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# China and Sovereignty in International Law: Across Time and Issue Areas

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*Sovereignty is a singularly prominent element in China's approach to international law throughout the People's Republic of China era, but its centrality and specific content have varied over time and across issue areas. During Mao Zedong's era, a vulnerable China in a hostile international environment strongly embraced sovereignty. In the early Reform Era, an increasingly secure China pursuing international engagement adopted more flexible positions, especially in international economic law, while largely retaining sovereignty's primacy. Differences across economic, human rights, and territorial sovereignty law reflect China's power, interests, and agendas, with the most assertive stances on territorial issues implicating core interests. Under Xi, a powerful China facing a warier world and having less to gain from the international legal status quo has turned back to more uncompromising sovereignty claims, except where its expanding global interests and influence point to a "sovereignty for me but not for thee" posture. China's approach to sovereignty is likely to sharpen and reconfigure further amid ideological rivalry with the West and the "securitization" of economic and normative disputes.*

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## INTRODUCTION

Sovereignty has been a central principle in China's approach to international law throughout the People's Republic of China ("PRC") era (and, indeed, since Qing dynasty China's initial encounter with Western-created international law in the mid-Nineteenth century).<sup>1</sup> While sovereignty has been a singularly prominent element in PRC positions on international law, the principle has varied in how central it has been and in its specific content over time and across issue areas.

Sovereignty's place in the PRC's engagement with international law has shifted across the last three-quarters of a century. For most of the Mao Zedong era (1949-1976), China was a vulnerable and relatively weak state with little opportunity for engagement with most aspects of the international legal order or with many states, including the states primarily responsible for shaping international law and institutions. These circumstances for China aligned with a strong embrace of sovereignty in international law. Over the first several decades of the Reform Era (1979-on), a more secure and increasingly powerful China faced an international environment that posed decreased risks. China had much to gain through pursuing greatly increased engagement with the world, especially economically but also politically. These conditions aligned with a reduction in the uncompromising character and predominance of sovereignty in Beijing's positions on international law.

During Xi Jinping's tenure, a still-more-powerful China has faced a world in which many states are growing increasingly wary of China (not least because of the potential threats to other major states' interests from a stronger China). At the same time, China has had less to gain from accepting status quo international regimes, more latitude to disregard them, and growing potential to shape international rules and institutions to fit its interests. These circumstances have mixed and complicated implications for the significance of sovereignty in China's perspectives on

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1. See, e.g., XUE HANQIN, CHINESE CONTEMPORARY PERSPECTIVES ON INTERNATIONAL LAW: HISTORY, CULTURE AND INTERNATIONAL LAW 68-97 (2012); Tieya Wang, *International Law in China: Historical and Contemporary Perspectives*, 221 RECUEIL DES COURS 195, 288-314 (1990); Duiwai Guanxi Fa (对外关系法) [The Law on Foreign Relations] (promulgated by the Standing Comm. Nat'l People's Cong., June 28, 2023, effective July 1, 2023), art. 1, NAT'L PEOPLE'S CONG., June 28, 2023, [http://en.npc.gov.cn.cdurl.cn/2023-06/28/c\\_898457.htm](http://en.npc.gov.cn.cdurl.cn/2023-06/28/c_898457.htm) (China) ("This law is formulated on the basis of the constitution to develop foreign relations [and] preserve national sovereignty . . ."); see also MARIA ADELE CARRAI, SOVEREIGNTY IN CHINA: A GENEALOGY OF A CONCEPT SINCE 1840 (2019); Tom Ginsburg, *Authoritarian International Law?*, 114 AM. J. INT'L L. 221 (2020); BATES GILL, DARING TO STRUGGLE: CHINA'S GLOBAL AMBITIONS UNDER XI JINPING 49-77 (2022) (concerning sovereignty).

international law. But they generally have dovetailed with a sustained or renewed emphasis on China's own sovereignty, if not the sovereignty of some other states with which China interacts—in effect, a “(resurgently strong) sovereignty for me, but (at least potentially) not for thee.”

These patterns of change over time have generally held across major issue areas of international law. But, especially since the beginning of the Reform Era, there have been differences across fields, as the examples of international trade/international economic law, human rights, and territorial sovereignty illustrate. The primacy of sovereignty has been least pronounced in economic affairs. In this realm, potential threats to core national interests from a more relaxed posture on sovereignty have been limited or indirect, and potential gains significant. And China has had relatively ample tools of international law (both doctrinal and institutional) to manage and mitigate those risks, and, increasingly, to exploit and cultivate opportunities to shape the international legal environment for the issue area.

Sovereignty has loomed larger in China's engagement with the international human rights legal regime. Human rights issues can—and in China's case have—posed greater challenges to (perceived) national interests, including the sovereign's discretion to keep order and govern as it sees fit at home. In this area, China has had moderately robust tools—both doctrinal and institutional—to mitigate the impact of international legal norms and obligations, and, incipiently, to take advantage of opportunities to advance China's interests and preferences concerning the content of international human rights law.

China's insistence on the centrality of sovereignty has been strongest on legal matters relating to territorial sovereignty and related questions of the exercise of sovereignty in China's own territory. These issues more strongly implicate a state's core interests generally, and also in the specific context of China's circumstances, which include China's claims to sovereignty over ostensibly lost territories and challenges to China's claims of sovereignty and uses of sovereign power in areas under China's governance. In this area, the generally (but not entirely) pro-sovereignty international legal rules and institutions have not been very helpful to China (and decreasingly so). This situation has been conducive to stronger in-principle sovereigntism from China. Yet, China's positions have grown more complex as an increasingly powerful China's vulnerabilities have waned, as longstanding sovereignty-asserting approaches have made little headway in advancing China's aims, and as China's growing interests abroad have made international legal norms that are strongly protective of other states' sovereignty less consistent with China's interests and aims.

Before turning to a more detailed assessment of sovereignty's place in China's engagement with international legal issues over time and across issue areas, a few framing remarks are in order. First, China's emphasis on sovereignty, and variations in it over time and across areas of international law, align with reasonable assessments of China's power and interests, in keeping with an international relations realist account. But China's views on sovereignty-related issues in international law also reflect political choices and preferences developed partly (but

only partly) in response to the challenges and opportunities China has faced in the international system. Second, China's opportunities to invoke principles of sovereignty successfully in addressing international legal issues depend on institutional structures and normative frameworks that govern various areas of international law, and that do so differently across issue areas and over different time periods. These institutions and values are constraining factors and key parts of the story, bounding—even defining—China's options and opportunities. Third, while sovereignty is an especially prominent concept in China's engagement with many areas of international law, it is not the only value that Beijing embraces or pursues. It coexists—and often contends with—other principles, some of which are at odds with strong notions of sovereignty. Which concepts and principles win out in shaping China's positions reflect state interests that are more complex than maximal sovereigntism, and political choices about trade-offs and priorities among interests—and values—including ones having little direct connection to international relations. Finally, the international legal norms and institutions with which China has been engaging are themselves not static. In the contemporary international system, sovereignty and Westphalianism in international law offer a means of pushing back against the encroachments of sovereignty-unfriendly developments in international law. China's recurrent (but not unwavering) emphasis on state sovereignty as an especially core principle of international law is in part a response to the increased challenges to the primacy of sovereignty and the state in areas of international law important to China.

#### I. INTERNATIONAL ECONOMIC LAW

For the first few decades of the People's Republic, China's position on international trade law and international economic law more generally was, at least de facto, strongly sovereigntist. Many features of China's political economy and international situation pulled or pushed in this direction.<sup>2</sup> With the adoption of broadly Soviet-style state economic planning, China's small-scale international trade was conducted through a handful of sector-based monopolistic state trading companies—entities that were at least as much bureaucratic entities as they were economic enterprises and that had little need for elaborate rules of international trade law. Trade policy was autarkic: exporting primarily served the limited function of making possible the import of things China could not produce for itself under an economic policy of self-reliance. Cold War politics blocked China's potential trade, investment, and other economic relations with most of the world, including the members of the ambitious international economic legal order that was emerging after the Second World War, including General Agreement on Tariffs and Trade (“GATT”) (which the Republic of China (“ROC”) government had signed on to as

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2. See generally BARRY NAUGHTON, *The Command Economy and the China Difference*, in GROWING OUT OF THE PLAN 59 (1996); William Kirby, *China's Internationalization in the Early People's Republic: Dreams of a Socialist World Economy*, 188 CHINA Q. 685 (2006); Amy King, *China's External Economic Relations during the Mao Era*, in CAMBRIDGE ECONOMIC HISTORY OF CHINA 685, 685–721 (2022).

a founding member shortly before the Chinese revolution and civil war drove the ROC off the Chinese mainland to Taiwan and prompted the ROC to withdraw from GATT because it was unable to implement the agreement in the bulk of the territory—China—that it claimed to represent), the World Bank, and the International Monetary Fund (“IMF”).<sup>3</sup>

The split with the Soviet Union several years after the PRC’s founding reduced the already modest opportunities for trade and investment with Soviet Bloc/ COMECON states. Beijing’s turn to a foreign policy of solidarity with mostly newly independent developing countries—the so-called “Bandung line”—beginning in the middle 1950s meant a degree of resonance for the critique from what was then called the Third World (and now the Global South) concerning the inequities and exploitation that resulted from trade and investment with the developed world and former imperial powers.<sup>4</sup> The gravamen of the anti-neo-colonial charge was that international trade, as then-constituted, and inbound foreign investment systematically exploited poorer countries and threatened their still-fragile sovereignty.<sup>5</sup> In these contexts, China’s interests and opportunities lined up with strong notions of sovereignty at international law, and those notions fit with broader Maoist ideologies (including self-reliance, anti-colonialism, and anti-hegemonism). The aspects of international economic law that would erode or require compromises of extremely robust state sovereignty were largely irrelevant and also ideologically unwelcome during the PRC’s early decades.

The Reform Era that began in 1979 brought a fundamental change. China sought to join the major institutions of the legal order for the international economy and was willing, even eager, to accept existing rules. The opening of normal trade relations between China and the U.S. went hand in hand with the establishment of diplomatic relations in 1979.<sup>6</sup> Beginning in 1986, China pursued entry into GATT and, later, its more institutionally and legally robust and demanding successor, the World Trade Organization (“WTO”). When China finally joined the WTO in 2001, it accepted extensive commitments that bound members generally, including core obligations to reduce barriers to trade, treat properly imported and domestic goods

3. See generally Francine McKenzie, *GATT and the Cold War: Accession Debates, Institutional Development, and the Western Alliance, 1947-1959*, 10 J. COLD WAR STUD. 78 (2008); Lori Fisler Damrosch, *GATT Membership in a Changing World Order: Taiwan, China, and the Former Soviet Republics*, 1992 COLUM. BUS. L. REV. 19 (1992).

4. See generally JOHN W. GARVER, *The Bandung Era & The Sino-Soviet Schism: the Race to Communism and Great Power Status, 1956-1958*, in CHINA’S QUEST: THE HISTORY OF THE FOREIGN RELATIONS OF THE PEOPLE’S REPUBLIC OF CHINA (2016); Mineo Nakajima, *Foreign Relations: From the Korean War to the Bandung Line*, in CAMBRIDGE HISTORY OF CHINA 259–90 (Roderick MacFarquhar & John K. Fairbank eds., 1987).

5. See generally WILL HOUT, *CAPITALISM AND THE THIRD WORLD: DEVELOPMENT, DEPENDENCE AND THE WORLD SYSTEM* (1993) (reviewing dependency theory, world systems theory, and international political economy of uneven development).

6. See AM. INST. IN TAIWAN, JOINT COMMUNIQUE OF THE UNITED STATES OF AMERICA AND THE PEOPLE’S REPUBLIC OF CHINA (NORMALIZATION COMMUNIQUE) (Jan. 1, 1979) (*posted* Mar. 31, 2022), <https://www.ait.org.tw/u-s-prc-joint-communique-1979>; see also Shu-yun Ma, *Recent Changes in China’s Pure Trade Theory*, 106 CHINA Q. 291 (1986).

equally, limit subsidies to and dumping by exporters, adopt international standards for intellectual property rights protection, and open key service sectors to foreign providers—all obligations that required significant changes to domestic law.<sup>7</sup> Additional terms for China's entry, mostly set forth in its Accession Protocol, imposed substantial "WTO plus" obligations that exceeded other members' commitments (especially to submit to monitoring and scrutiny of implementation of obligations) and "WTO minus" privileges (which gave China less protection against anti-dumping duties and export-limiting safeguards and denied China special treatment accorded other developing and transitioning-from-socialism economies).<sup>8</sup> Before achieving membership, China had already substantially reduced its trade barriers and revised many laws to become WTO-conforming.

China's pursuit of WTO entry was echoed in China's approach to other aspects of the international economic legal order. The PRC joined the World Bank, the IMF, and regional institutions such as the Asian Development Bank ("ADB") and Asia-Pacific Economic Cooperation ("APEC")—all on status quo-accepting terms.<sup>9</sup> At the Bank and the Fund, China later sought readjustment of quotas to reflect China's greater economic importance—a position that is, at least facially, regime-accepting.<sup>10</sup> China created a legal regime for inbound capital that moved toward relatively liberal global standards. Key developments included a first foreign investment law in 1979 (on equity joint ventures) and numerous additional new laws and amendments concerning various forms of joint ventures, wholly foreign-owned enterprises, foreign individuals' and, later, institutional investors' purchases of shares, and inbound mergers and acquisitions, movement toward a negative list approach to sectoral restrictions on foreign investment, and the coming into effect of a comprehensive Foreign Investment Law in 2020.<sup>11</sup> China also has pursued

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7. See generally Jacques deLisle, *China and the WTO: Evolving Agendas of Economic Openness, Domestic Reform and Challenges of the Post-Accession Era*, in CHINA UNDER HU JINTAO 229-292 (Tun-jen Cheng, Jacques deLisle & Deborah Brown eds., 2006); Margaret M. Pearson, *China's Integration into the International Trade and Investment Regime*, in CHINA JOINS THE WORLD: PROGRESS AND PROSPECTS 161-205 (Elizabeth Economy & Michel Oksenberg eds., 1999); Pitman B. Potter, *The Legal Implications of China's Accession to the WTO*, 167 CHINA Q. 592 (2001).

8. Henry Gao, *China's Participation in the WTO: A Lawyer's Perspective*, 11 SING. Y.B. INT'L L. 41 (2007); Julia Ya Qin, "WTO-plus" Obligations and their Implications for the WTO Legal System: An Appraisal of the China Accession Protocol, 37 J. WORLD TRADE 483 (2003).

9. See David Dollar, *Reluctant Player: China's Approach to International Economic Institutions*, BROOKINGS (Sept. 14, 2020), <https://www.brookings.edu/articles/reluctant-player-chinas-approach-to-international-economic-institutions/>; see also HAROLD K. JACOBSON & MICHEL OKSENBERG, CHINA'S PARTICIPATION IN THE IMF, THE WORLD BANK, AND GATT: TOWARD A GLOBAL ECONOMIC ORDER (1990); see also ROBERT F. WIHTOL., A PARTNERSHIP TRANSFORMED: THREE DECADES OF COOPERATION BETWEEN THE ASIAN DEVELOPMENT BANK AND THE PEOPLE'S REPUBLIC OF CHINA IN SUPPORT OF REFORM AND OPENING UP (2018), <https://www.adb.org/publications/adb-prc-partnership-transformed>.

10. See Colby Smith et al., *A Reboot of the World Bank and IMF Tests US Influence*, FIN. TIMES (Oct. 10, 2023), <https://www.ft.com/content/af612504-980f-456b-b2ae-6da6280a2291>.

11. For an overview of China's evolving laws governing inbound foreign investment, including a discussion of the laws noted in the text and their impact, see generally Yawen Zheng, *China's Domestic Law Governing Inbound Foreign Investment*, in CHINA'S FOREIGN INVESTMENT LEGAL REGIME 19, 19-74 (2023); and Lutz-Christian Wolff, *The History of China's Investment Law System: Lessons from the Past for the*

bilateral investment treaties—including one in protracted negotiation with the United States—that also move toward greater conformity with international norms. On these fronts as well, China accepted status quo norms and made—and largely implemented—changes through enacting conforming laws.<sup>12</sup>

To be sure, none of this was phrased in Chinese official discourse as a repudiation or ceding of sovereignty, which remained a core concept across the range of China's growing engagement with the international legal order. And the obligations were undertaken by entering into treaties—the form of international law-making that China prefers, in part because it is more protective of state sovereignty and state choice.<sup>13</sup> But, as the foregoing brief inventory of change and commitments to change suggests, China accepted internationally binding legal commitments (particularly in the case of the WTO) or more diffuse international legal norms and standards (in the case of the rules on foreign investment) deep into its domestic legal order—that is, into important aspects of the exercise of sovereignty at home.<sup>14</sup> Indeed, a view that gained traction in the West—and especially in the U.S.—held that welcoming China into the WTO and other elements of the international order could foster economic, legal, and even political change in China that went well beyond explicit treaty commitments and that would make China more like the developed capitalist democracies that were the gatekeepers to China's WTO membership.<sup>15</sup>

The change from the sovereigntism that preceded the Reform Era was bound up with a radical change in China's opportunities and agendas. By the late 1970s, China was in a position to pursue, and achieve, reacceptance into the international community, especially on economic matters, and to reap the benefits of its evolving economic comparative advantage during an era of growing economic globalization and integration. Making the sovereign discretion-constraining and potentially sovereign autonomy-undermining legal commitments and more diffuse embrace of largely liberal international economic legal norms fit well with the leadership's redefinition of China's direction and national interests to emphasize economic

(Brighter) *Future?*, 56 INT'L LAW. 141 (2023).

