

REVITALIZING LAW AND GOVERNANCE COLLABORATION WITH CHINA

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EXECUTIVE SUMMARY

Strengthening official U.S.-China legal cooperation to support China's efforts to establish rule of law and good governance, which has atrophied under the Trump administration, serves U.S. interests in protecting national security, developing economy and trade, and furthering rule of law and human rights both in China and globally. U.S. official legal engagement with China delivered concrete results over the years in multiple areas that further U.S. interests, including greater substantive and procedural predictability for U.S. businesses and the Chinese people. Rule of law dialogues also provided platforms to address human rights concerns in the more technical language of law and regulation and the political space for complementary private American initiatives with Chinese counterparts. While continuing to firmly address China's violations of U.S., international and its own law, the next administration should inventory, evaluate, and support pertinent U.S.-China legal cooperation programs at both the senior and staff levels. The goal of these programs should be to support China's ongoing efforts to modernize laws and legal institutions in order to better address its own, bilateral, and international challenges and to establish a level playing field in both countries for businesses. The U.S. government should strengthen its expertise on the evolving Chinese legal system to more effectively address disputes, ensure that bilateral agreements are enforceable under Chinese law, and cooperate on updating and setting global standards.

THE PROBLEM

The United States has a substantial interest in promoting good governance in China through increased legal protections and procedural regularity to help stabilize China domestically, facilitate its economic development, support a more

transparent and law-based business environment, and contribute to more rules-conscious behavior by Chinese state and private actors globally.¹ Better governance benefits both the Chinese people and U.S. companies, organizations, and individuals operating in or dealing with China. Yet, constructive U.S.-China legal cooperation and exchange has atrophied in recent years as the result of disinterest from the Trump Administration amid a narrative that U.S. engagement with China has failed and a growing perception that China's authoritarian political system affords no realistic prospect for developing rule of law.

Given the importance of China to the American economy and to solving serious global security and governance issues, the U.S. has no option but to work with China. The United States should cooperate, rather than merely deliver ultimatums, on specific legal topics of direct impact in the bilateral relationship and more generally to assist China's legal modernization and improve the capacity of and implementation by its governance institutions. To do so effectively, the U.S. and China need to better understand the domestic policy concerns and priorities of each other and how those are reflected in and implemented through each country's legal systems. Past U.S.-China rule of law collaborations have in fact had a positive impact on China's law and governance, which is more complex and sophisticated than is widely appreciated. While the Chinese Communist Party (CCP) is asserting more comprehensive leadership over all aspects of Chinese life, including law and the legal system,² China's leaders still view the U.S. and other foreign experience as a source of ideas and mechanisms to inform³ the modernization of its governance capacity and increasingly mature legal system.⁴

To be sure, the party-state at times flouts international law⁵ and its World Trade Organization (WTO) commitments,⁶ ignores its own legal

procedures and laws,⁷ adopts illiberal laws,⁸ and deploys law as an instrument of repression⁹ in pursuing its interests. The CCP's resort to extra-legal means to deal with perceived enemies in so-called "sensitive cases"¹⁰ creates uncertainty over the reliability of the party-state's legal commitments both at home and abroad.

Nonetheless, China's legal system is largely devoted to managing millions of ordinary civil, commercial, criminal, and administrative matters every day. U.S.-China engagement has enriched the development of that "normal" legal system¹¹ and helped foster a culture of law among the Chinese public.¹² Such cooperation promoted more professional and accessible courts¹³ and specialized intellectual property tribunals¹⁴ in which foreign plaintiffs are winning a majority of their patent infringement cases.¹⁵ Court reform has produced an increase in administrative litigation against the government, bankruptcy filings, intellectual property cases and other lawsuits, reaching nearly 32 million in 2019.

While the Xi Jinping administration has tightened the reins on NGO activities amidst a shrinking space for policy debate, social activism, rights lawyering, and investigative reporting, it also passed China's first Charity Law, which removes the requirement for a government sponsor for many NGOs and eases fundraising restrictions. In a still challenging environment,¹⁶ Chinese NGOs — which numbered nearly 867,000 at the end of 2019, up 76% since the end of 2012¹⁷ — are innovating new activism¹⁸ and hybrid fundraising methods.¹⁹ Environmental, LGBTQ, and other groups seek out targets of opportunity, as witnessed during China's COVID-19 epidemic,²⁰ even sharing their successful strategies with NGOs abroad.²¹ Environmental NGOs are afforded more space than others to collaborate with foreign NGOs like the U.S. Environmental Law Institute on legal exchanges and capacity building.²² National law now authorizes them to bring public interest environmental lawsuits, and a prominent local government recently codified support for such efforts with a special fund to help reduce NGO litigation costs.²³

