LEGAL SYSTEMS INSIDE OUT: AMERICAN LEGAL EXCEPTIONALISM AND CHINA'S DREAM OF LEGAL COSMOPOLITANISM

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ABSTRACT

What is the relationship between a legal systems' foreign-facing elements and its domestic ones? Contrary to "dualistic" theories ("dualism," "legal dualism," the "dual state," etc.) which suggest that a single legal system may encompass qualitatively different regimes regarding foreign and domestic legal questions, this Article takes the view that gaps between the foreign-facing and domestic aspects of a legal system may threaten that system's legitimacy and, in turn, its sustainability. Compatibility between the foreign/external and domestic/internal aspects of a legal system could be measured across a range of categories including provision of justice, fairness, and efficiency. This Article focuses on the recognition of difference. As used in this Article, *difference* means both the nature and source of law (e.g., foreign law, non-state law, religious law, customary law, etc.) and of legal authorities (i.e., in terms of race, ethnicity, gender, and nationality). In essence, the question posed is whether a legal system can regard difference disparately between its foreign-facing and domestic aspects. This Article addresses this question through a comparison between the People's Republic of China (PRC) and the United States, the two most powerful economies in the world and which are locked in a trade-cum-tech war.

The question of the recognition of difference has practical importance.

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How we characterize and analyze the PRC legal system is particularly important from the vantage of the United States as how the PRC domestic legal system may shape its relationship to the global economy and trade partners in the Global South, in particular, is both generally poorly understood and may affect U.S. economic and foreign policy. Misunderstanding results in a number of negative outcomes across a range of important issues, including suboptimal competition with China on developmental assistance to low-income and middle-income states as well as difficulties in U.S.-China coordination on global problems (e.g., poverty, climate change, and health), with competition and coordination not being mutually exclusive. To address this gap, this Article is the first to analyze China's "foreign-related 'rule of law'" (*shewai fazhi*) reforms at the intersection of private international law and foreign relations law which purport to shape the future of the relationship between China's domestic legal system and non-domestic law, exposing China to greater degrees of difference.

The Article is comprised of two sets of comparisons: one is *within* and the other is *between* legal systems—those of the U.S. and China. It finds that in the U.S. case, there is, broadly, convergence between the legal system's privileging of U.S. law extraterritorially and the status of foreign law domestically. However, the Chinese case is marked by growing divergence between its internal and external-facing approaches to foreign law. Whereas the U.S. has historically embraced versions of legal exceptionalism (both externally and internally), China has introduced reforms which orient it toward a relationship with external law and legal authorities that I call *legal cosmopolitanism*, the selective integration of foreign laws and their authorities into Chinese law and, conversely, the worlding of Chinese law. Legal cosmopolitanism is predicated on China's centrality in international trade and investment, and promoted by the Chinese Communist Party (CCP) and Chinese academics who seek to position the PRC as a leader of developing countries, as a corrective to U.S. racial capitalism. However, China faces a number of obstacles in building legal cosmopolitanism, among those, its domestic law approaches toward difference may be trending in the opposite direction, widening the gap between the foreign-facing and internal aspects of the legal system. As a result, legal cosmopolitanism remains aspirational.

Inspired by legal realism, decolonization theory, and Critical Race Theory, and informed by a comparative outlook, the broad claim of this Article is that the trajectory of externally-facing legal reform encounters difficulty escaping the corresponding features of domestic law. As a general observation, due to both domestic pressures and embeddedness in the international system, legal systems develop towards normative compatibility between that system's internal and external-facing rules and authorities. Whereas the PRC is purporting to build a "foreign-related 'rule of law'" that is ecumenical, pluri-legal, and hyper-diverse, for the most part, its domestic law remains strikingly unitary,

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homogenous, and "state-led." Furthermore, recent strains of nationalism, protectionism, and even xenophobia throughout the world but especially in China, have further closed off the economy and society. This paradoxical state of affairs of simultaneous opening and closure has real-world implications for China's goal of becoming a leader of the developing world, which entails building global law. From the U.S. perspective, policy-makers need to grasp this picture for not only improving its relationship with China but also with the Global South.

Keywords: legal cosmopolitanism, private international law, conflict of laws, foreign relations law, "foreign-related 'rule of law'", racial capitalism, international economic law, comparative law, critical race theory, U.S., China.

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ABBREVIATIONS

Beijing International Arbitration Center	BIAC
Belt and Road Initiative	BRI
Benchmark Chambers International	BCI
Brazil, Russia, India, China, and South Africa	BRICS
China-Africa Joint Arbitration Center	CAJAC
China International Economic and Trade Arbitration Commission	CIETAC
Chinese Communist Party	CCP
Critical Legal Studies	CLS
Critical Race Theory	CRT
Foreign-related "Rule of Law"	FROL
International Commercial Arbitration	ICA
Law on Choice of Law for Foreign-Related Civil Relationships	LAL
People's Republic of China	PRC
Shanghai International Arbitration Centre	SHIAC
Supreme People's Court	SPC
Third World approaches to international law	TWAIL
United Nations Commission on International Trade Law	UNCITRAL
World Trade Organization	WTO

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"We need to build a foreign-related rule of law system with Chinese characteristics, China's foreign-related rule of law system should interconnect and integrate China's foreign-related legal system and the United Nations Charter-based international rule of law system, and they should learn from each other. We need to focus on the 'going out' of Chinese law. Where there are Chinese people and Chinese enterprises, the voice of Chinese rule of law should be heard...."

- 90-year-old Li Changdao, first Dean of Fudan Law School[1]

INTRODUCTION

Consider two clusters of executive acts and their effects. First, in 2020, General Secretary of the Chinese Communist Party (CCP) and President of the People's Republic of China (PRC or China) Xi Jinping's called for China to shape "foreign-related 'rule of law'" (*shewai fazhi*) (hereinafter, "FROL").[2] FROL is a field of law that governs the intersection of China's domestic law, on the one hand, with foreign law and international law, on the other hand, and does so through an understanding of "rule of law" (*fazhi*) that is specific to China, namely, a legal order that is led by the CCP.[3] The FROL calls for building systems, both within China and outside of the PRC, that integrate Chinese law

[1] Li Zhiqiang (李志强), Mianhuai: Shenqie huainian jing'ai de enshi Li Changdao Xiansheng (缅怀 | 深切怀念敬爱的恩师李昌道先生) [In Memory: Deeply Miss My Beloved Teacher Mr. Li Changdao] (Nov. 22, 2021), https://perma.cc/3K99-B464. All Chinese names are given in Chinese name order (i.e., family name first).

[2] Xi Jinping zai zhongyang quanmian yifazhiguo gongzuo huiyi shang qiangdiao jianding bu yi zou Zhongguo tese shehui zhuyi fazhi daolu wei quanmian jianshe shehui zhuyi xiandaihua guojia tigong youli fazhi baozhang (习近平在中央全面依法治国工作会议上强调 坚定不移走中国特色社会主义法治道路 为全面建设社会主义现代化国家提供有力法治保障) [Xi Jinping Made Emphasis at the Central Work Conference on Comprehensively Governing the Country According to Law] (Nov. 17, 2020), https://perma.cc/C5Q3-YRGG.

[3] Zhongguo gongchandang di shiba jie Zhongyang weiyuanhui di si ci quanti huiyi (中国共产党第十八届中央委员会第四次全体会议) [Fourth Plenary Session of the Eighteenth Central Committee of the CCP], Zhonggong zhongyang guanyu quanmian tuijin yifazhiguo ruogan zhongda wenti de jueding (中共中央关于全面推进依法治国若干重大问题的决定) [Decision of the Central Committee of the CCP on Several Major Issues in Comprehensively Promoting the Governance of the Country by Law] (Oct. 23, 2014), http://www.dangjian.cn/shouye/zhuanti/zhuantiku/dangjianwenku/quanhui/202005/t20200529_5637876.shtml ("Make ruling the country according to the law as the basic strategy for the Party to lead the people in governing the country, and make ruling by law the basic way for the Party to govern the country, actively build the socialist rule of law, and make historic achievements.").

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and foreign and international law, and then promotes China's interests through such systems. Xi's directive initiated a number of reforms in the Chinese legal system including *inter alia* participating in international law organizations in formulating international law, building domestic capacity to deal with foreign law and conflict of laws issues, incorporating into legal institutions and networks foreign legal experts from around the world, creating extraterritorial legislation, and establishing bespoke dispute resolution mechanisms both inside China and beyond, from South Africa to Kyrgyzstan to Thailand, to deal with cross-border disputes.[4]

Second, around the same time as Xi's announcement, U.S. President Donald Trump told the UN General Assembly, "America is governed by Americans. We reject the ideology of globalism and we embrace the doctrine of patriotism."[5] Subsequently, President Trump either withdrew or threatened to withdraw from a number of executive agreements and Article II agreements that are foundational to human rights, environmental protection, health, trade, and diplomacy. [6] Concurrently, using his Article III powers, President Trump appointed some 200 federal judges, including three Supreme Court justices and 54 federal appellate court judges in what is likely one of his most lasting legacies given that the judges serve for life.[7] His appointments have reshaped the federal judiciary, ensuring a conservative majority, which may follow former Supreme Court Justice Scalia in restricting (if not outright rejecting) the use of foreign law in its decisions.[8] This is significant as it is more often than not federal courts that hear cases involving foreign law.[9] Similarly, in 2017, fourteen states in the U.S. introduced bills to prohibit a certain category of what is deemed to be foreign law, namely, sharia (Islamic law), and Texas and Arkansas enacted such

[4] *See infra* text accompanying note 245.

[5] United Nations, *US President rejects globalism in speech to UN General Assembly's annual debate* UN NEWS (Sept. 25, 2018), https://perma.cc/9TQE-7QGY.

[6] HAROLD HONGJU KOH, THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW 40-1 (2019).

[7] John Gramlich, *How Trump compares with other recent presidents in appointing federal judges*, PEW RESEARCH CENTER (Jan. 13, 2021), https://perma.cc/8FFA-SY9M.

[8] Roper v. Simmons 543 U.S. 551 (2005) (Scalia, dissent) (stating, "The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the reasoned basis of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision making, but sophistry."). The conservative Supreme Court has already overturned a half-century of precedents in women's rights. *See, e.g.*, Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. (U.S. June 24, 2022) (finding, in a six to three majority, that the U.S. Constitution does not confer a right to abortion).

[9] *See* Andrew W. Davis, *Federalizing Foreign Relations: The Case for Expansive Federal Jurisdiction in Private International Litigation*, 89 MINN. L. REV. 1464 (2005) (noting that federal courts often hear cases involving foreign law based on the parties' diversity or their wish to resolve their dispute in a federal forum), https://perma.cc/8FFA-SY9M.

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legislation in that year.[10] In short, the U.S. approach to foreign law and international law has been parochial if not isolationist.[11] American exceptionalism is not new under Trump; rather, the U.S.'s ambivalence towards foreign and international law has a long history.[12]

The contrast above begs the questions: how do legal systems treat difference, and, more specifically, does the treatment of difference externally correspond to their treatment of difference internally? Putting these questions in context, the relationship between the external- or foreign-facing and internal or domestic dimensions of legal system is one that underpins a swath of areas of law from constitutional law to civil procedure to foreign relations law.[13] One prevailing set of "dualist" theories advocates that divergence between the nature of foreign-facing aspects and domestic ones is plausible. This thinking is present

[10] Swathi Shanmugasundaram, *Anti-Sharia law bills in the United States*, SPLC (Feb. 5, 2018), https://perma.cc/HN37-ETF2.

[11] Pamela Bookman, *Litigation Isolationism*, 67 STAN L. REV. 1081 (2015); Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941 (2017).

[12] IAN TYRRELL, AMERICAN EXCEPTIONALISM: A NEW HISTORY OF AN OLD IDEA 3-4 (2021) (describing how "American exceptionalism" as a political term dates to the founding of the republic); Steven G. Calabresi, "*A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1337 (2006) (arguing that American exceptionalism as a popular concept is deeply embedded in American society).

[13] On constitutional law matters, *see, e.g.*, Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004); Sujit Chourdhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L. J. 819 (1999); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69 (2004); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999); Jeremy Waldron, *Foreign Law and the Modern* Ius Gentium, 119 HARV. L. REV. 148 (2005). For civil procedure issues, *see, e.g.*, Donald Earl Childress III, *Rethinking Legal Globalization: The Case of Transnational Personal Jurisdiction*, 54 WM. & MARY L. REV. 1489, 1493-94 (2013); John F. Coyle, *The Case for Writing International Law into the U.S. Code*, 56 B.C. L. REV. 433 (2015); Walter W. Heiser, Forum Non Conveniens *and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions*, 51 WAYNE L. REV. 1161 (2005). On foreign relations law, *see, e.g.*, CURTIS BRADLEY, *The Dynamic and Sometimes Uneasy Relationship Between Foreign Relations Law and International Law*, in BRIDGES AND BOUNDARIES: ENCOUNTERS BETWEEN FOREIGN RELATIONS LAW AN INTERNATIONAL LAW 343 (Helmut Philipp Aust & Thomas Kleinlein, eds., 2021); Curtis Bradley & Laurence Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, SUP. CT. REV. 213 (2011); Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign States*, 88 FORDHAM L. REV. 633 (2019); William Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582 (2020).

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in "dualist" approaches to the general principles of international law,[14] the concept of "legal dualism"[15] as a version of legal pluralism, and perhaps the hardest form of dualism, the "dual state."[16] One concrete example of such thinking is nondemocratic states' building special jurisdictional carve-outs that apply law that differs from the national law in order to attract foreign investment.[17] This Article stakes out a contrarian position: whereas, at a general observation, hypocrisy is tolerated to a certain extent in the international system, potential users may question the legitimacy of a system characterized by a widening gap between its foreign-facing and domestic aspects in regards to treating difference, and, thus, that gap may not be sustainable in the long run.[18]

This Article argues that the FROL orients China toward a certain relationship with foreign and international law, as well as their authorities, that I call *legal cosmopolitanism*, the selective integration of non-domestic law and legal authorities into the Chinese legal system, and, conversely, the worlding of Chinese law.[19] Drawing from legal realism, decolonization theory, Critical Race

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[14] Curtis A. Bradley, *'Breard,' Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 529 (1999) (arguing that the U.S. is traditionally "dualist" in its approach to international law).

[15] Kathryn Hendley, *Varieties of Legal Dualism: Making Sense of the Role of Law in Contemporary Russia*, 29 WIS. INT'L L.J. 233, 233 (2011) (arguing that legal dualism as legality/illegality characterizes Russian attitudes toward law); Cecília MacDowell Santos, *Legal Dualism and the Bipolar State: Challenges to Indigenous Human Rights in Brazil*, LATIN AMERICAN PERSP. 172, 172 (2016) (finding that human rights law in Brazil features both colonialist and multicultural perspectives); EYAL BENVENISTI, LEGAL DUALISM: THE ABSORPTION OF THE OCCUPIED TERRITORIES (2019) (analysing the application of Israeli law in the occupied territories).

[16] ERNEST FRAENKEL, THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP (2017) (presenting a theory of the dual state, including both the normative and prerogative states).

[17] Matthew S. Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 60 VA. J. INT'L L. 225, 230 (2020) (defining "exceptional zones" as "carve-outs from the applicable rules that apply to the broader jurisdiction.").

[18] *Compare* STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999) (observing hypocrisy is an enduring feature of international relations) *with* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 6 (2001) (showing how poor race relations in the U.S. in the 1960s negatively impacted the image of the U.S. abroad which, in turn, incentivized the U.S. Government to protect civil rights at home). To be concrete, per the example of "new legal hubs," *supra* note 17, many have proven unstable. For instance, the Dubai International Financial Centre has had trouble with both its international litigation and arbitration offerings, trouble which can be broadly attributable to concerns about fair treatment. Hong Kong, as well, has proven unstable the encroachment of legal norms from mainland China into Hong Kong has eroded confidence in Hong Kong's "rule of law."

[19] By "worlding," I borrow from and build upon anthropological theory. Specifically, my use suggests that law can be one cultural form that is projected onto the world and seeks to reform the world. *Cf.* AIHWA ONG, *Introduction: Worlding Cities, or the Art of Being Global*, in

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Theory, and grounded in a comparative outlook, the contrary claim of this Article is that the nature and direction of externally-facing legal reform cannot easily escape the corresponding features of domestic law.[20] Applying this claim to China, the issue is whether it is possible to build a FROL, based on ecumenism, pluri-legality, and hyper-diversity, when the domestic legal system is mono-cultural, mostly refuses to recognize non-state law, and is, in many domains, increasingly exclusionary.[21] Whereas tension between sovereignty and commitments to foreign and international law characterize all legal systems,[22] generally, most systems are designed for normative compatibility between internal and external-facing rules and authorities,[23] China seems to be bucking this trend. Hence, while this Article is comparative in its framing, it focuses chiefly on the China case as it is one that requires more explanation, especially

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WORLDING CITIES: ASIAN EXPERIMENTS AND THE ART OF BEING GLOBAL (Anaya Roy & Aihwa Ong, eds.) 11 (2011) (defining "worlding" as "projects and practices that instantiate some vision of the world in formation.")

[20] In linking domestic governance to external relations, I am influenced by Norbert Elias's concept of the "civilizing process." *See* NORBERT ELIAS, THE CIVILIZING PROCESS 43 (2000) (observing nations' perception of the internal completion of the civilizing process over a diverse population as galvanizing and legitimating their seeing themselves as "bearers of an existing or finished civilization to others.").

[21] *See, e.g.*, Carl Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 936 (2011); EVA PILS, HUMAN RIGHTS IN CHINA: A SOCIAL PRACTICE IN THE SHADOWS OF AUTHORITARIANISM (2017); MARY E. GALLAGHER, AUTHORITARIAN LEGALITY IN CHINA: LAW, WORKERS, AND THE STATE (2017); HUALING FU & MICHAEL DOWDLE, *The Concept of Authoritarian Legality: The Chinese Case*, in AUTHORITARIAN LEGALITY IN ASIA 63 (Weitseng Chen & Hualing, Fu, eds., 2020); Donald C. Clarke, *Order and Law in China*, U. ILL. L. REV. 541 (2022).

[22] *See generally*, JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2007) (contending that international law is simply a reflection of states' exercising their national interests); JEAN L. COHEN, GLOBALIZATION AND SOVEREIGNTY: RETHINKING LEGALITY, LEGITIMACY, AND CONSTITUTIONALISM (2012) (holding that despite the alleged oppositions between sovereignty and international law, there is an emerging "dualistic world order"); FULVIO MARIA PALOMBINO, DUELLING FOR SUPREMACY: INTERNATIONAL LAW. VS. NATIONAL FUNDAMENTAL PRINCIPLES (2019) (revealing the conflict between compliance with international law and judiciaries' preservation of fundamental principles); STEWART PATRICK, THE SOVEREIGNTY WARS: RECONCILING AMERICA WITH THE WORLD (2019) (arguing that the protection of sovereignty should not undermine engagement with international law).

[23] This view was most explicitly expressed in certain monist approaches to the relationship between domestic and international law. *See, e.g.*, ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 205 (1995) ("Monists contend that there is but a single system of law, with international law being an element within it alongside all the various branches of domestic law"). Beyond monism, however, the congruence between domestic and external law is a mainstay of a diverse set of analyses. *See, e.g.*, ANNE-MARIE SLAUGHTER & WILLIAM BURKE-WHITE, *The Future of International Law is Domestic (or, The European Way of Law*, in NEW PERSPECTIVES ON THE DIVIDE BETWEEN DOMESTIC AND INTERNATIONAL LAW 1110 (Janne E. Nijman & André Nollkaemper, eds., 2007) (finding a mutual impact between politics at the domestic and international levels).

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for U.S. audiences.[24]

Before proceeding to the analysis, I first explain terms. First, by "regarding" or "treating" difference, I mean not just empirical approaches to foreign and international law (e.g., foreign judgments recognized, foreign judges sitting on domestic court benches, treaties ratified, etc.) but also attitudinal ones. Dreaming is aspirational. While it certainly does not equal reality, through prescriptive policy, multi-year planning, agenda-setting, and even academic theory, it provides the raw material for future-oriented legal development. It thus warrants attention, although I underscore that gap between the "ought" and the "is." Importantly, it is not just Western Europeans who have "legal imaginations,"[25] but non-Europeans, too. While the US has been a wellspring of dreaming, China is a site of particularly ambitious—albeit deferred—dreaming, as a would-be global economic superpower. [26] Yet China also features nationalist and protectionist policies which undercut such superpower status, a situation that has become even starker following nearly three years of lockdown due to the COVID-19 pandemic.[27] Second, I understand "difference" broadly, not just in the legal sense (i.e., non-domestic law) but also in racial, ethnic, national and even religious terms (as in foreign legal authorities).[28] Third, "China" in my

[24] *See infra* text accompanying notes 38-42.

[25] MARTTI KOSKENNIEMI, TO THE UTTERMOST PARTS OF THE EARTH: LEGAL IMAGINATION AND INTERNATIONAL POWER 1300–1870 (2021) (focusing on the legal imagination of European men).

[26] *Compare* BARACK OBAMA, THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM 243 (2006) ("More minorities may be living the American dream, but their hold on that dream remains tenuous) *with* Xi Jinping (习近平), Zai canguan "Fuxing zhi lu" zhanlan shi de jianghua (在参观《复兴之路》展览时的讲话) [Speech while visiting the exhibition "Road to Rejuvenation"], RENMIN RIBAO (人民日报) [PEOPLE'S DAILY] (Nov. 30, 2012), http://www.12371.cn/special/xjpzyls/zgmls/1/ ("I firmly believe that by the 100th anniversary of the founding of the Chinese Communist Party…the goal of building a modern socialist country that is culturally advanced and harmonious will certainly be achieved. Dreams must come true.").

[27] *See infra* Part II.

[28] For discussions of the recognition (or not) of categories of legal difference, *see, e.g.*, Boaventura de Sousa Santos, *Law: A Map of Misleading: Toward a Postmodern Conception of Law*, 14 J. L. & Soc. 279, 281-2 (1987) (claiming that laws "misread" reality in order to claim their exclusivity over norms); GUNTHER TUEBNER, GLOBAL BUKOWINA: LEGAL PLURALISM IN THE WORLD SOCIETY, IN GLOBAL LAW WITHOUT A STATE 3 (Gunther Tuebner, ed., 1997) (asserting that the study of international economic law depends on the binary code of legal/illegal which may include non-state law); Brian Tamanaha, *A Non-Essentialist Concept of Legal Pluralism* 27 J. L. & Soc. 296 (2000) (providing a subjective definition of law); Ralf Michaels, *The Re-State-ment of Non-State Law: The State, Choice of Law, and the Challenge of Global Legal Pluralism*, 51 Wayne L. Rev. 1209, 1220 (2005) (finding that choice of law rules are blind to non-state law which is a problem in a globalized world); For parallel studies concerning legal treatments of non-legal categories, *see, e.g.*, ELIZABETH A. POVINELLI, THE

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usage refers to a constellation of actors, including not only government officials but also state-owned companies, private companies, academics, lawyers, judges, and arbitrators who do not always work in concert and sometimes at cross-purposes, but whose work the Party-State tries to align with its own goals, with varying degree of success.[29] With these building blocks in mind, I explain legal cosmopolitanism below.[30]

How the Chinese and the American legal systems treat difference, including foreign and international law and their authorities and institutions, is important as it informs their visions for world order: their relative inclusivity, which authorities shape that order, and the weight given to diverse or plural sources of norms in the order's making. More specifically, at the policy level, how the legal systems of the major economies govern difference matters in particular for their relationships not only in regards to each other but also with low-income and middle-income countries who may be economically dependent on the major economies. Asymmetrical relationships can lead to exploitation and domination or, in cosmopolitan futures, mutually-beneficial co-existence.