12. Hui Huang, *The Regulation of Foreign Investment in Post-WTO China*, 23 COLUM. J. ASIAN L. 185 (2009); Qingjiang Kong, *U.S.-China Bilateral Investment Treaty Negotiations*, 7 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 181 (2012); Mo Zhang, *Change of Regulatory Scheme: China's New Foreign Investment Law*, 37 UCLA PAC. BASIN L. J. 179 (2020).

13. See generally Samuel S. Kim, *The Development of International Law in Post-Mao China: Change and Continuity*, 1 J. CHINESE L. 117, 117 (1987).

14. See, e.g., deLisle, *supra* note 7; Potter, *supra* note 7; Julia Ya Qin, *Trade, Investment and Beyond: The Impact of WTO Accession on China's Legal System*, 191 CHINA Q. 720 (2007).

15. *The Clinton Presidency: A Foreign Policy for the Global Age*, WHITE HOUSE, <https://clintonwhitehouse5.archives.gov/WH/Accomplishments/eightyears-10.html> (last visited Mar. 23, 2024) (stating WTO membership “will entangle China more deeply in a rules-based international system and change China internally”); *Full Text of Clinton's Speech on China Trade Bill*, N.Y. TIMES (Mar. 9, 2000), <https://archive.nytimes.com/www.nytimes.com/library/world/asia/030900clinton-china-text.html> (stating WTO entry is the “. . . most significant opportunity . . . to create positive change in China” including political reform); Jerome A. Cohen, *Was Helping China Build Its Post-1978 Legal System a Mistake?*, 61 VA. J. INT'L L. ONLINE 1 (2020).



development through a turn to markets. It was widely accepted that Premier Zhu Rongji and other Chinese leaders sought WTO entry to impose external legal obligations that would help drive market-oriented economic reforms at home.<sup>16</sup> Much the same reasoning applied on the investment side, where the presence of foreign firms promised to help transform Chinese firms in market-oriented directions from within (through partnering in joint ventures or takeovers by foreign investors) or from without (through the competition from foreign-invested enterprises that Chinese firms would face in Chinese markets).

The retrenchment of sovereignty from its previously more dominant position was far from a rout and was mitigated in several important respects. The international economic liberalism of the WTO (much less the much weaker international legal regimes for non-trade issues) is far from thoroughgoing, with its permissions for the retention of tariffs, the invocation of public health and safety, serious economic disruptions (or threats thereof), national security, and other bases for restricting trade.<sup>17</sup> Moreover, and more specifically for China, the WTO regime has been, in important respects, ill-suited to policing the particular illiberal and often statist methods that the Chinese state uses to engage in illiberal economic practices that serve China's sense of its national interests.<sup>18</sup> China's behavior in the WTO regime and commitments to international economic liberalism more generally have faced sustained and widespread critiques for violating commitments and rules and for non-compliance or mere "paper compliance" even when Beijing is determined by authoritative treaty bodies to have violated its international legal obligations, primarily to create a more liberal economic legal order in which state boundaries matter less.<sup>19</sup> The only-semi-porous boundary between international law and domestic law in China has further mitigated risks to, or impact on, sovereignty. From the orthodox PRC view, treaties—rooted in the proper consent of the sovereign (and without the flaws of the "unequal treaties" that China considers void *ab initio*)—are the bases of China's legitimate and binding international economic legal obligations, not the more diffuse and potentially intrusive norms of customary international law.<sup>20</sup> And the legal changes that China undertook to come into line

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16. Joseph Fewsmith, *China and the WTO: The Politics Behind the Agreement*, 10 NBR ANALYSIS 23 (1999); Margaret M. Pearson, *The Case of China's Accession to GATT/WTO*, in *THE MAKING OF CHINESE FOREIGN AND SECURITY POLICY IN THE ERA OF REFORM* 337, 337–70 (David M. Lampton, ed., 2001); deLisle, *supra* note 7, at 245-265.

17. See General Agreement on Tariffs and Trade arts. XIX-XXI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (listing exceptions to GATT liberalization requirements); see also Robert Howse & Joanna Langille, *Continuity and Change in the World Trade Organization: Pluralism Past, Present and Future*, 117 AM. J. INT'L L. 1 (2023) (arguing for a pluralistic interpretation of GATT/WTO requirements that do not assume neoliberal legal and economic orders).

18. See, e.g., Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L.J. 261 (2016).

19. Timothy Webster, *Paper Compliance: How China Implements WTO Decisions*, 35 MICH. J. INT'L L. 525 (2014); Xiaowen Zhang & Xiaoling Li, *The Politics of Compliance with Adverse WTO Dispute Settlement Rulings in China*, 23 J. CONTEMP. CHINA 143 (2014).

20. Hungdah Chiu, *Communist China's Attitude Toward International Law*, 60 AM. J. INT'L L. 245, 257–59 (1966); see also Jacques deLisle, *The Chinese Puzzle of Taiwan's Status*, 44 ORBIS 35, 38–39 (2000); see also Dong Wang, *The Discourse of Unequal Treaties in Modern China*, 76 PACIFIC AFF. 399 (2003).

with WTO commitments and liberal international economic legal norms more generally are the products of China's discretionary—and reversible—exercise of its plenary powers to legislate at home.<sup>21</sup> Chinese sovereignty or sovereign discretion, thus, faced only limited constraint or encroachment despite the marked shift away from prior sovereigntism in economic affairs during the high Reform Era.

Although there has been no dramatic pivot to a new era akin to the launching of the Reform Era, the last decade or so has brought another change in direction that has—sometimes explicitly—turned back to greater emphasis on sovereignty in China's approach to the economic dimensions of international law. The PRC has remained an especially active member of the WTO, framed its many Regional Trade Agreements (“RTAs”) and new institutional initiatives such as the Asian Infrastructure Investment Bank (“AIIB”) as consistent with status quo rules and norms, and portrayed itself (especially in the face of U.S. retrenchment) as a leading protector of embattled economic globalization.<sup>22</sup> At the same time, much that China under Xi has done cuts in a different, more sovereignty-centric direction.

The recently added institutional dimensions of China's international economic—and related legal—engagement impose comparatively little constraint or encroachment on China's sovereignty or exercises of sovereign discretion. Beijing's proliferating bilateral trade agreements and RTAs and most notably the mammoth Regional Comprehensive Economic Partnership (“RCEP”) are relatively undemanding (compared to the WTO or the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”)), especially in terms of their requirements for domestic legal change and harmonization among member states or the powers of treaty bodies to issue binding decisions in trade disputes.<sup>23</sup> The Belt and Road Initiative (“BRI”)—the signature international economic policy initiative of the Xi era—is also institutionally and legally thin or, at least, fragmented

21. See generally Cai Congyan, *International Law in Chinese Courts During the Rise of China*, 110 AM. J. INT'L L. 269 (2016); Jacques deLisle, *The Chinese Model of Law, China's Agenda in International Law, and Implications for Democracy in Asia and Beyond*, in DEMOCRATIZATION, NATIONAL IDENTITY, AND FOREIGN POLICY IN ASIA (Gilbert Rozman, ed., 2021) (concerning preference for treaties).

22. See generally ST. COUNCIL INFO. OFF., CHINA AND THE WORLD TRADE ORGANIZATION (2018) (China), [https://english.www.gov.cn/archive/white\\_paper/2018/06/28/content\\_281476201898696.htm](https://english.www.gov.cn/archive/white_paper/2018/06/28/content_281476201898696.htm) (asserting China's record of compliance and participation); Francis Snyder, *China, Regional Trade Agreements and WTO Law*, 43 J. WORLD TRADE 1 (2009) (China's RTAs generally WTO compliant); Natalie Lichtenstein, *Governance of the Asian Infrastructure Investment Bank in Comparative Context*, 2018 AIIB Y.B. INT'L L. 50, [https://www.aiib.org/en/about-aiib/who-we-are/yearbook/\\_download/governance-aiib-comparative.pdf](https://www.aiib.org/en/about-aiib/who-we-are/yearbook/_download/governance-aiib-comparative.pdf) (AIIB is consistent with international norms for development banks); Ceri Parker, *China's Xi Jinping Defends Globalization from the Davos Stage*, WORLD ECON. F. (Jan. 17, 2017), <https://www.weforum.org/agenda/2017/01/chinas-xi-jinping-defends-globalization-from-the-davos-stage>.

23. See generally Jiangyu Wang, *China's Regional Trade Agreements: The Law, Geopolitics, and Impact on the Multilateral Trading System*, 8 SING. Y.B. INT'L L. 119 (2004); Sanchita Basu Das, *RCEP and TPP: Comparisons and Concerns*, in THE 3RD ASEAN READER 362 (2018); “*What's the Big Deal?*” ECONOMIST (Mar. 28, 2015), <https://www.economist.com/asia/2015/03/28/whats-the-big-deal>; Zoey Zhang, *Joining the CPTPP: What China Needs to Do and Comparison with the RCEP*, CHINA BRIEFING (Oct. 13, 2021), <https://www.china-briefing.com/news/chinas-bid-to-join-the-cptpp-challenges-comparison-with-rcep/>.

and *ad hoc*, defined by the terms of individual agreements with host states and arrangements for dispute resolution—a structure that poses little threat of constraining the sovereignty of China, if not of BRI partners.<sup>24</sup>

Xi-era Chinese economic and security-related policies have in some respects—including notably legal ones—moved to reduce China's openness to the global economy and market forces, and in turn, the restraints or intrusions on sovereignty and its exercise that such legally binding openness can bring. The “dual circulation” economy, the quest for greater self-sufficiency in crucial technologies, and the re-expansion of the party-state's roles in firms and the economy, are among the elements of this trend.<sup>25</sup> Restrictions, especially on inbound investment, have been toughened, primarily in the name of protecting national interests and national security. The Anti-Monopoly Law has been deployed to block inbound mergers and acquisitions, sometimes on grounds of national—that is, state sovereign—interests.<sup>26</sup> China has adopted blocking statutes and other measures to counter sanctions imposed on China and Chinese firms by the U.S. and others.<sup>27</sup> Beijing has put in place other legal measures that create genuine, serious, and intractable problems of simultaneous compliance with China's and foreign jurisdictions' laws by enterprises whose transnational operations have been vital to the long Reform-Era integration of China into the global economy. Such measures limit, or counter, the extraterritorial reach of other states' (particularly the United States') laws into China and over Chinese firms—which Chinese sources characterize as affronts to or encroachments on Chinese sovereignty.<sup>28</sup> A sweeping Foreign Relations Law, put in place in 2023, set forth in especially high-profile and formal legal form the Xi era rise of security interests relative to economic ones, and declares that its purpose is to “preserve national sovereignty [and] security”<sup>29</sup>—a provision that echoes the 2020 Foreign Investment Law's directive to “establish a foreign

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24. See generally Lutz-Christian Wolff, *Legal Responses to China's 'Belt and Road' Initiative: Necessary, Possible or Pointless Exercise?*, 29 *TRANSNAT'L L. & CONTEMP. PROB.* 249 (2020); Matthew S. Erie, *Chinese Law and Development*, 62 *HARV. INT'L L.J.* 51 (2021).

25. See generally NICHOLAS R. LARDY, *THE STATE STRIKES BACK: THE END OF ECONOMIC REFORM IN CHINA?* (2019); Justin Yifu Lin & Xiaobing Wang, *Dual Circulation: A New Structural Economics View of Development*, 20 *J. CHINESE ECON. & BUS. STUD.* 303 (2022); Jude Blanchette & Andrew Polk, *Dual Circulation and China's New Hedged Integration Strategy*, *CTR. FOR STRATEGIC & INT'L STUD.* (Aug. 24, 2022), <https://www.csis.org/analysis/dual-circulation-and-chinas-new-hedged-integration-strategy>.

26. See Meirong Jin & Qian Li, *China's Anti-Monopoly Merger Control and National Security: Interactions with Foreign Investment Law and Beyond*, 13 *J. NAT'L SEC. L. & POL'Y* 471 (2023).

27. MINISTRY OF COM., *RULES ON COUNTERACTING UNJUSTIFIED EXTRA-TERRITORIAL APPLICATION OF FOREIGN LEGISLATION AND OTHER MEASURES* (2021) (China), <http://english.mofcom.gov.cn/article/policyrelease/questions/202101/20210103029708.shtml>; see generally Fan Waiguo Zhicai Fa (反外国制裁法) [Anti-foreign Sanctions Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 10, 2021, effective June 10, 2021), <http://www.lawinfochina.com/display.aspx?lib=law&id=35670>.

28. See generally Ji Li, *Superpower Legal Rivalry and the Global Compliance Dilemma*, 45 *U. PENN. J. INT'L L.* (forthcoming 2024); MINISTRY OF FOREIGN AFFS., *The U.S. Willful Practice of Long-Arm Jurisdiction and Its Perils* (Feb. 3, 2023) (China), [https://www.fmprc.gov.cn/mfa\\_eng/wjbxw/202302/t20230203\\_11019281.html](https://www.fmprc.gov.cn/mfa_eng/wjbxw/202302/t20230203_11019281.html).

29. Duiwai Guanxi Fa (对外关系法) [The Law on Foreign Relations], *supra* note 1, art. 1.

investment security review system to conduct security reviews of foreign investment that affects or may affect national security.”<sup>30</sup>

To be sure, China’s interests and preferences during the Xi era are in many deep and important ways continuations of the earlier Reform Era and, accordingly, many doctrinal and institutional aspects of China’s economics-related engagement with international law, including commitments to openness, have persisted and been reaffirmed. But there has been a partial turn back toward sovereigntism in the legal aspects of international economic ties—with explicit references to sovereignty and kindred terms becoming more common in official discourse as well. This turn is in line with China’s evolving interests, opportunities, and agendas in several ways.

First, China’s opportunities to benefit from further-deepened engagement and openness have waned as other states have become wary of China’s growing power and perceived assertiveness, increasing the perceived economic and political risks of economic dependence on China. Especially among the advanced economic states of the Global North, the optimistic view of economic engagement with China that brought widespread international support for China’s WTO entry has faded markedly over the last two decades, and prospects are very dim for China’s application to join the most ambitious trade-liberalizing and economically integrating accord of the early 21<sup>st</sup> century—the TPP / CPTPP.<sup>31</sup> Other states, including members of the CPTPP, have witnessed troubling instances of China’s assertive use of economic levers to political ends—with painful effects on targeted countries—over such issues as partner states’ concerns about cybersecurity, technology theft, or interference in domestic politics, or China’s objections to restrictions on access to foreign technology and markets or other states’ criticisms of China’s policies toward Taiwan, Hong Kong, Xinjiang, or Tibet.<sup>32</sup>

In the Global South, China’s image has fared better, but the BRI has drawn criticism and pushback, with questionable charges of “debt trap diplomacy” and serious concerns about the lack of economic benefits, loss of foreign policy autonomy, and adverse internal political and rule-of-law effects for host countries.<sup>33</sup>

30. Waishang Tuoze Fa (外商投资法) [Foreign Investment Law] (promulgated by the Nat’l People’s Cong., Mar. 15, 2019, effective Jan. 1, 2020), art. 35., <https://www.lawinfochina.com/display.aspx?id=30060&lib=law>.

31. See generally Jacques deLisle, *Not Quite Déjà Vu All Over Again: CPTPP Accession and Taiwan–China–US Relations*, in CHINA, TAIWAN, THE UK AND THE CPTPP: GLOBAL PARTNERSHIP OR REGIONAL STAND-OFF? 181, 181–216 (Michael Riley and Chun-Yi Lee, eds. 2023).

32. See, e.g., Zack Cooper, *Between Beijing and a Hard Place: Responding to China’s Economic Coercion*, AM. ENTER. INST. (Dec. 7, 2021), <https://www.aei.org/wp-content/uploads/2021/12/CECC-Hearing-Testimony-Zack-Cooper.pdf?x85095>; Peter Harrell et al., *China’s Use of Coercive Economic Measures*, CTR. FOR A NEW AM. SEC. (2018), [https://s3.us-east-1.amazonaws.com/files.cnas.org/documents/China\\_Use\\_FINAL-1.pdf](https://s3.us-east-1.amazonaws.com/files.cnas.org/documents/China_Use_FINAL-1.pdf); Timothy Heath, *China’s Evolving Approach to Economic Diplomacy*, 22 ASIA POL’Y 157 (2016).

33. See, e.g., Carla Freeman & Henry Tugendhat, *Why China is Rebooting the Belt and Road Initiative*, U.S. INST. OF PEACE (Oct. 26, 2023), <https://www.usip.org/publications/2023/10/why-china-rebooting-belt-and-road-initiative>; Lee Jones & Shahar Hameiri, *Debunking the Myth of “Debt-Trap Diplomacy”*, CHATHAM HOUSE (Aug. 19, 2020), <https://www.chathamhouse.org/2020/08/debunking-myth-debt-trap-diplomacy>.

Compared to the time of China's entry into the WTO nearly a quarter-century ago, several factors weigh more heavily, and often more negatively in other states' assessments of the costs and benefits of engaging with China economically and incurring related political, as well as economic, risks. These changed circumstances include: the vast scale of PRC trade and investment (absolutely and relative to other partners), China's dominance in key sectors and supply chain links, the range and types of political ends to which Beijing uses economic leverage, and the party-state's pervasive power to control the behavior of China-based economic actors (making Beijing's efforts more potent and harder to police under existing international rules).<sup>34</sup>

Second, China has less to gain from bearing the sovereignty costs of deepened or even fully sustained engagement with the liberal international economic order and its legal components than was the case earlier in the Reform Era. The WTO has waned as the preeminent legal and liberalizing institution for the global economy—due to problems in the WTO that became more dire with the collapse of the Doha round, China's own RTA-focused strategy for trade and investment pacts, and the United States' retreating from its formerly strong support for the organization that it took a lead in creating.<sup>35</sup> Generally, legal and legal-institutional modes of deeper integration and openness—especially global ones—offer less to China in terms of profoundly advancing its economic developmentalist interest than was the case with China's entry into the WTO and other major elements of the international economic order during the first decades of the Reform Era. China's economy is so much larger, more developed, more mature, and intractably slower growing, and less dependent—or able to rely for growth—on foreign trade and inbound investment.

