

# Business, Risk, & China’s MCF: Modest Tools of Financial Regulation for a Time of Great Power Competition

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## ABSTRACT

*Doing business and investing both require mindfulness about risk, and market regulatory systems aim to ensure risk is appropriately disclosed. Recent discussions of today’s international system of Great Power Competition by U.S. Secretary of State Mike Pompeo mention risk from China’s Military-Civil Fusion (“MCF”). For U.S. and U.K individuals and business firms looking to invest in and do business with China, MCF awareness requires consideration of the ways in which all individuals and institutions in China are called to a duty that transcends their personal and civilian identities in their observable roles. As courts and regulators in China continue to demonstrate ever-improving professional procedures for dispute resolutions and regulatory investigations, including fairness in avoiding bias towards either litigating party when both parties are ordinary commercial entities, connecting the dots to MCF reveals a distinct category of embedded risk. MCF imposes obligations flowing in multiple directions among personnel in Chinese courts and agencies, national leadership, national security apparatus, and state-owned or state-championed commercial firms. This risk fits well with familiar tool kits used by U.S. and U.K. investors, business firms, and related commercial parties to make their own best-informed business decisions, as well as the familiar tool-kits used within the broader ecosystem of financial regulators and private parties who bring civil litigation, investigation, and whistleblower claims for material misstatements and the like.*

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## INTRODUCTION

The international environment has been widely recognized to have shifted away from a period of U.S. unipolar power that began sometime after the end of the Cold War in the late 1980s towards a period of Great Power Competition among the United States, Russia, and China that had begun by 2014.<sup>1</sup> Also widely recognized by now has been how appropriate it is to focus significant attention on the many high-powered opportunities and risks from various types of high-level cooperation and conflict that can occur between nation states, from treaty to war. For example, the frequent headlines over international markets for fossil fuels and raw metals show how conflict between nation states can cause large changes in both supply and demand across myriad streams of commerce.<sup>2</sup> Even the many peaceful shifts on the global scene since 2016 have drawn countless headlines about impacts on and opportunities for international markets. Consider the degree of attention paid to peaceful shifts in political systems as the major political parties in the United States and United King-

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<sup>1</sup> The Congressional Research Service attributes recognition of this shift to both the Obama and Trump Presidential Administrations. RONALD O'ROURKE, CONG. RESEARCH SERV., R43838, RENEWED GREAT POWER COMPETITION: IMPLICATIONS FOR DEFENSE—ISSUES FOR CONGRESS 1 (2020) (citing U.S. DEP'T OF DEF., THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA 2015, i, 1–4 (2015), [https://www.jcs.mil/Portals/36/Documents/Publications/2015\\_National\\_Military\\_Strategy.pdf](https://www.jcs.mil/Portals/36/Documents/Publications/2015_National_Military_Strategy.pdf) [<https://perma.cc/2RUY-94GM>], and then THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 27 (2017), <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf> [<https://perma.cc/6GCB-ZYDT>]) (“Long-term strategic competitions with China and Russia are the principal priorities . . . .” (citing U.S. DEP'T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 4 (2018), <https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf> [<https://perma.cc/ETJ2-27RZ>])). Scholars have suggested that Europe and India are two additional great powers in the competition. See Paul B. Stephan, *Symmetry and Selectivity: What Happens in International Law When the World Changes*, 10 CHI. J. INT'L L. 91, 91–92 (2009).

<sup>2</sup> Compare Amrith Ramkumar & Joseph Wallace, *Crude Prices Soar After Attack on Saudi Facilities, Threatening Global Growth*, WALL STREET J. (Sept. 16, 2019, 6:47 AM), <https://www.wsj.com/articles/oil-prices-soar-after-saudi-attack-11568585160> [<https://perma.cc/QX4Z-K4YJ>] (reporting a surge in crude oil prices following an attack on Saudi Arabia infrastructure), with David Hodari & Joe Wallace, *U.S. Oil Prices Plunge to Lowest Level in 18 Years*, WALL STREET J. (Mar. 18, 2020, 3:24 PM), <https://www.wsj.com/articles/u-s-oil-prices-plunge-to-lowest-level-in-more-than-17-years-11584538442> [<https://perma.cc/A2XK-Z9UX>] (reporting a drop in crude oil prices due to government-imposed travel restrictions).

dom fought to gain control over the offices of the U.S. Presidency and the U.K. Prime Ministry, as well as to influence the then-ongoing U.K. membership in, or exit from, the European political union.<sup>3</sup> Also consider the attention paid to recent peaceful shifts in trade systems, including the World Trade Organization, the Trans-Pacific Partnership, the Transatlantic Trade and Investment Partnership, the United States-Mexico-Canada Agreement, and myriad bilateral trade agreements.<sup>4</sup>

Against such a background of global political and economic frenzy, it is reasonable for so many to view the generally steady rise of China's political and economic system mainly through the lenses of either potential international conflict or investment.<sup>5</sup> From this perspective, those seeking to invest in China naturally focus attention on when and where within China to invest, after deciding whether to invest there at all based largely on an analysis of the sheer size of the China market and the potential upside from ongoing, generally peaceful growth.<sup>6</sup>

This Article accepts as a given that many reasonable individuals and businesses outside of China have significant interest in what they see as an important opportunity to invest heavily in China. Working from this premise, the Article endeavors to help those struggling over how to analyze the risks of investing in China on a more fine-grained level. The Article highlights the importance of maintaining mindfulness about a category of serious risk embedded in China that has received little attention in commercial circles: the risk from China's Military-Civil Fusion ("MCF"). The Article then explores some tools

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<sup>3</sup> Anchalee Worrachate & Justina Lee, *The Brexit Threat to World Markets Remains Too Huge to Ignore*, BLOOMBERG (Oct. 15, 2019, 12:00 AM), <https://www.bloomberg.com/news/articles/2019-10-15/the-brexith-threat-to-world-markets-remains-too-huge-to-ignore> [https://perma.cc/M8G5-DEQL].

<sup>4</sup> See, e.g., Dave Sherwood & Felipe Iturrieta, *Asia-Pacific Nations Sign Sweeping Trade Deal Without U.S.*, REUTERS (Mar. 8 2018, 1:12 AM), <https://www.reuters.com/article/us-trade-tpp/asia-pacific-nations-sign-sweeping-trade-deal-without-u-s-idUSKCN1GK0JM> [https://perma.cc/BB89-XSWQ].

<sup>5</sup> See, e.g., David A. Lake, *Economic Openness and Great Power Competition: Lessons for China and the United States*, 11 CHINESE J. INT'L POL. 237 (2018); Eric A. Posner & John Yoo, *International Law and the Rise of China*, 7 CHI. J. INT'L L. 1 (2006).

<sup>6</sup> See, e.g., DELOITTE, CHINA FACTORS: A GUIDE FOR INVESTING IN CHINA (2018), <https://www2.deloitte.com/us/en/pages/mergers-and-acquisitions/articles/china-investment-guide.html> [https://perma.cc/2HUB-4HGV] (making a strong pitch for investing in China that emphasizes economic factors such as the large economy, labor force, and consumer base in China, as well as improvements in China's "government policy and openness," while detailing a wide range of financial professional services and sets of investment opportunity matched to various industry sectors and investment types in China).

for coping with the risk of China's MCF that individuals and businesses outside of China can easily deploy because the tools are both local to the user and rely largely on existing practices.

As discussed more fully below, the underappreciated business and investment risks that flow from China's MCF become easier to see after connecting some underappreciated characteristics of how ordinary commercial and civil adjudication and regulation are done in China. Broader public discussions about today's era of Great Power Competition have already pointed out that MCF plays a powerful role in today's China.<sup>7</sup> This Article builds upon that basic idea and elucidates some importantly under-appreciated ways in which courts and regulatory and civil administrative agencies in China actually operate. The Article then explores some powerful implications about risks facing individuals and businesses investing in China, as well as how private individuals, business firms, financial regulators, and related professionals skilled at bringing civil litigation, investigation, and whistleblower claims for material misstatements and the like, may make mindful use of their existing tools for managing financial risk when armed with these basic lessons about what MCF means for courts and regulatory agencies in China.

As also discussed more fully below, the mitigation tools explored in this paper are described as easy to deploy because the tools are both local to the user and rely largely on existing practices. They are local to the user in that they focus on U.S. and U.K. individuals, business firms, and financial regulatory agencies, and some specific steps they can take at home—rather than in China—to ensure these individuals and organizations outside of China are making mindful decisions about any of their choices to invest in China. The tools are also described as reliant on existing practices because they focus on familiar, long-used concepts and techniques. No fundamentally new tool is being offered. Instead, this Article suggests applying the well-developed approaches that U.S. and U.K. financial systems have for addressing risk, to the particular category of risk this Article explores by connecting China's MCF with some underappreciated characteristics of how ordinary commercial and civil adjudication and regulation are done in China.