The U.S. has led what has come to be called the liberal international order, which has traditionally meant free markets, international law organizations, democracy promotion, rule of law, and human rights.[31] This order was meant to be inclusive with general rules that provide public goods for all.[32] As part of this order, it established international development agencies to transfer wealth from developed to developing economies and promoted democratization. [33] This vision has, however, had an underside, and one whose shadow has grown in

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CUNNING OF RECOGNITION: INDIGENOUS ALTERITIES AND MULTICULTURALISM (2002) (providing an ethnographic account of how liberal law in Australia paradoxically marginalizes Aboriginal peoples). *See also* CHARLES TAYLOR, *The Politics of Recognition*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25 (Amy Gutmann, ed., 1994) (critiquing American liberalism for suboptimal protection of certain communities' rights and calling for communitarian rights). *But see* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1996) (countering that group rights for minorities are consistent with liberal theory).

[29] By "Party-State," I refer to the integration of the CCP into all government functions.

[30] *See infra* text accompanying notes 69-82.

[31] G. John Ikenberry, *Liberal Internationalism 3.0: America and the Dilemmas of Liberal World Order*, 7 PERSP. ON POL. 71, 71 (2009) (defining liberal internationalism across three generations); Anne-Marie Slaughter, *Judicial Globalization*, 30 VA J. INT'L L. 1103, 1109 (2000) (envisioning a global community of courts that support human rights).

[32] Daniel Deudney & G. John Ikenberry, *The Nature and Sources of Liberal International Order*, 25 REV. INT'L STUDIES 179, 190 (1999) (positing that liberal states pursue economic openness).

[33] *See generally* DAVID A. BALDWIN, FOREIGN AID AND AMERICAN FOREIGN POLICY (1966); Hollis B. Chenery & Alan M. Strout, *Foreign Assistance and Economic Development* 56 AM. ECON. REV. 679 (1966); ROBERT A. PACKENHAM, LIBERAL AMERICA AND THE THIRD WORLD: POLITICAL DEVELOPMENT IDEAS IN FOREIGN AID AND SOCIAL SCIENCE (1973).

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recent years: unilateralism, dedemocratization, populism, racism and misogynism, and national security over individual liberties.[34]

China's vision of world order has undergone its own transformations as it has moved from the margins to the center of global capitalism. This vision emphasizes multilateralism, international organizations, soft law, and cautious trade liberalization; the vision equally prioritizes, sovereignty, security, social stability, and socio-economic rights over civil and political ones.[35] Chiefly, as opposed to the U.S. which viewed its relationship to the developing world through the lens of "American exceptionalism," China has positioned itself as its leader, and in fact, some of China's positioning has been as a direct response to the U.S. approach.[36] While the two visions stand in some tension, they also dovetail in a number of respects as both the U.S. and China are subject to the

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[34] EDWARD LUCE, THE RETREAT OF WESTERN LIBERALISM 51-67 (2018) (explaining how American liberal elite forsake the working class giving rise to discontent); John J. Mearsheimer, *Bound to Fail: The Rise and Fall of the Liberal International Order*, 43 INT'L SEC. 7, 8 (2019) (arguing that hyperglobalization that accompanied the spread of liberal democracy globally led to economic hollowing out in those states, causing backlash); THE DOWNFALL OF THE AMERICAN ORDER? (Peter J. Katzenstein & Jonathan Kirshner, eds., 2022) (chronicling the decline of liberal order); PANKAJ MISHRA, AGE OF ANGER: A HISTORY OF THE PRESENT 14 (2017) (suggesting that the failure of the American dream has caused widespread resentment); Inderjeet Parmar, *The US-led Liberal Order: Imperialism by Another Name*? 94 INT'L AFFAIRS 151, 151 (2018) (positing that liberal internationalism is elitist and Eurocentric).

[35] Heng Wang, *Selective Reshaping: China's Paradigm Shift in International Economic Governance*, 23 J. INT'L ECON. L. 583, 585 (2020) (explaining that China is shaping the international economic order); Gregory Shaffer & Henry Gao, *A New Chinese Economic Order?* 23 J. INT'L ECON. L. 607, 607 (observing a "new, decentralized model of trade governance through a web of finance, trade, and investment initiatives); Matthew S. Erie, *Chinese Law and Development*, 62 HARV. INT'L L. J. 51, 54 (identifying the mechanisms of Chinese law and development); CAI CONGYAN, THE RISE OF CHINA AND INTERNATIONAL LAW: TAKING CHINESE EXCEPTIONALISM SERIOUSLY 10, 102 (2019) (arguing China has a legal strategy for norm entrepreneurship in the international system); ANDREW J. NATHAN & ANDREW SCOBELL, CHINA'S SEARCH FOR SECURITY 30-31 (2014) (citing the 2011 "China's Peaceful Development" white paper naming security, stability, and development as core national interests); Cai Congyan, *International Law in Chinese Courts During the Rise of China*, 110 AM. J. INT'L L. 269, 288 (2016) (defining the "Beijing consensus" as prioritizing economic growth over political freedom and maintaining the authoritarian regime).

[36] *Compare* Packeham *supra* note 33 at 3319-20 (explaining how doctrines and theories of development stemmed from certain traditions of American exceptionalism that blinded their proponents to contrary evidence on the ground) *with* STATE COUNCIL INFO. OFFICE OF THE PRC, CHINA'S INTERNATIONAL DEVELOPMENT COOPERATION IN THE NEW ERA 6 (2021) ("By helping other developing countries reduce poverty and improve their people's lives, China works together with them to narrow the North-South gap, eliminate the deficit in development, establish a new model of international relations based on mutual respect, equity, justice and win-win cooperation, and build an open, inclusive, clean and beautiful world that enjoys lasting peace, universal security and common prosperity.").

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same forces of (de)globalization and its negative externalities.[37]

American audiences should take note: China increasingly seeks to shape law outside of China, mainly through transnational law,[38] and does so in ways that both borrow and diverge from approaches taken by the U.S.[39] Whereas the political climate in the U.S. has, in recent history, disfavored building transnational law or, for that matter, engaging with international law, China is increasingly picking up the slack, although, China, too, faces obstacles at the levels of both COVID-era policy and also deeper structural issues in the domestic legal system. Still, the days of unipolarity appear over and China is gaining more traction in global governance, a trend that the COVID-19 pandemic may ironically be fomenting.[40] More specifically, this Article triangulates the U.S.-China relationship—the most important bilateral relationship in the world—through their respective relationships with the low- and middle-income

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[37] JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS REVISITED: ANTI-GLOBALIZATION IN THE ERA OF TRUMP (2018) (detailing how a U.S.-China trade war disadvantages both sides); Henry Farrell & Abraham L. Newman, *Weaponized Interdependence: How Global Economic Networks Shape State Coercion*, 44 INT'L SEC. 42, 77 (2019) (analysing how US and Chinese reliance on global economic networks can cause disadvantages); ANTHEA ROBERTS & NICHOLAS LAMP, SIX FACES OF GLOBALIZATION: WHO WINS, WHO LOSES, AND WHY IT MATTERS 127 (2021) (explaining how US-China competition has resulted in a shift to relative gains).

[38] Transnational law differs from but overlaps with international law. Whereas the latter is traditionally understood as the legal relations among sovereign states, the former pertains mainly (but not exclusively) to transactional law between private parties. *See* TERENCE C. HALLIDAY & GREGORY SHAFFER, *Introduction: Transnational Legal Orders*, in TRANSNATIONAL LEGAL ORDERS 3, 4 (Terence C. Halliday & Gregory Shaffer, eds., 2015).

[39] *Compare* Shaffer & Gao *supra* note 35 at 608 ("…China builds from and repurposes Western legal models."), *with* Erie *supra* note 35 at 56 (suggesting that China's efforts to create cross-border order differ from those of the U.S.).

[40] *See* Seth Schindler, Nicholas Jepson, & Wenxing Cui, *Covid-19, China and the Future of Global Development* 2 RESEARCH IN GLOBALIZATION 1, 4 (2020) (finding that Chinese approaches to development may constitute an appealing alternative to U.S.-led development for many developing countries post-COVID); Thomas Ameyaw-Brobbey, *A Critical Juncture? Covid-19 and the Fate of the U.S.-China Struggle for Supremacy* WORLD AFFAIRS 260, 262 (2001) (finding that China's response to the COVID-19 pandemic may win some friends but such efforts are unlikely to shape positive global public perception of China in the long run). Generally, even before the most recent draconian lockdown measures were installed in Shanghai in May 2022 as part of China's "zero-COVID" policy, public perception of China in developed countries plummeted over the course of the pandemic. *See* Laura Silver, Kat Devlin & Christine Huang, *Unfavorable Views of China Reach Historic Highs in Many Countries*, PEW RESEARCH CENTER (Oct. 6, 2020), https://www.pewresearch.org/global/2020/10/06/unfavorable-views-of-china-reach-historic-highs-in-many-countries/. *But see* Josephine Appiah-Nyamekye Sanny & Edem Selormey, *Africans Welcome China's Influence but Maintain Democratic Aspirations*, AFROBAROMETER DISPATCH NO. 489 (Nov. 15, 2021) (identifying two-thirds of respondents as saying that China's economic and political influence in their country is "somewhat positive" or "very positive.").

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countries.[41] Economic and legal relationships in China-and-the-Global South are, in certain respects, a reaction to the U.S.-in-the-Global South. In short: China's legal cosmopolitans believe they can do empire better than the Americans.[42]

To make these arguments, this Article explores two sets of overlaid comparisons: one is *within* legal systems, that is, how legal systems treat difference internally and externally, and the other is *between* legal systems, that is, how the US and Chinese legal systems regard difference. It is important to underscore that these comparisons are not isolates, they are relational and causal: China proposes an alternative to what it and others perceive to be the racial capitalism of the U.S. which has seeped into international law. The US can, in fact, learn from aspects of what China is doing both in terms of its aspirations toward legal cosmopolitanism and its relationships with "legal barbarians."[43] The Chinese approach should thus be taken seriously even if not credulously. Part of the "China, Law and Development" project, based at the University of Oxford, this Article is principally conceptual and complements other project articles which are more empirical and provide examples in support of the ideas expressed herein.[44]

Organizationally, the remainder of this Article is comprised of five parts. In part one, I explain in general terms how legal systems recognize difference, in the from of non-domestic (or non-state) law externally and internally. Part two turns to the example of the U.S. First, I explain the concept of American legal exceptionalism through the U.S. legal system's treatment of foreign law externally, and specifically, its extraterritorial application of U.S. law. Next, I argue that the logic of American legal exceptionalism is reflected in the U.S. legal system's treatment of difference internally. In short, there is convergence between the external and internal treatment of difference. However, as shown in

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[41] *See generally*, KEVIN P. GALLAGHER, THE CHINA TRIANGLE: LATIN AMERICA'S BOOM AND THE FATE OF THE WASHINGTON CONSENSUS (2016); DAWN C. MURPHY, CHINA'S RISE IN THE GLOBAL SOUTH: THE MIDDLE EAST, AFRICA, AND BEIJING'S ALTERNATIVE WORLD ORDER (2022); CHINA'S GLOBAL ENGAGEMENT (Jacques deLisle & Avery Goldstein, eds., 2017); GLOBAL CHINA: ASSESSING CHINA'S GROWING ROLE IN THE WORLD (Tarun Chhabra, Rush Doshi, Ryan Hass & Emilie Kimball, eds., 2021); CHING KWAN LEE, THE SPECTER OF GLOBAL CHINA: POLITICS, LABOR, AND FOREIGN INVESTMENT IN AFRICA (2018); DAVID SHAMBAUGH, CHINA GOES GLOBAL: THE PARTIAL POWER (2013).

[42] By empire, I do not mean formal political control over foreign territories; rather, empire in my use is a juristic, economic, and imaginary space that purports to have some aspect of influence if not dominion (whether coercive or consensual) over jurisdictions outside of the home state. For more on China's "simulacral empire," *see* Matthew S. Erie, *The Soft Power of Chinese Law*, COLUM. J. TRANSNAT'L L. (forthcoming).

[43] DANIEL BONILLA MALDONADO, LEGAL BARBARIANS: IDENTITY, MODERN COMPARATIVE LAW AND THE GLOBAL SOUTH (2021) 7 (defining "legal barbarians" as "those who are only poor versions of the original legal subjects.").

[44] For more on the "China, Law and Development" project, including publications, *see* https://cld.web.ox.ac.uk/.

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part three, American legal exceptionalism, and specifically, the way in which that logic has shaped legal orders for the global economy, has been the object of intense criticism. China, for example, has participated in the critique of the U.S. racial empire and the institutionalization of racism in U.S. domestic law and international economic law. Hence, in part four, I shift to China and explain its alternative to U.S. racial capitalism, through its vision of legal cosmopolitanism. Specifically, I examine its construction of a FROL. I argue that this project and the vision it supports is hindered by a number of factors, including the PRC legal system's regard for difference internally. Part fives expands the question of a legal system's regard for difference to the foreign relations between donor and recipient states. A conclusion pertaining to the implication for the triangular relationship between U.S., China, and their trade partners, especially those in the Global South, follows.

I. REGARDING DIFFERENCE

How do states treat foreign and international law, institutions, and authorities? This question animates a number of legal fields including constitutional law, [45] foreign relations law, [46] international law, [47] multijurisdictional transactions, [48] transnational litigation, [49] judicial

[45] *See, e.g.*, Curtis A. Bradley, *The Supreme Court as a Filter Between International Law and American Constitutionalism*, 104 CA. L. REV. 1567 (2016) (analysing the interface between American constitutional law and international law).

[46] *See* Restatement (Fourth) of the Foreign Relations Law of the United States (2022) (covering jurisdiction, effect of treaties, and sovereign immunity); Kevin Cope, Pierre-Hughes Verdier, & Mila Versteeg, *The Global Evolution of Foreign Relations Law*, 118 AM. J. COMP. L. (2021) (providing a cross-jurisdictional study of how the domestic law of states interacts with international law).

[47] *See generally*, Pierre-Hugues Verdier & Mila Versteeg, *International Law in National Legal Systems: An Empirical Investigation*, 109 AM. J. INT'L L. 514 (2015) (analysing domestic implementation of international law); LAURI MÄLKSOO, RUSSIAN APPROACHES TO INTERNATIONAL LAW (2015) (examining how Russian views of international law differ from those of other states); ANTHEA ROBERTS ET AL., COMPARATIVE INTERNATIONAL LAW (2018) (arguing that states' different approaches to international law require a more comparative perspective).

[48] *See, e.g.*, Ronald A. Brand, *Uni-State Lawyers and Multinational Practice: Dealing with International, Transnational, and Foreign Law*, 34 VAND. J. TRANSNAT'L. L. 1135 (2001) (analysing how lawyers, licenses in one state, can ethically advise on transnational deals).

[49] *See, e.g.*, Harold Koh, Transnational Litigation in United States Courts (2008) (providing an overview of core doctrines such as transnational public and private law litigation, forum non conveniens, discovery, and recognition and enforcement of foreign judgments). *But see* Christopher A. Whytock, *Transnational Litigation in U.S. Courts: A Theoretical and Empirical Reassessment*, 19 J. EMP. LEGAL STUD. 4 (2022) (finding that, due to changes in procedural and

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cooperation,[50] and legal development assistance,[51] and to name a few. For a number of reasons, each state must balance its receptiveness to non-domestic law with protecting its own sovereignty.[52] These reasons include the prevailing Westphalian system of nation-states as members of an international legal system as well as economic considerations given that state economies depend on international trade and investment. States' calculations, in turn, depend on various factors, including their relative political and economic strength, regional or transnational integration, and histories of empire. Whereas since the 1970s, globalization has brought about greater fusing of legal systems through harmonization, in recent years, the externalities of globalization have bred nationalism and protectionism, inciting pushback against globalization.[53]

China is at the heart of these developments. Since the 1980s, as China has become more integrated into the global capitalist system through trade, investment, and cross-border finance, it has, as of necessity, had to grapple with an increasing complex set of questions pertaining to foreign and international law. Topics on the reform agenda include *inter alia* (i) the recognition of foreign law in people's courts, including conflict of laws, the ascertainment of foreign laws, transnational litigation, and the recognition and enforcement of foreign judgments as well as arbitral awards, the role of foreign legal authorities (including judges, arbitrators, and lawyers) in promoting China's legal integration into the world economy, and (ii) the extraterritorial application of PRC law, anti-suit injunctions, economic sanctions, judicial cooperation with foreign judges, and even establishing dispute resolution mechanisms outside the territory of the PRC. In contrast to the first fifteen years or so of China's entry into the World Trade Organization (WTO) in 2001, however, in recent years,

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substantive law, that the U.S. may be less attractive as a forum for transnational disputes than conventionally thought).

[50] Charles H. Koch, Jr. *Judicial Dialogue for Legal Multiculturalism*, 25 MI. J. INT'L L. 879, 879 (2004) ("No longer can national legal professionals and judiciaries, not even those of the United States, isolate themselves from the influences of the laws of other nations…").

[51] Am. Bar. Assoc. *ABA Rule of Law Programs Have Global Impact*, 41 ARK. LAW. (Oct. 2006) 14 (describing ABA programs in 40 countries); Judge David Shakes, *Legal Anthropology on the Battlefield: Cultural Competence in U.S. Rule of Law Programs in Iraq*, 10 WAKE FOREST J. L. & POL'Y 217, 274-5 (2020) (finding that US rule-of-law programming in post-war Iraq suffered from lack of cultural awareness).

[52] *See generally* Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1175 (2007) (analysing the US's commitments under international comity doctrines against deference to foreign sovereigns).

[53] *Compare* Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 322 (2002) (arguing that globalization requires a retheorization of jurisdiction as cosmopolitan pluralism) *with* Mariana Pargendler, *The Grip of Nationalism on Corporate Law*, 95 IND. L. J. 533, 534 (2020) (finding that nationalist impulses are pervasive in shaping corporate law around the world and has "put sand in the gears of globalization").

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China's relationship with the U.S., the dominant economy in the world, has become adversarial making China's economic integration fraught, contested, and controversial.[54]

China's reforms are indicative of an economic superpower's incorporation into international, transnational, and global legal orders.[55] In putting China's reforms in a broader context, there are three sets of distinctions that are important to keep in mind. The first is between the external and internal aspects of the legal system as they pertain to questions of foreign law and foreign legal authorities. At one level, this distinction is a specious one as there is porousness between these aspects, yet it is possible to differentiate on the issue of the treatment of difference as follows: external aspects refer to the legal system's regard for foreign and international law as well as its own domestic law extraterritorially whereas internal aspects refer primarily to recognition of difference domestically. Both categories are relevant to the analysis of these reforms.

The second distinction is between foreign law and international law. Foreign law her refers to laws of states other than the home state (e.g., U.S. or China) and international law refers to private international law (law between non-state entities) and public international law (law between sovereign states). This study is predominantly focused on the question of the relationship between home state law and foreign law, as China's reforms are directed mainly at cross-border issues involving foreign law, although international law is also pertinent as it provides a scaffolding for some of China's legal reforms. Hence, I refer to the conjunctive "foreign and international law."

A third and related set of categories is the distinction between private international law and public international law. This analysis focuses primarily on the former. As pertains to China, given the increasing volume of Chinese capital invested overseas over the last twenty plus years since the start of Chinese firms' "going out" (*zouchuqu*), coupled with its international development initiatives, some of which have been repackaged under the "Belt and Road Initiative"

[54] Mark Jia, *Illiberal Law in American Courts* 168 U. PA. L. REV. 1685 (2020) (explaining U.S. judges' vexed interpretation of authoritarian laws, including those from China); Donald C. Clarke, *Judging China: The Chinese Legal System in U.S. Courts* U. PA. J. INT'L L. (forthcoming) (finding that U.S. judges often inaccurately analyze the PRC legal system).
[55] GREGORY SHAFFER, EMERGING POWERS AND THE WORLD TRADING SYSTEM: THE PAST AND FUTURE OF INTERNATIONAL ECONOMIC LAW (2021).

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(BRI),[56] or, more recently, the "Global Development Initiative" [57] and "Global Security Initiative," [58] China has begun to promote cross-border and transboundary governance, including in such areas as trade and investment,[59] data governance, [60] financialization, [61] intellectual property and standard-

[56] The BRI is a macro-regional development project that purports to link China's economy with those of host states throughout the world, and particularly in developing states. Although started in 2013 and intended to last decades, the initiative, which is more accurately understood as innumerable infrastructure projects, agreements, and cooperative platforms rebranded as "BRI," has undergone continual adaptation and revision, particularly in light of the COVID-19 pandemic. The literature on the BRI is too extensive to cite. For an introduction from the perspective of the domestic policy drivers of the initiative, *see* MIN YE, THE BELT AND ROAD AND BEYOND: STATE-MOBILIZED GLOBALIZATION IN CHINA: 1998-2018 (2020).

[57] Wang Yi, *Jointly Advancing the Global Development Initiative and Writing a New Chapter for Common Development*, MIN. FOR. AFFAIRS OF PRC (Sept. 21, 2022), https://www.fmprc.gov.cn/eng/zxxx_662805/202209/t20220922_10769721.html (describing the Global Development Initiative, announced by Xi Jinping at the UN General Assembly, in 2021, as implementing the UN Sustainable Development Goals through building platforms for cooperative development).

[58] Wang Yi, *Acting on the Global Security Initiative to Safeguard World Peace and Tranquillity*, MIN. FOR. AFFAIRS OF PRC (Apr. 24, 2022), https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/zyjh_665391/202205/t20220505_10681820.html (stating that the Global Security Initiative was announced by Xi in 2022 at the Boao Forum for Asia Annual Conference and institutionalizes "China's wisdom…to tackling peace deficit, and offers China's solution to addressing international security challenges.").

[59] Vivienne Bath, *China's Role in the Development of International Investment Law—From Bystander to Participant*, 15 ASIAN J. WTO & INT'L HEALTH & POL'Y 359 (2020); Pasha L. Hsieh, *China's Development of International Economic Law and WTO Legal Capacity Building*, 13 J. INT'L ECON L. 997 (2010); Wang, *Selective Reshaping: China's Paradigm Shift in International Economic Governance*, 23 J. INT'L ECON. L. 583 (2020); GUIGUO WANG, INTERNATIONAL INVESTMENT LAW: A CHINESE PERSPECTIVE (2015); CHINA'S INTERNATIONAL INVESTMENT STRATEGY: BILATERAL, REGIONAL, AND GLOBAL LAW AND POLICY (Julien Chaisse, ed., 2018).

[60] *See generally*, Matthew S. Erie & Thomas Streinz, *The Beijing Effect: The 'Digital Silk Road' and Transnational Data Governance*, 54 N.Y.U. J. INT'L L. & POL. 3 (2021).

[61] *See, e.g.*, Qiu Yudong (戚聿东), Liu Huanhuan (刘欢欢) & Xiao Xu (肖旭), Shuzi huabi yu guoji huobi tixi biange ji renminbi guojihua xin jiyu (数字货币与国际货币体系变革及人民币国际化新机遇) [*The Reform of the International Monetary System and The Opportunity of RMB Internationalization Under the Trend of Digital Currency*] 74 WUHAN DAXUE XUEBAO (ZHEXUE SHEHUI KEXUEBAN) (武汉大学学报（哲学社会科学版）) [WUHAN UNIVERSITY JOURNAL (PHILOSOPHY & SOCIAL SCIENCE)] 105 (2021); Weitseng Chen, *Lost in Internationalization: Rise of the Renminbi, Macroprudential Policy, and Global Impacts*, 21 J. INT'L ECON. L. 31 (2018).