Third, and relatedly, China is in a much better position to disregard international legal obligations and norms (and other states' and international institutions' interpretations of them) when it sees reasons to do so, including to protect its perceived or declared sovereignty and related interests. This capacity is reflected in the behavior that has fueled the pervasive and rising complaints that China violates or shirks its responsibilities under the WTO and other international economic treaties,<sup>36</sup> and that has fed the recently greatly increased wariness among

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34. See, e.g., Hiroyuki Suzuki, *Building Resilient Global Supply Chains: The Geopolitics of the Indo-Pacific Region*, CTR. FOR STRATEGIC & INT'L STUD. (Feb. 19, 2021), [https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/210219\\_Suzuki\\_Global\\_Supply.pdf?VersionId=u4itMuKzUm0dJRXnIUbg2ZmZdCRfNv23](https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/210219_Suzuki_Global_Supply.pdf?VersionId=u4itMuKzUm0dJRXnIUbg2ZmZdCRfNv23); Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665 (2015); Ming Du, *China's State Capitalism and World Trade Law*, 63 INT'L & COMP. L.Q. 409 (2014); see also sources cited *supra* note 32.

35. See generally Aseema Sinha, *Understanding the "Crisis of the Institution" in the Liberal Trade Order at the WTO*, 97 INT'L AFF. 1521 (2021); Patrick Low, *The WTO in Crisis: Closing the Gap Between Conversation and Action or Shutting Down the Conversation?* 21 WORLD TRADE REV. 274 (2022).

36. See Chao Wang, *China's Treaty Compliance with the WTO: Perspectives of Selective Adaptation and Institutional Capacity*, 6 J. INT'L & COMP. L. 139 (2019); U.S. TRADE REPRESENTATIVE, 2022 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE (2023), <https://ustr.gov/sites/default/files/2023-02/>

other states of forging new pacts, or more broadly engaging, with China economically and bearing the risks that come with such dependence. Fundamentally, China has become so important as a trading partner, a destination for foreign investment, and, increasingly, a source of outbound investment that it has room to cheat on rules and obligations, to press aggressively self-serving and questionable interpretations of legal norms, and so on. At the same time, China's now-considerable experience in the WTO and other institutions of the international economic legal order has given it skills and tools to reduce adverse consequences by playing the game well—making *infra legem* arguments concerning regime rules that serve China's interests and aims, making its case effectively within dispute resolution processes, and so on.<sup>37</sup>

Finally, but far from least, the many trade agreements (bilateral, RTA, and RCEP), the new investment institutions (the AIIB, the New Development Bank (“NDB”)), the sprawling BRI, and a vast array of policies and actions by the Chinese state and Chinese firms, are mechanisms of expanding engagement, with legal components, that give China opportunities to shape international or transnational economic legal institutions, rules, and more diffuse norms in ways that fit with China's interests and agendas and that are not problematic from a Chinese sovereigntist perspective.<sup>38</sup>

China is the dominant economy and most powerful party to those trade and trade-plus agreements—much more so than in the WTO or, prospectively, the CPTPP—and thus greatly able to control their requirements and the degree to which they limit sovereign choice, and specifically China's sovereign choice. Much the same is true of the AIIB and the NDB—especially compared to the World Bank, ADB, or other Multilateral Development Banks in which China has less ability to set the terms of loans.<sup>39</sup> As with other initiatives of the Xi era, China is the more powerful party in BRI arrangements and, as the outbound investor, not at direct risk for erosion of its sovereignty, whether or not the same can be said for BRI host states. The BRI is also institutionally and legally thin or, at least, ad hoc and defined by the terms of individual agreements with host states and arrangements for dispute resolution—a structure that poses little threat of undermining the sovereign autonomy of China, if not of BRI partners.<sup>40</sup>

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2022%20USTR%20Report%20to%20Congress%20on%20China's%20WTO%20Compliance%20-%20Final.pdf; World Trade Organization, China: Dispute Settlement News Archive, [https://www.wto.org/english/news\\_e/archive\\_e/country\\_subj\\_arc\\_e.htm?country1=CHN&subject1=DISP](https://www.wto.org/english/news_e/archive_e/country_subj_arc_e.htm?country1=CHN&subject1=DISP) (last visited May 20, 2024).

37. See Gregory Shaffer & Henry Gao, *China's Rise: How It Took on the US at the WTO*, 2018 U. ILL. L. REV. 115 (2018).

38. See Gregory Shaffer & Henry Gao, *A New Chinese Economic Order?*, 23 J. INT'L ECON. L. 607 (2020).

39. See, e.g., Daniel C.K. Chow, *Why China Established the Asia Infrastructure Investment Bank*, 49 VAND. J. TRANSNAT'L L. 1255 (2016); G. John Ikenberry & Darren Lim, *China's Emerging Institutional Statecraft: The Asian Infrastructure Investment Bank and the Prospects for Counter-hegemony*, BROOKINGS (Apr. 2017), <https://www.brookings.edu/articles/chinas-emerging-institutional-statecraft/>.

40. DANIEL R. RUSSEL & BLAKE H. BERGER, *WEAPONIZING THE BELT AND ROAD INITIATIVE* (Asian Society Policy Institute, Sept. 2020), <https://asiasociety.org/sites/default/files/>

In such settings, China may, in effect, be able to eat (others') sovereigntist cake and have its (own) too. The cluster of China-led institutions and initiatives (particularly the BRI) provide channels for a less sovereigntist (and specifically other-states-sovereigntist) current in China's approach to international economic law. A concern raised in the U.S. and elsewhere is that China will use China-centered pacts and institutions to push for international economic legal rules that are less liberal—and thus less in tension with strong state sovereignty (and large state roles in the economy). In contrast to the Clinton-era beliefs that bringing China into the WTO and other institutions of the international legal-economic would transform China, from the Obama administration onward, the framing (with a fair amount of rhetorical license) has been of a contest between a liberal, open, deeply engaged international economy and China's more statist and sovereigntist alternative.<sup>41</sup>

But, at least in the near term, such characterizations likely miss the point. Partly, the channels of Chinese influence on the governance of international trade and investment, which are much more diffuse and fragmentary and flow primarily through bilateral or small-scale multilateral agreements or contracts and projects of Chinese state-linked firms, likely serve China's interests and aims but are not well-suited to a project of remaking the rules.<sup>42</sup> In the landmark Plan on Building the Rule of Law in China (2020-2025), China's commitment to "actively participate in the formulation of international rules" entails a degree of legal model export ("accelerating the advancement of the construction of a legal system applicable" outside China), but foresees doing so through diffuse, transnational means (such as "promoting . . . cooperation in . . . the 'Belt and Road' [and] international commercial courts [and] arbitration mechanisms").<sup>43</sup> Partly, China continues to benefit handsomely from the existing international economic legal rules which continue to provide substantial gains with limited risk and ample room for China to pursue statist economic policy and sovereignty-protective measures. And partly, Xi's China may be the latest example of the hoary principle—and a regime's belief in it—that the best arrangement is one where other states bear the risks of a liberal, open, and sovereignty-constraining order while one's own powerful and secure state

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2020-09/Weaponizing%20the%20Belt%20and%20Road%20Initiative\_0.pdf; Ikenberry & Lim, *supra* note 39 (including discussion of BRI's threat to other states' sovereignty and alignment with China's conceptions of sovereignty); *How Is the Belt and Road Initiative Advancing China's Interests?*, CHINAPOWER PROJECT, <https://chinapower.csis.org/china-belt-and-road-initiative> (last visited May 20, 2024); Heng Wang, *The Belt and Road Initiative Agreements: Characteristics, Rationale, and Challenges*, 20 WORLD TRADE REV. 282 (2021) ("soft law" and "minimal legalization" character of BRI agreements).

41. Tonya Somanader, *President Obama: "Writing the Rules for 21<sup>st</sup> Century Trade"*, WHITE HOUSE (Feb. 18, 2015, 3:01 PM), <https://www.whitehouse.gov/blog/2015/02/18/president-obama-writing-rules-21st-century-trade>; Anthony J. Blinken, *The Administration's Approach to the People's Republic of China*, U.S. DEP'T OF STATE (May 26, 2022), <https://www.state.gov/the-administrations-approach-to-the-peoples-republic-of-china>.

42. See Shaffer & Gao, *supra* note 38; Erie, *supra* note 24.

43. Fazhi Zhongguo Jianshe Jihua (2020-2025 nian) (法治中国建设规划 (2020-2025 年)) [PLAN ON BUILDING THE RULE OF LAW IN CHINA (2020-2025)], para. 25, XINHUA NEWS AGENCY (Jan. 10, 2021, 7:44 PM), *reprinted at* ST. COUNCIL (Jan. 10, 2021), [https://www.gov.cn/zhengce/2021-01/10/content\\_5578659.htm](https://www.gov.cn/zhengce/2021-01/10/content_5578659.htm) (China).

need not.

## II. HUMAN RIGHTS

China's approach to international human rights law and related norms has followed a broadly parallel arc but with the place of sovereignty more often being explicit. During much of the Mao period and into the early Reform Era, the official Chinese position was strongly sovereigntist, manifested principally in the PRC's rejection of the idea of universal human rights.<sup>44</sup> During the PRC's early decades, official and orthodox positions endorsed the Soviet view that international law was divided into two relatively hermetically sealed spheres of "socialist" and "bourgeois" international law.<sup>45</sup> The primarily liberal regime of international human rights law that was emerging in the post-Second World War period, in Beijing's view, fell on the bourgeois side of the divide. Western critiques of communist rule in China (as well as the Soviet Bloc) that sounded partly in human rights reinforced the point.<sup>46</sup> The PRC's exclusion from the United Nations until 1971 and its only gradual engagement thereafter was another factor weighing against China's engagement with the emerging UN-centered international legal regime for human rights, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic Social and Cultural Rights, and several later, more specific conventions, and follow-on agreements. To reject the foreign/liberal/bourgeois conceptions of international human rights—and their relative disdain for strong notions of sovereignty—was a sovereigntist position, for sovereignty provided a handy shield and a more effective means for parrying international criticism than would a flat-out rejection of the substantive values at stake (or a strained effort to interpret prevailing international norms in ways favorable to China's views).

As part of its pursuit of solidarity with the post-colonial developing world, China issued one of the most prominent and enduring statements of its international relations canons: the Five Principles of Peaceful Coexistence ("the Principles")—one of which is explicitly about respect for sovereignty and all of which are strongly pro-sovereignty.<sup>47</sup> Although not the specific focus of the Principles, the era's

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44. See generally JEROME ALAN COHEN & HUNGDAH CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY* (1974); Roberta Cohen, *People's Republic of China: The Human Rights Exception*, 9 HUM. RTS. Q. 447 (1987); MARINA SVENNSON, *Chapter 9 The 1950s: Human Rights Debates on Two Sides of the Taiwan Strait & Chapter 10 The Domestic Challenge Over Human Rights: The Democracy Wall Activists and the Official Reaction, 1978-1982*, in *DEBATING HUMAN RIGHTS IN CHINA* (2002); Ann Kent, *Waiting for Rights: China's Human Rights and China's Constitutions, 1949-1989*, 13 HUM. RTS. Q. 170 (1991).

45. See generally, Chiu, *supra* note 20; Hungdah Chiu, *Chinese Attitude Toward International Law of Human Rights in the Post-Mao Era*, 1989 OCCASIONAL PAPERS/REPRINT SER. CONTEMP. ASIAN STUD. 1, 3-7 (1989); Zofia MacLure, *Soviet International Legal Theory—Past and Present*, 5 FLETCHER F. 49 (1981).

46. See, e.g., Susan L. Shirk, *Human Rights: What about China?*, 29 FOREIGN POL'Y 109 (1977-78); Merle Goldman, *Human Rights in the People's Republic of China*, 112 DAEDALUS 111 (1983).

47. *China's Initiation of the Five Principles of Peaceful Coexistence*, MINISTRY OF FOREIGN AFFS. (2000) (China), [https://www.fmprc.gov.cn/eng/ziliao\\_665539/3602\\_665543/3604\\_665547/200011/t20001117\\_697812.html](https://www.fmprc.gov.cn/eng/ziliao_665539/3602_665543/3604_665547/200011/t20001117_697812.html); see also Zewei Yang & Ravni Thakur, *Role of Panchsheel in Building*



expanding notions of the legitimacy of human rights critiques of states' internal orders is one of the derogations from sovereignty against which the Five Principles provided a framework for pushing back. For China, accepting international human rights law also would have been profoundly at odds with ideological pillars of party rule during the Mao years. Especially—but not only—during the most radical phases of the PRC's first three decades, domestic legal rights that would have aligned with international human rights (especially civil and political rights) were rejected, sometimes very stridently. The hollow promises of civil and political rights in the 1956 Constitutions were partly excised from the so-called Gang of Four Constitution of 1975, and partly replaced by rights to engage in Cultural Revolution-style mass politics of direct action (in the form of the “four big freedoms”).<sup>48</sup> In the Cultural Revolution's most disruptive moments, legal rights were denounced as a bourgeois concept and an intolerable means for protecting class enemies or enemies of the people. An internationally isolated China, with reasons for concern about recurring domestic turmoil and heavily invested in Maoist ideology at home, had little reason to consider accepting—and little occasion to engage with—the emerging international legal regime for human rights, with its largely liberal content and expanding mandate to scrutinize states' domestic orders.

Mao-era positions concerning international human rights law endured much deeper into the Reform Era than was the case with international economic law. And the softening of prior sovereigntist positions on human rights was much less expansive and intensive than with international economic law.<sup>49</sup> The shift began to occur in earnest only as the PRC began to move into its fifth decade. After the Tiananmen Incident in 1989 and the international condemnation of China's human rights record that followed, official and orthodox Chinese sources began to engage with and move toward acceptance of universal human rights and the related legal regime.<sup>50</sup>

During the 1980s and 1990s, China acceded to most major international human rights treaties, including the International Covenant on Economic and Social Rights, and has signed but not ratified the International Covenant on Civil and Political Rights.<sup>51</sup> Such treaty memberships entail significant moves away from

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*International Order*, 8 WORLD AFF.: J. INT'L ISSUES 35 (2004) (arguing for continued centrality of sovereignty and critiquing human-rights-over-sovereignty views).

48. Kent, *supra* note 44; Jerome Alan Cohen, *China's Changing Constitution*, 76 CHINA Q. 794 (1978). The “four big freedoms” were speaking out freely, airing views fully, holding great debates, and writing big-character posters. XIANFA art. 13 (1975) (China).

49. Other scholarship finds a similar contrast between the two issue areas from a different analytical perspective. See Pitman B. Potter, *China and the International Legal System: Challenges of Participation*, 191 CHINA Q. 699 (2007).

50. See, e.g., *Human Rights in China*, ST. COUNCIL INFO. OFF. (Nov. 1991), <http://www.china.org.cn/e-white/7/index.htm> (China). On this era generally, see also ANN KENT, CHINA, THE UNITED NATIONS AND HUMAN RIGHTS: THE LIMITS OF COMPLIANCE (1999); SVENNSON, *supra* note 44, at 261–318; Andrew J. Nathan, *China and the International Human Rights Regime*, in CHINA JOINS THE WORLD: PROGRESS AND PROSPECTS 136–60 (Elizabeth Economy and Michael Oksenberg eds., 1999).

51. U.N. Hum. Rts. Treaty Bodies Database, Ratification Status for China, <https://>

“black box” sovereignty, given the open-ended and evolving character of obligations under the core human rights conventions, the status of universal human rights as customary international law (if not *jus cogens*) that is binding without specific consent, and the reach of human rights legal obligations deep into areas where domestic governance—including sensitive exercises of sovereign powers at home—are at stake.<sup>52</sup>

During the Reform Era, human rights norms began to enter Chinese laws and state practices. The 1982 Constitution restored the list of citizens’ rights that broadly tracked many international human rights.<sup>53</sup> A 2004 amendment to the Constitution pledged that the state respects and protects human rights.<sup>54</sup> Later amendments to criminal procedure law declared that respect for and protection of human rights were principles of the criminal process.<sup>55</sup> Often during the Reform Era, legal scholars and public intellectuals enjoyed some room to advocate for human rights. NGOs working on human rights-related issues—such as rights of groups discriminated against on the basis of health status—were allowed to operate.<sup>56</sup> A group of lawyers who dubbed themselves “rights protection lawyers” (*weiquan lushi*) and later “human rights lawyers” (*renquan lushi*) emerged (and were tolerated—and on occasion praised—by the state) to represent clients who had suffered wrongs at the hands of the state—a principal focus of international human rights law.<sup>57</sup>

China’s engagement with international human rights extended to procedures and institutions as well as substantive legal norms. Beginning in the 1990s, the State Council has issued numerous official “White Papers” specifically on human rights and on other issues with substantial human rights components (such as democracy, the rule of law, Tibet, Xinjiang, and so on), reciting accomplishments and articulating plans for future progress in ways that speak explicitly to international human rights legal norms, including several of the principal covenants. Beijing shifted from flatly dismissing the U.S. State Department’s annual report on human rights conditions in China as impermissible interference in China’s internal affairs. China began to issue detailed rebuttals and offered its own reports on the U.S.’s

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tbinternet.ohchr.org/\_layouts/15/TreatyBodyExternal/Treaty.aspx.?CountryID=36&Lang=en (last visited May 20, 2024).

