals abroad, creating situations in which it can be impossible to comply with both home country and host country (including US law).[32] China's criminal laws now purport to reach acts by foreigners outside PRC territory who commit crimes against the PRC or its citizens and acts committed outside China that have consequences in PRC territory—propositions that test the limits of international law concerning states' jurisdiction to prescribe (that is, to adopt laws regulating persons and conduct).[33] More subject matter-specific laws, including China's National Security Law for Hong Kong and recent provisions interpreting China's Taiwan-targeting Anti-Secession Law and related provisions of China's Criminal Law have raised concerns about apparent or purported reach to encompass speech and advocacy (as well as acts) outside of PRC territory and by non-PRC nationals that the PRC deems threatening to China's security and unity.[34] Finally (but not least), China has enacted an Anti-Foreign Sanctions Law, related regulations, blocking measures, and an "unreliable entities list" process that, collectively, authorize sanctions and

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[31] See the discussion earlier in this document; see also Matthew S. Erie, Legal Systems Inside Out: American Legal Exceptionalism and China's Dream of Legal Cosmopolitanism, 44 *University of Pennsylvania Journal of International Law* 731 (2023).

[32] Ji Li, *The Clash of Capitalisms: Chinese Companies in the United States* (2018); Ji Li, *Negotiating Legality: Chinese Companies in the US Legal System* (2024); Matthew S. Erie and Jacques deLisle, Chinese Developmentalism and Law in Matthew Erie, Jacques deLisle, and Jaclyn Neo, eds, *Chinese Developmentalism in the Global Legal and Economic Order* (forthcoming 2026)

[33] See Criminal Law of the People's Republic of China, arts. 6-10 (2023).

[34] See Law of the People's Republic of Chian on Safeguarding National Security in the Hong Kong Special Administrative Region (2020); Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security, Ministry of State Security, and Ministry of Justice, Opinions on Punishing Crimes of Separatism and Inciting Separatism by 'Taiwan Independence' Diehards in Accordance with Law (May 2024); Donald Clarke, "Hong Kong's National Security Law: A First Look," June 30, 2020, https://thechinacollection.org/hong-kongs-national-security-law-first-look/; Jacques deLisle, "The Anti-Secession Law in China's Taiwan Strategy, Then and Now" in Bonny Lin and I-Chung Lai, eds., *Employing Non-Peaceful Means Against Taiwan: The Implications of China's Anti-Secession Law* (October 2024), https://csis-website-prod.s3.amazonaws.com/s3fs-public/2024-10/241015_Lin_Means_Taiwan.pdf?VersionId=4PU_wYq.V6AFbR22H8QsRyQFgV2c6X7q

prohibitions against those who comply with foreign—including U.S.—sanctions that endanger China's national sovereignty, security, or development interests, apply discriminatory measures against Chinese entities, or violate "normal" market principles, or interfere in China's internal affairs. This legal regime also prohibits Chinese firms from complying with "unjustified" extraterritorial application of foreign sanctions, and gives Chinese parties injured by other actors' compliance with foreign sanctions a right to recover damages (with the evident aim of deterring such compliance).[35]

These are not a scattered or random collection of legal developments. They dovetail with stated goals of China's Xi Jinping-era agenda for China's "foreign-related rule of law," which calls for using "legal methods to safeguard" China's "sovereignty, security, and [economic] development interests."[36] In the same vein, China's recently adopted Foreign Relations Law declares that the state will "strengthen the construction of foreign-related rule of law" and asserts—and codifies—China's "right" to counter, or take restrictive measures against acts—including by foreigners and foreign states—that "endanger [China's] sovereignty, national security and development interests in violation of international law or fundamental norms governing international relations.[37] This agenda presents broad growing challenges to the reach of U.S. law, to U.S. national interests, and to U.S. international influence within, and beyond, legal affairs, and well beyond the problems posed by how U.S. courts handle potentially abusive or accountability-avoiding efforts by CCP- or state-linked Chinese parties to litigation in U.S. courts.

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[35] See Anti-Foreign Sanctions Law of the People's Republic of China (2021); Provisions on Unreliable Entity List (Ministry of Commerce Order No. 4 2020); Rules on Blocking Unjustified Extraterritorial
Application of Foreign Legislation and Measures (Ministry of Commerce 2021); Timothy Webster, "Retooling Sanctions: China's Challenge to the Liberal International Order," 23 *Chicago Journal of International Law* 178 (2022); Ryan Martinez Mitchell, "Sino-American Sanctions Convergence?" 7 *Cardozo International and Comparative Law Review* 741 (2024).

[36] See Chinese Communist Party Central Committee, "Plan for Construction of a Rule-of-Law China, 2020-2025" (January 2021) ¶ para 25; 'Xi Stresses Development of Foreign-Related Legal System', (Xinhua 29 November 2023) <https://perma.cc/EV3V-ARMU>;

[37] Foreign Relations Law of the People's Republic of China, arts. 29, 33 (2023). See also See generally Jacques deLisle, "China and Sovereignty in International Law: Across Time and Issue Areas," 9 *UC Irvine Journal of International, Transnational, and Comparative Law* 1 (2024).