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China's Sanctions and Rule of Law: How to Respond When China Targets Lawyers

Thomas D. Grant* & F. Scott Kieff**

The People's Republic of China (PRC) has begun to use sanctions against people who speak out against its policies.¹ Well-known are the sanctions that the PRC's Foreign Ministry Spokesperson announced on January 20, 2021 against twenty-eight persons, both named and unnamed, who recently served or were then serving in the Trump administration, including the then-Secretary of State and National Security Adviser.² On March 26, 2021, however, the PRC announced sanctions against a less conspicuous target: Essex Court Chambers, a set of barristers' chambers in London known for commercial work and investment arbitration.³ What ostensibly provoked China's unusual move was a hundred-odd-page legal opinion. Four barristers in Essex Court—Alison Macdonald QC, Jackie McArthur, Naomi Hart, and Lorraine Aboagye—had

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1. Foreign Ministry Spokesperson Announces Sanctions on Pompeo and Others, Ministry of Foreign Affs. of China (Jan. 20, 2021),

https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1847554.shtml
[<https://perma.cc/3R8H-8YCC>]

2. Id.

3. Foreign Ministry Spokesperson Announces Sanctions on Relevant UK Individuals and Entities, Ministry of Foreign Affs. of China (Mar. 26, 2021),

https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1864366.shtml
[<https://perma.cc/26UC-V73X>]; see also Essex Court Chambers Statement on Sanctions Imposed by Chinese Government, Essex Ct. Chambers (Mar. 26, 2021), <https://essexcourt.com/essex-court-chambers-statement-on-sanctions-imposed-by-chinese-government/>
[<https://perma.cc/F3QY-UDXF>].

supplied the opinion to address whether China might have international criminal responsibility for crimes against humanity and genocide against the Uyghurs.⁴

If China adopted sanctions against a group of lawyers in private practice in a mere fit of pique, then policy makers would have little reason to give the matter much thought.⁵ One would suppose that sanctions against high-profile public officials merit more concern.⁶ And, even sanctions such as those are perhaps not too much cause for worry. We know that PRC officials sometimes adopt a hectoring tone out of rhetorical habit rather than strategic purpose.⁷ Why concern ourselves with China's sanctions unless they have a direct effect on trade, commerce, or other readily quantifiable equities?

But China's recent use of sanctions should not be ignored.⁸ Among China's sanctions last year, the sanctions against the Essex Court barristers are particularly troubling.⁹ For reasons that policy makers need to recognize, those sanctions were not mere rhetoric,¹⁰ and salving a bruised ego was not China's goal in adopting them. China has a method and a purpose, and it connects to a larger strategy that China pursues on the global stage. We need a clear view of how sanctions against private citizens function: they produce immediate effects on the targets they name, but their purpose is to produce lasting effects on the wider community to which the targets belong.¹¹ The community here particularly concerned is the legal profession—and it would be a mistake to think China's focus on that profession is by chance. There are sound reasons to conclude it is by design. The time has come to start thinking about how countries for which the rule of law is not only a core value but also an indispensable tool might respond.

A recent case in the European Union (EU) related to U.S. sanctions merits a closer look for the lessons it offers in crafting a response to China's sanctions strategy.¹² Bank Melli Iran v. Telekom Deutschland,¹³ which the Court of Justice of the European Union (CJEU) decided on

4. See generally Alison Macdonald, et al., International Criminal Responsibility for Crimes Against Humanity and Genocide Against the Uyghur Population in the Xinjiang Uyghur Autonomous Region, Essex Ct. Chambers, (Jan. 26, 2021), https://14ee1ae3-14ee-4012-91cf-a6a3b7dc3d8b.usrfiles.com/ugd/14ee1a_3f31c56ca64a461592ffc2690c9bb737.pdf

5. *Id.* The barristers wrote the opinion on instruction by the Global Legal Action Network, the World Uyghur Congress, and the Uyghur Human Rights Project, human rights groups concerned with the conduct of the PRC government toward the Uyghurs.

6. Ministry of Foreign Affs. of China, *supra* note 3.

7. Ministry of Foreign Affs. of China, *supra* note 1.

8. See *id.*

9. See Ministry of Foreign Affs. Of China, *supra* note 1; see also Ministry of Foreign Affs. Of China, *supra* note 3.

10. See Ministry of Foreign Affs. of China, *supra* note 3.

11. See *id.*

12. Case C-124/20, Bank Melli Iran v. Telekom Deutschland GmbH, ECLI:EU:C:2021:386 (Dec. 21, 2021) [hereinafter Telekom (Judgment)].

13. *Id.* at ¶ 12.

December 21, 2021, illuminates some pitfalls for lawyers advising commercial actors as they manage compliance in a complex environment of conflicting U.S. and EU sanction regimes.¹⁴ The case should also interest policy makers because it illustrates how one sovereign has used a so-called “sanctions blocking” statute against sanctions that it wishes to counteract.¹⁵ The sanctions concerned in the Telekom Deutschland case are U.S. sanctions against Iran; they aim to impede Iran’s nuclear ambitions.¹⁶ The case should interest policy makers, not because it will change anybody’s view for or against U.S. Iran sanctions, but because it offers lessons for policy makers as they strategize a way to counteract the serious effects that China’s sanctions will have if left unanswered.

I. The Method and Purpose Behind China’s Sanctions

Before strategizing a response to China’s sanctions, policy makers need to understand how China intends its sanctions to function—and what China hopes they will achieve.

China, at first glance, in adopting the sanctions against Essex Court would appear to have a narrow aim. The aim would appear to be to penalize a small and specific handful of critics who have drawn attention to China’s egregious record of abuse toward the Uyghurs.¹⁷ On inspection, the effect of the sanctions even on the specific individuals they target would appear to be slight.¹⁸ The four barristers who wrote the opinion about the Uyghurs and the other barristers belonging to Essex Court will no longer be able to travel to China; any assets they might hold in China will be frozen.¹⁹ It is reported that these individuals, or most of them, in fact do not travel to China very often and hold few if any assets there.²⁰

To understand how China intends the sanctions to function, one must widen the aperture and recognize that the people immediately targeted by the Essex Court sanctions are only part of the story. It was Voltaire in his novel Candide who described the death sentence of a British

14. As to the corporate compliance issues that Telekom Deutschland raises, see Thomas Grant & Scott Kieff, Warnings And Guideposts From EU Sanctions Blocking Case, Law360 (June 4, 2021, 5:43 PM) <https://www.law360.com/articles/1390362/warnings-and-guideposts-from-eu-sanctions-blocking-case> [<https://perma.cc/W4KC-R2F3>] (addressing CJEU Advocate General Hogan’s opinion of May 12, 2021 in that case, hereinafter Telekom (Advocate General’s Opinion)).

15. Id.

16. Id.

17. See Ministry of Foreign Affs. of China, supra note 3.

18. Id.

19. Alison Macdonald, et al., supra note 4, at 105; Ministry of Foreign Affs. of China, supra note 3.

20. Primrose Riordan et al., UK Lawyers Feel Ripples of Chinese Sanctions on Essex Court Chambers, Fin. Times (Apr. 4, 2021). <https://www.ft.com/content/e6ab6819-6040-4b7f-b579-3a51658f7a4b> [<https://perma.cc/G3P3-T4FV>].

admiral as an act “pour encourager les autres.”²¹ The admiral in question had displeased the Admiralty, but the real point in sentencing him was to make an example in front of the officer corps as a whole.²² A better understanding of the Essex Court sanctions is much like that: China certainly was not pleased with the four barristers who wrote the opinion and called China to account for its ill-treatment of the Uyghurs,²³ but it would be a mistake to think that that is where the story ends. With the recent seemingly targeted sanctions, China aimed to provide a demonstration to the legal profession as a whole.²⁴ And the demonstration has had visible effects.²⁵

A number of barristers affiliated with Essex Court in Singapore quit the chambers shortly after China adopted the sanctions.²⁶ Toby Landau, a Queen’s Council known for his work in international investment arbitration, quit the chambers “with effect from . . . 2 April 2021.”²⁷ Matthew Gearing QC, a former co-head of arbitration at a major law firm who had planned to move his practice to Essex Court, decided against it.²⁸ Essex Court removed the legal opinion from its website.²⁹

So, China’s method is to make a demonstration—but for what purpose? A reshuffling of nameplates around the Inns of Court in London has resulted from the March 2021 sanctions.³⁰ But this is only a surface reflection of a deeper effect that China evidently seeks to bring about.³¹ We should contemplate that, in fact, China seeks to spread a chill across the legal profession, a subduing influence to stay or silence anybody in the profession who might otherwise advance opinions that call China’s conduct into question or advise or represent parties whom China dislikes.