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<sup>7</sup> See *supra* Part II.

## I. RISK AND THE ADAPTABLE REGULATOR

Regulators of financial markets adapt as the risks they regulate change and as their understanding of given risks becomes more refined. In just the time since the start of this century, regulators on both sides of the Atlantic have adapted in significant ways. In the United Kingdom, the Financial Services Authority, which was the regulator having omnibus scope over banks and securities, split after the financial crisis of 2008 into the Prudential Regulation Authority, which is focused mostly on banks and insurers, and the Financial Conduct Authority, which is focused mostly on other financial services firms and market conduct.<sup>8</sup> In the United States, the Securities and Exchange Commission (“SEC”) has adapted too. In its Strategic Plan for 2018–2022, the SEC challenged itself to adapt to evolving risks and other developments in the markets it regulates and to enhance its analytical capabilities to improve its understanding of those markets.<sup>9</sup> A regulator, where appropriate, also may target its adaptations as it becomes aware of a specific shift in risk. For example, Heath P. Tarbert, Chairman of the U.S. Commodity Futures Trading Commission (“CFTC”), gave remarks on December 11, 2019, before the Market Risk Advisory Committee about the transition away from the long-used London Interbank Offered Rate (“LIBOR”) because a firm’s ongoing reliance on LIBOR would be a source of risk to the firm and also to the global financial system.<sup>10</sup> Each regulator, unsurprisingly, is most attuned to risks facing business firms operating within its own national jurisdiction. But, as examples like the CFTC Chairman’s remarks about LIBOR suggest, regulators recognize that certain risks are not confined to a single national jurisdiction.<sup>11</sup>

Regulators also tend to keep their focus on the risks arising directly from the subject matter they regulate and such focus is natural—even necessary. No regulator has unlimited resources, and so each regulator must prioritize where it allocates its time, expertise,

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<sup>8</sup> Brooke Masters, *FSA to Give Way to ‘Twin Peaks’ System*, FIN. TIMES (Apr. 1, 2013), <https://www.ft.com/content/32ebdd78-97bf-11e2-97e0-00144feabdc0> [<https://perma.cc/Y9HB-24EZ>].

<sup>9</sup> U.S. SEC. & EXCH. COMM’N, STRATEGIC PLAN: FISCAL YEARS 2018–2022, at 9 (2018), <https://www.sec.gov/reports-and-publications/strategic-plan/reports-strategic-plan-2018-2022> [<https://perma.cc/8PD2-V47A>].

<sup>10</sup> Heath P. Tarbert, Chairman, Commodity Futures Trading Comm’n, Statement on LIBOR Transition Before the Market Risk Advisory Committee (Dec. 11, 2019), <https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement121119> [<https://perma.cc/2NAP-NTQ3>].

<sup>11</sup> See *id.* (U.S. regulator discussing use of LIBOR, in the United Kingdom, as a risk to global financial system, including in the United States).

and analytic capacity. Moreover, a national legal framework sets down the powers of a regulator. No one regulator is expected on its own to spot every risk that might affect the markets that fall within its mandate; and no one regulator has a mandate to regulate everything.

The interplay of risks in the world at large, however, takes place without regard to formal delimitations. Sovereign states—in which each regulator functions—interact with other sovereigns in markets that span national borders. The behavior of business firms in a regulator's own markets thus is not the only source of risk.

### *A. Risk in the World Great Power Competition*

To speak of geopolitics and competitive dynamics between states was the bread and butter of foreign policy, security policy, and a significant field of academic inquiry for most of the 20th century. Though people referred to them as “Superpowers,” during the Cold War the United States and the Union of Soviet Socialist Republics (“USSR”) were engaged in a competition that would have been perfectly familiar to statesmen of the 19th century—a time when there were several great powers competing with each other after the fall of Napoleon.<sup>12</sup> Market economies have functioned over long periods in environments of great power competition. The Cold War is the most familiar example of such a period because it is the most recent; and many regulatory bodies, financial mechanisms, and business practices that are mainstays of today's world economy and national economies already functioned or had recognizable antecedents functioning at that time.<sup>13</sup>

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<sup>12</sup> See generally PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS* (1987) (presenting an influential comparative analysis of the economic and political history of the great powers over the past 500 years); Lake, *supra* note 5, at 248–51 (2018) (providing background on the history of great power competition).

<sup>13</sup> The Cold War spanned the period between the end of World War II and the 1991 dissolution of the USSR. Many of the agencies presently regulating U.S. markets, like the Federal Reserve, the SEC, and the Federal Trade Commission, came into existence in the first half of the 1900s, while the CFTC came into existence in 1974, the Financial Industry Regulatory Authority in 2007, and the Consumer Financial Protection Bureau in 2011. DAVID H. CARPENTER, CONG. RESEARCH SERV., R42572, *THE CONSUMER FINANCIAL PROTECTION BUREAU (CFPB): A LEGAL ANALYSIS 2* (2014) (explaining that the CFPB was created by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, and 15 U.S.C.) which went into effect in 2011); MARC LABONTE, CONG. RESEARCH SERV., R44918, *WHO REGULATES WHOM? AN OVERVIEW OF THE U.S. FINANCIAL REGULATORY FRAMEWORK* 15–19 (2020) (noting that the Federal Reserve was created in 1913, the SEC was created in 1934, the CFTC was created in 1974); MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., R41381, *THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: STANDARDS OF CONDUCT OF BROKERS, DEALERS, AND INVESTMENT ADVISERS 1* (2010) (noting that the Financial Industry Regulatory Authority was created

Unlike the USSR during the Cold War, the People's Republic of China ("PRC") of today has become a productive economy, attracting investment in practically every sector and trading on a global scale.<sup>14</sup> Through the 1990s and until quite recently, few policy makers were comfortable suggesting that China was emerging not just as an economy but also as a competitor on a geopolitical stage.<sup>15</sup> Reticence was understandable, at least for a while; business firms and investors prospered in the China market and some observers surmised that China would undergo a political evolution toward democracy and rule of law.<sup>16</sup> More recently, policy makers in the United States and like-minded countries have begun to refine their understanding of the PRC and its own policy goals.<sup>17</sup>

Although the details of the PRC's place in the world have not been hidden from view, they have not been front of mind for English-language audiences and the business community—or most market regulators—outside China until recently. In the past few years, U.S. policy makers have started to address the details publicly. As U.S. Assistant Secretary of State for International Security and Nonproliferation Dr. Christopher A. Ford explained it in a nutshell—in a September 11, 2019 speech before the U.S. Defense Threat Reduction Agency—China is a geopolitical revisionist, a sovereign seeking, in a strategy of great power competition, to both use and shift the geopolitical landscape to favor its own emergence into the dominant sociopolitical system of the era.<sup>18</sup> The Trump Administration's National Security Strategy, published in December 2017, places this return to great power competition in the foreground.<sup>19</sup>

Great power competition has emerged as China frustrates expectations that economic growth would correlate to democracy and rule

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in 2007); *About the FTC*, FED. TRADE COMMISSION, <https://www.ftc.gov/about-ftc> [<https://perma.cc/RN4T-BFWV>] (noting that the FTC was created in 1914).

<sup>14</sup> See WAYNE M. MORRISON, CONG. RESEARCH SERV., RL33534, CHINA'S ECONOMIC RISE: HISTORY, TRENDS, CHALLENGES, AND IMPLICATIONS FOR THE UNITED STATES 1 (2019).

<sup>15</sup> See Amy Zegart, *Decades of Being Wrong About China Should Teach Us Something*, ATLANTIC (June 8, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/30-years-after-tiananmen-us-doesnt-get-china/591310/> [<https://perma.cc/WC7H-ZPFM>].

<sup>16</sup> See *id.*

<sup>17</sup> Kurt M. Campbell & Ely Ratner, *The China Reckoning: How Beijing Defied American Expectations*, FOREIGN AFF. (Mar. 2018), <https://www.foreignaffairs.com/articles/china/2018-02-13/china-reckoning> [<https://perma.cc/7AE7-53XS>].

<sup>18</sup> Dr. Christopher Ashley Ford, Assistant Sec'y, Bureau of Int'l Sec. & Nonproliferation, Bureaucracy and Counterstrategy: Meeting the China Challenge (Sept. 11, 2019), <https://china.usc.edu/christopher-ford-state-department-bureaucracy-and-counterstrategy-meeting-china-challenge-sept-11> [<https://perma.cc/G7UH-BUG9>].

<sup>19</sup> See THE WHITE HOUSE, *supra* note 1, at 2–3.

of law. Certain indicators of China's continued divergence from a democratic and rules-based path are well known. Front page stories include the PRC's crack-down on democracy activists in Hong Kong<sup>20</sup>—ignoring its commitments to preserve that part of China's unique “one country, two systems”<sup>21</sup>—and its military posturing and outright conflicts in the South China Sea—ignoring freedom of navigation in the world's busiest shipping lanes<sup>22</sup>—and its Belt and Road Initiative loans—ignoring international good governance standards in underdeveloped countries.<sup>23</sup> But these examples, given due prominence in the West, are not exhaustive.

