

**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 system's foreign-facing elements and its domestic ones? Contrary to "dualistic" theories ("dualism," "legal dualism," the "dual state," etc.) which may 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. Compatibility between the foreign/external and domestic/internal aspects of a legal system could be measured

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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). 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. 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 one of 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 United States 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 United States 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, 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

“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 School¹

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, 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

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], Fudan Daxue Faxueyuan Xueyuan Xinwen (复旦大学法学院学院新闻) [Fudan Univ. L. Sch. News.] (Nov. 22, 2021), <https://law.fudan.edu.cn/67/51/c27154a419665/page.htm> [<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 Buyi 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], Xinhuashe (新华社)[Xinhua News Agency] (Nov. 17, 2020), http://www.xinhuanet.com/politics/2020-11/17/c_1126751678.htm, [<https://perma.cc/C5Q3-YRGG>].

³ 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] (Promulgated by Fourth Plenary Session of the Eighteenth Central Comm. of the CCP, Oct. 23, 2014), Dang (党建网) [Dangjian network], http://www.dangjian.cn/shouye/zhuanti/zhuantiku/dangjianwenku/quanhui/202005/t20200529_5637876.shtml, [<https://perma.cc/3RT9-7RQR>] (“Make ruling

for building systems, both within China and outside of the PRC, that integrate Chinese law 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 U.N. 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 II 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

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.").

⁴ See *infra* text accompanying note 255.

⁵ *US President Rejects Globalism in Speech to UN General Assembly's Annual Debate*, U.N. NEWS (Sept. 25, 2018), <https://news.un.org/en/story/2018/09/1020472>, [https://perma.cc/9TQE-7QGY].

⁶ HAROLD HONGJU KOH, *THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW* 40-41 (2019).

⁷ John Gramlich, *How Trump Compares With Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/> [https://perma.cc/8FFA-SY9M].

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 United States 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 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 United States' 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 a 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

⁸ *Roper v. Simmons*, 543 U.S. 551, 627 (2005) (Scalia, J., dissenting) ("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.*, 142 S. Ct. 2228 (finding, in a six to three majority, that the U.S. Constitution does not confer a right to abortion).

⁹ *See generally* 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).

¹⁰ Swathi Shanmugasundaram, *Anti-Sharia Law Bills in the United States*, SPLC (Feb. 5, 2018), <https://www.splcenter.org/hatewatch/2018/02/05/anti-sharia-law-bills-united-states> [<https://perma.cc/HN37-ETF2>].

¹¹ Pamela Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1081 (2015); Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941, 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 Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004); Sujit Choudhry, *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*

divergence between the nature of foreign-facing aspects and domestic ones is plausible. This thinking is present 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

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 Donald Earl Childress III, *Rethinking Legal Globalization: The Case of Transnational Personal Jurisdiction*, 54 WM. & MARY L. REV. 1489 (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, for example, CURTIS BRADLEY, *The Dynamic and Sometimes Uneasy Relationship Between Foreign Relations Law and International Law*, in BRIDGES AND BOUNDARIES: ENCOUNTERS BETWEEN FOREIGN RELATIONS LAW AND 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*, 2010 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).

¹⁴ See Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529 (1999) (arguing that the United States is traditionally “dualist” in its approach to international law).

¹⁵ See Kathryn Hendley, *Varieties of Legal Dualism: Making Sense of the Role of Law in Contemporary Russia*, 29 WIS. INT’L L.J. 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*, 43 LAT. AM. PERSP. 172 (2016) (finding that human rights law in Brazil features both colonialist and multicultural perspectives). See generally, EYAL BENVENISTI, *LEGAL DUALISM: THE ABSORPTION OF THE OCCUPIED TERRITORIES* (2019) (analyzing the application of Israeli law in the occupied territories).

¹⁶ See generally 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”).

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 Theory, and grounded in a comparative outlook, the contrarian 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

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 United States in the 1960s negatively impacted the image of the United States 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,” Erie, *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 WORLDING CITIES: ASIAN EXPERIMENTS AND THE ART OF BEING GLOBAL 11 (Anaya Roy & Aihwa Ong, eds. 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 generally 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. COMPAR. L. 936 (2011) (arguing that China’s legal development is devolving into authoritarianism); EVA PILS, HUMAN RIGHTS IN CHINA: A SOCIAL PRACTICE IN THE SHADOWS OF AUTHORITARIANISM (2017) (showing how human rights activists operate in an increasingly hostile environment); MARY E. GALLAGHER, AUTHORITARIAN LEGALITY IN CHINA: LAW, WORKERS, AND THE STATE (2017) (demonstrating how the legal system fails to protect workers’ rights); Hualing Fu & Michael Dowdle, *The Concept of Authoritarian Legality: The Chinese Case*, in AUTHORITARIAN LEGALITY IN ASIA 63

and commitments to foreign and international law characterizes 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 for U.S. audiences.²⁴

Before proceeding to the analysis, I first explain terms. Firstly, by “domestic” or “internal” versus “foreign” or “external”-facing elements of a legal system, I mean the following: the former refer to those laws, rules, and institutions which are designed principally to deal with matters of domestic governance, that is, between and among nationals (e.g., transactions, civil and commercial relations, etc.), including their disputes, whereas the latter refer to the corresponding legal matters pertaining to foreign governance, that is, between nationals and foreigners or between foreigners, often involving issues of foreign law. There are caveats to such categorization. Not all legislation or judicial activity can be

(Weitseng Chen & Hualing, Fu, eds., 2020) (suggesting that, in China, law operates to control society and legitimize state power); Donald C. Clarke, *Order and Law in China*, 2022 U. ILL. L. REV. 541, 554 (arguing that China is building not a legal system but one for “order maintenance”).

²² See generally JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) (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) (contending 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 William W. Burke-White & Anne-Marie Slaughter, *The Future of International Law is Domestic (or, The European Way of Law)*, 47 HARV. INT’L L. J. 327 (2006), reprinted in *NEW PERSPECTIVES ON THE DIVIDE BETWEEN DOMESTIC AND INTERNATIONAL LAW* 110 (Janne E. Nijman & André Nollkaemper eds., 2007) (finding a mutual impact between politics at the domestic and international levels).

²⁴ See *infra* text accompanying notes 44-48.

categorized as “internal” or “external.” For a number of reasons, including the state’s international law commitments or doctrinal evolution, there is significant line-blurring. Of course, there is deep interdependence between domestic law and international law. For example, domestic law can result from that state’s treaty obligations or domestic law can profoundly shape the state’s approaches toward international law.²⁵ Likewise, domestic legislation can include explicit provisions dealing with foreign-related matters.²⁶

Notwithstanding the foregoing, and while demonstrating overlap and mutual constitutiveness, the categories can be useful heuristics to explain how states deal, in this case, with difference domestically and across borders. To varying degrees, both the U.S. and PRC legal systems have noticeable “internal” and “external” aspects. In the U.S. case, given the much longer period for the evolution of its common law, a period over two hundred years, the categories may be more incremental than distinct but they are nonetheless there.²⁷ The Chinese case is more dramatic given its shorter history, such that many aspects of the legal system during the 1980s and 1990s pertained to domestic governance whereas outward-facing considerations gained prominence after the 2001

²⁵ See Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181, 183-84 (1996) (describing how public and private actors interact in a variety of for a to make and internalize rules of transnational law); Burke-White & Slaughter, *supra* note 23, at 328 (arguing that international law directly engages domestic institutions by strengthening, backstopping, and compelling them to act). See generally NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL & INTERNATIONAL LAW (Janne Nijman & André Nollkaem eds., 2007); DAVID THÓR BJÖRGVINSSON, *THE INTERSECTION OF INTERNATIONAL LAW AND DOMESTIC LAW: A THEORETICAL AND PRACTICAL ANALYSIS* (2017).

²⁶ See, e.g., *Zhonghua Renmin Gongheguo Wangluo Anquanfa* (中华人民共和国网络安全法) [Cybersecurity Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Nov. 7, 2016, effective June 1, 2017) 2016 STANDING COMM. NAT’L PEOPLE’S CONG. Gaz. 6., art 5 (China) (“The state takes measures for monitoring, preventing, and handling cybersecurity risks and threats arising both within and without the mainland territory of the People’s Republic of China.”).

²⁷ See, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (establishing the “minimum contacts” test for establishing jurisdiction over an out-of-state defendant). For caselaw that has extended the “minimum contacts” test to foreign parties, see *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (“Even when the cause of action does not arise out of or relate to the foreign corporation’s activities in the forum State, due process is not offended by a State’s subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation.”).

WTO accession.²⁸ The Chinese case shows how legislatures may design statutes with specific jurisdictional and subject matters in mind, some of which may pertain primarily to domestic affairs and others to foreign relations.²⁹

Secondly, 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).³⁰ Different legal and political systems may have varying ways of organizing difference and for their own aims, but they each recognize difference. For example, Western liberalism has privileged the individual as rights-bearer vis-à-vis the state and conferred rights to her against the state,³¹ whereas imperial and contemporary China have, under ideologies of Confucianism and communism, respectively, emphasized the paternalistic state as granting different privileges and rights to groups ordered within the broader political community.³²

²⁸ See Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN L. 1, 11-17 (2006) (noting that there was a basic legal framework for international investment and trade issues beginning in the late 1970s); Donald C. Clarke, *China’s Legal System and the WTO: Prospects for Compliance*, 2 WASH. U. GLOB. STUD. L. REV. 97, 97 (2003) (explaining how the WTO accession allowed Chinese reformers to push through important legal and economic policy changes).

²⁹ See *infra* text accompanying note 298.

³⁰ For discussions of the recognition (or not) of categories of legal difference, see, for example, Boaventura de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, 14 J.L. & SOC’Y 279, 281-82 (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, 8 (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 Version of Legal Pluralism*, 27 J.L. & SOC’Y 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 from 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).

³¹ For studies concerning legal treatments of non-legal categories, see ELIZABETH A. POVINELLI, *THE CUNNING OF RECOGNITION: INDIGENOUS ALTERITIES AND THE MAKING OF AUSTRALIAN MULTICULTURALISM* (2002) (providing an ethnographic account of how liberal law in Australia paradoxically marginalizes Aboriginal peoples); CHARLES TAYLOR, *The Politics of Recognition*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 44 (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* 1 (1996) (countering that group rights for minorities are consistent with liberal theory).

³² For a treatment of Chinese imperial treatments of ethnic difference, see WANG HUI, *CHINA FROM EMPIRE TO NATION-STATE* 119-22 (Michael Gibbs Hill trans., 2014) (discussing how imperial discourses of categories of difference between

Thirdly, 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,”³³ but non-Europeans, too. While the United States has been a wellspring of dreaming, China is a site of particularly ambitious—albeit deferred—dreaming, as a would-be global economic superpower.³⁴ 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.³⁵

Fourthly, “China” in my usage refers to a constellation of actors, including not only government officials but also state-owned

foreigners and Chinese (*yi xia zhi bian*) suggest that Confucian ritual could transform such categories making the “outer” the “inner” and the “foreigner” the “Chinese”); SHUCHEN XIANG, CHINESE COSMOPOLITANISM: THE HISTORY AND PHILOSOPHY OF AN IDEA (2023) (arguing that imperial China was a hybrid of coalescing cultures). For a contemporary analysis of ethnic diversity in China today, see Ma Rong (马戎), Lijie Minzu Guanxi De Xin Silu – Shaoshu Zuqun Wenti De “Quzhengzhihua” (理解民族关系的新思路—少数民族问题的“去政治化”) [New Perspectives to Understand Ethnic Relations: De-Politicization of Ethnicity] 41 Beijing Daxue Xuebao: Zhexue Shehui Kexueban (北京大学学报: 哲学社会科学版) [J. PEKING UNIV.: HUMANS. & SOC. SCIS.] 123, 123 (2004) (arguing that granting “preferential policies” (*youhui zhengce*) to ethnic minorities in China has politicized them and weakened their cultural identification with the Chinese nation-state).

³³ See generally 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).

³⁴ 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 [American] dream remains tenuous.”), with Xi Jinping (习近平), Zai Cangan “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 NEWS] (Nov. 30, 2012), <http://www.12371.cn/special/xjpyls/zgmls/1/> [https://perma.cc/A9LB-BXV8] (“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.”).

³⁵ See *infra* Part IV.

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 degrees of success.³⁶ To summarize, internal-facing aspects of the legal system of the United States or China deal with difference in the form of non-state law, religious law, customary law, and the like, as well as the sources of such law, particularly among nationals of that state; external-facing aspects are oriented toward questions of foreign and international law and their authorities, including matters involving foreign parties.

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 with regard 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 United States 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.³⁷ This order was meant to be inclusive with general rules that provide public goods for all.³⁸ As part of this order, it established international development agencies to transfer wealth from developed to developing economies and promoted democratization.³⁹ This vision has, however, had an underside, and

³⁶ By "Party-State," I refer to the integration of the CCP into all government functions.

³⁷ See 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*, 40 VA J. INT'L L. 1103, 1109 (2000) (envisioning a global community of courts that support human rights).

³⁸ See Daniel Deudney & G. John Ikenberry, *The Nature and Sources of Liberal International Order*, 25 REV. INT'L STUD. 179, 190 (1999) (positing that liberal states pursue economic openness).

³⁹ See generally DAVID A. BALDWIN, *FOREIGN AID AND AMERICAN FOREIGN POLICY* (1966) (providing a sourcebook on how U.S. foreign policy informs its aid programs to developing countries); Hollis B. Chenery & Alan M. Strout, *Foreign Assistance and Economic Development*, 56 AM. ECON. REV. 679 (1966) (evaluating the process of

one whose shadow has grown in recent years: unilateralism, de-democratization, populism, racism and misogyny, and national security over individual liberties.⁴⁰

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.⁴¹ Chiefly, as opposed to the United States 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.⁴² While the two visions stand in some tension, they also

development with external assistance); ROBERT A. PACKENHAM, *LIBERAL AMERICA AND THE THIRD WORLD: POLITICAL DEVELOPMENT IDEAS IN FOREIGN AID AND SOCIAL SCIENCE* (1973) (analyzing American conception of the political systems of third world countries).

