NOTE

THE FIRST "STATE SPONSOR OF MASS IP THEFT": CHINA, SOVEREIGN IMMUNITY, AND UPHOLDING AMERICANS' INTELLECTUAL PROPERTY RIGHTS

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The government of China has long orchestrated a massive campaign to steal intellectual property (IP) from Americans, but few victims have been able to seek redress through civil litigation. A key reason is that U.S. law does not recognize a foreign government's vicarious liability for such thefts. Even when liability can be established, China's government has sovereign immunity from the jurisdiction of U.S. courts. This Note proposes a new legislative framework, including amendments to the Foreign Sovereign Immunities Act (FSIA), that would allow Americans to sue the Chinese government and collect Chinese state assets as damages for thefts of IP perpetrated for its benefit.

This Note suggests two legislative steps: First*, creating a new category—"state sponsors of mass IP theft"—modeled on the State Department's state-sponsors-of-terrorism list, and designating China under it;* second*, amending the FSIA to: (i) deny sovereign immunity to designated state sponsors of mass IP theft in suits under federal and state laws protecting trade secrets, trademarks, patents, and copyrights; (ii) provide a*

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federal private right of action that resets the statutes of limitations for those claims, and that recognizes the state sponsor's liability for the actions of its agents—including spies and military operatives, government regulators, state-owned enterprises, nominally private companies under the control of the Chinese Communist Party, participants in talent recruitment programs, and non-traditional collectors; and, (iii) permit successful plaintiffs to enforce judgments by attaching commercial assets of the foreign state and its state companies.

INTRODUCTION

The government of China has long orchestrated a massive campaign to steal intellectual property (IP) from Americans, yet when the victims discover the harm, they cannot sue the Chinese government. U.S. law does not recognize a foreign government's vicarious liability for such thefts. Even when liability can be established, China's government has sovereign immunity from the jurisdiction of U.S. courts. This Note proposes new federal legislation to create vicarious liability for China and any other "state sponsor of mass IP theft"—a proposed new legal category—for the thefts that they orchestrate. A foreign state so designated would lose sovereign immunity for theft of U.S. trade secrets, trademarks, patents, and copyrights. Modeled on remedies for U.S. victims of terrorist attacks supported by state sponsors of terrorism (SSTs),[1] the proposed legislation would allow U.S. judgment holders to enforce against the assets of both the Chinese government and its state-owned enterprises (SOEs).

China's state sponsorship of mass IP theft is without precedent.[2] "One of the largest transfers of wealth in history," the theft of up to $600 billion per year[3] of U.S. companies' IP is central to the Chinese Communist Party's "generational fight to surpass [the United States] in economic and

[1] "SST" refers to the State Department's list of state sponsors of terrorism mentioned in the Foreign Sovereign Immunities Act. It is not an official acronym. *See* Melissa Sanford, "*This is a Game": A History of the Foreign Terrorist Organization and State Sponsors of Terrorism Lists and their Applications*, 13 HIST. MAKING 139, 146 n.12 (2020).

[2] NAT'L BUREAU OF ASIAN RSCH., THE IP COMMISSION REPORT: THE REPORT OF THE COMMISSION ON THE THEFT OF AMERICAN INTELLECTUAL PROPERTY 1, 10 (2013) [hereinafter IP COMMISSION REPORT 2013]; OFF. OF THE U.S. TRADE REPRESENTATIVE, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974, at 17 (2018) [hereinafter USTR SECTION 301 REPORT 2018].

[3] NAT'L BUREAU OF ASIAN RSCH., UPDATE TO THE IP COMMISSION REPORT: THE THEFT OF AMERICAN INTELLECTUAL PROPERTY—REASSESSMENTS OF THE CHALLENGE AND UNITED STATES POLICY 1 (2017) [hereinafter UPDATE TO THE IP COMMISSION REPORT 2017].

technological leadership."[4] Beijing's theft violates Americans' property rights, discourages innovation, and damages the economy and national security of the United States.[5] Americans can file civil suits against people who misappropriate their trade secrets and otherwise steal IP, but they cannot sue China's government because U.S. courts do not have subject-matter jurisdiction over foreign states except in narrow circumstances.[6] Congress, however, could amend the Foreign Sovereign Immunities Act ("FSIA," or "the Act") to confer jurisdiction on the courts so that Americans can hold the Chinese government, including the ruling Chinese Communist Party (CCP, or "the Party") and its organs of state (collectively, "the Party-state" or "Beijing"), accountable for IP theft.

This Note proposes two legislative steps: *first*, creating a new category—state sponsors of mass IP theft—modeled on the State Department's SST list,[7] and designating China

[4] Christopher Wray, *The Threat Posed by the Chinese Government and the Chinese Communist Party to the Economic and National Security of the United States*, Fed. Bureau Investigation (July 7, 2020), https://www.fbi.gov/news/speeches/the-threat-posed-by-the-chinese-government-and-the-chinese-communist-party-to-the-economic-and-national-security-of-the-united-states [https://perma.cc/4LFK-R8W8]; *see* USTR SECTION 301 REPORT 2018, *supra* note 2, at 153 ("For over a decade, the Chinese government has conducted and supported cyber intrusions into U.S. commercial networks . . . gain[ing] unauthorized access to a wide range of commercially-valuable business information, including trade secrets, technical data, negotiating positions, and sensitive and proprietary internal communications.").

[5] *See* IP COMMISSION REPORT 2013, *supra* note 2, at 1–2, 10 ("IP theft is now a national security issue."); OFF. THE NAT'L COUNTERINTELLIGENCE EXEC., FOREIGN SPIES STEALING US ECONOMIC SECRETS IN CYBERSPACE, REPORT TO CONGRESS ON FOREIGN ECONOMIC COLLECTION AND INDUSTRIAL ESPIONAGE, 2009–2011 i (2011) [hereinafter NAT'L COUNTERINTELLIGENCE EXECUTIVE REPORT 2011] ("Chinese actors are the world's most active and persistent perpetrators of economic espionage.").

[6] *See* 28 U.S.C. § 1604.

[7] *See* State Sponsors of Terrorism, U.S. Dep't of State (last visited Oct. 6, 2024), https://www.state.gov/state-sponsors-of-terrorism/ [https://perma.cc/7VEY-TGHS] ("Countries determined by the Secretary of State to have repeatedly provided support for acts of international terrorism are designated pursuant to three laws: section 1754(c) of the National

under it; *second*, amending the FSIA to: (i) deny sovereign immunity to designated state sponsors of mass IP theft in suits under federal and state laws protecting trade secrets, trademarks, patents, and copyrights; (ii) provide a federal private right of action for those claims that imposes liability on the state sponsor for its agents' actions; and (iii) permit successful plaintiffs to enforce judgments by attaching commercial assets of the foreign state and its SOEs.

Though an old principle in the law of nations, the sovereign immunity doctrine has evolved with developments in international economics and diplomacy.[8] In the 1990s, Congress determined that SSTs should no longer enjoy sovereign immunity in U.S. courts. Congress disapproved of states that consider terrorism "a legitimate instrument of achieving their foreign policy goals."[9] Congress can now use similar measures to declare its disapproval of states that consider mass IP theft a legitimate governmental instrument.

China steals IP to build its economic might, develop technologies at home, and gain an edge in its strategic competition against the United States.[10] Stripping China of immunity for such IP thefts would give Americans a remedy for the violation of their property rights. It could also incentivize the CCP to change its policy of IP theft. It would be ideal if the CCP ended this practice entirely and respected IP rights in China and abroad, but that is unlikely to occur. Changing U.S. law on sovereign immunity may cause the CCP to instruct its companies to remove their assets from within the reach of U.S. courts. This would not insulate them entirely, however, because U.S. judgment holders would still be able to attach commercial payments owed to China's government and state enterprises.[11] Though Chinese firms

Defense Authorization Act for Fiscal Year 2019, section 40 of the Arms Export Control Act, and section 620A of the Foreign Assistance Act of 1961[].").

[8] *See infra* Part II; Section IV.A.

[9] H.R. REP. NO. 104–383, at 62 (1995); *see infra* Part II.

[10] *See infra* Part I.

[11] *See infra* note 133 and accompanying text.

have recently reduced their presence in the United States,[12] it could be many years before they are generally beyond the reach of U.S. court orders.

Part I of this Note reviews the CCP's policy of stealing U.S. IP and elaborates on the CCP's role in China's economy. It summarizes how the Party advances its interests through the state, SOEs, private companies, and individuals. Part II reviews how Congress amended the FSIA to allow Americans to sue SSTs. Part III lays out the proposal for designating China a state sponsor of mass IP theft and suggests language for an amendment to the FSIA that would allow Americans to hold China's government accountable for stealing their intellectual property. Part IV explains how this proposal is consistent with international law principles. It also addresses policy considerations.

I. "THE PARTY LEADS EVERYTHING"[13]: THE PROBLEM OF CHINESE IP THEFT AND CHINA'S CORPORATE STRUCTURE

"China is the world's largest source of IP theft."[14] For decades, to reduce its dependence on foreign technologies, China's industrial policies have encouraged trade secret misappropriation and infringement on trademarks, copyrights, and patents.[15] The strategy is straightforward: "Rob the American company of its intellectual property,

[12] Thilo Hanemann, Armand Meyer & Danielle Goh, *Vanishing Act: The Shrinking Footprint of Chinese Companies in the US*, RHODIUM GRP. (Sept. 7, 2023), https://rhg.com/research/vanishing-act-the-shrinking-footprint-of-chinese-companies-in-the-us [https://perma.cc/XKE6-BJZC] (noting that in 2021, Chinese businesses held $282 billion in assets in the United States); *see infra* Section IV.B.

[13] RUSH DOSHI, THE LONG GAME: CHINA'S GRAND STRATEGY TO DISPLACE AMERICAN ORDER 26 (2021) (citations omitted) (quoting Xi Jinping in 2017 and Mao Zedong).

[14] IP COMMISSION REPORT 2013, *supra* note 2, at 2.

[15] *See generally id.* at 3; USTR SECTION 301 REPORT 2018, *supra* note 2, at 10–18; U.S. INT'L TRADE COMM'N, CHINA: EFFECTS OF INTELLECTUAL PROPERTY INFRINGEMENT AND INDIGENOUS INNOVATION POLICIES ON THE U.S. ECONOMY, at xv (2011) [hereinafter U.S. I.T.C. REPORT 2011].

replicate the technology, and replace the American company in the Chinese market and, one day, the global market."[16] This is one component in the Party's grand strategy to modernize China's economy, achieve "national rejuvenation" by 2049, and replace the United States as the world's dominant power.[17]

The United States has faced economic espionage before.[18] "What is new," however, "is that unfair trade, security and industrial policies, tolerable in a smaller developing economy, are now combined with China's immense, government-directed investment and regulatory policies to put foreign firms at a disadvantage."[19] The U.S. International Trade Commission reported that in 2009 alone, U.S. IP-intensive firms lost $48.2 billion due to Chinese infringement of their IP rights.[20] Trademark infringement was the most common offense, while copyright infringement did the most economic damage.[21] In 2011, the Office of the National Counterintelligence Executive concluded that "Chinese actors are the world's most active and persistent perpetrators of economic espionage."[22] In 2015, China's State Council unveiled the "Made in China 2025" initiative to develop ten strategic industries—equally a "roadmap to theft as it is

[16] *China's Non-Traditional Espionage Against the United States: The Threat and Potential Policy Responses: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 5 (2018) (statement of John C. Demers, Assistant Att'y Gen., Nat'l Sec. Div., U.S. Dep't of Just.) [hereinafter Demers Testimony].

[17] DOSHI, *supra* note 13, at 4.

[18] *China's Non-Traditional Espionage Against the United States: The Threat and Potential Policy Responses: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 2 (2018) (statement of Peter Harrell, Adjunct Senior Fellow, Ctr. for a New Am. Sec.) [hereinafter Harrell Testimony].

[19] USTR SECTION 301 REPORT 2018, *supra* note 2, at 17 (quoting James Lewis from the Center for Strategic and International Studies) ("The fundamental issue for the U.S. and other western nations, and the IT sector is how to respond to a managed economy with a well-financed strategy to create a domestic industry intended to displace foreign suppliers.").