21 Voltaire, *Candide ou L’Optimisme* 174 (Librairie E. Droz 2d ed. 1931).

22. *Id.*

23. Ministry of Foreign Affs. of China, *supra* note 3.

24. Riordan et al., *supra* note 20.

25. See Jaime Hamilton, Essex Court Chambers Backpedals After China Imposes Sanctions, Roll on Friday (Apr. 1, 2021) <https://www.rollonfriday.com/news-content/essex-court-chambers-backpedals-after-china-imposes-sanctions> [<https://perma.cc/HTD4-KXXZ>]; see also Toby Landau QC Leaves Essex Court Chambers, Essex Ct. Chambers (Apr. 6, 2021) <https://essexcourt.com/toby-landau-qc-leaves-essex-court-chambers/> [<https://perma.cc/2D6E-A4JZ>].

26. Jaime Hamilton, *supra* note 24.

27. Essex Ct. Chambers, *supra* note 24.

28. Gearing Changes Course after China sanctions, Global Arbitration Rev. (Apr. 26, 2021), <https://globalarbitrationreview.com/sanctions/gearing-changes-course-after-china-sanctions> [<https://perma.cc/TRS4-4MLJ>].

29. Neil Rose, Chambers hit by China sanctions battens down the hatches, Legal Futures (Mar. 30, 2021), <https://www.legalfutures.co.uk/latest-news/chambers-hit-by-china-sanctions-battens-down-the-hatches> [<https://perma.cc/ET5S-V9K2>].

30. Hamilton, *supra* note 24; Essex Court Chambers, *supra* note 24.

31. Hamilton, *supra* note 24; Essex Court Chambers, *supra* note 24.

The legal profession functions under rules resembling those of a guild, but nobody today denies that it is also a business.³² And, as businesspeople, lawyers seek to keep and increase their opportunities to do business. That means keeping the clients they have and entering new engagements as new clients come along.³³ The converse is that lawyers are tempted to sidestep those who might cost them business in the future. They seldom if ever do this openly; in many rule-of-law jurisdictions, lawyers' binding ethical duties constrain them from such discrimination.³⁴ Omissions and reticence are hard to detect. However, for a sovereign of China's influence in the world economy, they are not hard to incentivize. With sanctions targeted in a visible way on one group of lawyers, China has communicated a clear incentive to the legal profession.³⁵ The intended result—the legal profession backing away from certain parties—is pernicious.³⁶

II. The Global “Operating System” and China’s Revisionist Aims

And, yet, evidence suggests that the purpose for which China is using sanctions is more ambitious than depriving certain parties and causes of the legal counsel they seek.³⁷

Christopher Ford, a diplomat and national security official in the G.W. Bush and Trump administrations, has argued for a decade that China seeks not to gain mere tactical advantage, but instead to change the “operating system” under which nations and societies function.³⁸ The 2018 US National Security Strategy stated the case like this: China’s goal is “to shape a world consistent with [its] authoritarian model—gaining veto authority over other nations’ economic, diplomatic,

32. Mark A. Cohen, Law Is a Profession and an Industry -- It Should Be Regulated That Way Forbes (Mar. 29, 2018), <https://www.forbes.com/sites/markcohen1/2018/03/29/law-is-a-profession-and-an-industry-it-should-be-regulated-that-way/?sh=45bee33b6598> [<https://perma.cc/ME5V-LYMT>].

33. Id.

34. The Bars Standard Bd. Handbook r. C28 (Bar Standards Bd. 2020).

35. Ministry of Foreign Affs. of China, supra note 3.

36. Id.

37. Christopher A. Ford, U.S.-Australia “Track II” dialogue held at the Australian Defense College in Canberra (Apr. 18, 2013), in Christopher A. Ford, The Asia-Pacific Region’s “Operating System” and The “Chinese Dream” of Global “Return” New Paradigms F. (Apr. 30, 2013), <https://www.newparadigmsforum.com/p1667> [<https://perma.cc/84HY-PT4Z>]; See also A ‘China Model?’ Beijing’s Promotion of Alternative Global Norms and Standards: Hearing Before the U.S.-China Econ. & Sec. Rev. Comm’n, 116th Cong. 35–69, 169–80 (2020) (statements of Daniel Tobin, Member of the China Studies Faculty, National Intelligence University, and Senior Associate (Non-resident), Freeman Chair in China Studies, Center for Strategic and International Studies) [hereinafter Beijing’s Promotion of Alternative Global Norms].

38. Ford, supra note 37; Beijing’s Promotion of Alternative Global Norms, supra note 37.

and security decisions.”³⁹ To shape the world that way means to transform both how countries relate to one another and how they order their own affairs.⁴⁰ China’s goal is not minor adjustments here and there.⁴¹ It is wholesale revision.⁴²

The conclusion that China aims to place itself at the apex of a new social system on a worldwide scale is not based on guesswork.⁴³ China’s leaders have stated that is what China aims to do. Their invocation of the “Strong Military Dream” and “the great rejuvenation of the Chinese nation” underpin the aspiration to return China to world preeminence, which China held until expanding European empires overwhelmed it in the 19th century and a long internal crisis ensued.⁴⁴ In calling to make China once again the most powerful state in the world, China’s leaders make clear that a change of the socio-political system goes hand-in-hand with that goal.⁴⁵ President Xi in 2013 said that China “must . . . build[] a socialism that is superior to capitalism, and lay[] the foundation for a future where we will win the initiative and have the dominant position.”⁴⁶ In his speech in 2017 to the National Congress of the Chinese Communist Party, President Xi predicted that “the Marxism of 21st century China will, without a doubt, emanate more mighty, more compelling power of truth.”⁴⁷

39. Jim Matis, Dep’t of Def., Summary of the 2018 National Defense Strategy of the United States of America: Sharpening the American Military’s Competitive Edge 2 (2018).

40. Id.

41. Id.

42. Id.

43. Dr. Christopher Ashley Ford, Assistant Secretary Bureau of International Security and Nonproliferation, Testimony to the U.S.-China Economic and Security Review Commission (June 20, 2019) in Technology and Power in China’s Geopolitical Ambitions, U.S. Dep’t of State (June 20, 2019), <https://2017-2021.state.gov/technology-and-power-in-chinas-geopolitical-ambitions/index.html> [<https://perma.cc/3R9Z-PWJJ>].

44. Id.

45. Id.

46. Xi Jinping, General Secretary, Uphold and Develop Socialism with Chinese Characteristics (Jan. 5th, 2013), translated in Tanner Greer, Xi Jinping in Translation: China’s Guiding Ideology, Palladium (May 31, 2019), <https://palladiummag.com/2019/05/31/xi-jinping-in-translation-chinas-guiding-ideology/> [<https://perma.cc/8R8C-NYSX>].

47. Xi Jinping, 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, Delivered at the 19th National Congress of the Communist Party of China (Oct. 18, 2017), in Full text of Xi Jinping's report at 19th CPC National Congress, Xinhua (Nov. 3, 2017, 5:17 PM), http://www.xinhuanet.com/english/download/Xi_Jinping's_report_at_19th_CPC_National_Congress.pdf).

Lest President Xi be misunderstood to mean that China will prevail on the strength of compelling argument, China's conduct evinces a strategy of action.⁴⁸ This includes China's strategic lending to low-income countries,⁴⁹ conducted without the democratic and human rights standards applicable to World Bank loans;⁵⁰ its Belt-and-Road Initiative that shunts not only trade but dispute settlement procedures into PRC channels;⁵¹ its endeavor with Russia to reshape the socio-legal systems of Eurasia along lines that eschew the individualism and freedoms associated with the United States and other rule-of-law countries.⁵² China's macro-economic and security policies have significantly affected international economic relations:⁵³ Free trade—which countries have pursued since World War II through the General Agreement on Tariffs and Trade (GATT) and its development into the World Trade Organization (WTO)⁵⁴—relies on the premise

48 See Drew Thompson, The Rise of Xi Jinping and China's New Era: Implications for the United States and Taiwan, 56 *Issues & Stud.: Soc. Sci. Q. on China, Taiwan, & E. Asian Aff.* 204004, 204004-3 (2020).

49 See Sophie Richardson, China's Influence on the Global Human Rights System 3 (2020), https://www.brookings.edu/wp-content/uploads/2020/09/FP_20200914_china_human_rights_richardson.pdf.

50. Jonathan Wheatley, China's secret loan contracts reveal its hold over low-income nations, *Fin. Times* (Mar. 31, 2021), <https://www.ft.com/content/7e98795f-159b-4455-903e-6e21c345d4a9> [<https://perma.cc/Z6VN-AXH4>] (note that the World Bank supports human rights as a part of its twin goals “to end extreme poverty and promote shared prosperity.” See Justice and Development, World Bank, <https://www.worldbank.org/en/topic/governance/brief/justice-rights-and-public-safety> [<https://perma.cc/334D-XA7S>]).

51. Jianguy Wang, Dispute Settlement in the Belt and Road Initiative: Progress, Issues, and Future Research Agenda, 8 *Chinese J. Compar. L.* 4, 11 (2020); Wangwei Lin et al., Developing a Dispute Resolution Mechanism for China's “One Belt, One Road” Initiative, 4 *Co. Law.* 118, 118 (2019).