One facet of China's strategy of great power competition that, until recently, has been largely overlooked is Military-Civil Fusion—MCF. To be sure, many levels of risk flow from MCF, including many far beyond the scope of this paper, which is limited to steps that can be taken with relatively modest cost at the local level by U.S. and U.K. individuals, business firms, civilian financial regulators, and the like, as discussed below. And, as also discussed below, the risk to investors outside of China flowing from China's MCF is exacerbated by the powerful control that the Chinese state—the government and the

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<sup>20</sup> See, e.g., Editorial, *Beijing Moves on Hong Kong*, WALL STREET J. (Aug. 30, 2019, 6:55 PM), <https://www.wsj.com/articles/beijing-moves-on-hong-kong-11567205756> [https://perma.cc/H4HN-PUM2]; Natasha Khan, *Hong Kong Police Arrest Activists Ahead of 13th Weekend of Mass Protests*, WALL STREET J. (Aug. 30, 2019, 1:36 AM), <https://www.wsj.com/articles/hong-kong-police-arrest-joshua-wong-other-activists-in-morning-roundup-11567134822> [https://perma.cc/YM4A-HVD8]; Austin Ramzy & Elaine Yu, *Under Cover of Coronavirus, Hong Kong Cracks Down on Protest Movement*, N.Y. TIMES (May 21, 2020), <https://www.nytimes.com/2020/04/21/world/asia/coronavirus-hong-kong-protests.html> [https://perma.cc/XSD5-DXYU]; Edward Wong, *Hong Kong Has Lost Autonomy, Pompeo Says, Opening Door to U.S. Action*, N.Y. TIMES (May 27, 2020), <https://www.nytimes.com/2020/05/27/us/politics/china-hong-kong-pompeo-trade.html> [https://perma.cc/S5RM-MDNF].

<sup>21</sup> In 1997, at the expiration of what had been a 99-year lease from the Chinese government to the U.K. government, the city of Hong Kong and some associated territories reverted to China's control under a treaty between China and the United Kingdom known as the Sino-British Joint Declaration. See Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, U.K.-China, Dec. 19, 1984, 1399 U.N.T.S. 33, 61. In that treaty, China committed to allowing Hong Kong to operate as a special administrative region of China under what is referred to as the “one country, two systems” principle that allowed Hong Kong to continue to practice a capitalism system and way of life, without having to conform to the Chinese communist system, for another 50 years, until the year 2047. *Id.* at 62.

<sup>22</sup> See, e.g., Hannah Beech, *U.S. Warships Enter Disputed Waters of South China Sea as Tensions with China Escalate*, N.Y. TIMES (Apr. 21, 2020), <https://www.nytimes.com/2020/04/21/world/asia/coronavirus-south-china-sea-warships.html> [https://perma.cc/DWP3-88X6].

<sup>23</sup> See, e.g., Wade Shepard, *How China Is Losing Support for Its Belt and Road Initiative*, FORBES (Feb. 28, 2020), <https://www.forbes.com/sites/wadeshepard/2020/02/28/how-beijing-is-losing-support-for-its-belt-and-road-initiative/#7e1ed6202199> [https://perma.cc/SZXJ-PCLG].



Communist Party of China (“CPC”)—continues to exert over private individuals in China, including civil servants inside Chinese courts and administrative agencies as well as Chinese citizens and those closely tied to China who may be providing professional services even outside of China.

### *B. Risk and China's Military-Civil Fusion (“MCF”)*

In June 2019, Robin Cleveland, Chairman of the U.S.-China Economic and Security Review Commission, described the concept of MCF as “a whole-of-nation effort [by the PRC] to foster linkages between commercial production, institutional research, and military programs.”<sup>24</sup> Public discussion of MCF has focused attention on the outcomes that the PRC hopes to achieve through MCF—in particular, military and economic dominance in critical emerging technologies such as artificial intelligence and quantum computing.<sup>25</sup> Indeed, the Xinhua News Agency, a state-run PRC organ, is open about the outcomes: MCF is a “powerful driving force and strategic support for realizing the Chinese Dream and a strong military dream.”<sup>26</sup>

Outside China, although awareness is growing as to what China hopes MCF will achieve, analysts, especially in commercial sectors, have focused less attention on how MCF precisely works within China as a tool of sovereign strategy. It was thus subtle, but critically important, when U.S. Secretary of State Michael Pompeo recognized in remarks to Silicon Valley technology leaders on January 13, 2020, that MCF is more than a set of goals; it is a mechanism to which PRC law gives operational meaning and substance: “It’s a technical term but a very simple idea. Under Chinese law, Chinese companies and researchers must—I repeat, must—under penalty of law, share technol-

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<sup>24</sup> *Hearing on Technology, Trade, and Military-Civil Fusion: China's Pursuit of Artificial Intelligence, New Materials, and New Energy Before the U.S.-China Econ. & Sec. Review Comm'n*, 116th Cong. 9 (2019) (opening statement of Robin Cleveland, Vice Chairman, U.S.-China Econ. & Sec. Review Comm'n), <https://www.uscc.gov/sites/default/files/2019-10/June%202019%20Hearing%20Transcript.pdf> [<https://perma.cc/VFR4-Q482>].

<sup>25</sup> *See Hearing on Technology, Trade, and Military-Civil Fusion: China's Pursuit of Artificial Intelligence, New Materials, and New Energy Before the U.S.-China Econ. & Sec. Review Comm'n*, 116th Cong. 52 (2019) (statement of Elsa B. Kania, Adjunct Senior Fellow, Tech. & Nat'l Sec. Program, Ctr. for a New Am. Sec., Chinese Military Innovation in Artificial Intelligence), <https://www.uscc.gov/sites/default/files/2019-10/June%202019%20Hearing%20Transcript.pdf> [<https://perma.cc/VFR4-Q482>].

<sup>26</sup> Feng Wenya (冯文雅), *Xi Jinping: Zhazha Shishi Tuijin Junmin Ronghe Shendu Fazhan Wei Shixian Zhongguo Meng Qiangjun Meng Tigong Qiangda Dongli He Zhanlue Zhicheng* (习近平: 扎扎实实推进军民融合深度发展 为实现中国梦强军梦提供强大动力和战略支撑), XINHUAWANG (新华网) (Mar. 12, 2018), [http://www.xinhuanet.com/politics/2018lh/2018-03/12\\_c\\_1122526642.htm](http://www.xinhuanet.com/politics/2018lh/2018-03/12_c_1122526642.htm) [<https://perma.cc/BJ9T-D32B>].

ogy with the Chinese military.”<sup>27</sup> The legal implications indeed are sobering—and, yet, are only starting to be recognized and their full scope explored. MCF is reportedly implemented under a Law for Managing National Defense Requirements and Joining Programs in Economic Buildup and National Defense.<sup>28</sup> Yet, little public comment in the West appears to be directed at parsing this legislation’s text to show inconsistency with the line of reasoning explored in this paper that connects the many proverbial dots representing actual conduct of myriad Chinese institutions and individuals to draw a line that is directly consistent with the type of specific conduct and overall effect reported to be within the plain meaning of the law.

Chinese writers referred to fusion-like efforts as early as the 1990s, and, over time, the concept entered PRC leaders’ parlance.<sup>29</sup> President Hu Jintao in 2012 invoked fusion, or something similar to it.<sup>30</sup> But scholars attribute the more centralized role of MCF in Chinese practice and national strategy to President Xi Jinping.<sup>31</sup> If such apex-level espousal, plus a legal framework, were not enough to make the point, institutional changes further demonstrate that MCF is not just declaratory. The PRC government has given MCF substance through a powerful institutional architecture. The Central Commission for the Development of Military-Civil Fusion went into operation in January 2017<sup>32</sup> and the Commission’s management is entrusted to one of China’s most senior officials.<sup>33</sup>

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27 Michael R. Pompeo, U.S. Sec’y of State, Remarks to the Silicon Valley Leadership Group: “Technology and the China Security Challenge” (Jan. 13, 2020), <https://id.usembassy.gov/remarks-by-secretary-pompeo-on-technology-and-the-china-security-challenge/> [<https://perma.cc/ZY67-MPBN>].

28 See Greg Levesque, *Military-Civil Fusion: Beijing’s “Guns AND Butter” Strategy to Become a Technological Superpower*, 19 CHINA BRIEF, no. 18, 2019, at 3, 4 & 8 n.4, <https://jamestown.org/wp-content/uploads/2019/10/Read-the-10-08-2019-CB-Issue-in-PDF.pdf?x97873> [<https://perma.cc/SB4L-T4R8>].

