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Chenglin Liu, Risks Faced by Foreign Lawyers in China, 35 *Ariz. J. Int'l & Comp. L.* 131 (2018).

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RISKS FACED BY FOREIGN LAWYERS IN CHINA

Chenglin Liu*

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ABSTRACT

This article provides an objective assessment of the potential risks that foreign lawyers face in China as they push the boundaries of the limits on their activities set by Chinese law. When the Shanghai Bar Association (SBA), a

government-controlled organization, accused foreign lawyers of violating Chinese law and called for official action, some scholars dismissed the threat, claiming that there was no legal basis for a crackdown on foreign lawyers. These scholars erroneously maintained that the Chinese laws that regulate foreign lawyers are ambiguous and create “gray areas.” In fact, the claims of the SBA are justified because the applicable provisions of Chinese law are clear and unambiguous, and the conduct of some foreign firms appears to plainly exceed what is permitted. Foreign firms are at risk of being found to have violated relevant legislative enactments, particularly because of the rise of nationalism in China and the emergence of a hostile regulatory environment that poses threats to foreign investors, including foreign law firms.

This article sounds an alarm for foreign law firms currently practicing in China and for other firms contemplating entering the Chinese legal market. After providing an overview of the laws regulating foreign lawyers, this article examines the plain meaning of these laws. Since the Chinese government has not issued an official interpretation of the two most relevant laws, it is imperative for firms to focus on the actual wording of the governing provisions. An examination of their “plain meaning” reveals that the laws are clear and unambiguous. Any effort to argue that the relevant provisions are ambiguous is ill-advised because that argument masks the perils faced by foreign law firms and their clients.

Finally, this article examines certain unique features of the Chinese legal environment, such as local protectionism, judicial corruption, and the existence of the adjudication committee. These issues, though not taught in Chinese law schools, are clearly understood by practicing Chinese lawyers. However, they are often not adequately appreciated by foreign lawyers.

I. INTRODUCTION

Although the fast-food giant McDonald’s had early access to the Chinese market in the 1990s,¹ international law firms met various obstacles while trying to gain a foothold in China’s legal market.² The Chinese government was concerned

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¹ See Nick Driver, *A Cultural Revolution in Beijing, Via Golden Arches: Mcdonald's: Billions Served? The Fast-Food Giant Hopes to Serve A Billion More as Its Eatery Opens on One of the City's Busiest Corners*, L.A. TIMES (Apr. 23, 1992), http://articles.latimes.com/1992-04-23/news/mn-1304_1_golden-arches. McDonald’s opened its first store in Shenzhen, China in 1990. *Id.*

² American Chamber of Commerce, *People’s Republic of China, American Business in China: 2011 White Paper*, AMCHAM-CHINA 296–300 (2011), <http://web.resource.amchamchina.org/cmsfile/2011/04/28/8ff8c3d4d14f50713e1be8f538b43f80.pdf> (“Yet international law firms in China still face a wide range of market access constraints, including: (1) the inability to provide comprehensive legal services to their clients; (2) a prohibition against participating in certain meetings in certain government

that Chinese law firms were still in a developing stage and not ready to compete with multinational corporations.³ In addition, the entry of international firms was reminiscent of the country's humiliating past at the turn of the twentieth century when the Western imperial powers disparaged Chinese law as a barbaric regime.⁴ For practical reasons, the government feared that foreign firms would bring Western legal concepts into Chinese courtrooms, such as separation of powers, judicial independence, and constitutionalism.⁵

When China became an official member of the World Trade Organization (WTO) in 2001, it promised to open its services markets, including the legal market.⁶ China had no choice but to keep its promise, but it did so with a stringent restriction that foreign law firms could not practice Chinese law.⁷ Today, China's wariness of foreign influence on its legal system remains as deep as it was in the 1990s. Thus, the government has held fast to its rule that foreign firms cannot practice Chinese law. With the recent rise of fervent nationalism in China, the government has become stricter on international corporations.⁸

Despite restrictions, the Chinese legal market presents a great potential for international law firms because of the increase in international trade.⁹ Even while prohibited from practicing Chinese law, foreign law firms have found ways to thrive in China—providing high-end non-litigation services that domestic firms are less competitive at supplying. These services include assistance with mergers and acquisitions, overseas initial public offerings, foreign litigation and arbitration, technology transfers, real estate transactions, intellectual property protection, and Foreign Corrupt Practices Act (FCPA) compliance.¹⁰ In 1992, China had only a

departments involving their clients; (3) an unnecessarily difficult, delayed and unpredictable registration process for the establishment of representative offices (or the opening of new ones); (4) unfavorable tax policies; and (5) other operational restrictions"). *See also*, U.S. Trade Rep., *2014 Report to Congress on China's WTO Compliance*, at 134–35 (Dec. 2014).

³ *See* Rachel E. Stern & Su Li, *The Outpost Office: How International Law Firms Approach the China Market*, 41 L. & SOC. INQUIRY 184, 190 (2016).

⁴ DANIEL C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL 5 (West Group 3d ed. 2015); Zhang Ziyang, *Zhōuqiáng: Yào gǎnyú xiàng xīfāng cuòwù sīcháo liàngjiàn* (周强: 要敢于向西方错误思潮亮剑) [*Zhou Qiang: To Dare to the Wrong What to the West Sword*], CHINA NEWS (Jan. 14, 2010), <http://www.chinanews.com/gn/2017/01-14/8124300.shtml> (discussing how Zhou Qiang, the President of the Supreme People's Courts, called for a crusade against the erroneous Western ideas of separation of powers and judicial independence).

⁵ *See* Ziyang, *supra* note 4; Susan E. Vitale, *Doors Widen to the West: China's Entry in the World Trade Organization Will Ease Some Restrictions on Foreign Law Firms*, 7 WASH. U. J. L. & POL'Y, 223, 248 (2001).

⁶ Thomas Rumbaugh & Nicolas Blancher, *China: International Trade and WTO Accession* 8 (IMF, Working Paper No. 04/36, 2014), <https://www.imf.org/external/pubs/ft/wp/2004/wp0436.pdf>.

⁷ Stern & Li, *supra* note 3, at 189.

⁸ *See infra* Part VIII.

⁹ Stern & Li, *supra* note 3, at 185.

¹⁰ *Id.*

handful of international law firms. As of 2015, there were 229 representative offices of foreign law firms registered with the Ministry of Justice.¹¹

This article provides an objective assessment of the potential risks that foreign lawyers face as they continue to push the boundaries of the legal limits set by China's laws. For example, the Shanghai Bar Association (SBA), a government-controlled organization,¹² accused foreign lawyers of violating the Chinese law.¹³ The alleged offenses include unauthorized practice of Chinese law and others:

- (1) Hiring licensed Chinese lawyers;
- (2) Drafting Chinese legal documents;
- (3) Conducting due diligence;
- (4) Engaging in litigation and arbitration;
- (5) Handling registrations, applications, and filings with government agencies;
- (6) Controlling Chinese law firms;
- (7) Using misleading propaganda; and
- (8) Avoiding Chinese taxes and foreign currency controls.¹⁴

¹¹ Sīfǎ bù wǎng (司法部网) [Justice Department of the Network], *Guanyu 229 Jiawai Guolv Shishi Wu Suo Zhuhua Daibiao Jigou Tongguo 2015 Nian Du Jian Yan Huo Zhun Zai Zhong Guo Jing Nei Zhi Ye [De Di] Gong Gao* (关于 229 家外国律师事务所驻华代表机构通过 2015 年度检验获准在中国境内执业的公告) [*About 229 Foreign Law Firms in China Through the 2015 Inspection Approved to Practice in China*], DFFTW (Sept. 12, 2016), <http://www.dffyw.com/sifashijian/ziliao/201609/41156.html> (discussing a Public Notice regarding 229 representative offices of foreign law firms passed annual inspection and gained permission to provide legal services in China in 2015). Global Trade Relations' website provides an updated list of news articles about international trade issues. *News Updates*, GLOBAL TRADE REL. <http://www.globaltraderelations.net/newsupdates.html> (last visited Oct. 7, 2017); Lucy Hornby & Charles Clover, *China Fines Audi and Chrysler for Price Fixing*, FIN. TIMES (Sept. 11, 2014), <https://www.ft.com/content/69fff63a-3991-11e4-83c4-00144feabdc0>; U.S. CHAMBER OF COM., *COMPETING INTERESTS IN CHINA'S COMPETITION LAW ENFORCEMENT: CHINA ANTI-MONOPOLY LAW APPLICATION AND THE ROLE OF INDUSTRIAL POLICY* (2014), https://www.uschamber.com/sites/default/files/am1_final_090814_final_locked.pdf [hereinafter *COMPETING INTERESTS IN CHINA*].

¹² *Shanghai Bar Association*, AM. BAR ASS'N, https://www.americanbar.org/content/dam/aba/uncategorized/international_law/international_bar_associations/shanghai_bar_association.authcheckdam.pdf (last visited Oct. 15, 2017) (explaining that the SBA "is under the direction and supervision of the Shanghai Municipal Bureau of Justice").

¹³ Dan Harris, *China's Foreign Lawyers Are Under Siege*, HARRIS | BRICKEN (May 11, 2006), http://www.chinalawblog.com/2006/05/chinas_foreign_law_firms_under.html; Confidential Reporter, *China Poised to Crack Down on Foreign Law Firms*, CHINA CONFIDENTIAL (May 11, 2006), <http://chinaconfidential.blogspot.com/2006/05/china-poised-to-crack-down-on-foreign.html>. *Shanghai Bar Assoc Say Foreign Law Firms Constitute Threat To Justice & Economic Safety Of China*, PRAC. SOURCE, <https://practicesource.com/shanghai-bar-assoc-say-foreign-law-firms-constitute-threat-to-justice-a-economic-safety-of-china/> (last visited Oct. 15, 2017).

¹⁴ Sida Liu, *Globalization as Boundary-Blurring: International and Local Law Firms in China's Corporate Law Market*, 42 L. & SOC. REV., 771, 795 (2008).

Some scholars responded by dismissing the threat of government action and claiming that there was no legal basis for a crackdown on foreign lawyers because the relevant provisions in Chinese laws were ambiguous and created “gray area.”¹⁵ However, the claims of the SBA are not baseless. The applicable provisions of Chinese law are clear, unambiguous, and the conduct of some foreign firms appears to plainly exceed what is permitted. Foreign firms are at risk of being found to have violated relevant legislative enactments, particularly because of the rise of nationalism in China and the emergence of a hostile regulatory environment that poses threats to foreign investors, including foreign law firms.

This article sounds an alarm for foreign law firms currently practicing in China and for other firms contemplating entering the Chinese legal market. First, the article provides an overview of the laws applicable to foreign lawyers. Second, it examines the “plain meaning” of these laws. Since the Chinese government has not issued an official interpretation of the two most relevant laws, it is imperative for firms to focus on the actual wording of the governing provisions. An examination of their “plain meaning” reveals that the laws are clear and unambiguous. Any effort to argue that the relevant provisions are ambiguous is ill-advised because that argument masks the real perils faced by foreign law firms and their clients.

Finally, this article examines certain unique features of the Chinese legal environment, such as local protectionism, judicial corruption, and the existence of the adjudication committee. These issues, though not taught in Chinese law schools, are clearly understood by practicing Chinese lawyers. However, they are often not adequately appreciated by foreign lawyers.