⁴⁰ See 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 hyper globalization that accompanied the spread of liberal democracy globally led to economic hollowing out in those states, causing backlash). See generally *THE DOWNFALL OF THE AMERICAN ORDER?* (Peter J. Katzenstein & Jonathan Kirshner eds., 2022) (chronicling the decline of the American liberal order); PANKAJ MISHRA, *AGE OF ANGER: A HISTORY OF THE PRESENT* 14-15 (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 AFFS. 151, 151 (2018) (positing that liberal internationalism is elitist and Eurocentric).

⁴¹ See 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 (2020) (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 (2021) (identifying the mechanisms of Chinese law and development); CAI CONGYAN, *THE RISE OF CHINA AND INTERNATIONAL LAW: TAKING CHINESE EXCEPTIONALISM SERIOUSLY* 10-11 (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); Congyan Cai, *International Law in Chinese Courts During the Rise of China*, 110 AM. J. INT'L L. 269, 271 (2016) (defining the "Beijing consensus" as prioritizing economic growth over political freedom and maintaining the authoritarian regime).

⁴² Compare PACKENHAM, *supra* note 39, at 3919-20 (explaining how doctrines and theories of development stemmed from certain traditions of American

dovetail in a number of respects as both the United States and China are subject to the same forces of (de)globalization and its negative externalities.⁴³ In short, one way to decode the superpowers' approach to global ordering is to examine how they have treated difference – as law and its authorities – domestically.

American audiences should take note: China increasingly seeks to shape law outside of China, mainly through transnational law,⁴⁴ and does so in ways that both borrow and diverge from approaches taken by the United States.⁴⁵ Whereas the political climate in the United States 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, according to some evidence at least, be fomenting.⁴⁶ More

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.").

⁴³ See Henry Farrell & Abraham L. Newman, *Weaponized Interdependence: How Global Economic Networks Shape State Coercion*, in THE USES AND ABUSES OF WEAPONIZED INDEPENDENCE 19, 50 (Daniel W. Drezner, Henry Farrell & Abraham L. Newman eds., 2021) (analyzing how U.S. and Chinese reliance on global economic networks can cause disadvantages); ANTHEA ROBERTS & NICOLAS LAMP, SIX FACES OF GLOBALIZATION: WHO WINS, WHO LOSES, AND WHY IT MATTERS 127 (2021) (explaining how U.S.-China competition has resulted in a shift to relative gains). See generally 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).

⁴⁴ 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).

⁴⁵ Compare Shaffer & Gao, *supra* note 41, at 608 ("China builds from and repurposes Western legal models."), with Erie, *supra* note 41, at 56 (suggesting that China's efforts to create cross-border order differ from those of the United States).

⁴⁶ See Seth Schindler, Nicholas Jepson & Wenxing Cui, *Covid-19, China and the Future of Global Development*, 2 RSCH. IN GLOBALIZATION 1, 4 (2020) (finding that Chinese approaches to development may constitute an appealing alternative to

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 countries.⁴⁷ 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.⁴⁸

U.S.-led development for many developing countries post-COVID); Thomas Ameyaw-Brobby, *A Critical Juncture? Covid-19 and the Fate of the U.S.-China Struggle for Supremacy*, 184 *WORLD AFFS.* 260, 262 (2021) (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 RSCH. CTR. (Oct. 6, 2020), <https://www.pewresearch.org/global/2020/10/06/unfavorable-views-of-china-reach-historic-highs-in-many-countries/> [<https://perma.cc/QM8B-5A48>]. But see Josephine Appiah-Nyamekye Sanny & Edem Selormey, *Africans Welcome China's Influence but Maintain Democratic Aspirations*, AFROBAROMETER, Nov. 15, 2021, at 1, 2, https://www.afrobarometer.org/wp-content/uploads/2022/02/ad489-pap3-africans_welcome_chinas_influence_maintain_democratic_aspirations-afrobarometer_dispatch-15nov21.pdf [<https://perma.cc/Z4CK-X4P8>] (identifying almost two-thirds of respondents as saying that China's economic and political influence in their country is "somewhat positive" or "very positive").

⁴⁷ See generally KEVIN P. GALLAGHER, *THE CHINA TRIANGLE: LATIN AMERICA'S BOOM AND THE FATE OF THE WASHINGTON CONSENSUS* (2016) (evaluating opportunities and challenges that China's economic growth presents for countries of Latin America); DAWN C. MURPHY, *CHINA'S RISE IN THE GLOBAL SOUTH: THE MIDDLE EAST, AFRICA, AND BEIJING'S ALTERNATIVE WORLD ORDER* (2022) (contending that China is constructing an alternate international order through its interactions with Middle East and Sub-Saharan Africa); CHINA'S GLOBAL ENGAGEMENT: COOPERATION, COMPETITION, AND INFLUENCE IN THE 21ST CENTURY (Jacques deLisle & Avery Goldstein eds., 2017) (exploring how China is reshaping international affairs in many dimensions through increased international involvement); GLOBAL CHINA: ASSESSING CHINA'S GROWING ROLE IN THE WORLD (Tarun Chhabra, Rush Doshi, Ryan Hass & Emilie Kimball eds., 2021) (evaluating China's actions on the global stage and the implications of China's growing global influence on the United States and the international legal order it established); CHING KWAN LEE, *THE SPECTER OF GLOBAL CHINA: POLITICS, LABOR, AND FOREIGN INVESTMENT IN AFRICA* (2018) (describing China's state-driven investment in Africa and evaluating the potential and perils it presents for African development); DAVID SHAMBAUGH, *CHINA GOES GLOBAL: THE PARTIAL POWER* (2013) (contending that China is only a partial player as opposed to developed nations and the United States).

⁴⁸ 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 generally Matthew S. Erie, *The Soft Power of Chinese Law*, 61 *COLUM. J.*

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 U.S. 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 United States which has seeped into international law. The United States 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.”⁴⁹ 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.⁵⁰

Organizationally, the remainder of this Article is comprised of five parts. In Part I, I explain in general terms how legal systems recognize difference in the form of non-domestic (or non-state) law externally and internally. Part II turns to the example of the United States. 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 Part III, 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 IV, I

TRANSNAT’L L. 1, 56 (2023) (contending that China is building a simulacral empire, based on discourses and international dispute resolution institutions that claim to represent South-South solidarity and common development).

⁴⁹ DANIEL BONILLA MALDONADO, LEGAL BARBARIANS: IDENTITY, MODERN COMPARATIVE LAW AND THE GLOBAL SOUTH 7 (Larissa van den Herik & Jean d’Aspremont eds., 2021) (defining “legal barbarians” as “those who are only poor versions of the original legal subjects”).

⁵⁰ For more on the “China, Law and Development” project, including publications, see CHINA, LAW AND DEVELOPMENT, <https://cld.web.ox.ac.uk/> [<https://perma.cc/52QU-ZNRU>].

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 V 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 the United States, 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,⁵¹ foreign relations law,⁵² international law,⁵³ multijurisdictional transactions,⁵⁴ transnational litigation,⁵⁵

⁵¹ See generally Curtis A. Bradley, *The Supreme Court as a Filter Between International Law and American Constitutionalism*, 104 CALIF. L. REV. 1567 (2016) (analyzing the interface between American constitutional law and international law).

⁵² See generally RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (AM. L. INST. 2018) (covering jurisdiction, effect of treaties, and sovereign immunity); Kevin Cope, Pierre-Hughes Verdier, & Mila Versteeg, *The Global Evolution of Foreign Relations Law*, 116 AM. J. COMPAR. L. 1 (2021) (providing a cross-jurisdictional study of how the domestic law of states interacts with international law).

⁵³ See generally Pierre-Hughes Verdier & Mila Versteeg, *International Law in National Legal Systems: An Empirical Investigation*, 109 AM. J. INT'L L. 514 (2015) (analyzing 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); COMPARATIVE INTERNATIONAL LAW (Anthea Roberts, Paul B. Stephan, Pierre-Hughes Verdier & Mila Versteeg eds., 2018) (arguing that states' different approaches to international law require a more comparative perspective).

⁵⁴ 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) (analyzing how lawyers, licenses in one state, can ethically advise on transnational deals).

⁵⁵ See 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, 4 (2022) (finding that, due to changes in procedural and substantive law,

judicial cooperation,⁵⁶ and legal development assistance.⁵⁷ For a number of reasons, each state must balance its receptiveness to non-domestic law with protecting its own sovereignty.⁵⁸ 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.⁵⁹

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 increasingly complex set of questions pertaining to foreign and international law. Topics on the reform agenda include *inter alia* (1) 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 (2) the extraterritorial application of PRC law, anti-

the United States may be less attractive as a forum for transnational disputes than conventionally thought).

⁵⁶ Charles H. Koch, Jr., *Judicial Dialogue for Legal Multiculturalism*, 25 MICH. 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 . . .").

⁵⁷ American Bar Association, *ABA Rule of Law Programs Have Global Impact*, 41 ARK. LAW. 14 (2006) (describing ABA programs in forty countries); 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, 274-45 (2020) (finding that U.S. rule-of-law programming in post-war Iraq suffered from lack of cultural awareness).

⁵⁸ See generally Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1175 (2007) (analyzing the United States' commitments under international comity doctrines against deference to foreign sovereigns).

⁵⁹ 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").

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, China's relationship with the United States, the dominant economy in the world, has become adversarial, making China's further integration with the world economy controversial.⁶⁰

China's reforms are indicative of an economic superpower's incorporation into international, transnational, and global legal orders.⁶¹ In putting China's reforms in a broader context, there are a couple of sets of distinctions that are important to keep in mind. The first distinction is between foreign law and international law. Foreign law here refers to laws of states other than the home state (e.g., the United States 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 second 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" (BRI),⁶² or, more recently, the "Global Development

⁶⁰ Mark Jia, *Illiberal Law in American Courts*, 168 U. PA. L. REV. 1685, 1713 (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*, 44 U. PA. J. INT'L L. 455 (2023) (finding that U.S. judges often inaccurately analyze the PRC legal system).

⁶¹ See GREGORY SHAFFER, *EMERGING POWERS AND THE WORLD TRADING SYSTEM: THE PAST AND FUTURE OF INTERNATIONAL ECONOMIC LAW* 262-63 (2021) (analyzing how China is building an economic order within the existing international economic legal system).

⁶² 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

Initiative”⁶³ and “Global Security Initiative,”⁶⁴ China has begun to promote cross-border and transboundary governance, including in such areas as trade and investment,⁶⁵ data governance,⁶⁶ financialization,⁶⁷ intellectual property and standard-setting,⁶⁸ maritime law,⁶⁹ cross-border dispute resolution,⁷⁰ and even space

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 generally MIN YE, *THE BELT AND ROAD AND BEYOND: STATE-MOBILIZED GLOBALIZATION IN CHINA: 1998-2018* (2020).

⁶³ 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 [<https://perma.cc/6TDR-7PFK>] (describing the Global Development Initiative, announced by Xi Jinping at the U.N. General Assembly in 2021, as implementing the U.N. Sustainable Development Goals through building platforms for cooperative development).

⁶⁴ 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 [<https://perma.cc/9RFB-57R3>] (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”).

⁶⁵ Vivienne Bath, *China’s Role in the Development of International Investment Law – From Bystander to Participant*, 15 *ASIAN J. WTO & INT’L HEALTH L. & POL’Y* 359, 359-60 (2020); Pasha L. Hsieh, *China’s Development of International Economic Law and WTO Legal Capacity Building*, 13 *J. INT’L ECON. L.* 997, 997 (2010); Heng Wang, *Selective Reshaping: China’s Paradigm Shift in International Economic Governance*, 23 *J. INT’L ECON. L.* 583, 583 (2020); CHINA’S INTERNATIONAL INVESTMENT STRATEGY: BILATERAL, REGIONAL, AND GLOBAL LAW AND POLICY 3 (Julien Chaisse, ed., 2018).

⁶⁶ 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).

⁶⁷ See generally 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 U. J. (PHIL. & SOC. SCI.)*] 105 (2021) (discussing prospects of renminbi internationalization).

⁶⁸ See, e.g., Peter K. Yu, *Building Intellectual Property Infrastructure along China’s Belt and Road*, 14 *U. PA. ASIAN L. REV.* 275, 275-76 (2019).

⁶⁹ See generally 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).

⁷⁰ See, e.g., ZHIQIONG JUNE WANG & JIANFU CHEN, *DISPUTE RESOLUTION IN THE PEOPLE’S REPUBLIC OF CHINA: THE EVOLVING INSTITUTIONS AND MECHANISMS* 175

law.⁷¹ 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 country⁷² 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.⁷³

In this Article, I compare and contrast the U.S. approach 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 United States 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.⁷⁴ 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 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

(2019) (assessing China’s internationalization of its dispute resolution mechanisms).

⁷¹ 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 Xuebao* (Zhhexue Shehui Kexueban) (山东大学 (哲学社会科学版)) [J. SHANDONG U. (PHIL. & SOC. SCI.)] 52, 60 (2020) (discussing China’s advancements in space law).

⁷² See Justice Steven Rares, *Commercial Issues in Private International Law*, in *COMMERCIAL ISSUES IN PRIVATE INTERNATIONAL LAW: A COMMON LAW PERSPECTIVE* 1, 1 (Michael Douglas, Vivienne Bath, Mary Keyes & Andrew Dickinson eds., 2019) (providing a generic definition of private international law).

⁷³ Curtis Bradley, *What is Foreign Relations Law?*, in *OXFORD HANDBOOK OF FOREIGN RELATIONS LAW* 4, 4 (Curtis A. Bradley ed., 2019) (defining “foreign relations law” as “the domestic law of each nation that governs how that nation interacts with the rest of the world”).

⁷⁴ 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).

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 Theory⁷⁵ and Third World Approaches to International Law,⁷⁶ as well as more contemporary theoretical reflections on the so-called “BRICS” (i.e., Brazil, Russia, India, China, and South Africa)⁷⁷—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

⁷⁵ See Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence*, 45 VILL. L. REV. 827, 827 (introducing the first symposium issue to apply Critical Race Theory to international law problems).

⁷⁶ See 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) [SOC. SCI.] 88, 88 (2011); BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES (Luis Eslava, Michael Fakhri & Vasuki Nesiiah eds., 2017) (analyzing Bandung Conference’s impact on third world countries and their struggle towards a new international justice system); James Thuo Gathii, *The Promise of International Law: A Third World View*, 36 AM. U. INT’L L. REV. 377, 377 (2021).