29 See Lorand Laskai, *Civil-Military Fusion: The Missing Link Between China’s Technological and Military Rise*, COUNCIL ON FOREIGN REL. (Jan. 29, 2018), <https://www.cfr.org/blog/civil-military-fusion-missing-link-between-chinas-technological-and-military-rise> [<https://perma.cc/EMR9-SYQR>].

30 See Elsa B. Kania, *In Military-Civil Fusion, China Is Learning Lessons from the United States and Starting to Innovate*, REALCLEAR DEF. (Aug. 27, 2019), [https://www.realcleardefense.com/articles/2019/08/27/in\\_military-civil\\_fusion\\_china\\_is\\_learning\\_lessons\\_from\\_the\\_united\\_states\\_and\\_starting\\_to\\_innovate\\_114699.html](https://www.realcleardefense.com/articles/2019/08/27/in_military-civil_fusion_china_is_learning_lessons_from_the_united_states_and_starting_to_innovate_114699.html) [<https://perma.cc/JN4A-9T3P>].

31 See *id.*

32 *Id.*

33 See Laskai, *supra* note 29 (reporting that Xi appointed the Vice Premier to manage the Commission).

If MCF were simply a declaration of intention associated with no real action on the ground—in Chinese institutions and society—then it would still be important for the message that it conveys. It would not, however, necessarily merit much concern in the United States and like-minded countries on the part of institutions and individuals whose business it is to be concerned with financial risk. But MCF goes beyond intentions. It is now an operational code with operational capacities. It is thus timely to consider how MCF might affect business and investment risk.

### C. *Implications and Unknowns of Embedded MCF Risk*

When businesses from the West began their first tentative forays into China following Deng Xiaoping's economic reforms of 1978, the country was largely *terra incognita*.<sup>34</sup> The growth of the China economy in the decades that followed unsurprisingly involved ever deeper and more diverse trade and investment relationships.<sup>35</sup> As those relationships multiplied, whole cadres of western financiers, investors, and business managers became acclimated to China's idiosyncrasies and challenges.<sup>36</sup> Even so, in recent years, concerns in the United States and like-minded countries have heightened regarding favoritism, corruption, intellectual property theft, and other practices endemic in China that do not accord with expectations of a free society.<sup>37</sup>

China's leaders have not been idle in the face of these concerns. Their efforts have been particularly visible in the court system, where they have made high-profile adjustments, especially when it comes to courts that have jurisdiction over disputes that might concern foreign investors. For example, China announced the opening in August 2018

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<sup>34</sup> See Abraham Denmark, *40 Years Ago, Deng Xiaoping Changed China—and the World*, WASH. POST (Dec. 19, 2018, 7:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/12/19/40-years-ago-deng-xiaoping-changed-china-and-the-world/> [https://perma.cc/JY2N-462L]; Virginia Harrison & Daniele Palumbo, *China Anniversary: How the Country Became the World's 'Economic Miracle'*, BBC NEWS (Oct. 1, 2019), <https://www.bbc.com/news/business-49806247> [https://perma.cc/H7P4-TSFZ].

<sup>35</sup> Harrison & Palumbo, *supra* note 34.

<sup>36</sup> See, e.g., Michael C. Wenderoth, *How a Better Understanding of Guanxi Can Improve Your Business in China*, FORBES (May 16, 2018, 2:30 PM), <https://www.forbes.com/sites/michaelcwenderoth/2018/05/16/how-a-better-understanding-of-guanxi-can-improve-your-business-in-china/#6b4ee3ad5d85> [https://perma.cc/2CW7-9WX7].

<sup>37</sup> See Zegart, *supra* note 15.

of the Shanghai Financial Court for high-sum, finance-related cases<sup>38</sup> and a two-chamber China International Commercial Court.<sup>39</sup>

Other institutional changes have been promised by China, especially to address concerns over intellectual property—including confidential business information. In a first of its kind, the Phase One Agreement between the United States and China provides that China will both observe the substance of intellectual property protection and supply procedures, including before Chinese courts and regulatory agencies, for parties to protect their intellectual property rights.<sup>40</sup> The Agreement pledges that government personnel and third-party experts or advisers involved in legal proceedings shall not make unauthorized disclosure of trade secrets or confidential business information that parties submit in the proceedings.<sup>41</sup>

Winning this commitment is a significant negotiating achievement for the United States because it highlights a vital U.S. interest as well as an assent by China to respect that interest. It further recognizes and encourages the important, ongoing improvements that China has been

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38 Zhou Wenting, *First-of-Its-Kind Financial Court Gets Down to Work in Shanghai*, SUPREME PEOPLE'S CT. OF THE PEOPLE'S REPUBLIC OF CHINA (Aug. 22, 2018), [http://english.court.gov.cn/2018-08/22/content\\_36806558.htm](http://english.court.gov.cn/2018-08/22/content_36806558.htm) [<https://perma.cc/DX4M-J278>]. For some practical implications, see Lester Ross, *China's New Financial Court*, WILMERHALE (June 5, 2019), <https://www.wilmerhale.com/en/insights/client-alerts/20190605-chinas-new-financial-court> [<https://perma.cc/Y92N-RY57>].

39 The court has two chambers, one in Shenzhen and one in Xi'an. See *A Brief Introduction of China International Commercial Court*, CHINA INT'L COM. CT. (June 28, 2018), <http://cicc.court.gov.cn/html/1/219/193/195/index.html> [<https://perma.cc/5FZG-Z2G9>]; see also Wei Cai & Andrew Godwin, *Challenges and Opportunities for the China International Commercial Court*, 68 INT'L & COMP. L.Q. 869 (2019), <https://ssrn.com/abstract=3479860> [<https://perma.cc/B5M2-R4HY>] (explaining and examining the general framework of the China International Commercial Court); Jingzhou Tao & Mariana Zhong, *The China International Commercial Court (CICC): A New Chapter for Resolving International Commercial Disputes in China*, 13 DISP. RESOL. INT'L 153 (2019) (same).

40 See Economic and Trade Agreement, China-U.S., art. 1.9 para. 1, Jan. 15, 2020, [https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic\\_And\\_Trade\\_Agreement\\_Between\\_The\\_United\\_States\\_And\\_China\\_Text.pdf](https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf) [<https://perma.cc/BB54-2F9B>]; see also Press Release, Office of the U.S. Trade Representative, United States and China Reach Phase One Trade Agreement (Dec. 13, 2019), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/december/united-states-and-china-reach> [<https://perma.cc/KT2P-QRX5>] (explaining the scope of the agreement and the general obligations of China and the United States); Daniel H. Rosen & Logan Wright, *Phase 1: The Good, the Bad, and the Missing*, RHODIUM GROUP (Jan. 16, 2020), <https://rhg.com/research/phase-1-the-good-the-bad-and-the-missing/> [<https://perma.cc/NU6Q-DWUY>] (summarizing practical impacts of the agreement).

41 See Economic and Trade Agreement, *supra* note 40, at 5–6. As discussed more fully below, a core risk lurking beneath this commitment against unauthorized disclosure stems from the way Chinese MCF may do far more than authorize disclosure to powerful Chinese military and civil interests, it may compel the disclosure. See *supra* text accompanying notes 56–57.

making to the professionalism of its courts and regulatory agencies and their staff.<sup>42</sup> All of this helps business entities outside China. It also helps China continue to contribute to and benefit from the world trading system from which it has profited so much in the past several decades, including by drawing further outside investment into the Chinese economy.

There is, however, a vital and underappreciated business risk embedded in all of this, even if commercial and other interactions between China and the United States were to quickly rewarm after the significant tensions associated with the 2019–2020 coronavirus pandemic.<sup>43</sup> A focus on specific interactions between actors can lose sight of the larger forces and consequences involved. For investment in China, reliance on professional and fair dispute resolution, as between the parties involved, may lose sight of the overall risk from MCF.

A pair of metaphors helps illustrate. Imagine an individual sees two people shouting and gesticulating at each other and the individual stands up, strides forward, and intervenes. The intervention will not be appreciated if the individual is a member of the audience at the opera and the “argument” she thinks she is helping mediate is, in truth, the performance on the opera stage that the individual has now disrupted. Attendees must be alert to where they are, why they are there, and the rules of the house. At least in this imaginary drama, all that is at stake is embarrassment and likely revocation of permission to watch the rest of the stage performance. Now consider a passenger on an airplane. The passenger sees a child tossing a tennis ball up and down. He thinks back to his high school physics lessons about force diagrams and the importance of accounting for each force and relative effect. The passenger first spots that the force of gravity acting on the weight of the ball pulls the ball back down into the child’s hand, while the force of the arm muscle pushes the ball upward. He then remembers that everyone on the plane depends vitally on much more. There is also engine thrust propelling the aircraft forward towards a timely arrival. But a key aviation insight is that this thrust is significant to

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42 For a discussion of the domestic political economy associated with the increasing professionalism of Chinese legal system, see Taisu Zhang & Tom Ginsburg, *China's Turn Toward Law*, 59 V.A. J. INT'L L. 279 (2019).