II. A FOREIGN CITIZEN CANNOT BE LICENSED AS A PRACTICING LAWYER IN CHINA

In 1986, the Ministry of Justice held the first national examination for qualification to practice law.¹⁶ In 1996, the Standing Committee of the National People’s Congress (NPC) enacted the Lawyers Law of China (Lawyers Law), which specifies the requirements for becoming a lawyer.¹⁷ Under the law, a candidate must first pass the national examination and then obtain a practice certificate to become a licensed practicing lawyer.¹⁸ To sit for the national qualification examination, a candidate must have three years of legal education at an institution of higher learning, have an equivalent professional level of experience, or have acquired an undergraduate education in another major at an institution of

¹⁵ Liu, *supra* note 14, at 780.

¹⁶ Jane J. Heller, *China’s New Foreign Law Firm Regulations*, 12 PAC. RIM L. & POL’Y J. 751, 755 (2003).

¹⁷ Lvshi Fa (律师法) [The Lawyers Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 28, 2007, effective June 1, 2008), LAWINFOCHINA (China) [hereinafter *The Lawyer’s Law*].

¹⁸ *Id.* at art. 6.

higher learning.¹⁹ The law did not require a law degree from a law school to sit for the national examination.

The Ministry of Justice issued a notice that requires a candidate to have an undergraduate degree in law, or an undergraduate degree in other qualifying subjects, along with knowledge of the law, to sit for the national bar.²⁰ In addition, the Ministry requires that a candidate for the bar exam have Chinese citizenship and uphold the Chinese Constitution, which makes obeying the Communist Party of China (the Party) a fundamental principle.²¹ In summary, a practicing lawyer in China must:

- (1) obtain an undergraduate degree in law or another discipline and possess knowledge of law;
- (2) pass the national lawyer's examination;
- (3) obtain a practice license;
- (4) hold Chinese citizenship (residents from Taiwan, Hong Kong, and Macau may qualify); and
- (5) pass criminal background checks.²²

A foreign citizen is not qualified to sit for the national bar exam.²³ Without passing the national bar exam, a foreign citizen cannot be licensed in China.²⁴ It is illegal to practice law without a license. Article 13 of the Lawyers Law (amended, 2007) provides, "a person who has not acquired a lawyer's practicing certificate shall not engage in legal *practices* in the name of a lawyer."²⁵

III. THE REGULATIONS AND RULES ON FOREIGN LAWYERS

To regulate foreign lawyers, the State Council promulgated the Administrative Regulations on Representative Offices of Foreign Law Firms in China (Regulations), which took effect on January 1, 2002.²⁶ The Ministry of Justice issued the Rules Concerning the "Enforcement of the Regulations on the

¹⁹ Sīfǎ bù (司法部) [Ministry of Justice], *2017 Nian Guojia Shifa Kaoshi Gonggao 2017 年国家司法考试公告* [2017 Notice State Judicial Exam Announcement], SINA EDUCATION (June 5, 2017), <http://edu.sina.com.cn/zgks/2017-06-05/doc-ifyfuzny3239700.shtml> [hereinafter *2017 Notice State Judicial Exam*].

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ The Lawyers Law, *supra* note 17, at art. 5.

²⁵ *Id.* at art. 13.

²⁶ Waiguo Lvshi Shiwu Suo Zhuhua Daibiao Jigou Guanli Tiaoli (外国律师事务所驻华代表机构管理条例) [Administrative Regulations on Representative Offices of Foreign Law Firms in China] (promulgated by the State Council of the People's Republic of China, Dec. 22, 2001, effective Jan. 1, 2002), LAWINFOCHINA (China) [hereinafter *Regulations*].

Management of Representative Office set up by Foreign Firms in China” (the Rules), which took effect on September 1, 2002.²⁷

The Ministry of Justice, as one of the 27 ministries of the State Council, is under direct leadership of the State Council. Therefore, regulations enacted by the State Council enjoy higher status than rules issued by ministries. The purpose of a ministry’s rules is to provide guidance and clarification on how a State Council regulation works in practice.²⁸ It is common that the State Council enacts a regulation that leaves ample room for a relevant ministry to fill in the details. Authorized by the Constitution, a ministry routinely issues departmental rules for implementing State Council regulations.²⁹ Both the Regulations and Rules on foreign law firms are administrative enactments and are legally binding.³⁰ Foreign firms must abide by the Regulations, Rules, and other Chinese laws.³¹

The Regulations promulgated by the State Council only provide a broad outline of how foreign lawyers are regulated. The Ministry of Justice’s Rules interpret the Regulations. They also detail the qualification criteria, application and registration procedures, and legal responsibilities of foreign applicants. The Ministry of Justice and Provincial Justice Departments are responsible for implementing Regulations and Rules.³² To determine the precise meaning of an administrative provision, a practicing lawyer must consult both enactments.

Without exception, the Regulations and Rules apply to foreign law firms that provide legal services in China.³³ The purpose of the enactments is to set a code of conduct for foreign law firms in the Chinese legal market.³⁴ No foreign law firm may treat the enactments in a selective manner. It is a privilege, not a right, for a foreign firm to operate in China. A foreign law firm with a presence in China acts as a legal person under Chinese law. As such, the firm must respect all Chinese laws, not only the enactments at issue.³⁵ Violations of the enactments will result in disciplinary actions by the Provincial Justice Department. If the violation is serious, the Ministry of Justice will revoke the law firm’s business license.³⁶

²⁷ Sifa Bu Guanyu Zhixing Waiguo Lvshi Shiwu Suo Zhuhua Daibiao Jigou Guanli Tiaoli De Guiding [Yi Xiuding(司法部关于执行《外国律师事务所驻华代表机构管理条例》的规定[已被修订]) [Provisions of the Ministry of Justice on the Execution of the Regulations on the Administration of Foreign Law Firms' Representative Offices in China, Revised] (promulgated by the Ministry of Justice, July 4, 2002, effective Sept 1, 2002, amended, Sept. 2, 2004) LAWINFOCHINA (China) [hereinafter Rules].

²⁸ See Legislation Law of the People's Republic of China (promulgated by Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000), ch. 3, Congressional-Executive Commission on China [hereinafter Legislation Law of the PRC].

²⁹ *Id.* See also XIANFA art. 90, § 3 (2004) (China).

³⁰ CHOW, *supra* note 4, at ch. 5.

³¹ Regulations, *supra* note 26, at art. 3.

³² *Id.* at art. 9.

³³ *Id.* at art. 1.

³⁴ *Id.*

³⁵ *Id.* at art. 3.

³⁶ Regulations, *supra* note 26, at ch. 5.

IV. REGULATIONS AND RULES IN DETAIL

The Regulations consist of thirty-five articles in six chapters. Chapter One sets forth the general requirements. Applicants must: (1) comply with Chinese laws and regulations and adhere to professional ethics and practice disciplines for Chinese lawyers;³⁷ (2) not harm China's state security and public interests,³⁸ and; (3) remain civilly responsible for their legal services rendered within the territory of China.³⁹

Chapter Two lays out the application requirements and procedures for foreign law firms to set up representative offices in China. A foreign law firm applicant must demonstrate that it is admitted for law practice in its home country and has not been sanctioned for ethics violations.⁴⁰ Chapter Two also requires the foreign firms' representatives to be admitted for law practice in their home country and engaged in the practice of law for at least two years prior to the application.⁴¹ The head of the representative office must possess three years of law practice experience before the application.⁴² In addition, the applicant must demonstrate why it is necessary to open a representative office in China.⁴³

Upon receiving the application, the Justice Bureau of the provincial government conducts a preliminary review and decides whether to submit the application to the Ministry of Justice in Beijing.⁴⁴ The Ministry of Justice has six months to decide whether to permit the applicant to open a representative office in China.⁴⁵ With a permit from the Ministry of Justice, the foreign law firm registers with the Justice Bureau and obtains a business license, which must be renewed annually. The bureau has the right to terminate a law firm's business license if the firm is no longer qualified to practice in China.⁴⁶

A. Scope of Services

Chapter Three defines five areas of services that a representative office is permitted to engage in. Although it cannot provide legal services on Chinese law issues, a representative office may:

- (1) Provide clients with consultative services regarding the laws of the country where the representative office and its lawyers are admitted for law practice or consultative services regarding international laws;

³⁷ Regulations, *supra* note 26, at art. 3.

³⁸ *Id.*

³⁹ *Id.* at art. 4–5.

⁴⁰ *Id.* at art. 7(2).

⁴¹ *Id.* at ch. 2.

⁴² Regulations, *supra* note 26, at art. 7.

⁴³ *Id.*

⁴⁴ *Id.* at art. 8–9.

⁴⁵ *Id.* at art. 9.

⁴⁶ *Id.* at art. 13–14.

- (2) Represent a client or a Chinese law firm to handle legal issues of the country where the office and its lawyers are admitted for law practice;
- (3) Retain Chinese law firms for clients to deal with legal affairs;
- (4) Retain a Chinese law firm on a long-term contract basis to handle legal issues; and
- (5) Provide clients with information on the impact of the Chinese legal environment.⁴⁷

How can a representative office practice Chinese law without offering a legal opinion on its concrete legal issues? In essence, the five permitted areas reflect the lawmakers' desire to make a foreign law firm's representative office serve as an intermediary between either foreign enterprises and Chinese law firms, or between Chinese enterprises and foreign law firms.⁴⁸ Foreign enterprises planning to enter the Chinese market often find it convenient to work with a foreign law firm that has a representative office in China. Due to language and cultural barriers, it is a daunting task for a foreign enterprise to establish a business relationship with a Chinese law firm. Although it is not allowed to provide specific legal opinions on concrete Chinese law issues, the representative office may provide general information about the impact of the Chinese legal environment. When a specific Chinese law issue arises, the representative office may refer the issue to a trustworthy Chinese law firm with which it has a long-term relationship. In addition, when a Chinese investor is planning to expand business in a foreign country where the representative office and its lawyers are admitted for law practice, the office could be better suited than a foreign firm without such a presence in China to facilitate the investment.⁴⁹

B. Legal Responsibilities

A representative office could face criminal penalties if it seriously violates China's state security, public security, or social order. Penalties include permanently barring the office and its lawyers from returning to the Chinese market for life.⁵⁰ If the office's violations do not warrant criminal penalties, it could still face administrative sanctions.⁵¹

⁴⁷ Regulations, *supra* note 26, at art. 15.

⁴⁸ Stern & Li, *supra* note 3, at 192 (“[L]awyers from the vast majority of firms from continental Europe, Asia, and Latin America defined their market niche as handling work from their home country or region. For example, bread-and-butter work for an Italian law firm might include outbound work (e.g., helping an Italian luxury brand franchise in China) as well as inbound work (e.g., guiding a Chinese company’s efforts to acquire an Italian business).”).

⁴⁹ Telephone interview with Liu Honghui, Partner, The Jingsh Law Firm (Dec. 28, 2016).

⁵⁰ Regulations, *supra* note 26, at art. 31.

⁵¹ *Id.* at art. 24.

If the representative office exceeds the scope of permitted practice areas and provides a legal opinion on concrete Chinese law issues, it could face various sanctions, ranging from suspension of business for correction or administrative fines of RMB 50,000 (\$7,500) to RMB 200,000 (\$30,000) to revocation of its business license.⁵² Additionally, employing Chinese licensed attorneys could subject a representative office to similar penalties.⁵³

Settling accounts for legal services fees outside the Chinese territory could subject a representative office to a fine of no less than 100% of the amount and no more than 300% of the amount.⁵⁴ In addition, the office may also face temporary suspension or revocation of its business license, depending on the seriousness of the violation.⁵⁵ It is in China's best financial interest to have all foreign firms settle accounts in China for the fees charged from the legal services they rendered. Such a requirement also makes it easier for the government to supervise the foreign firms' activities.