52. Cf. Press Release, People's Republic of China and the Russian Federation, Joint statement of the People's Republic of China and the Russian Federation on the development of a comprehensive strategic partnership for collaboration in the new era (Jun. 6, 2019), <https://www.bilaterals.org/?joint-statement-of-the-people-s> [<https://perma.cc/9M8E-MW7K>]. See also, Andrew Scobell et al., China's Grand Strategy: Trends, Trajectories, and Long-Term Competition 9 (2020) (leaders in China perceive that they are in a long-term geopolitical competition with the United States), https://www.rand.org/pubs/research_reports/RR2798.html [<https://perma.cc/9XEX-KLLZ>].

53 See John J. Mearsheimer, Bound to Fail: The Rise and Fall of the Liberal International Order, 43 *Int'l Sec.* 7, 46 (2019).

54 See, e.g., Craig VanGrasstek, The History and Future of the World Trade Organization (2013), https://www.wto.org/english/res_e/booksp_e/historywto_e.pdf.

that economic relations are essentially firm-to-firm and, thus, governed by the free market.⁵⁵ China erodes the premise with far-reaching mercantilist and security policies, including its so-called military-civil fusion (MCF).⁵⁶ China, in pursuing its system-changing ambitions, also uses blunt intimidation.⁵⁷ For example, PRC dam-building projects at home and abroad take control of water flow from downstream neighbors—a leveraging tactic that countries widely understand to be illegal.⁵⁸ China asserts claims that would exclude all other nations from the South China Sea, a vast maritime area where international law and the practice of centuries’ standing denies any one country exclusive rights.⁵⁹

55 See Winston H. Griffith, Neoliberal Economics and Caribbean Economies, 44 J. Econ. Issues 505, 505 (2010).

56. See U.S. Dep’t State, Military-Civil Fusion and the People’s Republic of China (2020), <https://www.state.gov/wp-content/uploads/2020/05/What-is-MCF-One-Pager.pdf>. See also, William Barr, Att’y Gen., U.S. Dep’t Just., Remarks on China Policy at the Gerald R. Ford Presidential Museum (July 17, 2020), <https://www.justice.gov/opa/speech/transcript-attorney-general-barr-s-remarks-china-policy-gerald-r-ford-presidential-museum> [<https://perma.cc/M229-NUF7>].

57 See Sec’y State, The Elements of the China Challenge 17-18 (2020), <https://www.state.gov/wp-content/uploads/2020/11/20-02832-Elements-of-China-Challenge-508.pdf>.

58. See Patrick Mendis & Antonina Luszczkiewicz, The Geopolitics of Water and the New Indo-Pacific Strategy, Harv. Int’l Rev. (Mar. 22, 2021), <https://hir.harvard.edu/geopolitics-of-taiwan-and-tibet/> [<https://perma.cc/V7KB-UK27>]. See, e.g., Mirza Zulfiqur Rahman, Geopolitics of Sino-Indian Transboundary Water Management in the Yarlung Tsangpo and the Brahmaputra, 45 *Mondes en Développement* 63, 64 (2017).

59. The exorbitance of China’s claims is not in China’s claims to certain existing natural land features (rocks). It is in China’s assertion that it holds some form of sovereign right over maritime areas that neither law nor modern practice recognize as susceptible to appropriation or unilateral jurisdiction. China is deliberately imprecise—and changeable—when alluding to that sovereign right, but it has used physical intimidation against other countries’ fishing vessels and oil and gas platforms in the area concerned. The main symbolic expression of China’s exorbitant South China Sea claim is the so-called nine-dashed line, communicated in 2009. U.N. Secretary-General, Letter dated May 7, 2009 from the Permanent Mission of the People’s Republic of China addressed to H.E. Mr. Ban Ki-Moon, Sec’y Gen., CML/17/2009, https://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf; U.N. Secretary-General, Letter dated May 7, 2009 from the Permanent Mission of the People’s Republic of China addressed to H.E. Mr. Ban Ki-Moon, Sec’y Gen., CML/18/2009, https://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf. See also, In the Matter of the South China Sea Arbitration (Phil. v. China), Case No. 2013-19, ¶¶ 169-278 (Perm. Ct. Arb. 2016). Regarding the unlawfulness of China’s claims to “some form of exclusive jurisdiction” in the South China Sea, see United States Department of State, People’s

Geopolitics, though out of fashion in most humanities and social sciences faculties,⁶⁰ has shaped the conduct of countries for centuries and continues to do so today.⁶¹ Strategists in the US have recognized the centrality of geopolitical thought to China's leaders,⁶² as those leaders seek to change the international system not merely to give China new advantages but to place China in a position of unrivaled power.⁶³ It is in this sense that China is a revisionist state, not one satisfied with the status quo.⁶⁴

The metaphor of China seeking to replace the "operating system" of world affairs is particularly salient when considering China's use of sanctions against the legal profession.⁶⁵ If any institution in a rule-of-law society belongs to its "operating system," then it is the law.⁶⁶ The courts, party counsel, and adjudication are not mere accessories in the United States and like-minded countries.⁶⁷ They are core elements of how we, in these countries, understand who we are. But they are not just about values or identity: the rules, procedures, and institutions of our legal system are crucial tools, and we rely on them in all aspects of society, including in the operation of

Republic of China: Maritime Claims in the South China Sea 150 Limits in the Seas 1, 14-15, 17-19, 21, 24-25, 30 (2022).

60. But see Univ. Cambridge Centre for Geopolitics, Annual Report 2020 4 (2020), https://www.cfg.polis.cam.ac.uk/system/files/documents/centre_for_geopolitics_annual_report_2020.pdf.

61. See Graham Allison, The New Spheres of Influence: Sharing the Globe with Other Great Powers, 99 Foreign Aff. 30, 30-31, 36, <https://www.foreignaffairs.com/articles/united-states/2020-02-10/new-spheres-influence>.

62. See Robert D. Blackwill & Ashley J. Tellis, Council on Foreign Relations, Revising U.S. Grand Strategy Toward China 36-37 (2015), https://carnegieendowment.org/files/Tellis_Blackwill.pdf.

63 See Hal Brands & Jake Sullivan, China Has Two Paths to Global Domination, Foreign Pol'y (May 22, 2021), <https://foreignpolicy.com/2020/05/22/china-superpower-two-paths-global-domination-cold-war/#> [<https://perma.cc/WH42-AE4L>].

64. See Dep't of Def., Summary of the 2018 National Defense Strategy of the United States of America, <https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf> [<https://perma.cc/BT92-UQG6>]; see also Christopher Ford, Ideological "Grievance States" and Nonproliferation: China, Russia, and Iran, New Paradigms F. (Nov. 12, 2019), <https://www.newparadigmsforum.com/p2442> [<https://perma.cc/UG7D-N32J>].

65. See Chenglin Liu, Risks Faced by Foreign Lawyers in China, 35 Ariz. J. of Int'l & Compar. L. 131, 135 (2018); William Nee, China's 709 Crackdown Is Still Going On, The Diplomat (July 9, 2021), <https://thediplomat.com/2021/07/chinas-709-crackdown-is-still-going-on/> [<https://perma.cc/3CSA-HRZY>].

66. See Raul Cordenillo & Kristen Sample, Introduction, in Rule of Law and Constitution Building: The Role of Regional Organizations 1-2 (Cordenillo & Sample eds.2014),.

67. See Rachel Klienfield Belton, Competing Definitions of the Rule of Law: Implications for Practitioners 8-9, 11 (2005).

government and public administration.⁶⁸ China's sanctions in March 2021, while targeting a small group of lawyers in one country, should be seen as part of a larger strategy to influence legal systems.⁶⁹ Legal systems—as China's strategic vision seems to hold them—are tolerable if they acquiesce in China's conduct, but if they challenge China then China seeks to bring them to heel.⁷⁰ China has discovered sanctions as a tool to pursue that goal.⁷¹

Problematically, the professional practices and habits of mind that make lawyers and judges so important in a rule-of-law society⁷² do not necessarily attune them to the kind of risk involved here.⁷³ Law is about the particulars—particular parties, particular disputes, and particular rules.⁷⁴ It is not the lawyer's job to strategize about geopolitics.⁷⁵ Accordingly, lawyers and judges are not likely to respond to the threat that intrusive and coercive measures such as the Essex Courts sanctions present, except by modifying their behavior case by case.⁷⁶ That is what China likely anticipated.⁷⁷ It is precisely what lawyers did.⁷⁸ Following the sanctions—in some instances

68 Fritz Morstein Marx, The Lawyer's role in Public Administration, 55 Yale L. J. 498, 498 (1946).

69. See Emily Feng, China's New Anti-Foreign Sanctions Law Sends a Chill Through the Business Community, Nat'l Pub. Radio (June 11, 2021), <https://www.npr.org/2021/06/11/1005467033/chinas-new-anti-foreign-sanctions-law-sends-a-chill-through-the-business-communi> [<https://perma.cc/T2KS-NTYC>]; Austin Ramzy, China Moves to Punish Lawyers Hired to Help Hong Kong Activists, N.Y. Times (Jan 4, 2021), <https://www.nytimes.com/2021/01/04/world/asia/china-hong-kong-lu-siwei-ren-quanniu.html> [<https://perma.cc/8ABD-YKST>].