52. See, e.g., Louis Henkin, *Human Rights and State Sovereignty*, 25 GA. J. INT’L & COMP. L. 31 (1995); Jack Donnelly, *State Sovereignty and International Human Rights*, 28 ETHICS & INT’L AFF. 225 (2014).

53. XIANFA arts. 33-56 (1982) (China).

54. XIANFA art. 33 (1982) (China); XIANFA art. 33 (2004) (China).

55. Xingshi Susongfa (2018 Xiuzheng) (刑事诉讼法 (2018 修正)) [Criminal Procedure Law (2018 Amendment)] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 26, 2018, effective Oct. 26, 2018), art. 2, <https://www.lawinfochina.com/display.aspx?id=29202&lib=law>.

56. See generally, Yiyi Lu, *The Growth of Civil Society in China: Key Challenges for NGOs*, CHATHAM HOUSE (Feb. 2005), <https://www.chathamhouse.org/sites/default/files/public/Research/Asia/china.pdf>; Anthony J. Spiers, *Contingent Symbiosis and Civil Society in an Authoritarian State: Understanding the Survival of China’s Grassroots NGOs*, 117 AM. J. SOCIO. 1 (2011).

57. See generally, EVA PILS, CHINA’S HUMAN RIGHTS LAWYERS: ADVOCACY AND RESISTANCE (2014); see also Hualing Fu, *Human Rights Lawyering in Chinese Courtrooms*, 2 CHINESE J. COMP. L. 270 (2014).

human rights failings.<sup>58</sup>

When the UN Human Rights Council was established in 2006, China sought successfully to become a member (which entailed an implicit affirmation of the universality of human rights) and has remained on the body almost without interruption ever since.<sup>59</sup> Beijing has accepted the relatively modest reporting responsibilities under the UN human rights system, routinely submits human rights performance self-reports, including the quadrennial “Universal Periodic Review” (although China has not agreed to the more demanding optional procedures that permit more intrusive scrutiny—such as having to answer complaints initiated by victims of human rights abuses—under some major human rights instruments, and the reports it does submit have drawn sharp criticism for inaccuracy and opacity).<sup>60</sup>

As this last point illustrates, China’s lowering of the shield of sovereignty in the face of international human rights law during the Reform Era has had significant limits, including especially in the form China’s asserting distinctive interpretations of, and priorities among, human rights.<sup>61</sup> First, official and orthodox Chinese accounts insist that there is something close to a *right to sovereignty*, in the robust Five Principles sense. This position also entails or implies the right of each state—or its people—to choose its political system, suitable to its own circumstances. Therein lies a claim of what in other contexts might be called a wide margin of appreciation that legitimates domestic behavior that other states might view as violating universal human rights. Claiming that sovereignty frames it as a factor to be balanced and weighed alongside the conventional list of human rights. Second, and relatedly, China has insisted that the sovereign state is a vital (or even the sole) *means* by which human rights can be effectively achieved. Therein lies another interposition of sovereignty against expansive and intrusive international human rights law. Third, and also relatedly, the state may legitimately give *priority* to economic, social and

58. Most such documents are issued by the State Council Information Office of China. *See, e.g.*, ST. COUNCIL INFO. OFF., NATIONAL HUMAN RIGHTS ACTION PLAN (2012) (China); ST. COUNCIL INFO. OFF., PROGRESS IN CHINA’S HUMAN RIGHTS IN 2014 (2015) (China); ST. COUNCIL INFO. OFF., HUMAN RIGHTS RECORD OF THE UNITED STATES IN 2014 (2015) (China); ST. COUNCIL INFO. OFF., FIFTY YEARS OF PROGRESS IN CHINA’S HUMAN RIGHTS (2000) (China); ST. COUNCIL INFO. OFF., REPORT ON HUMAN RIGHTS VIOLATIONS IN THE UNITED STATES IN 2022 (2023) (China). *See also* *China Rejects U.S. Finger Pointing on Human Rights, Democracy*, CONSULATE GEN. OF CHINA IN N.Y. (July 13, 2010), [http://newyork.china-consulate.gov.cn/eng/xw/201007/t20100713\\_4693753.htm](http://newyork.china-consulate.gov.cn/eng/xw/201007/t20100713_4693753.htm).

59. *China Secures 6<sup>th</sup> Term as Member of UN Human Rights Council*, XINHUA NET (Oct. 11, 2023, 11:17 AM), <https://english.news.cn/20231011/cb6b580d9502464f93575a4f66621c3b/c.html#:~:text=China%20previously%20held%20a%20seat,1%2C%202024;What%20Countries%20Have%20Been%20Members%20of%20the%20Human%20Rights%20Council>, U.N. ASK DAG LIBR. (Jan. 31, 2024), <https://ask.un.org/faq/268839>.

60. *See generally* Björn Ahl, *The Rise of China and International Human Rights Law*, 37 HUM. RTS. Q. 637 (2015); *see also* Dingding Chen, *China’s Participation in the International Human Rights Regime: A State Identity Perspective*, 2 CHINESE J. INT’L POL. 399 (2009).

61. Jianguy Wang, *China and the Universal Human Rights Standards*, 29 SYRACUSE J. INT’L L. & COMM. 135 (2001-2002); Jacques deLisle, *From Economic Development to What—and Why? China’s Evolving Legal and Political Engagement with International Human Rights Norms*, in *RETHINKING LAW AND DEVELOPMENT: THE CHINESE EXPERIENCE* (Guanghua Yu ed., 2013); ST. COUNCIL INFO. OFF., *SEEKING HAPPINESS FOR PEOPLE: 70 YEARS OF PROGRESS ON HUMAN RIGHTS IN CHINA* (Sept. 22, 2019), [www.scio.gov.cn/zfbps/ndhf/2019n/202207/t20220704\\_130632.html](http://www.scio.gov.cn/zfbps/ndhf/2019n/202207/t20220704_130632.html).

culture rights over—or construe them as a necessary precondition to—the civil and political rights emphasized by the West. Fourth, on China’s account, the specific content of universal human rights *varies by context*, including history, level of economic development, type of political system, and culture (with the latter emphasized during China’s 1990s flirtation with then-prominent “Asian values” arguments associated with the Bangkok Declaration on Human Rights).<sup>62</sup> Finally, China has sought to gloss, in ways that invoke sovereignty and closely kindred concepts, some of the specific human rights that are most likely to be invoked to criticize China’s domestic behavior. Thus, repression of political dissent with means that appear to violate international civil and political rights is characterized as the sovereign state’s right and obligation to maintain national security and social order, and to protect the rights of the majority of citizens against abusive exercises of purported rights by a dangerous few. And the PRC has framed the core international human right of the self-determination of peoples (recognized in the common first articles of the two principal covenants) in strikingly Chinese sovereigntist terms: as a right of states formerly subject to colonial rule or quasi-colonial encroachment to be free from such depredations of their sovereignty; as a right to be exercised by the Chinese people as a whole, and not—as urged by would-be secessionists—by the subset of the Chinese people who live in Taiwan or Hong Kong; and as a right that is satisfied by the limited accommodations that the PRC government offers through its special autonomous region regimes for Tibetans, Uyghurs, and other national minorities.<sup>63</sup>

Overall, increased engagement with the international legal regime for human rights fit China’s interests and agendas beginning in the later 1980s. Acceptance of universal human rights—at least to some degree—was part of the price of readmission to international society after the ostracism (albeit partial and brief) that followed the regime’s actions in 1989 and that had brought significant sanctions—and the threat of worse costs (including loss of most-favored nation trading privileges with the U.S.)—on human rights grounds. It was a significant political-side supplement to the economic engagement that was at the core of China’s approach to international law and the international order more generally in the early 1990s and beyond and thus a valuable part of China’s self-presentation as a responsible and engaged stakeholder in the international system.<sup>64</sup> At the same time, given the many mechanisms the international human rights legal regime offered and additional ones that China developed to limit or parry the reach of human rights

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62. See *Pursuing a Country-Specific Path to Human Rights Advancement and Jointly Promoting Worldwide Progress in Human Rights*, MINISTRY OF FOREIGN AFFS. (Dec. 5, 2023) (China), [https://www.fmprc.gov.cn/eng/wjdt\\_665385/zyjh\\_665391/202312/t20231205\\_11195127.html](https://www.fmprc.gov.cn/eng/wjdt_665385/zyjh_665391/202312/t20231205_11195127.html); Ann Kent, *Chinese Values and Human Rights in Human Rights in Asia in HUMAN RIGHTS IN ASIA: A REASSESSMENT OF THE ASIAN VALUES DEBATE* 83, 83–84 (Leena Avonius & Damien Kingsbury, eds 2008).

63. See Chunlia Xia, *Reappraising the Right of Self-Determination in the People’s Republic of China*, 8 ASIA-PAC. J. HUM. RTS. & L. 1 (2007) (providing an overview of PRC positions within China and abroad).

64. See, e.g., Robert Zoellick, *Whither China: From Membership to Responsibility*, U.S. DEP’T OF STATE (Sept. 21, 2005), <https://2001-2009.state.gov/s/d/former/zoellick/rem/53682.htm>.

critiques and potential sanctions or other adverse foreign relations consequences of a poor human rights record meant that China faced relatively modest downside risks—a point that became clear as time went on, and as China's power and skill in engaging with the human rights regime (and especially the UN Human Rights Council) grew.

More recent times have seen a continuation of the limits to the late Twentieth and early Twenty-First centuries relaxation of sovereigntist resistance to international human rights law and also a new turn toward a tougher, more sovereignty-asserting line—a turn reflected in the 2023 Foreign Relations Law.<sup>65</sup> In this area, the inflection began during Hu Jintao's tenure although it has increased under Xi. Many of the limitations of the earlier Reform Era have become sharper and starker. For example the adoption of a National Security Law for Hong Kong accelerated the decline of the pledges of autonomy and continuity that had included the continuation of protections for human rights (especially civil and political ones) and the remaining in force of the two principal UN human rights covenants in post-reversion Hong Kong. Severe measures implemented in Xinjiang prompted foreign critics, including the U.S. government, to level charges of genocide or cultural genocide.<sup>66</sup> "Rights protection lawyers" or "human rights lawyers" faced escalating repression, including particularly a harsh crackdown in 2011 and a significantly more severe one in mid-2015 (the "709 crackdown").<sup>67</sup> Human rights-related or human rights-adjacent NGOs (including foreign NGOs, which faced tightened restrictions under a 2017 Foreign NGO Law) and advocates of liberal-democratic civil and political rights (such as Nobel Peace Prize laureate Liu Xiaobo) were shut down in the mid-2010s.<sup>68</sup> Such measures both reduced the space for promoting or even discussing the norms associated with international human rights law in China

65. See *Duiwai Guanxi Fa* (对外关系法) [The Law on Foreign Relations], *supra* note 1, art. 22 ("China respects and protects human rights," upholds "the principle of the universality of human rights" in consideration of nations' circumstances, promotes the full and "coordinated development" of human rights, conducts "international exchanges and cooperation in the field of human rights on the basis of equality of mutual respect," and promotes the "healthy development" of international human rights affairs).

66. See, e.g., Michael C. Davis, *Beijing's Crackdown on Human Rights and the Rule of Law in Hong Kong*, 16 ASIA POL'Y 57 (2021); Michael R. Pompeo, *Determination of the Secretary of State on Atrocities in Xinjiang*, U.S. DEP'T OF STATE (Jan. 19, 2021) <https://2017-2021.state.gov/determination-of-the-secretary-of-state-on-atrocities-in-xinjiang/>; Brady Worthington, *Breaking Down the U.N.'s Report on Xinjiang*, LAWFARE (Sept. 15, 2022), <https://www.lawfaremedia.org/article/breaking-down-uns-report-xinjiang>.

67. Eva Pils, "Disappearing" China's Human Rights Lawyers, in *COMPARATIVE PERSPECTIVES ON CRIMINAL JUSTICE IN CHINA*, (Mike McConville and Eva Pils, eds. 2013); Hualing Fu, *The July 9th (709) Crackdown on Human Rights Lawyers: Legal Advocacy in an Authoritarian State*, 27 J. CONTEMP. CHINA 554, 554 (2018).

68. Han Zhu & Lu Jun, *The Crackdown on Rights-advocacy NGOs in Xi's China: Politicizing the Law and Legalizing the Repression*, 31 J. CONTEMP. CHINA 518 (2022); Jingwei Feizhengfu Zuzhi Jingnei Huodong Guanli Fa (境外非政府组织境内活动管理法)[Law on Regulating Activities of Overseas NGOs] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 28, 2016, effective Jan. 1, 2017), [https://www.gov.cn/xinwen/2016-04/29/content\\_5069003.htm](https://www.gov.cn/xinwen/2016-04/29/content_5069003.htm); Heike Holbig & Bertram Lang, *China's Overseas NGO Law and the Future of International Civil Society*, 52 J. CONTEMP. ASIA 574 (2022); *Liu Xiaobo (1955–2017)*, 28 J. DEMOCRACY 185 (2017).

and were defended in sovereignty-based terms akin to those used to assert the legitimacy of less extreme measures earlier in the Reform Era.

The rebuff of international human rights law for sovereignty-invoking or sovereignty-resonant reasons has included other more systematically or ideologically expressed elements. Reform Era official discourse has long denounced foreign—largely Western—efforts at interference in China’s domestic affairs pursuant to a strategy of “peaceful evolution” that seeks to make China into a more liberal and democratic political order—that is, to impermissibly steer China’s exercise of its sovereignty. Such denunciations reject reforms that would advance some internationally recognized conceptions of civil and political human rights. More specific and pointed arguments that “Western” political ideas—especially constitutionalism and separation of powers—were unsuited to China came to the fore during the later Hu Jintao-Wen Jiabao years.<sup>69</sup> Under Xi, this rejection has gone further. A debate over constitutionalism erupted in 2013, with what most observers saw as official backing for an academically weak analysis that expanded upon the view that Western-style constitutional governance was inappropriate and, indeed, destructive for China.<sup>70</sup> Central Committee Document Number 9 of 2013 specifically identified several “false” and dangerous “ideological trends,” including: promoting Western constitutional democracy, “universal values” (which were really Western values), civil society, neo-liberalism, Western ideas about journalism (specifically freedom of the press), “historical nihilism,” and “questioning reform and opening [and] socialism with Chinese characteristics” (in other words, challenging official accounts of PRC history and Reform-Era policy).<sup>71</sup> The Xi-era Five Year Plan for Building the Rule of Law (2020-2025) similarly (and continuing earlier Reform Era themes relevant to human rights) emphasizes the need to “proceed from Chinese realities” including “economic and social development,” “national conditions” and “Chinese legal culture” while also learning from the “*useful* experience of foreign rule of law” (emphasis added), and other Xi-era official human rights statements also have continued to stress sovereignty and relativism.<sup>72</sup>

69. Russell Ong, “Peaceful Evolution,” “Regime Change” and China’s Political Security, 16 J. CONTEMP. CHINA 717, 717 (2007); Cai Yuanming (蔡元明), Weishenme Xifangde Duodangzhi Bushihe Zhongguo (为什么西方多党制不适合中国) [Why a Western-style Multi-Party System Would Not Be Suitable for China], (求是) [QIUSHI], Oct. 1, 2009.

70. Joseph Fewsmith, *Debating Constitutional Government*, CHINA LEADERSHIP MONITOR, no. 42, 2013; Rogier Creemers, *China’s Constitutionalism Debate*, 74 CHINA J. 91, 91 (2015).

71. Guanyu Dangqian Yishixingtai Lingyu Qingkuang de Tongbao (9 Hao Wenjian) (关于当前意识形态领域情况的通报 (9号文件)) [*Communiqué on the Current State of the Ideological Sphere (Document No. 9)*], translated in DIGICHINA (Rogier Creemers trans., Apr. 22, 2013), <https://digichina.stanford.edu/work/communique-on-the-current-state-of-the-ideological-sphere-document-no-9/>.

72. See Wang Yi, State Councilor & Foreign Minister of China, Remarks at the High-level Segment of the 46th Session of The United Nations Human Rights Council: A People-centered Approach for Global Human Rights Progress, (Feb. 22, 2021) (transcript available at Permanent Mission of the People’s Republic of China to the United Nations Office at Geneva and Other International Organizations in Switzerland, [http://geneva.china-mission.gov.cn/eng/dbdt/202102/t20210222\\_9899531.htm](http://geneva.china-mission.gov.cn/eng/dbdt/202102/t20210222_9899531.htm)) (framing human rights in terms of “sense of gains,” happiness, security, and economic development and equality, and calling for upholding “both universality and particularity” of

The late Hu/Xi era pattern concerning international human rights law aligns with trends in contextual factors of power, interests, and aims. First, the wariness of a rising and more internationally influential China has left its mark in this field as well. China's approach to international human rights has become a growing international reputational liability for Beijing, for reasons that reflect both the PRC's human rights record and its power.<sup>73</sup> Especially in the Global North, the geopolitical contest to balance and check China's rising power has relied significantly on an ideological component that overlaps with major norms of international human rights law. The notion of a coalition of "like-minded" states rests on shared liberal-democratic human rights values and, equally important, the contrasts drawn with China.<sup>74</sup> In this circumstance, China's self-interested move is to (re)turn to sovereigntist limitations on the permissibility of intervention or even deep scrutiny of domestic orders and to assert a more pluralist conception of international human rights. In China's relations with the Global South, there has been much less such polarization (and, indeed, China has found allies in its attempts to weaken or blunt international human rights-based criticism).<sup>75</sup> But, as China's reach into the Global South has grown with the BRI and larger diplomatic and incipient military presences, Beijing's human rights principles and practices have become more salient and, for some in host countries, alarming, with China's growing roles seen as eroding local human rights through mechanisms ranging from helping to keep authoritarian rulers in power to labor rights violations by Chinese

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human rights, including variation based on "history, culture, social system and level of economic and social development").