The Regulations also impose severe administrative sanctions on the representative office for other violations, including revealing business secrets, working at two representative offices simultaneously, and providing false information.⁵⁶ The sanctions range from administrative fines to business license revocation.⁵⁷ If a representative office loses its business license for violating Regulations but not the criminal law, the office and its lawyers are barred from the Chinese market for five years.⁵⁸

The Regulations also sanction officials at the justice departments and Ministry of Justice who derelict their duties in granting licenses to foreign law firms to set up representative offices.⁵⁹ An official may be demoted for failing to examine application materials, conduct annual inspections, or collect excessive fees.⁶⁰ In addition, an official can be demoted or fired for granting licenses to unqualified foreign law firms, taking bribes for special favors, reducing fines, or embezzling funds.⁶¹ An official may face criminal penalties if his or her illegal acts, such as dereliction of duty, abuse of power, or corruption, have caused serious damage to public property or state interests.⁶²

⁵² Regulations, *supra* note 26, at art. 25.

⁵³ *Id.*

⁵⁴ *Id.* at art. 26.

⁵⁵ *Id.*

⁵⁶ *Id.* at art. 27, 29.

⁵⁷ Regulations, *supra* note 26, at art. 24.

⁵⁸ *Id.* at art. 31.

⁵⁹ *Id.* at art. 32.

⁶⁰ *Id.*

⁶¹ *Id.* at art. 33.

⁶² Regulations, *supra* note 26, at art. 33.

C. Enforcement

The Ministry of Justice and Provincial Justice Departments (PJD) are responsible for the enforcement of the Regulations and Rules.⁶³ A foreign law firm wishing to establish a representative office in a city in China needs to file an application with a respective PJD.⁶⁴ After a preliminary review, the PJD refers the application to the State Council for the final decision.⁶⁵ Upon receiving the State Council's approval, the representative office and its representatives must register with the PJD before rendering legal services.⁶⁶ The Regulations also require that the representative office and representatives register with the PJD annually.⁶⁷

The PJD inspects foreign law firms annually, and if the PJD finds that a firm's conduct warrants further investigation, it will create a record and send PJD officials to visit the alleged law firm office to review relevant materials, interview lawyers, and collect evidence. Upon completing the investigation, the PJD will issue an investigation report to the alleged firm. Subsequently, the PJD's disciplinary division will call the firm to a hearing, during which the alleged firm has the right to confront the evidence and defend its conduct. Depending on the degree of the violation, the PJD will impose penalties ranging from public reprimand, or fine, to suspension.⁶⁸ The firm has the right to petition the PJD for an administrative review of the penalties.⁶⁹ After exhausting administrative channels, the firm has the right to sue the PJD in court.⁷⁰ Because the local court is subject to the PJD's influence, there is virtually no chance for a firm to overturn the PJD's decision.⁷¹

On November 9, 2012, the Guangdong Provincial Justice Department (GPJD) suspended the operations of a representative office of Hengji, a Singapore

⁶³ Regulations, *supra* note 26, at ch. 5.

⁶⁴ *Id.* at art. 8.

⁶⁵ *Id.* at art. 9.

⁶⁶ *Id.* at art. 10.

⁶⁷ *Id.*

⁶⁸ Dui Weifan 《Waiguo Lvshi Shiwu Suo Zhuhua Daibiao Jigou Guanli Tiaoli》
De Chufa (对违反《外国律师事务所驻华代表机构管理条例》的处罚) [Penalties for violation of the Regulations on the Administration of Foreign Law Firms' Representative Offices in China], PEOPLE'S GOV'T OF HUBEI PROVINCE, <http://www.hbsf.gov.cn/gk/qzqc/hzcf/28955.htm> (last updated Dec. 24, 2015); Regulations, *supra* note 26, at art.10.

⁶⁹ Zhonghua Renmin Gongheguo Xingzheng Chufa Fa (中华人民共和国行政处罚法) [Law of The People's Republic of China on Administrative Penalty] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 17, 1996, effective Oct. 1, 1996, amended, Aug. 27, 2009) art. 6, LAWINFOCHINA (China).

⁷⁰ *Id.*

⁷¹ Li Jing, *Fu Ying: Jinnian "Min Gao Guan" Xingzheng Susong An Yuangao Shengsu Lv Mingxian Xiajiang* (傅莹近年“民告官”行政诉讼案原告胜诉率明显下降) [*Fu Ying: "The People Complained" the Chances of Winning an Administrative Law Suit Have Decreased Dramatically in Recent Years*], PEOPLE'S NETWORK (Mar. 4, 2014), <http://lianghui.people.com.cn/2014npc/n/2014/0304/c376798-24523286.html>.

based law firm, for violation of the Regulations and Rules.⁷² The GPJD found that Hengji illegally set up the representative office, representing both Chinese and foreign clients and charging high fees.⁷³ During the investigation process, the GPJD removed Hengji's nameplate hanging at the entrance of the office building, confiscated its promotional pamphlets, and seized other materials for further investigation.⁷⁴ Unfortunately, there is no official source for finding PJD's disciplinary actions. The following could be the reasons for the lack of reports on sanctions for foreign law firms' violations of the Regulations and Rules:

- (1) The Justice Bureau will not start an investigation of a foreign law firm's representative office for violation of the Regulations and Rules until it finds irregularities or receives formal complaints.
- (2) The law does not require the Ministry of Justice to make its disciplinary actions available to the public. Therefore, it is impossible to conduct reliable research on whether a firm is sanctioned or how many firms have been sanctioned.
- (3) Even when a client has a dispute with a foreign law firm and files a formal complaint, the Ministry of Justice often persuades the parties to reach a settlement, the result of which is not accessible to the public.⁷⁵

No law requires the Ministry of Justice and the Justice Bureaus to make all their administrative sanctions known and available to the public. Also, foreign law firms and lawyers are unlikely to publicize violations and sanctions. Chinese government entities do not release all such information on a regular basis or in a systematic manner. Further, Chinese government websites do not routinely publish administrative orders and sanctions. The government entities constantly delete website content without notice.

The following example illustrates how volatile the government information system is. In 2005, the Beijing Justice Bureau sanctioned Gaote Xiongdi, a foreign firm, for violating the Regulations and Rules. The decision is no longer available on the Bureau's website. A search using Google, which is blocked in China, leads only to a link of the decision archived by TOTOO, a private website.⁷⁶ Therefore, it is unreasonable to draw a conclusion that the Chinese government has not enforced the law based on a failure to locate administrative decisions.

⁷² Xing Hui, *Guangdong Chachu Shouzong Waiguo Feifa Lvshi Shiwu Suo Anjian* (广东查处首宗外国非法律师事务所案件) [*The Guangdong Provincial Department of Justice Investigates the Case of the First Foreign Law Firm*], LEGAL DAILY (Nov. 13, 2012), http://www.legaldaily.com.cn/Lawyer/content/2012-11/13/content_3981025.htm?node=34488.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Telephone interview with Liu Honghui, *supra* note 49.

⁷⁶ See Rader, *Gaote Beijing Weifa Zhiye Bei Chufa* (高特北京违法执业被处罚) [*Beijing Illegal Practice Gaote is Punished*], TOTOO 老论坛's ARCHIVER (Sept. 27, 2005), <http://www.old.totoo.org/archiver/?tid=25410.html>.

V. NO OFFICIAL INTERPRETATION OF THE REGULATIONS AND RULES

Under Chinese law, regulations and rules can only be construed according to the original wording of the two legal enactments. The State Council (the Central Government of China) has the sole power to interpret regulations and rules. As Professor Daniel Chow observed, unlike Western legal systems, Chinese courts have no authority to interpret administrative laws and regulations put forth by the government.⁷⁷ Chow further stated: “Under the current practice, only the State Council and its departments have the power to interpret administrative regulations and to the exclusion of all other government organs, including the Supreme People’s Court.”⁷⁸ The State Council’s power to interpret the regulations and rules is codified in Article 33 of the Ordinance Concerning the Procedures for the Formulation of Administrative Regulations.⁷⁹

The power to interpret rules belongs to the formulating organs of rules [the State Council or Ministries]. The formulating organs shall give interpretations to the rules that fall under one of the following circumstances:

- (1) the specific meaning of their provisions needs to be further defined; or
- (2) after their formulation, new development makes it necessary to define the basis to which they are applied.

Interpretations of rules shall be proposed by the legislative affairs departments of the formulating organs with reference to the procedures for the examination of the draft rules for examination, and they shall be promulgated after submission to and approved by the formulating organs.

Interpretations of rules have the same force and effect as the rules themselves.

So far, neither the State Council nor the Ministry of Justice has put out any official interpretation of the Regulations and Rules on foreign lawyers. Therefore, the understanding of the Regulations and Rules can only come from the plain wording of the provisions in the two laws.

⁷⁷ CHOW, *supra* note 4, at 177.

⁷⁸ *Id.*

⁷⁹ Guizhang Zhiding Chengxu Tiaoli (规章制定程序条例) [Regulations on Procedures for the Formulation of Administrative Regulations] (promulgated by the State Council of the People’s Republic of China, Nov. 16, 2001, effective Jan. 1, 2002), art. 33 (China).

VI. THE PLAIN MEANINGS OF ARTICLE 15(5) OF THE REGULATIONS AND ARTICLE 33 OF THE RULES

An extensive research revealed that foreign law firms frequently violate the Regulations and Rules by hiring Chinese lawyers to practice Chinese law.⁸⁰ Some scholars argued, however, the unclear provisions in the Regulations and Rules created a so-called “gray area,” blurring the boundaries of what foreign law firms were permitted to engage in.⁸¹ Therefore, the foreign law firms’ violations of Chinese law should be justified.⁸² Others make the same argument that the ambiguity in the laws leaves the door open for foreign law firms to practice Chinese law.⁸³ While these researchers may have presented a helpful argument for the foreign firms, their assertions have no legal basis. The plain meaning of the law leaves no room for debate.

To examine the plain meaning of the law, it is useful to read the legal provision the way a Chinese lawyer or judge would. When there is no official interpretation, the meaning of the law can only come from the direct reading of the legal provision, which emphasizes the plain Chinese meaning of each phrase in the provision. By using this method, the following section examines two key provisions that scholars claimed were ambiguous.

A. The Plain Meaning of the Two Articles Based on the Xinhua Dictionary

Article 15(5) of the Regulations permits foreign law firms to provide “information relating to the impact on Chinese legal [or translated as ‘regulatory’] environment.” (提供有关中国法律环境影响的信息). Article 33 provides “a representative organization and its representatives shall not provide specific comments or opinions on the application of the laws of China when providing information relating to the influences on China’s regulatory environment pursuant to Item (5) of Paragraph 1 of Article 15 of the Regulations.” (提供有关中国法律环境影响的信息时, 不得就中国法律的适用提供具体意见或判断)

Neither the original texts nor the translated texts were intended to be ambiguous. The two provisions work in tandem for defining the scope of practice that foreign lawyers are not permitted to engage in—providing specific opinions or judgments concerning the application of both substantive and procedural law.