[20] U.S. I.T.C. REPORT 2011, *supra* note 15, at 3-1.

[21] *Id.* at xvi, 3-1.

[22] NAT'L COUNTERINTELLIGENCE EXECUTIVE REPORT 2011, *supra* note 5, at i.

guidance to innovate," according to the Assistant Attorney General for the National Security Division.[23] A 2017 study estimated that IP theft costs the U.S. economy between $225 billion and $600 billion annually.[24]

The CCP dominates the Chinese Party-state.[25] "The Party sits above the state, runs parallel to the state, and is enmeshed in every level of the state," wrote Rush Doshi, who went on to serve as China director on President Biden's National Security Council staff.[26] China's judiciary is also subordinate to the CCP. The president of China's highest court has stated that "the courts should serve the Chinese Communist Party and industrial policy goals."[27] General Secretary Xi Jinping echoed Mao at the 19th Party Congress in 2017, saying: "Party, government, military, civilian, and academic, north, south, east, west, and center, the Party leads everything."[28]

The Party blurs the line between public and private commercial activity. Since 2016, Xi has increased the Party's control over state-owned firms and nominally private companies, such as Alibaba and Tencent.[29] China's nearly one

[23] Demers Testimony, *supra* note 16, at 2.

[24] UPDATE TO THE IP COMMISSION REPORT 2017, *supra* note 3, at 1.

[25] SUSAN V. LAWRENCE & MARI Y. LEE, CONG. RSCH. SERV., R46977, CHINA'S POLITICAL SYSTEM IN CHARTS: A SNAPSHOT BEFORE THE 20TH PARTY CONGRESS 1 (2021) (explaining the concept of a Leninist "Party-state"); *see generally U.S. Investment in China's Capital Markets and Military-Industrial Complex: Hearing Before the U.S.-China Econ. and Sec. Rev. Comm'n*, 117th Cong. 170 (2021) (statement of Jason Arterburn, Program Dir., Ctr. for Advanced Def. Stud.) [hereinafter Arterburn Testimony] ("[W]hen Chinese companies pursue globalization today, they do so with complex relationships to the Chinese party-state that defy simple categorizations as 'state-owned' or 'private.'").

[26] DOSHI, *supra* note 13, at 35.

[27] OFF. OF THE U.S. TRADE REPRESENTATIVE, 2023 SPECIAL 301 REPORT, at 45 (2023).

[28] DOSHI, *supra* note 13, at 26.

[29] Jude Blanchette, *From "China Inc." to "CCP Inc.": A New Paradigm for Chinese State Capitalism*, CHINA LEADERSHIP MONITOR (Dec. 2, 2020), https://www.prcleader.org/post/from-china-inc-to-ccp-inc-a-new-paradigm-for-chinese-state-capitalism [https://perma.cc/FBM8-XUKG]; *see also* Edward White, *Chinese Companies Revive Mao Zedong-era Militias*, FIN.

hundred SOEs are controlled by the State Council's State-owned Assets Supervision and Administrative Commission (SASAC).[30] Top executives are appointed through "a highly institutionalized sharing arrangement between the Party and SASAC."[31] Each SOE might have hundreds or even thousands of subsidiaries, complicating foreigners' understanding of ownership structures.[32] State influence extends beyond SOEs and their subsidiaries. Under Xi, writes China scholar Jude Blanchette,

> [the] demarcations between 'state-owned' and private . . . have become obscured to the point of irrelevancy by a concerted effort to expand the role of the CCP throughout the economy, both public and private. Indeed, even after recognizing the limitations of Beijing's influence over many company decisions, the problem remains that it is difficult (if not impossible) to delineate with any precision where CCP influence ends and where firm autonomy begins.[33]

This "new political-economic order" is unique to China,[34] so it is not surprising that U.S. law inadequately accounts for how the CCP marshals state tools to undermine U.S. IP rights.

China employs a "multifaceted approach" to IP theft.[35] Spies and military operatives, government regulators, SOEs,

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TIMES (Feb. 19, 2024), https://www.ft.com/content/d6b2e4d6-2f84-4ef9-bf99-10d76d92d045 [https://perma.cc/MY7J-SHWV]; *see generally* Scott Livingston, *The New Challenge of Communist Corporate Governance*, CTR. STRAT. & INT'L STUD. (Jan. 15, 2021), https://www.csis.org/analysis/new-challenge-communist-corporate-governance [https://perma.cc/PMU2-JHNA].

[30] *Directory*, STATE-OWNED ASSETS SUPERVISION & ADMIN. COMM'N OF THE STATE COUNCIL, http://en.sasac.gov.cn/sasacdirectory.html (last visited Oct. 6, 2024) (on file with the Columbia Business Law Review) [hereinafter SASAC Directory].

[31] Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665, 677 n.53 (2015).

[32] Arterburn Testimony, *supra* note 25, at 2.

[33] Blanchette, *supra* note 29.

[34] *Id.*

[35] Demers Testimony, *supra* note 16, at 3.

CCP-controlled but nominally private companies, talent recruitment programs, and non-traditional collectors are all involved. Intelligence officers from the Ministry of State Security and People's Liberation Army (PLA) perform economic espionage, stealing trade secrets through hacking and fraud and recruiting agents in the United States.[36] A bombshell report in 2013 revealed that members of PLA Unit 61398 had hacked 115 U.S.-based entities in strategically significant industries, including four "'strategic emerging industries' that China identified in its 12th Five-Year Plan."[37] The following year, the Department of Justice charged five Unit 61398 officers with cyber intrusions and economic espionage against six U.S. companies with substantial business in China.[38] The indictment alleged the PLA funneled

[36] *See, e.g.*, Press Release, U.S. Dep't of Just., Chinese Government Intelligence Officer Sentenced to 20 Years in Prison for Espionage Crimes, Attempting to Steal Trade Secrets from Cincinnati Company (Nov. 16, 2022), https://www.justice.gov/opa/pr/chinese-government-intelligence-officer-sentenced-20-years-prison-espionage-crimes-attempting [https://perma.cc/7BH7-72QZ]; Press Release, U.S. Dep't of Just., Chinese National Sentenced to Eight Years for Acting Within the United States as an Unregistered Agent of the People's Republic of China (Jan. 25, 2023), https://www.justice.gov/opa/pr/chinese-national-sentenced-eight-years-acting-within-united-states-unregistered-agent-people [https://perma.cc/7ZYQ-Q42J] ("This tasking was part of an effort by the [Ministry of State Security] to obtain access to advanced aerospace and satellite technologies being developed by companies within the U.S."); Press Release, U.S. Dep't of Just., Chinese Intelligence Officers and Their Recruited Hackers and Insiders Conspired to Steal Sensitive Commercial Aviation and Technological Data for Years (Oct. 30, 2018), https://www.justice.gov/opa/pr/chinese-intelligence-officers-and-their-recruited-hackers-and-insiders-conspired-steal [https://perma.cc/PA8S-GRYJ].

[37] USTR SECTION 301 REPORT 2018, *supra* note 2, at 155–56; *see also* Press Release, U.S. Dep't of Just., U.S. Charges Five Chinese Military Hackers for Cyber Espionage Against U.S. Corporations and a Labor Organization for Commercial Advantage (May 19, 2014), https://www.justice.gov/opa/pr/us-charges-five-chinese-military-hackers-cyber-espionage-against-us-corporations-and-labor [https://perma.cc/JWJ2-QVBM] (charging five Unit 61398 officers for hacking Westinghouse, U.S. Steel, Alcoa, and three other U.S. companies).

[38] USTR SECTION 301 REPORT 2018, *supra* note 2, at 157.

the stolen data and trade secrets to the U.S. companies' Chinese competitors, including SOEs.[39]

Other hackers are less obviously affiliated with the Chinese government, though researchers have grounds to believe that they are tools of the state. For example, one anonymous group known as APT10 appears to be a Chinese cyber espionage group that has targeted sectors important to China's 13th Five Year-Plan.[40]

Chinese government regulators and licensing officials coerce U.S. companies to transfer technology to them—and then reportedly siphon off that know-how to local competitors.[41] For some companies, turning over such material is a precondition for entering the market, though these "[i]nformation disclosure and expert panel review requirements can arise at any stage of a company's operations in China" across many industries.[42] "Expert panels" comprising representatives from industry, research institutions, and government have been suspected of passing to local competitors precise information about business plans and manufacturing methods—which may constitute trade secrets—that they demand from U.S. firms.[43]

Civil regulators intimidate companies that try to vindicate their IP rights. In one instance, antitrust regulators raided

[39] *Id.* at 158; *cf.* Ionut Arghire, *Chinese Hackers Targeted International Aerospace Firms for Years*, SEC. WEEK (Oct. 18, 2019), https://www.securityweek.com/chinese-hackers-targeted-international-aerospace-firms-years/ [https://perma.cc/N6Q9-ASSX] (Crowdstrike report alleged that a SOE, Commercial Aircraft Corporation of China (COMAC), benefitted from Chinese Ministry of State Security hacks of U.S. aerospace companies).

[40] USTR SECTION 301 REPORT 2018, *supra* note 2, at 169–70; *see generally* PWC & BAE SYSTEMS, OPERATION CLOUD HOPPER, at 13 (2021)

[41] Lingling Wei & Bob Davis, *How China Systematically Pries Technology from U.S. Companies*, WALL ST. J. (Sept. 26, 2018), https://www.wsj.com/articles/how-china-systematically-pries-technology-from-u-s-companies-1537972066 (on file with the Columbia Business Law Review); USTR SECTION 301 REPORT 2018, *supra* note 2, at 42.

[42] USTR SECTION 301 REPORT 2018, *supra* note 2, at 42.

[43] *Id.*; Wei & Davis, *supra* note 41.

the offices of a U.S. company and told it to drop a patent-infringement suit it had filed against a Chinese competitor.[44]

As the Unit 61398 operations show, SOEs can facilitate the military's IP theft, but they also conduct their own. In what is believed to be the first U.S. federal criminal case against a Chinese SOE,[45] Sinovel Wind Group Company Ltd. was convicted of trade secret theft for stealing "proprietary wind turbine technology" that ultimately cost U.S. firm ASMC "more than $1 billion in shareholder equity and almost 700 jobs."[46] In another case, a SOE in the chemicals industry, Pangang Group, orchestrated the theft of DuPont's proprietary manufacturing recipe for a valuable white pigment.[47] DuPont had controlled one-fifth of the pigment's $17 billion market.[48] This was the first ever conviction for economic espionage under 18 U.S.C. § 1831, and the first time a foreign SOE was charged with that crime.[49]

Non-state-owned companies also perpetrate IP theft for Beijing's benefit. "In the context of Chinese state capitalism, private ownership does not mean autonomy from the state."[50] The CCP exerts power over private companies via Party-state organs, subsidies, and extralegal control.[51] U.S. electric car company Tesla recently alleged that its technology secrets were stolen by a Chinese firm that makes sensors for autonomous vehicles.[52] That firm's second largest shareholder

[44] Wei & Davis, *supra* note 41.

[45] U.S. DEP'T OF JUST., REPORT TO CONGRESS PURSUANT TO THE DEFEND TRADE SECRETS ACT 8 (2018) [hereinafter DOJ DTSA REPORT 2018].

[46] Press Release, U.S. Dep't of Just., Court Imposes Maximum Fine on Sinovel Wind Group for Theft of Trade Secrets (July 6, 2018), https://www.justice.gov/opa/pr/court-imposes-maximum-fine-sinovel-wind-group-theft-trade-secrets [https://perma.cc/9N8B-R2KZ].

[47] IP COMMISSION REPORT 2013, *supra* note 2, at 39–40.

[48] *Id.* at 39.

[49] DOJ DTSA REPORT 2018, *supra* note 45, at 7.

[50] Milhaupt & Zheng, *supra* note 31, at 683.