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setting,[62] maritime law,[63] cross-border dispute resolution,[64] and even space law.[65] To summarize, the reforms center primarily on the overlap between what in civil law systems is referred to as "private international law," the field of *domestic* law concerned with identifying the applicable rules that courts of the forum must apply to resolve disputes involving laws from more than one country[66] and what is called foreign relations law in the United States, which is focused more on the interface between domestic constitutional law and international law.[67]

In this Article, I compare and contrast the approach of the United States to policing the relationship between its domestic legal system and foreign and international law, one that has come to be known as "American legal exceptionalism," to the Chinese experience which appears to embrace legal cosmopolitanism. In making such a comparison, I note that the U.S. and PRC both demonstrate aspects of legal exceptionalism and legal cosmopolitanism for the reason that all major economies have certain common orientations toward non-domestic law.[68] Exceptionalism and cosmopolitanism are not mutually exclusive; both can be present at the boundaries of external and internal aspects of the legal system. A nation-state can be cosmopolitan in some legal fields and exceptional in others, depending on needs, strategies, and capacities. Also, nation-states change over time in their attitudes. However, it is possible to trace

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[62] *See, e.g.*, Peter K. Yu, *Building Intellectual Property Infrastructure along China's Belt and Road*, 14 U. PA. ASIAN L. REV. 275 (2019).

[63] Tang Gang (唐刚), *Xi Jinping fazhi sixiang Zhong de quanqiu Haiyang zhili lilun ji shixian lujing (习近平法治思想中的全球海洋治理理论及实现路径) [The Global Ocean Governance Theory of Xi Jinping Thought on the Rule of Law and its Realization Path*], 32 ZHONGGUO HAISHANGFA YANJIU (中国海商法研究) [CHINESE J. MARITIME L.] 12 (2021).

[64] *See, e.g.*, ZHIQIONG JUNE WANG & JIANFU CHEN, DISPUTE RESOLUTION IN THE PEOPLE'S REPUBLIC OF CHINA: THE EVOLVING INSTITUTIONS AND MECHANISMS (2019).

[65] Li Shouping (李寿平), *Waikong anquan mianlin de xin tiaozhan jiqi guoji falü guizhi (外空安全面临的新挑战及其国际法律规制) [The New Challenges to Space Security and its Legal Regime]* 3 SHANDONG DAXUE XEUBAO (ZHEXUE SHEHUI KEXUEBAN) (山东大学（哲学社会科学版）) [JOURNAL OF SHANDONG UNIVERSITY (PHILOSOPHY AND SOCIAL SCIENCES] 52 (2020).

[66] *See* JUSTICE STEVEN RARES, *Commercial Issues in Private International Law*, in COMMERCIAL ISSUES IN PRIVATE INTERNATIONAL LAW: A COMMON LAW PERSPECTIVE (Michael Douglas et al., eds., 2019) 1, 1 (providing a generic definition of private international law).

[67] CURTIS BRADLEY, *What is Foreign Relations Law*? in OXFORD HANDBOOK OF FOREIGN RELATIONS LAW (Curtis A. Bradley ed., 2019) 4, 4 (defining "foreign relations law" as "the domestic law of each nation that governs how that nation interacts with the rest of the world.")

[68] Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 HARV. INT'L L.J. 1, 5 (2011) (suggesting that powerful nations all interpret international law in accordance with their values).

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trends in external-facing legal reform that may be characterized by greater or lesser degrees of exceptionalism or cosmopolitanism.

Before proceeding to the comparison, I want to address more directly this Article's main conceptual contribution. Specifically, I want to provide a fuller account of what I mean by legal cosmopolitanism, as my use—inspired by critical approaches to international law, namely, Critical Race Theory[69] and Third World Approaches to International Law,[70] as well as more contemporary theoretical reflections on the so-called "BRICS" (i.e., Brazil, Russia, India, China, and South Africa)[71]—may differ from other uses. The International Court of Justice judge Abdulqawi Yusuf, a Somali who speaks Somali, Arabic, French, Italian, and English, and received legal training in Somalia and Europe, distills a legal cosmopolitan mindset:

> I received my initial training as a lawyer in one of the most diverse legal systems in the world. Somalia's mixed legal system includes civil law, common law, customary law, and Islamic law. I feel that this diversity has been of great help in my work in international law…
>
> It is not a paradox to say that the universality of international law depends on diversity. Indeed, in the case of international law, universalisation and globalization do not reduce diversity; they actually promote it. For international law, universalisation means borrowing and adapting concepts and principles from different legal traditions. Thus, diversity plays a different role in international law. The more international law can draw on multiple legal traditions, the more universal it will be considered. International law was, in its origins, based on uniformity and

[69] See Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence*, 45 VILLANOVA L. REV. 827, 827 (introducing the first symposium issue to apply Critical Race Theory to international law problems).

[70] ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW (2004); B. S. Chimni, *The World of TWAIL: Introduction to the Special Issue*, 3 TRADE, L. & DEV. 14, 14 (2011); Li Hongfeng, (李洪峰), *Lun guojifa disan shijie fangfa de pipanxing (论国际法第三世界方法的批判性) [Discussion of TWAIL]* 65 SHEHUI KEXUE (社会科学) [SOCIAL SCIENCE] 88, 88 (2011); LUIS ESLAVA, ET AL., BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES (2017); James Thuo Gathii, *The Promise of International Law: A Third World View*, 36 AM. U. INT'L L. REV. 377, 377 (2021).

[71] *See* Shaffer *supra* note 5. *See also* RECONCEPTUALIZING INTERNATIONAL INVESTMENT LAW FROM THE GLOBAL SOUTH (Fabio Morosini & Michelle Ratton Sanchez Badin, eds., 2018); THE GLOBAL SOUTH AND COMPARATIVE CONSTITUTIONAL LAW (Philipp Dann, Michael Riegner, & Maxim Bönnemann, eds., 2020); William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 Harv. Int'l L.J. 1, 1 (2015).

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homogeneity, and thus diversity allows it to break out of those bounds.[72]

What Judge Yusuf refers to as "universalization," I call cosmopolitanism. Whereas universalization connotes homogenization, legal cosmopolitanism, in the ideal, means law of and for the whole world.[73] Legal cosmopolitanism is not simply legal pluralism (a formation of law, namely, mixture) or legal transplantation (a mechanism of inter-jurisdictional legal borrowing); rather, it aspires to both integrate and transcend national divisions.[74] While a complete delinking of nation-state from law is under the status quo is impossible, states nonetheless endeavor to adopt various forms of legal cosmopolitanism.[75]

Whereas, classically, some imperial law and religious law (and empires that applied religious law) represented versions of cosmopolitanism,[76] in the contemporary period, legal cosmopolitanism has assumed a number of forms. One derives from Kantian moral philosophy and argues for "global constitutionalism" although this form is mainly of and for Europe.[77] Indeed, this version has informed a liberal cosmopolitanism that some have argued has

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[72] Abdulqawi Yusuf, *Diversity of Legal Traditions and International Law: Keynote Address, 2 Cambridge* J. INT'L & COMP. L. 681, 682, 683 (2013).

[73] OED, *Cosmopolitan, adj. and n*. OED ONLINE (Dec. 2021), https://perma.cc/P4SP-KUYQ.

[74] *Contra* PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS 11-12, 141 (2012) (suggesting a cosmopolitan pluralist jurisprudence which highlights how people have multiple legally-mediated affiliations); ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 21 (1993) (defining legal transplant as "the moving of a rule or a system of law from one country to another.").

[75] H. PATRICK GLENN, THE COSMOPOLITAN STATE 111-161 (2013) (identifying common laws, constitutionalism, and institutions as the sources of legal cosmopolitanism).

[76] *See generally*, LAUREN BENTON & LISA FORD, RAGE FOR ORDER: THE BRITISH EMPIRE AND THE ORIGINS OF INTERNATIONAL LAW, 1800-1850 (2016) (explaining how efforts to apply constitutional law to order British territorial possessions lay the foundations for international law); IZA HUSSIN, THE POLITICS OF ISLAMIC LAW: LOCAL ELITES, COLONIAL AUTHORITY, AND THE MAKING OF THE MUSLIM STATE (2016) (describing how the universality of Islamic law was based, in part, on the universalist claims of empire); NURFADZILAH YAHAYA, FLUID JURISDICTIONS: COLONIAL LAW AND ARABS IN SOUTHEAST ASIA (2022) (chronicling how Arab traders drew on both Islamic legal sources and colonial law); KWAI HANG NG, THE COMMON LAW IN TWO VOICES: LANGUAGE, LAW, AND THE POSTCOLONIAL DILEMMA (2009) (showing how the conditions of postcoloniality shape cosmopolitan languages of law).

[77] ALEC STONE SWEET & CLARE RYAN, A COSMOPOLITAN LEGAL ORDER: KANT, CONSTITUTIONAL JUSTICE AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 251-54 (2018) (focusing their analysis on the European Court of Human Rights but including, in their conclusion, possible examples of global constitutionalism beyond Europe, including the Inter-American Convention on Human Rights and the Economic Community of West African States).

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become intrinsic in international law.[78] Another version, pursuant to decolonization starting in the 1960s and continuing with globalization, decenters Western legacies of international and comparative law and, instead, strives to integrate alternative understandings and traditions, including those from Africa and Asia.[79] This period has seen the opening of more space for non-Western interpretations of international and comparative law. As this form is articulated more through identity and power than moral philosophy, self-consciously "provincializes Europe,"[80] and has had more traction empirically in African and Asian contexts, it is this version that more centrally applies to China. Yet China has reinterpreted this version to suit its own political ideology, foreign relations goals, and attitude toward international law.[81]

A final note on legal cosmopolitanism: diverse individuals are a starting point for thinking in cosmopolitan terms. A legal expert may assume a cosmopolitan viewpoint based on her subjectivity, others may assert their own national traditions over and above orthodox Western ones hence reproducing some of the hierarchy of imperialism. In other words, just as the Nation is "imagined,"[82] so, too, is the Cosmopolis, and, further, rather than a heuristic for inclusion it can function—ironically—as one for ethnocentrism. In extreme forms where nationalists appropriate the language of cosmopolitanism in service to their own agendas, legal cosmopolitanism may be a type of sham cosmopolitanism and cover for self-interest.

II. AMERICAN LEGAL EXCEPTIONALISM

American sensibilities toward foreign and international law have been deeply ambivalent. Attitudes vary according to the directionality of the engagement (i.e., whether foreign law is "entering" the U.S. through, for

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[78] ILEANA M. PORRAS, *Liberal Cosmopolitanism or Cosmopolitan Liberalism?* in PAROCHIALISM, COSMOPOLITANISM, AND THE FOUNDATIONS OF INTERNATIONAL LAW (M.N.S. Sellers, ed.) 118, 123 (2012).

[79] BERNARD V. A. RÖLING, INTERNATIONAL LAW IN AN EXPANDED WORLD (1960); R. Y. JENNINGS, *Universal International Law in a Multicultural World*, in LIBER AMIORCUM FOR LORD WILBERFORCE (M. Bos & I. Brownlie, eds.) 40 (1987); ARNULF BECKER LORCA, MESTIZO INTERNATIONAL LAW (2015); Karen J. Alter, *From Colonial to Multilateral International Law: A Global Capitalism and Law Investigation*, 19 iCON 1, 1 (2021); Lena Salaymeh & Ralf Michaels, *Decolonial Comparative Law: A Conceptual Beginning*, 86 RABEL J. COMP. L. & INT'L PRIVATE L. 166 (2022).

[80] DIPESH CHAKRABARTY, PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE 6-7, 63, 66 (2000) (delinking modernity from the Enlightenment project).

[81] *See infra* note 35.

[82] BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1983).

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example, recognition of a foreign judgment by a U.S. court or whether U.S. law is "going out" to overseas jurisdictions through, for instance, the extraterritorial application of U.S. law) and who is engaging with non-domestic law (e.g., legal experts or the public). The overall picture is that whereas legal authorities, including judges, have been deeply engaged with questions of foreign law, the popular and policy perspective has, for the most part, been one of legal exceptionalism, although legal cosmopolitanism has been prevalent at times. American legal exceptionalism is a particular facet of the broader belief of American exceptionalism, an idea which has most recently been revived under President Trump's "Make America Great Again" campaign, and, generally, stands for the idea that the U.S. is special among nation-states.[83] American legal exceptionalism draws attention to U.S. laws and its Constitution as integral to this status, and, further, suggests that the U.S. does not have much to learn from foreign legal systems.[84]

A. External Aspects

The American approach to creating rules to regulate the relationship between U.S. domestic law and foreign and international law involves a number of overlapping legal fields including trade law, financial and banking law, corporate law, constitutional law,[85] and state-investor dispute resolution, to name a few, yet it has been constitutive of the fields of "conflict of laws" (i.e., the common law equivalent of private international law) and foreign relations law. As to conflict of laws, it is not surprising that the United States began developing its own rules in the early nineteenth century, a period of American industrial

[83] SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGE SWORD 18-19 (1966) (observing that Americans believe their country to be "qualitatively different, that it is an outlier" due to its founding values of liberty, egalitarianism, individualism, populism, and laissez-fair economics).

[84] *See* Calabresi, *supra* note 2, at 1337. A number of observers have attributed this belief to the nature of the adversarial trials, and the individualist and market-oriented values behind such a system, *see, e.g*., ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 8 (2nd ed., 2019) (identifying the key characteristics of American legal exceptionalism, including "more formal, adversarial procedures" for dispute resolution). Other scholars have focused on how U.S. legal exceptionalism shapes American attitudes toward foreign and international law, *see, e.g*., Harold Hongju Koh, *On American Exceptionalism* 55 STAN. L. REV. 1479, 1481-2 (2007) (identifying the particular salience of American exceptionalism in U.S. approaches to international law in the years after 9/11); Curtis A. Bradly, *Foreign Relations Law and the Purported Shift Away From 'Exceptionalism'* 128 HARV. L. REV. F. 294, 294 (2015) (arguing that assertions that foreign relations law is moving away from exceptionalism are over-stated).

[85] NOEL MAURER, THE EMPIRE TRAP: THE RISE AND FALL OF U.S. INTERVENTION TO PROTECT AMERICAN PROPERTY OVERSEAS (2013) (tracing the evolution of different enforcement mechanisms that defined American imperialism).

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revolution and economic expansion.[86] Since then, the U.S. has built up a substantial body of conflict of law rules.[87] Tracing the evolution of foreign relations law in the United States is more chimerical, given that the Constitution was designed by the founders to allow the three branches to work out foreign relations problems in light of the circumstances.[88] Nonetheless, scholars have debated the extent to which the early twentieth century witnessed a shift from foreign affairs powers as a constitutional exercise controlled by the enumerated and reserved powers in the Constitution to one that privileged the Executive in foreign affairs matters.[89]

Over the course of the long twentieth-century, the U.S. rose economically through the emergence of global capitalism and an international legal order which underpinned it, an order which the U.S. and its allies led.[90] As U.S. interests crossed national borders and U.S. companies and individuals conducted business in foreign markets, U.S. law became increasingly relevant to govern activities beyond the territorial jurisdiction of the U.S.[91] There were thus multiple, overlapping yet separate vectors for legal exchange, including U.S. foreign policy which promoted the export of U.S. law overseas and U.S. commercial interests which witnessed a greater degree of using foreign law on U.S. soil.[92] On the side of the U.S. government, the application of U.S. law

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[86] JUSTICE JOSEPH STORY, COMMENTARIES ON CONFLICT OF LAWS (1834) (providing a canonical study of American conflict of laws). *See* DAVID M. PLETCHER, THE DIPLOMACY OF TRADE AND INVESTMENT: AMERICAN ECONOMIC EXPANSION IN THE HEMISPHERE, 1865-1900 1 (1998) (defining the first half of the nineteenth century as a period of economic growth during which the U.S. gained more exposure to foreign trade).

[87] SYMEON SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE 423-37 (2006) (understanding a shift from rigid "rules" to flexible "approaches" starting in the 1960s). *See also* AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW, SECOND: CONFLICT OF LAWS 2D (1971) (providing black letter law for conflict of law rules for contract and tort cases); JOSEPH WILLIAM SINGER, CHOICE OF LAW: PATTERNS, ARGUMENTS, PRACTICES (2020) (providing summaries of caseload and commentaries, based on the emerging consensus of the yet-unfinished Third Restatement).

[88] Martin Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 LAW & CONTEMP. PROBLEMS 169, 171 (2004).

[89] Curtis A. Bradley, *A New American Foreign Affairs Law?* 70 COLUM. L. REV. 1089, 1090-91 (1999).

[90] NTINA TZOUVALA, CAPITALISM AS CIVILIZATION: A HISTORY OF INTERNATIONAL LAW 91-2 (2020) (explaining the pivotal role of the U.S. in building international legal institutions in the inter-war period).

[91] R. Daniel Keleman & Eric C. Sibbit, *The Globalization of American Law*, 58 INT'L ORG. 103, 113 (2004) (tracing the spread of American law in cross-border contracts through transactions serviced by U.S. lawyers).

[92] *See, e.g.*, Nashua Sav. Bank v. Anglo-Am. Land, Mortg. & Agency Co., 189 U.S. 221, 227-29 (1903) (providing guidance on how to prove foreign law in U.S. courts); The Atlanta, 82 F. Supp. 218, 235-37 (S.D. Ga. 1948 (applying the Panamanian Commercial Code); Cambridge Literary Props., Ltd. Vs. W. Goebel Porzellanfabrik G.m.b.H & Co., 295 F.3d 947, 64 (1st Cir.

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overseas took a number of forms including the extraterritorial use of U.S. anti-trust law, anti-corruption law, and counter-terrorism law, to name a few.[93] Meanwhile, U.S. corporations and individuals engaged in commercial activities overseas sought to apply U.S. state law to transactions involving foreign entities and assets. While the public and private interests were distinct and could even be at odds,[94] they could also converge through, for example, in the post-World War II period, international investment agreements between host states and in the International Development Finance Corporation (formerly, the Overseas Private Investment Corporation) that channeled private U.S. investment into projects overseas that supported U.S. national interests,[95] as well as the work of U.S. lawyers in the "foreign policy establishment" who knit together the interests of the U.S. government, investment banks, and private firms.[96]

As a consequence of both increased activity by both U.S. public and private interests, U.S. courts and arbitration institutions developed the rules and expertise to resolve foreign-related disputes, yet despite long-term engagement with non-domestic law, the fundamental directionality of legal movement has been to export U.S. law overseas rather than to import foreign law into the internal legal system. This tendency long predates the emergence of liberal

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2002) (recognizing that the U.S. district court can apply U.S. copyright law, German contract law, and Austrian inheritance law in the same lawsuit). Cases cited in Wilson *supra* note **Error! Bookmark not defined.** at 893, fn. 26.

[93] *See, e.g.*, Hartford Fire Insurance Co. v. California 113 S. Ct. 1892 (1993) (allowing U.S. courts to exercise prescriptive jurisdiction over foreign defendants who anticompetitive activities cause substantially adverse impact on U.S. commerce); Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§78dd-1 to 78ff (2012) [hereinafter, "FCPA"] (imposing criminal and civil liability on individuals and corporate entities that bribe officials abroad); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, § 804, 115 Stat. 272, 377 (codified at 18 U.S.C. § 7(9) (2006)), tit. III, sec 302(b) ("prevent, detect and prosecute international money laundering and the financing of terrorism").

[94] The legislative history of the FCPA demonstrates this fact. It was post-Watergate revelations that U.S. corporations were engaging with domestic politics and elections in foreign states in ways that potentially contravened the U.S. Government's interests that gave rise to the legislation. *See* Matthew S. Erie, *Anticorruption as Transnational Law: The Foreign Corrupt Practices Act, PRC Law, and Party Rules in China*, 67 AM. J. COMP. L. 233, 247 (2019).

[95] See Congressional Research Services, *BUILD Act: Frequently Asked Questions About the New U.S. International Development Finance Corporation*, EVERYCRSREPORT.COM (Jan. 15, 2019), https://perma.cc/M9WM-HDSM (providing a history of OPIC).

[96] BRYANT G. GARTH, *The Globalization of the Law*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 245, 249 (Keith E. Whittington, et al. eds., 2010). *See also* R. Daniel Kelemen & Eric C. Sibbitt, *The Globalization of American Law* 58 INT'L ORG. 103, 111 (2004) (noting that a precondition for economic liberalization in many countries was the entry of U.S. law firms into those markets which brought with them American legal practices, including multi-jurisdictional litigation, lobbying, and contract drafting).

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internationalism in the 1990s.[97] By the early 1960s, the U.S. began transplanting its laws and legal institutions bilaterally through legal development assistance programs in such regions as Latin America and Asia.[98] A common critique of such efforts was that American exceptionalism informed policies for overseas development which rendered them "ethnocentric."[99] In the 1990s, with the rise of liberal internationalism, these programs were updated under the rubric of "rule of law" and were aimed at these regions in addition to post-Soviet states from Eastern Europe to Central Asia. The chief goal of these projects was to foster democratization and "rule of law" abroad, but U.S. companies have also benefitted indirectly through the creation of foreign markets with regulatory systems that could protect their investments and assets overseas. Further, U.S. law travelled overseas not only through the "push" of the U.S. government, corporations, and lawyers but equally through the "pull" of counterparts in recipient states, amplifying the effects of Americanization.[100] In short, during this time, the direction of legal transplantation was mainly from the U.S. outward rather than incorporating non-domestic law into the U.S. legal system.

One indicator of the level of engagement with non-domestic law is U.S. courts' citation of foreign law. The U.S. Supreme Court has a long history of citing foreign law.[101] Yet the attitudes of state and federal courts toward foreign and international law have changed over time, as both the composition of the benches and the courts' role in setting U.S. foreign policy have evolved.[102] Greater cosmopolitanism featured in judicial decisions at the time of Independence, the early twentieth-century, and in the high tide of liberal internationalism between 1990 and the early 2000s.[103] For instance, one of the

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[97] Kenneth J. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties,* Thomas Jefferson School of Law Research Paper No. 2993300, 1-2 (2017).

[98] Jacques deLisle, *Lex Americana? United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L ECON. L. 179, 201 (1999).

[99] *See* Packenham, *supra* note 33.

[100] R. DANIEL KELEMEN, EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION (2011) (detailing how European Union bureaucrats modelled American regulatory law).

[101] *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19. How) 393 (1856) (relying on foreign law); *Miranda v Arizona*, 384 U.S. 436, 486-190 (1966) (Warren. C.J.) (assessing foreign laws on interrogation techniques); *Culombe v Connecticut*, 367 U.S. 568, 676 n. 11 (1961) (Frankfurther, J.) (citing an Irish court decision). *See also* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 88 (2006) ("cases demonstrate a longstanding tradition of resort to international law to provide substantive meaning to constitutional provisions").

[102] *See infra* §I(B).

[103] *See* Jedidiah J. KRONCKE, THE FUTILITY OF LAW AND DEVELOPMENT: CHINA AND THE DANGERS OF EXPORTING AMERICAN LAW 7, 10 (2016); Kenneth Anderson, *Through Our Glass*

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aims of liberal internationalism was the creation of what Professor Anne-Marie Slaughter called "a global community of courts" which were apply a mixture of international law and national law in matters of transnational litigation.[104] A notable feature of such networks was diversity in the professional identity of the courts' judges.[105] While cross-referencing between courts has proceeded apace, the larger claim of the emergence of such a community has been questioned on a number of grounds.[106]

The flipside of the U.S. legal system's recognition of foreign law is its application of U.S. law extraterritorially. Whereas the U.S. Supreme Court has long recognized a presumption against extraterritoriality, there are a number of important limits to this doctrine.[107] First, in the field of commercial law, it does not apply to anti-trust law, an area in which U.S. courts have been particular active.[108] Second, like other nations, the U.S. has the power to apply prescriptive jurisdiction, that is, it has the authority to apply its criminal and other regulatory laws to persons and activities, a power which has been interpreted broadly to include persons and activities outside of its own territory.[109] Third, U.S. Congress has expansive regulatory authority over commerce with foreign nations and to punish offenses against the laws of nations. Fourth, the presumption does not apply to state legislation.[110] So while there are important limits imposed on the extraterritoriality of U.S. laws, the U.S. has not shied away from such legislation. Examples range from the Foreign Corrupt Practices Act to the Alien Tort Statute

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Darkly: Does Comparative Law Counsel the Use of Foreign Law in U.S. Constitutional Adjudication?, 52 DUQUESNE L. REV. 115, 130-32 (2014).