⁸⁰ Liu, *supra* note 14, at 795 (“Although such practices do exist and, from a statutory point of view, could be interpreted as violations of the government regulation on foreign law offices, they are still in the gray area and have been tolerated by the BOJs for a long time.”).

⁸¹ *Id.* at 780.

⁸² *Id.* at 795.

⁸³ Stern & Li, *supra* note 3, at 201 (“[L]egal ambiguity limits growth by fostering uncertainty. It is an open secret that foreign law firms offer advice on Chinese law in order to keep clients happy and stay in business. One experienced lawyer complained that following the letter of the law means that ‘you aren’t supposed to do anything! The requirement to hire a Chinese law firm to provide your client with advice, it just doesn’t work that way. Clients are not going to accept double bills.’”).

To clarify the meaning of the two provisions, it is necessary to consult the Xinhua Dictionary (新华字典), the most authoritative Chinese dictionary, which contains the following definitions:

影响 (an effect, to influence, to affect, an influence);⁸⁴ 干扰 (to interfere with).⁸⁵

信息 (information, news);⁸⁶ 消息 (news, information).⁸⁷

意见 (opinion);⁸⁸ 见解; 主意, 见解 (view, opinion, idea).⁸⁹

证明 (to prove, identification, testimonial);⁹⁰ 用可靠的材料或事实来表明或判定真伪对错等 (to prove that something is right or wrong with credible materials or evidence).⁹¹

具体 (specific, concrete);⁹² 细节⁹³ 方面很明确的, 不抽象的; 不笼统的⁹⁴ (very clear about details, not in abstract, not in general).⁹⁵

Therefore, a literal translation of Article 15(5) of the Regulations is that foreign law offices are permitted to transmit legal information or general legal news relating to the regulatory environment of Chinese law. Legal information or legal

⁸⁴ *Ying xiang* (影响) [*To Influence*], ONLINE XINHUA DICTIONARY, <http://xh.5156edu.com/html5/z82m43j41925.html> (last visited Oct. 17, 2017).

⁸⁵ *Gan rao* (干扰) [*To Interfere*], ONLINE XINHUA DICTIONARY, <http://xh.5156edu.com/html5/z93m35j227535.html> (last visited Oct. 17, 2017).

⁸⁶ *Xin xi* (信息) [*Information*], ONLINE XINHUA DICTIONARY, <http://xh.5156edu.com/html5/z47m11j68864.html> (last visited Oct. 17, 2017).

⁸⁷ *Xiao xi* (消息) [*News*], ONLINE XINHUA DICTIONARY, <http://xh.5156edu.com/html5/z47m34j76734.html> (last visited Oct. 17, 2017).

⁸⁸ *Yi jian* (意见) [*Opinion*], YABLA, <https://chinese.yabla.com/chinese-english-pinyin-dictionary.php?define=%E6%84%8F%E8%A7%81> (last visited Oct. 17, 2017).

⁸⁹ *Jianjie* (见解) [*Opinion*], ONLINE XINHUA DICTIONARY, <http://xh.5156edu.com/html5/z48m48j273280.html> (last visited Oct. 17, 2017).

⁹⁰ *Zheng Ming* (证明) [*Prove*], ONLINE XINHUA DICTIONARY, <http://xh.5156edu.com/html5/z34m41j20204.html> (last visited Oct. 17, 2017). The Chinese meaning of Zheng Ming 证明 is taken from Xinhua Dictionary. The English translation of the Chinese definition of Zheng Ming 证明 is also taken from the same dictionary.

⁹¹ The English translation of the Chinese definition of Zheng ming 证明 (用可靠的材料或事实来表明或判定真伪对错等) is provided by the author.

⁹² *Ju ti* (具体) [*Specific*], ONLINE XINHUA DICTIONARY, <http://xh.5156edu.com/html5/z35m62j290247.html> (last visited Oct. 17, 2017).

⁹³ *Xi jie* (细节) [*Detail*], ONLINE XINHUA DICTIONARY, <http://xh.5156edu.com/html5/z37m46j84125.html> (last visited Oct. 17, 2017).

⁹⁴ *Long tong* (笼统) [*General*] ONLINE XINHUA DICTIONARY, <http://xh.5156edu.com/html5/z44m65j316567.html> (last visited Oct. 17, 2017).

⁹⁵ Except as otherwise footnoted, the English translation of the definitions of the above terms in parenthesis are taken from the Xinhua Dictionary.

news is objective in nature. A literal translation of Article 33 of the Rules states that foreign law offices are not permitted to provide specific or concrete legal opinions or certification while transmitting information about the Chinese regulatory environment. The line drawn in the law between merely transmitting legal information and providing assessments or certification about a specific legal question is clear, unequivocal, and unambiguous.

B. The Plain Meaning of the Two Articles Based on the Chinese Legal Dictionary

According to the Westlaw translation,⁹⁶ 法律环境 means “China’s regulatory environment.” Westlaw’s translation captures the essence of Article 15(5): A general legal sphere rather than specific legal issue. 法律环境 is a frequently used legal term in Chinese law to refer to the general view of the law. Per the Legal Dictionary (法学大辞典), 法律环境 means a sphere that covers the state regulatory regime and the legal consciousness of the state judicial organs and social organizations.⁹⁷ Therefore, the term of 法律环境 is clear and unequivocal, and it does not create a “grey area.” 法律环境 has a consistent meaning throughout the Chinese language. For example, in Chinese universities, there is a popular course entitled *Commercial Legal Environment*, which is a survey course that provides general information regarding the legal impact on businesses.⁹⁸

信息(information): 信息(information means) 音信; 消息(message, news).⁹⁹

意见(opinion): 意见(opinion) means 见解(idea); 主张(opinion).¹⁰⁰
The obvious difference between 信息(information) and 意见(opinion) is that information does not include a personal subjective opinion. 意见(opinion), however, is an idea formed through personal thinking or judgment.¹⁰¹

⁹⁶ Regulation on the Management of Representative Offices set up by Foreign Law Firms in China (promulgated by the State Council of the People’s Republic of China, Dec. 22, 2001, effective Jan. 1, 2002).

⁹⁷ See ZENG QINGMIN (曾庆敏), FAXUE DA CIDIAN (法学大辞典) [LEGAL DICTIONARY] 1100 (10th ed. 1980).

⁹⁸ E.g., Xie Haixia, MBA Business Teaching Content, University of Capital Economics (2016), <http://mba.cueb.edu.cn/docs/20161010222208630839.docx> (demonstrating that the Master of Business Administration (MBA) program at the University of Capital Economics explains that the Legal Environment of Business is an introduction course that helps students understand the general legal environment for doing business).

⁹⁹ XIANDAI HANYU CIDIAN (现代汉语词典) [MODERN CHINESE DICTIONARY] 760 (7th ed. 2016).

¹⁰⁰ *Id.* at 814.

¹⁰¹ *Id.* at 492.

具体 (concrete):¹⁰² 具体 (concrete): 不抽象 (not in abstract), 不笼统 (not in general).¹⁰³ As opposed to general information, a concrete opinion or judgment is specific, detailed, and targeted. The term 具体 (concrete) in Article 33 is precise and clear.

证明 (proof): 证明 (proof) is made based on information. To certify something is true or untrue¹⁰⁴ is clearly beyond mere information transmission.

Reading the above terms together, it is clear Article 15(5) of the Regulations and Article 33 of the Rules define the boundary between what foreign law firms can do and cannot do. It is permissible for foreign law firms to transmit general information regarding the legal impact of Chinese law, but in doing so, they are prohibited from providing a specific legal opinion on a concrete Chinese legal issue. If the ends or means of the laws regulating foreign law firms are not desirable, it is up to the Chinese lawmakers to make necessary adjustments, not foreign law firms. The plain meanings of Article 15(5) of the Regulations and Article 33 of the Rules are complementary and compatible.

VII. UNDERSTANDING CHINESE LAW AND POLITICS

A foreign lawyer once boasted: “[if the Chinese government allows me to practice Chinese law, I’m going to pick the best Chinese lawyers from Fangda, Jun He [top Chinese law firms]. I’m going to wipe them out.”¹⁰⁵ The foreign lawyer’s hyperbole is not only unfortunate, but also reveals ignorance about the Chinese legal system and the exceptional ability of Chinese lawyers to thrive in a chaotic legal environment. A lawyer who is successful in the US legal market may not naturally be successful in China because the two legal systems value different skill sets. In the United States, it is impossible to become an accomplished lawyer without basic skills such as self-direction, self-motivation, a commitment to lifelong learning, effective communication, persuasive rhetoric, analytical thinking, and many others.¹⁰⁶ In China, however, critical thinking and analytical skills may prove detrimental to one’s legal career because subordination is not just a virtue but a basic means of survival. Chinese lawyers have unique knowledge about China’s legal system and political environment, which is not taught in law schools but acquired through a combination of upbringing, Darwinian competition, and natural

¹⁰² *Jù tǐ* (具体, 拼为) [Specific], BAIDU ENCYCLOPEDIA, <https://baike.baidu.com/item/%E5%85%B7%E4%BD%93/4577821> (last visited Oct. 17, 2017) (providing that it is not abstract, not general, the details are clear).

¹⁰³ *Id.*

¹⁰⁴ XIANDAI HANYU CIDIAN, *supra* note 99, at 88.4.

¹⁰⁵ Stern & Li, *supra* note 3, at 199.

¹⁰⁶ *17 Skills of Successful Lawyers in 2015: PBI Town Hall Takeaways*, PA. BAR. INST. (Apr. 8, 2015), <http://www.pbi.org/now/17-skills-of-successful-lawyers-in-2015-pbi-town-hall-takeaways>.

aptitude. Professor Sida Liu succinctly summed up the unique skills required to practice Chinese law:

For the legal profession, localized expertise is not merely the technical knowledge of local law on the books, but an experience-based and culturally sensitive expertise that grows from day-to-day legal practice. As much of the law and society literature shows, legal practice is full of uncertainty, inconsistency, and unintended consequences, thus in their work lawyers often emphasize insider access and local connections rather than the formal image of law.¹⁰⁷

The following section explores some unique aspects of Chinese law, which are essential for a successful practice in China. Even though these aspects of the law are not taught in Chinese law schools, it is an open secret that law students must acquire them to ensure survival in the Chinese legal profession. If foreign lawyers and Chinese lawyers compete to solve a Chinese legal issue in a Chinese court, it would be unwise to bet on the foreign lawyers.

A. A Brief Overview of the Chinese Legal System

The current Chinese government structure is set forth in the 1982 Chinese Constitution (Constitution).¹⁰⁸ There are four levels of governments with the central government placed at the top in Beijing, followed by 31 provincial governments (including the governments of five ethnic minority regions and four megacities),¹⁰⁹ each of which oversees numerous city or prefecture governments. Below the city or prefecture level are the county governments and township governments.¹¹⁰

The principle of “democratic centrism” governs the relationships between the central government and the other three levels of government, which are often collectively referred to as “local governments.”¹¹¹ This means that lower level governments are subordinate to higher level governments and all local governments are subordinate to the central government.¹¹² Unlike the individual states of the United States, provinces or their equivalents do not have their own constitutions.

¹⁰⁷ Liu, *supra* note 14, at 775.

¹⁰⁸ XIANFA ch. 3, (1982) (China).