⁷⁷ See RECONCEPTUALIZING INTERNATIONAL INVESTMENT LAW FROM THE GLOBAL SOUTH (Fabio Morosini & Michelle Rattton Sanchez Badin eds., 2018) (providing a perspective on international economic law from host states); THE GLOBAL SOUTH AND COMPARATIVE CONSTITUTIONAL LAW (Philipp Dann, Michael Riegner & Maxim Bönnemann eds., 2020) (pluralizing comparative constitutional law from Global South views); William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARV. INT’L L.J. 1, 5 (2015) (finding the emergence of a “multi-hub” system with the emergence of new economies).

more universal it will be considered. International law was, in its origins, based on uniformity and homogeneity, and thus diversity allows it to break out of those bounds.⁷⁸

What Judge Yusuf refers to as “universalisation,” I call cosmopolitanism. Contrary to Judge Yusuf’s formulation, whereas universalization often connotes homogenization, legal cosmopolitanism, in the ideal, means law of and for the whole world.⁷⁹ 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.⁸⁰ While a complete delinking of nation-state from law is, under the status quo, impossible, states nonetheless endeavor to adopt various forms of legal cosmopolitanism.⁸¹

Whereas, classically, some imperial law and religious law (and empires that applied religious law) represented versions of cosmopolitanism,⁸² in the contemporary period, legal cosmopolitanism has assumed a number of forms. One derives from Kantian moral philosophy and argues for “global constitutionalism”

⁷⁸ Abdulqawi Yusuf, *Diversity of Legal Traditions and International Law: Keynote Address*, 2 CAMBRIDGE J. INT’L & COMPAR. L. 681, 681-83 (2013).

⁷⁹ *Cosmopolitan*, Oxford Eng. Dictionary, <https://www.oed.com/view/Entry/42259?redirectedFrom=cosmopolitan> [https://perma.cc/P4SP-KUYQ].

⁸⁰ *Contra* PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS 11-12 (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”).

⁸¹ See H. PATRICK GLENN, THE COSMOPOLITAN STATE 111-61 (2013) (identifying common laws, constitutionalism, and institutions as the sources of legal cosmopolitanism).

⁸² 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 R. 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 IN HONG KONG (2009) (showing how the conditions of postcoloniality shape cosmopolitan languages of law).

although this form is mainly of and for Europe.⁸³ Indeed, this version has informed a liberal cosmopolitanism that some have argued has become intrinsic in international law.⁸⁴ 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.⁸⁵ 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,”⁸⁶ 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.⁸⁷

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,”⁸⁸ so,

⁸³ 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).

⁸⁴ Ileana M. Porras, *Liberal Cosmopolitanism or Cosmopolitan Liberalism?*, in *PAROCHIALISM, COSMOPOLITANISM, AND THE FOUNDATIONS OF INTERNATIONAL LAW* 118, 123 (M.N.S. Sellers ed., 2012).

⁸⁵ See B. V. A. RÖLING, *INTERNATIONAL LAW IN AN EXPANDED WORLD* (Radhabinod Pal & B. V. A. Röling eds., 1960); Robert. Y. Jennings, *Universal International Law in a Multicultural World*, in *LIBER AMIORCUM FOR THE RT. HON. LORD WILBERFORCE* 40 (Marteen Bos & Ian Brownlie eds., 1987); ARNULF BECKER LORCA, *MESTIZO INTERNATIONAL LAW* (2015); Karen J. Alter, *From Colonial to Multilateral International Law: A Global Capitalism and Law Investigation*, 19 *INT’L J. CONST. L.* 798 (2021); Lena Salaymeh & Ralf Michaels, *Decolonial Comparative Law: A Conceptual Beginning*, 86 *RABEL J. COMPAR. L. & INT’L PRIV. L.* 166 (2022).

⁸⁶ DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* 6-7, 63, 66 (2000) (delinking modernity from the Enlightenment project).

⁸⁷ See *supra* text accompanying note 41.

⁸⁸ BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 6 (1983) (theorizing that the nation is an “imagine political community”).

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 United States through, for 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 United States is special among nation-states.⁸⁹ American legal exceptionalism draws attention to U.S. laws and its Constitution as integral to this status, and, further, suggests that the United States does not have much to learn from foreign legal systems.⁹⁰

⁸⁹ SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGE SWORD 18-19 (1966) (observing that writers and social scientists describe the United States as “qualitatively different, that it is an outlier” due to its founding values of liberty, egalitarianism, individualism, populism, and laissez-fair economics).

⁹⁰ See Calabresi, *supra* note 12, 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 (2d ed. 2019) (identifying the key characteristics of American legal exceptionalism, including “more formal, adversarial procedures” for dispute resolution); AMALIA D. KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN LEGAL CULTURE, 1800-1877, at 7 (2017) (arguing that adversarialism is a foundational aspect of the idea of American legal exceptionalism). Other scholars have focused on how U.S. legal exceptionalism shapes American attitudes toward foreign and international law.

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,⁹¹ 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 revolution and economic expansion.⁹² Since then, the United States has built up a substantial body of conflict of law rules.⁹³ 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.⁹⁴ 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

See, e.g., Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1481-82 (2007) (identifying the particular salience of American exceptionalism in U.S. approaches to international law in the years after 9/11); Curtis A. Bradley, *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 overstated).

⁹¹ *See generally* NOEL MAURER, *THE EMPIRE TRAP: THE RISE AND FALL OF U.S. INTERVENTION TO PROTECT AMERICAN PROPERTY OVERSEAS, 1893-2013* (2013) (tracing the evolution of different enforcement mechanisms that defined American imperialism).

⁹² *See generally* JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC* (1834) (providing a canonical study of American conflict of laws); DAVID M. PLETCHER, *THE DIPLOMACY OF TRADE AND INVESTMENT: AMERICAN ECONOMIC EXPANSION IN THE HEMISPHERE, 1865-1900*, at 1 (1998) (defining the first half of the nineteenth century as a period of economic growth during which the United States gained more exposure to foreign trade).

⁹³ SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* 423-37 (2006) (discussing the shift from rigid “rules” to flexible “approaches” starting in the 1960s). *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2D (AM. L. INST. 1980) (providing black letter law for conflict of law rules for contract and tort cases). *See generally* 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).

⁹⁴ Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 L. & CONTEMP. PROBS. 169, 171 (2004).

enumerated and reserved powers in the Constitution to one that privileged the executive in foreign affairs.⁹⁵

Over the course of the long twentieth century, the United States rose economically through the emergence of global capitalism and an international legal order which underpinned it, an order which the United States and its allies led.⁹⁶ 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 United States.⁹⁷ 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.⁹⁸ On the side of the U.S. government, the application of U.S. law 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.⁹⁹ Meanwhile, U.S. corporations and individuals engaged in commercial activities overseas sought to apply U.S. state

⁹⁵ Curtis A. Bradley, *A New American Foreign Affairs Law?* 70 *COLO. L. REV.* 1089, 1090-91 (1999).

⁹⁶ See NTINA TZOUVALA, *CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW* 91-92 (2020) (explaining the pivotal role of the United States in building international legal institutions in the inter-war period).

⁹⁷ R. Daniel Keleman & Eric C. Sibbitt, *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).

⁹⁸ See, e.g., *Nashua Sav. Bank v. Anglo-American Co.*, 189 U.S. 221, 227-29 (1903) (providing guidance on how to prove foreign law in U.S. courts); *Giannelis v. The Atlanta*, 82 F. Supp. 218, 235-37 (S.D. Ga. 1948) (applying the Panamanian Commercial Code); *Cambridge Literary Properties, Ltd. v. W. Goebel Porzellanfabrik G.m.b.H & Co. Kg.*, 295 F.3d 59, 64 (1st Cir. 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). See generally Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Doors to a Greater Global Understanding*, 46 *WAKE FOREST L. REV.* 887, 893 (2011) (discussing cases that exemplify the fact that global influences pervade United States courts and the decisions they make).

⁹⁹ See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (allowing U.S. courts to exercise prescriptive jurisdiction over foreign defendants whose anticompetitive activities cause substantially adverse impact on U.S. commerce); Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§78dd-1-78ff (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, 115 Stat. 296. (increasing the ability of the United States to "prevent, detect and prosecute international money laundering and the financing of terrorism").

law to transactions involving foreign entities and assets. While the public and private interests were distinct and could even be at odds,¹⁰⁰ 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,¹⁰¹ 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.¹⁰²

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 domestic legal system. This tendency long predates the emergence of liberal internationalism in the 1990s.¹⁰³ By the early 1960s, the United States began transplanting its laws and legal institutions bilaterally through legal development assistance programs in such regions as Latin America and Asia.¹⁰⁴ A common critique of such efforts was

¹⁰⁰ 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. Erié, *Anticorruption as Transnational Law: The Foreign Corrupt Practices Act, PRC Law, and Party Rules in China*, 67 AM. J. COMPAR. L. 233, 247 (2019).

¹⁰¹ See BUILD Act: Frequently Asked Questions About the New U.S. International Development Finance Corporation, EVERYCRSREPORT.COM (Jan. 15, 2019), https://www.everycrsreport.com/reports/R45461.html#_Toc535335624 [<https://perma.cc/M9WM-HD5M>] (providing a history of the Overseas Private Investment Corporation).

¹⁰² 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).

¹⁰³ KENNETH J. VANDEVELDE, THE FIRST BILATERAL INVESTMENT TREATIES: U.S. POSTWAR FRIENDSHIP, COMMERCE, AND NAVIGATION TREATIES 1-2 (2017).

¹⁰⁴ 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, 192-201 (1999).

that American exceptionalism informed policies for overseas development which rendered them “ethnocentric.”¹⁰⁵ 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 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.¹⁰⁶ In short, during this time, the direction of legal transplantation was mainly from the United States 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.¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹

For instance, one of the aims of liberal internationalism was the creation of what Professor Anne-Marie Slaughter called “a global

¹⁰⁵ See PACKENHAM, *supra* note 39.

¹⁰⁶ See generally R. DANIEL KELEMEN, *EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION* (2011) (detailing how the European Union led to E.U. bureaucrats enacting detailed laws and rights modelled after American regulatory law).

¹⁰⁷ See, e.g., *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (discussing the need to rely on and apply foreign law in the United States); *Miranda v. Arizona*, 384 U.S. 436, 486-90 (1966) (assessing foreign laws with regard to interrogation techniques); *Culombe v. Connecticut*, 367 U.S. 568, 590 (1961) (citing an Irish court decision); see also *Cleveland*, *supra* note 13, at 88 (arguing “cases demonstrate a longstanding tradition of resort to international law to provide substantive meaning to constitutional provisions”).

¹⁰⁸ See *infra* Section II.b.

¹⁰⁹ See JEDIDIAH J. KRONCKE, *THE FUTILITY OF LAW AND DEVELOPMENT: CHINA AND THE DANGERS OF EXPORTING AMERICAN LAW* 10 (2016); Kenneth Anderson, *Through Our Glass Darkly: Does Comparative Law Counsel the Use of Foreign Law in U.S. Constitutional Adjudication?*, 52 *DUQ. L. REV.* 115, 130-32 (2014).

community of courts” which applied a mixture of international law and national law in matters of transnational litigation.¹¹⁰ A notable feature of such networks was diversity in the professional identity of the courts’ judges.¹¹¹ 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.¹¹²

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.¹¹³ First, in the field of commercial law, it does not apply to antitrust law, an area in which U.S. courts have been particularly active.¹¹⁴ Second, the United States has interpreted the permissible scope of its prescriptive jurisdiction broadly to include persons and activities outside of its own territory subject to a reasonableness test.¹¹⁵ Third, the U.S. Congress has expansive regulatory authority over commerce with foreign nations and to punish offenses against

¹¹⁰ Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 192 (2003); see also STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* (2015) (arguing that U.S. courts are increasingly enmeshed in global legal problems).

¹¹¹ See Slaughter, *supra* note 110, at 192.

¹¹² See e.g., Hannah Buxbaum, *From Empire to Globalization . . . and Back? A Post-Colonial View of Transjudicialism*, 11 IND. J. GLOB. LEGAL STUD. 183, 187 (2004) (concluding that while courts cite each other, it is not a full dialogue between equal partners either); Ken I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 WASH. U. GLOB. STUD. L. REV. 345, 345-47 (2005) (arguing that legal transnationalism in U.S. courts is elite-driven, politically-motivated, and antithetic to democratic self-rule); David Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523, 527 (2011) (offering an explanation of “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”).

¹¹³ See generally *EEOC v. Arabian Am. Oil*, 499 U.S. 248 (1991) (holding that Title VII does not apply to U.S. employers who employ U.S. citizens abroad); CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* 186-93 (3d ed. 2020) (discussing the evolution of the presumption against extraterritoriality developed by the U.S. Supreme Court); William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582 (2020) (assessing the historical evolution of the doctrine and the challenges posed by changing canons).

¹¹⁴ See e.g., *Hartford Fire Ins. v. California*, 509 U.S. 764, 795-96 (1993) (holding that the Sherman Act applies to foreign conduct meant to produce substantial effects in the United States).

¹¹⁵ See BRADLEY, *supra* note 113, at 193-94 (describing the factors considered by courts to decide whether the exercise of prescriptive jurisdiction is reasonable).

the laws of nations.¹¹⁶ Fourth, the presumption does not apply to state legislation.¹¹⁷ So while there are important limits imposed on the extraterritoriality of U.S. laws, the United States has not shied away from such legislation. Examples range from the Foreign Corrupt Practices Act to the Alien Tort Statute to the Iran and Libya Sanctions Act.¹¹⁸ 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 United States.¹¹⁹ 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 United States’ foreign relations and its treatment of foreign law, reflects domestic features of the legal system in terms of how the latter system regards difference. To wit, there are generally two prevailing explanations for why the United States 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

¹¹⁶ U.S. CONST., art I., § 8, cls. 3, 10.

¹¹⁷ See BRADLEY, *supra* note 113, at 205-206 (discussing the limits in the extraterritorial application of state law).

¹¹⁸ Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§78dd-1-78ff (2012); Alien Tort Statute of 1789, 28 U.S.C. § 1350; Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (codified in scattered sections of 50 U.S.C.).