73. See, e.g., Amy Hawkins, *China's Human Rights Record Criticized at UN as It Faces Rare Scrutiny of Policies*, GUARDIAN (Jan. 23, 2024), <https://www.theguardian.com/world/2024/jan/23/china-human-rights-record-criticised-un-faces-rare-scrutiny-of-policies>; Laura Silver, Christine Huang & Laura Clancy, *Negative Views of China Tied to Critical Views of Its Policies on Human Rights*, PEW RSCH. CTR. (June 29, 2022), <https://www.pewresearch.org/global/2022/06/29/negative-views-of-china-tied-to-critical-views-of-its-policies-on-human-rights>; Margaret K. Lewis, *Why China Should Unsign the International Covenant on Civil and Political Rights*, 53 VAND. J. TRANSNAT'L L. 131 (2021).

74. See, e.g., WHITE HOUSE, INTERIM NATIONAL SECURITY STRATEGIC GUIDANCE 20-21 (Mar. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/03/NSC-1v2.pdf>; PRESS & INFO TEAM DELEGATION TO CHINA, *Statement of the EU Delegation to China on the International Human Rights Day 2023*, DELEGATION OF THE EUR. UNION TO CHINA (Dec. 10, 2023), [https://www.eeas.europa.eu/delegations/china/statement-eu-delegation-china-international-human-rights-day-2023\\_en?s=166](https://www.eeas.europa.eu/delegations/china/statement-eu-delegation-china-international-human-rights-day-2023_en?s=166); Andreas B. Forsby, *How "Like-Mindedness" Became the Key Attribute of the China Containment Strategy*, DIPLOMAT (Feb. 9, 2023), <https://thediplomat.com/2023/02/how-like-mindedness-became-the-key-attribute-of-the-china-containment-strategy>.

75. See, e.g., Christopher B. Primiano, *China's Human Rights Statements in the United Nations: What Are the Future Implications?* 16 CHINA: INT'L J. 183 (2018) (China's shielding Global South states from human rights criticism at the UN while criticizing developed countries' records); *Statement on Behalf of the Like Minded Group During Dialogue with the UN High Commissioner*, PERMANENT MISSION OF CHINA TO THE U.N. OFF. AT GENEVA & OTHER INT'L ORGS. IN SWITZ. (Sept. 10, 2019), [http://geneva.china-mission.gov.cn/eng/dbdt/201909/t20190911\\_8192468.htm](http://geneva.china-mission.gov.cn/eng/dbdt/201909/t20190911_8192468.htm); Amr Essam, *The Like-Minded Group (LMG): Speaking Truth to Power*, UNIVERSAL RTS. GRP. (May 10, 2016), <https://www.universal-rights.org/like-minded-group-lmg-speaking-truth-power>; *The Majority of Countries Oppose the Interference in China's Internal Affairs in the Name of Human Rights*, MINISTRY OF FOREIGN AFFS. (Oct. 21, 2021) (China), [https://www.mfa.gov.cn/eng/wjb\\_663304/zwjg\\_665342/zwbd\\_665378/202110/t20211025\\_9980797.html](https://www.mfa.gov.cn/eng/wjb_663304/zwjg_665342/zwbd_665378/202110/t20211025_9980797.html).

companies.<sup>76</sup>

Second, China has less to gain by engaging with important (although not all) aspects of the status quo legal regime for international human rights (and that regime's limited deference to sovereignty). Whatever its human rights record or positions, a more powerful and secure China does not face the incentives for accepting sovereignty-intrusive international standards that it did in 1989 and shortly thereafter. The crackdowns in Hong Kong and Xinjiang and on dissent and civil society within China under Xi have been sufficiently severe and notorious that there is little that Xi's China could or would do to support, or feign, acceptance of and conformity to the prevalent norms of the current order. In these circumstances, and in line with broader Xi era positions that embrace Chinese exceptionalism and nationalism on many fronts,<sup>77</sup> China's limited engagement—in the form of trying to stymie critical reports and to assert its success as measured by the metrics of its own distinctive interpretations of human rights—plausibly serves China's interests.

Third, and somewhat conversely, a more powerful China is better able to disregard or endure the consequences of rejecting in principle and in practice the norms and obligations of the international legal regime for human rights, or unwelcome foreign and international interpretations of them. China has the luxury to articulate and pursue an alternative version. Beijing's accumulated experience in dealing with the regime's institutions has increased its capacity to reduce the adverse consequences. A prominent example is Beijing's actions to undermine or block critical assessments in the UN Human Rights Council, including securing the exclusion of NGOs critical of China from the review and comment processes, and cooperating with other authoritarian states to cooperate on votes to impeded critical assessments of their human rights performance.<sup>78</sup> More broadly, as human rights activists and organizations have observed, China is becoming less amenable to the limited pressure that outsiders can exert on issues of human rights.<sup>79</sup> China's leaders

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76. See Diane A. Desierto, *The Complexities of Democracy, Development, and Human Rights in China's Belt and Road Initiative*, 35 CONN. J. INT'L L. 299 (2020); Marketa Jerabek, *Democracy and Human Rights in the Context of the Belt and Road Initiative* in SECURITY AND DEMOCRACY IN EURASIA: TRANSFORMATION AND DEVELOPMENT IN THE OSCE REGION (Anja Mihr, Paolo Sorbello & Brigitte Weiffen eds., 2023); Christopher Balding, *Why Democracies are Turning Against Belt and Road*, FOREIGN AFFS. (Oct. 24, 2018), <https://www.foreignaffairs.com/articles/china/2018-10-24/why-democracies-are-turning-against-belt-and-road>.

77. See, e.g., Xi Jinping, Gen. Sec'y, Communist Party of China, Report to the 19th National Congress of the Communist Party of China: Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era (Oct. 18, 2017), in THE GOVERNANCE OF CHINA III, 2020, reprinted at NAT'L PEOPLE'S CONG. (Dec. 24, 2021) (China), [https://subsites.chinadaily.com.cn/npc/2021-12/24/c\\_693899.htm](https://subsites.chinadaily.com.cn/npc/2021-12/24/c_693899.htm) (noting the distinctiveness of China's political system and the Chinese dream of national rejuvenation).

78. See, e.g., HUM. RTS. WATCH, *The Costs of International Advocacy: China's Interference in UN Human Rights Mechanisms* (Sept. 5, 2017), <https://www.hrw.org/report/2017/09/05/costs-international-advocacy/chinas-interference-united-nations-human-rights>; Ted Piccone, *China's Long Game on Human Rights at the UN*, BROOKINGS (Sept. 2018), [https://www.brookings.edu/wp-content/uploads/2018/09/FP\\_20181009\\_china\\_human\\_rights.pdf](https://www.brookings.edu/wp-content/uploads/2018/09/FP_20181009_china_human_rights.pdf).

79. See, e.g., Emma Farge, *UN in Rare Move Rejects Debate on China's Treatment of Uyghur Muslims*,



surely came to appreciate during the quarter-century after Tiananmen that threatened sanctions and opprobrium based on international human rights standards have not had a significant effect on China's march toward wealth and power or its opportunities to engage extensively with the outside world politically and economically.<sup>80</sup> Moreover, amid the increasingly adversarial, even Cold War-like relationship between China and the United States (and their respective friends and allies), the view from Beijing appears to be that efforts led by Washington to "keep China down" are already baked in, such that any changes by China on human rights issues would not materially change the situation and, thus, would not be in China's interests.<sup>81</sup>

Fourth, China's reasons to engage or accept the existing international human rights legal regime on its own terms may be weakening as China appears to be increasing its capacity, as well as its commitment, to reshape—as well as evade—relevant norms in ways that serve its preferences and what it sees as its interests. At home, the reinvigoration or sharpening of China's longstanding sovereigntist opposition to outside interference or even judgment over human rights issues is one manifestation. A more striking one is the growing, self-conscious articulation under Xi of a distinctive Chinese vision of politics and governance, one that has little room for what are derided as falsely universalist and actually subversive (to China) Western notions of human rights.<sup>82</sup>

Abroad, the picture is more complicated. China under Xi continues to preach the gospel of sovereignty-based limits on the intrusion of international human rights critiques or interventions into states' domestic affairs (including, most visibly in an international legal context, at the UN Human Rights Council, and, in the realm of

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REUTERS (Oct. 6, 2022, 7:30 PM), <https://www.reuters.com/world/china/un-body-rejects-historic-debate-chinas-human-rights-record-2022-10-06/>; Isaac Stone Fish, *Davos Diary: When It Comes to Human Rights in China, It's Don't Ask, Won't Tell*, FOREIGN POL'Y (Jan. 24, 2015, 7:00 AM), <https://foreignpolicy.com/2015/01/24/davos-diary-when-it-comes-to-human-rights-in-china-its-dont-ask-wont-tell>.

80. See Melinda Liu, *30 Years After Tiananmen: How the West Still Gets China Wrong*, FOREIGN POL'Y (June 4, 2019) <https://foreignpolicy.com/2019/06/04/30-years-after-tiananmen-how-the-west-still-gets-china-wrong>; see also Richard C. Bush, *30 Years After Tiananmen Square, a Look Back on Congress' Forceful Response*, BROOKINGS (May 29, 2019), <https://www.brookings.edu/articles/30-years-after-tiananmen-square-a-look-back-on-congress-forceful-response>.

81. See generally Jacques deLisle & Avery Goldstein, *Rivalry and Security in a New Era for US-China Relations*, in AFTER ENGAGEMENT: DILEMMAS IN US-CHINA SECURITY RELATIONS 1 (Jacques deLisle & Avery Goldstein eds., 2021); Jacques deLisle, *Rethinking a Liberal International Order for Asia? The United States and the Impact of the Ukraine War*, 1 KOREA POL'Y 22 (2023).

82. See, e.g., Qin Gang, Foreign Minister of China, Remarks at the High-level Segment of the 52nd Session of the United Nations Human Rights Council: Following a Chinese Path of Human Rights Development and Contributing China's Strength to Global Human Rights Governance (Feb. 27, 2023) (transcript available at Permanent Mission of the People's Republic of China to the United Nations Office at Geneva and Other International Organizations in Switzerland, [http://geneva.china-mission.gov.cn/eng/zgyw/202302/t20230228\\_11032426.htm](http://geneva.china-mission.gov.cn/eng/zgyw/202302/t20230228_11032426.htm)); Han Zheng, Vice President of China, Statement at the General Debate of the 78th Session of the United Nations General Assembly: Build a Community with a Shared Future for Mankind and Jointly Deliver a Bright Future for the World (Sept. 22, 2023) (transcript available at Ministry of Foreign Affairs of China, [https://www.mfa.gov.cn/eng/zxxx\\_662805/202309/t20230922\\_11148422.html](https://www.mfa.gov.cn/eng/zxxx_662805/202309/t20230922_11148422.html)).

high politics, through its opposition to humanitarian intervention as a possibly incipient doctrine).<sup>83</sup> Yet, a still-inchoate subtext is less sovereigntist concerning other states, particularly in the Global South. As Xi-era China has moved beyond its prior reluctance to promote a “China Model” to top-level statements that China’s experience is something that other developing countries could learn from and emulate, modes of governance—including those at odds with international human rights norms (or mainstream interpretations of them)—can be part of the package, and part of its appeal for (at least) authoritarian rulers in the Global South. Yet, the substantive human rights-related content of any such model remains relatively ambiguous beyond its portrayal as an alternative to Western-origin, liberal-democratic, market-capitalist paradigms. And China is not aggressively exporting, as opposed to holding forth, its still-ambiguous “model.” The verdict is not yet in on the question of whether China’s international agenda goes beyond “making the world safe for autocracy” to actually promoting autocracy (or a Chinese model, however one wants to characterize its contours).<sup>84</sup> The latter remains, at most, still over the horizon, not least because a powerful Xi-era China’s most pronounced international weakness is its “soft power”—the attractiveness abroad of its domestic political order, including human rights-related components. The sovereigntist implications if China were to be able to go, and interested in going, much farther down a path that includes reshaping international human rights law and norms also would likely be ambiguous, taking the form of insisting on the sovereign rights of states to choose to adopt the pro-sovereigntist model that China likely would be proffering.

### III. TERRITORIAL SOVEREIGNTY

Sovereignty has, not surprisingly and almost tautologically, been especially central to China’s approach to the international law of territorial sovereignty. There have been some limited ups and downs, loosely tracking the pattern in other doctrinal areas of international law—although with less extensive departures from a strongly sovereigntist stance. Territorial sovereignty was a primary focus of China’s engagement with international law during the PRC’s first decades. The Chinese Communist Party had come to power as the culmination of a decades-long

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83. HUM. RTS. WATCH, *supra* note 78; Piccone, *supra* note 78; Yu-jie Chen, *China’s Challenge to the International Human Rights Regime*, 51 N.Y.U. J. INT’L L. & POL. 1179 (2019); Zheng Chen, *China and the Responsibility to Protect*, 25 J. CONTEMP. CHINA 686 (2016); Michael C. Davis, *The Reluctant Intervenor: The UN Security Council, China’s Worldview, and Humanitarian Intervention in INTERNATIONAL INTERVENTION IN THE POST-COLD WAR WORLD* (Michael C. Davis, Wolfgang Dietrich & Bettina Scholdan eds., 2004).

84. See generally Jessica Chen Weiss, *A World Safe for Autocracy? China’s Rise and the Future of Global Politics*, FOREIGN AFFS. (June 11, 2019), <https://www.foreignaffairs.com/articles/china/2019-06-11/world-safe-autocracy>; Ginsburg, *supra* note 1; deLisle, *supra* note 21; Jacques deLisle, *Law and the China Development Model in IN SEARCH OF CHINA’S DEVELOPMENT MODEL: BEYOND THE BEIJING CONSENSUS* (S. Philip Hsu, Yu-Shan Wu & Suisheng Zhao eds., Routledge 2011); *China Rejects Allegations of “Exporting Governance Model,”* CGTN (Apr. 10, 2020), <https://news.cgtn.com/news/2020-04-10/China-rejects-allegations-of-exporting-governance-model—Pzg7rxjSe1/index.html>.

nationalist revolution and anti-colonial struggle. Its initial claims to power and legitimacy rested in significant part on its contributions to the Anti-Japanese War and the restoration of a Chinese government's exercise of sovereignty in large swaths of Chinese territory.<sup>85</sup> Redeeming China from the humiliation of multiple colonial and, in the Maoist phrase, "semi-colonial" encroachments and depredations was a major element in the new regime's claim to authority at home and in its mobilization of resources for hard power, including to address the lingering challenges of the ousted ROC regime in Taiwan and the conflict with the U.S. and UN forces on the Korean peninsula. A focus on protecting, restoring, or extending PRC territorial sovereignty over contested or lost areas remained a principal focus for the CCP regime as the U.S. built an alliance network along China's periphery. After the split between Beijing and Moscow, threats to PRC territorial sovereignty from the Soviet Union loomed larger, made manifest in the Soviet dispatch of forces to deal with apostate socialist regimes in Eastern Europe, Moscow's articulation of a claimed right to do so, and armed clashes along the PRC-USSR border. Also in the mix of asserting territorial sovereignty were Beijing's militarized assertion of control over a previously more loosely integrated Tibet and smaller-scale incidents in areas along China's maritime periphery claimed by both China and its neighbors.<sup>86</sup>

In this context of a relatively weak and internationally besieged China—with claims to sovereignty over territory it did not control and a recently restored or somewhat shaky hold over some of the territory it did control looming very large in China's external relations—a focus on territorial sovereignty, an insistence on a particularly robust notion of sovereignty, and a high priority to protect sovereignty claims were to be expected in Mao era China's engagement with international law. China arguably has been most prone to conflict with rival territorial claimants when China has been relatively weak.<sup>87</sup> It was sensible, in terms of China's interests under such circumstances, for China to embrace and invoke sovereignty in light of the specific version that was prominent in international law in the early decades following the Second World War, when sovereignty was especially closely bound up with issues of decolonization and the end of imperialism—principles that had figured prominently in the CCP's rise to power and in the international relations visions and agendas of the newly independent states and the non-aligned movement with which the PRC made common cause in its early decades.

Moreover, China in the Mao era articulated particular sovereignty-centric

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85. See generally James Townsend, *Chinese Nationalism*, 27 AUSTRALIAN J. CHINESE AFFS. 97 (1992) (describing enduring force of nationalism-centered explanations of the Chinese revolution and CCP victory); Tony Saich, *Introduction: The Chinese Communist Party and the Anti-Japanese War Base Areas*, 140 CHINA Q. 1000 (1994).

86. See Nicholas Rostow, *Law and the Use of Force by States: The Brezhnev Doctrine*, 7 YALE J. WORLD PUB. ORD. 209 (1981); Luke T. Chang, *Legal Analysis of the Sino-Soviet Frontier Disputes*, 3 HASTINGS INT'L & COMP. L. REV. 231 (1980); Alfred P. Rubin, *The Position of Tibet in International Law*, 1968 CHINA Q. 110, 139–53 (1968).