70. See Int'l Serv. for Hum. Rts., Human Rights Defenders and Lawyers in China: A Mid-Term Assessment of Implementation During the UPR Second Cycle 6-8 (2015), https://www.ohchr.org/Documents/HRBodies/UPR/NGOsMidTermReports/ISHR_midterm_China.pdf [<https://perma.cc/EKN4-DDJJ>].

71. See Emily Feng, 'Where No One Dares Speak Up' China Disbars Lawyers on Sensitive Cases, Nat'l Pub. Radio (Feb. 18, 2021), <https://www.npr.org/2021/02/18/963217332/where-no-one-dares-speak-up-china-disbars-lawyers-on-sensitive-cases> [<https://perma.cc/YBD4-XEMX>].

72. See Robert W. Gordon, The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections, 11 Theoretical Inq. L. 441, 457-58 (2010).

73. See Ben. W. Heineman, Jr. et al., Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century 6, 10, 22, 51 (2015).

74. See Jamal Green, Rule of Originalism, 117 Colum. L. Rev. 1639, 1653, 1776 (2016).

75. See Miro Cerar, The Relationship Between Law and Politics, 15 Ann. Surv. Int'l & Compar. L. 19, 21-22 (2009).

76. See Riordan et al., supra note 20.

77. See Judith McMorrow et al., Lawyer Discipline in an Authoritarian Regime: Empirical Insights from Zhejiang Province, China, 30 The Geo. J. of L. Ethics 267, 288, 291, 297 (2017).

78. See Alun John and Scott Murdoch, China's Planned Anti-Sanctions Law for Hong Kong Unsettles Financial Sector, Reuters (Apr. 19, 2021),

almost immediately—lawyers modified their behavior.⁷⁹ They distanced themselves from the colleagues and the organization that China had targeted.⁸⁰ In so doing, they amplified the warning that China had intended.⁸¹ The warning is this: if you express views to which China objects, or represent clients of whom China disapproves, then you should expect China to impose costs.⁸² The result that China hopes thereby to achieve is to silence any who might object to China's conduct⁸³—and, in time, to reconfigure the “operating system” of the rule-of-law world.⁸⁴ That result is not the business of the legal profession alone.⁸⁵

III. Tit-for-Tat? Or Meaningful Impact?

Naturally, when a competing country adopts a measure that one judges to prejudice one's own country's interests, the first reaction is to address the competing country with a reciprocal measure, similar in target and amplitude.⁸⁶ Tit-for-tat is typical in diplomatic incidents⁸⁷: one country expels

<https://www.reuters.com/business/finance/chinas-planned-anti-sanctions-law-hong-kong-unsettles-financial-sector-2021-08-19/> [<https://perma.cc/WB6S-Y5LC>].

79. See China Undermining Human Rights By Locking Up Rights Lawyers, UN Independent Expert Says, U.N. News (Dec. 16, 2020), <https://news.un.org/en/story/2020/12/1080242> [<https://perma.cc/S555-P925>].

80. See Meganne Tillay, Essex Court Loses Another QC After Chinese Sanctions, Law.com Int'l (Aug. 18, 2021), <https://www.law.com/international-edition/2021/08/18/essex-court-loses-another-qc-after-chinese-sanctions/> [<https://perma.cc/U2PD-FRTD>].

81. See Lisa Shuchman, Global Talent Wars and Geopolitics Upend the Legal Industry, Law.com Int'l (Oct. 18, 2021), <https://www.law.com/international-edition/2021/10/18/global-talent-wars-and-geopolitics-upend-the-legal-industry/> [<https://perma.cc/H7LN-HVCD>].

82. See U.S. Dep't of State, Bureau of Democracy, H.R. and Lab, China 2020 Human Rights Report 1-2, 11-12 (2020).

83. See Malcolm Jorgenson, China Is Overturning the Rules-Based Order from Within, The Interpreter (Aug. 12, 2020), <https://www.lowyinstitute.org/the-interpreter/china-overturning-rules-based-order-within> [<https://perma.cc/BZ2M-WLMG>].

84. See Jeffrey Cimmino, A Strategic Framework for Countering China's Human-Rights Violations in Xinjiang 5-7 (2021).

85. See Barbara Dluhosch & Daniel Horgos, (When) Does Tit-for-Tat Diplomacy in Trade Policy Pay Off? 2 (FIW- Rsch. Ctr. Int'l Econ. Working Paper, Paper No. 84, 2012),

86. See Marianne Schneider-Petsigner et al., US-China Strategic: The Quest for Global Technological Leadership 3-6 (2019).

87. See Olga Krasnyak, Tit for Tat: Diplomatic Expulsions and Closures, Univ. of S. Cal. Ctr. for Pub. Diplomacy (Sept. 13, 2017), <https://uscpublicdiplomacy.org/blog/tit-tat-diplomatic-expulsions-and-closures> [<https://perma.cc/JH79-XXQZ>].

an embassy officer, then the other country expels an officer of similar rank.⁸⁸ In diplomatic incidents, states take measures at government-to-government level.⁸⁹ Each measure targets the government itself.⁹⁰ We should ask, however, whether it is adequate here to focus on China itself, in response to the particular challenge that China's anti-rule-of-law sanctions have raised.⁹¹

Several high-profile individuals and institutions, as well as the U.S. and UK governments, have ventured to address the Essex Court sanctions.⁹² It is not clear that the measures taken so far will counteract the sanctions' intended effect.⁹³

The UK Prime Minister and U.S. President "expressed their concern about retaliatory [action]" taken by China."⁹⁴ The UK Foreign Minister addressed the matter, stating that "[i]t speaks volumes that, while the UK joins the international community in sanctioning those responsible for human rights abuses, the Chinese government sanctions its critics."⁹⁵

The regulatory bodies for barristers in the British Isles—the Bar Council of England and Wales, the Faculty of Advocates of Scotland, and the Bar Council of Northern Ireland, and the Bar of Ireland—adopted a joint statement about the sanctions.⁹⁶ The joint statement, *inter alia*, called on

88. See Andrew Osborn & Tom Balmforth, Russia Retaliating Against Washington, Asks 10 U.S. Diplomats to Leave, Reuters (Apr. 12, 2021), <https://www.reuters.com/business/finance/kremlin-says-putin-decide-counter-sanctions-against-washington-2021-04-16/> [<https://perma.cc/3LFN-Q64A>].

89. See *id.*

90. See Heather A. Conley & Roksana Gabidllina, The Costs of Weaponizing Russian and Western Diplomatic Expulsions, Ct. for Strategic and Int'l Stud. (June 10, 2021), <https://www.csis.org/analysis/costs-weaponizing-russian-and-western-diplomatic-expulsions> [<https://perma.cc/2EKX-LV8T>].

91. See, *Securing a Democratic World: The Case for a Democratic Values-Based U.S. Foreign Policy* (2018),

92. See Caroline Simson, Response to China's Sanctions on UK Lawyers Seen as Weak, Law 360 (May 3, 2021), <https://www.law360.com/articles/1379363/response-to-china-s-sanctions-on-uk-lawyers-seen-as-weak> [<https://perma.cc/EH4C-RVZ2>].

93. See *id.*

94. See Johnson and Biden share UK-US concern about Chinese response to sanctions – spokesman, Reuters (Mar. 26, 2021), <https://www.reuters.com/article/uk-britain-usa-johnson-biden/johnson-and-biden-share-uk-us-concern-about-chinese-response-to-sanctions-spokesman-idUSKBN2BI2Y9> [<https://perma.cc/3BGA-62FG>].

95. Press Release, Dominic Raab, Secretary of State for Foreign, Commonwealth and Development Affairs, China's sanctions on UK citizens: Foreign Secretary's statement, <https://www.gov.uk/government/news/uk-sanctions-perpetrators-of-gross-human-rights-violations-in-xinjiang-alongside-eu-canada-and-us> [<https://perma.cc/5UMS-4SYT>].

96. See Statement of the Four Bars on PRC Government Sanctions Against Barristers, <https://www.barcouncil.org.uk/resource/statement-of-the-four-bars-on-prc-government-sanctions-against-barristers.html> [<https://perma.cc/A23U-UYVE>].

“national and international Bar associations to condemn the imposition of these sanctions as an unjustifiable interference with the professional role of lawyers and an attack upon the rule of law internationally.”⁹⁷ The joint statement acknowledged that the sanctions “are . . . a threat to the global legal community,” and called on the People’s Republic of China (PRC), to “review these sanctions.”⁹⁸

Senior executives of the International Bar Association (IBA) also made statements. Mark Ellis, the IBA Executive Director, said that “[w]e respect and applaud those who are holding to account anyone who may be violating the fundamental human rights of others.”⁹⁹ The Executive Director’s remarks are welcome insofar as they reflect his organization’s cognizance of the possibility that somebody might be responsible for human rights violations, even if the remarks were pointedly non-specific with respect to who the violator might be.¹⁰⁰ Sternford Moyo, the IBA President, said that “[i]t is ironic that the very voices the Chinese authorities sought to silence have, inadvertently, been amplified because of imposition of sanctions.”¹⁰¹ These remarks, too, are welcome, expressing solidarity as they do with the lawyers whom China sanctioned.