[51] *Id.*

[52] Vishakha Saxena, *Tesla Sues China Chip Designer for 'Stealing Tech Secrets*,*'* ASIA FIN. (Sept. 6, 2023), https://www.asiafinancial.com/tesla-sues-china-chip-designer-for-stealing-tech-secrets [https://perma.cc/N9LH-ZJP3].

is Xiaomi, a leading electronics producer that became a direct Tesla competitor when it received permission from China's central planners to manufacture electric vehicles—a "Made in China 2025" strategic resource.[53] Though Xiaomi is not state-owned, like nearly all of China's largest private enterprises, it has a "founder or de facto controller" who "is currently or formerly a member of central or local Party-state organizations such as People's Congresses and [Chinese] People's Political Consultative Conferences [CPPCC]."[54] Xiaomi's CEO has been a repeat delegate to the CPPCC.[55] Major companies Tencent, Baidu, and Lenovo have also sent their chief executives to those political bodies.[56] Since the Biden administration, the Department of Energy considers current and former CPPCC members to be "senior . . . political figure[s]" in the Chinese government.[57]

[53] *Id.*; Kenji Kawase, *"Made in China 2025" Thrives with Subsidies for Tech, EV Makers*, ASIA NIKKEI (July 22, 2022), https://asia.nikkei.com/Business/Business-Spotlight/Made-in-China-2025-thrives-with-subsidies-for-tech-EV-makers [https://perma.cc/9HJF-Z3ZB]; *see generally* Guo Wu Yuan Guan Yu Yin Fa 《Zhong Guo Zhi Zao 2025》de Tong Zhi (国务院关于印发《中国制造2025》的通知) [Notice of the State Council on the Publication of "Made in China 2025"], GUO WU YUAN (国务院) [P.R.C. ST. COUNCIL] (May 8, 2015) (China) https://www.gov.cn/zhengce/content/2015-05/19/content_9784.htm [https://perma.cc/35HU-P4TH], *translated in* CTR. FOR SEC. & EMERGING TECH. (Mar. 8, 2022), https://cset.georgetown.edu/publication/notice-of-the-state-council-on-the-publication-of-made-in-china-2025/ [https://perma.cc/H6DG-F9DJ].

[54] Milhaupt & Zheng, *supra* note 31, at 684.

[55] Laurie Chen, *At China Political Meeting, Internet Bosses Are Out, Chip Execs Are In*, REUTERS (Mar. 3, 2023), https://www.reuters.com/technology/china-political-meeting-internet-bosses-are-out-chip-execs-are-2023-03-03/ [https://perma.cc/R3X8-BU3P].

[56] Shen Lu, *China Favors Chips, AI Executives over Internet Tycoons at Top Political Meetings*, WALL ST. J. (Mar. 5, 2023), https://www.wsj.com/articles/china-favors-chips-ai-executives-over-internet-tycoons-at-top-political-meetings-eb1076f2 (on file with the Columbia Business Law Review).

[57] Interpretation of Foreign Entity of Concern, 89 Fed. Reg. 37079, 37086 (May 6, 2024).

Huawei, which has misappropriated IP for decades,[58] might be one of China's best-known companies, but its ties to the Party are not as stark as those of its peers. Huawei is not state-owned but it receives generous state subsidies and maintains ties to China's ruling party and China's intelligence and military apparatuses.[59] Huawei does not publicize whether its executives participate in formal Party functions,[60] though its founder and CEO attended the 12th National Congress of the CCP in 1982[61] and a former chairwoman had

[58] Press Release, U.S. Dep't of Just., Chinese Telecommunications Conglomerate Huawei and Subsidiaries Charged in Racketeering Conspiracy and Conspiracy to Steal Trade Secrets (Feb. 13, 2020), https://www.justice.gov/opa/pr/chinese-telecommunications-conglomerate-huawei-and-subsidiaries-charged-racketeering [perma.cc/2ZEF-FUZH]; *see also* Press Release, U.S. Dep't of Just., Chinese Telecommunications Device Manufacturer and its U.S. Affiliate Indicted for Theft of Trade Secrets, Wire Fraud, and Obstruction Of Justice (Jan. 28, 2019), https://www.justice.gov/opa/pr/chinese-telecommunications-device-manufacturer-and-its-us-affiliate-indicted-theft-trade [perma.cc/QZY8-9EPC] (for stealing T-Mobile's technology for developing a phone-testing robot called Tappy).

[59] MIKE ROGERS & C.A. DUTCH RUPPERSBERGER, H. PERMANENT SELECT COMM. ON INTELLIGENCE, INVESTIGATIVE REPORT ON THE U.S. NATIONAL SECURITY ISSUES POSED BY CHINESE TELECOMMUNICATIONS COMPANIES HUAWEI AND ZTE 21–35 (2012) [hereinafter ROGERS-RUPPERSBERGER REPORT]. The company "exhibits a pattern of disregard for the intellectual property rights of other entities and companies in the United States." *Id.* at 31. *See also* Milhaupt & Zheng, *supra* note 31, at 685; Press Release, U.S. Dep't of Def., DOD Releases List of People's Republic of China (PRC) Military Companies in Accordance With Section 1260H of the National Defense Authorization Act for Fiscal Year 2021 (Jan. 31, 2024), https://www.defense.gov/News/Releases/Release/Article/3661985/dod-releases-list-of-peoples-republic-of-china-prc-military-companies-in-accord/ [perma.cc/NY96-2PJE] (Huawei participates in China's Military-Civil Fusion strategy to help the People's Liberation Army "acquire advanced technologies and expertise developed by PRC companies, universities, and research programs that appear to be civilian entities.").

[60] Milhaupt & Zheng, *supra* note 31, at 684.

[61] Ren Zhengfei, Huawei's founder and CEO, has not said anything about his role in the CCP since the 1982 National Congress. ROGERS-RUPPERSBERGER REPORT, *supra* note 59, at 23; *Mr. Ren Zhengfei*, HUAWEI (last visited Oct. 6, 2024), https://www.huawei.com/en/executives/board-of-directors/ren-zhengfei [perma.cc/ZGE6-TJM6].

previously worked for the Ministry of State Security.[62] U.S. policymakers and law enforcement have long considered Huawei a tool of the CCP, and Huawei has used IP theft to drive its market performance.[63]

Finally, China harvests IP also using "non-traditional collectors"[64] such as researchers at companies and academic institutions and participants in "talent programs."[65] They also target strategically important sectors, including autonomous and clean-energy vehicles and agricultural technology. For instance, at least three Chinese nationals working for Apple's self-driving car division have been accused of trade-secret theft in the last five years. One of them is a fugitive in China

[62] OPEN SOURCE CENTER, HUAWEI ANNUAL REPORT DETAILS DIRECTORS, SUPERVISORY BOARD FOR FIRST TIME 3 (2011), https://irp.fas.org/dni/osc/huawei.pdf [https://perma.cc/VG2S-LSJ3].

[63] *See generally* ROGERS-RUPPERSBERGER REPORT, *supra* note 59; Sara Salinas, *Six Top US Intelligence Chiefs Caution Against Buying Huawei Phones*, CNBC (Feb. 15, 2018, 11:03 AM), https://www.cnbc.com/2018/02/13/chinas-hauwei-top-us-intelligence-chiefs-caution-americans-away.html [https://perma.cc/Z95E-5L3W].

[64] *Case Example: Insider Threat and Non-Traditional Collection*, FED. BUREAU INVESTIGATION (2019) https://www.fbi.gov/file-repository/china-case-example-corn-seeds-2019.pdf [https://perma.cc/B5NF-E9N6] (defining non-traditional collector as "an individual whose primary profession is not intelligence collection but who collects sensitive U.S. technologies and information on behalf of Chinese government entities."); *see generally* Danielle Hayes, *A Letter to the IC on Defining Non-Traditional Collection*, 37 AM. INTEL. J. 106 (2020).

[65] *See* Press Release, U.S. Dep't of Just., Chinese National Sentenced for Economic Espionage Conspiracy (Apr. 7, 2022), https://www.justice.gov/opa/pr/chinese-national-sentenced-economic-espionage-conspiracy [https://perma.cc/X4N2-8BUF]; Press Release, U.S. Dep't of Just., One American and One Chinese National Indicted in Tennessee for Conspiracy to Commit Theft of Trade Secrets and Wire Fraud (Feb. 14, 2019), https://www.justice.gov/opa/pr/one-american-and-one-chinese-national-indicted-tennessee-conspiracy-commit-theft-trade [https://perma.cc/CQS4-T9Z5]; *see generally* Eileen Guo, Jess Aloe & Karen Hao, *The US Crackdown on Chinese Economic Espionage Is a Mess. We Have the Data to Show It*, MIT TECH. REV. (Dec. 2, 2021), https://www.technologyreview.com/2021/12/02/1040656/china-initative-us-justice-department/ [https://perma.cc/V6CQ-ZKK8] (organizing federal criminal prosecutions by defendants' membership in talents programs).

reportedly working as an executive at an electric-vehicle subsidiary of Baidu.[66] Mo Hailong, an executive at a Chinese conglomerate with a corn seed subsidiary company, pleaded guilty to stealing inbred corn seeds, a trade secret belonging to Monsanto, from fields "for the purpose of transporting the seeds to [his employer] DBN in China."[67] In a separate matter, Xiang Haitao, an imaging scientist at Monsanto, pleaded guilty to economic espionage after federal investigators found that he had misappropriated a proprietary predictive algorithm for China's benefit.[68]

What do U.S. companies do when they fall victim to these thefts? Risk of retaliation by Chinese regulators deters challenges to China's unfair trade practices.[69] Occasionally large companies have sued major competitors with an international presence.[70] But for most, legal obstacles at several stages of litigation disincentivize filing claims in the first place. Service of process can be extremely difficult, if not

[66] Rohan Goswami & Kif Leswing, *Ex-Apple Employee Accused of Stealing Trade Secrets Is Exec at Baidu Self-Driving Car Joint Venture*, CNBC (May 16, 2023), https://www.cnbc.com/2023/05/16/ex-apple-employee-accused-of-stealing-secrets-is-jidu-automotive-exec.html [https://perma.cc/DFY8-Y5JE]; *see also* Press Release, U.S. Dep't of Just., Former Apple Employee Charged With Theft of Trade Secrets (May 16, 2023), https://www.justice.gov/usao-ndca/pr/former-apple-employee-charged-theft-trade-secrets [https://perma.cc/ZZ9E-YSMM].

[67] Press Release, U.S. Dep't of Just., Chinese National Sentenced to Prison for Conspiracy to Steal Trade Secrets, (Oct. 5, 2016), https://www.justice.gov/opa/pr/chinese-national-sentenced-prison-conspiracy-steal-trade-secrets [https://perma.cc/7T6P-JN8U].

[68] Press Release, U.S. Dep't of Just., Chinese National Sentenced for Economic Espionage Conspiracy (Apr. 7, 2022), https://www.justice.gov/opa/pr/chinese-national-sentenced-economic-espionage-conspiracy [https://perma.cc/5ZY8-UVKQ].

[69] USTR SECTION 301 REPORT 2018, *supra* note 2, at 9; *see* Wei & Davis, *supra* note 41.

[70] *See* Rachel Lerman, *Jury Awards T-Mobile $4.8M in Trade-Secrets Case Against Huawei*, SEATTLE TIMES (May 18, 2017, 2:14 PM), https://www.seattletimes.com/business/technology/july-awards-t-mobile-48m-in-trade-secrets-case-against-huawei/ [https://perma.cc/79CU-56M5] (the jury found liability only for breach of contract, though, and not for trade secrets misappropriation).

impossible, despite the United States and China both being signatories of the Hague Service Convention.[71] Papers naming the Chinese government as a defendant simply do not get served.[72] When service is achieved, Chinese companies ignore discovery requests.[73] Occasionally a judgment will be entered (by default judgment or otherwise), but even then, plaintiffs have a difficult time collecting.[74]

In sum, U.S. victims of China's IP theft policies currently have little recourse other than to seek criminal enforcement of laws protecting IP rights. As U.S. law now stands, many victims of IP theft cannot bring claims against IP thieves operating out of China. So, the Chinese government sponsors a systematic, broad, abusive campaign to steal IP from Americans, and its victims have no civil recourse.