[104] Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L. J. 191, 192 (2003). *See also* STEPHEN BREYER, COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES (2016) (arguing that U.S. courts are increasingly enmeshed in global legal problems).

[105] *See* Slaughter, *supra* note 104, at 192.

[106] Hannah Buxbaum, *From Empire to Globalization…and Back? A Post-Colonial View of Transjudicialism*, 11 IND. J. GLB. LEGAL STUD. 183, 187 (2004) (concluding that while courts cite each other, such citations do not occur between equals); Ken I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 WASH. U. GLB. STUD. L. REV. 345, 346-7 (2005) (arguing that global courts are an extension of U.S. ideology); David Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523, 527 (2011) ("[explaining] why the concept of 'global judicial dialogue' neither describes the actual practice of comparative analysis by judges nor explains the emergence of a global constitutional jurisprudence").

[107] EEOC v. Arabian American Oil Co., 499 U.S. 248 (1991). *See also* CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM (3rd ed.) 186-194 (2020); William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582 (2020) (assessing the historical evolution of the doctrine).

[108] Hartford Fire Ins. Co. v. California, 509 U.S. 764, 795–96 (1993).

[109] *See* Bradley, *supra* note 107, at 194.

[110] *See* Bradley, *supra* note 107, at 205-6.

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to the Iran and Libya Sanctions Act.[111] These are far from dead letters and are actively used by U.S. courts to apply U.S. law to non-U.S. citizens engaged in activities outside of the U.S.[112] The combination of "controversial" application of foreign law in U.S. courts with the legal system's reliance on the extension of U.S. law overseas through long-arm statutes and extraterritorial jurisdiction suggests that those external-facing aspects of the legal system generally support an exceptionalist stance vis-à-vis foreign law and its authorities.

B. Internal Aspects

American legal exceptionalism, which is manifested most clearly in the U.S.'s foreign relations and its treatment of foreign law therein, reflects domestic features of the legal system in terms of how the system regards difference. To wit, there are generally two prevailing explanations for why the U.S. has embraced legal exceptionalism to the extent that it has both of which are based on domestic law and its relationship to difference: the first points to the cognitive and unconscious biases of legal authorities, including judges, and the second highlights the role of legal doctrinal and procedural rules.

As to the former, in accordance with the legal realist tradition, there is causal relationship between the identity of law-makers and their legal thinking.[113] A number of empirical studies have shown how, for instance, judges are influenced by their political ideology, [114] as well as their demographic characteristics, such as religion, gender, and race.[115] Bias or prejudice of judicial

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[111] Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§78dd-1 to 78ff (2012); Alien Tort Statute 1789, 28 U.S.C. § 1350; Iran and Libya Sanctions Act 1966, 50 U.S. ch. 35.

[112] Matthew S. Erie, *Anticorruption as Transnational Law: The Foreign Corrupt Practices Act, PRC Law, and Party Rules in China* 67 AM. J. COMP. L. 233, 233 (2019); Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Laws: A New Rule for Extraterritorial Application of U.S. Law* 95 MINN. L. REV. 110, 110 (2011); Ali Laidi, *American Extraterritorial Legislation: The Data Gathering Behind the Sanctions* 68 THEORIA 113, 113 (2021); JAMES B. TOWNSEND, EXTRATERRITORIAL ANTITRUST: THE SHERMAN ANTITRUST ACT AND U.S. BUSINESS ABROAD (1980).

[113] JEROME FRANK, LAW AND THE MODERN MIND (1930).

[114] LEE EPSTEIN, WILLIAM M. LANDES, & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (2013); CASS. R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006).

[115] Scott C. Idleman, *The Concealment of Religious Values in Judicial Decisionmaking*, 91 VA. L. REV. 515, 515 (2005) (finding that judges' religious beliefs can play a significant role in their decisions); Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J. LAW ECON. ORGAN. 299, 299 (2004) (finding that in three-judge panel on the federal Court of Appeals that the presence of female judges determined outcomes of decisions); Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167, 167 (2013)

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thinking similarly shapes views of non-domestic law.

To take the U.S. federal judiciary as an example, for the first 140 years of its existence, the bench was exclusively white and male.[116] Whereas the federal judiciary has been thin historically on demographic or surface-level diversity, some progress has been made more recently. As of 2021, 12.31% of federal judges are black and 35.30% federal judges are women[117] However, President Trump degraded judicial diversity when he appointed almost 25 percent of the entire federal bench during his first two years of office, resulting in appointments that are 92% white and 76% male.[118] Most of these appointees are politically conservative, with originalism—which is largely averse to citing foreign law—as one component of that conservatism.[119] At the same time, and for different reasons, deep-level diversity factors, including educational diversity, is also at an all-time low; for instance, on the issue of education, federal judges today are disproportionately graduates of the same elite law schools.[120] Along these lines, lack of training and exposure to foreign law has been a perennial problem in U.S. courts.[121] Outside of the judiciary, other dispute resolution industries suffer from low diversity in the U.S. For instance, whereas arbitration has been the focus of diversity efforts, it is nonetheless prone to being what critics have called being

(finding that black judges are significantly more likely than nonblack judges to support affirmative action programs).

[116] *See* Jason Iuliano & Avery Stewart, *The New Diversity Crisis in the Federal Judiciary*, 84 TENN. L. REV. 247, 269 (2016).

[117] American Constitution Society, *Diversity of the Federal Bench*, https://perma.cc/R9QN-4SJX.

[118] Stacy Hawkins, *Trump's Dangerous Judicial Legacy*, 67 UCLA L. REV. DISCOURSE 20, 30 (2019).

[119] Kevin R. Johnson, *How Political Ideology Undermines Racial and Gender Diversity in Federal Judicial Selection: The Prospects for Judicial Diversity in the Trump Years*, WIS. L. REV. 345 (2017) (finding that Trump's commitment to appointing conservative judges would undermine judicial diversity).

[120] *Id*. at 250.

[121] The Hon. Malcolm R. Wilkey, *Transnational Adjudication: A View from the Bench* 18 INT'L LAWYER 541, 543 (1984) ("…although transnational litigation is increasing, the likelihood remains fairly low that a particular judge will be experienced in this area."); Andrew N. Adler, *Translating & Interpreting Foreign Statutes*, 19 MICH. J. INT'L L. 37, 38 (1997) ("Most judges strive mightily to avoid even having to glance at foreign laws"). *See also supra* note **Error! Bookmark not defined.**, at 890 (noting that most judges have not studied foreign law).

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"male, pale, and stale,"[122] a problem particularly acute in the U.S.[123]

Legal authorities' subjective and phenotypical characteristics may not tell the whole story, another explanation for the traditional aversion of U.S. courts to foreign law is legal doctrine and procedural rules themselves. According to this view, it is not individual bias (unconscious or otherwise) that leads to preferences for U.S. law over foreign law, but rather institutional capacities and path dependence in the common law.[124] Hence, doctrines such as discovery of foreign evidence and *forum non conveniens* may result in parochial outcomes.[125] Over time, the rules themselves may direct judges toward decisions that favor U.S. litigants and U.S. law.[126]

Importantly, both proponents of this argument and those above who spotlight legal authorities' subjectivity agree that judges rely on decisionmaking shortcuts; however, their analyses have different focuses. Those that focus on legal authorities seek to explain how judges' intuition shapes outcomes (while recognizing that such outcomes can, over time, form path-dependent doctrine) whereas those that focus on the law itself emphasize that second step (how judges' heuristics become encoded into procedures) rather than the source of those heuristics themselves.[127] In other words, both the legal authorities and the law may be working synergistically to prioritize local (U.S.) law at the expense of foreign alternatives.

The result of these synergies is a legal system that portends to be adaptive and multicultural but which has recognized difference marginally if at all, a limited recognition that applies to non-state law such as religious law just as

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[122] *See supra* note **Error! Bookmark not defined.**, at 34-6 (describing the "Grand Old Men" of arbitration); Samaa A.F. Haridi, *Towards Greater Gender and Ethnic Diversity in International Arbitration*, 2 BAHRAIN CHAMBER FOR DISPUTE RESOLUTION INT'L ARB. REV. 307 (2015); Susan D. Franck et al., *The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration*, 53 COL. J. TRANS. L. 429, 446 (2015) (finding, based on their survey, that the median international arbitrator was a fifty-three year-old man who was a national of a developed country).

[123] *See, e.g.*, MONIKA PRUSINOWSKA, *Analyzing Appointments in International Arbitration: Nationality, Ethnicity, Race, and Legal Training of Arbitrators*, in IDENTITY AND DIVERSITY ON THE INTERNATIONAL BENCH: WHO IS THE JUDGE 142, 148 (Freya Baetens, ed., 2021) (citing a case wherein the musician Jay-Z halted an arbitration between his company and a clothing company on the grounds that there was a lack of African-American arbitrators on the panel which left him vulnerable to unconscious bias).

[124] Maggie Gardner, *Parochial Procedure* 69 STAN L. REV. 941, 945 (2017).

[125] *Id.* at 968-994.

[126] *See also* Pamela Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015).

[127] *Compare* Jeffrey J. Rachlinksi & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges* 12 ANN. REV. SOC. SCI. 203, 211-12 (2017) (explaining intuitive reasoning in judges due to confirmation bias and other errors) *with id.* at 946 (suggesting that individual heuristics "become amplified and ossified as precedents mount, creating path dependence toward consistently parochial outcomes.").

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much as it does to African Americans, women, and those living in U.S. overseas territories.[128] For example, pursuant to the U.S. Constitution's "religious clauses" are understood to prohibit U.S. courts from resolving religious questions,[129] disputes pertaining to matters of religion are often resolved either by religious arbitration or religious courts, even if those solutions are piecemeal at best.[130] The non-recognition of religious law is most apparent in the case of sharia or Islamic law, a topic which has been a lightning rod of activism by conservatives.[131] Anti-sharia bills have been paralleled by anti-protest laws introduced in some 35 states to prevent movements like #blacklivesmatter.[132] In the face of institutional racism that continues to damage law enforcement in the U.S., the Supreme Court has struggled to balance First Amendment rights with public order.[133] The limited recognition of difference applies likewise to women's rights perhaps most clearly signaled by the U.S. Supreme Court's overruling of *Roe v. Wade*.[134] Arguably, the most strident example of the racial logics of the U.S. empire, is courts' continued support of the turn-of-the-century *Insular Cases* (still, valid law) which denied the extension of Constitutional rights to millions of people, principally, people of color, in territories such as Guam, Puerto Rico, and the Philippines.[135] In short, while U.S. law has made strides in developing a jurisprudence that seeks to recognize and protect difference, nonetheless, it still struggles to extend fair and equal treatment to fundamental categories of difference, whether non-state law or racial and other minorities. The broader point is that the partial or non-regard for difference

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[128] *See generally,* ELIZABETH A. POVINELLI, THE CUNNING OF RECOGNITION: INDIGENOUS ALTERITIES AND THE MAKING OF AUSTRALIAN MULTICULTURALISM (2002) (providing a critique of multicultural liberalism in the comparative case of Australia).

[129] Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1576 (1st Cir. 1989) ("civil courts cannot adjudicate disputes turning on church policy and administration or on religious doctrine and practice").

[130] Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 497 (2013) ("Both as a matter of constitutional law and sound policy, courts should wade into the waters of disputes turning on religious doctrine or practice so as to afford parties access to an adjudicative forum that can provide redress for legal wrongs.").

[131] *See supra* note 10.

[132] Mr. Clément Nyaletsossi Voule, *United States: UN Expert Decries New Laws Targeting Peaceful and Black Lives Matter Protestors*, United National Human Rights Office of the High Commission (May 5, 2021), https://www.ohchr.org/en/press-releases/2021/05/united-states-un-expert-decries-new-laws-targeting-peaceful-and-black-lives.

[133] *See, e.g.*, DeRay Mckesson v. John Doe, 592 U.S. __ (2020) (remanding a tort claim brought by a police officer injured in a protest led by activist DeRay Mckesson in Louisiana in 2016 after the police killing for Alton Sterling).

[134] Dobbs v Jackson Women's Health Organization 945 F. 3d 265 (holding that the Constitution does not confer a right to abortion).

[135] *See, e.g.*, Downes v. Bidwell, 182 U.S. 244 (1901) (denying Constitutional rights be extended to individuals living in Puerto Rico).

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internally reflects the legal system's treatment of difference externally: the two dimensions are broadly convergent in supporting historically-contingent versions of American legal exceptionalism.

III. THE CRITIQUE OF AMERICAN LEGAL EXCEPTIONALISM

To a certain degree, aspects of American legal exceptionalism, and, in particular, the cultural and racial logics that underlie it, have been "uploaded" into international economic law and the global financial system. It is undisputed that the U.S. was the chief architect of the Bretton Woods institutions, namely, the International Monetary Fund and the World Bank, as well as a main proponent of the World Trade Organization; [136] consequently, the U.S. has been actively involved in shaping international investment, trade, and finance law.[137] American exceptionalism is illustrated in these diverse laws through, for example, the types of conditionalities that international financial institutions impose on donors, conditionalities that largely mirror U.S. foreign policy preferences (e.g., democracy, rule of law, representative elections, etc.) as well as the U.S. Government's decisions to exempt itself from WTO obligations. Perhaps more fundamentally, scholars from the Third World approaches to international law (TWAIL) or other critical perspectives and some of them from developing countries in the Global South, have been decrying for decades as to how the international economic system favors Northern states, including the U.S.[138] Most recently, scholars have brought together insights from Critical Race

[136] RICHARD PEET, UNHOLY TRINITY: THE IMF, WORLD BANK, AND WTO (2009) (lambasting "neoliberal capitalism."); Nils Gilman, Mandarins of the Future: Modernization Theory in Cold War America (2003) (explaining how American modernization theory created the "Third World.").

[137] LAURA NADER, *The Americanization of International Law*, IN MOBILE PEOPLE, MOBILE LAW: EXPANDING LEGAL RELATIONS IN A CONTRACTING WORLD (Franz von Benda-Beckmann, Keebet von Benda-Beckmann, & Anne Griffiths, eds.) 199 (2016) (explaining how American law and capitalism shaped international law); Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IN. J. GLOBAL LEGAL STUD. 383 (2002) (arguing that U.S. "imperial law" subsists on capitalism and has attained global and hegemonic status); BRYANT G. GARTH, *The Globalization of the Law*, in THE OXFORD HANDBOOK OF LAW AND POLITICS (Keith E. Whittington, R. Daniel Keleman, & Gregory A. Caldeira, eds.) 245 (2010) (arguing that American law has played a pivotal role in the globalization of law).

[138] See ANGHIE, *supra* note 70; GUILIANO GARAVINI, AFTER EMPIRES: EUROPEAN INTEGRATION, DECOLONIZATION, AND THE CHALLENGE FROM THE GLOBAL SOUTH, 1957-1986 (Richard R. Nybakken trans., 2023) (discussing the emergence and decline of developing countries in international decision-making in the twentieth century); KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL (2013) (tracing the origins of international investment law to empires); LUIS ESLAVA, MICHAEL FAKHRI, & VASUKI NESIAH, BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL

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Theory (CRT) into TWAIL to forge connections between minorities' struggles domestically and internationally to bring attention to bear on racial capitalism.[139]

China has been a part of the critique of American exceptionalism, namely, U.S. hegemony and the role of law in supporting that power, since the 1960s. In 1963, Mao Zedong wrote, "The fascist atrocities committed by American imperialism against black people have exposed the essence of so-called democracy and freedom in the United States, and [also] exposed the inner connection between the reactionary domestic policy of the U.S. government and its aggressive policy abroad."[140] Mao's drawing attention to the double standards in the U.S. democracy-promotion abroad when 19 million of its own citizens, roughly 11 percent of the national population, lacked basic rights resonated with the Soviet criticism of the U.S., which legal historian Mary Dudziak identified as one reason for the U.S. Government's support of civil rights.[141] While it is perhaps wrong to over-value foreign criticism and anti-US propaganda at the risk of under-valuing the toil of domestic advocates of greater legal protection for blacks and other minorities, it is sensible to assume that awareness of foreign criticism is one factor among many that effects governmental response. The U.S. and the PRC Governments have, in fact, attacked each other's human rights records for years, demonstrating that there is mutual awareness and response, even if that response is to criticize the other.[142]

Building on Mao's early call for unity with African Americans, the Chinese socialist critique of American legal exceptionalism has identified both

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LAW: CRITICAL PASTS AND PENDING FUTURES (2017) (explaining the importance of the 1955 Bandung conference to sparking decolonization of law).

[139] James Thuo Gathii & Ntina Tzouvala, *Racial Capitalism and International Economic Law*, J. INT'L ECON. L. (2022) (noting that international economic law is implicated in relationships of exploitation); Carmen G. Gonzalez & Athena Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J. L & POL. ECON. (2022) (assessing the role of law in growing racial capitalism, including profit-making and race-making); Makau Mutua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 VILLANOVA L. REV. 841 (2000) (calling for an accommodation between CRT and TWAIL).

[140] Mao Zedong [毛泽东], Huyu shijie renmin lianhe qilai fandui Meiguo diguo zhuyi de zhongzu qishi, zhichi Meiguo heiren fandui zhongzu qishi de douzheng de shengming (呼吁世界人民联合起来反对美国帝国主义的种族歧视、支持美国黑人反对种族歧视的斗争的声明) [A statement calling on the people of the world to unite against the racial discrimination of American imperialism and to support the struggle of American blacks against racial discrimination], RENMIN RIBAO (人民日报) [PEOPLE'S DAILY] (1963), https://www.marxists.org/chinese/maozedong/1968/5-038.htm.

[141] *See* Dudziak, *supra* note 18, at 12.

[142] Matthew S. Erie, *Through Culture and its Disciplines: Human Rights and the Institutionalization of Law in China*, Cornell Law Faculty Working Papers (2003), https://scholarship.law.cornell.edu/clsops_papers/13/ (describing the diplomatic tit-for-tat between the U.S. and PRC Governments).

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discriminatory aspects of domestic law and the spillover of those aspects into international law. On the domestic law side, PRC scholars have observed the institutionalization of racism and exclusion in U.S. law.[143] Wang Huning, a former professor who traveled in the U.S. in the 1980s, subsequently became a leading member of the CCP's Politburo Standing Committee, and is considered the top ideologue in contemporary China, observed the systemic racism in the American society and the failures of affirmative action.[144] Other scholars, inspired by Critical Legal Studies (CLS) developed in the U.S., criticized the capitalist basis of U.S. law observing its dominating effects on the non-ruling classes and other minorities; such reflection was used to integrate CLS into Chinese legal thought in the 1980s to improve Chinese law.[145] On the topic of U.S law's influence in international law, legal academics such as Jiang Shigong extended such critiques to the Americanization of international law, claiming that the capitalist and racial logic of capitalism has informed conceptions of "human rights" as enshrined in public international law.[146] For these members of the Chinese intellectual and political establishment, American legal exceptionalism has not provided solutions to global injustice and inequality but rather exacerbated such conditions.

Xi Jinping, the most powerful leader of the CCP and the PRC Government since Mao Zedong, has made the contrast with the U.S. a mainstay of his foreign policy. One consistent strain of thought in Xi's oeuvre is the notion that the U.S. political and legal system, including its definition of "rule of law," "human rights," "constitutionalism," and "independent judiciary" are retrograde.[147] In their place,

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[143] *See, e.g.*, 孙鹏 [Sun Peng], *Meiguo de fazhi fazhan yu zhongzu qishi 30ingxi (美国的法制发展与种族歧视评析) [Comments on the Development of the Legal System and Racial Discrimination in America]*, 425 XIANDAI JIAOJI (现代交际) [MODERN COMMUNICATION] 81, 81 (2016).

[144] WANG HUNING (王沪宁), MEIGUO FANDUI MEIGUO (美国反对美国) [AMERICAN AGAINST AMERICA] 332, 334 (1991).

[145] Zhu Jingwen (朱景文), Dui xinfang falü chuantong de tiaozhan: Meiguo pipan falü yanjiu yundong (对西方法律传统的挑战——评美国批判法律研究运动) [Challenge to the Western Legal Tradition: The American Legal Studies Movement] (2006).

[146] Jiang Shigong (强世功), Maoyi yu renquan (shang): Shijie diguo yu "Meiguo xingwei de genyuan" (贸易与人权（上）——世界帝国与"美国行为的根源") [Trade and Human Rights (Part 1): World Empire and "The Roots of U.S. Behavior"] (Jan. 9, 2022), https://m.aisixiang.com/data/130812.html. *Cf.* Wang Hui, *Depoliticized Politics, from East to West* 41 THE NEW LEFT REV. 29, 42 ("American hegemony rests on the multiple foundation of monopoly of violence, economic dominance and ideological 'soft power'").

[147] Wang Zhen (王珍) Xi Jinping fazhi sixiang de zhe tiao hexin yaoyi, biaoti le Zhongguo fazhi yu xifang fazhi de zuida qubie (习近平法治思想的这条核心要义，揭示了中国法治与西方法治的最大区别) [The core essence of Xi Jinping's thought on the rule of law reveals the

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Xi has advocated for "socialist rule of law with Chinese characteristics."[148] His concept is amorphous but most clearly stands for the proposition that the CCP is central to "rule of law" and ensures that the law is protecting the lawful rights of the people. The Party-State's discourse on international development links its notion of Party-led rule of law with Xi's idea of "community of common destiny for mankind" (*renlei mingyun gonggonti*).[149] Another expansive expression, the idea appears to stand for the proposition that the PRC and Party-State in particular can create inclusive frameworks which benefit all peoples regardless of race, ethnicity, nationality, gender, political persuasion, and so on. When combined with Chinese "rule of law," the "community of common destiny for mankind" then would provide an alternative basis for international trade, investment, and human rights to that of American legal exceptionalism.[150] In the part that follows, I assess the prospects for such an alternative.

IV. CHINESE LEGAL COSMOPOLITANISM

China has its own approach to incorporating difference into its legal system and, as with the U.S., this approach can be analyzed by comparing how

biggest difference between Chinese rule of law in China and Western rule of law] ("The leadership of the Party is the soul of the socialist rule of law with Chinese characteristics, the biggest difference between the rule of law in China and the rule of law in Western capitalist countries, and the fundamental guarantee for advancing the comprehensive rule of law.") SHANGGUAN (上观) [SHANGHAI OBSERVER] (Oct. 3, 2022), https://export.shobserver.com/baijiahao/html/531132.html; *See also* Zuigaofa Zhou Qiang: Yao ganyu xiang xifang "sifa duli" deng cuowu sicho liangjian (最高法周强：要敢于向西方"司法独立"等错误思潮亮剑) [Supreme Court Zhou Qiang: We must dare to show our swords against erroneous thoughts such as Western "judicial independence"], ZHONGXIN WANG (中新网) [CHINA NEW NET] (Jan. 14, 2017), https://news.qq.com/a/20170114/021364.htm.

[148] *See supra* note 2.