43 The Phase 1 agreement appears to remain intact through the summer of 2020, despite the tensions around the pandemic and expressed reticence by at least the United States for a Phase 2. See, e.g., Eric Beech & David Lawder, *Trump Says He Is 'Not Interested' in Trade Talks with China*, REUTERS (July 14, 2020, 4:23 PM), <https://www.reuters.com/article/us-usa-trade-china-trump/trump-says-he-is-not-interested-in-trade-talks-with-china-idUSKCN24F2Q4> [https://perma.cc/2NFL-B5PX].

more than timeliness. It also must be enough to keep the forward speed above the plane's stall speed throughout the flight so the airflow over the wings provides enough lift to offset gravity's effect on the overall weight of the plane including everyone and everything aboard. A plane crash is a more serious loss than an interrupted opera. Not only does situational awareness commend attention to the rules of the house; sometimes those rules are less like loose social constraints and more like the laws of physics for which enforcement is especially certain and powerful, and an understanding of relative effects can be vital. Similarly, all litigations and investigations occurring before the officials working for PRC courts and agencies must proceed with an acute understanding that control within China over Chinese individuals working as civil servants within China, or as professional service providers even outside of China, must strictly follow the rules of the house in China—a large and powerful house of the sovereign PRC which is known, respected, and feared by all of its subjects for demanding unyielding adherence to, and support for, the central Chinese government, now including its overt policies and practices of MCF.

Business firms from abroad with dealings in China are resorting, less reluctantly than before, to Chinese courts and agencies—a shift reflected, for example, by the attention American and other lawyers are giving to the new Chinese judicial bodies.<sup>44</sup> Focusing on the conduct of proceedings in many PRC courtrooms, at least when it comes to commercial litigation, this trust in PRC institutions is largely justified. PRC court judgments, whether concerning patents, trademarks, copyrights, or even trade secrets, have been reported in recent years to be generally well-founded on applicable facts and law, reached through ever more improved professional procedures, and fair in avoiding bias towards either litigating party when both parties are ordinary commercial entities.<sup>45</sup> Focusing only on fairness between dis-

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<sup>44</sup> See, e.g., Ross, *supra* note 38; Helen Tang et al., *China's International Commercial Courts Hear First Cases*, HERBERT SMITH FREEHILLS (June 7, 2019), <https://hsfnnotes.com/asiadisputes/2019/06/07/chinas-international-commercial-courts-hear-first-cases/> [<https://perma.cc/97WX-M587>].

<sup>45</sup> See, e.g., Kristin Murphy, *China Court Delivers First Judgment in Favor of a Foreign Company Under Anti-Unfair Competition Law*, IPWATCHDOG (Mar. 28, 2019), <https://www.ipwatchdog.com/2019/03/28/china-court-delivers-first-judgment-in-favor-of-a-foreign-company-under-anti-unfair-competition-law/id=107750/> [<https://perma.cc/AGA5-UZTK>]; see also Tao Kaiyuan, *China's Commitment to Strengthening IP Judicial Protection and Creating A Bright Future For IP Rights*, WIPO MAG., June 2019, at 20, [https://www.wipo.int/export/sites/www/wipo\\_magazine/en/pdf/2019/wipo\\_pub\\_121\\_2019\\_03.pdf](https://www.wipo.int/export/sites/www/wipo_magazine/en/pdf/2019/wipo_pub_121_2019_03.pdf) [<https://perma.cc/T2GL-FPKX>] (PRC official highlighting IP adjudication).

puting parties to a given litigation before a Chinese court, PRC justice in some sectors has rightly earned much confidence.<sup>46</sup>

But even if the confidence is well founded, it only should go so far. As China's MCF communicates in clear terms, all persons and organizations in China are called to a duty that transcends their personal and civilian identities in their observable roles.<sup>47</sup> The true risk-return calculus to doing business in China includes an account of how MCF imposes obligations flowing in multiple directions among personnel in Chinese courts and agencies, national leadership, national security apparatus, and state-owned or state-championed commercial firms.

To say that a Chinese court is a safe place to go because the judge applies procedure correctly and is fair between disputing parties on

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<sup>46</sup> To be sure, debate remains about the nature and extent of bias towards one or another of the disputing parties before Chinese courts (such as a local party with social ties to the community that includes the court staff or a foreign owner of a large local employer with economic ties). Compare Brian J. Love et al., *Patent Litigation in China: Protecting Rights or the Local Economy?*, 18 VAN. J. ENT. & TECH. L. 713, 718 (2016) (concluding that the Chinese judicial system is not necessarily biased against foreigners within patent litigation), with Mark Cohen, *Patent Litigation, Local Protectionism and Empiricism: Data Sources and Data Critiques*, CHINA IPR (July 12, 2016), <https://chinaipr.com/2016/03/10/patent-litigation-local-protectionism-and-empiricism-data-sources-and-data-critiques/> [<https://perma.cc/GHW8-DHQB>] (responding to Love et al., *supra*, by surveying a number of studies on the win rates of foreigners in the Chinese judicial system and discussing local protectionism evinced in those studies); and Donald C. Clarke, *Interesting Study of Patent Litigation in China: Is the Conventional Wisdom About Protectionism Wrong?*, LAW PROFESSOR BLOGS NETWORK: CHINESE L. PROF BLOG (Mar. 2, 2016), [https://lawprofessors.typepad.com/china\\_law\\_prof\\_blog/2016/03/interesting-study-of-patent-litigation-in-china-is-the-conventional-wisdom-about-protectionism-wrong.html](https://lawprofessors.typepad.com/china_law_prof_blog/2016/03/interesting-study-of-patent-litigation-in-china-is-the-conventional-wisdom-about-protectionism-wrong.html) [<https://perma.cc/6LR3-B4FG>] (responding to Love et al., *supra*, and contending that the study might misconstrue the data in a way that suggests that foreign companies are more successful than they actually are). For more on how and why Chinese courts act in ways that depend on factors other than the merits of a given case, see KWAI HANG NG & XIN HE, *EMBEDDED COURTS: JUDICIAL DECISION-MAKING IN CHINA* (2017) (summarizing extensive fieldwork over many years and providing numerous anecdotes and insights about judicial decision-making in China gleaned from them); Ji Li, *The Power Logic of Justice in China*, 65 AM. J. COMP. L. 95 (2017) (exploring a number of theoretical explanations for the operation of Chinese courts, none of which depend on the actual merits of the case); Donald C. Clarke, Book Review, 237 CHINA Q. 257 (2019) (reviewing KWAI HANG NG & XIN HE, *EMBEDDED COURTS: JUDICIAL DECISION-MAKING IN CHINA* (2017), and providing additional context for audiences more familiar with the U.S. legal system); and Donald C. Clarke, *Order and Law in China* (GW Law Sch. Pub. Law & Legal Theory, GW Legal Studies, Paper No. 2020-52, 2020), <https://ssrn.com/abstract=3682794> [<https://perma.cc/2HRP-N6VV>] (arguing that Chinese courts have been purposely built to help the overall system in China maintain order and the political primacy of the CPC, rather than to further the delivery of justice).

<sup>47</sup> See Office of the Spokesperson, *Briefing with Senior State Department Official on the PRC's Military-Civil Fusion Strategy*, U.S. DEP'T STATE (Mar. 12, 2020), <https://www.state.gov/senior-state-department-official-on-the-prcs-military-civil-fusion-strategy/> [<https://perma.cc/NXN9-F6HP>] [hereinafter State Department MCF Briefing].

the day is to reach a conclusion on incomplete information. A court exists and functions within a larger social and political setting. A triumph of democratic societies where individuals enjoy powerful rights against the state with well-established rule of law is the high degree of independence that judges and other civil servants enjoy from social and political forces that exist outside the courtroom. It may give comfort to assume that independence of *curia* from *polis* is observed in China. However, to do so exposes a party to a series of unknowns. A party doing business in China and finding itself in front of a seemingly modern, technocratically sophisticated Chinese court or agency needs to widen the lens beyond the courtroom and ask hard questions. Courts and agencies do not function in a vacuum. If they are to have meaningful information about the risks involved, western parties need a better understanding of the obligations, habits, and expectations that shape the conduct of each dispute settlement institution and of its individual personnel.