¹⁰⁹ *See generally* CHOW, *supra* note 4. In addition to 22 provinces, five autonomous regions of ethnic minorities, and four megacities in the mainland, the People’s Republic of China has two Special Administrative Regions, namely Hong Kong and Macau, which have their own legal systems. China also regards Taiwan a renegade province, which has a distinctive legal system. This overview is limited to the description of mainland China. *Id.*

¹¹⁰ *Id.* Below the county level are township governments, which only have branches of the basic county courts, called people’s tribunals. *Id.*

¹¹¹ *Id.* at 86.

¹¹² CHOW, *supra* note 4, at 86.

In practice, the Party holds the country's real power.¹¹³ The structure of the Party committee parallels each level of government. Thus, at each of the four levels, there are two sets of leadership, one from the government and another from the Party committee. Within each Party committee, there is a political legal office supervising judicial affairs.¹¹⁴

At the central level, there are six major state organs: the NPC and its Standing Committee, the State President, the Central Military Commission, the State Council, the Supreme People's Court (SPC), and the People's Supreme Procuratorate (a prosecutorial organ).¹¹⁵ Each of the local governments have similar organs except for a military commission.¹¹⁶

The judicial system in China consists of four levels of courts including the SPC at the top, the people's high courts at the provincial level, the people's intermediate courts at the city or prefecture level, and the people's basic court at the county level.¹¹⁷ There are ordinarily two steps in the legal process: a trial at a court and an appeal to the next higher-level court. Theoretically, the SPC can try a case of first instance, for which there is no appeal, but this has rarely happened in practice.

From a literal reading of the Constitution, it appears that the NPC holds the highest state power and other state organs are responsible to the NPC.¹¹⁸ In practice, the State Council is the central government, which directs social and economic affairs of the entire country.¹¹⁹ Administratively, the SPC is a level below the State Council.¹²⁰ Despite the fact that the Constitution mandates that the SPC work independently,¹²¹ the lower administrative rank in reality makes it impossible for the SPC to conduct juridical affairs without being subject to outside pressures. Thus, the judiciary is an integral part of the government, rather than a co-equal branch that provides checks and balances on other state organs.¹²²

At the local level, the weakness of the judiciary is equally, if not more, pronounced. Even though the Constitution gives the Local People's Congress (LPC) the power to approve a candidate for president of the local court, it is impossible for the LPC to disapprove a nominee put forward by the government and the Party.¹²³ Therefore, the government and the Party maintain complete control of the

¹¹³ CHOW, *supra* note 4, at ch. 4.

¹¹⁴ *Id.* at 122.

¹¹⁵ XIANFA ch. 3, (1982) (China).

¹¹⁶ *Id.*

¹¹⁷ CHOW, *supra* note 4, at 192.

¹¹⁸ XIANFA art. 57, § 1 (1982) (China).

¹¹⁹ *Id.* at art. 85, § 3.

¹²⁰ CHOW, *supra* note 4, at 195.

¹²¹ *Id.* at 196.

¹²² *Id.*

¹²³ See U.S. DEP'T OF STATE, CHINA (Mar. 11, 2008), <https://www.state.gov/j/drl/rls/hrrpt/2007/100518.htm>; *Jiaqiang Dang Dui Renda Gongzuo De Lingdao Tuidong Renda Gongzuo Chuangxin Fazhan* (加强党对人大工作的领导 推动人大工作创新发展) [*To Enhance the Party's Leadership over the People's Congress and Move the People's Congress's Work Forward Creatively*], GUANGZHOU GOV'T (July 11, 2017), <http://www.gz.gov.cn/gzgov/s5811/201707/90ac65d6505a4a748f02256d75a1f571.shtml>.

appointment and promotion of local judges. The most serious problems plaguing the Chinese legal system are local protectionism, lack of judicial independence, and judicially coerced settlements.

B. Local Protectionism and Reluctance to Rule Against Local Industries

Local governments are reluctant to enforce the laws that could burden local businesses and slow local economic growth¹²⁴ because of deep-rooted local protectionism.¹²⁵ About “25-35% of all judgments are not enforced.”¹²⁶ Professors Benjamin L. Liebman and Curtis Milhaupt observed, “[L]ocal protectionism is perhaps the single biggest problem undermining China’s efforts to strengthen its legal system, and the combination of devolved authority and local protectionism frequently lead to under enforcement.”¹²⁷

The economic reforms started in the 1980s have reshaped the relationship between the central and local governments. One major aspect of the economic reforms is decentralization—shifting some important decision-making power from the central to local governments.¹²⁸ The purpose of the shift is to maximize the provinces’ capability to achieve economic growth. The central government depends on each local region to grow its economy so the nation’s overall growth can be maintained.

Decentralization does not mean sending the power back to the local people. As in the pre-reform era, local leaders are appointed by the central government

¹²⁴ Zhang Ling (张凌), *Shipin anquan reng duotou guanli weiyuan huyu chedi gaige* (食品安全仍多头管理委员呼吁彻底改革) [Food Safety Enforcement Still Relies on Multiple Local Agencies and Experts Have Thus Expressed Doubt About the Effectiveness of the New Food Safety Law], CHENGDU SHANGBAO (成都商报) [CHENGDU DAILY] (Mar. 1, 2009), <http://news.sina.com.cn/c/2009-03-01/032315236384s.shtml>.

¹²⁵ See Chenglin Liu, *Profits Above the Law: China’s Melamine Tainted Milk Incident*, 79 MISS L. J. 371 (2009).

¹²⁶ CHOW, *supra* note 4, at 230.

¹²⁷ Benjamin L. Liebman & Curtis Milhaupt, *Reputational Sanctions in China’s Securities market*, 108 COLUM. L. REV. 929, 929 (2007). See also Eric Priest, *The Future of Music and Film Piracy in China*, 21 BERKELEY TECH. L. J. 795, 822 (2006) (“Local protectionism probably constitutes the largest obstacles to cracking down on piracy in China.”); Srinivasan, *Regulating the Belching Dragon: Rule of Law, Politics of Enforcement, and Pollution Prevention in Post-Mao Industrial China*, 18 COLO. J. INT’L ENVTL. L. & POL’Y 267, 335 (2007) (arguing that “the lack of strong centralized environmental administration and deep-seated political unwillingness to disrupt economic growth, combined with corruption and local protectionism, has precluded China from fully complying with its international treaty obligations and enforcing its domestic environmental law.”).

¹²⁸ See YONGNIAN ZHENG, *GLOBALIZATION AND STATE TRANSFORMATION IN CHINA* 109 (2004); YONGNIAN ZHENG, *DE FACTO FEDERALISM IN CHINA: REFORMS AND DYNAMICS OF CENTRAL-LOCAL RELATIONS* 55 (2007); JUNMIN WANG, *STATE-MARKET INTERACTIONS IN CHINA’S REFORM ERA: LOCAL STATE COMPETITION AND GLOBAL MARKET BUILDING IN THE TOBACCO INDUSTRY* 33 (2014).

rather than truly elected by the local people.¹²⁹ As a result, the primary criterion for the central government in selecting local leaders is how well they can develop local gross domestic product (GDP).¹³⁰

To grow the local economy, local leaders forge close ties with businesses in their communities. These close relationships are always mutually beneficial.¹³¹ The local government relies on local businesses to grow GDP, a much-needed political credit for the leaders to retain their jobs or seek a promotion. In return, the local government takes measures to reduce production costs for local businesses.¹³² For example, a local government in the Anhui Province suspended six local environmental protection agency officials because they conducted three environmental inspections of a factory in a twenty day span.¹³³ The local government claimed that frequent enforcement actions damaged its business-friendly image and hampered future investment in the region.¹³⁴ One commentator observed:

Local protectionism in China has seriously challenged judicial independence and its ability to reform. It is usually the root cause for the [undue] delay and impediments to enforcing foreign-related [arbitration] awards because the local courts depend on local governments for personnel and financial support while local governments rely on local companies for revenue. This interest becomes a high priority when the enforcement of an award could risk economic ruin for a small to medium-sized town heavily or even entirely dependent on a target company's operations and financial welfare. Protecting the local companies from enforcement—to submit to and carry out a potentially detrimental award—is in turn, to protect the courts themselves.¹³⁵

¹²⁹ MARK KESSELMAN, JOEL KRIEGER, & WILLIAM A. JOSEPH, INTRODUCTION TO POLITICS IN THE DEVELOPING WORLD 658 (6th ed. 2012) (“The most powerful positions in the [Chinese] government, such as city mayors and provincial governors, are appointed, not elected.”). See also CHENG LI, CHINESE POLITICS IN THE XI JINPING ERA: REASSESSING COLLECTIVE LEADERSHIP 69 (2016).

¹³⁰ S. PHILIP HSU, YU-SHAN WU, & SUISHENG ZHAO, IN SEARCH OF CHINA'S DEVELOPMENT MODEL: BEYOND THE BEIJING CONSENSUS 242 (2011).

¹³¹ ROBERT GRAFSTEIN & FAN WEN, A BRIDGE TOO FAR?: COMMONALITIES AND DIFFERENCES BETWEEN CHINA AND THE UNITED STATES 109 (2009).

¹³² See generally Wayne M. Morrison, *China's Economic Rise: History, Trends, Challenges, and Implications for the United States*, CONGRESSIONAL RES. SERV. (Sept. 15, 2017).

¹³³ Wang Jin (汪劲), *Zhongguo huanjing fazhi weihe shibai?* (中国环境法治为何失败?) [*Why Environmental Law in China Has Failed?*], CHINA DIALOGUE (Sept. 23, 2010), <http://www.chinadialogue.net/article/show/single/ch/3831--China-s-green-laws-are-useless->.

¹³⁴ *Id.*

¹³⁵ Christina Cheung, Comment, *The Enforcement Methodology of Non-Domestic Arbitral Awards Rendered in the U.S. & Foreign-Related Arbitral Awards Rendered in*

C. Lack of Judicial Independence

According to the Organic Law of People's Court,¹³⁶ each court establishes an adjudication committee, whose members are chosen by the president of the court and approved by the people's congress.¹³⁷ Usually, the adjudication committee is composed of the president, chief judges in each chamber, and associate judges.¹³⁸ The official objective of the adjudication committee is to gather individuals with trial experience and discuss significant or difficult cases and other issues related to trial. In practice, however, the adjudication committee has shifted from discussing to deciding the outcome of cases that it deems "significant" or "difficult." Thus, the presiding judge cannot issue a valid judgment without both the president and the adjudication committee's approval. The existence of the adjudication committee seriously threatens judicial independence for the following reasons.

First, the adjudication committee is composed of the court president and judges recommended by the president.¹³⁹ These members may be skilled administrators but they are not necessarily seasoned judges. In fact, some members of the adjudication committee have never been career judges.¹⁴⁰ Membership on the committee signifies a high social status and does not reflect one's qualifications in the legal field.

Second, while the adjudication committee meetings are always held behind closed doors, its decisions are nonetheless binding on affected parties. Typically, the adjudication committee routinely convenes to discuss and decide a number of cases all in one meeting.¹⁴¹ Before the meeting, members of the committee normally do not have time to review court documents. They make decisions solely based on the presiding judge's presentation at the meeting.¹⁴² Without formal court proceedings and presentations by lawyers from both sides, the presiding judge has wide discretion in deciding how he reports the case to the committee.¹⁴³ Since all of the committee meeting records are secret, it is almost impossible for concerned parties to know whether the committee adequately discussed their issue and made a fair decision. In one case, a follow-up investigation

China pursuant to Domestic Law and the New York Convention, 11 SANTA CLARA J. INT'L L. 237, 238 (2012).