[149] Xi Jinping (习近平), Xieshou goujian hezuo gong ying xin huoban tongxi dazao renlei mingyun gongtongti—zai di qishi jie lianheguo dahui yiban xing bianlun shi de jianghua (携手构建合作共赢新伙伴 同心打造人类命运共同体—在第七十届联合国大会一般性辩论时的讲话) [Work together to build a new partnership for win-win cooperation and build a community with a shared future for mankind—Speech at the General Debate of the Seventieth Session of the United Nations General Assembly], XINHUA (新华) [NEW CHINA] (Sept. 28, 2015), http://www.xinhuanet.com/world/2015-09/29/c_1116703645.htm; H.E. Mr. Xi Jinping, President, Statement, General Assembly of the United Nations (General Debate, 70th Session) (Sept. 28, 2015), https://gadebate.un.org/en/70/china.

[150] The concept was written into the PRC Constitution as an amendment in 2018. *See* Zhonghua renmin gongheguo xianfa (中华人民共和国宪法) [PRC Constitution], adopted at the Second Session of the Tenth People's Congress on March 14, 2024, as amended March 11, 2018, by the First Session of the Thirteenth National People's Congress, preamble.

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the system's external-facing aspects treat difference with its corresponding domestic aspects. In comparing this interface between the Chinese and U.S. cases, two general observations are warranted. First, as with any economic superpower, China not only wants to protect its economic and geostrategic interests, but also promote them through law. China has learned from the U.S. in this regard.[151] Given the fact that it is the largest trading country in the world and a major capital exporter, China has the economic clout to do just that.[152] Specifically, China has sought to protect its domestic industry as it opens up to foreign investment while also limiting the impact of foreign parties, whether sovereign, corporate, or civil society, within its territory. Consequently, China has its own strain of legal exceptionalism, including its own variants of sovereigntism, protectionism, and nativism, in terms of how it selectively complies with international law.[153]

Second, China is a late-comer to global governance and hence must operate within a set of rules and institutions that may not necessarily reflect its own values.[154] China's approach to engaging with that system, including foreign and international law, must, as of necessity, be different from that of the U.S. Further, the starting point for China's self-perception of its law—its ideas of constitutionalism, rule of law, and justice—differ from those of the U.S., and color its interaction with non-domestic law.[155] China has not, historically at least, showcased the same confidence America has in its law (although this may be changing). Consequently, China is embracing something that looks like legal cosmopolitanism by creating systems of rules, institutions, and platforms that integrate Chinese and foreign law, while also using those innovations to promote China's interests abroad. Chinese legal exceptionalism is baked into its cosmopolitan overtures.

Chinese legal cosmopolitanism nonetheless is a product of a number of dovetailing intellectual and political-economy projects. These include Chinese

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[151] JULIAN GEWIRTZ, UNLIKELY PARTNERS: CHINESE REFORMERS, WESTERN ECONOMISTS AND THE MAKING OF GLOBAL CHINA 7 (2017) (documenting how Chinese leaders built a "socialist market economy" with the help of American economists).

[152] UNCTAD, *Evolution of the World's 25 Top Trading Nations*, https://perma.cc/L5R2-YSW3.

[153] *See supra* note 68; CAI, THE RISE OF CHINA, *supra* note 35 at 102 (showing how China seeks to influence some areas of international law over others); Pitman B. Potter, *Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices*, 2 WASH. U. GLOBAL STUD. L. REV. 119, 121 (2003) (finding that the Chinese government selectively adapts global norms to local economic regulation).

[154] *See* Erie, *supra* note 35, at 57.

[155] *Compare* Calabresi, *supra* note 12, at 1340 ("Americans see the Constitution as a quasi-religious creed that explicates America's exceptional mission") *with* NEIL J. DIAMANT, USEFUL BULLSHIT: CONSTITUTIONS IN CHINESE POLITICS AND SOCIETY (2022) (calling attention to the absurdity of the idea of a constitution in Communist-run China).

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legal scholars' embrace of global constitutionalism;[156] the PRC government's international development priorities, including such cross-border areas as digital development and health, and which increasingly emphasize governance,[157] the globalization (and localization) of Chinese firms,[158] and revisionist histories that both recast imperial China as one of pluri-legal multi-ethnic integration and exemplar of non-Western modernity,[159] all of which have been supercharged by a steroidal "great rejuvenation of the Chinese nation" (*Zhonghua minzu weida fuxing*) crusade led by Xi Jinping.[160]

It is fair to say that there are different genealogies of cosmopolitanism among China's legal reformers. One genealogy derives from Chinese philosophy at the end of the Qing empire, and is based on the concept of "Great Harmony" (*datong*) which advocates for the dissolution of national borders in favor for world government, equality, and "utmost happiness."[161] There are others who are influenced by liberal cosmopolitan who emphasize "freedom, individualism, and pluralism."[162] There is still another interpretation of cosmopolitanism, which may draw to some extent with the first, and is that of reformers who promote a vision of Chinese nationalism, culture, and identity, while also having overseas experience, intellectual backgrounds, and multiple languages. Many of these scholars, officials, and practitioners are also strong supporters of the CCP, and act as intermediaries between the Party-State and the international legal community.[163]

It is this third type of cosmopolitan that is of most interest to this Article as they are the ones who most readily takes up the cause of the FROL. For

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[156] *See e.g.*, BIN LI, CHINA'S SOCIALIST RULE OF LAW AND GLOBAL CONSTITUTIONALISM, IN GLOBAL CONSTITUTIONALISM FROM EUROPEAN AND EAST ASIAN PERSPECTIVES 58 (Takao Suami et al., eds, 2018).

[157] State Council Information Office of the PRC, *China's International Development Cooperation in the New Era*, (Jan. 2021), https://perma.cc/88HB-X98K.

[158] *See* Erie, *supra* note 35, at 70-1, 81.

[159] SU LI, THE CONSTITUTION OF ANCIENT CHINA 98, 133 (2018); WANG HUI, CHINA FROM EMPIRE TO NATION-STATE 27 (2014).

[160] Xi Jinping, Zhonghua minzu weida fuxing julun ding neng dida guanghui bi'an (中华民族伟大复兴巨轮定能抵达光辉彼岸) [*The Huge Wheel of the Great Rejuvenation of the Chinese Nation Will Surely Reach the Glorious Shore*] ZHONGGUO GONGCHANDANG XINWEN WANG (中国共产党新闻网) [CHINESE COMMUNIST PARTY NEWS NET] (Dec. 30, 2017), https://perma.cc/5SK9-V8TV.

[161] WILLIAM A. CALLAHAN, CHINA DREAMS: 20 VISIONS OF THE FUTURE 110, 112 (2013) (discussing the work *Datongshu* (The Book of Great Harmony) by the early twentieth-century Chinese philosopher Kang Youwei).

[162] SAMULI SEPPÄNEN, IDEOLOGICAL CONFLICT AND THE RULE OF LAW IN CONTEMPORARY CHINA: USEFUL PARADOXES 3 (2016).

[163] *See supra* note 42 (providing an example of Chinese legal professionals, their relationships with the Party-State, and with transnational networks of legal elite).

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example, against the backdrop of the BRI and Xi Jinping's call to build a "community of common destiny," a number of Chinese legal scholars have initiated projects mega research projects that demonstrate China's commitment to legal cosmopolitanism. For example, Wang Guiguo at Zhejiang University Guanghua Law School established the "International Academy of the Belt and Road" in 2016 featuring fifty legal scholars and practitioners from all over the world that designs rules for Chinese outbound investment and trade, including the idea of "good offices" in BRI countries to deal with disputes.[164] This form of Chinese legal cosmopolitanism may share affinities with liberal versions of cosmopolitanism, including its ecumenism and belief in the transformative power of international commerce, but it is distinguished by its emphasis on the role of the state and, more specifically, the Party-State, in orchestrating such transformations.[165]

In the remainder of this part, I outline the background to China's reform of the interface between external and internal sides of the legal system. I begin with its reforms to its private international law noting that a higher number of foreign-related commercial disputes have necessitated China's building a more advanced interface between its domestic law and foreign and international law, an interface which has most recently been given the name of the FROL. In providing an overview of these reforms, I place particular emphasis on the tension between resurgent Chinese protectionism (in the form of judicial sovereigntism) and would-be cosmopolitanism.

A. External Aspects

Since the 1980s, China has moved from the margins to the center of global capitalism. China is the largest trading nations in the world, one of the largest outbound investors, the largest actor in developmental aid, and the home of some of the largest multi-national corporations the world over.[166] As a result of the high volume of cross-border transactions and related disputes, China is in the process of building out its framework of rules for private international law (conflict of laws in common law jurisdictions) and foreign relations law, that is, the FROL. Whereas the U.S. has had over two hundred years to develop its

[164] INTERNATIONAL ACADEMY OF THE BELT AND ROAD, DISPUTE RESOLUTION MECHANISM FOR THE BELT AND ROAD 35 (Wang Guiguo et al., eds., 2016).

[165] The role of the Party-State may not be explicit in such projects, yet it remains a fixture. *See, e.g.*, YIDAIYILU ZHENGDUAN JIEJUE JIZHI (一带一路争端解决机制) [THE DISPUTE RESOLUTION MECHANISM OF THE 'BELT AND ROAD INITIATIVE'] 15 (Wang Guiguo (王贵国) et al., eds., 2017) (listing members of the International Academy of the Belt and Road who are members of official PRC bodies or the CCP).

[166] *See* Erie, *supra* note 35, at 70-1.

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analogous rules,[167] China is in the midst of accelerating this process. Yet China's reforms to further open up the legal system do not operate in a vacuum and are counterbalanced by ongoing concerns of protectionism and judicial sovereignty, concerns that have intensified during the U.S.-China trade war. These pressures operate as brakes on reforms and complicate institutional and doctrinal outcomes.

One concrete example requiring reform is the increase in foreign-related disputes in Chinese dispute resolution institutions. Chinese courts and arbitration centers increasingly receive a large number of foreign-related disputes. In 2018, the year before the COVID-19 pandemic outbreak in China, people's courts in China adjudicated 75,000 foreign-related cases.[168] This is a 340% increase from 2010.[169] Chinese arbitration commissions have also increased their foreign-related caseload over time. For instance, the China International Economic and Trade Arbitration Commission (CIETAC), the oldest arbitration commission and the first to handle foreign-related disputes in China, administered 739 foreign-related disputes in 2020 versus 543 in 2000, an increase of 36%.[170] It is clear from this snapshot that Chinese dispute resolution institutions have an increasing caseload of foreign-related disputes, a trend that has strained the existing framework for resolving such disputes.

1. Private international law reforms in China

In response to the influx of foreign-related disputes and the changing political environment following the U.S.-China trade war, China has sought to reform the applicable legislative and regulatory framework to modernize its systems for handling foreign-related disputes in order to onshore more commercial disputes and also build out the extraterritorial reach of its legal system. In doing so, reforms have sought (not always successfully) to balance the priorities of protecting China's judicial and territorial sovereignty with greater internationalization. Specific reforms can be broadly categorized into two overlapping areas. The first is reforms to the domestic legal system to deal with

[167] *See supra* note 86.

[168] Zhou Qiang (周强), Zuigao renmin fayuan gongzuo baogao (quanwen) (最高人民法院工作报告（全文）) [(Whole Text) SPC WORK REPORT] (Mar. 25, 2018), https://perma.cc/2ZTT-U62X.

[169] Huang Jin [黄进], Li Hejia [李何佳], Du Huanfang [杜涣芳], 2010NIAN ZHONGGUO GUOJI SIFA SHIJIAN SHUPING (2010 年中国国际私法司法实践述评) [REVIEW OF THE JUDICIAL PRACTICE OF CHINA'S PRIVATE INTERNATIONAL LAW IN 2010] 367 (2011).

[170] CIETAC, Tongji shuju (统计数据) [Statistical Data] (n.d.), https://perma.cc/7WE4-263M. The use of statistics from Chinese arbitration commissions warrants some caution as they may use non-standardized definitions of "foreign-related cases" (*shewai anjian*), for example disputes between two Chinese companies over imported or exported goods and are not necessarily all cases featuring one Chinese and one foreign party.

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more foreign-law related issues which includes jurisdictional matters, conflict of laws, recognition and enforcement of foreign judgments, ascertainment of foreign law, parallel proceedings and anti-suit injunctions, international commercial arbitration, investor-state dispute resolution, and the creation of special courts and bespoke "one-stop shop" mechanisms that incorporate litigation, mediation, and arbitration. The second is more outward-facing reforms including judicial cooperation, mutual judicial assistance, and memoranda of understanding with foreign courts and arbitration institutions.

While an assessment of all of these areas goes beyond the scope of this Article, at a general level, jurisdictional matters, conflict of laws (especially, ascertain of foreign law), recognition and enforcement of foreign judgments, and international commercial arbitration are areas that highlight some of China's balancing between judicial sovereignty and cosmopolitanism. Many changes demonstrate more of the former than the latter. Internationalism may not be cosmopolitan and instead function to extend China's jurisdictional reach through, for example, anti-suit injunctions or international arbitration, as reflections of China's legal exceptionalism. Still, there are openings for greater integration between domestic and legal orders, for example, in the ascertainment of foreign law, and even in some areas, such as international arbitration, which are mainly exceptional.

a. Jurisdiction

As a threshold matter, jurisdiction is largely a matter of Chinese domestic law as China has not entered into any international jurisdiction treaties.[171] The general rules concerning cases involving a "foreign element" are provided in the PRC Civil Procedure Law (CPL).[172] A "foreign element" is defined as (i) at least one of the parties is a foreign citizen, foreign legal person, or other organization or individual without nationality, (ii) the habitual residence of a party or parties is located outside of the PRC, (iii) the subject matter of the dispute is located outside of the PRC, (iv) the legal facts affecting the civil relation take place outside the PRC, or (v) there exist any other circumstances that can be determined as foreign-related civil relations.[173] China claims exclusive jurisdiction over

[171] In 2017, China signed but has not yet ratified the HCCH Convention on Choice of Court Agreements 2005 (providing uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters).

[172] See PRC Civil Procedure Law, adopted by the National People's Congress on Apr. 9, 1991, and amended June 27, 2017, Part 4, esp. Ch. 24.

[173] Zuigao renmin fayuan Guanyu shiyong "Zhonghua renmin gongheguo minshi susongfa" de jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释) [*Interpretation by the SPC on Using the PRC Civil Procedure Law*], FASHI [2015] No. 5, art. 522, https://perma.cc/545X-NX7G.

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certain types of foreign-related disputes that touch on matters of public interest. For instance, people's courts have exclusive jurisdiction over all contracts for Chinese-foreign joint ventures, a practice that contravenes international trends for judicial cooperation.[174] Similarly, China claims exclusive jurisdiction over other "sovereign-sensitive issues" including incorporation, legal capacity and dissolution of companies, and the content and validity of intellectual property rights.[175] As such China conceives of such concerns as tied to its sovereignty, China has an incentive to flex its jurisdictional muscles, putting real limits on cosmopolitan aspirations.

Indeed, jurisdictional considerations may lead to exercises of judicial sovereignty. For instance, on the issue of recognizing foreign jurisdiction clauses, as a baseline, a people's court is not required to decline jurisdiction even when the parties have written a valid exclusive jurisdiction clause into their contract which selects a foreign court.[176] However, practice varies between courts with some honoring party autonomy; thus, there is a high degree of uncertainty in such determinations.[177]

More assertive examples of judicial sovereignty can be seen in both people's courts' use of anti-suit injunctions in the course of parallel proceedings and its application of extraterritorial jurisdiction.[178] The decision by the Wuhan

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[174] *See* Zheng et al., *supra* note **Error! Bookmark not defined.**, at 59 (citing Pearl Time Investments v. Tianjin Metal Instruments, SPC, [2002] Min Si Zhong Zi (demonstrating exclusive jurisdiction over a Chinese-foreign equity joint venture contract) and Guangzhou Baiyun Foreign investment Services v. Xianggang Wancheng, Guangdong Province Guangzhou Municipality IPC, (2006) Sui Zhong Fa Min Si Chu Zi 47 (showing exclusive jurisdiction over a Chinese-foreign contract joint venture agreement)).

[175] Jie (Jeanne) Huang, *The Partially Modernized Chinese Conflicts System: Achievements and Challenges*, 13 J. PRIVATE INT'L L. 633, 643-44 (2017).

[176] Zheng et al., *supra* note **Error! Bookmark not defined.**, at 101.

[177] *Id.* At fn. 46 (compiling cases that show conflicting outcomes).

[178] The earliest example of Chinese courts using anti-suit injunctions were in maritime disputes. *See, e.g.*, Qingdao Maritime Court, The Ship Xintaihai [新泰海] v Atlas Navios Navegacao LDA (May 2012) (ordering respondent to release the applicant's ship in Australia and to desist in the seizure of the applicant's property). More recently, Chinese courts have asserted their jurisdiction over an expanding list of commercial matters. *See, e.g.*, Xisiwei'er guoji youxian gongsi, xisi wei'er xianggang youxian gongsi lanyong shichang zhipei diwei jiufen an (西斯威尔国际有限公司、西斯威尔香港有限公司滥用市场支配地位纠纷案)) [S.I.SV.EL International S.A. & S.I.SV.EL. (Hongkong) Limited v. Guangdong OPPO Mobile Telecommunications Co., Ltd. & Guangdong OPPO Mobile Telecommunications Co., Ltd. Shenzhen Branch, A Dispute over Abusing Dominant Market Positions], Sup. People's Ct. (China), Dec. 28, 2020 (claiming jurisdiction over the trust case based on the conduct of S.I.SV.EL which was found to have abused its dominant market position towards OPPO in the Chinese market, resulting in economic losses). Chinese courts have also been more assertive in adjudicating on cross-border crime. *See, e.g.*, Huang Jiangping, Liu Jinming Kaishi Duchang An (江平、刘金明开设赌场案) [The Case of Huang Jiangping, Liu Jinming Opening a

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Intermediate People's Court in the case of *Xiaomi Technology Limited Corporation v. Interdigital Digital Holdings Limited Corporation* (2020) illustrates the Chinese court's muscle-flexing as it ordered an anti-suit injunction not only against the court in India but against "any court worldwide," imposing a fine of RMB 1 million per day for any violation of the injunction.[179] In the context of the U.S.-China trade war, China is engaging in economic nationalism and lawfare, in part by expanding its courts' jurisdiction across borders. In short, jurisdictional matters shows how judicial practices are internationalizing but less in a way that integrates non-domestic laws and more in a way that overrides them.

b. Conflict of laws

Conflict of laws is another area that has undergone modernization, seeking to balance territorial and judicial sovereignty with some degree of cosmopolitanism. The Law on Choice of Law for Foreign-Related Civil Relationships (2010, hereinafter, "LAL") is the main legislation governing conflict of laws in people's courts.[180] A number of judicial interpretations have also been issued by the Supreme People's Court (SPC) to supplement the LAL.[181]

Casino], Malong District People's Ct., Sept. 29, 2019 (finding that the court had jurisdiction as the crime was committed in Myanmar).

[179] Xiaomi Tongxun Jishu Youxian Gongsi yu Jiaohu Shuzi Kongduan Youxian Gongsi (小米通讯技术有限公司与交互数字控股有限公司) [Xiaomi Technology Limited Corporation v. Interdigital Digital Holdings Limited Corporation], [No. 169] Wuhan Interm. People's Ct., Sept 23, 2020 (China) (establishing its jurisdiction because Xiaomi is registered in China and one of the affiliated companies is based in Wuhan and the case was first filed in China and only subsequently in India). Although the decision is not available to the public, the Wuhan Government has issued a statement on the decision. *See* Jinzhi yi Meiguo gongsi Wuhan guansi jieshu qian zai quanqiu qisu Xiaomi Wuhan Zhong yuan fachu quanqiu shou ge kuaguo jin su ling (禁止一美国公司武汉官司结束前在全球起诉小米: 武汉中院发出全球首个跨国禁诉令) [Ban on U.S. Company from Suing Xiaomi Globally until Completion of Wuhan Lawsuit: Wuhan Intermediate Court Issued the World's First Cross-Border Anti-Suit Injunction] (proclaiming that the injunction applies to all jurisdictions in the world) (Mar. 4, 2021), https://perma.cc/3G67-CCZ9.

[180] Zhonghua renmin gongheguo shewai minshi falü shiyongfa (中华人民共和国涉外民事关系法律适用法) [Law on Choice of Law for Foreign-Related Civil Relationships] (adopted by the Standing Comm. Nat'l People's Cong., Oct. 28, 2010, effective Apr. 1, 2011.

[181] Zuigao renmin fayuan guanyu shiyong "Zhonghua renmin gongheguo shewai minshi guanxi falü shiyongfa" ruogan wenti de jieshi (yi) (最高人民法院关于适用《中华人民共和国涉外民事关系法律适用法》若干问题的解释）（一）[Interpretation I by the SPC on Issues Concerning the Application of the Law on Choice of Law for Foreign-Related Civil Relationships] (promulgated by the Sup. People's Ct. Dec. 28, 2012, effective Jan. 7, 2013) [hereinafter, "2012 SPC Judicial Interpretation"]; Zuigao renmin fayuan guanyu shiyong "Zhonghua renmin gongheguo shewai minshi guanxi falü shiyongfa" ruogan wenti de jieshi (yi)

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The regime was revised in 2020 following the promulgation of the Civil Code.[182]

The conflict of laws regime operates through four main principles: party autonomy, closest connection, mandatory rules, and public policy.[183] While party autonomy is an international norm and has been reflected in Chinese contract law,[184] the relevant article in the LAL specifies "parties may, *in accordance with a provision of law*, expressly make a choice of law applicable to a civil relation with foreign elements."[185] The inclusion of the language "in accordance with a provision of law" actually limits freedom of contract, allowing parties choice of law only where the relevant Chinese law grants them such a choice.[186] The closest connection principle is a standard gap-filler.[187] The mandatory rules also limits freedom of contract by imposing Chinese law in certain cases even when the parties have explicitly chosen foreign law.[188] SPC judicial interpretations seek to clarify when people's courts should use the mandatory rules, but the SPC's intervention has been regarded by commentators as sowing confusion.[189] Lastly, the principle of public policy is safeguarded as "social and public interests."[190] While on its face, the LAL does not encode bias against foreign law, unfortunately, the practice in people's courts has been to do just that.[191]

Against the trend to apply Chinese law, one growing kernel of cosmopolitanism is the issue of the ascertainment of foreign law. As a procedural matter, given that China is a civil law system, the proof of foreign law is a

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(最高人民法院关于适用《中华人民共和国涉外民事关系法律适用法》若干问题的解释（一） [Interpretation I by the SPC on Issues Concerning the Application of the Law on Choice of Law for Foreign-Related Civil Relationships] (promulgated by the Sup. People's Ct. Dec. 31, 2020, effective Jan. 1, 2021) [hereinafter, "2020 SPC Judicial Interpretation"].

[182] *See id*.

[183] Mo Zhang, *Codified Choice of Law in China: Rules, Processes and Theoretical Underpinnings*, N.C. J. INT'L L. & COM. REG. 99-105 (2011).

[184] Zhonghua renmin gongheguo (中华人民共和国民法典) [Civil Code of the PRC], promulgated by the NPC on May 28, 2020 and effective Jan. 1, 2021, art. 4 (ensuring party autonomy).

[185] *See supra* note 180 art. 3 (italics added).

[186] *See also* 2020 SPC Judicial Interpretation *supra* note 181, at art. 4.

[187] *See supra* note 180 art. 2(2).

[188] *See supra* note 180 art. 4.

[189] *See* Qingkun Xu, *The Codification of Conflicts Law in China: A Long Way to Go*, 65 AM. J. COMP. L. 919, 941 (2018) (commentating on art. 10 of the 2012 SPC Judicial Interpretation).