Past suggestions to amend the FSIA to address malign Chinese activity have not borne fruit. The Countering Communist China Act, introduced in 2021, proposed stripping China of sovereign immunity for all legal claims.[75] However, that bill would not impose vicarious liability on the Chinese government for the IP thieves operating under it. Frazier &

[71] *See e.g.*, Femtometrix, Inc. v. Chongji Huang, No. SACV 22-01624-CJC (KESx), 2023 U.S. Dist. LEXIS 26048 (C.D. Cal. Feb. 15, 2023) (order denying, *inter alia*, motion to dismiss for insufficiency, and approving alternative method of service); *see generally* KEVIN ROSIER, CHINA'S GREAT LEGAL FIREWALL: EXTRATERRITORIALITY OF CHINESE FIRMS IN THE UNITED STATES 4 (2015), https://www.uscc.gov/research/chinas-great-legal-firewall-extraterritoriality-chinese-firms-united-states [https://perma.cc/GK7L-T9S2]; Glenn Chafetz, *How China's Political System Discourages Innovation and Encourages IP Theft*, SAIS REV. INT'L AFFS. (July 31, 2023), https://saisreview.sais.jhu.edu/how-chinas-political-system-discourages-innovation-and-encourages-ip-theft/ [https://perma.cc/5XHP-VZG7].

[72] ROSIER, *supra* note 71, at 4–5.

[73] *Id.* at 4.

[74] *See* Cisco Sys., Inc. v. Shenzhen Usource Tech. Co., No. 5:20-cv-04773-EJD, 2020 WL 5199434, at *11 (N.D. Cal. Aug. 17, 2020) (granting TRO and authorizing alternative service of process) (collecting cases showing difficulty of enforcing judgments against defendants located in China); *see, e.g.*, Walters v. Indus. & Com. Bank of China, Ltd., 651 F.3d 280 (2d Cir. 2011) (illustrating difficulty of enforcing a judgment against a foreign state).

[75] Countering Communist China Act, H.R. 4792, 117th Cong. (2021) § 812.

Frazier have suggested legislation that would allow the U.S. government to sue China for economic espionage that targets national security-related trade secrets and to execute judgments on U.S. debt instruments in China's possession.[76] Their proposed "National Trade Secret Protection Strategy" would assign the U.S. government limited ownership rights in certain trade secrets developed by companies with which it had contracted. This would give the United States standing to bring civil actions over the theft of those trade secrets.[77] By contrast, the proposal in this Note focuses on private companies' path to civil recourse. China's policies, however, often deter private companies from bringing claims against the state or its interests.[78] Frazier & Frazier's strategy could complement this Note's proposal by empowering the United States to sue in some instances when private firms choose not to.[79]

U.S. policymakers acknowledge the need to update U.S. laws and regulations in light of the CCP's control over the Chinese state.[80] In a 2024 final interpretive rule, the Department of Energy interpreted "government of a foreign country" to mean "[a] dominant or ruling political party (*e.g., Chinese Communist Party (CCP)*) of a foreign country."[81] Recognizing the Party's organizational structure, the

[76] Grant H. Frazier & Mark B. Frazier, *Taming the Paper Tiger: Deterring Chinese Economic Cyber-Espionage and Remediating Damage to U.S. Interests Caused by Such Attacks*, 30 S. CAL. INTERDISC. L.J. 33, 54–60 (2020).

[77] *See id.*

[78] *See, e.g.*, USTR SECTION 301 REPORT 2018, *supra* note 2, at 9; Wei & Davis, *supra* note 41.

[79] *See* Frazier & Frazier, *supra* note 76, at 54–60.

[80] *See e.g.*, SELECT COMM. ON THE STRATEGIC COMPETITION BETWEEN THE UNITED STATES AND THE CHINESE COMMUNIST PARTY, RESET, PREVENT, BUILD: A STRATEGY TO WIN AMERICA'S ECONOMIC COMPETITION WITH THE CHINESE COMMUNIST PARTY 20–22 (2023); *cf.* Protecting American Intellectual Property Act of 2022, Pub. L. No. 117–336, 136 Stat. 6147 (authorizing the President to sanction foreign persons who engaged in "significant theft of trade secrets of United States persons").

[81] Interpretation of Foreign Entity of Concern, 89 Fed. Reg. 37079, 37090 (May 6, 2024) (emphasis added).

Department of Energy defined "senior foreign political figures" of China's government to include "current members of the Chinese People's Political Consultative Conference and current and former members of the Politburo Standing Committee, the Politburo, the Central Committee, and the National Party Congress."[82] This Note's proposal would build on that concept from the Department of Energy.

II. OVERVIEW OF THE FSIA AND ITS STATE SPONSOR OF TERRORISM PROVISIONS

A. FSIA Background

While foreign states typically enjoy immunity from civil lawsuits, the FSIA allows American victims of a terrorist act to sue the foreign state responsible for it, if that state was already designated an SST or was so designated as a result of the act.[83] Another provision, added in 2016 over a presidential veto, allows a broader category of suits against foreign states, even non-SSTs, that cause injury or death by "an act of international terrorism in the United States."[84] Congress also gave special privileges to plaintiffs enforcing terrorism-related judgments.[85]

Enacted in 1976, the FSIA codified the common-law principle that, subject to certain exceptions, nations generally could not haul another sovereign into their courts.[86] Foreign sovereign immunity is considered "a matter of grace and comity on the part of the United States."[87] The government,

[82] *Id.* Executives of major Chinese companies are members of the CPPCC and may therefore be captured by the Department of Energy's definition. *See supra* notes 54–61 and accompanying text.

[83] 28 U.S.C. § 1605A.

[84] 28 U.S.C. § 1605B.

[85] 28 U.S.C. § 1610(g).

[86] *See, e.g.*, Rubin v. Islamic Republic of Iran, 583 U.S. 202, 208–09 (2018); *see generally* Mark B. Feldman, *Foreign Sovereign Immunity in the United States Courts 1976-1986*, 19 VAND. J. TRANSNAT'L L. 19, 19–23 (1986).

[87] Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983).

therefore, may determine its breadth. Before the FSIA's enactment, courts had generally deferred, case by case, to the executive branch as to whether a foreign state enjoyed immunity.[88] "Prior to 1952, the State Department generally held the position that foreign states enjoyed absolute immunity from all actions in the United States."[89] But that year the State Department changed its policy out of recognition that more foreign states were conducting commercial activity in the United States, so their American business partners should "have their rights determined in the courts."[90] For the following quarter century, the State Department typically granted foreign states immunity, though not in suits tied to their commercial acts.[91] The FSIA made the doctrine of sovereign immunity more predictable, legislating a "careful balance between respecting the immunity historically afforded to foreign sovereigns and holding them accountable, in certain circumstances, for their actions."[92]

Today, the FSIA "provides the 'sole basis' for obtaining jurisdiction over a foreign sovereign in the United States."[93] Generally, foreign states and their agencies and instrumentalities are not subject to the jurisdiction of U.S. courts (jurisdiction immunity)[94] and their property cannot be attached to enforce judgments against them (execution, or judgment, immunity).[95] There are exceptions to this general rule, however, including cases where the sovereign has waived immunity, engaged in a commercial activity in or affecting the

[88] *Rubin*, 583 U.S. at 208.

[89] *Id.*

[90] *Id.* (quoting J. Tate, *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 DEPT. STATE BULL. 984, 985 (1952)).

[91] *Id.*

[92] *Id.* at 208–09.

[93] Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 611 (1992) (citation omitted).

[94] 28 U.S.C. § 1604.

[95] 28 U.S.C. § 1609.

United States, expropriated property, or committed certain tortious acts.[96]

SOEs enjoy sovereign immunity under the FSIA. SOEs are "instrumentalit[ies],"[97] which the Act includes in the statutory definition of "foreign state."[98] At the same time, instrumentalities are "juridical entities distinct and independent from their sovereign."[99] As such, the Supreme Court in *Bancec* instructed courts to "normally" treat instrumentalities as separate from the foreign state for purposes of liability.[100] But this was merely a presumption and could be overcome. An instrumentality might be liable for a judgment against a foreign state when the latter "so extensively control[s]" the instrumentality "that a relationship of principal and agent is created,"[101] or where upholding their separateness "would work fraud or injustice."[102] The Court did not establish a formula for assessing when to impose the state's liability on the

[96] 28 U.S.C. § 1605; *see* Aryeh S. Portnoy et al., *The Foreign Sovereign Immunities Act: 2008 Year in Review*, 16 L. & BUS. REV. AM. 179, 182 (2010).

[97] Dole Food Co. v. Patrickson, 538 U.S. 468, 477 (2003).

[98] 28 U.S.C. § 1603(a). Section 1603 defines "agency or instrumentality" as distinct from "foreign state," but also covered by the phrase "foreign state" in most of the statute:

> For purposes of this chapter—
>
> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

Id.

[99] First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 627 (1983) [hereinafter *Bancec*].

[100] *Id.*

[101] *Id.* at 629.

[102] *Id.* at 630.

instrumentality, but lower courts eventually developed a five-factor test (known as the *Bancec* factors) to make that determination:

> 1) the level of economic control by the government;
> 2) whether the entity's profits go to the government;
> 3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs;
> 4) whether the government is the real beneficiary of the entity's conduct; and,
> 5) whether adherence to separate identities would entitle that foreign state to benefits in United States courts while avoiding its obligations.[103]

Years later, for enforcing terrorism-related judgments against SSTs, Congress specifically erased the line between foreign states and their instrumentalities.[104]

In 1996 Congress added the exception for terrorism-related suits against SSTs.[105] Lawmakers showed their willingness to strip states of their immunity when their national policies harmed Americans.[106] Congress again amended the FSIA in 2008, creating a federal private right of action against SSTs, providing for punitive damages, and facilitating the execution of judgments against SST properties.[107] In 2016, another

[103] Rubin v. Islamic Republic of Iran, 583 U.S. 202, 210 (2018) (internal quotation marks omitted) (quoting Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines, 965 F.2d 1375, 1380 n.7 (5th Cir. 1992)).

[104] 28 U.S.C. § 1610(g); *Rubin*, 583 U.S. at 210–11; *see infra* notes 128–33 and accompanying text.

[105] JENNIFER K. ELSEA, CONG. RSCH. SERV., RL31258, SUITS AGAINST TERRORIST STATES BY VICTIMS OF TERRORISM 1 (2008).

[106] *Id.* at 4–5; *see* Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, § 221, 110 Stat. 1214, 1241 (1996); *see also* H.R. Rep. No. 104–383, at 62 (1995) (disapproving of states that consider terrorism "a legitimate instrument of achieving their foreign policy goals").

[107] National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110–181, § 1083, 122 Stat. 3, 339–40; *see* 28 U.S.C. §§ 1605A(c), 1610(a)(7), 1610(b)(3).

amendment removed immunity for any state, not just SSTs, responsible for an act of terrorism within the United States.[108]

The terrorism exception's structure—particularly as amended in 2008, when Congress added §§ 1605A and 1610(g)[109]—reflected Congress's desire to allow Americans to sue and enforce judgments against SSTs more easily than would be possible against other kinds of foreign states.

Congress could replicate much of the terrorism exception's design to counter China's mass IP theft. The following discussion reviews how to adapt those provisions to combat China's IP theft.

B. Section 1605A

Section 1605A expanded the terrorism exception to jurisdictional immunity that was enacted in 1996, added a private cause of action against SSTs, and authorized punitive damages.[110] Three elements must be proved to establish subject-matter jurisdiction under this section: (1) the foreign state had been designated a "state sponsor of terrorism" under relevant laws at the time of the act or as a result of it; (2) if the alleged act took place in the foreign state being sued, the plaintiff afforded that state reasonable time to arbitrate the claim; and (3) the claimant seeks money damages for

> personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while

[108] Justice Against Sponsors of Terrorism Act, Pub. L. No. 114–222, § 3, 130 Stat. 852, 853 (2016).

[109] *See* ELSEA *supra* note 105, at 38–46 (summarizing additions of 28 U.S.C. § 1605A and 28 U.S.C. § 1610(g) in the 2008 amendment). The Justice Against Sponsors of Terrorism Act of 2016, *supra* note 108, made additional changes that are not relevant here.

[110] Portnoy et al., *supra* note 96, at 201.