¹³⁶ *Zhonghua Renmin Gonghe Guo Renming Fayuan Zuzhi Fa* (中华人民共和国人民法院组织法) [The Organic Law of the People's Court of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, effective Jan 1, 1980, amended, Oct. 31, 2006) LAWINFOCHINA.

¹³⁷ *Id.* at art. 10.

¹³⁸ *Id.* at art. 27.

¹³⁹ *Id.* at art. 9.

¹⁴⁰ Quan Wu (全武), *Zailun Shenpan Weiyuanhui Zhidu Gaige* (再论审判委员会制度改革) [Revisit the Reform of the Adjudication Committee System], ZHONGGUO FAYAN WANG (中国法院网) [CHINA COURT] (June 13, 2008), <http://old.chinacourt.org/html/article/200806/13/307185.shtml>.

¹⁴¹ CHOW, *supra* note 4, at 218.

¹⁴² *Id.*

¹⁴³ *Id.*

revealed that the presiding judge misled the adjudication committee. As a result, the committee made the wrong decision.¹⁴⁴ It is not clear how often this type of follow-up investigation is conducted.

D. Judicial Corruption

Despite China having the second largest economy in the world, China's judicial system suffers from severe corruption problems rarely seen in leading economies. Judicial corruption has not been a subject of credible empirical study,¹⁴⁵ but the public in China regards judicial corruption as a common phenomenon.¹⁴⁶ A few significant scandals speak to the gravity of this entrenched problem.

In August 2015, Xi Xiaoming, the Vice President of the SPC, was under both criminal and Party disciplinary investigation for the corruption that he and his family members perpetrated.¹⁴⁷ Law enforcement found a trove of cash in the amount of RMB 300,000,000 (\$43,185,000) while searching the home of Xi's son.¹⁴⁸ Even the investigators, who often uncovered cash troves from corrupt officials' homes, were dumbfounded by this staggering amount of money found in a single search.¹⁴⁹ The junior Xi had no explanation for the source of the cash. The subsequent investigation revealed that the junior Xi had a law firm in Shenzhen that specialized in cases involving massive business disputes.¹⁵⁰ Taking advantage of the senior Xi's influence, the junior Xi sought favors for his clients in provincial, city, and county courts, which were all under his father's supervision. In addition, the junior Xi received bribes from those who sought his father's direct favor.¹⁵¹ Moreover, Xi's wife and another SPC justice were also implicated in the corruption investigation.¹⁵²

On October 18, 2016, the State Procuratorate (a prosecutorial organ) officially brought a criminal charge against Xi, alleging he took advantage of his

¹⁴⁴ Cheng Yuihua (陈瑞华), *Ping Fayuan Shenpan Weiyuan Hui Zhidu* (评法院审判委员会制度) [Comment on the Adjudication Committee System] 1 BEIDA FALV PINGLUN (北大法律评论) [PEKING U. L. REV.] 381, 389–90, 404–05 (1998).

¹⁴⁵ RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 295 (2002) (“Reliable statistics on the scope of corruption are not available for obvious reason.”).

¹⁴⁶ Yuhau Wang, *Court Funding and Judicial Corruption in China*, 69 CHINA J. 43, 44–45 (2013).

¹⁴⁷ *Gao Yuan Fu Yuanzhang Xi Xiaoming Erzi Jiazhong Bei Chaochu 3 Yi Xianjin Danchang Daizou* (高院副院长奚晓明儿子家中被抄出3亿现金被当场带走) [RMB 300 Million in Cash Found in the Residence of the Vice President of the SPC Xi Xiaoming's Son: The Junior Xi was Arrested], WORLD J. (Aug. 4, 2015), <http://www.wenxuecity.com/news/2015/08/04/4461393.html> [hereinafter *RMB 300 Million in Cash Found*].

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *RMB 300 Million in Cash Found*, *supra* note 147.

office to receive bribes, a crime that is punishable by life imprisonment.¹⁵³ Xi was accused of divulging vital secrets in the course of judicial proceedings over which he presided. In addition, Xi was expelled from the Party for violation of Party discipline, mainly because his deeds damaged the image of the Party.¹⁵⁴ Xi's case is pending before the Tianjin No. 2 Intermediate Court.¹⁵⁵ In a country where the conviction rate is over 99.9%,¹⁵⁶ there is little doubt that Xi will be found guilty and sentenced to harsh punishment.

It might be shocking to see one of the nation's top jurists fall from grace in such a dramatic fashion, but Xi was not the first. In January 2009, Huang Songyou, Vice President of the SPC, was sentenced to life imprisonment for the same crime that Xi committed.¹⁵⁷ During his tenure as the Vice President of the SPC, he traded his influence on cases in the judicial system for bribes in the amount of RMB 3,900,000 (\$561,316.58).¹⁵⁸

In 2013, two Vice Presidents of the Shanghai High People's Court were convicted for collectively patronizing prostitutes with funds paid by parties to a case they adjudicated.¹⁵⁹ The two judges were incarcerated for ten days and expelled from the High People's Court. The Party expelled them from the party organization.¹⁶⁰ These high-profile corruption cases have greatly eroded public trust in China's judicial system.

The so-called "empirical studies" on judicial corruption are inherently unreliable. In his work entitled *China's Long March Toward Rule of Law*, published by the Cambridge Press, Professor Peerenboom stated: "Reliable statistics on the scope of corruption are not available for obvious reasons. However,

¹⁵³ Shouhui Chao Yui Yuan Zuigoa Fa Yuan Fu Yuan Zhang Xixiaoming Bei Pan Wuqi (Zu Tu) (受贿超亿元 最高法原副院长奚晓明被判无期) [*Bribery Overbearing the Highest Law of the Former Vice President Xi Xiaoming was Sentenced to No Period*], CHINA GATE (Feb. 16, 2017), <http://www.wenxuecity.com/news/2017/02/16/6024105.html>.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Terrence McCoy, *China Scored 99.9 Percent Conviction Rate Last Year*, WASH. POST (Mar. 11, 2014), https://www.washingtonpost.com/news/morning-mix/wp/2014/03/11/china-scored-99-9-percent-conviction-rate-last-year/?utm_term=.363d0da4bdfb.

¹⁵⁷ Zhongguo Dafaguan Huang Songyou Yin Shouhui Tanwu Pan Wuqi Tuxing (中国大法官黄松有因受贿贪污判无期徒刑) [*Mr. Huang Songyou, a Supreme People's Court Judge, Sentenced to Life Imprisonment for Corruption*], VOA, <http://www.voachinese.com/a/china-corrupt-grand-justice-sentenced-to-life-in-jail-20100119-82051342/459730.html> (last updated Jan. 19, 2010).

¹⁵⁸ *Id.*

¹⁵⁹ Shanghai 3 Ming Faguan Jiti Piochang Bei Kaichu Dangji Zao Xing Ju 10 Tian (上海 3 名法官集体嫖娼被开除党籍 遭行拘 10 天) [*Shanghai Three Judges Collective Prostitution Was Expelled from the Party Was Arrested For 10 Days*], BEIJING NEWS (Aug. 7, 2013), <http://news.qq.com/a/20130807/001038.htm>.

¹⁶⁰ *Id.*; Jane Perlezaug, *Chinese Judges Disciplined in Prostitution Scandal After Videos Circulate Online*, N.Y. TIMES (Aug. 7, 2013), <http://www.nytimes.com/2013/08/08/world/asia/chinese-judges-disciplined-for-cavorting-with-prostitutes.html>.

even official accounts acknowledge that the corruption is becoming more serious and widespread.”¹⁶¹ It is inconceivable for any judge to admit his own guilt.

Professor Carl Minzner claims that in recent years “China actually looked like back when it had full-blown personalized rule.”¹⁶² In his article entitled *China’s Turn Against Law*, Professor Minzner provides a vivid account of how Chinese courts have increasingly become beholden to influences outside the judiciary.¹⁶³ The reluctance of Chinese judges to admit their corrupt practices will remain a serious problem in China for an indefinite period. Professor Peerenboom’s earlier observations ring as true now as when they were made in 2002:

[Judicial] corruption is systemic; it is a pervasive social problem. One can hardly expect judges to be honest when government and Party officials from the top to bottom are busily filling their pockets.¹⁶⁴ Moreover, an independent and authoritative judiciary alone is not enough to ensure rule of law. It will take years to produce a competent and honest corps of judges.¹⁶⁵

A sound empirical study starts with the right data. Without reliable data, even a well-trained social scientist equipped with the finest statistical formula has no way to produce meaningful, reliable, and convincing research. An old Chinese saying sums it up well: “Even a clever housewife cannot cook a meal without rice.”¹⁶⁶

E. Judicially Coerced Settlements

Between 2010 and 2014, plaintiffs often faced intense pressure from judges to settle with defendants through judicial mediation.¹⁶⁷ A judicially forced settlement or mediation is binding on both parties and enforceable by the court.¹⁶⁸

Judicial mediation in civil cases started in the 1930s, before the Party took control of China.¹⁶⁹ Since then, judicial mediation has become an important means

¹⁶¹ RANDALL PEERENBOOM, *CHINA’S LONG MARCH TOWARD RULE OF LAW* 295 (2002)

¹⁶² Michael Forsythe, *Q and A: Carl Minzner on the Shift to Personalized Rule in China*, N.Y. TIMES (May 24, 2016), <https://www.nytimes.com/2016/05/25/world/asia/china-carl-minzner-xi-jinping.html>.

¹⁶³ Carl Minzner, *China’s Turn Against Law*, 59 AM. J. COMP. L. 935 (2011).

¹⁶⁴ PEERENBOOM *supra* note 161, at 322.

¹⁶⁵ *Id.* at 330.

¹⁶⁶ JOHN S. ROHSENOW, *ABC DICTIONARY OF CHINESE PROVERBS (YANYU)* xiii (2003).

¹⁶⁷ Minzner, *supra* note 163, at 939.

¹⁶⁸ Zhao Yuhong, *Environmental Dispute Resolution in China*, J. ENV. L. 157, 170–71, § 3.3.1 (2004).

¹⁶⁹ Liu Chong (刘冲), *Renmin Tiaojie Zhidu de Lishi Yangethe Gaihe Fazhan* (人民调解制度的历史沿革和改革发展) [*The Historical Development of the People’s Mediation*]

of dispute resolution. Since Wang Shengjun became the President of the SPC in 2008, courts across China substantially changed their trial methods. Wang, a trained historian, was fond of the experience of the 1930s, and aggressively urged lower courts to use mediation as a primary means of dispute resolution.¹⁷⁰ In June 2010, the SPC issued an important notice to lower courts requiring mediation take priority over trial.¹⁷¹ In its notice, the SPC stated:

We must firmly establish the principle of giving priority to mediation, which is the most efficient and highest quality trial.¹⁷² Mediation is conducive to solving social problems, ending conflicts, repairing damaged personal relations between parties, and achieving a harmonious society. Therefore, courts must recognize the important and unique role that mediation plays in the dispute solution process. Courts must shift the focus from trial to mediation and ensure that mediation is the first choice of method in dealing with disputes.¹⁷³

The SPC requires the court to use mediation as the primary means of resolution and only use trial as a last resort. In difficult cases or cases of significant influence, lower courts should coordinate and consult with the local branches of the Party, the people's congress, and the administrative department at higher levels.¹⁷⁴ By requiring lower courts to reach out to other departments, the SPC clearly undercuts the requirement of judicial independence that is mandated by the Constitution.¹⁷⁵

Therefore, Chinese law is extremely complicated. China's bar passage rate is about 10%.¹⁷⁶ After passing the bar, a candidate must successfully

System], TIANJIN BUREAU OF JUSTICE (Mar. 28, 2017), <http://www.tjsf.gov.cn/system/2017/03/28/012278053.shtml>.