The U.S. has shared concepts and mechanisms with Chinese officials, lawyers, NGOs, and other advocates concerning China's access to government information statute and its use,²⁴ advocacy for same-sex marriage in the national legislative

process,²⁵ using protective orders in domestic violence cases,²⁶ and successfully²⁷ proving gender discrimination in employment.²⁸ Criminal law and procedure reforms, while largely driven as are other reforms by domestic pressures,²⁹ have been influenced by U.S. and international advocacy and exchanges.³⁰ Improvements have included returning death penalty decision-making authority to the top court, which drove a significant drop in executions,³¹ using the suspended death penalty in all but the most serious cases; and reducing the number of capital offenses in the Criminal Law.³² More recent reforms make trials central to the criminal process, encourage witnesses to testify in court, and make unlawfully obtained evidence (like forced confessions) inadmissible at trial.³³

Legal exchange and cooperation have been part of the official U.S.-China relationship from its earliest days and have achieved concrete results. Numerous federal agencies have regularly exchanged information and held discussions over the years regarding the laws and procedures of both countries to better understand each other's systems, resolve disputes, and promote significant legislative and procedural advancements. U.S. Department of Commerce programs date back to 1979, when the U.S. Patent and Trademark Office hosted its first Chinese delegation and explained the American patent system to officials working on China's first laws governing intellectual property (IP).³⁴ U.S.-China IP law exchanges helped promote the establishment of specialized IP courts, introduced the practice of *amicus* briefs in IP proceedings, and supported China's development of a form of case precedent to enhance uniformity of court judgments.³⁵ All of these developments were informed by U.S. law and practice and are contributing to a procedurally and substantively fairer system of IP law in China.³⁶ Following years of advocacy, and spurred by imposed tariffs and a dispute filed in the WTO, China eliminated in March 2019 the most onerous provisions on foreign company technology transfers³⁷ and is taking a number of steps to better protect trade secrets.³⁸

Commerce legal interaction has taken place through government-to-government dialogues like the Commercial Law Working Group under the Joint Commission on Commerce and Trade,³⁹ the 27th session of which took place in November 2016.⁴⁰ Commerce collaborations with its Chinese

counterpart and other agencies have sought to promote a legal framework for businesses to operate through transparent and clear rules that are administered in a predictable and fair manner,⁴¹ including private sector representatives on occasion under the U.S.-China Legal Exchange.⁴² Such dialogues achieved suspension of restrictive regulations on several occasions⁴³ and furthered a variety of legal reforms. As the United States Trade Representative (USTR) pressed China over many years to meet its WTO transparency commitments, including to provide a reasonable period of time for public comment before implementing trade-related measures,⁴⁴ Commerce and the private sector shared with Chinese counterparts the U.S. experience with participatory rulemaking and hearings. China gradually instituted notice-and-comment rulemaking and lawmaking procedures to enable public input into draft laws⁴⁵ and regulations⁴⁶ that are published online. U.S. agencies, trade associations, companies and scholars have utilized these comment channels, which are now codified in binding legislation.⁴⁷

The U.S. Department of Justice joined with Commerce in 2016⁴⁸ to hold the first high-level U.S.-China Judicial Dialogue, which brought officials and judges from both countries to discuss case management, alternative dispute resolution, precedent, and evidence in civil and commercial cases.⁴⁹ Justice also employs the U.S. Embassy Beijing-based Resident Legal Advisor, who works with U.S. and Chinese officials on criminal justice sector reform initiatives in China, while facilitating bilateral cooperation on issues like money laundering, drug trafficking, and terrorist financing.⁵⁰ Ongoing Environmental Protection Agency engagement⁵¹ has impacted substantive air, water, and soil pollution, hazardous waste and other environmental legislation in China,⁵² as well as China's development and codification of governance mechanisms including environmental information disclosure, public participation in environmental decision-making and public interest lawsuits.⁵³ The U.S. Department of Labor conducted dialogues with Chinese counterparts on specific issues including worker rights, workplace safety, collective bargaining, and labor law enforcement until 2016.