87. See generally M. TAYLOR FRAVEL, *STRONG BORDERS, SECURE NATION: COOPERATION AND CONFLICT IN CHINA'S TERRITORIAL DISPUTES* (2008).

positions relating to territorial sovereignty that were especially suited to the PRC's aims and interests. The most striking and distinctive element was the doctrine of "unequal treaties," which the PRC partly inherited from predecessor Chinese regimes and presented as a Chinese contribution to general principles of international law.<sup>88</sup> On this view, the territories that China saw itself as having lost, and that it was not yet in a position to meaningfully seek to recover, were really sovereign territories of China, notwithstanding purported transfers of territorial sovereignty by treaty or the fact of long-term exercises of sovereignty by other states. Taiwan, Hong Kong, the islands in the South and East China Seas, and some areas along China's borders were not, or could not have been, transferred by various Nineteenth century treaties because those treaties were "unequal" and void *ab initio*. The only international legal issue, then, was when China would "resume the exercise of sovereignty" (in the phrase used in the later PRC-UK Joint Declaration on Hong Kong) over territory that had always been China's sovereign territory.<sup>89</sup> As the PRC began to establish diplomatic relations with many states, including the US, other major Western powers, and Japan during the late Mao years, joint statements (including the Shanghai Communiqué with the U.S.) included acknowledgment or understanding (if not recognition or acceptance by Beijing's counterparts) of the PRC position that there was but one China that included Taiwan.<sup>90</sup> Within such a framework, a still-weak China could more comfortably bide its time, tolerating and indeed favoring keeping Hong Kong and Macau off the decolonization agenda of the UN when the PRC gained the Chinese seat, and remaining patient with an extended period of British governance in Hong Kong, Portuguese rule in Macau (even to the point of rebuffing a possible retrocession after a change of regimes in Portugal), and the ROC's control in Taiwan.

To be sure, the picture was not entirely uniform. At times, especially during the Cultural Revolution, Maoist China purported to support leftist revolution inside other states and at least flirted with Marxist-derived notions that class cleavages cutting across states were the important political dividing line.<sup>91</sup> But these arguably anti-sovereignist moments were minor themes in the Mao-era PRC's repertoire, and they were most prominent during a period when China was least engaged with international law and institutions and retained a significant focus on sovereign states (for example, in the formulation that the global countryside—the mostly newly

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88. See sources cited *supra* note 20; see also Wang, *supra* note 1, at 250–62, 333–43.

89. See Wang, *supra* note 1, at 288–315, 333–42; Jacques deLisle, *Sovereignty Resumed: China's Conception of Law for Hong Kong*, 2 HARV. ASIA Q. 21 (1998).

90. See, e.g., *Joint Statement Following Discussions with Leaders of the People's Republic of China, U.S.-China, Feb. 27, 1972* in OFF. OF THE HIST., FOREIGN RELATIONS OF THE UNITED STATES, 1969-1976, VOL. XVII, CHINA, 1969-1972,

<https://history.state.gov/historicaldocuments/frus1969-76v17/d203> (last visited May 20, 2024); Joint Communiqué of the Government of Japan and the Government of the People's Republic of China, Japan-China, Sep. 29, 1972, MINISTRY OF FOREIGN AFFS. OF JAPAN, <https://www.mofa.go.jp/region/asia-paci/china/joint72.html> (last visited May 20, 2024).

91. See, e.g., Michael B. Yahuda, *Chinese Foreign Policy After 1963: The Maoist Phases*, 36 CHINA Q. 93 (1968).

independent states of the developing world—should surround the global cities—the great powers and states of the developed world).<sup>92</sup>

The Reform Era brought a significant but comparatively limited departure from the Mao years. An uncompromising commitment to the principle of sovereignty remained at the core of China's approach to the international law of territorial sovereignty, particularly with respect to the cases that were most important to China (and, in most cases, a matter of China's declared "core interests"): Hong Kong (and the largely ancillary issue of Macau), Taiwan, the South China Sea (and the similar if less complicated issue of the East China Sea), and restive areas under Chinese control (such as Tibet and Xinjiang).<sup>93</sup> In the PRC-UK Joint Declaration on Hong Kong, entered into in 1984, Beijing maintained its familiar insistence that its purported loss of sovereignty over Hong Kong (ostensibly through unequal and therefore void Nineteenth century treaties) had not occurred, and that the return of Hong Kong to Chinese rule pursuant to the Joint Declaration constituted merely China's "resumption of the exercise" of the sovereignty that it had never lost. Nonetheless, in the Joint Declaration, the PRC tolerated London's statement that the UK was transferring the sovereignty it held over Hong Kong Island and the Kowloon Peninsula portions of Hong Kong, and accepted the Joint Declaration as a solemn document having essentially the status of a treaty at international law—one that included extensive and detailed pledges about how post-reversion Hong Kong would be governed and governed differently from the mainland and, thus, how China would exercise its sovereign power to govern the Hong Kong Special Administrative Region.<sup>94</sup>

During the early decades of the Reform Era, Beijing's approach to the issue of Taiwan was broadly similar. In the "White Papers" it issued on the Taiwan issue in 1993 and 2000 and in many other official statements, Beijing did articulate its longstanding position that the Nineteenth century treaty ceding Taiwan to Japan was an invalid and void unequal treaty (or, failing that, that Taiwan had returned to Chinese sovereignty when Japan violated the 1894 peace treaty by invading China in 1937, or when Japan was defeated in the Second World War, leading to the restoration to China of "stolen territories" as pledged by the allied powers in the Cairo and Potsdam Declarations, which Beijing regards as making binding treaty

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92. See Alexander C. Cook, *Third World Maoism in A CRITICAL INTRODUCTION TO MAO* 288–312 (Timothy Cheek ed., 2010).

93. See generally ALLEN CARLSON, UNIFYING CHINA, INTEGRATING WITH THE WORLD: SECURING CHINESE SOVEREIGNTY IN THE REFORM ERA (2005); deLisle, *supra* note 20; Jacques deLisle, *Troubled Waters: China's Claims and the South China Sea*, 56 ORBIS 608 (2012) [hereinafter *Troubled Waters*]; Jacques deLisle, *Borderline Sovereignty Disorder: China and the Law and Politics of the China-India Territorial Disputes*, 12 CHINESE J. COMP. L. (forthcoming 2024).

94. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, China-U.K., Dec. 19, 1984, 1339 U.N.T.S. 23391 [hereinafter the PRC-UK Joint Declaration]. See generally Michael C. Davis, *Constitutionalism and Hong Kong's Future*, 8 J. CONTEMP. CHINA 263 (1999); Jacques deLisle & Kevin P. Lane, *Hong Kong's Endgame and the Rule of Law (I): The Struggle over Institutions and Values in the Transition to Chinese Rule*, 18 U. PA. J. INT'L ECON. L. 195 (1997).

commitments).<sup>95</sup> But here, too, the Reform Era also brought a more flexible and nuanced view of sovereignty over the relevant territory. The “one country, two systems” model that the Joint Declaration promised for Hong Kong was initially developed at the dawn of the Reform Era as a framework for the (re)unification of Taiwan. It was proffered in a New Year’s Day Message to Taiwan Compatriots and variations on the theme continued over the following decades, including major pronouncements by Jiang Zemin and Hu Jintao and top-level organs of the CCP and the PRC state apparatus.<sup>96</sup> To be sure, there were tense moments in cross-Strait relations in this period, especially during the presidencies in Taiwan of Lee Teng-hui (who, among other things, declared in 1999 that the ROC had long been an independent country—a position that Beijing derided as a “two state thesis” incompatible with China’s sovereignty over Taiwan) and Chen Shui-bian (who, among other things, declared that there was “one country on each side” of the Taiwan Strait and sought Taiwan’s admission to the UN, implying its separate statehood).<sup>97</sup> But Beijing’s responses—set forth in their most formal legal form in the 2005 Anti-Secession Law—continued the familiar insistence that Taiwan had not (yet) seceded and thus was currently part of China’s sovereign territory, the specific form of governance of which was negotiable consistent with the “one country, two systems” formula.<sup>98</sup>

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95. TAIWAN AFFS. OFF. & ST. COUNCIL INFO. OFF., THE TAIWAN QUESTION AND THE REUNIFICATION OF CHINA (Aug. 1993) (China), <http://www.china.org.cn/e-white/taiwan/index.htm>; TAIWAN AFFS. OFF. & ST. COUNCIL INFO. OFF., THE ONE-CHINA PRINCIPLE AND THE TAIWAN ISSUE (2000) (China), <http://www.china.org.cn/english/taiwan/7956.htm> [hereinafter ONE-CHINA PRINCIPLE].

96. *Message to Compatriots in Taiwan*, CHINA.ORG.CN (Jan. 1, 1979), <http://www.china.org.cn/english/taiwan/7943.htm>; Jiang Zemin, President of China, Continue to Promote the Reunification of the Motherland (Xinhua News Agency trans., 1995) (Jan. 30, 1995) (transcript available at CSIS Interpret: China, <https://interpret.csis.org/translations/continue-to-promote-the-reunification-of-the-motherland>); Hu Jintao, President of China, Let Us Join Hands to Promote the Peaceful Development of Cross-Strait Relations and Strive with a United Resolve for the Great Rejuvenation of the Chinese Nation (Xinhua News Agency trans., 2008) (Dec. 31, 2008) (transcript available at CSIS Interpret: China, <https://interpret.csis.org/translations/let-us-join-hands-to-promote-the-peaceful-development-of-cross-straits-relations-and-strive-with-a-united-resolve-for-the-great-rejuvenation-of-the-chinese-nation-speech-at-the-forum-marking-t>).

97. Lee Teng-hui, *Special State-to-State Relationship: Responses to Questions Submitted by Deutsche Welle*, 17 AM. ASIAN REV. 165 (1999); Weixing Hu, “Two-State” Theory versus One-China Principle: Cross-Strait Relations in 1999, 2000 CHINA REV. 135 (2000); Eric Lin, *President Chen Defines Cross-Strait Relations as “One Country on Each Side” of the Taiwan Strait*, TAIWAN PANORAMA (Phil Newell trans., Sept. 2002), <https://www.taiwan-panorama.com/en/Articles/Details?Guid=ec93456b-3b98-47d1-8e04-9259a1091c72&CatId=11&postname=President%20Chen%20Defines%20Cross-Strait%20Relations%20as%20%22One%20Country%20on%20Each%20Side%22%20of%20the%20Taiwan%20Strait>; Bonnie Glaser, *China’s Taiwan Policy in the Wake of “One Country on Each Side,”* 24 AM. FOREIGN POL’Y INTS. 515 (2002); Press Release, General Assembly, General Assembly Adopts Work Programme for Sixty-Second Session, Rejects Bid to Include Agenda Item on Taiwan, U.N. Press Release GA/10617 (Sept. 21, 2007).

98. See TAIWAN AFFS. OFF. & ST. COUNCIL INFO. OFF., THE TAIWAN QUESTION AND THE REUNIFICATION OF CHINA IN THE NEW ERA (2022), sec. II, XINHUANET (Aug. 10, 2022), <https://english.news.cn/20220810/d9d3b8702154b34bbf1d451b99bf64a/c.html> (China) [hereinafter NEW ERA]; ONE-CHINA PRINCIPLE, *supra* note 95; deLisle, *supra* note 20; Fan Fenlie Guojia Fa (反分裂国家法) [Anti-Secession Law] (promulgated by the Nat’l People’s Cong., Mar. 14, 2005, effective Mar. 14,

In the South and East China Seas contexts, China during the Reform Era has asserted in White Papers and numerous other official statements (as it also did with Hong Kong and Taiwan) that distant history (albeit selectively read) establishes the basis of China's territorial sovereignty—through discovery and thin occupation—over the landforms within the vast maritime area enclosed by the notorious U-shaped line (which has its origins in pre-PRC era Chinese maps), notwithstanding some Nineteenth century treaties that purported to cede sovereignty over some areas and that China includes on its list of unequal and therefore void treaties. On its most radical (though not most frequent) formulations, China has at least flirted with a more radically expansive notion of territorial sovereignty in international law, suggesting possible sovereignty or near-sovereign rights (partly based in history) over the maritime space in the South China Sea.<sup>99</sup>

Beijing's Reform Era positions on Tibet and Xinjiang have been similar. It has set forth, in authoritative White Papers and other official contexts, arguments that base Chinese claims of territorial sovereignty in selective uses of thin and distant history, that reject some adverse treaties as unequal and void, that embrace some more favorable treaties as acknowledging China's sovereignty, and so on. China's regime for "autonomous regions" for national minority-heavy areas such as Tibet and Xinjiang echoes (albeit with thinner promises of autonomy and as a purely unilateral choice) the Special Administrative Regime structure adopted for Hong Kong and Macau pursuant to the Joint Declarations with the departing colonial powers.<sup>100</sup>

These positions concerning territorial sovereignty and international law during the early decades of the Reform Era were suited to China's interests, given the circumstances it faced and the goals it set within the opportunities shaped by those

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2005) [hereinafter Anti-Secession Law], <https://www.lawinfochina.com/display.aspx?lib=law&id=3970&CGid=>; Jacques deLisle, *Legislating the Cross-Strait Status Quo? China's Anti-Secession Law, Taiwan's Constitutional Reform and Referenda, and the United States' Taiwan Relation Act*, in *ECONOMIC INTEGRATION, DEMOCRATIZATION AND NATIONAL SECURITY IN EAST ASIA* 101, 101–38 (Peter Chow ed., 2007).

99. See MINISTRY OF FOREIGN AFFS., *China's Indisputable Sovereignty over the Xisha and Nansha Islands*, 7 BEIJING REV. 15 (1980) (China); MINISTRY OF FOREIGN AFFS., *THE ISSUE OF THE SOUTH CHINA SEA* (2000) (China); ST. COUNCIL INFO. OFF., *DIAOYU DAO, AN INHERENT TERRITORY OF CHINA* (2012) (China); see generally *Troubled Waters*, *supra* note 93; Peter Dutton, *Three Disputes and Three Objectives*, 64 NAVAL WAR COLL. REV. 42 (2011); Jacques deLisle, *China's Territorial and Maritime Disputes in the East and South China Seas: What Role for International Law?*, in *CHINA'S GLOBAL ENGAGEMENT: COOPERATION, COMPETITION, AND INFLUENCE IN THE 21<sup>ST</sup> CENTURY* 235 (Jacques deLisle and Avery Goldstein eds., 2017).

100. ST. COUNCIL INFO. OFF., *TIBET SINCE 1951: LIBERATION, DEVELOPMENT AND PROSPERITY* (May 21, 2021), [https://english.www.gov.cn/archive/whitepaper/202105/21/content\\_WS60a724e7c6d0df57f98d9da2.html](https://english.www.gov.cn/archive/whitepaper/202105/21/content_WS60a724e7c6d0df57f98d9da2.html); ST. COUNCIL INFO. OFF., *TIBET'S PATH OF DEVELOPMENT IS DRIVEN BY AN IRRESISTIBLE HISTORICAL TIDE* (Apr. 15, 2015), [http://www.scio.gov.cn/zfbps/ndhf/2015n/202207/t20220704\\_130105.html](http://www.scio.gov.cn/zfbps/ndhf/2015n/202207/t20220704_130105.html); ST. COUNCIL INFO. OFF., *HISTORICAL MATTERS CONCERNING XINJIANG* (July 21, 2019), [https://english.www.gov.cn/archive/whitepaper/201907/21/content\\_WS5d33fed5c6d00d362f668a0a.html](https://english.www.gov.cn/archive/whitepaper/201907/21/content_WS5d33fed5c6d00d362f668a0a.html); ST. COUNCIL INFO. OFF., *DEVELOPMENT AND PROGRESS IN XINJIANG* (Sept. 21, 2009), *reprinted at* CCTV (Sept. 21, 2009), <https://english.cctv.com/20090921/104461.shtml>. See also Pitman B. Potter, *Governance of China's Periphery: Balancing Local Autonomy and National Unity*, 19 COLUM. J. ASIAN L. 293 (2005).

circumstances. Taking the positions that Beijing took entailed little risk and helped mitigate some potential problems in its external relations. The PRC's positions on territorial sovereignty remained sufficiently strong and uncompromising that China would not invite interpretations that it was yielding its claim to the areas along its periphery that it regarded as sovereign territory over which it had (temporarily) lost control or areas within the PRC's borders where questions of self-determination and possible secession lurked. For several major territories (Tibet and Xinjiang and Hong Kong and Macau as well), the PRC during the Reform Era (after 1997 in the case of Hong Kong and 1999 in the case of Macau) faced no serious challenges to its assertion that they were sovereign territory of the PRC. The special autonomy regimes threatened, at most, limited constraints (or international criticism and possible sanctions for rejection of constraints) on China's discretion in exercising its sovereign powers over its sovereign territories: both the Special Administrative Region and the Autonomous Region structures were creatures of Chinese domestic law; although the former was grounded in joint declarations, Beijing's positions on the treaty-like bindingness of those pledges was hedged, and any notion of a contract-like *quid pro quo* was rejected.

At the same time, there were potentially significant benefits to China's agendas on territorial sovereignty and broader foreign policy goals that could follow from the complex positions it embraced during this period. Strikingly, the Joint Declaration arrangements—with the Chinese position on territorial sovereignty embodied in them—achieved the return of Hong Kong and Macau to Chinese rule. Beijing's posture on Taiwan held out the prospect of extending that model to achieve a still-greater prize.<sup>101</sup> With no realistic prospect of unifying Taiwan in the near term and faced with the challenges of Taiwanese leaders whom Beijing regarded (or at least depicted) as dangerously separatist, the position Beijing staked out served its interests well. By asserting that Taiwan had not seceded/ceased to be China's sovereign territory—and that it was merely temporarily not under the Chinese national government's control—Beijing made an expansive claim concerning sovereignty in principle (that it belonged to China) and thereby implicitly explained why there was no particular urgency to act to achieve unification in practice (as there would be if Beijing were to concede that Taiwan had seceded or that China had otherwise lost sovereignty over the territory and thus needed to regain it).