A category of risk may inhere in the difference between how duties of loyalty run in the Chinese system and in the United States and like-minded countries. The literature generally recognizes that while the United States and other democracies are premised upon the legitimacy of private individuals' interests that may stand against state interests, under the communist system operating in China since Mao Zedong's 1966 Cultural Revolution, everything and everyone must serve the state.<sup>48</sup> Building on top of the existing Chinese system, MCF imposes further duties of loyalty on a range of individuals and institutions to put their know-how in service towards China's larger strategic objectives that through MCF compels linkage between the civilian and military domains.<sup>49</sup> The risk would, of course, be different if the case had been made by the PRC, and especially if made by anyone outside

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<sup>48</sup> See generally Hon. Richard D. Cudahy, *From Socialism to Capitalism: A Winding Road*, 11 CHL. J. INT'L L. 39, 56 (2010) (pointing out the "single most obvious distinction between the Soviet and the Chinese experience" regarding communism to be the centralization of political power in China's authoritarian state); John W. Head, *Feeling the Stones When Crossing the River: The Rule of Law in China*, 7 SANTA CLARA J. INT'L L., no. 2, 2010, at 25, 70–83 (2010) (noting that while there is significant rule of law in China, there also remains extensive power of the central government and the CPC over all private individuals in China, including civil servants working to enforce the law); Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L. 43, 44 (2001) (highlighting the strengthening of the rule of law in China as distinct from the development of democracy in China); John C. Reitz, *The Chinese Model of Democracy as Liberal Democracy's Major Competitor*, 66 DRAKE L. REV. 863 (2018) (exploring differences between Chinese and western democratic systems including with respect to the relationship between the private individual and the state).

<sup>49</sup> See State Department MCF Briefing, *supra* note 47.



of the PRC, that this fusion of information to sovereign strategy somehow excludes information obtained in the course of business transactions, shared in joint ventures with foreign investors, or learned by a judge, law clerk, or other employee in a Chinese court.

The contrast with the United States and like-minded countries regarding this fusion is striking. In these types of countries, loyalty to the sovereign is generally understood not to interfere with, much less to override, loyalty to the profitability of a business along the broad spectrum of ordinary commercial life. In these countries, private people and companies may refuse to cooperate with government demands for access to information or materials,<sup>50</sup> absent specifically tailored and properly issued warrants or subpoenas.<sup>51</sup> After paying taxes set at broadly applicable rates, private people and businesses are generally free to save, invest, or spend their money as they wish. And when individuals gain access to valuable inside information of a private business and then trade on that information or give it to a business associate or relative to trade on it, they are liable to be prosecuted, even if—indeed, especially if—they are at a government facility and hold a government office.<sup>52</sup> Taking courts and administrative agencies in the United States as an example, personnel working in those institutions are explicitly bound by numerous rules—backed up by powerful enforcement mechanisms—that presumptively bar people from using or revealing information learned in their jobs when they interact with most others, whether within the government or without.<sup>53</sup> And the

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<sup>50</sup> See Dr. Christopher Ashley Ford, Assistant Sec'y, Bureau of Int'l Sec. & Nonproliferation, Huawei and Its Siblings, the Chinese Tech Giants: National Security and Foreign Policy Implications (Sept. 11, 2019), <https://www.state.gov/huawei-and-its-siblings-the-chinese-tech-giants-national-security-and-foreign-policy-implications/> [<https://perma.cc/76JE-YFB8>] (comparing compelled cooperation in the PRC and the United States).

<sup>51</sup> See, e.g., Leander Kahney, *The FBI Wanted a Back Door to the iPhone. Tim Cook Said No*, WIRED (Apr. 16, 2019, 12:43 PM) <https://www.wired.com/story/the-time-tim-cook-stood-his-ground-against-fbi/> [<https://perma.cc/A4MS-M9CD>]; Arash Khamooshi, *Breaking Down Apple's iPhone Fight with the U.S. Government*, N.Y. TIMES (Mar. 21, 2016) <https://www.nytimes.com/interactive/2016/03/03/technology/apple-iphone-fbi-fight-explained.html> [<https://perma.cc/P8G3-XUF3>].

<sup>52</sup> See, e.g., Benjamin Weiser & Emily Palmer, *Ex-Rep. Chris Collins Gets 26-Month Prison Sentence in Insider Trading Case*, N.Y. TIMES (Jan. 17, 2020), <https://www.nytimes.com/2020/01/17/nyregion/chris-collins-sentencing-prison.html> [<https://perma.cc/8EA3-UJTY>].

<sup>53</sup> For example, the federal courts in the United States provide, in the Code of Conduct for Judicial Employees, express provisions requiring law clerks and other court employees to keep information they learn at work strictly confidential and not to use it for personal gain. See, e.g., CODE OF CONDUCT FOR JUDICIAL EMPLOYEES, Canon 3(D)(2) (2019), [https://www.uscourts.gov/sites/default/files/code\\_of\\_conduct\\_for\\_judicial\\_employees\\_effective\\_march\\_12\\_2019\\_0.pdf](https://www.uscourts.gov/sites/default/files/code_of_conduct_for_judicial_employees_effective_march_12_2019_0.pdf) [<https://perma.cc/8AE2-VFE9>] (“A judicial employee should not use for personal gain any confidential information received in the course of official duties.”); *id.*, Canon 3(D)(3) (“A judicial

rules that bind judges and others who work in regulatory or dispute settlement processes are reinforced by a surrounding professional ethic that imprints itself on legal personnel at every phase of career development.<sup>54</sup>

Government personnel across Chinese courts and agencies operate in ways that are demonstrably different from their counterparts in the United States and like-minded countries.<sup>55</sup> This is not an observation about cultural differences; every country has a unique culture. The observation, instead, concerns specific legal duties—and government mechanisms to enforce those duties—that China has put in place in its prosecution of a sovereign strategy of great power competition. Duties of loyalty in China for all people, especially government personnel, are deep and broad towards the State.<sup>56</sup> MCF merely provides one more specific and concrete dimension to the ways in which those duties are not general or abstract. They must be performed, and their performance serves explicitly to further the national interest in pursuit of concrete national military and economic goals, which, as a matter of state doctrine, are fused together.<sup>57</sup> Depending on precisely how China elects to enforce MCF—and even, perhaps, expand it—personnel in Chinese courts and agencies may be more than *authorized* to

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employee should never disclose any confidential information received in the course of official duties except as required in the performance of such duties.”). When even the appearance of a conflict arises between the access to information that a former law clerk may have had during a one- or two-year post working for a judge and the law clerk’s current employment in the private sector with a law firm, courts write stern opinions admonishing more care and explaining that punitive sanctions will be applied otherwise. *See, e.g., In re Violation of Rule 50*, 749 F. App’x 963 (Fed. Cir. 2018) (per curiam) (citing Fed. Cir. R. 50); *In re Violation of Rule 50*, 712 F. App’x 1005 (Fed. Cir. 2018) (per curiam) (same); *In re Violation of Rule 50*, 502 F. App’x 981 (Fed. Cir. 2013) (same); *In re Violation of Rule 50*, 78 F.3d 574 (Fed. Cir. 1996) (per curiam) (same).

<sup>54</sup> *See* Marla N. Greenstein, *Ethics and Judicial Independence in an Executive Branch Judiciary*, A.B.A. (May 1, 2019), [https://www.americanbar.org/groups/judicial/publications/judges\\_journal/2019/spring/ethics-and-judicial-independence-an-executive-branch-judiciary/](https://www.americanbar.org/groups/judicial/publications/judges_journal/2019/spring/ethics-and-judicial-independence-an-executive-branch-judiciary/) [https://perma.cc/Z6TE-G4UX].

<sup>55</sup> *See, e.g.,* Wang Jiangyu, *The Party in the Legislature and the Judiciary*, in *THE CHINESE COMMUNIST PARTY IN ACTION* 181, 186–92 (Zheng Yongnian & Lance L.P. Gore eds., 2020) (discussing the operation of Chinese courts); SUSAN V. LAWRENCE & MICHAEL F. MARTIN, CONG. RESEARCH SERV., R41007, *UNDERSTANDING CHINA’S POLITICAL SYSTEM* (2013) (discussing overall Chinese bureaucracy).

<sup>56</sup> *See* Bruce J. Dickson, *Who Wants to Be a Communist? Career Incentives and Mobilized Loyalty in China*, 217 *CHINA Q.* 42, 51 (2014). Career incentives for civil servants in China, including the personnel of courts and administrative agencies, are fundamentally premised upon the basic rules of the state, in which private individuals must serve the state. *See supra* notes 47–49, and accompanying text.

<sup>57</sup> *See* Kania, *supra* note 30.

devote their efforts and information to the benefit of China's political system; they may be *compelled* to do so.

In proceedings in China to adjudicate a typical trade secret suit between two private firms, the private firms may each enjoy world-class and fair adjudication of their rights *as between themselves*. Depending on precisely what the relevant Chinese authorities<sup>58</sup> say MCF means, the government personnel involved in that suit may have the obligation to provide the sovereign with any and all technological and other business information that those private firms introduced in the proceedings. The ordinary incentives associated with a strong centralized government's significant involvement across domestic bureaucracies and markets explain both how and why under MCF such information might then be deployed by China in furtherance of sovereign goals, perhaps including helping firms in China compete against either or both litigants and helping China gain military advantage in the great power competition China for some time has seen to be its vocation to pursue.