Official US-China legal cooperation has also provided a conducive bilateral political environment

within which American lawyers, legal scholars, companies, and NGOs have interacted effectively with Chinese counterparts. Unofficial endeavors complement and supplement U.S. government engagement on legal and governance issues. Some, like the U.S.-Asia Partnerships for Environmental Law at the University of Vermont⁵⁴ and other rule of law initiatives carried out by universities, law schools, the American Bar Association,⁵⁵ and NGOs like the Asia Foundation, have been supported in part with U.S. government funding.⁵⁶ Many private sector projects frequently involved experienced U.S. federal, state, and local officials and judges with relevant expertise. In one example, former U.S. government lawyers shared their experience⁵⁷ with Chinese officials piloting a new government lawyer system to improve legal awareness and compliance within government agencies and CCP organizations.⁵⁸

Private initiatives have included criminal law and procedure projects often involving collaboration with and sometimes among Chinese police, procurators, judges, lawyers, academics, and social workers,⁵⁹ assisting development of a more active and professional defense bar,⁶⁰ juvenile justice, and ensuring that every criminal defendant has legal representation,⁶¹ as well as advancing mandatory reporting and child protection systems⁶² under China's 2015 Domestic Violence Law.⁶³ Private U.S.-China legal cooperation has also helped promote government,⁶⁴ judicial,⁶⁵ and charitable transparency,⁶⁶ legal reasoning⁶⁷ and case guidance⁶⁸ programs with Chinese courts; the development and enforcement of disability⁶⁹ and mental health⁷⁰ law in China; clinical legal education and the development of activist legal centers in Chinese law schools;⁷¹ and rights protection trainings for Chinese officials, judges, and lawyers,⁷² a profession now including over 473,000 practitioners.⁷³

Restrictions imposed by China in 2017⁷⁴ that severely restrict the ability of foreign NGOs to operate in China curtailed the channels for and subject matter of private legal cooperation, other than through U.S. universities, business associations, and in areas such as the environment⁷⁵ that the party-state deems less sensitive. Moreover, the increasingly antagonistic actions against and rhetoric concerning China adopted by the Trump administration⁷⁶ combined with disapprobation

of China's crackdown on civic and labor activists, religious leaders, lawyers, journalists, and ethnic and religious minorities, most blatantly in Xinjiang and Tibet, made federal officials more reluctant to participate in privately sponsored legal projects with China.

OBJECTIVES

China should evolve into a stable, transparent, rules-based, and accountable partner. This can include working with the U.S. on issues of mutual concern and on global challenges including combating climate change, strengthening global health collaboration, and establishing rules-based frameworks to address emerging issues like cybersecurity, data flows, AI and autonomous weapons, climate change, technical standards (including for technology and sustainable infrastructure projects globally), outer space,⁷⁷ and timely sharing of epidemic information. China should also afford due process in its criminal justice system, eliminating extra-judicial detention without access to lawyers of one's choice,⁷⁸ as evidenced most alarmingly in the mass incarceration of possibly millions of ethnic Uighurs in Xinjiang under the pretext of anti-terrorism. Arbitrary detention is also deployed against foreigners,⁷⁹ including U.S. citizens,⁸⁰ raising concerns about business and other travel to China.⁸¹

China should provide a level playing field for U.S. business competitiveness, including U.S. job-supporting exports to China of U.S. commodities and services. Top priorities for U.S. companies continue to include fairness in competing with both state-owned and private companies, business and product licensing, IP protection and enforcement, data flows and cybersecurity policies, relaxing remaining market access restrictions, influence in technical standards setting,⁸² and enhanced overall transparency, predictability, and fairness of China's regulatory environment.⁸³ Improved U.S.-China relations may help alleviate, although not resolve entirely, some of these impediments.⁸⁴

Official U.S.-China law and governance dialogues and programs should be revived. These engagements will help achieve U.S. interests and provide a more enabling bilateral political environment for complementary private American rule of law and governance efforts. Rule of law

dialogues also provide platforms to address sensitive human rights concerns in the more technical language of law and regulation. Renewed legal cooperation might even facilitate an eventual relaxation of current foreign (and domestic) NGO restrictions, permitting China's vibrant but beleaguered civil society to develop more fully.