It is far from clear, however, that amplifying the message was inadvertent. It would appear to be of a piece with the method that China here employs. China’s method in sanctioning the Essex Court lawyers is to induce changes of behavior in the legal profession as a whole; China’s purpose is therefore served when governments and legal institutions merely supply reminders that China is ready to impose costs on lawyers who refrain from adopting those changes.¹⁰² In the responses to date, it is easy to discern reminders—an inadvertent amplification—of the very threat that China aims to communicate. But it is hard to discern any reason for the profession to refrain from doing precisely what Chin’s threats are designed to get them to do.

To have a meaningful impact, a response to China’s sanctions must give the profession a reason to refrain from changing their behavior to comport with China’s preferences: the response must include some practical incentive for lawyers. The EU, with the sanctions blocking statute that it adopted in 1996 to forbid compliance by EU parties with certain foreign sanctions, illustrates one way such a response might be shaped. The EU sanctions blocking statute to date has addressed only US sanctions. The statute is drafted, however, so that it could address other countries’ sanctions as well. That statute may be read, moreover, not just for its specific legal machinery, but for the outline of a general approach to counter-sanctions strategy.

97. Id.

98. Id.

99. Press Release, Int’l Bar Ass’n, China: IBA Salutes Advocates Standing Up for the Rule of Law (Mar. 29, 2021), <https://www.ibanet.org/article/1E5D5333-F4C7-4CA7-9255-C8D5F5CFB3D8> [<https://perma.cc/5CGV-X8PT>].

100. Id.

101. Id.

102. See e.g. Council Regulation 2271/96, art. 1, 1996 O.J. (L 309) 2 (EC).

To begin considering how a blocking statute might work, let us turn to the recent case in which the EU's blocking statute has been applied, Telekom Deutschland, before suggesting some other steps that countries and the legal profession might take along the lines of that general approach.

IV. Telekom Deutschland and Making Counter-Sanctions Work

In Telekom Deutschland, the E.C.J. was called upon to interpret Council Regulation (EC) No. 2271/96 of November 22, 1996—a sanctions blocking statute that aims to “counteract[] the effects of the extra-territorial application” of certain U.S. sanctions laws.¹⁰³ The circumstances were that Telekom Deutschland, seemingly in response to the extraterritorial application of U.S. sanctions addressing Iran, terminated certain service contracts with Bank Melli Iran, an Iranian state-owned bank.¹⁰⁴ The bank sued to restore the service contracts.¹⁰⁵

The Advocate General delivered his opinion in Telekom Deutschland (Opinion) on May 12, 2021 and the Court (Grand Chamber) delivered its judgment on December 21, 2021. In the essential points of the case, the judgment accorded with the Judge Advocate's opinion, though with some important refinements that are salient to how a legislator might fashion a sanctions-blocking law to address China's anti-rule-of-law sanctions.

Under the judgment of December 21, 2021, Bank Melli Iran's case is now referred back to the national court which had stayed proceedings to request the CJEU's judgment.¹⁰⁶ In accordance with the judgment the national court shall apply the EU's sanctions blocking statute, even though the U.S. sanctions law, to date, was not accompanied by any U.S. judgment or other action directly addressing Deutsche Telekom.¹⁰⁷ According to the CJEU, “the mere threat of the legal consequences that could be incurred” by breaching the U.S. sanctions law are “capable of producing [the] effects” that the EU sanctions-blocking statute is intended to prevent.¹⁰⁸ An initial point, then, is that a response to sanctions needs to address the dissuasive effects of sanctions, not just specific legal burdens the sanctions have actually placed on a sanctions target. This is an important point when we consider China's sanctions because, as noted, China intends its sanctions not merely to affect particular targets; it intends them to dissuade important actors throughout society from carrying out their proper functions.

103. Id. at 2.

104. Telekom (Judgment), supra note 12, at ¶¶ 16-22; Telekom (Advocate General's Opinion), supra note 14.

105. Telekom (Judgment), supra note 12, ¶ 23; Telekom (Advocate General's Opinion) supra note 14.

106. Telekom (Judgment), ¶ 34.

107. Telekom (Judgment), ¶¶ 42-51.

108. Telekom (Judgment), supra note 12, at ¶ 49.

The judgment of December 21, 2021 affirms that the blocking statute gives a private party such as Bank Melli Iran standing to sue.¹⁰⁹ As the Advocate General had observed, it is not just for public regulators to enforce the counter-sanctions law.¹¹⁰

Two substantive points that the Advocate General had drawn attention to are particularly relevant for present purposes. First, the Advocate General had concluded that a person who has terminated a contractual obligation with a sanctioned party may be compelled to give reasons why it did so.¹¹¹ So too may a person who has refrained from entering a contractual relationship with a sanctioned party be called upon to give reasons why.¹¹² On our reading, the CJEU's judgment accords with those conclusions.¹¹³

The second substantive point is that a person who has terminated a contractual relationship in order to comply with the sanctions may be compelled by a court to re-enter the relationship.¹¹⁴ The Advocate General acknowledged that this injunction, which is akin to specific performance, is a “blunt” remedy but concluded that the statutory language requires it.¹¹⁵ Here, the CJEU added some important nuance. The CJEU acknowledged that a national court remedy of annulment—by which Deutsche Telekom's termination of its contracts with Bank Melli Iran would cease to have any legal effect and, thus, those contracts, in effect, would be reinstated—would “entail[...] a limitation on the freedom to conduct a business” which is a fundamental right of companies and individuals in the EU¹¹⁶; and, moreover, that reinstating its contracts with the Iranian company, because doing so would run afoul the US sanctions law, would expose Deutsche Telekom to the potential loss of its US business—in other words, nearly half of Deutsche Telekom's entire business.¹¹⁷ The CJEU identified two pathways to avoid such a catastrophic impact on the defendant. One is contained in the EU sanctions-blocking statute itself. Under the second paragraph of Article 5 of the EU Regulation, a party may seek authorization to comply with a foreign sanction. The task of deciding whether to grant such an authorization belongs to the EU

109. Telekom (Judgment), supra note 12, at ¶¶ 59, 67-68.

110. Telekom (Advocate General's Opinion), supra note 14.

111. Id.

112. Id.

113. The judgment interprets Art. 5 of the EU sanctions-blocking law, Regulation No. 2271/96, not to require, in itself, that a party give reasons when terminating a contract with a person on the US sanctions list. Telekom (Judgment), supra note 12, at ¶ 63. However, in a civil proceeding in which the claimant alleges infringement of the Regulation, if the evidence “tends to indicate prima facie” that the defendant has terminated the contract in order to comply with the US sanctions that the Regulation intends to block, then the burden is on the defendant to prove that sanctions compliance was not the reason for termination. Id., ¶ 67.

114. Telekom (Advocate General's Opinion), supra note 14. For reasoning, see id.

115. Id., ¶ 136.

116. Telekom (Judgment), supra note 12, at ¶ 77.

117. Id., ¶ 16.

Commission, to be assisted by a committee of the EU Parliament (the Committee on Extra-territorial Legislation).¹¹⁸

The other pathway available to a defendant is to plead to the national court that non-compliance with the foreign sanctions (which is to say, *compliance* with the EU sanctions-blocking Regulation) will cause an injury to the defendant out of proportion to any benefit that state of affairs will produce for the EU legal order.¹¹⁹ The sanctions-blocking Regulation serves “to protect the established legal order and the interests of the European Union in general,” but the implementation of the Regulation must be in a manner that does not have disproportionate effect on the defendant’s fundamental economic rights.¹²⁰

The two pathways for avoiding adverse economic consequences of ignoring foreign sanctions seem to be intertwined, at least to a degree. In Deutsche Telekom’s case, it appears that the company did not apply to the EU Commission to obtain an authorization to comply with US Iran sanctions.¹²¹ Though the matter will be in the hands of the national court, the CJEU suggests that this omission will weaken any proportionality plea that Deutsche Telekom might make in the national court proceedings.¹²² It would appear that the CJEU is inviting—but does not require—the national court to lay down an incentive on companies to channel future sanctions compliance/non-compliance issues through the EU Commission procedure supplied by the second paragraph of Article 5 of the sanctions-blocking Regulation. The Advocate General thus was correct to say that the remedy for failing to respect the sanctions-blocking Regulation can be “blunt,” but the CJEU has drawn attention to a regulatory channel (through the Commission with assistance of the parliamentary committee) and a proportionality assessment (to be conducted by the national court) that might soften the impact.

The posture of the legal profession in regard to China’s sanctions is not identical to that of companies like Telekom Deutschland engaged in business relationships with sanctioned entities. But the scope of the relevant provision of the EU blocking statute is broad:

“No person referred to . . . shall comply, whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission, with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from the laws specified in the Annex or from actions based thereon or resulting therefrom.”¹²³

118. *Id.*, ¶ 84.