The same risk could arise when private firms submit information to regulators in China, for example in relation to antitrust, consumer safety, environmental impact, or export control. Disclosures to personnel inside Chinese regulatory agencies may find their way across all sectors of the Chinese government, civilian, military, and ostensibly non-governmental commercial world.

The tools of China's competitive strategy also reach private Chinese citizens abroad. Some of those private citizens have access to information that falls within MCF's compass. Attention has been directed recently toward Chinese citizens in American, British, and other western universities who have links to strategic institutions in China and are carrying out research on sensitive technologies.<sup>59</sup> These are not the only Chinese citizens who have information that the PRC might tap.

Consider the incentive that an American or other non-Chinese firm doing significant business in or with China may have to populate

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<sup>58</sup> The relevant Chinese authorities in this context are those responsible for implementing MCF, not the judge or administrative officer on the scene. In the context of the PRC as a muscular sovereign over its own subjects, the context suggests that a command, and perhaps even a hint, from the PRC Central Commission for the Development of Military-Civil Fusion will be heeded by officials with likely much lower and more localized power in mere commercial and civil courts and regulatory agencies.

<sup>59</sup> See, e.g., Ana Swanson & Keith Bradsher, *White House Considers Restricting Chinese Researchers Over Espionage Fears*, N.Y. TIMES (Apr. 30, 2018), <https://www.nytimes.com/2018/04/30/us/politics/trump-china-researchers-espionage.html> [<https://perma.cc/E9DB-Q4QC>].

its executive suite or board of directors with individuals who have authentic China-specific human capital that is able to wield clout with or within China. The value such individuals bring to the table may be because they are members of the CPC, or closely related to members of the CPC. Individuals such as these, whether they know it or not, may in time be called to much the same duties of loyalty to the sovereign as full-time personnel of the government of China, which would be a risk to the same private business outside of China. While some media attention has already focused on the risks of the Chinese government or CPC becoming increasingly involved in the ways a foreign business firm operates its local operations within China,<sup>60</sup> at least that risk is limited by the extent of the firm's investment in China. A core implication of China's MCF is that a particular mindfulness must be paid towards the obligations to China that may exist for all those private individuals subject to the duties within or to China that stem from China's MCF—be they personnel of a court in China adjudicating a dispute that involves the confidential business information of a private U.S. or U.K. company or professional services personnel wittingly or unwittingly under the control of the Chinese government or CPC while also genuinely helping a private company in the United States or United Kingdom work with, draw investment from, or invest in China.

MCF also raises risks for those outside of China who do not think of themselves as even in a for-profit business, such as academics or other thought leaders. For example, an American academic or thought leader or an American think tank or university unit might have a natural interest in being more widely sought-after and impactful by being offered invitations to provide guest lectureships in China or opportunities to receive financial or other support, such as research grants, stipends, honoraria, data, laboratory equipment, reagents, or other materials. When such an external interaction ultimately appears sufficiently inconsistent with the desired core ethical and moral identity of the host American think tank or university unit, a great struggle can arise both internally and externally with other core constituents and sources of support, as is demonstrated by the recent efforts of leading U.S. academic institutions like the Massachusetts Institute of Technol-

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<sup>60</sup> See, e.g., Alexandra Stevenson, *China's Communists Rewrite the Rules for Foreign Businesses*, N.Y. TIMES (Apr. 13, 2018), <https://www.nytimes.com/2018/04/13/business/china-communist-party-foreign-businesses.html> [<https://perma.cc/F3FH-L33T>] (“[F]oreign executives have been approached by their Chinese joint venture partners demanding that they involve internal party committees in strategic decisions.”).

ogy's ("MIT") Media Labs surrounding the receipt of funds from Jeffrey Epstein.<sup>61</sup> Initial pleadings suggest that the fear of stimulating just such conflicts among sources of external support may also have led to the alleged criminal misstatements by the Chairman of Harvard's Chemistry Department, who was charged with federal crimes for failing to disclose financial support from China in violation of disclosure obligations designed to reveal risks akin to those from China's MCF.<sup>62</sup>

Regardless of the thoughts or feelings of an academic or academic organization's membership, leadership, or other stakeholders, about receiving support from China during China's MCF, the U.S. Government may itself decide to significantly regulate or withhold funding from those academic individuals and organizations who elect to receive financial or other support from China at the same time that they receive financial or other support from the U.S. Government. The Supreme Court's 2006 decision in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*,<sup>63</sup> which involved efforts by the U.S. government to withhold its extensive research grant and tuition support dollars from campuses that did not allow the military to recruit during a time when military policies did not comply with most university policies against sexual orientation discrimination,<sup>64</sup> suggests that even First Amendment rights of speech and association may not make the threat of withholding such federal funds an unconstitutional condition. As a result, the risk to domestic universities from China's MCF may be more than the direct risk of specific individual criminal prosecutions like the one facing the Harvard chemistry professor, and may include the need to build compliance programs that ensure no risk of cutoff from federal funds if policies analogous to those that gave rise to the *Rumsfeld* case are put into play targeting those receiving support from China's MCF.

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<sup>61</sup> See *MIT Releases Results of Fact-Finding on Engagements with Jeffrey Epstein*, MIT NEWS (Jan. 10, 2020), <http://news.mit.edu/2020/mit-releases-results-fact-finding-report-jeffrey-epstein-0110> [<https://perma.cc/4D3G-UE46>].

<sup>62</sup> Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Harvard University Professor and Two Chinese Nationals Charged in Three Separate China Related Cases (Jan. 28, 2020), <https://www.justice.gov/opa/pr/harvard-university-professor-and-two-chinese-nationals-charged-three-separate-china-related> [<https://perma.cc/6HS2-R8VU>] (including links to charging documents detailing the complaint); Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Harvard University Professor Indicted on False Statement Charges (June 9, 2020), <https://www.justice.gov/opa/pr/harvard-university-professor-indicted-false-statement-charges> [<https://perma.cc/X2JZ-Q5ZJ>].

<sup>63</sup> 547 U.S. 47 (2006).

<sup>64</sup> See *id.* at 51.

The core risk from China's MCF in these examples involving activity outside of China relates mainly to the power that China can project towards information collected outside its borders, which, according to the dictates of MCF, is gathered to serve the national military or economic interests of the PRC's internal governmental and commercial organizations. The U.S.-based individuals and organizations that are targeted by China's MCF may have, initially or continually, been entirely unwitting of the risk from China. Put differently, the MCF risk may exist—and indeed be very high to particular individuals and organizations caught up in it—regardless of intent and loyalty.

## II. POTENTIAL RISK MITIGATION

Fortunately, familiar tools that have long been in use can largely address the risk from China's MCF. Individuals and business firms in the United States and United Kingdom can be mindful in deciding whether and which particular individuals, organizations, and equipment they wish to expose to Chinese civil and commercial courts and regulatory agencies. Ordinary human and cyber counter-espionage tactics may suffice—including “air gaps”<sup>65</sup> in computer networks and maintaining entirely separate pools of employees on either side of the Chinese border. Another option is of course to entirely avoid entry into or direct dealings with China.<sup>66</sup> A middle ground solution may be the preferred option for those deciding to conduct more ordinary bus-

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<sup>65</sup> See Bruce Schneier, *Air Gaps*, SCHNEIER ON SECURITY, (Oct. 11, 2013, 6:45 AM), [https://www.schneier.com/blog/archives/2013/10/air\\_gaps.html](https://www.schneier.com/blog/archives/2013/10/air_gaps.html) [<https://perma.cc/Y3XF-S2JS>] (providing overview of how air gaps can enhance security of computer systems). *But see* Ionut Arghire, *Chinese Hackers Target Air-Gapped Military Networks*, SECURITYWEEK (May 15, 2020), <https://www.securityweek.com/chinese-hackers-target-air-gapped-military-networks> [<https://perma.cc/3GM5-AKES>] (showing how air gapped computers are not completely safe).

<sup>66</sup> The Executive Branch recently promulgated interim regulations that may accomplish a version of this by prohibiting certain U.S. government agencies from contracting with businesses that use certain telecommunications equipment or services. See Federal Acquisition Regulation: Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment, 85 Fed. Reg. 42,665 (July 14, 2020) (to be codified at 48 C.F.R. pts. 1, 4, 13, 39, 52). These regulations are promulgated under section 889 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 889, 132 Stat. 1636, 1917–19 (2018), and are often referred to as the “Section 889 Regs” or the “Anti-Huawei Rule.” For recent summaries of the practical impact, see COVINGTON & BURLING LLP, U.S. GOVERNMENT RELEASES AWAITED “SECTION 889” RULE ON PROHIBITION ON “USE” OF COVERED TELECOMMUNICATIONS EQUIPMENT BY FEDERAL CONTRACTORS (2020), <https://www.cov.com/-/media/files/corporate/publications/2020/07/us-government-releases-awaited-section-889-rule-on-prohibition-on-use-of-covered-telecommunications-equipment-by-federal-contractors.pdf> [<https://perma.cc/YDJ2-NY79>] (guidance to law firm clients); and JONATHAN ARONIE ET AL., THE LONG REACH OF SECTION 889 (AKA THE ANTI-HUAWEI RULE) (2019),

iness and investment in China and could center around the adequate disclosure of the MCF risk to investors and other appropriate business partners and regulators.