RECOMMENDATIONS

Inventory, evaluate, and restart federal government-led legal cooperation programs that have demonstrated positive impact over time. At the same time, it will be important to avoid over-committing to dialogues that may permit Chinese counterparts to "buy time" without agreeing to desired concessions.⁸⁵ High-level dialogues among leaders from both sides, used judiciously, help establish the political cover for effective collaboration and convey important messages about bilateral legal issues. Both formal and informal staff interactions should be encouraged. Built on shared professional experiences and needs, these engagements are the true lifeblood of a successful partnership among U.S. and Chinese officials on which mutual understanding can be built. Proactively use such engagements to open space for, and help fund where appropriate, private sector law and governance programs with Chinese counterparts.

Seek China's "buy-in" to ensure productive cooperation. Dialogues must include matters the Chinese side cares about, not just what the U.S. wants China to do. They should also involve relevant Chinese decisionmakers and may require the participation of relevant high-level CCP representatives.⁸⁶

Restart the Bilateral Investment Treaty (BIT) negotiations. A mutually beneficial and high-standard U.S.-China BIT is desired generally by the U.S. business community to set the "rules-of-the-road" for reciprocal investment.⁸⁷ Negotiations would afford another platform for engaging China in areas of continued law-related disagreement bilaterally and internationally, including market access, fair competition, national security screening, subsidies and preferential treatment of state-owned enterprises, standards, and transparency.⁸⁸

Join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and encourage China to do so. Mutual accession efforts, building on Chinese Premier Li Keqiang’s May 2020 remarks indicating that China “has a positive and open attitude” toward joining the CPTPP,⁸⁹ would afford another opportunity to engage with China on thorny legal issues regarding state-owned enterprises, data flows, labor obligations, and subsidies, as well as bring benefits to both countries.

Develop and utilize expertise on Chinese law and how the legal and regulatory systems work. Better understanding will facilitate more effective resolution of bilateral disagreements and help ensure that bilateral agreements are enforceable under Chinese law. Misunderstanding concerning the binding force of various Chinese documents,⁹⁰ for example, has led the USTR to chastise China for failing to publish “as required by WTO” certain opinions and notices mischaracterized as “binding legal measures”⁹¹ and has not acknowledged in its reporting to Congress that China did codify an agreed 30-day comment period for both lawmaking (2015)⁹² and government rulemaking (2018).⁹³ Deeper understanding of Chinese law could help U.S. authorities avoid adopting policies⁹⁴ and targeting⁹⁵ issues⁹⁶ that are based on misapprehension, for example, China’s application of national security laws to companies,⁹⁷ and its evolving social credit system.⁹⁸

Approach bilateral legal cooperation with a constructive attitude. The U.S. knows from its own experience the complexity and difficulty of getting law “right” and implementing it well. Chinese counterparts are open to learning from foreign experience, both positive and negative, as they seek to improve and supplement the country’s legal system and institutions. Moreover, China has been quite innovative in some areas. It was the first country⁹⁹ to establish Internet courts,¹⁰⁰ innovating related technology-enabled experiments such as blockchain-authenticated evidence¹⁰¹ and garnering experience that should be of interest to U.S. courts conducting online adjudication for the first time in the COVID-19 era.¹⁰² China’s courts frequently broadcast trials online¹⁰³ and boast the largest open and searchable database of over 100 million court decisions.¹⁰⁴ The U.S. might learn from China on these¹⁰⁵ and other matters in the course of cooperating on China’s legal modernization.

Improve rule of law principles and practices at home. The U.S. will more effectively elicit cooperation and desired change in China by strengthening rule of law at home, including government transparency, accountability and due process, equal rights and treatment for all, and law enforcement based on clear principles and evidence rather than nationality¹⁰⁶ or imprecise definitions of national security,¹⁰⁷ and by employing negotiation and sound legal tools such as anti-dumping investigations and bringing WTO cases in response to illegal Chinese behaviors. The U.S. should lead by example to also abide by international law and treaty obligations, as it asks China to do.

CONCLUSIONS

U.S.-China legal and governance cooperation has not been, and should not be, premised on a belief that the U.S. can change China or its one-party state led by the CCP. America should confront China on its unacceptable behaviors, working with other like-minded countries when possible, and be clear-eyed about where interests do diverge on issues of law, governance, and human rights. However, U.S. legal engagement with China has positively impacted law, procedure, and enforcement in service of the “normal” legal system that provides effective governance to the majority of the Chinese people on a daily basis and is gradually improving the business environment for U.S. companies to compete more effectively and help sustain jobs at home.¹⁰⁸ Moreover, better mutual understanding of the respective legal regimes — basic principles and implementing experience and practices — of each country can help strengthen the foundations of the overall bilateral relationship.

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