¹⁷⁰ Chen Fei (陈菲), *Zuigao Renmin Fayuan Yuanzhang Wang Shengjun: Zhuzhong Yunyong Tiaojie Shouduan Jiejue Susong Nan, Zhixing Nan Wenti* (最高人民法院院长王胜俊: 注重运用调解手段解决诉讼难、执行难问题) [*Wang Shengjun, the President of the Supreme People's Court: Using Mediation to Solve Difficult Problems Associated with Litigation and Enforcement*], XINHUA (July 28, 2009), <http://cd.qq.com/a/20090729/001488.htm>.

¹⁷¹ *Zuigao Renmin Fayuan yinfa guanyu jiyibu guanche "tiaojie youxian, tiaopan jiehe" gongzuo yuanze de ruogan yijian* (最高人民法院印发《关于进一步贯彻“调解优先, 调判结合”工作原则的若干意见》的通知) [*The Supreme People's Court Notice: Several Opinions on Further Carrying Out the Principle of "Mediation Being a Preferred Method and Fusing Trials with Mediation"*], CHINALAWINFO (June 7, 2010), <http://en.pkulaw.cn/display.aspx?cgid=134416&lib=law>.

¹⁷² *Id.* This sentence sounds contradictory. Mediation is mediation. How can mediation be a high-quality trial? It is clear that the SPC in the notice used a metaphor to emphasize the importance of mediation.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ XIANFA art. 126, § 7 (1982) (China).

¹⁷⁶ *Guojia Sifa Kaoshi* (国家司法考试)[*The State Judicial Examination*], BAIDU,

accomplish an internship at law firms for one-year before being licensed. In an interview, a lawyer stated, “With 9 years’ experience in practice, I still constantly learn something new. For difficult cases, I still have to consult colleagues and professors at law schools.”¹⁷⁷ Without formal training in Chinese law, Chinese language, Chinese culture, and its unique political environment, a foreign lawyer is unlikely to fit in practicing Chinese law. The Regulations and Rules protect not only Chinese lawyers, but also Chinese consumers’ interests. This is the reason why China has its own system of admitting lawyers to practice and prohibit foreign lawyers from practicing Chinese law.

VIII. PRESSURES MOUNTED AGAINST FOREIGN INVESTORS IN CHINA

In 2007, the Standing Committee of the People’s Congress enacted the anti-monopoly law (AML), which took effect on August 1, 2008.¹⁷⁸ On its face, the objective of the AML is to prevent monopolistic conduct, promote the development of socialist market economy, and protect fair market competition, economic efficiency, and consumer interests.¹⁷⁹ However, the real purpose of the AML, as Professor Daniel C.K. Chow observed, is to “further the industrial policy goals established by the Party.”¹⁸⁰ Specifically, the Chinese authorities used the AML to benefit Chinese state-owned enterprises (SOEs) at the expense of multinational companies (MNCs).¹⁸¹ To many MNCs, the AML is “protectionist, nationalistic, and discriminatory.”¹⁸²

To avoid investors’ attention, the Chinese government implemented the AML quietly.¹⁸³ Three government agencies are responsible for enforcing the

<http://baike.baidu.com/view/225302.htm> (last visited Oct. 18, 2017).

¹⁷⁷ Telephone interview with Liu Honghui, *supra* note 49.

¹⁷⁸ Zhonghua Renmin Gongheguo Fan Longduan Fa (中华人民共和国反垄断法) [Anti-Monopoly Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Aug. 1, 2008), GOV’T OF CHINA (China) [hereinafter AML].

¹⁷⁹ *Id.* at art. 1.

¹⁸⁰ Daniel C.K. Chow, *How China Promotes Its State-Owned Enterprises at the Expense of Multinational Companies in China and Other Countries*, 41 N.C. J. INT’L L. 455, 476 (2016). *See also* Yane Svetiev & Lei Wang, *Competition Law Enforcement in China: Between Technocracy and Industrial Policy*, 79 L. & CONTEMP. PROBS. 187, 189 (2016) (“Some have even argued that the AML has been abused as a competition instrument, by turning it into a protectionist tool to favor or shield domestic industry or local economic interests.”).

¹⁸¹ Chow, *supra* note 180, at 476.

¹⁸² *Id.* at 456.

¹⁸³ *See id.* at 462; Thomas M. Hout & Pankaj Ghemawat, *CHINA VS THE WORLD: Whose Technology Is It?*, 88 HARV. BUS. REV. 94, 95 (Dec. 2010) (“Beijing has been quietly implementing policies to enable China to overtake the West as the globe’s technology powerhouse.”).

AML. The Ministry of Commerce (MOFCOM)¹⁸⁴ reviews proposed mergers and acquisitions (M&A) that will take place in China and, if the involved companies have a presence in the Chinese market, in other countries as well.¹⁸⁵ The State Administration of Industry and Commerce (SAIC) and its local offices have the authority to initiate an investigation of anti-competitive conduct.¹⁸⁶ The National Development and Reform Commission (NDRC) has the power to impose fines for anti-competitive conduct.¹⁸⁷ From 2008 to 2014, the government only focused on reviewing M&A applications.¹⁸⁸ Even though the MOFCOM denied several high-profile M&A proposals, foreign investors remained optimistic about the Chinese market.¹⁸⁹

Two years after the ascent of Xi Jinping, who ushered in the new wave of nationalistic and protectionist sentiment, the government suddenly accelerated the enforcement of the AML, targeting foreign companies.¹⁹⁰ Xi's signature slogan "China Dream" of national rejuvenation, is not only a metaphor but a concrete objective that has been firmly carried out in the administration of social, economic, diplomatic, and international affairs.¹⁹¹ From a fervent nationalistic point of view, foreign investors are the main obstacles that prevent domestic companies, especially the SOEs, from becoming global players.¹⁹²

From 2014 through 2016, Chinese authorities launched a series of campaigns for increased scrutiny on foreign companies.¹⁹³ Regulators have

¹⁸⁴ Susan Beth Farmer, *The Impact of China's Antitrust Law and Other Competition Policies on U.S. Companies*, 23 LOY. CONSUMER L. REV. 34, 43 (2010).

¹⁸⁵ AML, *supra* note 178, at art. 2.

¹⁸⁶ Daniel C.K. Chow, *China's Enforcement of its Anti-Monopoly Law and Risks to Multinational Companies*, 14 SANTA CLARA J. INT'L 99, 102 (2016).

¹⁸⁷ *Id.*

¹⁸⁸ *See id.* at 101.

¹⁸⁹ *See, e.g., id.* at 105.

¹⁹⁰ *See* Feng Zhang, *Xi Jinping's Real Chinese Dream: An "Imperial" China?*, NATIONAL INTERESTS (Sept. 18, 2015), <http://nationalinterest.org/blog/the-buzz/xi-jinpings-real-chinese-dream-imperial-china-13875?page=show>; Robert Lawrence Kuhn, *Xi Jinping's Chinese Dream*, N.Y. TIMES (June 4, 2013), <http://www.nytimes.com/2013/06/05/opinion/global/xi-jinpings-chinese-dream.html>.

¹⁹¹ *See* Zheng Wang, *The New Nationalism: "Make My Country Great Again"*, DIPLOMAT (May 10, 2016), <http://thediplomat.com/2016/05/the-new-nationalism-make-my-country-great-again/>; Nayan Chanda, *Law Challenges China Dream for Control of South China Sea*, YALE GLOBAL ONLINE (July 14, 2016), <http://yaleglobal.yale.edu/content/law-challenges-china-dream-control-south-china-sea>; Javier C. Hernandez, *With Odes to Military March, China Puts Nationalism into Overdrive*, N.Y. TIMES (Nov. 15, 2016), <http://cn.nytimes.com/china/20161115/china-long-march-xi-jinping-mao/en-us/>; Simon Shen, *10 Characteristics of Chinese Diplomacy in the Xi Jinping Era*, FOREIGN POL'Y ASS. (April 19, 2016), <http://foreignpolicyblogs.com/2016/04/19/10-characteristics-of-chinese-diplomacy-in-the-xi-jinping-era/>; Charles Clover, *China: Monopoly Position*, FIN. TIMES (Jan. 25, 2015), <https://www.ft.com/content/22704a96-9ff2-11e4-9a74-00144feab7de>.

¹⁹² *See* Simon Denyer, *U.S. Companies are Feeling Less Welcome in China*, WASH. POST Sept. 3, 2014, at A11.

¹⁹³ Since 2014, the Chinese government has imposed heavy fines on foreign corporations for violating the Chinese Anti-Monopoly Law and Unfair Competition Law.

investigated, raided, and penalized many foreign firms for corruption, antitrust violations, and tax evasion.¹⁹⁴ Investigations have spanned from the automobile

Some commented that the Chinese government's heavy-handed approach may have violated the World Trade Organization rules. Chow, *supra* note 186, at 99. Major newspapers published a series of articles that documented these cases. *G.M.'s Venture in China Fined \$29 Million Under Antimonopoly Law*, N.Y. TIMES (Dec. 23, 2016), <https://www.nytimes.com/2016/12/23/business/gm-china-penalty.html>; Keith Bradsher & Chis Buckley, *China Fines GlaxoSmithKline Nearly \$500 Million in Bribery Case*, N.Y. TIMES (Sept. 16, 2014), <https://www.nytimes.com/2014/09/20/business/international/gsk-china-fines.html>; Neil Gough & Chris Buckley, *Mercedes-Benz to Pay Fine in China to Settle Price-Fixing Claims*, N.Y. TIMES (Apr. 23, 2015), <https://www.nytimes.com/2015/04/24/business/international/chinese-regulators-fine-mercedes-benz-over-price-fixing.html>; Paul Mozur & Nick Wingfield, *Microsoft Faces New Scrutiny in China*, N.Y. TIMES (Jan. 5, 2016), <https://www.nytimes.com/2016/01/06/business/international/microsoft-china-antitrust-inquiry.html>; Paul Mozur & Quentin Hardy, *China Hits Qualcomm with Fine*, N.Y. TIMES (Feb. 9, 2015), <https://www.nytimes.com/2015/02/10/business/international/qualcomm-fine-china-antitrust-investigation.html>; Keith Bradsher, *China to Crack Down on Tax Collection from Multinational Companies*, N.Y. TIMES (Feb. 4, 2015), <https://www.nytimes.com/2015/02/05/business/international/china-to-enforce-tax-collection-from-multinational-companies.html>; Neil Gough, *China's Antitrust Campaign Seen as Possible Breach of W.T.O. Rules*, N.Y. TIMES (Sept. 8, 2014), <https://www.nytimes.com/2014/09/09/business/international/us-group-says-china-could-be-violating-trade-accords.html>; Keith Bradsher, *No Longer Business As Usual in China*, N.Y. TIMES (Nov. 9, 2014), <https://www.nytimes.com/2014/11/10/business/international/no-longer-business-as-usual-in-china.html> [hereinafter Bradsher, *No Longer Business*]; *China Fines Japanese Auto Suppliers for Antitrust Violations*, N.Y. TIMES (Aug. 19, 2014), <https://www.nytimes.com/2014/08/20/business/international/china-fines-japanese-auto-suppliers-for-antitrust-violations.html>; Neil Gough, *Western Companies Appear to Push Back Against Chinese Crackdown*, N.Y. TIMES (Sept. 3, 2014), <https://www.nytimes.com/2014/09/04/business/international/chinese-antitrust-investigations-alarm-western-companies.html>; *China Fines Global Shipping Firms for Price-Fixing*, BBC (Dec. 28, 2015), <http://www.bbc.com/news/business-35188120>; Laurie Burkitt & Colum Murphy, *China Using Antimonopoly Law to Pressure Foreign Businesses*, WALL ST. J. (Aug. 4, 2014), <https://www.wsj.com/articles/china-using-antimonopoly-law-to-pressure-foreign-businesses-1407154916>; Anna Zhang, *China Fines Tetra Pak Record \$97 Million for Antitrust Violations*, CORP. COUNSEL (Nov. 16, 2016), <http://www.corpcounsel.com/id=1202772558342/China-Fines-Tetra-Pak-Record-97-Million-for-Antitrust-Violations?slreturn=20170118104404>; Denyer, *supra* note 192; Jeffrey Rothfeder, *The Great Unraveling of Globalization*, WASH. POST (Apr. 24, 2015), https://www.washingtonpost.com/business/reconsidering-the-value-of-globalization/2015/04/24/7b5425c2-e82e-11e4-aae1-d642717d8afa_story.html; Catherine Rampell, *The Truth About China's Currency Devaluation*, WASH. POST (Aug. 13, 2015), https://www.washingtonpost.com/opinions/the-truth-about-chinas-currency-devaluation/2015/08/13/7418fbf0-41e0-11e5-8e7d-9c033e6745d8_story.html; *China Said Prepared to Retaliate if Trump Raises Trade Barriers*, JAKARTA POST (Jan. 8, 2017), <http://www.thejakartapost.com/news/2017/01/06/china-said-prepared-to-retaliate-if-trump-raises-trade-barriers.html>.