¹¹⁹ See Erie, *supra* note 100, at 246-51 (analyzing the Foreign Corrupt Practices Act in the context of the operation of anti-corruption as transnational law across the corporate governance regimes of the United States and China); see also Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Laws: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110 (2011) (arguing that the past century of U.S. legal doctrine has bypassed traditional territorial limits in favor of extraterritorial jurisdiction under various doctrinal banners); Ali Laidi, *American Extraterritorial Legislation: The Data Gathering Behind the Sanctions*, 68 THEORIA: J. SOC. & POL. THEORY 113 (2021) (arguing that since the early 2000s, the United States’ different administrations of justice have been prosecuting foreign companies suspected of violating U.S. laws on bribery of foreign public officials and failing to respect embargoes and economic sanctions); JAMES B. TOWNSEND, *EXTRATERRITORIAL ANTITRUST: THE SHERMAN ANTITRUST ACT AND U.S. BUSINESS ABROAD* (1980) (examining all international aspects of the Sherman Act).

judges, and the second highlights the role of legal doctrinal and procedural rules.

On the one hand, in accordance with the legal realist tradition, there is a causal relationship between the identity of lawmakers and their legal thinking.¹²⁰ A number of empirical studies have shown how, for instance, judges are influenced by their political ideology,¹²¹ as well as their demographic characteristics, such as race, gender, or even religion.¹²² Bias or prejudice of judicial 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 men.¹²³ Whereas the federal judiciary has been historically thin 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 women¹²⁴ However, President Trump undermined the diversity of the judiciary when he appointed almost 25% of the entire federal bench during his first two years of office, resulting in appointments that are 92% white and 76% male.¹²⁵ Most of these appointees are politically conservative, with originalist

¹²⁰ See generally JEROME FRANK, *LAW AND THE MODERN MIND* (1930) (analyzing lawyers' pretenses and professional hypocrisy in relation to the unsettled condition of the law).

¹²¹ See generally LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013) (presenting empirical research on determinants of judicial behavior, including political ideology); CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006) (proposing an empirical analysis of judges' behavior to determine the influence of the political ideology on their decisions).

¹²² Scott C. Idleman, *The Concealment of Religious Values in Judicial Decisionmaking*, 91 VA. L. REV. 515, 517 (2005) (positing 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. L. ECON. & ORGAN. 299, 324-28 (2004) (finding that in three-judge panel on the federal courts of appeals the presence of female judges determined outcomes of decisions); Jonathan P. Kstellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167, 179-82 (2013) (finding that black judges are significantly more likely than nonblack judges to support affirmative action programs).

¹²³ Jason Iuliano & Avery Stewart, *The New Diversity Crisis in the Federal Judiciary*, 84 TENN. L. REV. 247, 269 (2016).

¹²⁴ *Diversity of the Federal Bench*, AMER. CONST. SOC'Y, <https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench/> [<https://perma.cc/R9QN-4SjX>] (last visited Apr. 1, 2023).

¹²⁵ Stacy Hawkins, *Trump's Dangerous Judicial Legacy*, 67 UCLA L. REV. DISCOURSE 20, 30 (2019).

views largely averse to citing foreign law.¹²⁶ At the same time, and for different reasons, deep-level diversity factors, including educational diversity, are 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.¹²⁷ Along these lines, lack of training and exposure to foreign law has been a perennial problem in U.S. courts.¹²⁸ Outside of the judiciary, other dispute resolution industries suffer from low diversity in the United States. For instance, whereas arbitration has been the focus of diversity efforts, it is nonetheless prone to being what critics have called “pale, male, and stale,”¹²⁹ a problem particularly acute in the United States.¹³⁰

On the other hand, as legal authorities’ subjective and demographic 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.¹³¹ Hence,

¹²⁶ See Kevin R. Johnson, *How Political Ideology Undermines Racial and Gender Diversity in Federal Judicial Selection: The Prospects for Diversity in the Trump Years*, 2017 WIS. L. REV. 345, 350-51 (finding that Trump’s commitment to appointing conservative judges undermines judicial diversity).

¹²⁷ See Iuliano & Stewart, *supra* note 123, at 278-79.

¹²⁸ Malcolm R. Wilkey, *Transnational Adjudication: A View from the Bench*, 18 INT’L L. 541, 542-43 (1984) (“[A]lthough 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.”).

¹²⁹ Samaa A.F. Haridi, *Towards Greater Gender and Ethnic Diversity in International Arbitration*, 2 BAHRAIN CHAMBER FOR DISP. RESOL. INT’L ARB. REV., 305, 315; see also YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 34-36 (1996) (describing the “Grand Old Men” who played a central role in the emergence of international arbitration); Susan D. Franck, James Freda, Kellen Lavin, Tobias Lehmann & Anne Van Aaken, *The Diversity Challenge: Exploring the ‘Invisible College’ of International Arbitration*, 53 COLUM. J. TRANSNAT’L L. 429, 466 (2015) (finding, based on survey, that the median international arbitrator was a fifty-three-year-old man who was a national of a developed country).

¹³⁰ See, e.g., Monika Prusinowska, *Analysing Appointments in International Arbitration: Nationality, Ethnicity, Race, and Legal Training of Arbitrators*, in *IDENTITY AND DIVERSITY ON THE INTERNATIONAL BENCH: WHO IS THE JUDGE* 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).

¹³¹ See e.g., Gardner, *supra* note 11, at 945.

doctrines such as discovery of foreign evidence and *forum non conveniens* may result in parochial outcomes.¹³² Over time, the rules themselves may direct judges toward decisions that favor U.S. litigants and U.S. law.¹³³

Importantly, both proponents of this argument and those above who spotlight legal authorities' subjectivity agree that judges rely on decision-making 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 the second step (how judges' heuristics become encoded into procedures) rather than the source of those heuristics themselves.¹³⁴ 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 much as it does to African Americans, women, and those living in U.S. overseas territories.¹³⁵ For example, pursuant to the U.S. Constitution's "religion clauses," which are understood to prohibit U.S. courts from resolving religious questions,¹³⁶ disputes pertaining to matters of religion are often resolved either by religious arbitration or religious courts, even if those solutions are piecemeal at best.¹³⁷ The non-recognition

¹³² *Id.* at 968-94.

¹³³ See Bookman, *supra* note 11 (describing U.S. litigation isolationism and the main drivers used by the courts to achieve it).

¹³⁴ Compare Jeffrey J. Rachlinski & 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 Gardner, *supra* note 11, at 946 (suggesting that individual heuristics "become amplified and ossified as precedents mount, creating path dependence toward consistently parochial outcomes").

¹³⁵ 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).

¹³⁶ See *Natal v. Christian & Missionary All.*, 878 F.2d 1575, 1576 (1st Cir. 1989) ("[C]ivil courts cannot adjudicate disputes turning on church policy and administration or on religious doctrine and practice.").

¹³⁷ 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.").

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.¹³⁸ Anti-sharia bills have been paralleled by anti-protest laws introduced in some thirty-five states to prevent movements like #blacklivesmatter.¹³⁹ In the face of institutional racism that continues to damage law enforcement in the United States, the Supreme Court has struggled to balance First Amendment rights with public order.¹⁴⁰ 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*.¹⁴¹ 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 full Constitutional rights to millions of people, principally, people of color, in territories such as Guam, Puerto Rico, and the Philippines.¹⁴² 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 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.

¹³⁸ See *supra* text accompanying note 10.

¹³⁹ Clément Nyaletsossi Voule, *United States: UN Expert Decries New Laws Targeting Peaceful and Black Lives Matter Protestors*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (May 5, 2021), <https://www.ohchr.org/en/press-releases/2021/05/united-states-un-expert-decries-new-laws-targeting-peaceful-and-black-lives> [https://perma.cc/6ZME-ASER].

¹⁴⁰ See, e.g., *Mckesson v. Doe*, 141 S. Ct. 48 (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 of Alton Sterling).

¹⁴¹ See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (holding that the Constitution does not confer a right to abortion).

¹⁴² See, e.g., *Downes v. Bidwell*, 182 U.S. 244 (1901) (declining to extend all constitutional rights to individuals living in Puerto Rico); BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* 4 (2006).

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 United States 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 WTO;¹⁴³ consequently, the United States has been actively involved in shaping international investment, trade, and finance law.¹⁴⁴ 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 United States.¹⁴⁵ Most recently, scholars have brought together

¹⁴³ See generally 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”).

¹⁴⁴ See Laura Nader, *The Americanization of International Law*, in *MOBILE PEOPLE, MOBILE LAW: EXPANDING LEGAL RELATIONS IN A CONTRACTING WORLD* 199 (Franz von Benda-Beckmann, Keebet von Benda-Beckmann & Anne Griffiths eds. 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 *IND. J. GLOBAL LEGAL STUD.* 383, 383 (2002) (arguing that U.S. “imperial law” subsists on capitalism and has attained global and hegemonic status); Garth, *supra* note 102 (arguing that American law has played a pivotal role in the globalization of law).

¹⁴⁵ ANGHIE, *supra* note 76; GIULIANO GARAVINI, *AFTER EMPIRES: EUROPEAN INTEGRATION, DECOLONIZATION, & THE CHALLENGE FROM THE GLOBAL SOUTH, 1957-1986* (Richard R. Nybakken trans., 2012) (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). See generally BANDUNG, *GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES*, *supra* note 76 (explaining the importance of the 1955 Bandung conference to sparking decolonization of law).

insights from Critical Race Theory (CRT) into TWAIL to forge connections between minorities' struggles domestically and internationally to bring attention to bear on racial capitalism.¹⁴⁶

China has been an active participant in 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, "[t]he 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."¹⁴⁷ Mao's drawing attention to the double standards in the U.S. democracy-promotion abroad when 19 million of its own citizens, roughly 11% of the national population, lacked basic rights resonated with the Soviet criticism of the United States, which legal historian Mary Dudziak identified as one reason for the U.S. government's support of civil rights.¹⁴⁸ While it is perhaps wrong to over-value foreign criticism and anti-U.S. propaganda at the risk of under-valuing the toil of domestic advocates of greater legal protection for black people and other minorities, it is sensible to assume that awareness of foreign criticism is one factor among many that affects governmental response. The United States 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.¹⁴⁹

¹⁴⁶ James Thuo Gathii & Ntina Tzouvala, *Racial Capitalism and International Economic Law*, 25 J. INT'L ECON. L. 199, 199 (2022) (noting that international economic law is implicated in relationships of exploitation); see also Carmen G. Gonzalez & Athena Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J.L. & POL. ECON. 127 (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 VILL. L. REV. 841 (2000) (calling for an accommodation between CRT and TWAIL).

¹⁴⁷ 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 NEWS] (Aug. 8, 1963), <https://www.marxists.org/chinese/maozedong/1968/5-038.htm> [<https://perma.cc/LJ7T-A7PV>].

¹⁴⁸ DUDZIAK, *supra* note 18, at 12.

¹⁴⁹ See Matthew S. Erie, *Through Culture and its Disciplines: Human Rights and the Institutionalization of Law in China*, (Cornell L. Fac., Working Paper No. 13, 2003),

Building on Mao's early call for unity with African Americans, the Chinese socialist critique of American legal exceptionalism has identified both 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.¹⁵⁰ Wang Huning, a former professor who traveled in the United States in the 1980s, subsequently became a leading member of the CCP's Politburo Standing Committee, and who is considered the top ideologue in contemporary China, observed the systemic racism in the American society and the failures of affirmative action.¹⁵¹ Other scholars, inspired by Critical Legal Studies (CLS) developed in the United States, 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.¹⁵² 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.¹⁵³ For these members of the Chinese intellectual and political establishment, American legal exceptionalism has not

https://scholarship.law.cornell.edu/clsops_papers/13/
[<https://perma.cc/3XSG-847H>] (describing the diplomatic tit-for-tat between the U.S. and PRC governments).

¹⁵⁰ See, e.g., 孙鹏 [Sun Peng], *Meiguo De Fazhi Fazhan Yu Zhongzu Qishi Pingxi (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).

¹⁵¹ WANG HUNING (王沪宁), *MEIGUO FANDUI MEIGUO (美国反对美国)* [AMERICA AGAINST AMERICA] 332, 334 (1991).

¹⁵² See generally 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) (providing a study of the birth of CLS in the U.S. legal academy).

¹⁵³ 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> [<https://perma.cc/RC67-NPJJ>]. Cf. Wang Hui, *Depoliticized Politics, from East to West*, 41 NEW LEFT REV. 29, 42 ("American hegemony rests on the multiple foundation of monopoly of violence, economic dominance and ideological 'soft power.'").

provided solutions to global injustice and inequality, but rather has 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 United States 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 systems, including its definition of "rule of law," "human rights," "constitutionalism," and "independent judiciary," are retrograde.¹⁵⁴ In their place, Xi has advocated for "socialist rule of law with Chinese characteristics."¹⁵⁵ His concept is amorphous but most clearly stands for the proposition that the CCP is central to "rule of law" in ensuring 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 gonggongti*).¹⁵⁶ 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

¹⁵⁴ 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 Biggest Difference Between Chinese Rule of Law in China and Western Rule of Law] Shangguan (上观) [SHANGHAI OBSERVER] (Oct. 3, 2022), <https://export.shobserver.com/baijiahao/html/531132.html> [<https://perma.cc/R6JJ-5E7U>] ("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."); see also Zuigaofa Zhou Qiang: Yao ganyu xiang xifang "sifa duli" deng cuowu sichu 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://china.huanqiu.com/article/9CaKrnJZJVr> [<https://perma.cc/VC6R-RPYU>].

¹⁵⁵ See Xinhua News Agency, *supra* note 2.

¹⁵⁶ See e.g., 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 [<https://perma.cc/CME5-Z2PT>]; U.N. GAOR, 70th Sess., 13th plen. mtg. at 18, U.N. Doc. A/70/PV.13 (Sept. 28, 2015).

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.¹⁵⁷ In Part IV, 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 United States, this approach can be analyzed by comparing how 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 to promote them through law. China has learned from the United States in this regard.¹⁵⁸ As the largest trading country in the world and a major capital exporter, China has the economic clout to do just that.¹⁵⁹ 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,

¹⁵⁷ 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, 2004, as amended March 11, 2018, by the First Session of the Thirteenth National People’s Congress, preamble (China), <http://www.npc.gov.cn/englishnpc/constitution2019/201911/36a2566d029c4b39966bd942f82a4305.shtml#:~:text=The%20Amendment%20to%20the%20Constitution,hereby%20promulgated%20to%20take%20effect.&text=Our%20country%20will%20long%20remain%20in%20the%20primary%20stage%20of%20socialism> [https://perma.cc/468M-8D5R].