[190] *See supra* note 180 art. 5.

[191] Xu Qingkun [许庆坤], Wo guo shewai minshi guanxi falü shiyongfa sifa shijian zhi jianzhi (我国涉外民事关系法律适用法司法实践之简直) [A Review of the Judicial Practice of the Law on Choice of Law for Foreign-Related Civil Relationships in China] 2 Guojifa yanjiu (国际法研究) [Research on International Law] 102, 102 (2018) (arguing that historically, Chinese courts have done a poor job of analyzing conflict of laws questions).

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question of law, rather than one of fact.[192] According to the LAL, the parties shall provide the foreign law, but where the law must be ascertained, the court does so ex officio, often through recourse to legal experts.[193] In line with the foregoing conflict of laws issues, Chinese judges tend to apply the *lex fori* on the grounds of failure to prove the foreign law due to lack of convenient means in ascertainment.[194]

However, this picture is changing. For instance, in 2018, I visited, in Shenzhen, Benchmark Chambers International (BCI), one of several "foreign law ascertainment centers" (*waifa chaming zhongxin*) in China. Headed by Dr. Xiao Jingyi, the daughter of the former Supreme Court Justice Xiao Yang—a fact that has likely been instrumental to its success—BCI is a think tank that assists parties and Chinese judges in ascertaining foreign law. They have a network of over 1,500 experts with some 100 partner organizations, and from their founding in 2014 to 2022, they provided legal ascertainment services on 459 cases, involving 146 jurisdictions.[195] As I saw visiting their offices which are decorated with photographs of their training sessions, they also conduct workshops led by foreign experts, from corporate lawyers from developing countries to Harvard Law School professors, for Chinese companies and officials on matters relating to foreign law, for risk mitigation, compliance, and due diligence for overseas corporate work.[196]

It is not only service centers like BCI that are contributing to trainings in foreign law. For example, the National Judges College in Beijing also holds continuing education classes for PRC judges on foreign law matters, some of which are led by foreign law professors.[197] Further, training in law is not a one-

[192] *Cf.* Vivian Grosswald Curran, *Federal Rule 44.1: Foreign Law in U.S. Courts Today*, MN. J. INT'L L. (forthcoming) (explaining how the importation of the civil law approach into Federal Rule 44.1 has created difficulties for U.S. judges).

[193] *See supra* note 189, at 939.

[194] Guodong Du & Meng Yu, *Voice of Chinese Judges: Ascertainment of Foreign Law in Chinese Courts*, CHINA JUSTICE OBSERVER (Mar. 25, 2018), https://perma.cc/3VBS-EQ3Z.

[195] Personal interview with Xiao Jinyi, Mar. 28, 2018, Shenzhen, China. Follow-up WeChat correspondence on Feb. 9, 2022.

[196] *Id*.

[197] Guanyu yinfa "2022nian Guojia Faguan Xueyuan yu Xianggang Chengshi Daxue Falü Xueyuan hezuo peiyang faxue boshi (JSD) chaosheng jianzhang" de tongzhi (关于印发《2022年国家法官学院与香港城市大学法律学院合作培养法学硕士(JSD)招生简章》的通知) [Notice on Issuing the "2022 National Judges College and the City University of Hong Kong School of Law Cooperative Cultivation of Juris Doctor (JSD) Admissions Guide] (Dec. 17, 2021), https://perma.cc/BR9J-ND2F (implementing the "coordination of domestic and foreign-related rule of law" by cultivating a corps of people "who adhere to the concept of socialist rule of law, are proficient in English, and familiar with foreign-related, Hong Kong and Macau civil and commercial laws.").

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way process, as the National Judges College,[198] China Law Society,[199] and the Shanghai Cooperation Organization,[200] are all involved in activities with foreign lawyers and judges in Chinese law. Some Chinese scholars have argued that these programs constitute China-led transnational judicial networks, akin to those previously championed by liberal internationalists.[201] While such operations as BCI are small and judicial networking remains, at present, nascent, they are representative of the entrepreneurialism that may sustain a more robust cosmopolitanism in the course of cross-border legal issues in the future.

c. Recognition of foreign judgments and arbitral awards

As a general matter, a state's courts are incentivized to recognize the judgments of other state's courts as well as foreign arbitral awards as doing so facilitates transnational legal certainty, yet, at the same time, a state's courts guards against deficient procedures in other jurisdictions and hence there are valid reasons to not grant such instruments legal force domestically.[202] In private international law, states have recognized two general principles to guide such

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[198] *See, e.g.*, 2019nian Miandian faguan yanxiuban juhang jieye dianli (2019 年缅甸法官研修班举行结业典礼) [*The 2019 Myanmar Judges Seminar Held a Graduation Ceremony*], ZUIGAO RENMIN FAYUAN (最高人民法院) [SPC] (Nov. 4, 2019), https://perma.cc/5LV2-SJ3D.

[199] Zhongguo-Lamei he Jialebi guojia falü rencai jiaoliu xiangmu yanxiu ban kai ban yishi zai Shanghai Caijing Daxue juxing ("中国-拉美和加勒比国家法律人才交流项目研修班"开班仪式在上海财经大学举行) [*The opening ceremony of the "China-Latin America and Caribbean Legal Talent Exchange Program Seminar" was held at Shanghai University of Finance and Economics*], FORO CHINA-CELAC (May 24, 2019), https://perma.cc/BC8V-UFJP.

[200] *See, e.g.*, "Yidaiyilu" Ouya diqu fazhi yanxiuban kaiban yishi zai wo xiao longzhong juxing ("一带一路"欧亚地区法治研修班开办仪式在我校隆重举行) [*Our School Holds the Opening Ceremony of the 'Belt and Road' Eurasian Rule of Law Seminar*], SHANGHAI ZHENGFA XUEYUAN (上海政法学院) [SHANGHAI UNIVERSITY OF POLITICAL SCIENCE AND LAW] (Sept. 15, 2020), https://perma.cc/7GEZ-9QW2.

[201] Cai Congyan (蔡从燕) & Wang Yifei (王一斐), *Daguo jueqi Zhong de kuaguo sifa duihua (大国崛起中的跨国司法对话) [Transnational Judicial Dialogue in the Rise of Great Powers*], 1 GUOJIFA YANJIU (国际法研究) [INTERNATIONAL LAW RESEARCH] (2022), https://perma.cc/39SV-XSBW (providing a list of 16 training events for foreign judges held by the National Judges College in 2019).

[202] RALF MICHAELS, *Recognition and Enforcement of Foreign Judgments*, in MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2009), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2699&context=faculty_scholarship.

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determinations, including comity[203] and reciprocity.[204] The Party-State is particularly concerned about the recognition and enforcement of PRC courts' judgments overseas, and thus, has attached importance to this area for reform.

PRC courts recognize and enforced foreign judgments on the basis of an international treaty or the principle of reciprocity.[205] In terms of the former, at the multilateral level, the PRC has signed but not ratified the Hague Convention on Choice of Court Agreements;[206] however, it has concluded some 38 bilateral treaties on mutual assistance covering recognition and enforcement of court judgments, a not insignificant number which represents some degree of internationalization.[207] The principle of reciprocity has not historically been one that PRC courts have cited, however.[208]

In recent years, however, PRC courts have shown a growing openness to recognizing and enforcing foreign judgments through reciprocity, in particular. Around 2016, a string of cases signaled a policy shift as PRC courts began gravitating toward the reciprocity principle.[209] More specifically, PRC courts

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[203] Hilton v. Guyot, 159 U.S. 113, 163-164 (1895) ("neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regards both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws").

[204] Reciprocity is the concept that a state's courts should recognize and enforce another state court's judgments only to the extent that that state's courts has recognized its own judgments. *See* Michaels, *supra* note 202.

[205] *See* Zhonghua renmin gonheguo minshi susongfa (中华人民共和国民事诉讼法) [PRC Civil Procedure Law], adopted at the Fourth Session of the Seventh National People's Congress on Apr. 9, 1991, as amended at the Thirty-Second Sessions of the Standing Committee of the Thirteenth National People's Congress on Dec. 4, 2021, art. 282 ("Having received an application or a request for recognition and execution of a legally effective judgment or ruling of a foreign court, a people's court shall review such judgment or ruling pursuant to international treaties concluded or acceded to by the People's Republic of China or in accordance with the principle of reciprocity. If, upon such review, the people's court considers that such judgment or ruling neither contradicts the basic principles of the law of the People's Republic of China nor violates State sovereignty, security and the public interest, it shall rule to recognize its effectiveness").

[206] Hague Convention on Choice of Court Agreements (June 30, 2005), https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.

[207] This figure is based upon the author's search of the PRC Ministry of Foreign Affairs' treaty database (http://treaty.mfa.gov.cn/web/list.jsp) with a keyword search for "*minshi sifa xiezhu*" (judicial assistance for civil matters) and "*shangshi sifa xiezhu*" (judicial assistance for commercial matters), conducted on May 2, 2022. The most recent treaty is with Iran (dated Apr. 29, 2021).

[208] Guangjian Tu, Private International Law in China § 15 (2016).

[209] *See, e.g.*, 高尔集团股份有限公司 与江苏省纺织工业（集团）进出口有限公司 (Gao'er jituan gufen youxian gongsi yu Jiangsu sheng fangzhi gongye (jituan) jin chukou youxian gongsi) [Kolmar Group AG v. Jiangsu Textile Industry Import & Export Corp.], Su 01 Xie Wai

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have become increasingly open to not just *de facto* reciprocity (requiring that the rendering state had previously recognized a judgment from the enforcing state) but also *de jure* reciprocity (recognizing a judgment from a rendering state without requiring that state to first recognize a judgment from the enforcing state).[210] The SPC has recently sought to clarify the shift from *de facto* reciprocity to *de jure* reciprocity by providing a three-part test.[211] Generally, such efforts are viewed to provide greater harmonization of judicial practices,[212] suggesting more willingness to give force to judgments rendered outside of the PRC.

The basis for China's regime for recognizing and enforcing foreign arbitral awards is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[213] Despite the framework, there is general skepticism about PRC courts' willingness to recognize and enforce foreign arbitral awards. The SPC has established a "pre-reporting system" under which lower courts, if they seek to refuse recognition or enforcement, must obtain permission to do so from the SPC.[214] Empirical research suggests that this

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Ren No 3, Nanjing Intermed. People's Court (Dec. 9, 2016) (recognizing a Singaporean judgment); Liu Li v. Tao Li & Tong Wu (刘利诉陶莉和童武) [Liu Li v. Tao Li & Tong Wu], Hui 01 Xie Wai Ren No. 16, Wuhan Intermed. People's Crt (June 30, 2017) (recognizing a judgment from the State of California).

[210] *See, e.g.*, Solar Gongsi v. SD Gongsi (Solar 公司 v. SD 公司) [Solar Company v. SD Company], Hu 01 Xie Wai Ren No. 22, Shanghai No. 1 (2019), Intermed. People's Court (Jul. 20, 2021), (recognizing and enforcing a Singaporean judgment based on *de jure* reciprocity). *See also* Monika Prusinowska, *Current Developments in the Area of Recognition and Enforcement of Court Judgments in Civil and Commercial Matters between China and Other States*, CHINA, LAW AND DEVELOPMENT RESEARCH BRIEF, NO. 1 3 (2022), https://cld.web.ox.ac.uk/files/finalrbprusinowskapdf.

[211] Quanguo fayuan shewai shangshi haishi shenpan gongzuo zuotanhui huiyi jiyao (全国法院涉外商事海事审判工作座谈会会议纪要) [Conference Summary of the Symposium on Foreign-related Commercial and Maritime Trials of Courts Nationwide] (Dec. 31, 2021), https://cicc.court.gov.cn/html/1/218/62/409/2172.html (providing three tests for *de jure* reciprocity, reciprocal understanding of consensus, and reciprocal commitment without exception).

[212] For commentaries, *see* Guodong Du & Meng Yu, *How Chinese Courts Determine Reciprocity in Foreign Judgment Enforcement – Breakthrough for Collecting Judgments in China Series (III)*, CHINA JUSTICE OBSERVER (Apr. 3, 2022), https://www.chinajusticeobserver.com/a/breakthrough-for-collecting-judgments-in-china-series-3; Susan Finder, *Supreme People's Court Issues New Guidance on Cross-Border Commercial & Procedural Legal Issues*, SUPREME PEOPLE'S COURT MONITOR (Jan. 28, 2022), https://supremepeoplescourtmonitor.com/.

[213] *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958). China acceded on Jan. 22, 1987. https://www.newyorkconvention.org/countries.

[214] Zuigao renmin fayuan (最高人民法院) [Supreme People's Court], Guanyu renmin fayuan chuli yu shewai zhongcai ji waiguo zhongcai shixiang youguan wenti de tongzhi (关于人民法

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mechanism mostly works in catching at least some lower-court decisions that erred in refusing to recognize or enforce a foreign award.[215] Additionally, proposed amendments to the out-dated 1994 Arbitration Law[216] would limit the scope of review of the enforcing court to resist enforcement.[217]

Overall, it seems that PRC courts are increasingly adopting principles and practices which support the recognition and enforcement of foreign judgments and arbitral awards. Empirical evidence points to such an outcome. For example, between 2017 and 2020, PRC courts received 163 applications for recognition and enforcement of foreign judgments and arbitral awards, of which 155 were recognized and enforced by PRC courts, with only seven rejected and one withdrawn.[218] While there remains considerable room for improvement in terms of in PRC courts' performance in this area, generally, domestic courts are becoming more professionalized in engaging with foreign legal systems through the recognition and enforcement of foreign judgments. The recognition and enforcement of foreign arbitral awards has seen particular advancement in recent years, [219] a reflection of the growth in China's international commercial arbitration industry.

院处理与涉外仲裁及外国仲裁是想有关问题的通知) [Regarding the Notice on People's Courts' Handling Issues Related to Foreign-Related Arbitration and Foreign Arbitration Institutions] (Aug. 28, 1995), http://www.people.com.cn/zixun/flfgk/item/dwjjf/falv/9/9-2-1-05.html.

[215] GU WEIXIA, DISPUTE RESOLUTION IN CHINA: LITIGATION, ARBITRATION, MEDIATION, AND THEIR INTERACTIONS 190 (2021) (finding that from 2009 to 2018, the SPC heard 55 pre-reported cases and among those, overturned 29 decisions of lower courts).

[216] *See infra* note 221.

[217] See Kun Fan, *Proposed Amendments to the Arbitration Law: A New Era of Arbitration?* ICC DISPUTE RESOLUTION BULLETIN 3 (2021) (explaining that under the 1994 law, the losing party can both apply to set aside an award and to file an action to resist recognition, but under the proposed amendments, PRC courts may refuse to enforce an award only if it is "against social public interest.").

[218] Zhang Meiping (张美萍), Pingxi waiguo falü wenzhu zai Zhongguo de chengren yu zhi hang qingkuang (评析外国法律文书在中国的承认与执行情况) [An Analysis of the Recognition and Enforcement of Foreign Legal Instruments in China], Beijing De he Heng Qingdao Lüshi shiwusuo (北京德和衡青岛律师事务所) [Beijing DHH Qingdao Law Firm], (Jul. 24, 2020), https://mp.weixin.qq.com/s?__biz=Mzg5OTcxMTAyOQ==&mid=2247519358&idx=2&sn=b48ec637f93d842f3bd02d43bee11c2f&source=41#wechat_redirect.

[219] For instance, at the 2021 Annual Summit on Commercial Dispute Resolution in China, hosted virtually by the Beijing International Arbitration Commission on Nov. 26, 2021, Zhao Fang, one of the co-authors of the Zhongguo zhongcai sifa shencha niandu baogao (2019nian) (中国仲裁司法审查年度报告（2019 年）) [Annual Report on the Judicial Review of Arbitration in China (2019)], stated that in that year, there were 32 submissions for the recognition and enforcement of foreign awards, and only 1 was denied.

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d. International commercial arbitration

One area of China's private international law that has seen the most energetic push for internationalization, including seeds of cosmopolitanism, is international commercial arbitration (ICA). There are few jurisdictions in the world that have promoted arbitration to the extent China has.[220] The PRC currently has some 255 arbitral commissions that mainly administer domestic arbitrations. In recent decades, a number of city-level arbitration commissions were established, and which are in the process of providing cross-border services. Before explaining these arbitration commission's internationalization efforts, I first address Chinese ICA's shortcomings, many of which derive from outdated legislation, itself a reflection of a penchant for government control over arbitration institutions.

Whereas the PRC acceded to the New York Convention in 1987, and hence, its arbitral awards are recognized outside of China and it has improved its performance on recognizing foreign arbitral awards in Chinese courts, the main legislative basis for Chinese arbitration, the 1994 PRC Arbitration Law, has become obsolete on a number of fronts.[221] One, unlike domestic arbitration law in most states in the Asia-Pacific region, the PRC Arbitration Law is not based on the UN Commission on International Trade Law (UNCITRAL) Model Law. As the UNCITRAL Model Law has become an internationally-recognized template for arbitration reform and has become familiar to foreign investors, many states wading into the ICA market have sought to adopt it in whole or in part.[222] Against this tide of convergence,[223] China has pursued its own path. The

[220] Both at the central government level and municipal governments, commercial arbitration has received intensive support in recent years. *See, e.g.*, Zhonggong zhongyang bangong ting, guowuyuan bangong ting (中共中央办公厅，国务院办公厅) [Gen. Office of Central Comm. Communist Party of Ch., Gen. Office of State Council], Guanyu wanshan zhongcai zhidu tigao zhongcai gongxinli de ruogan yijian (关于完善仲裁制度提高仲裁公信力的若干意见) [Several Opinions on Improving the Arbitration System and Increasing the Credibility of Arbitration] (Dec. 31, 2018) (imposing a number of requirements on local governments including incorporating arbitration business into the local economic development plans and increasing foreign exchanges and cooperation).

[221] Zhonghua renmin gongheguo zhongcaifa (中华人民共和国仲裁法) [PRC Arbitration Law], adopted at the 9th Session of the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, as amended at the 29th Session of the Twelfth Nat'l People's Cong., Sept. 1, 2017).

[222] *See generally*, ANSELMO REYES & WEIXIA GU, THE DEVELOPING WORLD OF ARBITRATION: A COMPARATIVE STUDY OF ARBITRATION REFORM IN THE ASIA PACIFIC (2018).

[223] *See, e.g.*, HON. JUSTICE MICHAEL KIRBY AC CMG, *The Growing* Rapprochment *Between International Law and National Law*, in VISIONS OF THE LEGAL ORDER IN THE 21ST CENTURY: ESSAYS IN HONOUR OF JUDGE CHRISTOPHER WEERAMANTRY X (Garry Surgess & Antony Anghie, eds., 1998); A FAREWELL TO FRAGMENTATION: REASSERTION AND CONVERGENCE IN INTERNATIONAL LAW (Mads Andenas & Eirik Bjorge, eds., 2015).

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reason seems to be the PRC government's reluctance to give legal recognition to truly independent arbitration commissions. Rather, most arbitration commissions are budgetarily dependent on the municipal governments under which they are organized.[224] Consequently, the PRC Arbitration Law does not recognize *kompetenz-kompetenz*. Instead, in China, people's courts and arbitration commissions have the power to decide whether an arbitration agreement is valid and whether the arbitration should take place in the event that one party contests the validity of such an agreement.[225]

Two, the PRC Arbitration Law does not include the notion of the seat of arbitration.[226] The seat refers to the legal system that governs the procedure of the arbitration (i.e., the *lex arbitri*).[227] Many systems bifurcate the nationality of an award between domestic and foreign awards and trace the nationality of the award to the arbitral seat. The Chinese system also bifurcates awards between domestic and "foreign-related," but rather than tracing nationality to the seat, courts usually privilege the jurisdiction of the arbitration institution.[228] Under this arrangement, the validity of foreign-administered Chinese-seated awards has been uncertain.[229] As a result of the inadequacy of the PRC Arbitration Law, not

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[224] WEIXIA GU, DISPUTE RESOLUTION IN CHINA: LITIGATION, ARBITRATION, MEDIATION, AND THEIR INTERACTIONS 113 (2021).

[225] Monika Prusinowska, *China as Global Arbitration Player? Recent Developments of Chinese Arbitration System and Directions for Further Changes*, 10 TSINGHUA U. L. REV. 34, 44 (2017).

[226] Kun Fan, *Prospects of Foreign Arbitration Institutions Administering Arbitration in China*, 28 J. INT'L ARB. 343, 350-2 (2011).

[227] CHARTERED INSTITUTE OF ARBITRATORS, INTERNATIONAL ARBITRATION: WORKBOOK MODULE 1: LAW, PRACTICE & PROCEDURE 88 (2017).

[228] *See supra* note 221, Ch. VII. "Foreign-related" awards are defined as having a "foreign element," although, confusingly, an award administered by a foreign institution in China may not qualify for the award to be "foreign-related."

[229] Deguo Xupulin Guoji Youxian Zeren Gongsi yu Wuxi Woke Tongyong Gongcheng Xiangjiao Youxian Gongsi shenqing queren zhongcai xieyi xiaoli an (德国旭普林国际有限责任公司与无锡沃可通用工程橡胶有限公司) [Züblin International GmbH v Wuxi Woke General Engineering Rubber Co Ltd] ((2003) Min Si Ta Zi No. 23) (refusing to recognize and enforce an arbitral award classified as "non-domestic" for being issued by the ICC Court of Arbitration in Shanghai). *But see* Degaogangtie Gongsi yu Ningbo shi Gongyipin Jin Chukou Youxian Gongsi Maimai ((德高钢铁公司)与被申请人宁波市工艺品进出口有限公司买卖) [Duferco S.A. v Ningbo Arts & Crafts Import and Export Co Ltd] (2008) Yong Zhong Jian Zi No. 4, Apr. 22, 2009, Ningbo Intermediate People's Court (enforcing an arbitral award, considered "non-domestic," as it was given by the ICC in Beijing); Anhui sheng Longlide Baozhuang Yinshua Youxian Gongsi yu BP Agnati S.R.L. (安徽省龙利得包装印刷有限公司与被 BP Agnati S.R.L.) [Anhui Longlide Packaging and Printing Co Ltd v PB Agnati S.R.L.] (2013) Min Si Ta Zi No. 13, Mar. 25, 2013, Supr. People's Ct. (upholding the validity of an arbitration clause involving a Shanghai-seated ICC arbitration); BNB v BNA (2020), Shanghai

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only has the SPC filled in some of the gaps through judicial interpretations[230] and case decisions,[231] but also, the arbitration commissions regularly update their institutional rules, including adopting the language of the "seat."[232] Hence, the institutional arbitration rules are often one normative source for innovation in the Chinese ICA industry, yet because these are merely contractual in nature, they do not trump legislation or judicial interpretations. Lastly, the PRC Arbitration Law includes a number of provisions that are unfriendly to arbitration, including giving ample room to courts to invalidate arbitral agreements and others that deprive arbitral tribunals from issuing interim measures.

As of this writing, draft proposals for amending the PRC Arbitration have been issued by the Ministry of Justice, which cure some but not all of the current deficiencies. [233] For example, foreign arbitration institutions, *kompetenz-kompetenz*, and the seat are all recognized under the proposed amendments.[234] However, the fundamental nature of arbitration commissions and their relationship to local governments have not changed, likely given the Party-State's distrust of independent institutions.

Despite these structural and legislative restrictions, the Chinese ICA

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01 Civil Special 83 (holding that an arbitration seated in Shanghai and administered by the Singapore International Arbitration Center was valid).