In the South China Sea—and to a significant extent the East China Sea as well—Beijing's conception of territorial sovereignty at international law lines up well with efforts to claim economic rights over the resources in and beneath vast areas of ocean and expansive rights to operate in and limit the operation of other states, their militaries, and the companies they might license in the area.<sup>102</sup> Here,

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101. See the PRC-UK Joint Declaration, *supra* note 94; see generally Jacques deLisle, *Law's Spectral Answers to the Cross-Strait Sovereignty Question*, 46 ORBIS 733 (2002) (concerning obstacles to China's proffered—and other—legal solutions to Taiwan sovereignty issues).

102. See deLisle, *China's Territorial and Maritime Disputes*, *supra* note 99; see generally ISAAC B. KARDON, *CHINA'S LAW OF THE SEA* (2023).



several streams in Beijing's Reform-Era positions on sovereignty operated together: claims of territorial sovereignty (rooted in history and surviving despite unequal treaties with, and de facto control by, other states) over all of the small, contested landforms; a highly contestable claim (at least in some contexts) that the small landforms over which China held territorial sovereignty are, under law of the sea rules, capable of generating expansive maritime zones; and an assertion of an extremely capacious notion of the rights (concerning both economic and security matters) that China holds in those maritime areas.

PRC positions on territorial sovereignty over Hong Kong and Macau, the South and East China Seas, and Tibet and Xinjiang also implied—and sometimes explicitly asserted—a sharp distinction between a merely conservative or irredentist Chinese agenda (keeping what China controlled and retaking Chinese territory that had been lost) and an expansionist one (having designs on territory beyond that traditionally claimed by China). During much of the Reform Era, this was a legally coherent position rooted in notions of territorial sovereignty and China's claims to it that might help to assuage concerns abroad that a rising China might be a broadly expansionist power.

China's positions on the use of force, including intervention in the sovereign territory of another state softened in some significant respects during the first decades of the Reform Era.<sup>103</sup> China supported, and sometimes contributed to, UN peace-keeping operations. But these involved uses of force that were limited in scope and purpose (although some expanded to authorize force to protect relief efforts) and that were based on UN authorization and, almost always, an invitation from the host country.<sup>104</sup> In the First Gulf War, China allowed United Nations Security Council ("UNSC") authorization of force to address Iraq's conquest of Kuwait. But the force authorized was in service of bedrock international legal principles of state sovereignty (ones that China has long supported), and the authorized military action was in the form of collective self-defense against an

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103. For an analysis on China's positions on intervention and its legitimacy, see Michael C. Davis, *The Reluctant Intervener: The UN Security Council, China's Worldview, and Humanitarian Intervention*, in *INTERNATIONAL INTERVENTION IN THE POST-COLD WAR WORLD* 241 (Michael C. Davis et al. eds., 2004); Jonathan E. Davis, *From Ideology to Pragmatism: China's Position on Humanitarian Intervention in the Post-Cold War Era*, 44 *VAND. J. TRANSNAT'L L.* 217 (2011); Bates Gill & James Reilly, *Sovereignty, Intervention and Peacekeeping: The View from Beijing*, 42 *SURVIVAL* 41 (2000); Allen Carlson, *Helping to Keep the Peace (Albeit Reluctantly): China's Recent Stance on Sovereignty and Multilateral Intervention*, 77 *PAC. AFFS.* 9 (2004); Chengqiu Wu, *Sovereignty, Human Rights, and Responsibility: Changes in China's Response to International Humanitarian Crises*, 15 *J. CHINESE POL. SCI.* 71 (2009).

104. Examples of these actions, generally under Chapter VI, the peacekeeping part of the U.N. Charter, include: Somalia in the early 1990s under UNSC Resolution 794 (a case in which there was no host government consent but also no functioning government and in which authorization of use of force under Chapter VII was added); Bosnia, the Former Yugoslavia, in the early 1990s under UNSC Resolutions 743, 770, 776, and several follow-on resolutions (another case in which Chapter VII authorization was added, with China sometimes supporting and sometimes abstaining); and East Timor in the late 1990s under UNSC Resolutions 1264 and 1272 (a case in which China supported resolutions for deploying multinational peacekeeping forces welcomed by Indonesia). See S.C. Res. 794 (Dec. 3, 1992); S.C. Res. 743 (Feb. 21, 1992); S.C. Res. 770 (Aug. 13, 1992); S.C. Res. 776 (Sept. 14, 1992); S.C. Res. 1264 (Sept. 15, 1999); and S.C. Res. 1272 (Oct. 25, 1999).

international attack, not the more controversial types of intervention (for example, in internal conflicts) that China ordinarily opposed.<sup>105</sup> China sharply objected to U.S.-led North Atlantic Treaty Organization (“NATO”) intervention in the former Yugoslavia, rejected the highly contested doctrine of “humanitarian intervention” that was offered in some quarters as a rationale, and denounced the actions in the conflict in Kosovo as an improper interference in the internal affairs of another state, a violation of that state’s sovereignty and territorial integrity, and a poorly disguised, self-serving, and illegal effort—primarily by the U.S.—to extend quasi-imperial control or achieve domestic regime change abroad, and as beyond the authority of a regional security organization (NATO) that was neither the UNSC nor a body that included the targeted state (or states that faced imminent threat from the targeted state).<sup>106</sup> Beijing reprised these arguments, in much more muted tones, in response to the U.S.-led “coalition of the willing” intervention in Iraq in 2003.<sup>107</sup> After the Arab Spring and efforts to oust Qaddafi plunged Libya into civil strife in 2011, Beijing reluctantly supported international forcible intervention as legitimate, abstaining from (while raising concerns about) a UNSC resolution vote (supported by the Arab League) authorizing the use of force to protect civilians.<sup>108</sup>

This complex Reform Era pattern on international legal issues relating to territorial sovereignty, too, was relatively well-tailored to China’s interests in the situations it faced. There was little downside. China was sufficiently rich, powerful, and both unthreatened and unthreatening that a more relaxed position on intervention (especially in extreme circumstances) did not risk meaningfully increasing China’s risk of being a target of intervention (or suffering significant fallout from interventions) or of triggering worries abroad that such a stance indicated China was seeking doctrinal cover for its possible interventions. As a veto-wielding permanent member of the Security Council, China could cast significant—arguably decisive—doubt on the legality of any intervention that it chose to oppose. At least that was the logic of China’s further position that only UNSC-approved uses of force or forcible interventions were lawful. At the same time, agreeing to

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105. China voted in favor of UNSC Resolution 660 demanding Iraq withdraw from Kuwait, abstained on UNSC Resolution 678 which authorized member states, under Chapter VII, to use force to expel Iraq from Kuwait, and abstained from Resolution 688, which insisted Saddam Hussein’s regime end abuses of Iraqi civilians and which the U.S. and others later relied upon, over China’s objection, as a basis for forcibly enforcing no-fly zones. *See* S.C. Res. 660 (Aug. 2, 1990); S.C. Res. 678 (Nov. 29, 1990); and S.C. Res. 688 (Apr. 5, 1991).

106. For one example of China’s positions, set forth at the UNSC, see U.N. SCOR, 53rd Sess., 3988th mtg., U.N. Doc. S/PV.3988 (Mar. 24, 1999). China’s opposition also came against the background of the U.S. bombing of the Chinese embassy in Belgrade. *See* S.C. Res. 1244 (June 10, 1999) (China abstaining); *see also* Sakaguchi Yoshiaki & Mayama Katsuhiko, *Significance of the War in Kosovo for China and Russia*, NIDS SEC. REPS., no.3, Mar. 2002.

107. *China’s Position on the US War in Iraq*, PERMANENT MISSION OF CHINA TO THE U.N. (Mar. 26, 2003), [http://un.china-mission.gov.cn/eng/chinaandun/securitycouncil/regionalhotspots/mideast/yjk/200902/t20090214\\_8417803.htm](http://un.china-mission.gov.cn/eng/chinaandun/securitycouncil/regionalhotspots/mideast/yjk/200902/t20090214_8417803.htm).

108. *See* S.C. Res. 1973 (Mar. 17, 2011). *See also* A. Garwood-Gowers, *China and the “Responsibility to Protect”: The Implications of the Libyan Intervention*, 2 ASIAN J. INT’L L. 375 (2012); Anastasia Shesterina, *Evolving Norms of Protection: China, Libya and the Problem of Intervention in Armed Conflict*, 29 CAMBRIDGE REV. INT’L AFFS. 812 (2016).

support uses of force in the more extreme cases, such as Kuwait, and being somewhat open in less clear cases allowed the PRC to bolster its image as an at least somewhat cooperative player in the international regime for peace and security—which was part of Beijing’s evident strategy for increasing its international stature and influence during the Reform Era more generally.

During Xi’s tenure, with some roots in the immediately preceding years, China’s approach to the law of territorial sovereignty and the place of sovereignty in that approach have taken another turn. As in other areas of international law, the direction has been, in general, sovereigntist with respect to China, but complex—particularly in its ambivalence toward other states’ sovereignty. In Hong Kong, the latest installments in a long-running series of formal interpretations of the Basic Law—the Special Administrative Region’s mini-constitution—by the central authorities in Beijing during the Xi era sharply eroded Hong Kong’s promised autonomous governance and hopes for democracy.<sup>109</sup> Beijing increasingly declared that the Joint Declaration had been fully executed and thus that it owed no international legal obligations thereunder (and the UK and others lacked standing to complain about violations of the Joint Declaration).<sup>110</sup> The trend culminated in the adoption and implementation of a draconian National Security Law for Hong Kong, which was a radical exercise (in terms of departure from the relatively liberal Basic Law baseline of earlier times) of China’s plenary sovereign authority to make the rules governing Chinese territory and which was framed partly in terms of protecting China’s sovereignty over Hong Kong from the threats posed by foreign-linked subversive plots, including a very small-scale pro-independence camp.<sup>111</sup>

Concerning Taiwan, developments were less dramatic but trended in a similar direction. During the second presidential term of Ma Ying-jeou in Taiwan, which coincided with Xi’s first years in power, Beijing grew more impatient with the lack of progress toward negotiations over the question of sovereignty and, in turn, toward unification—an agenda with an endpoint but not a clear timeframe that had

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109. See *Legislation: NPC Standing Committee’s Legislative Interpretations—Hong Kong and Macao*, NPC OBSERVER, <https://npcobserver.com/legislation/legislative-interpretations/#3b2e18e9a40e> (last visited May 20, 2024) (collecting all NPC-SC interpretations of the Basic Law for the Hong Kong Special Administrative Region); see also Tony Cheung, *Unpacking Hong Kong’s Laws, 25 Years After Handover: 5 Rulings on Basic Law Where Beijing, Not the City’s Courts, Had Final Say in Key Cases*, S. CHINA MORNING POST (June 22, 2022), <https://www.scmp.com/news/hong-kong/politics/article/3182540/unpacking-hong-kongs-laws-25-years-after-handover-5-rulings>; Cora Chan, *From Legal Pluralism to Dual State: Evolution of the Relationship between the Chinese and Hong Kong Legal Orders*, 16 LAW & ETHICS HUM. RTS. 99 (2022); Jacques deLisle, *Taking Hong Kong’s Constitutional Journey to the World*, 53 HONG KONG L.J. 121 (2023).

110. See *Sino-British Declaration on HK “No Longer Has Realistic Significance”*: Chinese FM, CGTN (June 30, 2017), <https://news.cgtn.com/news/356b7a4d31517a6333566d54/index.html>; *China Voices Firm Opposition to UK, G7 Statements over Hong Kong*, XINHUANET (Mar. 14, 2021), [http://www.news.cn/english/2021-03/14/c\\_139809006.htm](http://www.news.cn/english/2021-03/14/c_139809006.htm).

111. See generally MICHAEL C. DAVIS, MAKING HONG KONG CHINA (2020); Carole J. Petersen, *The Disappearing Firewall: International Consequences of Beijing’s Decision to Impose a National Security Law and Operate National Security Institutions in Hong Kong*, 50 HONG KONG L.J. 633 (2020); Jacques deLisle, *Hong Kong’s Summer of Discontent: Another Battle in the Long War over Autonomy, Democracy, and the Rule of Law*, 63 ORBIS 473 (2019).

been reaffirmed in the 2000 White Paper on Taiwan and the 2005 Anti-Secession Law.<sup>112</sup> Once Tsai Ing-wen became president of Taiwan in 2016, China's posture on legal (and other) issues related to territorial sovereignty sharpened, with a return to condemning the administration in Taipei as being run by secessionists and separatists, more pointed reiterations (which helped Tsai win reelection in 2020) that the one country, two systems model defined by Beijing and first implemented in Hong Kong was the sole acceptable basis for peaceful unification, and a third White Paper on Taiwan issued in 2022. Although the 2022 White Paper broke little new conceptual ground, it came amidst, and contributed to, an escalating drive by Beijing to insist that, as a matter of international law and the views of the international community of states, Taiwan is a mere province of China—that is, that Taiwan is fully part of China's sovereign territory.<sup>113</sup> Under Xi, the recovery of Taiwan has been linked to the high-priority project of the Great Rejuvenation of the Chinese Nation—with “complete reunification” deemed a “historic mission” and a matter of defending “national sovereignty and territorial integrity.”<sup>114</sup>

China's core position concerning its territorial sovereignty claims to Tibet and Xinjiang did not change from the baselines of earlier eras. But some developments did occur that sharpened the emphasis on territorial sovereignty. As in Hong Kong, the exercises of China's asserted plenary discretion in how it governs its territory became substantively harsher and reduced local autonomy, particularly following unrest in Tibet in 2008 and especially starkly in Xinjiang a decade later. The crackdown in Tibet and the large-scale internment of Uyghurs in Xinjiang were framed in the official Chinese account as in part efforts to combat foreign interference and transborder secessionist, terrorist, or extremist influence.<sup>115</sup>

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112. ONE-CHINA PRINCIPLE, *supra* note 95; Anti-Secession Law, *supra* note 98; deLisle, *Legislating the Cross-Strait Status Quo?*, *supra* note 98. See also Jacques deLisle, *Taiwan's Quest for International Space: Ma's Legacy, Tsai's Options, China's Choices, and U.S. Policy*, 60 ORBIS 550 (2016).

113. See NEW ERA, *supra* note 98, sec. I; Jacques deLisle, *Taiwan's Quest for International Space in the Tsai Era: Adapting Old Strategies to New Circumstances*, in TAIWAN IN THE ERA OF TSAI ING-WEN, 239, 239–83 (June Teufel Dreyer & Jacques deLisle eds., 2021); see also JESSICA DRUN & BONNIE GLASER, THE DISTORTION OF UN RESOLUTION 2758 TO LIMIT TAIWAN'S ACCESS TO THE UNITED NATIONS (2022), <https://www.gmfus.org/sites/default/files/2022-03/Drun%26Glaser-distortion-un-resolution-2758-limit-taiwans-access.pdf>; JACQUES DELISLE & BONNIE S. GLASER, WHY UN GENERAL ASSEMBLY RESOLUTION 2758 DOES NOT ESTABLISH BEIJING'S “ONE CHINA” PRINCIPLE: A LEGAL PERSPECTIVE (2024), [https://www.gmfus.org/sites/default/files/2024-04/GMF\\_UNGA%20Res.%202758\\_April%202024%20Report.pdf](https://www.gmfus.org/sites/default/files/2024-04/GMF_UNGA%20Res.%202758_April%202024%20Report.pdf).

114. Xi Jinping, Gen. Sec'y, Communist Party of China, Speech at a Ceremony Marking the Centenary of the Communist Party of China (July 1, 2021) (transcript available at XinhuaNet, [http://www.xinhuanet.com/english/special/2021-07/01/c\\_1310038244.htm](http://www.xinhuanet.com/english/special/2021-07/01/c_1310038244.htm)); see also David Sacks, *What Xi's Major Speech Means for Taiwan*, COUNCIL ON FOREIGN RELS. (July 6, 2021, 4:39 PM), <https://www.cfr.org/blog/what-xi-jinpings-major-speech-means-taiwan>.

115. See, e.g., Lin Le, *China's Perception of External Threats and Its Current Tibet Policy*, 76 CHINA J. 103 (2013); *China Urges U.S. to Stop Supporting Dalai Lama in Any Form*, CONSULATE GEN. OF CHINA IN N. Y. (July 28, 2008), [http://newyork.china-consulate.gov.cn/eng/xw/200807/t20080728\\_4687629.htm](http://newyork.china-consulate.gov.cn/eng/xw/200807/t20080728_4687629.htm); ST. COUNCIL INFO. OFF., TIBET SINCE 1951, *supra* note 100; ST. COUNCIL INFO. OFF., THE FIGHT AGAINST TERRORISM AND EXTREMISM AND HUMAN RIGHT PROTECTION IN XINJIANG (Mar. 2019) (China), [http://english.scio.gov.cn/node\\_8010999.html](http://english.scio.gov.cn/node_8010999.html); *Commentary: Xinjiang Affairs Broke No Foreign Interference*, XINHUANET (Oct. 11, 2019), <http://www.xinhuanet.com/>

Although such positions could trace their lineage to China's use of the post-9/11 emerging international law concerning international terrorism, the most dramatic developments came in the Xi era.<sup>116</sup>

A broadly similar but less dramatic pattern characterized the South China Sea territorial claims. Here, too, the fundamental PRC positions did not change from earlier in the Reform Era. But formal assertions of sovereignty by Beijing ticked up in the late 2000s and thereafter, including the inclusion of the U-shaped line map on submissions to the UN Commission on the Limits of the Continental Shelf, and domestic lawmaking that set up governance structures for some of the landforms and asserted regulatory authority over the disputed areas—as well as building structures, including military installations on disputed landforms, which constituted an especially tangible and indeed provocative assertion of territorial sovereignty.<sup>117</sup> On the specifically international legal front, China refused to participate in—and denied the jurisdiction of—the arbitral panel that issued a landmark ruling in favor of the Philippines in a case brought against China concerning maritime rights in the region. Among the principal arguments China pressed in support of its position was that the tribunal could not determine the maritime zone issue without resolving questions of sovereignty over landforms—a question beyond the jurisdiction of a proceeding applying United Nations Convention on the Law of the Sea (“UNCLOS”) rules and a question that China would not submit to binding third-party resolution. Another argument from China also resonated with expansive claims of territorial sovereignty: the assertion of historic rights to the disputed maritime areas that had not been displaced by UNCLOS.<sup>118</sup>

Finally, and more dramatically, the question of the use of force and intervention went in new and, in some respects, striking directions in China's approach to sovereignty in international law during the Xi era. From 2011 onward, China, along with Russia, began vetoing UNSC resolutions on Syria, marking a partial turn away from the limited (and fluctuating) flexibility China had begun to

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english/2019-10/11/c\_138463836.htm.