¹⁵⁸ See JULIAN GEWIRTZ, UNLIKELY PARTNERS: CHINESE REFORMERS, WESTERN ECONOMISTS AND THE MAKING OF GLOBAL CHINA 1–14 (2017) (highlighting that Chinese leaders built a “socialist market economy” with the help of American economists).

¹⁵⁹ See Carlos Razo, *Evolution of the World’s 25 Top Trading Nations*, UNCTAD (Apr. 6, 2021), <https://unctad.org/topic/trade-analysis/chart-10-may-2021> [https://perma.cc/L5R2-Y5W3].

protectionism, and nativism, in terms of how it selectively complies with international law.¹⁶⁰

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.¹⁶¹ China's approach to engaging with that system, including foreign and international law, must therefore necessarily be different from that of the United States. 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 United States, and color its interaction with non-domestic law.¹⁶² 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 legal scholars' embrace of global constitutionalism;¹⁶³ the PRC government's international development priorities, including such cross-border areas as digital development and health, and which increasingly emphasize governance,¹⁶⁴ the globalization (and localization) of Chinese

¹⁶⁰ See Bradford & Posner, *supra* note 74; CAI, *supra* note 41, at 101-53 (discussing China's approach to the selection of areas of international law to comply with and further develop); Pitman B. Potter, *Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices*, 2 WASH. U. GLOBAL STUD. L. REV. 119 (2003) (finding that the Chinese government selectively adapts global norms to local economic regulation).

¹⁶¹ See Erie, *supra* note 41, at 57.

¹⁶² Compare Calabresi, *supra* note 12, at 1340 (explaining that "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) (discussing popular perceptions of Chinese constitutions in the PRC).

¹⁶³ See, e.g., Bin Li, *China's Socialist Rule of Law and Global Constitutionalism*, in GLOBAL CONSTITUTIONALISM FROM EUROPEAN AND EAST ASIAN PERSPECTIVES 58, 58-99 (Takao Suami, Anne Peters, Dimitri Vanoverbeke & Mattias Kumm eds, 2018).

¹⁶⁴ See, e.g., STATE COUNCIL INFORMATION OFFICE OF THE PRC, CHINA'S INTERNATIONAL DEVELOPMENT COOPERATION IN THE NEW ERA (2021), http://english.www.gov.cn/archive/whitepaper/202101/10/content_WS5ffa6bbbc6d0f72576943922.html [<https://perma.cc/93D2-XSN8>] (exposing the Chinese government's views on international development cooperation).

firms,¹⁶⁵ and revisionist histories that both recast imperial China as one of plurilegal multi-ethnic integration and exemplar of non-Western modernity,¹⁶⁶ all of which have been supercharged by a steroidal “great rejuvenation of the Chinese nation” (*Zhonghua minzu weida fuxing*) crusade led by Xi Jinping.¹⁶⁷

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.”¹⁶⁸ There are others who are influenced by liberal cosmopolitanism who emphasize “freedom, individualism, and pluralism.”¹⁶⁹ There is still another interpretation of cosmopolitanism, which may draw to some extent from 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.¹⁷⁰

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 example, against the backdrop of the BRI and Xi

¹⁶⁵ See Erie, *supra* note 41, at 70-71, 81 (highlighting Chinese economic globalization and noting that three of the top five Global Fortune 500 companies are Chinese).

¹⁶⁶ See e.g., SU LI, THE CONSTITUTION OF ANCIENT CHINA 98-102 (Zhang Yongle & Daniel A. Bell eds., Edmund Ryden trans., 2018); WANG, *supra* note 32.

¹⁶⁷ See, e.g., Xi Jinping (习近平), *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, 9:07 AM), <http://cpc.people.com.cn/n1/2017/1230/c64094-29737399.html> [<https://perma.cc/5SK9-V8TV>].

¹⁶⁸ See WILLIAM A. CALLAHAN, CHINA DREAMS: 20 VISIONS OF THE FUTURE 110-14 (2013) (discussing the work *Datongshu* (The Book of Great Harmony) by the early twentieth-century Chinese philosopher Kang Youwei).

¹⁶⁹ See SAMULI SEPPÄNEN, IDEOLOGICAL CONFLICT AND THE RULE OF LAW IN CONTEMPORARY CHINA: USEFUL PARADOXES 3 (2016) (defining the characteristics of the liberal cosmopolitan Chinese legal scholar).

¹⁷⁰ See, e.g., Erie, *supra* note 48, at 24-32 (providing an example of Chinese legal professionals promoting arbitration in Africa and discussing the extent of their relationships with the Party-State).

Jinping's call to build a "community of common destiny,"¹⁷¹ a number of Chinese legal scholars have initiated 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.¹⁷² 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.¹⁷³

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 both a higher number of foreign-related commercial disputes and U.S. lawfare 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 exceptionalism (driven by protectionism and 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 multinational corporations the world over.¹⁷⁴ As a result of the high

¹⁷¹ See PRC Constitution, *supra* note 158.

¹⁷² GUIGUO WANG, YUK-LUN LEE & MEI-FUN LEUNG, DISPUTE RESOLUTION MECHANISM FOR THE BELT AND ROAD 28 (2020).

¹⁷³ The role of the Party-State may not be explicit in such projects, yet it remains a fixture. See, e.g., *id.* at vii-xv (listing members of the International Academy of the Belt and Road who are members of official PRC bodies or the CCP).

¹⁷⁴ See Erie, *supra* note 41, at 70-71.

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 United States has had nearly two hundred years to develop its analogous rules,¹⁷⁵ 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 growing 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.¹⁷⁶ This number is a 340% increase from 2010.¹⁷⁷ 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%.¹⁷⁸ 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.

¹⁷⁵ See STORY, *supra* note 92, at iv (providing a datum of 1834 for the commencement of conflict of laws rules in U.S. jurisprudence).

¹⁷⁶ 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://www.court.gov.cn/zixun-xiangqing-87832.html> [<https://perma.cc/2ZTT-U62X>].

¹⁷⁷ Huang Jin [黄进], Li Hejia [李何佳] & Du Huanfang [杜换芳], 2010 NIAN ZHONGGUO GUOJI SIFA SHIJIAN SHUPING (2010 年中国国际私法司法实践述评) [REV. OF THE JUD. PRAC. OF CHINA'S PRIV. INT'L L. IN 2010] 355, 367 (2011).

¹⁷⁸ 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.

i. 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 (though 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 area is reforms to the domestic legal system to deal with more foreign-law related issues which include 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 area is more outward-facing reforms including judicial cooperation, mutual judicial assistance, and memoranda of understanding with foreign courts and arbitration institutions.¹⁷⁹

While an assessment of all 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.

¹⁷⁹ See CENTRAL COMMITTEE OF THE CCP, *infra* note 261.

1. Jurisdiction

As a threshold matter, jurisdiction is largely a matter of Chinese domestic law as China has not entered into any international jurisdiction treaties.¹⁸⁰ The general rules concerning cases involving a “foreign element” are provided in the PRC Civil Procedure Law (CPL).¹⁸¹ 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.¹⁸² China claims exclusive jurisdiction over 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.¹⁸³ 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.¹⁸⁴ 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.

¹⁸⁰ 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). Hague Convention on Choice of Court Agreements, Jun. 30, 2005, 44 I.L.M. 1294.

¹⁸¹ See P.R.C. Civil Procedure Law, adopted by the Nat’l People’s Cong. on Apr. 9, 1991, and amended June 27, 2017, Part 4, ch. 24.

¹⁸² 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 P.R.C. Civ. Proc. L.], FASHI [2015] No. 22, art. 520, <https://perma.cc/545X-NX7G>.

¹⁸³ See ZHENG SOPHIA TANG, YONGPING XIAO & ZHENGXIN HUO, CONFLICT OF LAW IN THE PEOPLE’S REPUBLIC OF CHINA 59 (2016) (citing Pearl Time Inv. 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 Inv. Serv. v. Xianggang Wancheng, Guangdong Province Guangzhou Mun. IPC, [2006] Sui Zhong Fa Min Si Chu Zi 47 (showing exclusive jurisdiction over a Chinese-foreign contract joint venture agreement)).

¹⁸⁴ Jie (Jeanne) Huang, *The Partially Modernized Chinese Conflicts System: Achievements and Challenges*, 13 J. PRIV. INT’L L. 633, 643-44 (2017).

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.¹⁸⁵ However, practice varies between courts with some honoring party autonomy; thus, there is a high degree of uncertainty in such determinations.¹⁸⁶

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.¹⁸⁷ The decision by the Wuhan Intermediate People's Court in the case of *Xiaomi Technology Limited Corporation v. Interdigital Digital Holdings Limited Corporation* illustrates the Chinese court's muscle-flexing as it ordered an anti-suit injunction not only against Interdigital's filing a suit in the court in India but against it doing so in "any court worldwide," imposing a fine on Interdigital of RMB 1 million per day for any violation of the injunction.¹⁸⁸ In the

¹⁸⁵ ZHENG ET AL., *supra* note 183, at 101.

¹⁸⁶ *Id.* (compiling cases that show conflicting outcomes).

¹⁸⁷ The earliest example of Chinese courts using anti-suit injunctions were in maritime disputes. *See, e.g.*, *Xintaihailun Yu Putaiyaji Ouxinnalun Chuanbo Pengzhuang Sunhai Peichang Jiufenan* (新泰海"轮与葡萄牙籍"欧新娜"轮船碰撞损害赔偿纠纷案) [A Dispute Between The Ship Xintaihai (新泰海) and Portugal Atlas Navios Navegacao LDA Concerning the Liability of Collision], Qingdao Haishi Fanyuan Gongzuo Baogao (青岛海事法院工作报告) [Qingdao Mar. Ct. Work Rep.](April 17, 2017) (ordering respondent to release the applicant's ship in Australia and to desist in the seizure of the applicant's property), <http://www.sdcourt.gov.cn/qdhsfy/sjgk/gzbg67/1706083/index.html> [<https://perma.cc/44ZF-49VV>]. 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 Int'l S.A. & S.I.SV.EL. (Hongkong) Limited v. Guangdong OPPO Mobile Telecomm. Co., Ltd. & Guangdong OPPO Mobile Telecomm. Co., Ltd. Shenzhen Branch, A Dispute over Abusing Dominant Market Positions], Sup. People's Ct. Guiding Case No. 392, Dec. 28, 2020 (China) (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 Casino], Malong District People's Ct., Sept. 29, 2019 (finding that the court had jurisdiction as the crime was committed in Myanmar).

¹⁸⁸ *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 Tech. Ltd. Corp. v. Interdigital Digital Holdings Ltd. Corp.], [No. 169] Wuhan

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 show how judicial practices are internationalizing, but less in a way that integrates non-domestic laws and more in a way that overrides them.

2. 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 (LAL) is the main legislation governing conflict of laws in people's courts.¹⁸⁹ A number of judicial interpretations have also been issued by the Supreme People's Court (SPC) to supplement the LAL.¹⁹⁰ The

Intermediate 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. Co. from Suing Xiaomi Globally until Completion of Wuhan Lawsuit: Wuhan Intermediate Ct. Issued the World's First Cross-Border Anti-Suit Injunction], Huanqiu Wang (环球网)[Global Network](proclaiming that the injunction applies to all jurisdictions in the world) (Mar. 4, 2021), <https://perma.cc/3G67-CCZ9>.

¹⁸⁹ 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), P.R.C. Presidential Order No. 36 [hereinafter LAL].

¹⁹⁰ Zuigao Renmin Fayuan Guanyu Shiyong <Zhonghua Renmin Gongheguo Shewai Minshi Guanxi Falü Shiyongfa> Ruogan Wenti De Jieshi (Yi) Fashi [2012] Ershisi Hao (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)法释〔2012〕24号) [Interpretation I by the SPC on <Issues Concerning the Application of the Law on Choice of Law for Foreign-Related Civil Relationships> Judicial Interpretation No. 24 [2012]] (promulgated by the Sup. People's Ct. Dec. 28, 2012, effective Jan. 7, 2013), <https://www.court.gov.cn/shenpan-xiangqing-5273.html> [https://perma.cc/MH22-64SP] [hereinafter 2012 SPC Judicial Interpretation]; Zuigao Renmin Fayuan Guanyu Shiyong <Zhonghua Renmin Gongheguo Shewai Minshi Guanxi Falü Shiyongfa> Ruogan Wenti De Jieshi (Yi) Fashi [2012] Shiba Hao (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)法释〔2020〕18号) [Interpretation I by the SPC on <Issues Concerning the Application of the L. on Choice of L. for Foreign-Related Civil Relationships> Judicial Interpretation No. 24 [2012]] (promulgated by the Sup. People's Ct. Dec. 31, 2020, effective Jan. 1, 2021),

regime was revised in 2020 following the promulgation of the Civil Code.¹⁹¹

The conflict of laws regime operates through four main principles: party autonomy, closest connection, mandatory rules, and public policy.¹⁹² While party autonomy has been reflected in Chinese contract law,¹⁹³ the relevant article in the LAL specifies “parties may explicitly choose the laws applicable to foreign-related civil relations *in accordance with provisions of law*.”¹⁹⁴ The inclusion of the language “in accordance with provisions of law” actually limits freedom of contract, allowing parties’ choice of law to govern only where the relevant Chinese law grants them such a choice.¹⁹⁵ The closest connection principle is a standard gap-filler.¹⁹⁶ The mandatory rules also limits freedom of contract by imposing Chinese law in certain cases even when the parties have explicitly chosen foreign law.¹⁹⁷ 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.¹⁹⁸ Lastly, the principle of public policy is safeguarded as “social public interests.”¹⁹⁹ While on its face the LAL does not encode bias against foreign law, unfortunately, the practice in people’s courts is just that.²⁰⁰

<https://law.pkulaw.com/chinalaw/ace77639698996cfbdfb.html>
 [https://perma.cc/2GCL-4EFD] [hereinafter 2020 SPC Judicial Interpretation].

¹⁹¹ See 2020 SPC Judicial Interpretation *supra* note 190.

¹⁹² Mo Zhang, *Codified Choice of Law in China: Rules, Processes and Theoretical Underpinnings*, 37 N.C. J. INT’L L. & COM. REG., 84, 99-105 (2011).

¹⁹³ Zhonghua Renmin Gongheguo (中华人民共和国民法典) [Civil Code of the P.R.C.], promulgated by the NPC on May 28, 2020 and effective Jan. 1, 2021, art. 4 (ensuring party autonomy).