> acting within the scope of his or her office employment or agency.[111]

The Act defines torture, extrajudicial killing, aircraft sabotage, hostage taking, and material support or resources based on their meanings in other parts of the U.S. Code and international conventions.[112]

Section 1605A's private right of action streamlined plaintiffs' ability to bring suits. The 1996 SST exception "did not provide a cause of action against foreign states, but only waived immunity for terrorism-related claims."[113] This required plaintiffs to scour often inconsistent state laws for causes of action.[114] Section 1605A replaced the state claims with a federal one for certain plaintiffs—U.S. nationals, members of the U.S. military, employees or contractors of the U.S. government, or their legal representative.[115] Now those plaintiffs may hold an SST "vicariously liable for the acts of its officials, employees, or agents" who "act[ed] within the scope of [their] office" and caused "personal injury or death" by acts of terrorism.[116] As for the applicable substantive law, courts look to "general principles of tort law" to determine liability and damages.[117]

C. Section 1610

For plaintiffs who bring § 1605A actions against SSTs, Congress also provided help in enforcing judgments.[118] Under

[111] 28 U.S.C. § 1605A(a)(1)–(2); *see also* DAVID P. STEWART, THE FOREIGN SOVEREIGN IMMUNITIES ACT: A GUIDE FOR JUDGES 102–03 (2d ed. 2018).

[112] 28 U.S.C. § 1605A(h).

[113] Portnoy et al., *supra* note 96, at 200–01.

[114] *Id.*

[115] 28 U.S.C. § 1605A(c); STEWART, *supra* note 111, at 107 (citing Fraenkel v. Islamic Republic of Iran, 248 F. Supp. 3d 21, 34 (D.D.C. 2017) ("For persons covered by the private right of action in 28 U.S.C. § 1605A(c) state law claims are not actionable.")).

[116] 28 U.S.C. § 1605A(c).

[117] STEWART, *supra* note 111, at 108, 118, 121, 123 and accompanying notes (collecting cases).

[118] *See id.* at 127.

the FSIA, even when a foreign state does not have immunity from a U.S. court's jurisdiction, the state's property is presumptively immune from execution or attachment, subject to the exceptions enumerated in § 1610.[119] Those include waiver, commercial activity (provided that there is a nexus between the property and the "commercial activity upon which the claim is based"), and expropriation (assuming the requisite nexus)—so long as the property is "used for a commercial activity in the United States."[120] For foreign states' agencies and instrumentalities, judgment immunity is much narrower. If an agency or instrumentality is "engaged in commercial activity in the United States," all its property in the United States is subject to execution and attachment.[121]

Section 1610 provides § 1605A plaintiffs unique avenues for enforcing judgments. First, plaintiffs bringing claims against foreign states do not need to show a nexus between the property they seek to attach and the underlying claim.[122] Subsections 1610(a)(7) and (b)(3) provide that property used for a commercial activity can be attached to enforce a judgment against an SST or its instrumentality "regardless of whether the property is or was involved [with] the act upon which the claim is based."[123] Once a judgment against a foreign state or instrumentality is entered under § 1605A, all of its commercial property in the U.S. is available for

[119] 28 U.S.C. § 1609; *see also* 28 U.S.C. §§ 1610, 1611 (§ 1611 specifies certain types of property immune from execution notwithstanding § 1610); *see generally* STEWART, *supra* note 111, at 127–28. The judgment creditor bears the burden to show a specific property satisfies a § 1610 exception. Courts may permit limited discovery to aid plaintiffs at this stage. *Id.* at 128.

[120] 28 U.S.C. § 1610(a).

[121] 28 U.S.C. § 1610(b).

[122] 28 U.S.C. § 1610(a)(7) (property used for a commercial activity in the United States "shall not be immune from attachment in aid of execution, or from execution, upon a judgment, if— . . . the judgment relates to a claim for which the foreign state is not immune under section 1605A . . ., *regardless of whether the property is or was involved with the act upon which the claim is based*" (emphasis added)); 28 U.S.C. § 1610(b)(3) (same, for claims against agencies and instrumentalities).

[123] 28 U.S.C. § 1610(a)(7), (b)(3).

execution. Second, § 1610(f)(1) "permit[s] execution against frozen or diplomatic assets of [SSTs]," subject to a presidential waiver.[124] Section 1610(f)(2) directs the Treasury and State Departments "to fully, promptly, and effectively assist any judgment creditor or any court that has issued [a judgment under § 1605A and its predecessor] in identifying, locating, and executing against the property of that foreign state or any agency or any agency or instrumentality of such a state."[125] The U.S. government has no such obligations for any other action brought via the FSIA.[126] Congress further tried to broaden the scope of available blocked SST assets in the Terrorism Risk Insurance Act of 2002.[127]

Third, and most significantly, § 1610(g) allows a § 1605A judgment holder to attach the property not just of the defendant SST, but also of its instrumentalities.[128] This "abrogate[s]" *Bancec*'s presumption of independent status for

[124] STEWART, *supra* note 111, at 130–31; 28 U.S.C. § 1610(f).

[125] 28 U.S.C. § 1610(f)(2)(A).

[126] The President waived (f)(1) immediately and it has never been operative. STEWART, *supra* note 111, at 130–31.

[127] *Id.* at 131–34; Pub. L. No. 107-297, § 201(a), 116 Stat. 2337 (2002) (codified at 28 U.S.C. § 1610 note).

[128] 28 U.S.C. § 1610(g). Section 1610(g)(1) states:

> [T]he property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—
>
> (A) the level of economic control over the property by the government of the foreign state;
>
> (B) whether the profits of the property go to that government;
>
> (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> (D) whether that government is the sole beneficiary in interest of the property; or
>
> (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

a foreign state's "duly created instrumentalities."[129] For § 1605A judgments, the *Bancec* factors[130] are not necessary to pierce the corporate veil between state and SOE; there is no veil to begin with.[131] This means such a judgment holder can attach not only the foreign state's commercial property but also that of any of its SOEs. As the Supreme Court summarized:

> [p]rior to the enactment of § 1610(g), the plaintiffs would have had to establish that the *Bancec* factors favor holding the agency or instrumentality liable for the foreign state's misconduct. With § 1610(g), however, the plaintiffs could attach and execute against the property of the state-owned entity regardless of the *Bancec* factors, so long as the plaintiffs can establish that the property is otherwise not immune (e.g., pursuant to § 1610(a)(7) because it is used in commercial activity in the United States).[132]

Judgment holders are also entitled to seize cash owed by U.S. entities to the SST's state-owned company. In one instance, a litigant against Iran, an SST, was able to enforce a small part of its judgment by garnishing a payment that the Sprint telephone company owed to an Iranian state telecommunications company.[133]

Section 1610(g), combined with § 1605A's terrorism exception to jurisdiction immunity, private right of action, and punitive damages, has the potential to impose significant costs on SSTs. Those provisions give American victims of state-sponsored terrorism legal vehicles to win and enforce judgments against their assailants, which imposes some financial costs on the countries who back terrorism against

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[129] Rubin v. Islamic Republic of Iran, 583 U.S. 202, 211 (2018); *Bancec*, 462 U.S. 611, 627 (1983); *see generally* STEWART, *supra* note 111, at 36–39.

[130] *Supra* note 103 and accompanying text; *see generally Rubin*, 583 U.S. at 210–11 (explaining provenance of *Bancec* factors).

[131] *See* Paula Kates, *Immunity of State-Owned Enterprises: Striking a New Balance*, 51 N.Y.U. J. INT'L L. & POL. 1223, 1226 (2019).

[132] *Rubin*, 583 U.S. at 213.

[133] Estate of Heiser v. Islamic Republic of Iran, 807 F. Supp. 2d 9 (D.D.C. 2011) [hereinafter *Heiser III*].

the United States. In reality, though, SSTs maintain few assets in the United States, so Americans have had a difficult time enforcing judgments.[134] In light of those obstacles, Congress has created alternative means for judgment holders to collect. It authorized them to attach SST assets that were frozen by the Treasury Department, and it established a victims' fund out of the fines paid by sanctions violators and the proceeds from the sale of forfeited Iranian state property.[135] That fund has awarded over $3 billion to claimants, though more than $107 billion remains outstanding.[136] Nevertheless, the FSIA's terrorism exceptions clearly deprive foreign governments responsible for killing and injuring Americans of the "grace and comity" that the sovereign immunity doctrine affords to all other states.[137]

III. PROPOSAL TO DESIGNATE CHINA A STATE SPONSOR OF MASS IP THEFT AND AMEND THE FSIA

This Note proposes legislation modeled on the terrorism exception to sovereign immunity to deter further state-sponsored IP theft and to help Americans recover some of the value stolen from them. Even if only partially adopted, such legislation could benefit the public, so it helps to break down its component parts:

1. Establish under U.S. law an official category of foreign state labeled "state sponsors of mass IP theft." Induct China into it. Authorize the executive branch to conduct fact-finding to add or remove other countries.

[134] JENNIFER K. ELSEA, CONG. RSCH. SERV., IF10341, JUSTICE FOR UNITED STATES VICTIMS OF STATE SPONSORED TERRORISM ACT: ELIGIBILITY AND FUNDING 1 (2023).

[135] *Id.* at 1–2.

[136] *Id.* at 2. Congress might consider establishing a similar fund for judgment holders against state sponsors of mass IP theft, as a complement to this proposal.

[137] Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983).

2. Add a new section to the FSIA, § 1605C, entitled "Mass IP theft exception to the jurisdictional immunity of a foreign state."[138] This section would:
    a. remove immunity for state sponsors of mass IP theft in suits for money damages that arise from conduct by the state and its agents that would generate civil liability[139] under the Economic Espionage Act (as amended),[140] Copyright Act (as amended),[141] Patent Act (as amended),[142] and Lanham Act (as amended);[143]
    b. create a federal private right of action that imposes vicarious liability on a state sponsor of mass IP theft for the actions of its officials or agents;
    c. define "agents" to include the foreign state's military and intelligence services; state-owned enterprises and any subsidiaries; companies controlled by a foreign state's dominant or ruling political party (e.g., the Chinese Communist Party),[144] including members of central or local party state organizations (e.g., National People's Congress, Chinese People's

[138] *See* 28 U.S.C. §§ 1605A ("Terrorism exception to the jurisdictional immunity of a foreign state"), 1605B.

[139] *See* BRIAN T. YEH, CONG. RSCH. SERV., RL34109, INTELLECTUAL PROPERTY RIGHTS VIOLATIONS: FEDERAL CIVIL REMEDIES AND CRIMINAL PENALTIES RELATED TO COPYRIGHTS, TRADEMARKS, PATENTS, AND TRADE SECRETS (2016).

[140] 18 U.S.C. § 1836(b). The Defend Trade Secrets Act of 2016 amended the Economic Espionage Act to add a federal private right of action for trade secret misappropriation. Defend Trade Secrets Act, Pub. L. No. 114–153, 130 Stat. 376 (2016).

[141] *E.g.*, 17 U.S.C. §§ 501, 504–05, 1203; 18 U.S.C. § 2318(e)(1).

[142] *E.g.*, 35 U.S.C. §§ 271, 281–97.

[143] *E.g.*, 15 U.S.C. §§ 1114(1), 1125(a), 1125(c)–(d), 8131; 19 U.S.C. §§ 1526(3).

[144] *Cf.* Interpretation of Foreign Entity of Concern, 89 Fed. Reg. 37079, 37090 (May 6, 2024).

Political Consultative Conferences);[145] companies like Huawei, which have corporate structures by which the dominant or ruling political party (e.g., CCP) of a foreign country exerts influence or control; and individuals acting for the benefit of a foreign government, foreign instrumentality, or foreign agent (as defined in the Economic Espionage Act);[146] and

d. permit retroactive suits, going back to September 25, 2015, when U.S. President Barack Obama and CCP General Secretary Xi Jinping announced, in President Obama's words, that China will no longer "knowingly support cyber-enabled theft of intellectual property, including trade secrets or other confidential business information for commercial advantage."[147] For thefts conducted after this proposal's enactment, the underlying law will determine the applicable limitations period.