116. See generally Liselotte Odgaard & Thomas Galasz Nielsen, *China's Counterinsurgency Strategy in Tibet and Xinjiang*, 23 J. CONTEMP. CHINA 535 (2014); Jacques deLisle, *Security First - Patterns and Lessons from China's Use of Law to Address National Security Threats*, 4 J. NAT'L SEC. L. & POL'Y 397 (2010).

117. See *Troubled Waters*, supra note 93; Feng Zhang, *Chinese Thinking on the South China Sea and the Future of Regional Security*, 132 POL. SCI. Q. 435 (2017); Robert Beckman & Leonardo Bernard, *Maritime Boundary Disputes in the East and South China Seas in FUTURE SEAS E. ASIA* 27, 27-32 (2015).

118. See *Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines*, MINISTRY OF FOREIGN AFFS. (July 12, 2016, 5:12 PM) (China), [https://www.fmprc.gov.cn/eng/wjdt\\_665385/2649\\_665393/201607/t20160712\\_679470.html](https://www.fmprc.gov.cn/eng/wjdt_665385/2649_665393/201607/t20160712_679470.html); see generally MINISTRY OF FOREIGN AFFS., POSITION PAPER OF THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA ON THE MATTER OF JURISDICTION IN THE SOUTH CHINA SEA ARBITRATION INITIATED BY THE REPUBLIC OF THE PHILIPPINES (Dec. 7, 2014) (China), reprinted in 15 CHINESE J. INT'L L. 431 (2016); Jacques deLisle, *Political-Legal Implications of the July 2016 Arbitration Decision in the Philippines-PRC Case Concerning the South China Sea: The United States, China, and International Law in 21 ASIAN Y.B. INT'L L.* 49 (2017); Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 AM. J. INT'L L. 98 (2013); Isaac B. Kardon, *China Can Say "No": Analyzing China's Rejection of the South China Sea Arbitration*, 13 U. PA. ASIAN L. REV. 1 (2018).

show earlier in the Reform Era on questions of intervention and interference in dire circumstances inside other states.<sup>119</sup> The most striking and complex developments in China's positions in this area have concerned Russia's war in Ukraine and its implications for Taiwan scenarios. Three weeks before the war, Putin and Xi issued a lengthy and high-profile joint statement proclaiming their shared view of the importance of sovereignty, foreseeing "limitless" cooperation between their two countries, and denouncing the kindred threats they faced from an overlapping set of adversaries—meaning NATO for Russia and the U.S.-led alignments in the Indo-Pacific for China. At the Munich Security Conference, five days before Russia's invasion, PRC Foreign Minister Wang Yi affirmed China's venerable commitment to sovereignty, independence, and territorial integrity of all states—specifically including Ukraine.<sup>120</sup> Yet, China abstained from the post-invasion Security Council resolution that condemned Russia's action as a violation of the core UN Charter provision prohibiting the use of force against the territorial integrity or political independence of any state and calling for immediate withdrawal of Russian forces, and a similar General Assembly emergency session resolution.<sup>121</sup> Tellingly, China eschewed unequivocally condemning Russia's actions as an impermissible attack on a sovereign state and its territorial integrity and political independence.<sup>122</sup> Instead, Beijing drew distinctions between the situation in Ukraine, which was "complicated" and involved a relationship between "two countries" and thus was "different in nature" from the case of Taiwan, which is an "inalienable" part of China's sovereign territory and where any use of force by China would be a purely internal matter.<sup>123</sup>

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119. Michelle Nichols, *Russia, Backed by China, Casts 14<sup>th</sup> U.N. Veto on Syria to Block Cross-Border Aid*, REUTERS (Dec. 20, 2019), <https://www.reuters.com/article/idUSKBN1YO23S/>; Courtney J. Fung, *Separating Intervention from Regime Change: China's Diplomatic Innovations at the UN Security Council Regarding the Syria Crisis*, 235 CHINA Q. 693 (2018).

120. Zhonghua Renmin Gongheguo he Eluosi Lianbang Guanyu Xinshidai Guojiguanxi he Quanjie Kechixufazhan de Lianheshengming (中华人民共和国和俄罗斯联邦关于新时代国际关系和全球可持续发展的联合声明) [*Joint Statement of the People's Republic of China and the Russian Federation on International Relations and Global Sustainable Development in the New Era*], MINISTRY OF FOREIGN AFFS., secs. III-IV (Feb. 4, 2022, 10:09 PM) (China), [https://www.mfa.gov.cn/zyxw/202202/t20220204\\_10638953.shtml](https://www.mfa.gov.cn/zyxw/202202/t20220204_10638953.shtml); Wang Yi: *All Parties Need to Work Together for Peace, Not Create Panic or Hype Up War*, EMBASSY OF CHINA IN THE U.S. (Feb. 19, 2022, 11:21 PM), [http://www.china-embassy.org/eng/zgyw/202202/t20220220\\_10643724.htm](http://www.china-embassy.org/eng/zgyw/202202/t20220220_10643724.htm).

121. Press Release, Security Council, Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto, U.N. Press Release SC/14808 (Feb. 25, 2022); Stéphanie Fillion, *With Caution and Tact: How Asian Countries Voted on Ukraine at UN*, LOWY INST. (Feb. 9, 2023), <https://www.lowyinstitute.org/the-interpreter/caution-tact-how-asian-countries-voted-ukraine-un>.

122. See Jacques deLisle, *China's Russia/Ukraine Problem*, 66 ORBIS 402 (2022); Qin Gang, *Chinese Ambassador: Where We Stand on Ukraine*, WASH. POST (Mar. 15, 2022, 3:11 PM), <https://www.washingtonpost.com/opinions/2022/03/15/china-ambassador-us-where-we-stand-in-ukraine/>.

123. *State Councilor and Foreign Minister Wang Yi Meets the Press*, MINISTRY OF FOREIGN AFFS. (Mar. 7, 2022, 8:00 PM) (China), [https://www.fmprc.gov.cn/eng/zxxx\\_662805/202203/t20220308\\_10649559.html](https://www.fmprc.gov.cn/eng/zxxx_662805/202203/t20220308_10649559.html); Wang Yi Speaks with U.S. Secretary of State Antony Blinken on the Phone at Request, MINISTRY OF FOREIGN AFFS. (Mar. 5, 2022, 11:55 PM) (China), [https://www.fmprc.gov.cn/mfa\\_eng/wjb\\_663304/wjbz\\_663308/activities\\_663312/202203/t20220306\\_10648426.html](https://www.fmprc.gov.cn/mfa_eng/wjb_663304/wjbz_663308/activities_663312/202203/t20220306_10648426.html); see Zhu Haiquan, *Taiwan Is Not Ukraine*, WASH. POST (Mar. 31, 2022, 2:10 PM), <https://>

China's positions on territorial sovereignty and related matters during the Xi era (and, in some respects, shortly before) both shifted and remained constant in ways that accorded with China's evolving power and international situation, as well as the broad policy responses of China's leadership to those circumstances. First, a tough or re-toughened (from still-high baselines) position on territorial sovereignty made sense in the context of the negative reaction, both abroad and among targeted groups in China, to China's modes of exercising sovereignty over territories that it does control and China's more assertive posture in pressing its claims to territorial sovereignty over areas that are controlled by others. In peripheral areas under Chinese rule, including Hong Kong, Tibet, and Xinjiang, harsh measures in response to perceived or concocted threats of separatism and foreign interference, growing restiveness at the increasingly authoritarian content of Chinese rule, and rising international criticism of Beijing's actions in those regions have meant China had little to lose and something to gain by insisting on its claimed rights as territorial sovereign and reinvigorating its prior "black box" conception of sovereignty that denies the legitimacy of foreign or values-based scrutiny of—much less foreign interference in—domestic governance.

In a key area beyond Beijing's current reach, the Xi-era trajectory of "one country, two systems" in Hong Kong made Beijing's proffered (and, in principle, somewhat-soft-on-sovereignty) model for exercising sovereignty even more thoroughly unappealing in Taiwan, reducing any upside for Beijing in promising accommodating terms for post-unification governance. Beijing's ambiguous position on Russia's assault on Ukraine and its sovereign territory (coupled with China's reaffirmation of its claim to indisputable sovereignty over Taiwan) further reinforced wariness in Taiwan toward the PRC.<sup>124</sup> The reaction, especially in the Global North, to Russia's invasion of Ukraine gave China another reason to stiffen or at least underscore its established positions on territorial sovereignty, especially concerning Taiwan. For Beijing, the prospect that support among democratic states for the regime in Kyiv would lead to stronger international backing for the regime in Taipei, and the risk that Washington, and others, would perceive the war in Ukraine as increasing the likelihood of Chinese coercion of Taiwan and warrant sanctions or intervention, were problems against which China had an interest in pushing back.<sup>125</sup>

In the South China Sea (and to a lesser degree the East China Sea), rising alarm among rival claimant states over China's rising power, its moves to exert greater control over disputed maritime areas and (in turn) access to land forms that China did not control, and its build-up of military installations on landforms that China did control (but over which China did not, in the view of other interested states, and could not, in the view of the Philippines-China arbitral panel, enjoy full-fledged

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[www.washingtonpost.com/opinions/2022/03/31/taiwan-is-not-ukraine](http://www.washingtonpost.com/opinions/2022/03/31/taiwan-is-not-ukraine); deLisle, *supra* note 122.

124. See Alan H. Yang & Hsin-Huang Michael Hsiao, *Taiwanese Perspectives on the Russian Invasion of Ukraine and its Implications*, 8 GLOB. TAIWAN BRIEF (SPECIAL ISSUE) 1 (2023).

125. See Jacques deLisle, *Deterrence Dilemmas and Alliance Dynamics: United States Policy on Cross-Strait Issues and the Implications of the War in Ukraine*, 29 AM. J. CHINESE STUD. 151 (2022).

territorial sovereignty) posed challenges for China. Beijing could, and did, seek a principled foundation for its claims by invoking expansive and uncompromising conceptions of sovereign rights over specified territory. These developments both reflected and reinforced a more confrontational relationship with China's maritime neighboring states, which moved toward closer alignment with the United States. In this context, there was little room or taste (from China's perspective) for China's earlier Reform-Era positions of "setting aside" questions of territorial sovereignty in order to seek cooperation on practical matters, progress toward bilateral agreements, or a possible multilateral code of conduct for the region that would have entailed a more restrained and flexible approach to the exercise of China's claimed territorial sovereignty.

Second, and relatedly, China's agenda and the circumstances it faces in the Xi era mean that China has less to gain from accepting a more relaxed or limited conception of territorial sovereignty. If China were to do so, it would undercut Beijing's reliance on its claims of robust sovereignty as a shield against the increasingly strident and urgent criticisms of—and pushback against—its actions in areas along its periphery within and beyond the current reach of PRC governance. Moreover, China's strong claims that it has sovereignty—long-standing and indisputable—over Tibet, Xinjiang, Hong Kong, Taiwan, and the disputed areas in the South and East China Seas has the virtue of conceptual coherence and it also may offer some international political advantages: in framing expansions or potential extensions of Chinese control over areas outside the Chinese mainland (and Hong Kong and Macao) as mere resummptions of the exercise of sovereignty over China's own sovereign territory, Beijing can hope to mitigate inferences that such moves are harbingers of an expansionism that threatens other states' sovereignty over areas not previously in dispute. More broadly, a strongly sovereigntist position—rejecting the legitimacy of much foreign intervention or pressure on states to change their domestic exercises of sovereignty or modes of domestic governance—aligned with China's broader international legal-political agenda, which has been characterized as promoting "authoritarian international law" or "making the world safe for autocracy" and thereby winning support, especially among non-democratic regimes in the Global South.<sup>126</sup>

Third, as China's behavior in restive or contested regions and the legal rationales it offers for such actions reflect, China has considerable latitude to disregard opprobrium and pressure from abroad concerning its approach to issues of territorial sovereignty. It faces no significant external or internal threat to its control over, and choices concerning how to govern, Hong Kong, Tibet, or Xinjiang, which the international community generally recognizes as part of China's sovereign territory. For Taiwan and the disputed maritime areas, reputational costs, at least with the Global North and among China's neighbors, surely are a source of concern for China, but there is much to indicate that the leadership in Beijing views such costs as already sunk, at least in relations with Washington and, increasingly,

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126. See, e.g., Ginsburg, *supra* note 1; Weiss, *supra* note 84; deLisle, *supra* note 21.



the EU and major East Asian states, or as worth bearing—particularly with respect to Taiwan, which Beijing deems an especially core interest.<sup>127</sup>

Finally, as in other dimensions of international law, the most notable instances of modest softening of China's positions on territorial sovereignty during the Xi era have occurred in dimensions where such adjustments are in accord with China's interests and agendas under the conditions of the times. A pattern of "sovereignty for me, but less for thee" is a promising fit if it can be achieved. China's hedged position on Russia's war on Ukraine—affirming sacred UN principles of territorial state sovereignty yet backing Russia in practice and describing the situation as entirely disanalogous to Taiwan—aligns with China's position as a great power that is the nearest peer competitor to the U.S., that is increasingly and deeply at odds with the U.S. and the Global North, and that therefore sees avoiding weakness or collapse of Russia as serving Beijing's geopolitical interests (while also seeking to avoid an outcome that could cut against China's high-priority interests in insisting on incontrovertible sovereignty over Taiwan). China's expanding presence abroad, especially through the Belt and Road Initiative, has meant greater stakes in, and potentially vulnerabilities to, the internal governance of other states, especially in the Global South. With such developments come reasons and incentives (familiar to earlier great powers) to undertake—and, in turn, offer international legal rationales to defend—interventions that entail a reduced solicitude for the sovereignty of those other states.

Any need for a deeper reorientation, such as might be required to justify much more open or expansive intervention by China in the territory of another state (beyond those "lost" territories over which China claims legitimate and arguably unbroken sovereignty) remains an over-the-horizon problem. But, as with other areas of international law, China's evolving interests could create pressure for a more substantial and coherent doctrinal revision. With China's expanding footprint, particularly with PRC nationals and capital increasingly present and at risk in the Global South, and the PRC's souring relations with the US, other major powers, and many of China's neighbors—as well as China's acquisition of access to far-flung military facilities—the prospect that China will see occasions that may call for the use of force abroad may rise and, with it, pressure to recalibrate Beijing's positions on legal questions of territorial sovereignty and non-interference in the internal affairs of sovereign states.

#### CONCLUSION

During the three-quarters of a century of the PRC era, sovereignty consistently has been a central principle in China's engagement with international law, but it has

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127. See, e.g., Minghao Zhao, *Is a New Cold War Inevitable? Chinese Perspectives on US-China Strategic Competition*, 12 CHINESE J. INT'L POL. 371 (2019); see also John J. Mearsheimer, *The Inevitable Rivalry: America, China, and the Tragedy of Great Power Politics*, 100 FOREIGN AFFS. 48 (2021); Jinghan Zheng, Yuefan Xiao & Shaun Breslin, *Securing China's Core Interests: The State of Debate in Chia*, 91 INT'L AFFS. 245 (2015).

varied notably over time and across doctrinal areas. China's position on sovereignty softened and waned somewhat after the Mao era as an increasingly secure China gained, and took advantage of, opportunities for greater international engagement in ways that effectively required relaxing prior strongly sovereigntist positions (while retaining relatively robust legal means for limiting unwanted erosion or encroachment on sovereignty). Into the Xi era, a still-more-powerful China had still less need for the international legal shield that sovereigntist principles offered, faced a less welcoming international environment (especially from the Global North) that offered reduced rewards for accepting international legal limits to China's own sovereignty, and developed expanded interests (especially in the Global South) where international legal rules favoring strong sovereignty aligned less well with China's aims and interests. The full consequences of those trends may still be emerging—and could sharpen—in the relatively near future.

Differences across doctrinal areas resonate with these patterns of changes over time. The emphasis on China's sovereignty has been most dominant in the national-security-sensitive and strongly state-power-implicating area of territorial sovereignty. At least since the dawn of the Reform Era, China's insistence on sovereignty has been a good deal weaker in the realm of international economic law, where a cost-benefit analysis in terms of China's interests and goals pointed to greater tolerance for intrusion by, and restrictions from, international legal norms and institutions. International human rights law has fallen somewhere in between, with China—at least for a time—loosening what was once an intransigently sovereigntist posture. During the Xi era, China's insistence on China's (if not other states') sovereignty has resurged in some respects amid “securitization” across issue areas. International economic issues have come to be seen by China (and by the United States and others) as more deeply entangled with questions of national security (and thus raising concerns more akin to those seen in the realm of territorial sovereignty). Great power rivalry with the United States (and “like-minded states”) has taken on a more ideological character, with human rights being among the points of friction in a values-based contest. If such mindsets persist, and China's ability to shirk, shake, or shape international legal rules remains robust or grows, the place of sovereignty in China's approach to a wide range of international legal issues could continue to resurge and further reconfigure the salience and the nuances of China's view of its own, and other states', sovereignty across many areas of international law.