¹⁹⁴ See LAL, *supra* note 189, art. 3 (emphasis added).

¹⁹⁵ See also 2020 SPC Judicial Interpretation, *supra* note 190, art. 4.

¹⁹⁶ See LAL, *supra* note 189, art. 2(2).

¹⁹⁷ *Id.* art. 4.

¹⁹⁸ See Qingkun Xu, *The Codification of Conflicts Law in China: A Long Way to Go*, 65 AM. J. COMPAR. L. 919, 941 (2018) (commentating on art. 10 of the 2012 SPC Judicial Interpretation).

¹⁹⁹ See LAL, *supra* note 189, art. 5.

²⁰⁰ 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检视) [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).

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 question of law, rather than one of fact.²⁰¹ 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.²⁰² 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.²⁰³

However, this picture is changing. For instance, in 2018, I visited, in Shenzhen, Benchmark Chambers International (BCI), one of several “foreign law ascertainment centers” (*wai fa 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.²⁰⁴ 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.²⁰⁵

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

²⁰¹ Cf. Vivian Grosswald Curran, *Federal Rule 44.1: Foreign Law in U.S. Courts Today*, 30 MINN. J. INT’L L. 231 (2021) (explaining how the importation of the civil law approach into Federal Rule 44.1 has created difficulties for U.S. judges because it has led to an incomplete transition of foreign law from being an issue of fact to becoming an issue of law).

²⁰² Xu, *supra* note 198, at 939.

²⁰³ Guodong Du & Meng Yu, *Voice of Chinese Judges: Ascertainment of Foreign Law in Chinese Courts*, CHINA JUST. OBSERVER (Mar. 25, 2018), <https://www.chinajusticeobserver.com/a/voice-of-chinese-judges-ascertainment-of-foreign-law-in-chinese-courts> [<https://perma.cc/3VBS-EQ3Z>].

²⁰⁴ Interview with Xiao Jinyi, Executive President of Council, Benchmark Chambers Int’l, in Shenzhen, China (Mar. 28, 2018); Follow-up WeChat correspondence (Feb. 9, 2022).

²⁰⁵ *Id.*

foreign law matters, some of which are led by foreign law professors.²⁰⁶ Further, training in law is not a one-way process, as the National Judges College,²⁰⁷ China Law Society,²⁰⁸ and the Shanghai Cooperation Organization²⁰⁹ 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.²¹⁰ While such operations as BCI are small and judicial networking remains, at present, nascent,

²⁰⁶ Guanyu Yinfa “2022 Nian 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博士(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”], Guojia Faguan Xueyuan (国家法官学院) [NATIONAL ACADEMY OF JUDGES] (Dec. 17, 2021), <https://mp.weixin.qq.com/s/75Ii29DT0E7WYCrG3Mdfqw> [https://perma.cc/BR9J-ND2F] (implementing the “coordinat[ion] of domestic rule of law 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 are familiar with foreign-related, Hong Kong and Macao-related civil and commercial laws”).

²⁰⁷ See, e.g., 2019 Nian Miandian Faguan Yanxiuban Juxing 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], ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN FAYUAN (中华人民共和国最高人民法院) [SUPREME PEOPLE’S COURT OF THE PEOPLE’S REPUBLIC OF CHINA] (Nov. 4, 2019, 10:46 PM), <https://www.court.gov.cn/zixun-xiangqing-196111.html> [https://perma.cc/5LV2-SJ3D].

²⁰⁸ See e.g., 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], CHINA-CELAC FORUM (May 24, 2019, 4:03 PM), http://www.chinacelacforum.org/chn/lttdt/201905/t20190524_6214004.htm [https://perma.cc/BC8V-UFJP].

²⁰⁹ 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) [The Opening Ceremony of the “Belt and Road” Rule of Law Seminar in Eurasia was held in our school], SHANGHAI ZHENGFA XUEYUAN (上海政法学院) [SHANGHAI UNIV. OF POL. SCI. & L.] (Sept. 15, 2020), <https://www.shupl.edu.cn/dwbgsfhyzbgs/2020/0915/c1958a81811/page.htm> [https://perma.cc/7GEZ-9QW2].

²¹⁰ 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] (Jan. 24, 2022, 7:07 PM), <https://mp.weixin.qq.com/s/JvOnIs9iYchtvvhJqy8A0w> [https://perma.cc/39SV-XSBW] (providing a list of sixteen training events for foreign judges held by the National Judges College in 2019).

they are representative of the entrepreneurialism that may sustain a more robust cosmopolitanism in the course of cross-border legal issues in the future.

3. Recognition of Foreign Judgments and Arbitral Awards

As a general matter, a state's courts are incentivized to recognize the judgments of other states' 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.²¹¹ In private international law, states have recognized two general principles to guide such determinations: comity²¹² and reciprocity.²¹³ 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 enforce foreign judgments on the basis of an international treaty or the principle of reciprocity.²¹⁴ In terms of the former, at the multilateral level, the PRC has signed but not ratified the Hague Convention on Choice of Court

²¹¹ Ralf Michaels, *Recognition and Enforcement of Foreign Judgments*, in MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INT'L L., 7 (Rüdiger Wolfrum ed., 2009).

²¹² See *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) (“[N]either 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 regard 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”).

²¹³ 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 211, at 2.

²¹⁴ See *Zhonghua Renmin Gongheguo Minshi Susongfa* (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, amended Oct. 28, 2007, Aug. 31, 2012, and June 27, 2017), art. 289 (China) (“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.”).

Agreements;²¹⁵ however, it has concluded some thirty-eight bilateral treaties on mutual assistance covering recognition and enforcement of court judgments, a not insignificant number which represents some degree of internationalization.²¹⁶ The principle of reciprocity has not historically been one that PRC courts have cited, however.²¹⁷

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.²¹⁸ More specifically, PRC courts 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).²¹⁹ The SPC has recently sought

²¹⁵ Hague Convention on Choice of Court Agreements, Jun. 30, 2005, 44 I.L.M. 1294.

²¹⁶ This figure is based upon the author's search of the PRC Ministry of Foreign Affairs' treaty database (https://www.fmprc.gov.cn/mfa_eng/wjbxw/201901/t20190103_462418.html) with a keyword search for "*minshì sifā xièzhù*" (judicial assistance for civil matters) and "*shangshì sifā xièzhù*" (judicial assistance for commercial matters), conducted on May 2, 2022. The most recent treaty is with Iran (dated Apr. 29, 2021). Zhonghua Renmin Gongheguo Tiaoyue Shuju Ku (中华人民共和国-条约数据库) [Treaty Database, PRC Ministry of Foreign Affairs] https://www.fmprc.gov.cn/mfa_eng/wjbxw/201901/t20190103_462418.html [<https://perma.cc/5ZRJ-N7H2>]; http://treaty.mfa.gov.cn/Treaty/web/list.jsp?nPageIndex=1&keywords=%E5%95%86%E4%BA%8B%E5%8F%B8%E6%B3%95%E5%8D%8F%E5%8A%A9&chnltype_c=all [<https://perma.cc/X23C-NKD2>].

²¹⁷ GUANGJIAN TU, PRIVATE INTERNATIONAL LAW IN CHINA 170 (2016).

²¹⁸ See, e.g., Gao'er Jituan Gufen Youxian Gongsi Yu Jiangsu Sheng Fangzhi Gongye (Jituan) Jinchukou Youxian Gongsi (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) [Kolmar Group AG v. Jiangsu Textile Industry Import & Export Corp.], Su 01 Xie Wai Ren No. 3, Nanjing Intermed. People's Ct. (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 Ct. (June 30, 2017) (recognizing a judgment from the state of California).

²¹⁹ 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 Ct. (July 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 3 (May 24, 2022), <https://cld.web.ox.ac.uk/files/finalrbprusinowskapdf> [<https://perma.cc/UB9G-NYCC>].

to clarify the shift from *de facto* reciprocity to *de jure* reciprocity by providing a three-part test.²²⁰ Generally, such efforts are viewed to provide greater harmonization of judicial practices,²²¹ 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.²²² 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.²²³ Empirical research suggests that this mechanism mostly works in catching at least some lower-court decisions that erred in refusing to recognize or enforce a foreign award.²²⁴ Additionally, proposed amendments to the

²²⁰ 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] (2021), <https://cicc.court.gov.cn/html/1/218/62/409/2172.html> [<https://perma.cc/RH22-2D7P>] (providing three tests for *de jure* reciprocity, reciprocal understanding of consensus, and reciprocal commitment without exception).

²²¹ 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 JUST. OBSERVER (Apr. 3, 2022), <https://www.chinajusticeobserver.com/a/breakthrough-for-collecting-judgments-in-china-series-3> [<https://perma.cc/S3VS-RZHK>]; see also 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/> [<https://perma.cc/5JVX-5QEV>] (analyzing the reasons of the SPC's Conference summary and its main consequences).

²²² See *Contracting States*, N.Y. ARB. CONVENTION, <https://www.newyorkconvention.org/countries> [<https://perma.cc/AR5Y-M867>] (last visited Apr. 1, 2023). China acceded on January 22, 1987. *Id.*

²²³ 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 (关于人民法院处理与涉外仲裁及外国仲裁是有关问题的通知) [Regarding the Notice on People's Courts' Handling Issues Related to Foreign-Related Arbitration and Foreign Arbitration Institutions] (1995), <http://fgcx.bjcourt.gov.cn:4601/law?fn=chl067s081.txt&truetag=2708&titles=&contents=&dbt=chl> [<https://perma.cc/2NVZ-92DN>].

²²⁴ GU WEIXIA, DISPUTE RESOLUTION IN CHINA: LITIGATION, ARBITRATION, MEDIATION, AND THEIR INTERACTIONS 190 (2021) (finding that from 2009 to 2018, the

outdated 1994 Arbitration Law²²⁵ would limit the scope of review of the enforcing court to resist enforcement.²²⁶

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.²²⁷ While there remains considerable room for improvement in terms of 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,²²⁸ a reflection of the growth in China's international commercial arbitration industry.

SPC heard fifty-five pre-reported cases and among those, overturned twenty-nine decisions of lower courts).

²²⁵ See Zhonghua Renmin Gongheguo Zhongcaifa (中华人民共和国仲裁法) [PRC Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995, amended Sept. 1, 2017), http://www.npc.gov.cn/englishnpc/Law/2018-02/22/content_2076673.htm [<https://perma.cc/F7CL-ENRW>].

²²⁶ See Kun Fan, *Proposed Amendments to the Arbitration Law: A New Era of Arbitration?* 3 ICC DISP. RESOL. BULL. 21, 24 (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").

²²⁷ 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] (July 24, 2020), https://mp.weixin.qq.com/s?__biz=Mzg5OTcxMTAyOQ==&mid=2247519358&idx=2&sn=b48ec637f93d842f3bd02d43bee11c2f&source=41#wechat_redirect [<https://perma.cc/6WAJ-TJF5>].

²²⁸ For instance, at the 2021 Annual Summit on Commercial Dispute Resolution in China, hosted virtually by the Beijing International Arbitration Commission on November 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 thirty-two submissions for the recognition and enforcement of foreign awards, and only one was denied.

4. 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.²²⁹ 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.²³⁰ One, unlike domestic arbitration law in most states in the Asia-Pacific region, the PRC Arbitration Law is not based on the U.N. 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

²²⁹ Both at the central government level and municipal governments, commercial arbitration has received intensive support in recent years. *See, e.g.,* 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*], Zhonggong Zhongyang Bangong Ting, Guowuyuan Bangong Ting (中共中央办公厅, 国务院办公厅) [GEN. OFF. OF CENTRAL COMM. COMMUNIST PARTY OF CH., GEN. OFF. OF STATE COUNCIL] (Dec. 31, 2018), http://www.gov.cn/zhengce/2019-04/16/content_5383424.htm [<https://perma.cc/7YYZ-QWK4>] (imposing a number of requirements on local governments including incorporating arbitration business into the local economic development plans and increasing foreign exchanges and cooperation).

²³⁰ Indeed, the 1994 PRC Arbitration Law was officially amended in 2017. *See generally* PRC Arbitration Law, *supra* note 225 (“[T]he Law is formulated in order to ensure fair and timely arbitration of economic disputes, protect the legitimate rights and interests of the relevant parties and guarantee the sound development of the socialist market economy.”).

part.²³¹ Against this tide of convergence,²³² China has pursued its own path. The 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.²³³ 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.²³⁴

Two, the PRC Arbitration Law does not include the notion of the seat of arbitration.²³⁵ The seat refers to the legal system that governs the procedure of the arbitration (i.e., the *lex arbitri*).²³⁶ 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.²³⁷ Under this arrangement, the validity of foreign-administered Chinese-seated awards has been uncertain.²³⁸ As a

²³¹ See generally ANSELMO REYES & WEIXIA GU, *THE DEVELOPING WORLD OF ARBITRATION: A COMPARATIVE STUDY OF ARBITRATION REFORM IN THE ASIA PACIFIC* (2018) (presenting "a cross-jurisdiction comparative and contextual study of the developing world of arbitration in the Asia Pacific" and identifying "an Asia Pacific model of arbitration modernisation").

²³² See, e.g., Michael Hwang, *The New York Convention and the UNCITRAL Law on International Commercial Arbitration: Existing Models for Legal Convergence in Asia?* in *CONVERGENCE AND DIVERGENCE OF PRIVATE LAW IN ASIA* 62, 62 (Gary Low ed., 2022).

²³³ REYES & GU, *supra* note 231, at 98.

²³⁴ 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).

²³⁵ Kun Fan, *Prospects of Foreign Arbitration Institutions Administering Arbitration in China*, 28 *J. INT'L ARB.* 343, 350-52 (2011).

²³⁶ CHARTERED INSTITUTE OF ARBITRATORS, *INTERNATIONAL ARBITRATION: WORKBOOK MODULE 1: LAW, PRACTICE & PROCEDURE* 88 (2017).