[145] *See generally* Milhaupt & Zheng, *supra* note 31, at 684 ("Based on publicly available information, we identified ninety-five out of the top one hundred private firms and eight out of the top ten Internet firms whose founder or de facto controller is currently or formerly a member of central or local party-state organizations such as People's Congresses and People's Political Consultative Conferences.").

[146] "(1) the term 'foreign instrumentality' means any agency, bureau, ministry, component, institution, association, or any legal, commercial, or business organization, corporation, firm, or entity that is substantially owned, controlled, sponsored, commanded, managed, or dominated by a foreign government; (2) the term 'foreign agent' means any officer, employee, proxy, servant, delegate, or representative of a foreign government." 18 U.S.C. § 1839.

[147] Press Release, The White House Off. of the Press Sec., Remarks by President Obama and President Xi of the People's Republic of China in Joint Press Conference (Sept. 25, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/09/25/remarks-president-obama-and-president-xi-peoples-republic-china-joint [https://perma.cc/CYX4-6XLM] [hereinafter Obama-Xi Joint Press Conference].

3. Amend § 1610 to add a state sponsor of mass IP theft exception to immunity from attachment or execution. Congress may:
    a. add a new subsection, § 1610(a)(8), to eliminate immunity for property of a *foreign state* used in commercial activity in the United States to enforce a § 1605C judgment;[148]
    b. add another new subsection, § 1610(b)(4), to eliminate immunity for any property of a foreign state's *agency or instrumentality engaged in commercial activity* in the United States to enforce a § 1605C judgment;[149] and
    c. apply § 1610(g)(1) to § 1605C judgments, permitting judgment holders against state sponsors of mass IP theft to attach the property of both the foreign state and its instrumentality regardless of the *Bancec* factors.[150] Subsection (g)(2) would also need a parallel reference to § 1605C.

A. Establish "State Sponsors of Mass IP Theft" Category

Creating a list of state sponsors of mass IP theft would recognize that these infringements are not unrelated crimes but part of a campaign by a state that sees theft as "a legitimate instrument of achieving [its] foreign policy goals."[151] This list is an analog to the SST list that has existed since 1979, which imposes four kinds of sanctions on countries included therein.[152] Sanctions need not automatically attach to a state sponsor of mass IP theft, and the prudence of pairing sanctions to the list is beyond the scope of this Note.

[148] *Compare* 28 U.S.C. § 1610(a)(7).

[149] *Compare* 28 U.S.C. § 1610(b)(3).

[150] *See* 28 U.S.C. § 1610(g).

[151] H.R. REP. NO. 104–383, at 62 (1995) (referring to terrorism).

[152] *State Sponsors of Terrorism*, *supra* note 7; Sanford, *supra* note 1, at 146.

Congress should, by law, designate that China is a state sponsor of mass IP theft and authorize the Secretary of State to maintain the list and determine which other countries, if any, should be added or removed. China would be removable only by statute. The State Department maintains the SST list, consistent with the Department's role in controlling exports of sensitive items and technologies.[153] Mass IP theft involves criminal law, trade policy, industrial security, military technology controls, and cybersecurity. Diplomatic considerations are also relevant. There are grounds, therefore, to authorize the Secretary of State to maintain the list, but an alternative could be the Attorney General, who already reports biannually to Congress on the "scope and breadth of the theft of trade secrets" by foreign actors.[154] Congress could require the Secretary of State to consult with the Attorney General, Director of the Federal Bureau of Investigation, Secretary of Defense, Director of National Intelligence, and other members of the interagency in maintaining the list.

B. Proposed § 1605C—Mass IP Theft Exception to the Jurisdictional Immunity of a Foreign State

The proposed § 1605C would eliminate jurisdictional immunity for state sponsors of mass IP theft. Its federal right of action would allow a U.S. company to hold China vicariously liable for misappropriation of trade secrets and infringement on patents, trademarks, and copyrights perpetrated by Chinese officials and agents. The definition of "agent" should account for the many non-governmental ways that the CCP advances its interests. Intelligence and military operations[155] would naturally give rise to claims, and so would activities conducted outside traditional government organs. This is essential to capturing China's full range of tactics to steal IP. Here is proposed text for § 1605C, modeled on

[153] *State Sponsors of Terrorism*, *supra* note 7.

[154] Defend Trade Secrets Act of 2016, § 4(b), Pub. L. No. 114–153, 130 Stat. 376, 383.

[155] *See supra* notes 35–40 and accompanying text.

§ 1605A, followed by an explanation of certain terminology, along with some alternatives:

> § 1605C. Mass IP theft exception to the jurisdictional immunity of a foreign state.
>
> (a) IN GENERAL.
>
> (1) NO IMMUNITY. A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for any act giving rise to a private civil action under the Economic Espionage Act (as amended),[156] Copyright Act (as amended),[157] Patent Act (as amended),[158] or Lanham Act (as amended),[159] or under state laws protecting against trade secret misappropriation or infringement on patents, trademarks, or copyrights, if such act is engaged in by an official, employee, or agent, of such foreign state while acting within the scope of his or her office, employment, or agency.
>
> (2) CLAIM HEARD. The court shall hear a claim under this section if—
>
> (i) the claim alleges an act described in paragraph (1) that occurred after September 25, 2015, and before the enactment of this section, and the foreign state is designated a state sponsor of mass IP theft when the claim is filed or was so designated

[156] 18 U.S.C. § 1836(b). The Defend Trade Secrets Act of 2016 amended the Economic Espionage Act to add a federal private right of action for trade secret misappropriation. Pub. L. 114–153, 130 Stat. 376.

[157] *See e.g.*, 17 U.S.C. §§ 501, 504–05, 1203; 18 U.S.C. § 2318(e)(1).

[158] *See e.g.*, 35 U.S.C. §§ 271, 281–97.

[159] *See e.g.*, 15 U.S.C. §§ 1114(1), 1125(a), 1125(c)–(d), 8131; 19 U.S.C. §§ 1526(3).

> within the 6-month period before the claim is filed under this section; or,
>
> (ii) the foreign state was designated a state sponsor of mass IP theft at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section.

(b) LIMITATIONS AND RETROACTIVITY. Notwithstanding any other provision of law, an action may be brought or maintained under this section not later than the latter of—

> (1) the latest date permitted by the limitations period of the underlying substantive law on which the claim is based; or,
>
> (2) if the act giving rise to the claim took place after September 25, 2015, and before the enactment of this section, the latest date permitted by the limitations period of the underlying substantive law on which the claim is based, that period deemed to have begun from the date of this section's enactment.

(c) PRIVATE RIGHT OF ACTION. A foreign state that is or was a state sponsor of mass IP theft as described in subsection (a)(2), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to any United States person for money damages resulting from acts giving rise to a private civil action under the Economic Espionage Act (as amended),[160]

[160] *See* 18 U.S.C. § 1836(b).

> Copyright Act (as amended),[161] Patent Act (as amended),[162] or Lanham Act (as amended),[163] for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.
>
> (d) DEFINITIONS. For purposes of this section,—
>
> (1) "agent" shall mean a foreign state's military and intelligence services; a foreign state's agency or instrumentality or any of its subsidiaries; a company controlled by or subject to the direction of a foreign state's dominant or ruling political party (e.g., the Chinese Communist Party),[164] including by a member of central or local party state organizations (e.g., National People's Congress, Chinese People's Political Consultative Conferences);[165] a company with corporate structures by which the dominant or ruling political party (e.g., Chinese Communist Party) of a foreign country exerts influence or control; or, an individual acting knowingly or willfully for the benefit of a foreign government, a foreign state's dominant or ruling political party (e.g., the Chinese Communist Party), a foreign instrumentality, or foreign agent.
>
> (2) "foreign instrumentality" has the meaning given that term in section 1839(1) of title 18;

[161] *See e.g.*, 17 U.S.C. §§ 501, 504–05, 1203; 18 U.S.C. § 2318(e)(1).

[162] *See e.g.*, 35 U.S.C. §§ 271, 281–97.

[163] *See e.g.*, 15 U.S.C. §§ 1114(1), 1125(a), 1125(c)–(d), 8131; 19 U.S.C. §§ 1526(3)

[164] *Cf.* Interpretation of Foreign Entity of Concern, 89 Fed. Reg. 37079, 37090 (May 6, 2024).

[165] *See generally* Milhaupt & Zheng, *supra* note 31, at 684.

> (3) "foreign agent" has the meaning given that term in section 1839(2) of title 18.
> (4) "United States person" has the meaning given that term in section 6010 of title 22.

Defining "agent" expansively would cover China's broad range of tactics to steal IP. State actors would be covered by the word's ordinary definition, but it is important to add military and intelligence services and SOEs lest a court exclude them under the *expressio unius* rule.[166] "Agency or instrumentality" is currently construed to cover SOEs but not their subsidiaries,[167] so it is necessary to mention the latter here.

The novelty of the "agent" definition is its inclusion of nominally private companies and individuals who engage in "non-traditional collection" of IP (and other assets and information) on behalf of the Chinese government.[168] Companies like Huawei, Tencent, Baidu, Xiaomi, and Lenovo are not state-owned but maintain close ties to the CCP and China's military and intelligence services.[169] Their executives are or have been members of the CPPCC and National People's Congress, which makes them "senior . . . political figure[s]" in China's government under the 2024 final rule issued by the Department of Energy.[170] That rule recognizes

[166] *Expressio unius*, or the negative-implication canon, is a "canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." *Expressio Unius Est Exclusio Alterius*, BLACK'S LAW DICTIONARY (12th ed. 2024).

[167] Dole Food Co. v. Patrickson, 538 U.S. 468, 477 (2003).

[168] *Supra* notes 64–68 and accompanying text.

[169] *Supra* notes 50–63 and accompanying text.

[170] *Id.*; Interpretation of Foreign Entity of Concern, 89 Fed. Reg. 37079, 37086 (May 6, 2024). Unlike the proposed statute, the rule quantifies the influence necessary to establish control. It states that an entity is "owned by, controlled by, or subject to the direction" of another entity if "25% or more of the entity's board seats, voting rights, or equity interest, with each metric evaluated independently, are cumulatively held by that other entity, whether directly or indirectly via one or more intermediate entities," or if

that the CCP has erased the line between public and private corporations, and so does this statute.

Another way to cover those firms would be the catch-all provision in the definition of "agent" that refers to companies with corporate structures that allow a foreign country's dominant or ruling political party (e.g., CCP) to exercise influence or control. A third option would be to define "agent" as including any company that has an internal Party committee that "provide[s] the party-state with an extralegal means" to influence companies "toward CCP policy priorities."[171] Huawei has such a committee,[172] as do approximately three-quarters of China's private companies (Chinese law requires one for all companies with at least three Party members).[173] However, this characterization would conflate firms that simply employ CCP members and those actually run by them—a distinction Congress may or may not want to preserve.

The "agent" definition must also cover "non-traditional collectors"[174] such as talents program participants and Chinese government-tied researchers at companies and academic institutions.[175] The statute may borrow from the Economic Espionage Act, which punishes the theft of trade

the entity is subject to certain specified contractual obligations to another entity. *Id.* at 37090.

[171] Arterburn Testimony, *supra* note 25, at 10.

[172] Elsa Kania, *Much Ado About Huawei (Part 2)*, AUSTL. STRATEGIC POL'Y INST.: THE STRATEGIST (Mar. 28, 2018), https://www.aspistrategist.org.au/much-ado-huawei-part-2/ [https://perma.cc/XFC3-46EZ].

[173] Livingston, *supra* note 29, at 2.

[174] *See generally* Hayes, *supra* note 64, at 112; *Case Example: Insider Threat and Non-Traditional Collection*, *supra* note 64.

[175] *Cf.* Press Release, U.S. Dep't of Just., Chinese National Sentenced for Economic Espionage Conspiracy (Apr. 7, 2022), https://www.justice.gov/opa/pr/chinese-national-sentenced-economic-espionage-conspiracy [https://perma.cc/YGT4-PN8K]; Press Release, U.S. Dep't of Just., One American and One Chinese National Indicted in Tennessee for Conspiracy to Commit Theft of Trade Secrets and Wire Fraud (Feb. 14, 2019), https://www.justice.gov/opa/pr/one-american-and-one-chinese-national-indicted-tennessee-conspiracy-commit-theft-trade [https://perma.cc/D7FU-BJGP]; *see generally* Guo et al., *supra* note 65.

secrets by anyone "intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent."[176] The definitions of foreign instrumentality and foreign agent should be the same as in that law.[177] This proposal adds a reference to a foreign state's dominant or ruling political party (e.g., CCP).