119. *Id.*, ¶¶ 90-95.

120. *Id.*, ¶ 90.

121. *Id.*, ¶ 93.

122. *Telekom (Judgment)*, *supra* note 12, at ¶ 93.

123. Council Regulation 2271/96, *supra* note 103, art. 5. The phrase “[n]o person referred to” brings within Art. 5’s scope a number of categories of persons, including, among others, “any natural person being a resident in the [EU],” and “any legal person incorporated within the [EU].” *Id.* art. 11.

The phrases “based on or resulting, directly or indirectly from” and “based thereon or resulting therefrom” suggest the breadth of the provision’s scope. The provision does not appear to be restricted to active steps that are in direct response to a barred foreign sanctions law (that is, one of the “laws specified in the Annex”).

A blocking statute drafted to address the particular challenge raised by China’s sanctions could both broaden and refine the focus. For example, a legislator might consider calling on professional services firms to demonstrate that their reason for entering or refraining from selected relationships is not to hew to China’s wishes. Under a blocking statute, a firm that avoids potential clients whom China has targeted with sanctions might trigger possible liability exposure. Individual practitioners might face discipline or liability for sanctions compliance or other defined behavior that serves the sanctions’ purpose. So, too, could a sanctions-blocking statute supply pathways such as those that the CJEU identified in the December 21, 2021 judgment, available to a party that demonstrates that complying with the statute in the circumstances would impose on the party a burden out of proportion to the public purpose that the legislator intends compliance to serve.

There may be a role here for professional bodies as well as legislatures. Considering how to fashion a response to the Essex Court sanctions, an eminent English barrister, Lord Sandhurst QC, suggested that the Bar Councils modify their codes of professional conduct.¹²⁴ The object would be to dissuade lawyers from taking clients who might flee the sanctioned set: “Essex Court Chambers cannot be left isolated. It would be intolerable if other chambers or law firms simply took over work which is transferred away from Essex Court. Urgent thought must be given to special codes of conduct to prevent that.”¹²⁵ The Bar Councils (at least as of January 2022) had not modified their codes in any considerable way.¹²⁶

124. Neil Rose, Former Bar Chair’s Rallying Call: ‘We Are All Essex Court Now’, Legal Futures (Apr. 6, 2021, 12:03 AM), <https://www.legalfutures.co.uk/latest-news/former-bar-chairs-rallying-call-we-are-all-essex-court-now>.

125. Id.

126. Some lawyers well may object that such modification would take the codes of professional conduct in altogether new and unfamiliar directions, but the existing codes, in fact, contain provisions that would seem to impose obligations along somewhat similar lines. The present writers are not members of the English bar, so we do not purport to give interpretations of English bar rules. But the Bar Standards Board Handbook contains a number of exacting provisions in relation to the duty of barristers to supply legal services. Bar Standards Board, Bar Standards Board Handbook – Version 4.6 (Dec. 31, 2020). Turning to Rule C28, for example, one reads that, if you are a barrister, “[y]ou must not withhold your services or permit your services to be withheld: 1. on the ground that the nature of the case is objectionable to you or to any section of the public; 2. on the ground that the conduct, opinions or beliefs of the prospective client are unacceptable to you or to any section of the public. . .” Id. § C28. The interpretative Guidance to Rule C28 says that “[t]his obligation applies whether or not the client is a member of any protected group” for purposes of UK statute. Id. Famously, English barristers are subject to the “cab rank rule”—which likens their professional duty to represent clients to the tradition

Private parties might also have a role to play. As noted in Telekom Deutschland, the EU blocking Regulation entails standing for certain private parties to bring suit, where they are ready to make plausible allegations that a defendant's conduct was for purposes of compliance with a barred sanctions law.¹²⁷ The burden on a plaintiff in this regard is not very onerous.¹²⁸ If a claimant "simply provide[s] prima facie evidence" that the defendant "may feel concerned by one of the pieces of [sanctions] legislation mentioned in the annex [to the blocking statute]" and the claimant has fulfilled the general commercial and legal conditions for becoming or remaining the defendant's customer,¹²⁹ then the burden arguably shifts to the defendant. The defendant must then "establish that there was an objective reason, other than the fact that the [claimant] was subject to primary sanctions" to explain why the defendant adopted the course of conduct it did (i.e., terminating a relationship or declining to start one); and the court must "verify the veracity of such [reason]."¹³⁰ Readyng their internal records for litigation along these lines no doubt would place an unwelcome compliance burden on potential future defendants. According to the Advocate General, the burden, however, is one that the EU legislator thought is justified by the policy purpose served.¹³¹

China, with its Essex Court sanctions, seeks to change how the legal system functions by dissuading the legal profession at large from representing clients, interests, or viewpoints that China opposes. To have a meaningful impact, the response that governments and the profession adopt to the sanctions must counteract that dissuasive method. A response to the sanctions, therefore, should be considered that would give the profession incentives that run the other way.

among London cab drivers that a driver is obliged to take the first passenger who requests a ride at the head of a line of cabs. Id. § C29. The bar rules express the rule at Rules C29 and C30. See id. §§ C29, C30. Subject to exceptions relating, inter alia, to fees and professional specialty and availability, a barrister is obliged to accept instructions from a client, irrespective of the identity of the client and the nature of the case to which the instructions relate. Id. § C29. No doubt, the lawyers who moved chambers after China's sanctions in March 2021 have taken care of these rules. But one might ask whether re-organizing one's practice so as not to offend China is the best possible way to fulfill the standards that the Bar places on the profession.

127, Telekom (Judgment), supra note 12, ¶¶ 59, 67-68.

128. See id.

129. Telekom (Advocate General's Opinion), supra note 14.

130. Id., ¶ 98 (emphasis in original); see also id., ¶ 111.

131. Id. ¶ 97. The CJEU in its judgment of Dec. 21, 2021, on our reading, does not take any clear exception with the Advocate General on this point about compliance burden. Moreover, where the judgment identifies the possibility of the burden of proof shifting to the defendant (Telekom (Judgment), supra note 12, ¶ 68), it follows that a prudent business with a potential exposure to US sanctions liability will take steps in its own decision-making and record-keeping to prepare itself for the situation in which a plaintiff might demand proof of the reason for its acts or omissions.

Sovereign-to-sovereign measures may also have a role to play as rule-of-law societies address China's sanctions, but measures that function only at sovereign level do not quite hit the mark. In pursuit of its larger goals, China's method is to induce change in private behavior, and so a sanctions counter-strategy needs to focus at the private level too.

The European Parliament, on May 20, 2021, gave an example of what a sovereign-level response might look like.¹³² China had sanctioned certain EU parliamentarians.¹³³ The Parliament voted to freeze efforts to ratify the Comprehensive Agreement on Investment, an EU-China trade treaty.¹³⁴ According to the European Parliament's resolution on the matter, it "considers it crucial for the EU and all its institutions to stand united against this attack against European democracy and in defending our common values."¹³⁵ The resolution "demands that China lift the sanctions before Parliament can deal" with the trade agreement.¹³⁶ It also said that "intimidation attempts [by China] are futile."¹³⁷ The resolution is encouraging because it suggests that at least one important legislator recognizes the gravity of the situation.¹³⁸ Assuming that the resolution results in a serious delay in the EU-China trade negotiations, it is not a mere token.¹³⁹

But the Parliament resolution is still very much in the traditional mold; it is a sovereign-to-sovereign measure, addressed to a government to get that government to do, or refrain from doing, something.¹⁴⁰ To this extent, suspending trade negotiations, while helpful, does not respond everywhere that a response must be felt. China's sanctions have already bypassed the classic channel of intergovernmental relations.¹⁴¹ China does not intend the sanctions to change the conduct of this or public authority regarding one or another specific issue.¹⁴² China's target is the behavior and habits of mind of private institutions and individuals, who form a critical piece of the

132. See generally Resolution on Chinese Countersanctions on EU Entities and MEPs and MPS, Eur. Parl. Doc. P9_TA(2021)0255 (2021).

133. *Id.* ¶ D.

134. Jorge Liboreiro, MEPs Vote to Freeze Controversial EU-China Investment Deal, Euronews (June 24, 2021), <https://www.euronews.com/2021/05/20/european-parliament-votes-to-freeze-controversial-eu-china-investment-deal> [<https://perma.cc/K6RG-XAN4>].

135. Resolution on Chinese Countersanctions on EU Entities and MEPs and MPs, *supra* note 120, ¶ 9.

136. *Id.* ¶ 10.

137. *Id.* ¶ 3.

138. See *id.* ¶ H.

139. See *id.* ¶ 6.

140. *Id.*

141. See Riordan et al., UK Lawyers Feel Ripples of Chinese Sanctions on Essex Court Chambers, Financial Times (April 4, 2021), <https://www.ft.com/content/e6ab6819-6040-4b7f-b579-3a51658f7a4b> [<https://perma.cc/7XQP-LL6W>].