²³⁷ PRC Arbitration Law, *supra* note 225, ch. VII. "Foreign-related" awards are defined as having a foreign element ("foreign economic, trade, transportation or maritime matters"), although, confusingly, an award administered by a foreign institution in China may not qualify for the award to be "foreign-related." *Id.*

²³⁸ Deguo Xupulin Guoji Youxian Zeren Gongsì Yu Wuxi Woke Tongyong Gongcheng Xiangjiao Youxian Gongsì Shenqing Queran 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)

result of the inadequacy of the PRC Arbitration Law, not only has the SPC filled in some of the gaps through judicial interpretations²³⁹ and case decisions,²⁴⁰ but also the arbitration commissions regularly update their institutional rules, including adopting the language of the “seat.”²⁴¹ 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 Law have been issued by the Ministry of Justice which

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 Gongsì Yu Ningbo Shi Gongyipin Jin Chukou Youxian Gongsì 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, Ningbo Intermediate People’s Court (Apr. 22, 2009) (enforcing an arbitral award, considered “non-domestic,” as it was given by the ICC in Beijing); Anhui Sheng Longlide Baozhuang Yinshua Youxian Gongsì 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. BP Agnati S.R.L.] Min Si Ta Zi No. 13, Sup. People’s Ct., Xin Min Er Chu Zi (新民二初字) No. 154 (Wuxi High-Tech Indus. Dev. Zone People’s Ct., 2013) (upholding the validity of an arbitration clause involving a Shanghai-seated ICC arbitration); *BNB v. BNA* (2020), Shanghai 01 Civil Special 83 (holding that an arbitration seated in Shanghai and administered by the Singapore International Arbitration Center was valid).

²³⁹ See, e.g., 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 on Several Issues Concerning the Application of the <Arbitration Law of the People’s Republic of China>] (promulgated by the Sup. People’s Ct., Aug. 8, 2006, effective Sept. 8, 2006), Fa Shi No. 7, art. 16.

²⁴⁰ Bulante Wude Gongye Youxian Gongsì, Guangdong Fa’an Long Jixie Chengtao Shebei Gongcheng Youxian Gongsì Shenqing Chengren Yu Zhixing Fayuan Panjue, Zhongcai Caijue Anjian Yishen Minshi Caiding Shu (布兰特伍德工业有限公司, 广东阔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 v. Guangdong Fa-anlong Mechanical Equipment Manufacture Co. Ltd.], Sui Zhong Fa Min Si Chu Zi (穗中法民四初字) No. 62 (Guangzhou Intermediate People’s Ct., 2015). (finding that China-seated arbitral awards made by a foreign arbitration institution shall be regarded as Chinese foreign-related awards).

²⁴¹ See, e.g., Zhongguo Guoji Jingji Maoyi Zhongcai Weiyuanhui Zhongcai Guize (中国国际经济贸易仲裁委员会仲裁规则) [China International Economic and Trade Arbitration Commission Arbitration Rule], art. 7 (promulgated by China Int’l Econ. & Trade Arb. Comm’n, effective Jan. 1, 2021). (specifying “place of arbitration” (*Zhongcaidi*)).

cure some but not all of the current deficiencies.²⁴² For example, foreign arbitration institutions, *kompetenz-kompetenz*, and the seat are all recognized under the proposed amendments.²⁴³ 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 industry itself stands for full-throttled 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%).²⁴⁴ Part of BIAC's internationalization strategy is to include foreign arbitrators on its panels.²⁴⁵ Notably, BIAC is one of only two arbitration commissions that has been able to pull away from the conventional budgetary system and attain more independence.²⁴⁶

The Shanghai International Arbitration Center (SHIAC) (est. 1988) has been even more innovative in broadening its reach beyond

²⁴² 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)》征求意见稿的通知) [Notice of the Ministry of Justice on Public Consultation on the "PRC Arbitration Law" (Revision) (Draft for Solicitation of Comments)] (July 30, 2021), http://www.moj.gov.cn/pub/sfbgw/lfyjzj/lflfyjzj/202107/t20210730_432967.html [https://perma.cc/SG2S-QNMH].

²⁴³ 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, <http://com.gd.gov.cn/go/article.php?typeid=37&contentId=18086> [https://perma.cc/AJR9-Z6XQ].

²⁴⁴ 2017 Annual Work Report of BAC/BIAC, BEIJING ARB. COMM'N (Mar. 20, 2018), <http://www.bjac.org.cn/english/news/view?id=3167> [https://perma.cc/9DQD-URWA].

²⁴⁵ Still, the numbers are small. In 2020, only 9 out of 399 arbitrators registered with BIAC were foreigners. 2020 Annual Work Report of BAC/BIAC, BEIJING ARB. COMM'N (Feb. 10, 2021), <http://www.bjac.org.cn/news/view?id=3890> [https://perma.cc/E7WJ-QYVM].

²⁴⁶ See Kai-Shen Huang, *Competing for Policy Enforcement: The Marketization of Commercial Arbitration in China*, CHINA, LAW AND DEVELOPMENT, Mar. 1, 2020, at 2, https://cld.web.ox.ac.uk/files/huang_2020_rbpdf [https://perma.cc/RBE7-HHNS]. The other is the Shenzhen Court of International Arbitration (SCIA). See Zhao Fang, Managing Partner, Hui Zhong Law Firm Shanghai Office, Comments at 2021 Annual Summit on Commercial Dispute Resolution in China (Nov. 26, 2021) (explaining that SCIA was re-structured to be a non-profit and independent from the government and has international standards, citing the Regulations of the Shenzhen Court of International Arbitration, Oct. 1, 2020).

China. SHIAC experienced a greater number of foreign-related cases. From 2000 to 2012, SHIAC has concluded 693 foreign-related cases per year or approximately 27.28% of its total caseload.²⁴⁷ 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).²⁴⁸ SHIAC has a much longer roster of foreign arbitrators than most of the newer centers.²⁴⁹

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.²⁵⁰ 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) arbitration.²⁵¹ In part

²⁴⁷ *Statistics Data*, SHANGHAI INT'L ARB. CTR., https://www.shiac.org/SHIAC/aboutus_E.aspx?page=5, [https://perma.cc/U4NU-FN5G] (last accessed Apr. 1, 2023).

²⁴⁸ See *Shanghai International Arbitration Center*, GLOBAL ARBITRATION REVIEW, <https://globalarbitrationreview.com/organisation/shanghai-international-arbitration-center> [https://perma.cc/Z3U3-HX9Y] (last accessed Feb. 22, 2023).

²⁴⁹ Compare SHIAC, PANEL OF ARBITRATORS (2021), https://www.shiac.org/upload_files/file/2021/20210816152714_0030.pdf [https://perma.cc/AB3K-UZPX] (listing close to 300 foreign arbitrators, although some appear to be Chinese nationals living overseas), with BIAC, PANEL OF ARBITRATORS (2022), <http://www.bjac.org.cn/attached/file/20221111/arbitrators.pdf> [https://perma.cc/JP38-Z973] (listing approximately 140 foreign arbitrators, including what also appears to be Chinese nationals living abroad).

²⁵⁰ Chen Fuyong, *Shifting Landscape of International Arbitration in China*, CHINA BUS. L. J. (Mar. 10, 2020), <https://law.asia/shifting-china-international-arbitration/> [https://perma.cc/LA7M-54U8].

²⁵¹ Compare *id.* (defining the time period starting from composition of tribunal to rendering of award), with *Frequently Asked Questions*, LONDON CT. OF INT'L ARB. (Oct. 2018), https://www.lcia.org/frequently_asked_questions.aspx [https://perma.cc/6JDE-ULBE] (providing median figures for 2013 to 2016), and

due to the generally short duration of Chinese ICA, costs are frequently lower than for arbitration administered by non-Chinese institutions.²⁵² Perhaps the most frequently cited asset of Chinese ICA is its efficiency.²⁵³

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.²⁵⁴ 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 CAJAC, Bishkek International Court of Arbitration for Mining and Commerce, and the Thai-Chinese International Arbitration and Mediation Center.²⁵⁵ 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.

5. "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,²⁵⁶ and whereas foreign relations law may be

INTERNATIONAL CHAMBER OF COMMERCE, ICC DISPUTE RESOLUTION 2019 STATISTICS 17 (2020).

²⁵² Sheng Chang Wang, *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).

²⁵³ See Erie, *supra* note 48, at 36-37 (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).

²⁵⁴ See *id.* at 44-45 (listing CIETAC branches outside of the PRC).

²⁵⁵ See *id.* at 47 (discussing these new cooperative dispute resolution centers).

²⁵⁶ 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 Liu Renshan, *On Chinese Foreign Relations Law as a "Law" of "Governing the State by Law"*, 3 *L. & COM. STUD.* 131 (2016)). In the last few

the closest cognate to 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.²⁵⁷ 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.²⁵⁸ 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,”²⁵⁹ laying the foundation for Xi Jinping’s announcement.²⁶⁰ 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)” (the

years, Chinese legal scholars have become increasingly focused on foreign relations law, in part due to the pressures of the U.S.-China trade war, U.S. long-arm legislation, and U.S. sanctions. Chinese legal scholars are considering 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 produced the Restatement of 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.

²⁵⁷ See generally MICHAEL SCHOENHALS, *DOING THINGS WITH WORDS IN CHINESE POLITICS: FIVE STORIES* (1992) (explaining how watchwords work in Chinese political lexicon).

²⁵⁸ PERRY LINK, *AN ANATOMY OF CHINESE: RHYTHM, METAPHOR, POLITICS* 278 (2013).

²⁵⁹ Dang De Shijiu Jie Sizhong Quanhui <Jueding> (党的十九届四中全会《决定》) [*Decision of the Fourth Plenary Session of the Nineteenth Central Committee of the Chinese Communist Party*] ¶ 13.1, Huanqiu wang (环球网) [GLOBAL NETWORK] (Oct. 31, 2019), <https://china.huanqiu.com/article/9CaKrnKnC4> [<https://perma.cc/B97B-CAFA>].

²⁶⁰ See Xinhua News Agency, *supra* note 2.

Plan).²⁶¹ 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.

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 China'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

²⁶¹ Xinhuashe (新华社) [Xinhua News Agency], *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)*], Zhonggong Zhongyang (中共中央) [CENTRAL COMMITTEE OF THE CCP] (Jan. 10, 2021), http://www.gov.cn/zhengce/2021-01/10/content_5578659.htm [<https://perma.cc/9MSR-VGVH>].

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.²⁶²

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,²⁶³ the SPC,²⁶⁴ and law schools, many of which have 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.²⁶⁵ 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

²⁶² *Id.* ¶ 25.

²⁶³ 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 LEGIS. WORK PLAN OF THE STANDING COMM. OF THE NPC] (Apr. 16, 2021), <http://www.npc.gov.cn/npc/c30834/202104/1968af4c85c246069ef3e8ab36f58d0c.shtml> [<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.").

²⁶⁴ 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) [REP. ON THE PEOPLE'S CTS.' FOREIGN-RELATED TRIAL WORK] (Oct. 19, 2022), <https://www.court.gov.cn/xinshidai-xiangqing-377231.html> [<https://perma.cc/C6P8-TQCQ>];

see also Susan Finder, *Supreme People's Court's New Policy Document on Opening to the Outside World*, SUP. CT. MONITOR (Oct. 9, 2020), <https://supremepeoplescourtmonitor.com/2020/10/09/supreme-peoples-courts-new-policy-document-on-opening-to-the-outside-world/> [<https://perma.cc/6BAX-GFCM>].

²⁶⁵ 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], Quanguo Renmin Daibiao Dahui (全国人民代表大会) [STANDING COMM. NAT'L PEOPLE'S CONG.] (July, 28, 2021), <http://www.npc.gov.cn/npc/c30834/202107/668ff619a7254a7882c73e34b5d21b6c.shtml> [<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'.").

international law put forth their interpretations.²⁶⁶ 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.”²⁶⁷ 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.”²⁶⁸ Professor Zhang Qinglin, Dean of the Shanghai University of Foreign Economics and Business Law School, proclaimed “[t]he 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.”²⁶⁹ 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.”²⁷⁰ 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 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,

²⁶⁶ 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] (providing a set of definitions of “foreign-related ‘rule of law’” by leading legal scholars in China).

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

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.²⁷¹ 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.²⁷²

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.”²⁷³ This definition steers the concept closer to what is understood in the United States 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 United States. 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 investment, finance, anti-monopoly, data

²⁷¹ 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), http://www.qstheory.cn/dukan/qs/2019-02/15/c_1124114454.htm [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.”).

²⁷² 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*, 18 *ASIAN J. COMPAR. L.* (forthcoming 2023).

²⁷³ *Zhongguo Shewai Fazhi Fazhan Baogao (2021 Niandu)* (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)] 王敬波编 (Wang Jingbo ed., 2022) (on file with the author) (providing yet another definition of “foreign-related ‘rule of law’”).

governance, civil and commercial matters, private international law, uniform international commercial law, maritime law, and international commercial dispute resolution.²⁷⁴

The FROL marks a turn towards legal cosmopolitanism and away from the “anti-foreign-law syndrome”²⁷⁵ 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 universities²⁷⁶ and think tanks,²⁷⁷ these projects often feature collaborations with foreign legal experts to build databases of foreign law to assist Chinese companies in their cross-border work.²⁷⁸ 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

²⁷⁴ *Id.*

²⁷⁵ See Zhang, *supra* note 192, at 90-91.

²⁷⁶ A non-exhaustive list includes: Asia-Pacific Institute of Law at Renmin University, <http://apil.ruc.edu.cn/> [<https://perma.cc/5QT2-W7KB>], Institute of South-South Cooperation at Peking University, <https://cnisscad.pku.edu.cn/> [<https://perma.cc/JFH3-KHU8>], China-Africa Economic and Trade Law Research Institute at Xiangtan University, <https://law.xtu.edu.cn/kxyj/kyjg.htm> [<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://wfyx.jou.edu.cn/xspt1/jss_ydyl_flfwyzx2.htm [<https://perma.cc/4ACF-54VX>].

²⁷⁷ Institute of West-Asian and African Studies at the Chinese Academy of Social Sciences, http://waas.cssn.cn/about_us/about_iwaas/ [<https://perma.cc/FZD2-UXBW>] and the International Academy of the Belt and Road, <https://www.facebook.com/interbeltandroad> [<https://perma.cc/9QM9-2A7E>].

²⁷⁸ 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) (providing one such example of an international intellectual project to build knowledge about foreign law).

transactions outside of China.²⁷⁹ 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 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.²⁸⁰ 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 United States, and seeks to both protect Chinese interests overseas while also proactively challenging U.S. 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.²⁸¹ More specifically, this

²⁷⁹ 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) (on file with author) (showing one example of legal ascertainment centers providing practical support to corporate clients)

²⁸⁰ See CALLAHAN, *supra* note 168, at 2.