Risk disclosure in securities regulation is an area where careful adaptation could address risks arising from China's MCF. In the law of financial securities, it is axiomatic that companies have ongoing duties of disclosure to investors. In the United States, companies must make annual filings called 10-Ks and quarterly filings called 10-Qs to the SEC, as well as disclosures in solicitations for voting proxies around corporate meetings and public statements of corporate officials like those customarily made at important junctures in the life cycle of the business.<sup>67</sup> One of the core obligations in these filings and disclosures is the obligation to report risk.<sup>68</sup> Risk reporting is not a mere pro forma exercise—though, incidentally, the SEC has detailed forms on which companies are to report their risks.<sup>69</sup> The concept of material risk entails that a company, in reporting risk, look at its risk exposures holistically and so convey the information that an investor needs to make informed decisions.<sup>70</sup>

Questions arise as to the scope of material risk even in relatively well-known areas; questions abound when new areas of risk come to view. New areas—for example, climate change and cybersecurity—have entailed their own unknowns, and the SEC has adapted. Toward such new areas and their possible risks, the SEC has devoted thoughtful consideration informed by wide-ranging analytic resources, including input contributed from cabinet agencies and other parts of the U.S. government.<sup>71</sup> The SEC has promulgated public interpretive guidances that have improved the general understanding of various

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<http://thecgp.org/images/Coalition-889-Blog.pdf> [<https://perma.cc/DY7A-UE44>] (guidance to trade association members).

<sup>67</sup> *Annual Meetings and Proxy Requirements*, U.S. SEC. & EXCHANGE COMMISSION (Nov. 28, 2017), <https://www.sec.gov/smallbusiness/goingpublic/annualmeetings> [<https://perma.cc/X9QQ-JYLT>]; *Fast Answers: Form 10-K*, U.S. SEC. & EXCHANGE COMMISSION (June 26, 2009), <https://www.sec.gov/fast-answers/answers-form10k.htm> [<https://perma.cc/BK5T-CRQT>].

<sup>68</sup> See, e.g., *Form 10-K*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/about/forms/form10-k.pdf> [<https://perma.cc/BMD9-BC8M>] (showing the required disclosure of risk factors).

<sup>69</sup> See, e.g., *id.*

<sup>70</sup> Rule 12b-20 of the General Rules and Regulations of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78qq (2018), provides as follows: “In addition to the information expressly required to be included in a statement or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading.” 17 C.F.R. § 240.12b-20 (2019).

<sup>71</sup> See, e.g., Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290, 6290–92 (Feb. 8, 2010) (to be codified at 17 C.F.R. pts. 211, 231, 241).

areas of risk over the years.<sup>72</sup> Indeed, the disclosure envisioned by this Article is entirely consistent with regulatory approaches focused on benchmarks or forms, as well as those focused on standards and principles, and therefore would work well with the SEC's recently proposed rules changes on financial disclosures.<sup>73</sup>

Because what types of risks a fully informed and mindful investor will decide to accept is an empirical question, disclosures about China's MCF may not ultimately lead to different investment flows into China. But adequate disclosure will at least ensure the risk is knowingly accepted by investors who will be making informed choices between those and competitive investment opportunities with different risk profiles. The risks similarly should be considered by western firms when arguing before courts, agencies, and other tribunals outside of China when litigating against motions to transfer the proceedings to Chinese tribunals for matters of convenience or the like; although mileage may vary on how much these risks will actually sway particular transfer decisions.

Other institutional and legal tools exist as well. A constellation of laws regulates the structure of markets by addressing issues such as fraud, collusion on price or output, theft of intellectual property, and dumping in breach of international trade agreements. Agencies like the CFTC (as mentioned above), the U.S. Federal Trade Commission, the U.S. International Trade Commission ("ITC"), and others, form a web of jurisdictions regarding such issues. Claimants have already begun to experiment with ways to use these agencies, as well as U.S. courts, to push back when they suffer harm in their dealings in and with China. For example, cases have been brought in U.S. courts and before the ITC, premised on allegations about Chinese power over global markets in Vitamin C, which met with some success, and steel, which failed in its early stages.<sup>74</sup> If relevant decision makers find merit

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<sup>72</sup> See, e.g., *id.* at 6296; Press Release, U.S. Sec. & Exch. Comm'n, SEC Adopts Statement and Interpretive Guidance on Public Company Cybersecurity Disclosures (Feb. 21, 2018), <https://www.sec.gov/news/press-release/2018-22> [<https://perma.cc/B3EU-JVZ4>].

<sup>73</sup> See Press Release, U.S. Sec. & Exch. Comm'n, SEC Proposes Amendments to Modernize and Enhance Financial Disclosures (Jan. 30, 2020), <https://www.sec.gov/news/press-release/2020-25> [<https://perma.cc/HC4B-G36J>].

<sup>74</sup> See, e.g., *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1870 (2018) (Vitamin C); *Certain Carbon & Alloy Steel Prods.*, Inv. No. 337-TA-1002, USITC Pub. 4947 (Apr. 9, 2018) (Notice of Commission Determination to Terminate the Investigation in Its Entirety) (steel); *Certain Carbon & Alloy Steel Prods.*, Inv. No. 337-TA-1002, USITC Pub. 4947 (Nov. 1, 2017) (Notice of Commission Determination Not to Review an Initial Determination Granting Summary Determination of No Section 337 Violation Based on False Designation of Origin) (steel). For a critique of the early stage dismissal of the steel case that is agnostic on the



in such allegations—which in the vitamin and steel examples concern the PRC's alleged full-spectrum coordination on price and quantity—then their decisions would, in effect, call out the PRC for its attempts to surveil and control up and down the global supply chain in a range of product markets, as well as in related derivative and securities markets. The risks thus exposed would include risks to western firms of both upward and downward shocks to price and output, unfair competition through outright nation-state industrial planning, and more.

Private litigants in the West, however patriotic, are not motivated primarily by a desire to help advance a national strategy; they use private rights of action to pursue private aims. But the substantive law and jurisdiction of a powerful range of public institutions already may be—if, so far, only by happenstance—helping realize those private aims in ways that, in the present era of great power competition, advance larger public objectives. The United States and like-minded countries now are bringing those objectives into focus. Institutions such as those mentioned here may well have an even greater role to play.

### CONCLUSION

The economic and social costs would be high, and the moral loss uncompensable, if concerns about the PRC slid into xenophobia against the Chinese people; the costs would be high if great power competition escalated to a point of no return. No nation in the West desires isolation, much less military conflict. Being mindful of the ties that bind particular individuals and institutions located in and out of China to the PRC and to the State's strategic ambition allows individuals to design strategies of their own to mitigate risk in fair and measured ways. Indeed, if one places MCF in its proper frame—seeing it as an operational tool in China's strategy of great power competition—individuals can address risk rationally and with appropriate distinctions. In so doing, American regulators and others can refine their understanding of the challenge that needs to be addressed—and at the same time avoid overreactions that jeopardize the values that define the United States.

For financial regulators, this then becomes a relatively focused question of how to address heretofore underappreciated categories of risk that arise from doing business in and with China. Regulators may

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ultimate merits, see F. Scott Kieff, *Private Antitrust at the U.S. International Trade Commission*, 14 J. COMPETITION L. & ECON. 46 (2018).

be joined by private litigants who have plausible claims of injury in their own capacity as investors. To the extent regulators, litigants, or both play a role in shining a light on these risk categories, American interests as a nation in an era of great power competition are furthered, and American private citizens and firms are making more fully informed choices for themselves.

An effective response to MCF is indeed a risk-based response. It is no surprise that MCF, to date, has not been on the radar of commercial litigators or market regulators, because what MCF means and how it works have only recently come into focus. But a key and basic intuition that flows from recognizing the existence of MCF is that seemingly ordinary civil and commercial proceedings in China are well within MCF's grasp. This means it now makes sense to ask further questions about the embedded risks from China's MCF across a broad range of settings. Mindfulness of this risk has powerful implications for U.S. and U.K. investors, business firms, and related commercial parties as they make their own best-informed business decisions. It also holds implications for those deploying familiar toolkits within the broader ecosystem of financial regulators and private parties who bring civil litigation, investigation, and whistleblower claims for material misstatements and the like.