142. See *id.*; See also Christopher Ford, Ideological "Grievance States" and Nonproliferation: China, Russia, and Iran, New Paradigms Forum (Nov. 12, 2019), <https://www.newparadigmsforum.com/p2442> [<https://perma.cc/C6JU-PC3W>].

operating system of a rule-of-law society.¹⁴³ The Essex Court sanctions are a tool to induce systemic change.¹⁴⁴ To counteract them, rule-of-law societies need to shape a response that reaches the same audience and influences that audience to continue to play its proper role within the system to which it belongs.

V. The Equivalency Trap

Some might say that China's sanctions are, in effect, equivalent to the sanctions that the US has employed for many years; that China's sanctions are no more troubling than those sanctions; and, thus, it lies ill in the mouth of policy makers in the United States, or its allies, to criticize China. In at least two respects, however, China's sanctions are very much unlike sanctions employed by the United States.

First, the ongoing US-EU contest over sanctions and their secondary effects does not, or at least should not, concern policy goals.¹⁴⁵ It concerns, instead, what tools are appropriate for a country to use in regard to an area of policy where a great deal of common ground exists.¹⁴⁶ Nuclear nonproliferation and counterterrorism are not at odds with rule-of-law; to the contrary, these are policies supported, at least in word, by practically all countries.¹⁴⁷ No such common ground exists between China and the democratic countries in which China is targeting its sanctions. The difference with China is over both the propriety of PRC sanctions that have effects outside China and the policies and socio-political change that China hopes the sanctions will promote.

Second, the conduct from which China's sanctions aim to dissuade individuals and institutions is of systemic importance to the societies in which those sanctions have their intended dissuasive effects: China's sanctions threaten freedom of expression, freedom of association, and the functioning of the legal profession in service to the rule of law.¹⁴⁸ While the EU judges it to be an infringement of its rights when US sanctions deter a German telecommunications company from providing phone service to an Iranian bank, we think a more serious concern is a sanction that coerces the Bar into resiling from its duty to represent parties in litigation, to supply candid legal advice, and to take principled stands in defense of human rights.¹⁴⁹ The Essex Court sanctions

143. Essex Court Chambers Statement Sanctions Imposed by Chinese Government, Essex Courts Chambers (Mar. 26, 2021), <https://essexcourt.com/essex-court-chambers-statement-on-sanctions-imposed-by-chinese-government/> [<https://perma.cc/L97E-H2GQ>].

144. See Riordan et al., supra note 141.

145. Telekom (Advocate General's Opinion), supra note 14.

146. Id.

147. See id. ¶ 2; See also Christopher Ford, supra note 130.

148. See Andrew Scobell Et. Al., China's Grand Strategy: Trends, Trajectories, and Long-Term Competition, 9 (Rand Corp., 2020)..

149. See Telekom (Advocate General's Opinion) supra note 14; See also Riordan et al., supra note 141.

aim to cast a pall over the legal profession, not merely to stop certain commercial actors from engaging in specific transactions.¹⁵⁰

We think that to suggest equivalency between the US and PRC sanctions is to fall into a trap. Human beings tend to habituate to new realities. If PRC sanctions, such as those against Essex Court, come to be accepted as a new reality, then, no doubt, English barristers will habituate themselves to it.¹⁵¹ We submit that quitting our professional affiliations and self-censoring in response to threats from a one-party dictatorship that seeks a free hand to suppress its ethnic minorities and impose its “operating system” on the world at large is not a good habit. On the contrary: it is behavior that a rule-of-law society should act to prevent. Declaring PRC sanctions to be equivalent to western sanctions is unconvincing on the merits, and, we fear, it invites habituating to PRC sanctions.

The wider legal setting behind the EU blocking statute is relevant here. The recitals to the EU blocking statute declare that the extraterritorial application of “such laws, regulations and other legislative instruments” as the US instruments targeted by the statute “violate international law.”¹⁵² The Advocate General observed that academics and parliamentarians in some EU Member States have said that US sanctions, when the sanctions have extraterritorial effects, are “not easily reconciled with general principles of public international law,”¹⁵³ a view that the CJEU, quoting the recitals of the sanctions-blocking Regulation, reiterated.¹⁵⁴ If US sanctions are not, then China’s sanctions, serving to insulate China from scrutiny for evidently gross violations of human rights, must be very difficult to reconcile with those principles indeed. True, the objections that the Advocate General mentioned are objections about extraterritoriality, irrespective of the policies that the sanctioning government pursues.¹⁵⁵ But if “general principles of public international law” are brought into the picture, then it is unclear to us why those principles should be limited to scrutinizing the sanction’s methods: surely, the sanction’s *purpose* also should enter into how rule-of-law countries respond.¹⁵⁶

VI. Summing Up: The Geopolitical Challenge and Making Counter-Sanctions Strategy

150. Neil Rose, Chambers Hit by China Sanctions Battens Down the Hatches, Legal Futures (Mar. 30, 2021), <https://www.legalfutures.co.uk/latest-news/chambers-hit-by-china-sanctions-battens-down-the-hatches> [<https://perma.cc/FE5H-YVVT>].

151. Riordan, et al., supra note 141.

152. Council Regulation 2271/96, supra note 103 at 1.

153. Telekom (Advocate General’s Opinion), supra note 14.

154. Telekom (Judgment), supra note 12, at ¶ 3; See also id.

155. See Telekom (Advocate General’s Opinion), supra note 14.

156. See id.

Work

The democratic-liberal world has faced geopolitical challenges before, but the challengers in the past, though using a wide range of tactics, seldom used sanctions.¹⁵⁷ Sanctions that exclude an individual or a firm from a market are useless if nobody wants in that market. The USSR, the democratic-liberal world's chief competitor from 1945 to 1989, was not a market that very many individuals or firms in the free world were eager to enter.¹⁵⁸ The USSR, therefore, did not attain strategic objectives by using sanctions against individuals or firms in the free world.¹⁵⁹ By contrast, many around the world *are* eager to participate in China's market.¹⁶⁰ A PRC sanctions law that excludes a professional or commercial actor from China's market, therefore, has the potential to be an effective tool in China's international relations.¹⁶¹ China indeed now has begun to use sanctions.

The initial indications are that China has aimed its sanctions smartly. The recent experience with China's Essex Court sanctions suggests that the legal profession will respond quickly to a sanctions threat.¹⁶² The Essex Court sanctions were aimed at a small number of lawyers but carried an unmistakable message to the legal profession at large: cross China, and face consequences.¹⁶³ The United States, United Kingdom, and like-minded countries should be concerned if China targets *any* industry with sanctions, but China's targeting of the legal profession should occasion particular concern.¹⁶⁴ The legal services industry is not just another industry. In a society based on rule of law, it is vital to every aspect of society.¹⁶⁵ To change the operating code of the legal

157 See Sanctions Are Now a Central Tool to Governments Economy, *The Economist* (April 22, 2021), <https://www.economist.com/finance-and-economics/2021/04/22/sanctions-are-now-a-central-tool-of-governments-foreign-policy> [<https://perma.cc/E26F-Y2WP>].

158 Polly Mosendz, Russian Sanctions Have Been Pointless, but the Next Ones Could Hurt the U.S. More, *The Atlantic* (Mar. 5, 2014), <https://www.theatlantic.com/international/archive/2014/03/russian-sanctions-have-been-pointless-but-the-next-ones-could-hurt-the-us-more/359502/> [<https://perma.cc/9PMF-MRA3>].

159 *Id.*

160 John Hung, Doing Business in China, 4 (2020), <https://www2.deloitte.com/content/dam/Deloitte/cn/Documents/international-business-support/deloitte-cn-csg-doing-business-in-china-2020-en-201102.pdf>.

161 Riordan et al., *supra* note 141.

162 *See id.*

163 *Id.*

164 *See id.*

165 David Papke, Rule of Law in American Life: A Long and International Tradition, *American Bar Ass'n* (August 29, 2019), https://www.americanbar.org/groups/public_education/resources/rule-of-law/rule-of-law-in-american-life--a-long-and-intentional-tradition/ [<https://perma.cc/3VEN-GU4D>].

profession the way that China seeks would be to change society in fundamental ways.¹⁶⁶ It is China's concept of "legal warfare," which other writers have recently addressed,¹⁶⁷ directed against law itself.

The change that China seeks by targeting lawyers with sanctions is in service to geopolitical objectives that China's leaders openly articulate.¹⁶⁸ Nation-states functioning on the basis of democratic-liberal principles are at odds with the "harmonious society" that China says will come to pass when China returns to its natural place as the central polity and political system of the world.¹⁶⁹ Accordingly, those principles—the operating system of rule-of-law societies—must give way to China's conception of governance if China is to achieve its aspiration in the stated way.¹⁷⁰

The democratic-liberal countries, when facing geopolitical revisionist states in the past, faced them essentially at the intergovernmental level.¹⁷¹ Interpenetration of societies and economies was minimal, and so, geopolitical strategy was directed at influencing domestic constituencies only to a degree. It is the systematic, large-scale targeting of key constituencies *in* democratic-liberal societies that identifies China's sanctions as a new concern.¹⁷²

In its strategy today, China might well say that its sanctions intrude upon democratic-liberal countries nowhere near as much as Europe's measures of socio-political control did in China in the age of Europe's rise.¹⁷³ There may be echoes here, if distant, of China's experience in the 19th and early 20th centuries with the so-called capitulations—treaty arrangements under which China's courts and legal profession were subordinated to European jurisdiction, so that disputes

166 See Munoz Mosquera & Sascha Dov-Dominik (Dov) Bachmann, How China Uses Strategic Preconditioning in the Age of Great Power Competition, Fletcher Forum of World Affairs (last visited May 18, 2021), <http://www.fletcherforum.org/home/2020/5/13/how-china-uses-strategic-preconditioning-in-the-age-of-great-power-competition> [<https://perma.cc/R2LD-H6YK>]; See also Christopher Ford, supra note 130.