[230] *See, e.g.*, Zuigao renmin fayuan (最高人民法院) [Supreme People's Court], Guanyu shiyong "Zhonghua renmin gongheguo zhongcaifa" ruogan wenti de jieshi (关于使用《中华人民共和国仲裁法》若干问题的解释) [Interpretation of the SPC Concerning Some Issues on the Application of the "PRC Arbitration Law"] Fashi (法释) [Legal Interpretation] (2006) No. 7., Art. 16.

[231] Bulante wude gongye youxian gongsi, Guangdong fa'an long jixie chengtao shebei gongcheng youxian gongsi shenqing chengren yu zhixing fayuan panjue, zhongcai caijue anjian yishen minshi caiding shu (布兰特伍德工业有限公司，广东阀安龙机械成套设备工程有限公司申请承认与执行法院判决，仲裁裁决案件一审民事裁定书) [Brentwood Industries vs. Guangdong Fa-anlong Mechanical Equipment Manufacture Co. Ltd.] (2015) Sui Zhong Fa Min Si Chu Zi No. 62 (2015) 穗中法民四初字 (finding that China-seated arbitral awards made by a foreign arbitration institution shall be regarded as Chinese foreign-related awards).

[232] *See, e.g.*, CIETAC Arbitration Rules, revised and adopted by the China Council for the Promotion of International Trade/China Chamber of International Commerce, on Nov. 4, 2014, and effective Jan. 1, 2015, Art. 7 (specifying "place of arbitration" (*zhongcaidi*)).

[233] Sifabu guanyu "Zhonghua renmin gongheguo zhongcaifa (xiuding) (zhengqiu yijiangao)" gongkai zhengqiu yijian de tongzhi (司法部关于《中华人民共和国仲裁法（修订）（征求意见稿）》征求意见的通知) [Notice of the Ministry of Justice on Public Consultation on the "PRC Arbitration Law" (Revision) (Draft for Solicitation of Comments] (July 30, 2021), https://perma.cc/SG2S-QNMH.

[234] Zhonghua renmin gongheguo zhongcaifa (xiuding) (zhengqiu yijiangao) (中华人民共和国仲裁法（修订）（征求意见稿）) [PRC Arbitration Law (Revision) (Draft for Solicitation of Comments)], Arts. 12, 28, 90, https://perma.cc/AJR9-Z6XQ.

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industry itself stands for full-throttle internationalization. For example, the Beijing International Arbitration Center (BIAC) (est. 1995) has made a strong push to attract non-Chinese parties to its forum. From 2012 to 2017, the caseload for foreign-related disputes has increased year-on-year, although the percentage of total cases remains small (about 2.17 percent).[235] Part of BIAC's internationalization strategy is to include foreign arbitrators on its panels.[236] Notably, BIAC is one of only two arbitration commissions that have been able to pull away from the conventional budgetary system and attain more independence.[237]

The Shanghai International Arbitration Center (SHIAC) (est. 1988) has been even more innovative in broadening its reach beyond China. SHIAC experienced a greater number of foreign-related cases. From 2000 to 2012, SHIAC has concluded, on average, 112 foreign-related cases per year or approximately 50 percent of its total caseload.[238] More recently, SHIAC has embarked on an aggressive internationalization strategy, which will likely increase its foreign-related caseload. In 2013, it founded the China (Shanghai) Free Trade Zone Court of Arbitration, in 2014, the Shanghai International Aviation Court of Arbitration (the first aviation arbitration platform in the world), in 2015, the BRICS Dispute Resolution Center Shanghai (the first dispute resolution platform for BRICS countries), and, in that same year, the China-Africa Joint Arbitration Center (CAJAC). SHIAC has a much longer roster of foreign arbitrators than most of the newer centers.[239]

According to its proponents, the specific advantages of Chinese ICA over non-Chinese are speed, low cost, and efficiency. On efficiency, BIAC has been one of the most aggressive arbitration commissions in China to develop expedient case management procedures, including procedural orders and terms of reference for preparing arbitration and online hearings.[240] As a result, for 2019, the average typical ICA took approximately five months, compared to sixteen months for a typical arbitration at the London Court of International Arbitration and twenty-six months for an International Chamber of Commerce (ICC)

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[235] Beijing Arbitration Commission, *2017 Annual Work Report of BAC/BIAC* (Mar. 20, 2018), https://perma.cc/9DQD-URWA.

[236] Still, the numbers are small. In 2020, only 9 out of 399 arbitrators registered with BIAC were foreigners, https://perma.cc/E7WJ-QYVM.

[237] The other is the Shenzhen Court of International Arbitration. *See* Shenzhen Court of International Arbitration Rules, as amended Oct. 1, 2020, https://perma.cc/HW5U-LL93.

[238] Shanghai International Arbitration Center, Statistics Data, https://perma.cc/U4NU-FN5G.

[239] SHIAC, Panel of Arbitrators (2021), https://perma.cc/AB3K-UZPX (listing close to 300 foreign arbitrators, although some appear to be Chinese nationals living overseas).

[240] Chen Fuyong, *Shifting Landscape of International Arbitration in China* (Mar. 10, 2020), CH. BUS. L. J., https://perma.cc/UL9T-XPYZ.

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arbitration.[241] In part, due to the generally short duration of Chinese ICA, costs are frequently lower than for arbitration administered by non-Chinese institutions.[242] Perhaps the most frequently cited asset of Chinese ICA is its efficiency.[243]

In summary, Chinese ICA has shown aggressive internationalization in recent years. One type of example is the establishment of branches of Chinese arbitration commissions outside of mainland China. For example, CIETAC has established branches in Hong Kong, Vancouver, and Vienna.[244] Another type of example is arbitration institutions co-created with partners in host states. For instance, cooperative economic development platforms have created institutions such as the China-African Joint Arbitration Center, Bishkek International Court of Arbitration for Mining and Commerce, and the Thai-Chinese International Arbitration and Mediation Center.[245] In some cases, these new institutions and their rules demonstrates attempts to extend the jurisdictional reach of Chinese ICA beyond PRC's borders and to attract more disputes. Yet even if the main driver is internationalization, some of these institutions—to the extent they are viable from the perspective of would-be users—may create environments for more interaction between Chinese arbitration rules, arbitrators, and even PRC courts, and counterparts in host states, that is, they may facilitate greater cosmopolitanism.

2. "Foreign-related 'Rule of Law'"

The FROL builds on many of these on-going reforms to private international law. China, to date, really has no recognized field of foreign relations law,[246] and whereas foreign relations law may be the closest cognate to

[241] *Compare id*. (defining time period starting from composition of tribunal to rendering of award) *with* London Court of International Arbitration, *Frequently Asked Questions*, https://perma.cc/6JDE-ULBE (providing median figures for 2013 to 2016) and INTERNATIONAL CHAMBER OF COMMERCE, ICC DISPUTE RESOLUTION 2019 STATISTICS 17 (2020).
[242] WANG SHENGCHANG, *CIETAC's Perspective on Arbitration and Conciliation Concerning China*, *in* NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 27, 35 (Albert Jan van den Berg ed., 2005).
[243] *See supra* note 42 (providing an example of how proponents of Chinese ICA persuaded counterparts in African states to co-establish the China-Africa Joint Arbitration Centre based on efficiency arguments).
[244] *See id.* (listing CIETAC branches outside of the PRC).
[245] *See id.* (discussing these new cooperative dispute resolution centers).
[246] Chinese legal scholars date the scholarship on foreign relations law in China to circa 2016. *See* Congyan Cai, *Foreign Relations Law in China*, 111 AJIL UNBOUND 336, 336 (2017) (citing a 2016 article by Liu Renshan). In the last few years, Chinese legal scholars have become increasingly focused on foreign relations law, in part, due to the pressures of the US-China trade war, US long-arm legislation, and US sanctions. Chinese legal scholars are considering

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FROL, FROL is broader, and intersects with private international law. It must be emphasized that the FROL is, above all, a discourse, one with loose parameters and undefined contents. It is currently being filled in by Chinese legal professionals and academics. More precisely, the FROL is a *tifa*, a watchword used by the CCP, like "community of common destiny" that orients the population toward certain goals without necessarily providing means.[247] It provides what Sinologist Perry Link calls an instance of the "language game" in Chinese official-speak: a term that may not reflect reality but must be made sense of within political awareness, and in so doing, creates its own reality.[248] While the FROL is still formative, given its potential implications, it is warranted to provide an initial study of the concept to assess its normative power and possible constraints.

The FROL has been enumerated through a number of Party-State documents. Tellingly, the CCP was the first to announce the new initiative. In 2019, the Decision of the Fourth Plenary Session of the Nineteenth Central Committee of the CCP called for "strengthening foreign-related rule of law work,"[249] laying the foundation for Xi Jinping's announcement.[250] Subsequently, in 2020, the CCP published a five-year plan for legal development, the "Plan for the Construction of China under Rule of Law (2020-2025)" (hereinafter, "the Plan").[251] The Plan, which is a policy document that sets a reform agenda, has the most complete description of the FROL to date.

> Strengthen foreign-related legal work. To meet the needs of high-level opening-up work, improve the foreign-related legal and rule system, make up for shortcomings, and improve the legalization of foreign-related work.

drafting a foreign relations law and have been conducting research in preparation to do so, including, perhaps ironically, through some limited interaction with U.S. legal scholars via the American Law Institute which has written the Foreign Relations Law of the United States, currently in its fourth iteration. The Chinese draft legislation would be organized into general and specific provisions. The former would address such topics as general international law, treaties (and procedures to conclude) as well as enforcement, immunity, adjudication, and recognition and enforcement of foreign judgments. Specific provisions would address trade, investment, human rights, criminal law, and civil law.

[247] *See generally*, MICHAEL SCHOENHALS, DOING THINGS WITH WORDS IN CHINESE POLITICS: FIVE STORIES (1992).

[248] PERRY LINK, AN ANATOMY OF CHINESE: RHYTHM, METAPHOR, POLITICS 278 (2013).

[249] Dang de shijiu jie sizhong quanhui (jueding) (quanwen) (党的十九届四中全会《决定》（全文）) [(Entire Text) ("Decision" of the Fourth Plenary Session of the Nineteenth Central Committee of the Chinese Communist Party], Oct. 31, 2019, para. 13.1, https://perma.cc/B97B-CAFA.

[250] *See supra* note 2.

[251] Zhonggong Zhongyang (中共中央) [Central Committee of the CCP], Fazhi Zhongguo jianshe jihua (2020-2025) (法治中国建设计划（2020-2025 年) [Plan for the Construction of China under the Rule of Law (2020-2025)], https://perma.cc/9MSR-VGVH.

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> Actively participate in the formulation of international rules and promote the formation of a fair and reasonable system of international rules. Accelerate the construction of a legal system applicable outside China's jurisdiction. Focusing on the promotion of international cooperation in the joint construction of the "Belt and Road," we will promote the construction and improvement of international commercial courts. Promote the establishment of joint arbitration mechanisms between Chinese arbitration institutions and national arbitration institutions jointly building the "Belt and Road." Strengthen foreign-related legal services and safeguard the legitimate rights and interests of Chinese citizens and legal persons overseas and foreign citizens and legal persons in China. Establish a legal system for foreign-related work. Guide foreign economic and trade cooperation enterprises to strengthen compliance management and raise awareness of legal risk prevention. Establish and improve mechanisms for identifying extraterritorial laws. Promote the publicity of the rule of law abroad, and tell the story of the rule of law in China. Strengthen the research and application of international law.
>
> Strengthen multilateral and bilateral dialogues on the rule of law and advance foreign exchanges on the rule of law. Deepen international judicial exchanges and cooperation. Improve my country's judicial assistance system and mechanism, and promote international cooperation in judicial assistance in the extradition and repatriation of criminal suspects and the transfer of sentenced persons. Actively participate in international cooperation in law enforcement and security, and jointly combat violent terrorist forces, ethnic separatist forces, religious extremist forces, drug trafficking, and transnational organized crime. Strengthen international cooperation in anti-corruption, and increase efforts to pursue fugitives, recover stolen goods, repatriate and extradite overseas.[252]

Since the issuance of the Plan, a number of state institutions have responded to the *tifa*, playing the language game. These include the National People's Congress,[253] the SPC,[254] and law schools, many of which have

[252] *Id.* art 25.

[253] Quanguo renmin daibiao dahui (全国人民代表大会) [Nat'l People's Cong., PRC], Quanguo renda changweihui 2021 niandu lifa gongzuo jihua (全国人大常委会 2021 年度立法工作计划) [2021 Legislative Work Plan of the Standing Committee of the NPC] (Apr. 16, 2021), https://perma.cc/Z2C6-U7BZ ("Focusing on anti-sanctions, anti-interference, and countermeasures against "long-arm jurisdiction", we will accelerate the promotion of foreign-related legislation.").

[254] Zuigao renmin fayuan (最高人民法院) [Sup. People's Ct.], Guanyu renmin fayuan shewai shenpan gongzuo qingkuang de baogao (关于人民法院涉外审判工作情况的报告) [Report on

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established "foreign-related 'rule of law'" research institutes (*shewai fazhi yanjiuyuan*) and "foreign-related 'rule of law' study programs (*shewai fazhi xuexi ban*) for students.[255] The legal academia in China have debated the correct interpretation of the concept, whether it is really just synonymous with international law or if it is a combination of international law and Chinese domestic law regarding foreign and international law. At a 2021 conference at Fudan University, a number of leading Chinese scholars of private international law put forth their interpretations.[256] Professor Huang Jin, President of the China Society of International Law and Professor of Law at Fudan University argued "domestic rule of law and foreign-related rule of law are actually two aspects, two dimensions, and two directions for constructing the rule of law in China," showing a graphic of overlapping circles each representing "domestic rule of law" and "international rule of law" with the grey overlap marked as "foreign-related rule of law." Professor Shan Wenhua of Xi'an Jiaotong University suggested that China's domestic rule of law can be applied to foreign-related legal questions that will eventually become foreign-related rule of law and "even a useful experience in the construction of the rule of law in other countries." Professor Zhang Qinglin, Dean of the Shanghai University of Foreign Economics and Business Law School proclaimed, "The rule of law concerning foreign affairs is a concept pioneered by China. The goal is to better use legal means to safeguard China's sovereignty, security, and development interests." Xie Diyang, a doctoral student from Fudan University put forth her own concise understanding: "The foreign-related rule of law is a governance model that aims to protect the interests of the country and extends the concept, system, implementation mechanism, and order of the rule of law to foreign parties or overseas through domestic unilateral measures or international cooperation." No consensus was reached.

From the mélange, the following provisional claims may be made about the FROL. First, it is relational: it combines, on the one hand, domestic legal

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the People's Courts' Foreign-Related Trial Work] (Oct. 19, 2022), https://www.court.gov.cn/xinshidai-xiangqing-377231.html. *See also* Susan Finder, *Supreme People's Court's New Policy Document on Opening to the Outside World*, SUPREME COURT MONITOR (Oct. 9, 2020), https://perma.cc/6BAX-GFCM.

[255] Ma Huaide (马怀德), Jiaqiang shewai fazhi rencai peiyang fuwu guojia shewai fazhi jianshe (加快涉外法治人才培养 服务国家涉外法治建设) [Accelerate the training of foreign-related legal talents and serve the country's foreign-related legal construction] (July, 28, 2021), https://perma.cc/2RBW-ABF2 ("Foreign-related legal talents should be familiar with foreign cultures and foreigners' thinking, so in the process of cultivating students, it is necessary to 'bring in' and 'send out'.").

[256] Tongchou tuijin guonei fazhi yu shewai fazhi jichu lilun yantao hui (统筹推进国内法治与涉外法治基础理论研讨会) [Seminar on the Overall Promotion of the Domestic Rule of Law and the Basic Theory of Foreign-Related Rule of Law] Fudan University, Shanghai, China (Nov. 16, 2021) [virtual attendance by the author].

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reform, with, on the other hand, how the domestic legal system interacts with foreign and international law. The FROL thus serves as the intermediary set of norms between the internal and external legal orders. Second, there is a causal relationship between domestic law and FROL such that the former provides the raw materials (legislation, administrative regulations, and even case law) for the latter. Third, the FROL encodes core interests of China including its sovereignty, security, and development interests. Fourth, the FROL demands not only Chinese "legal talent" (i.e., lawyers, judges, arbitrators, students, and academics) to engage with foreign counterparts, but it likewise requires that foreign legal professionals work alongside Chinese, sharing legal knowledge and practices. Fifth, by building a FROL, China can, ultimately shape international law. It should be noted that despite the ambition of the FROL, it is actually a retreat from an earlier command issued by Xi Jinping which explicitly called for China to shape international law directly.[257] Given the political climate spurred by the U.S.-China trade war and the COVID-19 pandemic, the leadership has scaled back some of its rhetoric.[258]

A 2022 report published by the Foreign-Related 'Rule of Law' Research Institute at the University of International Business and Economics' School of Law provides a succinct definition of "foreign-related 'rule of law'" as "referring to the country's practice of handling foreign affairs and participating in international affairs in a rule-of-law way."[259] This definition steers the concept closer to what is understood in the U.S. as foreign relations law, although the Chinese notion of "foreign affairs" (*shewai shiwu*) and "international affairs" (*guoji shiwu*) is broader than foreign relations law as understood in the U.S. The report's organization indicates this breadth and includes such areas as the development of FROL in the BRI, China's international business environment, environmental protection, anti-sanctions, foreign trade, export control, foreign

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[257] XI Jinping (习近平), *Jiaqiang dang dui quanmian yifazhiguo de lingdao (加强党对全面依法治国的领导)* [*Strengthen the Party's Leadership over the Comprehensive Rule of Law*] QIUSHI WANG (求是网) [SEEKING THE TRUTH NET] (Feb. 15, 2019), https://perma.cc/4S5H-4BCY ("When China goes global and participates in international affairs as a responsible major country, it must be good at using the rule of law. In external struggles, we must take up legal weapons, occupy the commanding heights of the rule of law, and dare to say no to saboteurs and disruptors. The global governance system is in a critical period of adjustment and change. We must actively participate in the formulation of international rules and be a participant, promoter and leader in the process of global governance reform.").

[258] On rhetoric regarding the applicability of Chinese legal thought outside of China, *see* Samuli Seppänen, *Chinese Legal Thought on the Global and the Domestic State: A Rhetorical Study*, AS. J. COMP. L. (forthcoming).

[259] Zhongguo shewai fazhi fazhan baogao (2021niandu) (中国涉外法治发展报告（2021 年度）) [Report on the Development of China's Foreign-Related Rule of Law (2021)] 王敬波 (Wang Jingbo) ed. (2022) (on file with the author).

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investment, finance, anti-monopoly, data governance, civil and commercial matters, private international law, uniform international commercial law, maritime law, and international commercial dispute resolution.[260]

The FROL marks a turn towards legal cosmopolitanism and away from the "anti-foreign-law syndrome"[261] of previous decades. It seeks to integrate foreign legal professionals and foreign law into the ongoing domestic law reform while creating platforms for the creation of rules to properly manage the internal legal order's relationship with foreign and international law. One preceding step in regulating such issues is acquiring knowledge about foreign law. In step with the FROL, in recent years, there have been a number of intellectual projects to map out foreign legal systems, particularly in those BRI countries which receive high volumes of Chinese investment. Led by universities[262] and think tanks,[263] these projects often feature collaborations with foreign legal experts to build databases of foreign law to assist Chinese companies in their cross-border work.[264] Some of these projects are more substantive than others, and clearly some have played the language game and lost. Nevertheless, there is also real work being done in the name of building capacity. The progression of the BCI illustrates this point. It has transitioned from exclusively ascertaining the law in China-based disputes to currently also "finding the law" (*zhaofa*) for transactions outside of China.[265] This trend clearly follows the outbound flow of Chinese investment. Perhaps most provocatively, the FROL provides a legitimating discourse for the extraterritorial application of Chinese law.

In spite of the intellectual activity the FROL has generated, the question remains whether the FROL will actually generate meaningful legal reform, mainly in the PRC's domestic legal system but also potentially in external legal

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[260] Id.

[261] *See supra* note 183, at 90.

[262] A non-exhaustive list includes: Asia-Pacific Institute of Law at Renmin University, (https://perma.cc/5QT2-W7KB), Institute of South-South Cooperation at Peking University (https://perma.cc/JFH3-KHU8), China-Africa Economic and Trade Law Research Institute at Xiangtan University (https://perma.cc/B8E3-GSTA), Belt and Road Initiative Legal Service Research Center of Jiangsu Haiyang University (https://perma.cc/2KB4-NCYB), and the Ministry of Commerce-Shaanxi-Xi'an Jiaotong University Collaborative Innovation Centre for Silk Road Belt Law and Policy Studies (https://perma.cc/4ACF-54VX).

[263] Institute of West-Asian and African Studies at the Chinese Academy of Social Sciences (https://perma.cc/FZD2-UXBW) and the International Academy of the Belt and Road (https://perma.cc/9QM9-2A7E).

[264] *See, e.g.*, Wang Guiguo (王贵国) et al., "Yidaiyilu" yanxian guojia falü jingyao (一带一路沿线国家法律精要) [Essentials of BRI States' Law] (2017).

[265] Xiao Jingyi (肖璟翊), Zhongguo qiye zouchuqu de fengxian fangfan yu kexue pinggu (中国企业走出去的风险防范与科学评估) [Risk Prevention and Scientific Evaluation of Chinese Enterprises Going Global] (Sept. 30, 2021), https://perma.cc/93HU-LPTD.

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systems. To the extent that the FROL is part of the Chinese language game, activity prompted by the FROL may simply be "baroquely choreographed," as tends to happen with Chinese political discourse.[266] Yet even choreographed actions can have concrete effects. The FROL may also have traction in terms of shaping legal rules, practices, and institutions in the long-term. As much of the FROL seems motivated by China's adversarial relationship with the U.S., and seeks to both protect Chinese interests overseas while also proactively challenging US extraterritoriality, to the extent that the U.S.-China trade war continues and intensifies, China's learning curve, while steep, may bear fruit. However, as illustrated by the foregoing, there are brakes on generating a truly cosmopolitan orientation even based on China's external-facing rules. Such obstacles may be further entrenched when the analysis considers the internal-facing aspects of the legal system in terms of how it regards difference.

B. Internal Aspects

In contrast to dualist theories, the main contention of this Article is that externally-facing reforms regarding the incorporation of difference that may veer—potentially substantially—from traits and trends that characterize domestic law and its authorities' attitudes toward difference may not be sustainable for a number of reasons, chief among them that the legal system may lose credibility and legitimacy in the eyes of would-be users.[267] More specifically, this Article suggests that it is unlikely that external-facing legal reforms that go in one direction in terms of integrating categories of difference through openness, ecumenism, diversity, and cosmopolitanism are sustainable while domestic law demonstrates other potentially opposing treatments toward those same categories of difference, namely, homogeneity, flatness, reactionism, and enclosure, qualities which may, in the case of China, be intensifying.

Recalling Judge Yusuf's reflection,[268] the prospect of legal cosmopolitanism depends on both the content of law (rules, norms, and procedures) and the legal professionals who articulate, argue, and adjudicate that content. China's domestic legal system is limited in its recognition of difference in both regards. Before identifying some of these limitations, it may be helpful to first acknowledge where Chinese law has made progress in this area. The Chinese legal system, is after all, a palimpsest of different sources (European civil law, Japanese law, Soviet law, and Anglo-American common law) and has

[266] *See supra* note 161, at 2.
[267] Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 706 (1988) (defining legitimacy as that quality of a rule "which derives from a perception on the part of those to whom it is addressed that is has come into being in accordance with right process").
[268] *See infra* 72.