²⁸¹ 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

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,²⁸² 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 a wide array of normative sources in terms of the state organs that can issue different types of rules.²⁸³

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.²⁸⁴ 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.²⁸⁵ Also, the types of customary law recognized are usually localized rules and depoliticized forms.²⁸⁶ 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

perception on the part of those to whom it is addressed that it has come into being in accordance with right process").

²⁸² See *supra* Part I.

²⁸³ See Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMPAR. L. 711, 712 (1994).

²⁸⁴ Katherine P. Kaup, *Controlling the Law: Legal Pluralism in China's South-West Minority Regions* 236 CHINA Q. 1154, 1154 (2018) (focusing on the customary law of ethnic minorities in Yunnan Province).

²⁸⁵ *Id.* at 1154-56 (providing examples of the Miao, Dai, and Zhuang).

²⁸⁶ *Id.* at 1154-55 (giving examples such as marriage and divorce, social interactions, utilization of natural resources, and so on).

underground lending market.²⁸⁷ 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.²⁸⁸ Hence, there are areas, particularly in civil and commercial law, but even surprisingly in criminal law,²⁸⁹ 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.²⁹⁰

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.²⁹¹ This discrepancy creates some dissonance between China’s internal governance of difference and foreign policy outreach.

²⁸⁷ Ding Jianwen (楼建波), *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) (showing how courts deal with legal issues caused by informal banking).

²⁸⁸ See generally SHITONG QIAO, *CHINESE SMALL PROPERTY: THE CO-EVOLUTION OF LAW AND SOCIAL NORMS* (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).

²⁸⁹ See Kaup, *supra* note 284, at 1165-67.

²⁹⁰ Chen Fuyong, Deputy secretary-General, Beijing International Arbitration Centre, 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?*, in *DIVERSITY IN INTERNATIONAL ARBITRATION: WHY IT MATTERS AND HOW TO SUSTAIN IT* 142 (Shahla Ali, Filip Balcerzak, Giorgio Fabio Colombo & Joshua Karton eds., 2022).

²⁹¹ MATTHEW S. ERIE, *CHINA AND ISLAM: THE PROPHET, THE PARTY, AND LAW* 71-72 (2016).

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,²⁹² and yet at home it not only fails to recognize Islamic law but it actively persecutes Uyghurs, one of China's largest Muslim minority groups.²⁹³ Incorporation of non-state norms has happened historically at the margins and Chinese judges work within the space allotted to them,²⁹⁴ 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—namely, 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.²⁹⁵ 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, only 47% of its 5,149 judges belong to ethnic minority groups.²⁹⁶ Moreover, only 10% of all judges in

²⁹² Muhammad Zulfikar Rakhmat, *The Rise of Islamic Finance on China's Belt and Road*, DIPLOMAT (Feb. 15, 2019), <https://thediplomat.com/2019/02/the-rise-of-islamic-finance-on-chinas-belt-and-road/> [<https://perma.cc/QN7H-VLT4>].

²⁹³ UYGHUR TRIBUNAL, UYGHUR TRIBUNAL JUDGMENT ¶ 190 (2021), <https://uyghurtribunal.com/wp-content/uploads/2022/09/UYGHUR-TRIBUNAL-Judgment-2022.09.20.pdf> [<https://perma.cc/Z6PK-ZMV6>] (“[T]he 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.”).

²⁹⁴ See *supra* notes 284-287. 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).

²⁹⁵ 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) (evincing the shortage of female judges).

²⁹⁶ Shuangyu Faguan Duiwu Jianshe Qingkuang Ji Peiyang Lujing Tansuo: Xinjiang Wei Wu'er Zhizhiqiu 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

Xinjiang are bilingual, a crucial skill in a region where both Uyghur and Mandarin are the official languages.²⁹⁷ Xinjiang may be an extreme example where the judiciary underserves its population. Importantly, the metric for China's inclusiveness towards difference is not a "liberal cosmopolitan" one imposed from outside, but rather, its own version of cosmopolitanism: the Party-State has made its support of ethnic minorities and women a pillar of its role in building the nation-state, as enshrined in legislation and policy.²⁹⁸

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.²⁹⁹ Second, judicial reasoning, and thereby substantive and procedural justice, may be improved by higher degrees of diversity,³⁰⁰ an assertion that may hold particularly valid for transnational litigation.³⁰¹ 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.

民法院队伍建设：调研文集 [PEOPLE'S COURT TEAM BUILDING: A COLLECTION OF RESEARCH TEAMS] 328, 329 (Xu Jiabin ed., 2019).

²⁹⁷ *Id.*

²⁹⁸ See, e.g., *Zhonghua Renmin Gongheguo Minzu quyue Zizhifa* (中华人民共和国民族区域自治法) [Regional Ethnic Autonomy Law of the PRC] (Promulgated by the Second Session of the Sixth National People's Congress on May 31, 1984, effective Oct. 1, 1984, amended at the Twentieth Meeting of the Standing Committee of the Ninth People's Congress on February 28, 2001), art. 31 (providing preferential policies to ethnic minorities); STATE COUNCIL INFORMATION OFFICE, WHITE PAPER: GENDER EQUALITY IN CHINA (2005), http://www.chinadaily.com.cn/english/doc/2005-08/24/content_471841.htm [<https://perma.cc/6482-SGJX>] ("It has always been a basic state policy of China to promote equality between men and women.").

²⁹⁹ Carolyn B. Lamm, *Diversity and Justice*, 48 *JUDGES' J.* 1, 1 (2009); Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 *NW. U. L. REV.* 587, 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).

³⁰⁰ Farhand & Wawro, *supra* note 122, at 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).

³⁰¹ 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 extent judges come from a variety of backgrounds and life experiences" in transnational courts).

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 had established a Chinese police liaison officer in Fiji to “enhance police co-operation efforts between the two countries,”³⁰² 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.”³⁰³ 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.³⁰⁴ 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.”³⁰⁵ Indeed, while Xi speaks at U.N. General Assembly meetings about China's version of human rights, the Party-State has been repressing China's own human rights lawyers in a nation-wide crackdown some seven years in the making.³⁰⁶

Perhaps most poignantly, the Party-State claims to offer a more decolonized developmental model, one based on “mutual respect,

³⁰² Arieta Vakasukawaqa, *Qiliho: Chinese Police Liaison to Enhance Partnership*, FIJI TIMES (Sept. 13, 2021), <https://www.fijitimes.com/qiliho-chinese-police-liaison-to-enhance-partnership> [<https://perma.cc/UHF7-5VGA>].

³⁰³ SUZANNE E. SCOGGINS, *POLICING CHINA: STREET-LEVEL COPS IN THE SHADOW OF PROTEST 3* (2021).

³⁰⁴ *Compare 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], Zuigao Renmin Fayuan (最高人民法院) [Supreme People's Court] (May 15, 2017), <https://www.court.gov.cn/zixun-xiangqing-44722.html> [<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://www.chinafile.com/reporting-opinion/viewpoint/verdicts-chinas-courts-used-be-accessible-online-now-theyre-disappearing> [<https://perma.cc/ALF3-XUX7>].

³⁰⁵ 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://chinadigitaltimes.net/chinese/676342.html> [<https://perma.cc/KP9R-CYFK>] (describing life as a legal scholar).

³⁰⁶ See generally Hualing Fu, *The July 9th (709) Crackdown on Human Rights Lawyers: Legal Advocacy in an Authoritarian State*, 27 J. CONTEMP. CHINA 554 (2018) (studying the 2015 crackdown on human rights lawyers in China and analyzing the development of three types of human rights lawyers since 2011).

equity, justice and win-win cooperation [to] build an open, inclusive, clean and beautiful world,"³⁰⁷ and yet it has effectively implemented settler colonialism in Xinjiang. Contrary to pronouncements of supporting the rights of nonwhite and non-majority 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 United States.³⁰⁸ Likewise, whereas the Chinese entry into 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.³⁰⁹ 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.³¹⁰

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 United States' domestic/international divide delegitimized liberal internationalism,³¹¹ 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

³⁰⁷ State Council Information Office of the PRC, *China's International Development Cooperation in the New Era* 5 (Jan. 2021), https://english.www.gov.cn/archive/whitepaper/202101/10/content_WS5ffa6bbbc6d0f72576943922.html [<https://perma.cc/B7ZR-3XAV>].

³⁰⁸ See generally Vincent Wong, *Racial Capitalism with Chinese Characteristics: Analyzing the Political Economy of Racialized Dispossession and Exploitation in Xinjiang*, 3 AFR. J. INT'L ECON. L. (forthcoming) (arguing that the severe intensification of discriminatory repression in the XUAR is a phenomenon directly linked to Chinese state capitalism); DARREN BYLER, *TERROR CAPITALISM: UYGHUR DISPOSSESSION AND MASCULINITY IN A CHINESE CITY* (2022).

³⁰⁹ 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, 292 (2022) ("[T]he territorial lease that China was once notoriously subjected to by the British was not part of its own IEL/BRI arsenal.").

³¹⁰ See Erie, *supra* note 48.

³¹¹ Beate Jahn, *Liberal Internationalism: History Trajectory and Current Prospects*, 94 INT'L AFFAIRS 43, 45 (2018).

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.³¹² 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 U.S. RELATIONS WITH CHINA AND THE GLOBAL SOUTH

What are the implications for the United States 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. The United States 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 United States has done historically.

First, as a basic observation: the Chinese are willing to become involved in many developing countries which the United States 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.³¹³ For a host of reasons, including political liability, the United States refrains from engaging with many states with

³¹² Compare Robin Brant, *Winter Olympics 2022: China Sells Xinjiang as a Winter Sports Hub*, BBC NEWS (Jan. 19, 2022), <https://www.bbc.com/news/world-asia-china-59991321> [<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), <https://globalarbitrationreview.com/article/born-resigns-expert-committee-of-chinese-court> [<https://perma.cc/Z8W3-MCTU>] (quoting Gary Born, a world-renowned arbitrator, who quit 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").

³¹³ See generally MARIA REPNIKOVA, CHINESE SOFT POWER (2022) (introducing China's distinct theorization of "soft power" and its application across global contexts).

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.³¹⁴ The United States 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)³¹⁵ and also JAMS, which is the most internationalized of U.S. alternative dispute resolution organizations.³¹⁶ Rather, the United States 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.³¹⁷ So rather than build elite networks, the U.S. approach has been to focus on the legal needs of the marginalized.

If the United States 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 United States 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.³¹⁸ Likewise, critical commentary on the liberal internationalists' global courts was that they were an elite and exclusive exercise.³¹⁹ As part of the United States' post-Afghanistan

³¹⁴ See LINA BENABDALLAH, *SHAPING THE FUTURE OF POWER: KNOWLEDGE PRODUCTION AND NETWORK-BUILDING IN CHINA-AFRICA RELATIONS* (2020) (probing the types of power mechanisms that build, diffuse, and project China's power in Africa).

³¹⁵ Personal observation, New York City, Sept. 28, 2018 (attending the 2018 meeting of the Standing International Forum of Commercial Courts).

³¹⁶ *JAMS Global*, <https://jamsadr.com/global/> [<https://perma.cc/432T-VFFB>].

³¹⁷ See deLisle, *supra* note 104.

³¹⁸ 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).

³¹⁹ See Kersch, *supra* note 112.

recalibration of its presence in fragile states, it needs to return to the basics in terms of studying local needs.³²⁰ 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 United States 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 United States is doing just that: following China.³²¹ 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 United States had earlier jettisoned this approach in the 1970s.³²² The United States 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 United States to supply particular types of infrastructure, for example, digital infrastructures as part of digitally-driven development in host states. Yet, crucially, the United States 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

³²⁰ 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).

³²¹ Andrea Brinza, *Biden's "Build Back Better World" Is an Empty Competitor to China*, FOREIGN POL'Y (June 29, 2021), <https://foreignpolicy.com/2021/06/29/biden-build-back-better-world-belt-road-initiative/> [<https://perma.cc/V8H6-P4PR>].

³²² *The Overseas Private Investment Corporation: Background and Legislative Issues*, EVERYCRSREPORT.COM (Dec. 22, 2016), <https://www.everycrsreport.com/reports/98-567.html#ifn10> [<https://perma.cc/B2BG-A74V>].

wedded to greater local knowledge, can lead to productive results, whether commercial or democratizing.³²³

The United States, 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 among adjudicators but also among juries and legislatures, each of which may affect the governance of transnational litigation.³²⁴ 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.³²⁵ 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 born out of poor legal integration across the world, namely, collaboration between the United States 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.

³²³ See generally, BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (Erik Gilbert Jensen & Thomas C. Heller eds., 2003) (suggesting evidence-based approaches to legal development assistance).

³²⁴ 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., 2018 at 1 (identifying certain U.S. state laws as reflecting the xenophobic bias of that state's population); see also Shanmugasundaram, *supra* note 10 (noting the ban on the use of Islamic law in certain U.S. states).

³²⁵ See DUDZIAK, *supra* note 18.

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 United States 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 and plant its flag,³²⁶ 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 xenophobia³²⁷ 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, meaning that foreign legal professionals, academics, and businesspeople had not been able to travel to China, a situation that did 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

³²⁶ 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).

³²⁷ Reuters Staff, *African Ambassadors Complain to China Over ‘Discrimination’ in Guangzhou*, REUTERS (Apr. 11, 2020), <https://www.reuters.com/article/us-health-coronavirus-africa/african-ambassadors-complain-to-china-over-discrimination-in-guangzhou-idUSKCN21T0T7> [<https://perma.cc/9W7B-ZX9K>] (reporting on African ambassadors’ drawing the PRC government’s attention to racial discrimination experienced by African migrants in Guangzhou following the COVID-19 outbreak).

goals. Domestically, its expertise is shallow. Yet the idea of legal cosmopolitanism has attraction in developing countries, particularly in those that have suffered under Euro-American colonialism. The Party-State has been busy in the last decade (despite the pandemic in recent years) 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 United States appears to be drifting. The problems of nationalism, racism, and xenophobia are certainly more violent if not more virulent in the United States 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 United States has in the legal field. Yet to fully exploit such capital, the United States 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—especially those involved in dispute resolution—who reflect the United States' own demographic diversity and its deep ties to countries throughout the world.