167. Mosquera, supra note 153.

168 See Orazio Coco, Contemporary China and the Harmonious World Order in the Age of Globalization, The Chinese J. of Corp. Governance, 1 (2020).

169. For a not unsympathetic account of China's understanding of "harmony" in geopolitics, but nevertheless expressing the essentials, see Orazio Coco, Contemporary China and the "Harmonious" World Order in the Age of Globalization, 6(1) Chinese J. of Global Governance 1-19 (2020).

170. Id.

171 See Orazio Coco, supra note 155.

172 See id.

173 See Erwin Lowenfeld, The Mixed Courts in Egypt as Part of the System of Capitulations after the Treaty of Montreux, 26 Transactions of the Grotius Soc'y 83, 83 (1940) (discussing the capitulations and mixed courts in the region covered by the Ottoman Empire); see also Christopher A. Ford, The Asia-Pacific Region's "Operating System" and the "Chinese Dream" of Global "Return" New Paradigms Forum (Apr. 30, 2013), <https://www.newparadigmsforum.com/p1667> [<https://perma.cc/4DKX-BFNB>].

involving Europeans (and select Chinese collaborators) were no longer subject to the laws and procedures of China but, instead, removed to “mixed courts” set up by the European countries in key Chinese cities.¹⁷⁴ Capitulations were indeed an instrument of European domination in China and around the world.¹⁷⁵ They were a significant, and justified, object of grievance.¹⁷⁶

But moral equivalence is a trap. Pleas that turnabout is fair play, while perhaps aesthetically pleasing for the symmetry they invite between past and future, do nothing to come to grips with the problem we face today. It is neither in the interest of democratic-liberal countries nor an obligation on our part to accept the demands of a single-party state that we change to accommodate that state’s plans for reordering world affairs. The substantive merits of the case certainly do not recommend that we change our socio-political system to imitate China’s.¹⁷⁷ The continuing practice of China of sending its students, engineers, and scientists to universities and research institutions in the democratic-liberal countries, and China’s almost frantic intellectual property theft,¹⁷⁸ are not redolent of self-confidence or success. It is hardly time to abandon the principles that have served democratic-liberal societies so well.

The Telekom Deutschland case suggests, at least in a general way, how democratic-liberal societies might defend our principles.¹⁷⁹ China’s sanctions target private actors with material inducements and deterrents, and they set an example that other private actors, as things stand today, find difficult to ignore.¹⁸⁰ A counter-sanctions strategy, therefore, will work best if it addresses

174 Lowenfeld, supra note 160

175. Id.

176. Perhaps the most conspicuous procedural incident of that grievance was the Sino-Belgian case of 1927. See Denunciation of the Treaty of Nov. 2nd, 1865, Between China and Belgium, (Belg. v. China), Judgment, 1927 P.C.I.J. (ser. A) No. 8 (where the Permanent Court, in provisional measures that it adopted on Jan. 8, 1927, directed China to continue the capitulatory régime of the 1865 treaty, at least to the extent, for example, that China was to continue to respect “a right on the part of any Belgian who may commit a crime against a Chinese or any other offence against the law, not to be arrested except through a consul, nor to be subjected, as regards the execution of any penalty involving personal violence or duress, to any except the regular action of Belgian law”).

177. See Ben Rigby, UK and Ireland Bar Associations Team up to Condemn China’s Sanctions on Essex Court Chambers, The Global Legal Post (April 27, 2021), <https://www.globallegalpost.com/news/uk-and-ireland-bar-associations-team-up-to-condemn-china39s-sanctions-on-essex-court-chambers-43346750> (criticizing the reputation of the socio-political system in China and the consequences of the recently imposed sanctions).

178. See, e.g., Stop China’s IP Theft Act, H.R. 8764, 116th Cong. § 2 (2020)..

179. Telekom (Judgment), supra note 12, at ¶¶ 35, 37; Telekom (Advocate General’s Opinion), supra note 14.

180. See Riordan et al., supra note 141.

private actors and not just China.¹⁸¹ With inducements and deterrents to the legal profession that present a counterpoise to China's spoken and unspoken threats, a counter-sanctions strategy merits serious consideration by professional leaders, policy makers, and legislators in the United States, the United Kingdom, and beyond.

When concluding that the EU's blocking-statute—a particular counter-sanctions strategy—creates a private cause of action, the Advocate General of the CJEU in Telekom Deutschland said that the legislature drafted the statute “in the most uncompromising and stark terms.”¹⁸² He characterized the EU blocking statute as “a very blunt instrument, designed as it is to sterilise the intrusive extraterritorial effects of . . . sanctions within the Union.”¹⁸³ The Advocate General noted, however, that “blunt” though the blocking statute may be, the EU anti-sanctions law targets one country's sanctions only.¹⁸⁴ Perhaps the Advocate General was inviting the EU legislator to think more broadly about whom it addresses its blocking legislation to.¹⁸⁵ If so, then the invitation is timely, even as the December 21, 2021 judgment of the CJEU offers some pathways to temper the blocking statute's potentially burdensome effects.¹⁸⁶

Whether intended as an invitation or not, Telekom Deutschland teaches a lesson: if we, as a society, are serious about counteracting the effect of China's sanctions, then we have tools for the task. The tools include compensatory or even injunctive regimes to protect private actors from the costs of sanctions; and deterrent measures to add costs to steps a private actor might take to stay in the good books of the sanctioning state. A major commercial country that threatens private actors in other countries will only escalate its threats, if those private actors give in.¹⁸⁷ But given no inducement—affirmative or negative—to show resolve, a law firm, a barrister, or, for that matter, a publicly traded corporation, almost certainly will not resist.¹⁸⁸ Where market share is at stake, and only the sanctioning country offers inducements, the private actor is most likely to yield to that country's wishes.¹⁸⁹

None of this is to call for a new regulatory burden before carefully measuring the benefits and costs. The EU sanctions-blocking legislation may impose costs on EU businesses; the CJEU judgment of December 21, 2021 recognizes this.¹⁹⁰ It remains to be seen how businesses address

181. See Rachel Barnes, et al., The Guide to Sanctions – First Edition, Global Investigations Rev., Aug. 14, 2020, at 2.

182. Telekom (Advocate General's Opinion), supra note 14.

183. Id.

184. Recall that the sanctions that the EU sought to block were U.S. sanctions. See id.

185. See id.

186. Id.

187. See Riordan et al., supra note 141.

188. See id.

189. See id.

190. Id.

the compliance challenges that that legislation seems to present.¹⁹¹ Compliance will include clear internal records maintenance that shows the reasons for terminating a relationship with a customer or co-venturer (or for not starting one).¹⁹² Individuals and organizations, including the full range of professional organizations, should think carefully about their compliance strategies as the jurisprudence evolves and as legislators consider next steps as well.¹⁹³ Aligning one's conduct with statutory counter-sanctions rules answers legal and prudential concerns. With well-cast rules that address the *geopolitical* concerns that China's new sanctions present, corporate compliance also may be put in service to larger social ends.

It would be a mistake if rule-of-law countries restricted themselves to symbolic gestures when responding to China's sanctions. When the Advocate General studied the EU blocking statute, he was troubled by the consequences for businesses that its strong wording might entail.¹⁹⁴ But he concluded that, "[i]n these circumstances, the threat of 'dissuasive' sanctions'" not supported by concrete steps "would likely be a hollow one and the Union and its Member States would be reduced, like Shakespeare's King Lear, to protesting that they would 'do such things . . . I know not [what], but they shall be the terrors of the earth'."¹⁹⁵ The title character of the play was enraged over the sanctions his daughters had imposed on him, but, a spent force, he had no effective way to respond.¹⁹⁶ Rule of law is not a spent force. The countries that embrace it have the ingenuity and means to address the challenge that China's sanctions present.

191. See Thomas D. Grant & F. Scott Kieff, Warnings And Guideposts From EU Sanctions Blocking Case, Law360 (June 4, 2021), <https://www.law360.com/telecom/articles/1390362/warnings-and-guideposts-from-eu-sanctions-blocking-case>

192. See *id.*

193. See *id.*

194. Telekom (Advocate General's Opinion), *supra* note 14.

195. *Id.*

196. See generally William Shakespeare, King Lear act 2, sc. 4.