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a wide array of normative sources in terms of the state organs that can issue different types of rules.[269]

There are a few areas where the PRC legal system has sought to recognize difference in terms of law and legal authorities. Examples of the former include China's limited recognition of "customary law" (*xiguanfa*) for certain ethnic minority groups.[270] These populations often belong to the smaller ethnic groups, and those groups which have had more or less closer historical relations to the ethnic majority Han Chinese. Also, the types of customary law recognized are usually localized rules and depoliticized forms. Another area of non-state law which demonstrates some openness of local grassroots courts is shadow finance. Grassroots people's courts have shown, in some instances, flexible and adaptive responses to dealing with peer-to-peer lending platforms and the underground lending market.[271] Along these lines, PRC courts have also shown creativity in engaging with questions of "small property" which consists of property ownership based on communal norms rather than formal legal title.[272] Hence, there are areas, particularly in civil and commercial law, but even surprisingly in criminal law,[273] where Chinese courts have been responsive to normative pluralism.

The Chinese legal system has also made some progress in recognizing difference between and among legal authorities. The best example of such recognition is in the field of commercial arbitration, an industry which has some degree of autonomy vis-à-vis state regulators in comparison to courts which are emphatically state institutions. The Chinese industry of commercial arbitration has generally done a better job of achieving greater gender parity than arbitration based in Western states.[274]

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[269] Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711 (1994).

[270] Katherine P. Kaup, *Controlling the Law: Legal Pluralism in China' South-West Minority Regions* 236 CHINA QUARTERLY 1154 (2018) (focusing on the customary law of ethnic minorities in Yunnan Province).

[271] Ding Jianwen, *Fayuan panjue dui Zhongguo yingzi yinhang yewu de jianjie jili—jinrong shangfa de shijiao ding jianwen* (法院判决对中国影子银行业务的间接激励 ——金融商法的视角) [Indirect Incentives of Court Judgments on China's Shadow Banking Business—— From the Perspective of Financial and Commercial Law], 4 SHANXI QINGNIAN (山西青年) [SHANXI YOUTH] 145 (2020)

[272] SHITONG QIAO, CHINESE SMALL PROPERTY: THE CO-EVOLUTION OF LAW AND SOCIAL NORMS 160-1 (2018) (discussing courts in Shenzhen and Beijing that adopted different methods dealing with "small property" cases but which served to maintain the status quo and minimize the negative impact of illegality).

[273] Kaup, *supra* note 270, at 1165-67.

[274] Chen Fuyong, Speech at 2018 London Summit on Commercial Dispute Resolution in China (June 28, 2018) (claiming that the Beijing International Arbitration Centre has attained a rate of 40% female arbitrators whereas the international norm is 10%). *See also* MONIKA PRUSINOWSKA, *Boosting Diversity in International Arbitration: Lessons From and For China?*

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Outside of these examples, however, generally the PRC legal system is strikingly homogenous. By homogenous, I mean both the low diversity of legal norms and its legal professionals. For example, while it is true that PRC law gives recognition to "customary law" of certain ethnic minority groups, it is not a recognition that is uniformly applied, and does not apply to groups' religious law if religious law forms part of their body of customary law.[275] This discrepancy creates some dissonance between China's internal governance of difference and foreign policy outreach.

For instance, as part of its global investment initiatives, the Party-State claims it wants to build Islamic finance institutions in partnership with business communities in the Middle East,[276] and yet, at home, it not only fails to recognize Islamic law but it actively persecutors Uyghurs, one of China's largest Muslim minority groups.[277] Incorporation of non-state norms has happened historically at the margins and Chinese judges work within the space allotted to them, [278] but this space is not growing at present. There is a yawning gap between the reservoir of China's domestic legal norms (and, further, not only an absence, but active destruction of them) and its aspirations to build inclusive platforms for legal integration across borders.

The flatness of China's legal system is further reflected in the lack of diversity of its legal professionals. China's dispute resolution professionals—judges, and arbitrators—are for the most part male Han Chinese. For an example of the lack of gender parity among Chinese judges, as of 2019, only 34.7% of China's judges were female.[279] The numbers for China's ethnic minority judges are also disproportionately low. In the Xinjiang Uyghur Autonomous Region, for example, in a population of over 22 million, of whom 60% are ethnic minorities,

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in DIVERSITY IN INTERNATIONAL ARBITRATION: WHY IT MATTERS AND HOW TO SUSTAIN IT 150 (Shahla Ali, ed., 2022).

[275] MATTHEW S. ERIE, CHINA AND ISLAM: THE PROPHET, THE PARTY, AND LAW 71-2 (2016).

[276] Muhammad Zulfikar Rakhmat, *The Rise of Islamic Finance on China's Belt and Road,* THE DIPLOMAT (Feb. 15, 2019), https://perma.cc/Z6PK-ZMV6.

[277] Uyghur Tribunal Judgment (Dec. 9, 2021) 190, https://perma.cc/Z6PK-ZMV6 ("the Tribunal is satisfied beyond reasonable doubt that the PRC, by imposition of measures to prevent births intended to *destroy* a significant part of the Uyghurs in Xinjiang as such, has committed genocide").

[278] *See supra* notes 270-273; *See generally*, Zhu Suli (朱苏力), SONGFAXIAXIANG: ZHONGGUO JICENG SIFA ZHIDU YANJIU (送法下乡：中国基层司法制度研究) [SENDING THE LAW DOWN TO THE COUNTRYSIDE: RESEARCH ON CHINA'S GRASSROOTS JUDICIAL SYSTEM] 54 (2011) (describing the Chinese judiciary as an "informal system" that mediates plural norms).

[279] Zhongguo funü ertong qingkuang tongji ziliao (中国妇女儿童情况统计资料) [Statistics on the Situation of Women and Children in China] 90 (2020).

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only 47% of its 5,149 judges belong to ethnic minority groups.[280] Moreover, only 10% of all judges in Xinjiang are bilingual, a crucial skill in a region where both Uyghur and Mandarin are the official languages.[281] Xinjiang may be an extreme example where the judiciary underserves its population.

The paucity of diversity among China's adjudicators matters for a couple of reasons. First, if the literature on diversity and judiciaries is right, then greater diversity of judges enhances the lay perception of the legitimacy of those courts.[282] Second, judicial reasoning, and thereby substantive and procedural justice, may be improved by higher degrees of diversity,[283] an assertion that may hold particularly valid for transnational litigation.[284] The incommensurability of building externally-facing aspects of the legal system predicated on inclusiveness with internally-facing ones that precludes diversity presents problems for the FROL.

Homogeneity of norms and personnel is not the only shortcoming of the Chinese legal system as it tries to globalize, but is part of China's broader domestic incapacity problems, problems exacerbated by an opaque system and authoritarian regime. For instance, whereas China's Ministry of Public Security has established a Chinese police liaison officer in Fiji to "enhance police co-

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[280] Shuangyu faguan duiwu jianshe qingkuang ji peiyang lujing tansuo: Xinjiang Wei wu'er Zhizhiqu gaoji renmin fayuan zhengzhibu ketizu (双语法官队伍建设情况及培养路径探索：新疆维吾尔自治区高级人民法院政治部课题组) [Exploration of the Construction Teams of Bilingual Judges and Their Training Paths: The Research Group of the Political Department of the Higher People's Court of Xinjiang Uyghur Autonomous Region], in Renmin fayuan duiwu jianshe: diaoyan wenji (人民法院队伍建设：调研文集) [People's Court Team Building: A Collection of Research Teams], Xu Jiaxin (徐家新), ed. 328, 329 (2016).

[281] *Id*.

[282] Carolyn B. Lamm, *Diversity and Justice*, 48 JUDGES' J. 1 (2009); Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW. U. L. REV. 587 (2011). The legitimacy of the Party-State also depends on its legal institutions. *See* Taisu Zhang & Tom Ginsburg, *China's Turn Toward Law*, 59 VA. J. INT'L L. 307, 313 (2019).

[283] Sean Farhand & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J. L., ECON., & ORG. 299, 300 (finding that the presence of women on panels in federal appeals courts shapes their decisions in discrimination cases); Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts* 114 YALE L. J. 1759, 1761 (2005) (concluding that the gender composition of the bench affected federal appellate court outcomes in Title VII sexual harassment and sex discrimination cases).

[284] Mathilde Cohen, *Symposium Introduction: What Can We Learn From Transnational Courts About Judicial Diversity?* 34 CONN. J. INT'L L. 278, 280 (2019) (underscoring the value of judicial diversity as "whether and to what extend judges come from a variety of backgrounds and life experiences" in transnational courts).

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operation efforts between the two countries,"[285] including surveilling Chinese nationals there, Chinese law enforcement back home is "weak and plagued by problems of resources, enforcement, and oversight in virtually every area of policing except protest response." [286] Likewise, in the course of a much-publicized campaign to increase judicial transparency, the SPC touts "model cases" for the BRI to showcase to the world, meanwhile, the online database of cases has seen geo-fencing if not greater censorship.[287] In much the same way, while representatives of the China Law Society travel to developing countries to "tell the story of Chinese law," legal scholars back in the PRC suffer under the "systematization of evil."[288] Indeed, while Xi speaks at UN General Assembly meetings about China's version of human rights, meanwhile the Party-State has been repressing China's own human rights lawyers in a nation-wide crackdown, some seven years in the making.[289]

Perhaps most poignantly, the Party-State claims to offer a more decolonized developmental model, one based on "mutual respect, equity, justice and win-win cooperation [to] build an open, inclusive, clean and beautiful world,"[290] and yet it has effectively implemented settler colonialism in Xinjiang. Contrary to pronouncements of supporting the rights of nonwhite and nonmajority peoples, the Party-State has sought to radically transform Uyghur and other Muslim minorities' culture, language, religion, community, and family structures, suggesting that the PRC is reproducing some of the ills of racial capitalism committed by the U.S.[291] Likewise, whereas the Chinese entry into

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[285] Arieta Vakasukawaqa, *Qiliho: Chinese police liaison to enhance partnership*, THE FIJI TIMES (Sept. 13, 2021), https://perma.cc/UHF7-5VGA.

[286] SUZANNE E. SCOGGINS, POLICING CHINA: STREET-LEVEL COPS IN THE SHADOW OF PROTEST 3 (2021).

[287] *Compare* Zuigao renmin fayuan (最高人民法院) [SPC], Di'er pi she "Yidaiyilu" jianshe dianxing anli (第二批涉"一带一路"建设典型案例) [The Second Batch of 'BRI' Model Cases] (May 15, 2017), https://perma.cc/S9JL-B2VE *with* Luo Jiajun & Thomas Kellogg, *Verdicts from China's Courts Used to Be Accessible Online. Now They're Disappearing*, CHINAFILE (Feb. 1, 2022), https://perma.cc/ALF3-XUX7.

[288] Lao Dongyan (劳东燕), *Zhimian zhenshi de shijie (直面真实的世界) [Facing the Real World*], CHINA DIGITAL TIMES (Jan. 29, 2022), https://perma.cc/KP9R-CYFK (describing life as a legal scholar).

[289] Hualing Fu, The July 9th (709) Crackdown on Human Rights Lawyers: Legal Advocacy in an Authoritarian State 27 J. Contemp. Ch. 554 (2018).

[290] State Council Information Office of the PRC, China's International Development Cooperation in the New Era 6 (Jan. 2021), https://english.www.gov.cn/archive/whitepaper/202101/10/content_WS5ffa6bbbc6d0f72576943922.html.

[291] Vincent Wong, *Racial Capitalism with Chinese Characteristics: Analyzing the Political Economy of Racialized Dispossession and Exploitation in Xinjiang*, 3 AfJIEL 1 (2022); DARREN BYLER, TERROR CAPITALISM: UYGHUR DISPOSSESSION AND MASCULINITY IN A CHINESE CITY (2022).

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global development may be predicated on offering an alternative to international financial institutions and erstwhile colonial powers as donors, in fact, it may be employing the same legal weapons used on China by European colonials.[292] These are just a few examples attendant to the internationalization of what I have called elsewhere China's "legal surrealism," a problem which undercuts legal cosmopolitan futures.[293]

China's global ambitions render it harder for the Party-State to continue to monopolize information about China. As more of China's would-be partners encounter the growing gap between China's cosmopolitan globalization and its own domestic challenges, including its desert of diversity, they may question the wisdom of China-led cosmopolitanism. In much the same way that the erosion of the U.S.'s domestic/international divide delegitimized liberal internationalism, [294] so, too, may a similar erosion detract from China's cosmopolitan aspirations. This assertion is not a foregone conclusion but goes to the center of international debates about business and human rights in the context of China's global supply chains. Whereas some business leaders accept the Party-State's version of its rule, there are cracks showing in would-be Chinese legal cosmopolitanism.[295] The more general conclusion is that external-facing legal orders cannot grow unhinged from internal legal orders, eventually the limitations of the latter will catch up with the former.

V. IMPLICATIONS FOR US RELATIONS WITH CHINA AND THE GLOBAL SOUTH

What are the implications for the U.S. and its relationships with low-income and middle-income countries in the Global South? This Article suggests that there are causal links between a state's approach towards foreign and international law and a number of policy concerns from that state's presence in international economic law to its participation in legal development assistance.

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[292] *See, e.g.*, Sujith Xaver, Amar Bhatia & Adrian A. Smith, *Indebted Impunity and Violence in a Lesser State: Ethno-Racial Capitalism in Sri Lanka* 22 J. INT'L ECON. L. 277, 298 (2022) ("…the territorial lease that China was once notoriously subjected to by the British was not part of its own IEL/BRI arsenal.").

[293] *See supra* note 42.

[294] Beate Jahn, *Liberal Internationalism: History Trajectory and Current Prospects*, 94 INT'L AFFAIRS 43, 45 (2018).

[295] *Compare* Robin Brant, *Winter Olympics 2022: China sells Xinjiang as a winter sports hub*, BBC NEWS (Jan. 19, 2022), https://perma.cc/Y4KP-CHP9 (quoting the head of Burton's China subsidiary saying he did not want to "divorce" Burton from Xinjiang despite allegations of human rights abuse) *with* Alison Ross, *Born resigns from expert committee of Chinese court*, GLOBAL ARB. REV. (Jan. 24, 2022) (quoting Gary Born, a world-renowned arbitrator, who quite the CICC International Expert Committee reasoning "I believe the rule of law and protections of fundamental human rights and civil liberties are better served through my resignation than through continued association with the court's work.").

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The U.S. can learn from what China is doing, without mimicking it. There are a number of key differences, then, between what the Chinese are offering and what the U.S. has done historically.

First, as a basic observation: the Chinese are willing to become involved in many developing countries which the U.S. avoids. Mainly through its soft power, but also through its deployment of FROL-inspired thinking in host states, China is shaping perceptions about its government, people, and companies overseas.[296] For a host of reasons, including political liability, the U.S. refrains from engaging with many states with nondemocratic political systems, which may work against U.S. long-term interests in those countries. Second and related, the type of involvement by Chinese actors differs from that of U.S. counterparts. To support its economic governance abroad, China is building elite professional networks and institutions in developing countries.[297] The U.S. has mainly refrained from such types of networks for dispute resolution, although there are exceptions, including the Standing International Forum of Commercial Courts, perhaps a successor to Slaughter's "global community of courts" (albeit one led by the British and not the Americans)[298] and also JAMS, which is the most internationalized of U.S. alternative dispute resolution organizations.[299] Rather, the U.S. has historically focused on legal development assistance, including funding and operating legal education, legal aid, criminal defense, and access to justice programs in recipient states.[300] So rather than build elite networks, the U.S. approach has been to focus on the legal needs of the marginalized.

If the U.S. wants to compete with China, it needs to look both outward and inward. Looking outward means refining long-standing approaches to foreign law and international law in its development assistance to low-income and middle-income countries. The U.S. can build meaningful relationships with partners in such countries, but only if they are based on willingness to actually listen to local needs. One of the long-standing critiques of U.S.-led law and development programs was that they were ethnocentric.[301] Likewise, critical commentary on the liberal internationalists' global courts was that they were an elite and exclusive exercise.[302] As part of the U.S.'s post-Afghanistan recalibration of its presence in fragile states, it needs to return to the basics in

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[296] *See generally*, MARIA REPNIKOVA, CHINESE SOFT POWER (2022).
[297] *See supra* note **Error! Bookmark not defined.**.
[298] Personal observation, New York City, Sept. 28, 2018 (attending the 2018 meeting of the Standing International Forum of Commercial Courts).
[299] JAMS Global, https://perma.cc/432T-VFFB.
[300] *See supra* note 98.
[301] *See generally*, David M. Trubek, *Law and Development: Forty Years after 'Scholars in Self-*Estrangement', 66 U TORONTO L. J. 301 (2017) (reflecting on forty years of law and development, identifying past faults, and possible avenues for future research).
[302] *See infra* note 106.

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terms of studying local needs.[303] If legal development assistance requires a reboot, then U.S. public relations needs an even greater overhaul. Chinese soft power is distorting if not illusory, yet it is persistent and increasingly sophisticated. The Party-State has gained proficiency in supplying its narrative overseas; U.S. development agencies need to highlight the public goods they are creating in recipient countries, and specifically, they need to create platforms for those beneficiaries to tell their own stories.

The U.S. does not, of course, have to follow the Chinese approach to legal cosmopolitanism, as that way (to date, at least) leads to surface over substance and, worse, to possible exploitation. Yet there is the worrying trend in some government agencies that suggests that the U.S. is doing just that: following China.[304] The Build Back Better World and Blue Dot Network are presented as antidotes to the BRI. While the Chinese are onto something in terms of supplying infrastructure to host states, the infrastructure-driven approach allows China to set the agenda for development assistance and legal cooperation abroad. The U.S. had earlier jettisoned this approach in the 1970s.[305] The U.S. does not have to forego infrastructure development entirely, and the idea of marrying "good governance" with "good infrastructure" has appeal; further, there may be spaces for the U.S. to supply particular types of infrastructure, for example, digital infrastructures as part of digitally-driven development in host states. Yet, crucially, the U.S. has a competitive advantage in terms of the quality of its legal services (legal industry, legal education, and public law) and it is this advantage which, when wedded to greater local knowledge, can lead to productive results, whether commercial or democratizing.[306]

The U.S., however, can only do the above if it also looks inward. Just as the Chinese judiciary lacks representation of its diverse population ensuring legal norms diverge from societal expectations, so, too, does the U.S. dispute resolution field have a diversity problem. Diversity is not dispositive but rather indicative of legal cosmopolitanism. To be sure, this applies to not only diversity

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[303] Certainly, I am not the first to make such a suggestion, although the current low-point in U.S. development assistance would seem to be a fortuitous time to reflect on previous calls for local knowledge. *See, e.g.*, JAMES FERGUSON, DEVELOPMENT, DEPOLITICIZATION, AND BUREAUCRATIC POWER IN LESOTHO (1990) (showing how development programs in Lesotho often demonstrate ignorance of local realities).

[304] Andrea Brinza, *Biden's "Build Back Better World" Is an Empty Competitor to China*, FOREIGN POLICY (June 29, 2021), https://perma.cc/V8H6-P4PR.

[305] Congressional Research Service, *The Overseas Private Investment Corporation: Background and Legislative Issues*, EVERYCRSREPORT.COM (Dec. 22, 2016), https://perma.cc/B2BG-A74V.

[306] *See generally*, ERIK GILBERT JENSEN & THOMAS C. HELLER, BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (2003) (suggesting evidence-based approaches to legal development assistance).

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among adjudicators but also among juries and legislatures, each of which may affect the governance of transnational litigation.[307] The broad take-away is that American cosmopolitanism has become hollowed out from the core, exposing its limitations to prospective audiences in the Global South.[308] America's relationship with external legal orders can only be fully reset once it has turned inward and reconciled the gaps between its Constitutional rights and racialized inner empire. Just as diversity needs to be protected, so, too does freedom of speech (e.g., CRT) which resists creeping authoritarianism at home and ensures the flourishing of democratic institutions. Most importantly, Americans need to do a better job of listening to each other. Only then are Americans well-positioned towards perhaps the most radical solution to the kinds of problems that are born out of poor legal integration across the world, namely, collaboration between the U.S. and China on cross-border legal problems, including commercial, developmental-assistance, and their various permutations. Perhaps combining Chinese "hard" infrastructure with American "soft" infrastructure presents the best possibility for developing countries to emerge into more sustainable futures.

CONCLUSION

Much of the focus on U.S.-China relations is understandably bilateral, and increasingly framed as one of "great power competition"; yet, an overlooked dimension is how the U.S. and China are respectively shaping international governance in part through their evolving relationships with low- and middle-income countries in the Global South. One window into these relationships is the degree to which the respective capital-exporting country integrates foreign and international law into its version of global rule-making. Historically, China has had to learn global governance, whether trade law or development finance, from the West, yet from at least the 2008 financial crisis onward, China has endeavored to build its own vision for world order. Nonetheless, China faces considerable obstacles in fulfilling its aims of becoming a center of legal cosmopolitanism, obstacles that are both ideological and institutional.

Ideologically, China features simultaneously a drive to internationalize

[307] *See, e.g.*, Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497, 1503 (2003) (finding a perception of bias against foreign litigants by U.S. juries in patent litigation); Asif Efrat & Abraham L. Newman, *Cultural Intolerance and Aversion to Foreign Judgments in the American States*, ASIAN J. L. & ECON. 1, 1 (2018) (identifying certain U.S. state laws as reflecting the xenophobic bias of that state's population). *See also supra* note 10 (noting the ban on the use of Islamic law in certain U.S. states).

[308] *See* Dudziak, *supra* note **Error! Bookmark not defined.**.

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and plant its flag,[309] and a countervailing tendency of protectionism. Along with Xi Jinping's calls to build a FROL, nationalism is also growing in China, and with it, the space for foreign legal professionals to practice law in China, appears to be diminishing. Nationalist sentiment and outright racism and xenophobia[310] undercut the Party-State's attempts to portray itself as an enlightened civilization. Following the exceptional times of the COVID-19 pandemic, the Party-State has effectively shut the country for three years ongoing, meaning that foreign legal professionals, academics, and businesspeople have not been able to travel to China, a situation that does not ameliorate cross-border misunderstandings.

Assuming that legal cosmopolitanism is possible ideologically, then, institutionally, China does not yet have the capacity, whether in private international law or foreign relations law, to realize its goals. Domestically, its expertise is shallow. Yet, the idea of legal cosmopolitanism has attraction in developing countries, particularly those that have suffered under Euro-American colonialism. The Party-State has been busy in the last decade (despite the pandemic in recent years) in building strong ties with partner states in the Global South. China clearly wants to be seen by such countries as a leader in law and development. Whether its interventions can reflect vibrant legal cosmopolitanism remains to be seen.

Meanwhile, on both fronts of ideology and institutions, the U.S. appears to be drifting. The problems of nationalism, racism, and xenophobia are certainly more violent if not more virulent in the U.S. than China. Whereas the Biden Administration has sought to resuscitate liberal internationalism lite, its reception by foreign states has been mixed. For the most part, neither the U.S. government nor the private dispute resolution industry have seized on the significant symbolic capital the U.S. has in the legal field. Yet to fully exploit such capital, the U.S. needs a serious recalibration in how it approaches questions of international and foreign law at home and the law of host states overseas. Such a recalibration starts with cultivating legal professionals, and especially those involved in dispute resolution, who reflect the U.S.'s own demographic diversity and its deep ties to countries throughout the world.

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[309] *See generally*, KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW (2009) (revealing the history of extraterritoriality under U.S. law).

[310] Reuters Staff, *African ambassadors complain to China over 'discrimination' in Guangzhou*, REUTERS (Apr. 11, 2020), https://perma.cc/9W7B-ZX9K (African ambassadors' drawing the PRC government's attention to racial discrimination experienced by African migrants in Guangzhou following the COVID-19 outbreak).

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