The federal private right of action would permit U.S. victims to sue state sponsors of mass IP theft in federal court under the doctrine of vicarious liability. Substantive law will not be affected, except for the statutes of limitations. However, Congress might consider amending IP laws to allow extraterritoriality or to remove limitations on extraterritoriality where it is permitted.[178] Punitive damages would be available per the underlying substantive law.[179]

Plaintiffs may be any "United States person"—that is, "any United States citizen or alien admitted for permanent residence in the United States, and any corporation, partnership, or other organization organized under the laws of the United States."[180] They may bring actions under existing federal statutes creating liability for trade-secret misappropriation and infringement on trademarks, patents, and copyrights. They may bring these claims against the

[176] 18 U.S.C. § 1831.

[177] *See* 18 U.S.C. § 1839. "(1) the term 'foreign instrumentality' means any agency, bureau, ministry, component, institution, association, or any legal, commercial, or business organization, corporation, firm, or entity that is substantially owned, controlled, sponsored, commanded, managed, or dominated by a foreign government; (2) the term 'foreign agent' means any officer, employee, proxy, servant, delegate, or representative of a foreign government."

[178] *See generally* Motorola Sols., Inc. v. Hytera Commc'ns Corp., 108 F.4th 45 (7th Cir. 2024) (Hytera, a partially state-owned Chinese company, appealed the district court's extraterritorial application of the Copyright Act and Defend Trade Secrets Act in finding liability and calculating damages); KEVIN J. HICKEY ET AL., CONG. RSCH. SERV., R46532, INTELLECTUAL PROPERTY VIOLATIONS AND CHINA: LEGAL REMEDIES 37–39 (2020) (summarizing extraterritorial reach of federal IP laws); *cf.* Countering Communist China Act, H.R. 4792, 117th Cong. (2021) § 813 ("Redress of Theft of Trade Secrets Extraterritorially").

[179] 18 U.S.C. § 1831(a)(5).

[180] *See* 22 U.S.C. § 6010.

Chinese government as well as against any individual or company that performed the theft. The benefit of making the government liable is not just that the government has deep pockets; it makes it easier to enforce a judgment because, per the amendments discussed below, the plaintiff would be able to execute on the commercial property of the Chinese government or of its SOEs.

Except for the Lanham Act, each of the underlying IP statutes has its own statute of limitations (usually three to six years).[181] As a general rule, those will continue to be in force. However, Congress should provide for retroactivity notwithstanding those rules,[182] given that China's state policy of mass IP theft dates back many years and U.S. victims would only now be receiving an opportunity for civil recourse against the Chinese government. Thus, this right of action will import the underlying laws' limitations periods, but with a crucial exception: for acts of theft performed after September 25, 2015, and before the date of this law's enactment, the limitations period will begin on the day of enactment. This is meant to give recourse to Americans who suffered from China's sponsorship of IP theft even after China's leader publicly pledged to cease it.[183] Courts generally uphold retroactive civil legislation within constitutional limits, especially statutes with clear statements of retroactivity.[184]

C. Proposed Amendments to FSIA § 1610

The proposed changes to § 1610 would make it easier for plaintiffs to enforce judgments. Section 1605C judgment holders would be able to attach any kind of property of a foreign state used in a commercial activity, not just property

[181] *See* YEH, *supra* note 139, at 3.

[182] *See* Landgraf v. USI Film Prods., 511 U.S. 244, 270, 274 (1994) (courts must look for a clear statement of congressional intent before applying a substantive law retroactively, even when no such statement is necessary for "statutes conferring or ousting jurisdiction").

[183] *See* Obama-Xi Joint Press Conference, *supra* note 147.

[184] JOANNA R. LAMPE, CONG. RSCH. SERV., IF11293, RETROACTIVE LEGISLATION: A PRIMER FOR CONGRESS 1–2 (2019).

with a nexus to the claim. The judgment holder would be able to execute against the property of either the defendant-state or its instrumentality, usually a SOE, without regard for the *Bancec* factors.[185] To protect property from attachment, the state sponsor might remove assets from the United States—even then, § 1605C judgment holders would be able to execute on commercial liabilities owed to the foreign state's instrumentalities, as when plaintiffs garnished the funds Sprint owed Iran's state telecommunications company.[186]

Accordingly, new subsection 1610(a)(8) would remove judgment immunity for the enforcement of § 1605C claims. It would provide (new text in italics):

> (a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—
>
> . . .
>
> *(8) the judgment relates to a claim for which the foreign state is not immune under section 1605C, regardless of whether the property is or was involved with the act upon which the claim is based.*

The parallel subsection for agencies and instrumentalities, § 1610(b)(4), would similarly remove immunity for judgments arising from § 1605C claims, providing (new text in italics):

> (b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United

[185] *See* 28 U.S.C. § 1610(g).

[186] *Supra* note 133 and accompanying text.

> States or of a State after the effective date of this Act, if—
> . . .
> *(4) the judgment relates to a claim for which the agency or instrumentality is not immune under section 1605C, regardless of whether the property is or was involved with the act upon which the claim is based.*

Finally, § 1610(g), which abrogated the *Bancec* factors for claims against SSTs, would simply need to add "or section 1605C" following mentions of § 1605A. This would eliminate the *Bancec* presumption that a SOE is separate from the state for purposes of enforcing judgments against the state.

D. Section 1610(g) and State Corporate Law

Congress could consider expressly preempting state corporate law in order to pierce the corporate veil when enforcing judgments against state sponsors of mass IP theft.[187] Under § 1610(g), § 1605C judgment holders would be able to attach the property of the foreign state and its instrumentalities, i.e., SOEs that are majority-owned by the state.[188] But what about the property of those SOEs' *subsidiaries*, which are not "instrumentalities" of the state under the FSIA? Without further changes to the Act, the judgment holder would not be able to reach the subsidiary's assets, because § 1610(g) currently allows a plaintiff to go down "one tier only"[189]—to the SOE majority-owned by the state, and not to its subsidiary.[190] Thus the FSIA maintains

[187] *Cf.* Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine under Federal Common Law*, 95 HARV. L. REV. 853, 856 n.20 (1982) (providing examples of federal statutes "clearly disregard[ing] the corporate entity").

[188] *See* 28 U.S.C. § 1603(b); Dole Food Co. v. Patrickson, 538 U.S. 468, 477 (2003); *see generally* STEWART, *supra* note 111, at 40.

[189] STEWART, *supra* note 111, at 40.

[190] Though the subsidiary's assets are out of reach, the parent's controlling shares in its subsidiary could be attached. *See* Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela, 932 F.3d 126, 150 (3d Cir. 2019)

the presumption that a parent SOE (the "instrumentality") and its subsidiary are separate juridical entities. Eliminating that presumption would require another amendment to the FSIA.

Were Congress not to preempt state law, judgment holders might still be able to improve their collection prospects through "reverse veil-piercing." Traditional veil-piercing allows plaintiffs to hold a parent company liable for the conduct of its subsidiary. Reverse veil-piercing goes the other way, making a subsidiary's assets available to its parent's creditors.[191] States vary on whether they permit reverse veil-piercing and on what factors justify disregarding the corporate structure.[192] For example, Delaware would consider the reverse veil-piercing doctrine "[o]nly in cases alleging egregious facts, coupled with the lack of real and substantial

(judgment holder against Venezuela successfully attached Venezuela-owned energy company's controlling shares in its U.S.-based subsidiary after satisfying the *Bancec* factors). I am grateful to Zohar Goshen for this idea. When a foreign state's assets are outside the United States, a court would order their turnover only if (i) state jurisdictional law permits such an order, *see* FED. R. CIV. P. 69(a)(1), and (ii) once in the United States, the assets were found to satisfy the commercial-activity exception to judgment immunity under FSIA § 1610(b). *See* Peterson v. Islamic Republic of Iran, 876 F.3d 63, 90–94 (2d Cir. 2017) (articulating two-step test) *cert. granted, judgment vacated sub nom.*, 140 S. Ct. 813 (2020), and *adopted in part*, 963 F.3d 192 (2d Cir. 2020). A court might analyze both prongs at once if the foreign state possesses the assets, but if a non-sovereign third party is holding the assets, the court might compel their recall to the United States before conducting the FSIA analysis. *Compare* Bainbridge Fund Ltd. v. Republic of Argentina, 690 F. Supp. 3d 411, 415–21 (S.D.N.Y. 2023) (denying motion to compel Argentina to turn over its extraterritorial assets even though New York law permitted the order, because the judgment debtor had failed to show the assets were excepted from execution immunity) *with* Foley v. Union de Banques Arabes et Françaises, 683 F. Supp. 3d 375, 392–95 (S.D.N.Y. 2023) (ordering non-sovereign bank to recall to New York extraterritorial assets belonging to judgment-debtor Syria and declining to reach the FSIA immunity analysis).

[191] Manichaean Cap., LLC v. Exela Techs., Inc., 251 A.3d 694, 710 (Del. Ch. 2021).

[192] *Id.* at 710–16 (evaluating various states' reverse veil-piercing practices).

prejudice to third parties."[193] Accordingly, whether reverse veil-piercing could be used to enforce § 1605C judgments will depend on the corporate structure in question, the facts of the case, and the choice of law.

IV. INTERNATIONAL LAW AND STRATEGIC CONSIDERATIONS

A. International Law

Does this proposal conform with international law? As a matter of U.S. law, the FSIA is the "sole basis" for obtaining jurisdiction over foreign states.[194] However, sovereign immunity is also a principle of customary international law,[195] which some scholars claim is "part of the relevant matrix of law" that U.S. courts should consider.[196] A full analysis of the international law debates on sovereign immunity is beyond this Note's scope, but this Section discusses some of the issues

[193] *Id.* at 714.

[194] Republic of Austria v. Altmann, 541 U.S. 677, 699 (2004).

[195] *See* William S. Dodge, *Why Terrorism Exceptions to State Immunity Do Not Violate International Law*, JUST SEC. (Aug. 10, 2023), https://www.justsecurity.org/87525/why-terrorism-exceptions-to-state-immunity-do-not-violate-international-law [https://perma.cc/A9CF-7N4L]; *Foreign Sovereign Immunities Act*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFS. (Dec. 19, 2023), https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Service-of-Process/Foreign-Sovereign-Immunities-Act.html# [https://perma.cc/5RE9-Z89Y] ("The immunity of a state from the jurisdiction of the courts of another state is an undisputed principle of customary international law."); Jurisdictional Immunities of the State (Ger v. It.), Judgment, 2012 I.C.J. 99, ¶ 57 (Feb. 3) ("[T]he rule of State immunity occupies an important place in international law and international relations").

[196] *See, e.g.*, Lori Fisler Damrosch, *Changing Immunity Law Through National Decisions*, 44 VAND. J. TRANSNAT'L L. 1185, 1188 (2011). Constitutional lawyers debate whether courts should consider customary international law part of the federal common law. *Compare* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997), *with* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

implicated by this proposal. Exercising jurisdiction over state sponsors of IP theft is consistent with the widespread practice, over the last eighty years, of conferring immunity only on foreign states' sovereign acts.[197]

International law does not define the scope of sovereign immunity.[198] The "restrictive" theory of immunity is now the most commonly used,[199] but it is relatively new—most countries afforded foreign states absolute immunity until the middle of the twentieth century.[200] Today there is no single restrictive theory. As a general matter it protects foreign states from suits "with regard to sovereign or public acts (*jure imperii*) . . . but not with respect to private acts (*jure gestionis*)."[201] But the theory is "applied so divergently that it is more aptly described as an idea, doctrine, or concept which needs to be specified before it can be applied to a case than as a specific rule."[202] For example, some states have a tort

[197] *See* Dodge, *supra* note 195.

[198] *See id.*; Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 226–29 (1951).

[199] Dodge, *supra* note 195.