¹⁹⁴ See Mozur & Hardy, *supra* note 193 (finding China is scrutinizing foreign entities for corruption, tax evasion, and antitrust violations).

and technology sectors to the medical industry and consumer products such as baby formula, milk, and contact lenses.¹⁹⁵ For example, after storming four China-based Microsoft offices, questioning executives, and copying contracts, records, and data from Microsoft servers in July 2014, SAIC regulators began investigating Microsoft's business practices in China in January 2016.¹⁹⁶ In 2014, authorities imposed multimillion-dollar fines on the multinational corporations GlaxoSmithKline, Chrysler, Volkswagen, Audi, BMW, Samsung, Mead Johnson, and Johnson & Johnson.¹⁹⁷ Many foreign firms received substantial penalties from the Chinese legal and regulatory system:

- In August 2014, twelve Japanese automotive parts manufacturers were ordered to pay a total of \$200 million in fines. Specifically, the NDRC fined two Japanese manufacturers of automotive bearings for antitrust violations. NSK's fine equaled RMB 174,900,000 (\$28.4 million), and NTN's penalty amounted to RMB 119,200,000 (\$19.4 million).¹⁹⁸
- In September 2014, Chinese authorities imposed a \$40.5 million fine on Audi for offending the AML, and a Chinese court fined GlaxoSmithKline, a British pharmaceutical company, \$500 million for bribery.¹⁹⁹
- In February 2015, the NDRC fined the American chip manufacturer Qualcomm \$975 million for violating China's AML.²⁰⁰
- In April 2015, antitrust officials found Mercedes-Benz guilty of setting prices on cars and parts and issued a penalty of RMB 350,000,000 (\$57 million).²⁰¹

¹⁹⁵ See Burkitt & Murphy, *supra* note 193 (detailing the range of targeted industries); *G.M.'s Venture in China Fined \$29 Million Under Antimonopoly Law*, *supra* note 193 (indicating milk is one of several industries investigated by regulators).

¹⁹⁶ See Mozur & Wingfield, *supra* note 193 (reporting on the incident and the subsequent investigation).

¹⁹⁷ See Badsher, *No Longer Business*, *supra* note 193 (noting regulators fined GlaxoSmithKline, Chrysler, Volkswagen, Samsung, Mead Johnson, and Johnson & Johnson in 2014); Rothfeder, *supra* note 193 (listing GlaxoSmithKline, BMW, and Audi as entities under investigation in "the past year").

¹⁹⁸ See Bradsher & Buckley, *supra* note 193 (revealing Chinese regulators fined twelve Japanese auto parts makers \$200 million in August 2014); *China Fines Japanese Auto Supplies for Antitrust Violations*, *supra* note 193 (outlining the details of the NDRC's investigation into Japanese automotive parts manufacturers and the decision to fine two automotive bearing manufacturers).

¹⁹⁹ See Bradsher & Buckley, *supra* note 193 (explaining Audi received \$40.5 million in fines for antitrust violations and one court sent a strong signal by fining GlaxoSmithKline \$500 million for bribing doctors and hospitals and "channeling illicit kickbacks" through separate agencies and associations).

²⁰⁰ See Mozur & Hardy, *supra* note 193 (reporting on the NDRC's decision to impose a \$975 million fine on Qualcomm).

²⁰¹ See Gough & Buckley, *supra* note 193 (indicating the pricing bureau accused Mercedes-Benz of fixing prices and issued a fine of RMB 350,000,000).

- In December 2015, the NDRC fined seven international shipping companies \$65 million for price fixing and thereby violating the AML.²⁰²
- In November 2016, the SAIC charged Tetra Pak International S.A., a Swedish packaging firm, \$97 million for abusing its dominance in the market.²⁰³
- In December 2016, Chinese regulators imposed a RMB 201,000,000 (\$29 million) fine on General Motors's joint venture, Shanghai G.M., for improperly restraining competition by establishing minimum sales prices for its dealers.²⁰⁴

The policy shift has greatly impacted foreign investors in China. In January 2017, the American Chamber of Commerce found 80% of the survey respondents believed foreign firms were less welcome in China,²⁰⁵ a 40% rise since 2013.²⁰⁶ In addition, 49% of those surveyed felt Chinese officials were targeting foreign businesses with pricing and antitrust campaigns.²⁰⁷ Many foreign firms assert they are victims of an increasing economic nationalism in China,²⁰⁸ which results in attacking foreign companies to protect the domestic firms' market share.²⁰⁹ The report claimed the fines and antimonopoly tactics "often appear designed to advance industrial policy and boost national champions."²¹⁰ Vice Chairman of the American Chamber of Commerce in China, Lester Ross, cited the pharmaceutical, medical device, automobile, and technology industries as sectors that China seems to be targeting.²¹¹ The purpose of bringing down foreign firms is to narrow the gap between foreign and domestic companies, allowing Chinese firms to "catch up with the rest of the world."²¹²

²⁰² See *China Fines Global Shipping Firms for Price-Fixing*, *supra* note 193 (stating the NDRC, after a twelve-month investigation, found the shipping companies cooperated in order to keep prices high and imposed a RMB 407,000,000 fine, amounting to approximately \$65 million).

²⁰³ See Zhang, *supra* note 193 ("China's [SAIC] has fined Swedish packaging giant Tetra Pak International S.A. \$97 million for abusing market dominance.").

²⁰⁴ See *G.M.'s Venture in China Fined \$29 Million Under Antimonopoly Law*, *supra* note 193 (announcing the Shanghai Price Bureau stated Shanghai G.M. suppressed normal market competition and issued a penalty of \$29 million).

²⁰⁵ Michael Martina, *U.S. Lobby Says China Protectionism Fueling Foreign Business Pessimism*, REUTERS BUS. NEWS (Jan. 18, 2017), <http://www.reuters.com/article/us-china-usa-business-idUSKBN1520EY>.

²⁰⁶ U.S.-CHINA ECON. AND SEC. REV. COMM'N, THE FOREIGN INVESTMENT CLIMATE IN CHINA: PRESENT CHALLENGES AND POTENTIAL FOR REFORM 45 (Jan. 28, 2015).

²⁰⁷ *Id.*

²⁰⁸ See Mozur & Hardy, *supra* note 193 (providing the argument proposed by the multinational firms).

²⁰⁹ See Rothfeder, *supra* note 193 (proposing emerging nations attack foreign MNCs to preserve the domestic firms' market share).

²¹⁰ COMPETING INTERESTS IN CHINA, *supra* note 11, at ii.

²¹¹ See Denyer, *supra* note 192 (including the statements of Lester Ross in his article).

²¹² *Id.*

The Chinese government follows a strategy of fining and regulating foreign firms, keeping them from gaining too much market share, favoring domestic firms, and protecting its citizens from high prices.²¹³ Foreign companies attempt to avoid investigation and penalties by joining state-owned firms or cultivating relationships with powerful Chinese leaders and, when those tactics fail, pay the fines.²¹⁴ As Professor Chow observed, “China will only become more aggressive, and MNCs may find themselves at a great disadvantage by the time the United States and other developed countries fully realize the extent to which China is using these aggressive tactics to promote its economic interests.”²¹⁵

In March 2017, the Chinese government issued the strategic plan “Made in China by 2025,” which aims at replacing foreign-produced high-tech goods, such as planes, computer chips, and electric cars, with Chinese-made products.²¹⁶ The government will provide domestic industries with \$300 billion in subsidies to develop new technologies.²¹⁷ Industries in the West fear that the plan will further disadvantage foreign companies in the Chinese market.²¹⁸ Therefore, it is unlikely that China will reverse its restrictive and hostile regulatory environment for foreign investors anytime soon.

IX. CONCLUSION

Foreign law firms and researchers attempt to convince themselves that Chinese law is unclear in order to justify their violation of the Regulations and Rules that prohibit foreign lawyers from practicing Chinese law. However, this ostrich tactic will not change the plain meaning of the law. By denying reality, foreign law firms could put both their own interests and their clients’ interests at risk. China is striving to protect the domestic legal market, which ultimately leads to restrictions on foreign law firms in China. Therefore, the Chinese government has not expanded the scope of activities and businesses in which foreign law firms are

²¹³ See Burkitt & Murphy, *supra* note 193 (including one law firm partner’s statement that Chinese officials believe multinational companies are exploiting Chinese consumers); *China Fines Global Shipping Firms for Price-Fixing*, *supra* note 193 (asserting Chinese regulators utilize the AML to penalize companies and reduce prices for Chinese consumers); Mozur & Wingfield, *supra* note 193 (describing some Western critics accuse China of utilizing its regulatory and court systems to penalize foreign firms and assist domestic firms); Rothfeder, *supra* note 193 (“To protect the [market share] of domestic firms, emerging nations have attacked foreign multinationals.”).

²¹⁴ See Burkitt & Murphy, *supra* note 193 (opining targeted companies “have little choice but to comply” because the Party controlled Chinese courts offer no option for redress); Mozur & Nick, *supra* note 193 (explaining MNCs “have for years gone out of their way to curry favor with leaders in China” and employed strategies, such as investing in SOEs); Zhang, *supra* note 193 (reporting a company representative stated Tetra Pak accepted and will not appeal the decision) .

²¹⁵ Chow, *supra* note 180, at 457.

²¹⁶ Bradsher & Mozur, *supra* note 193.

²¹⁷ *Id.*

²¹⁸ *Id.*

permitted to engage, and is highly unlikely to do so in the future. It is time for foreign law firms to wake up and prepare themselves for the wave of nationalistic policies targeting foreign investors in China.