[200] *Id.* Even so, immunity "finds no support in classical international law." Lauterpacht, *supra* note 198, at 228 ("Grotius does not refer to it. Bynkershoek occasionally deprecates it. . . . Vattel, after admitting it with regard to the person of the foreign sovereign, is silent with regard to the position of foreign states as such.")

[201] Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193, 199 (2007) (internal quotation marks omitted) (quoting Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711 (1976)); *see also* Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 242 (1974) ("since sovereign immunity probably no longer extends to acts [*j*]*ure gestionis,* the servant or agent of a State cannot claim immunity in respect of acts [*j*]*ure gestionis*."). Scholars disagree on the definition of private act (*jure gestionis*): some claim it is determined by the conduct's aim (which could lead to the conclusion that any government action should be immune because all of it can be said to serve the government's ends), while others look at the conduct's nature—"if the transaction could be entered into by an individual, it is one *jure gestionis*." Clive M. Schmitthoff & Frank Wooldridge, *The Nineteenth Century Doctrine of Sovereign Immunity and the Importance of the Growth of State Trading*, 2 DENV. J. INT'L L. & POL'Y 199, 201 (1972).

[202] Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?*, 21 EUR. J. INT'L L. 853, 874 (2010).

exception.[203] Some that have tort exceptions do not apply it to countries' militaries, while others do.[204] The United States' terrorism exception is another variation, based on the premise that terrorism is not a sovereign act.[205] Some countries presume foreign states are immune except for certain non-sovereign acts, while others begin with a baseline of non-immunity and carve out exceptions for sovereign activity.[206] A similar restrictive theory applies to judgment immunity. Here, too, "international law contains no general rule prohibiting execution of domestic judgments against foreign states," with some exceptions.[207]

The restrictive theory balances two international law principles that conflict with each other in the sovereign immunity context: states are equal, and a state's sovereignty means the right to enforce its laws against entities and people within its territory.[208] "Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it," wrote the International Court of Justice in 2012.[209] On the other hand, "[e]xceptions to the immunity of the State represent a departure from the principle of sovereign equality."[210] To preserve both interests, sovereign acts should be immune but a state may exercise jurisdiction over a foreign state's non-sovereign acts. International law scholar Hersh Lauterpacht explained that this compromise enables the state asserting jurisdiction not to suffer its own sovereignty being undermined and its own "independence, and . . . equality . . . denied if the foreign state

[203] *Id.*

[204] *Id.* at 875 n.110; *see* Jurisdictional Immunities of the State (Ger v. It.), Judgment, 2012 I.C.J. 99, ¶¶ 66–76 (Feb. 3) (comparing more than fifteen countries).

[205] *See* Dodge, *supra* note 195.

[206] *Id.*

[207] James Crawford, *Execution of Judgments and Sovereign Immunity*, 75 AM. J. INT'L L. 820, 860 (1981).

[208] Jurisdictional Immunities of the State (Ger v. It.), Judgment, 2012 I.C.J. 99, ¶ 57 (Feb. 3).

[209] *Id.*

[210] *Id.*

claims as a matter of right—as a matter of international law—to be above the law of the state" where it incurred liability.[211]

Stripping sovereign immunity for specific kinds of property torts—IP thefts—conforms with the restrictive theory's principles. IP theft is a non-sovereign act. Indeed, this was affirmed by the United Nations Convention on Jurisdictional Immunities of States and Their Property—which is neither in force nor signed by the United States (although China is a signatory).[212] The Convention provides that a state cannot invoke immunity in another's court over "an alleged infringement by the State," in the territory of the forum state, of rights "in a patent, industrial design, trade name or business name, trademark, copyright or any other form of intellectual or industrial property which enjoys a measure of legal protection in the territory of the State of the forum."[213] That treaty language would permit U.S. courts to exercise jurisdiction over foreign governments in suits alleging industrial espionage by cyberattack and trade-secret theft of the type (allegedly) suffered by Apple and Monsanto (for example).[214] Nevertheless, as a matter of U.S. law, the act of state doctrine might be available to a state sponsor of mass IP theft for its agents' conduct within its borders, though the doctrine is a substantive defense and not a limit on jurisdiction.[215]

[211] Lauterpacht, *supra* note 198, at 229.

[212] *United Nations Convention on Jurisdictional Immunities of States and Their Property*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en [https://perma.cc/5ZHM-RQGP] (last visited Oct. 14, 2024) (listing signatories).

[213] G.A. Res. 59/38, art. 14(a) (Dec. 16, 2004), https://treaties.un.org/doc/source/docs/A_RES_59_38-E.pdf [https://perma.cc/GM4K-UYKN].

[214] *See supra* Part I, notes 36–68 and accompanying text.

[215] William S. Dodge, *A Primer on the Act of State Doctrine*, TRANSNAT'L LITIG. BLOG (Mar. 25, 2022), https://tlblog.org/a-primer-on-the-act-of-state-doctrine/ [https://perma.cc/VQB2-GVDF].

B. Strategic Considerations

How might U.S. businesses and China react to this proposal?

i. Reactions from U.S. Businesses

Individual businesses would decide for themselves whether to sue under § 1605C. In addition to conducting ordinary cost-benefit analyses, they would also need to consider the unique aspects of litigating against a foreign-state defendant that may retaliate through unfavorable regulation or harassment. In the case of China, there is a substantial retaliation risk.[216] Small businesses might be likelier to sue than large multinational companies. Smaller firms are less able to protect against theft and to absorb its costs.[217] They might be less vulnerable to retaliation, especially if they do not operate in China. By contrast, larger companies are accustomed to being subjected to forced technology transfers by China's regulators, and sometimes intimidation, in exchange for access to China's huge market, labor force, and sophisticated supply chains.[218] They may prefer not to antagonize the CCP and instead preserve market access by continuing to absorb the losses from theft. On the other hand, companies of all sizes will consider that the benefits of suing include recovering damages and deterring further thefts by showing a willingness to go to court.

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[216] *See* USTR SECTION 301 REPORT 2018, *supra* note 2, at 9; *see* Wei & Davis, *supra* note 41.

[217] *IP Protect*, NAT'L INTELL. PROP. RTS. INFO. CTR., https://www.iprcenter.gov/ip-protect [https://perma.cc/V7XF-CF8P] (last visited Oct. 14, 2024); *see generally* Letter from the H. Select Comm. on the Strategic Competition Between the United States and the Chinese Communist Party and H. Comm. on Small Business to Att'y Gen. Merrick Garland (June 15, 2023), https://selectcommitteeontheccp.house.gov/sites/evo-subsites/selectcommitteeontheccp.house.gov/files/evo-media-document/6.15.2023-letter-to-doj-china-select-cmte.-on-small-business.pdf [https://perma.cc/J83Q-44TT].

[218] *See supra* notes 41–44 and accompanying text.

To counter this proposal, it can be argued that the government should not interfere in private companies' apparent willingness to have their IP stolen in exchange for business opportunities. Companies should be free, according to that argument, to do business with IP thieves if they believe that the commercial benefits outweigh the costs.

But this proposal would not require U.S. companies to take action against IP theft. It would give victim-companies the option either to acquiesce in China's IP theft campaign or to vindicate their rights against the Chinese government as they would against any private IP thief. Today, they have no such opportunity.

Holding China's government accountable would serve U.S. national interests. Those interests are not necessarily the same as the aggregated interests of U.S. businesses, even if individual companies may sometimes be justified, in pure market terms, in deciding to absorb IP losses in exchange for Chinese business. China's thefts, however, target specific sectors with the aim of aiding China strategically against the United States.[219] It is harmful to the United States to participate in a world economy in which U.S. companies' trade secrets and other IP are stolen without consequence. The United States has an interest in making it possible for U.S. companies to hold China accountable for mass IP theft even if those companies choose not to enforce their rights.

ii. Reactions from China

This proposal aims to stop China's IP theft, but Beijing may not be so willing. China already harasses U.S. companies.[220] Its officials might cite these amendments as a pretext to continue doing so. Beijing might calculate that an especially harsh response could deter private lawsuits altogether. Businesses that bring § 1605C suits would need to

[219] *See supra* Part I.

[220] *See, e.g.*, Edward White & Kana Inagaki, *China Starts 'Surgical' Retaliation Against Foreign Companies After US-led Tech Blockade*, FIN. TIMES (Apr. 16, 2023) (on file with the Columbia Business Law Review); Wei & Davis, *supra* note 41.

prepare for the CCP to retaliate without due process. China might pay out the judgments entered against it, but it should be expected that Chinese officials would object to the exercise of U.S. jurisdiction over it, refuse to respond to lawsuits, and reject the validity of any judgments. That is why § 1610 would allow a U.S. judgment holder to attach property of China's government and its state businesses.

A risk of this proposal is that it could lead China to reduce its commerce with the United States.[221] But that does not preclude Congress's giving Americans a remedy for their stolen IP. After all, if China is unwilling to trade with the United States unless it can steal from Americans in the process, that is a strong argument for rethinking economic relations with China. China's growth depends on foreign markets.[222] Beijing benefits immensely from its commercial relationship with the United States,[223] so it has an interest in not endangering its "national rejuvenation" in reacting to this proposal.[224]

China's own foreign sovereign immunity law contains a "reciprocity" section that this proposal might implicate. Enacted in 2023, it provides, "[i]f the immunity accorded by a State to the [People's Republic of China ("PRC")] and its property is less favorable than those provided by this Law, the [PRC] applies the principle of reciprocity."[225] This permits

[221] If Americans successfully enforce judgments against Chinese state and SOE property, China might begin removing assets from the United States to take them out of courts' reach. Chinese firms have already been reducing their U.S. presence, and further harm to the U.S. economy due to this proposal could be limited—Chinese firms make up only "1.5% of the total asset base of multinational companies in the [United States]." Haneman et al., *supra* note 12.

[222] KAREN M. SUTTER, CONG. RSCH. SERV., IF11284, U.S.-CHINA TRADE RELATIONS (2023).

[223] *See generally* Michael Pettis, *China Cannot Weaponize Its U.S. Treasury Bonds*, CARNEGIE ENDOWMENT FOR INT'L PEACE (May 28, 2019), https://carnegieendowment.org/chinafinancialmarkets/79218 [https://perma.cc/B78F-43CN].

[224] *See* DOSHI, *supra* note 13.

[225] Zhonghua Renmin Gongheguo Waiguo Guojia Huomian Fa (中华人民共和国外国国家豁免法) [Foreign State Immunity Law of the People's

Chinese courts "to exercise jurisdiction over the United States and its property in any case where U.S. law would permit U.S. courts to exercise jurisdiction over China and its property."[226] This should not be of much concern to U.S. officials because the United States does not have a comparable campaign of IP theft from China.[227] Of course, China could change its laws at will and strip the United States of immunity in part or whole. Were this proposal enacted, U.S. policymakers should stress that this is a carefully circumscribed law that pertains only to IP suits, and that Congress would reverse China's state sponsor of mass IP theft designation once Beijing abandons its national policy of IP theft.

CONCLUSION

False distinctions between state and private actors in China, combined with sovereign immunity, have long allowed Beijing to avoid accountability for its campaign of IP theft. The proposed legislation would recognize that China is a Party-state and that U.S. law should conceive of the Party-state's organs as elements of the Chinese government. It would designate China a state sponsor of mass IP theft and establish a federal private right of action for Americans to hold Beijing liable for orchestrating those thefts. China's government would lose sovereign immunity for those claims. Judgment holders would be empowered to collect from the Chinese government and its SOEs. By enacting this law, Congress would incentivize China to change its policies and help U.S. victims of China's IP thefts obtain the remedies they deserve.

Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 1, 2023, effective Jan. 1, 2024), art. 10, http://en.moj.gov.cn/2023-12/15/c_948359.htm [https://perma.cc/VUD8-DRVK].

[226] William S. Dodge, *China's Draft Law on Foreign State Immunity Would Adopt Restrictive Theory*, TRANSNAT'L LITIG. BLOG (Apr. 12, 2023), https://tlblog.org/chinas-draft-law-on-foreign-state-immunity-would-adopt-restrictive-theory/ [https://perma.cc/2D2S-9SRZ].

[227] Frazier & Frazier, *supra* note 76, at 66.