2022

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

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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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2. Id.

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

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.
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.
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. 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. The sanctions concerned in the Telekom Deutschland case are U.S. sanctions against Iran; they aim to impede Iran’s nuclear ambitions. 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. On inspection, the effect of the sanctions even on the specific individuals they target would appear to be slight. 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. 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.

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

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.
admiral as an act “pour encourager les autres.” 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. 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, 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. And the demonstration has had visible effects.

A number of barristers affiliated with Essex Court in Singapore quit the chambers shortly after China adopted the sanctions. Toby Landau, a Queen’s Council known for his work in international investment arbitration, quit the chambers “with effect from . . . 2 April 2021.” 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. Essex Court removed the legal opinion from its website.

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. But this is only a surface reflection of a deeper effect that China evidently seeks to bring about. 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.
26 Jaime Hamilton, supra note 24.
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,
and security decisions." To shape the world that way means to transform both how countries relate to one another and how they order their own affairs. China’s goal is not minor adjustments here and there. It is wholesale revision.

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. 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. 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. 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.” 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.”

40. Id.
41. Id.
42. Id.
44. Id.
45. Id.
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.\textsuperscript{48} This includes China’s strategic lending to low-income countries,\textsuperscript{49} conducted without the democratic and human rights standards applicable to World Bank loans;\textsuperscript{50} its Belt-and-Road Initiative that shunts not only trade but dispute settlement procedures into PRC channels;\textsuperscript{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.\textsuperscript{52} China’s macro-economic and security policies have significantly affected international economic relations.\textsuperscript{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)\textsuperscript{54}—relies on the premise


\textsuperscript{51} Jiangyu 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).


\textsuperscript{53} See John J. Mearsheimer, Bound to Fail: The Raise and Fall of the Liberal International Order, 43 Int’l Sec. 7, 46 (2019).

that economic relations are essentially firm-to-firm and, thus, governed by the free market. China erodes the premise with far-reaching mercantilist and security policies, including its so-called military-civil fusion (MCF). China, in pursuing its system-changing ambitions, also uses blunt intimidation. 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. 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. 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/cles_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/cles_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, has shaped the conduct of countries for centuries and continues to do so today. Strategists in the US have recognized the centrality of geopolitical thought to China’s leaders, 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. It is in this sense that China is a revisionist state, not one satisfied with the status quo.

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. If any institution in a rule-of-law society belongs to its “operating system,” then it is the law. The courts, party counsel, and adjudication are not mere accessories in the United States and like-minded countries. 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

government and public administration. 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. 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. China has discovered sanctions as a tool to pursue that goal.

Problematically, the professional practices and habits of mind that make lawyers and judges so important in a rule-of-law society do not necessarily attune them to the kind of risk involved here. Law is about the particulars—particular parties, particular disputes, and particular rules. It is not the lawyer’s job to strategize about geopolitics. 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. That is what China likely anticipated. It is precisely what lawyers did. Following the sanctions—in some instances

68 Fritz Morstein Marx, The Lawyer’s role in Public Administration, 55 Yale L. J. 498, 498 (1946).
74. See Jamal Green, Rule of Originalism, 117 Colum. L. Rev. 1639, 1653, 1776 (2016).
76. See Riordan et al., supra note 20.
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. In so doing, they amplified the warning that China had intended. 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. The result that China hopes thereby to achieve is to silence any who might object to China’s conduct—and, in time, to reconfigure the “operating system” of the rule-of-law world. That result is not the business of the legal profession alone.

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. Tit-for-tat is typical in diplomatic incidents: one country expels...
an embassy officer, then the other country expels an officer of similar rank. In diplomatic incidents, states take measures at government-to-government level. Each measure targets the government itself. 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.

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

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

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. The joint statement, inter alia, called on

89. See id.
91. See, Securing a Democratic World: The Case for a Democratic Values-Based U.S. Foreign Policy (2018).
93. See id.
“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.” 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.”

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.” 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. 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.” 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. 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.

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97. Id.
98. Id.
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. 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. The bank sued to restore the service contracts.

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 acceded 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. 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. 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. 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 EU;116 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

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

\begin{itemize}
  \item 118. Id.\textsuperscript{a} ¶ 84.
  \item 119. Id.\textsuperscript{a} ¶¶ 90-95.
  \item 120. Id.\textsuperscript{a} ¶ 90.
  \item 121. Id.\textsuperscript{a} ¶ 93.
  \item 122. Telekom (Judgment), supra note 12, at ¶ 93.
  \item 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.
\end{itemize}
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

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. The burden on a plaintiff in this regard is not very onerous. 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, 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].” Readying 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.

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.
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. China had sanctioned certain EU parliamentarians. The Parliament voted to freeze efforts to ratify the Comprehensive Agreement on Investment, an EU-China trade treaty. 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.” The resolution “demands that China lift the sanctions before Parliament can deal” with the trade agreement. It also said that “intimidation attempts [by China] are futile.” The resolution is encouraging because it suggests that at least one important legislator recognizes the gravity of the situation. Assuming that the resolution results in a serious delay in the EU-China trade negotiations, it is not a mere token.

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. 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. China does not intend the sanctions to change the conduct of this or public authority regarding one or another specific issue. China’s target is the behavior and habits of mind of private institutions and individuals, who form a critical piece of the

133. Id. ¶ D.
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. The Essex Court sanctions are a tool to induce systemic change. 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. 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. 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. 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. 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. The Essex Court sanctions

144. See Riordan et al., supra note 141.
146. Id.
147. See id., ¶ 2; See also Christopher Ford, supra note 130.
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


\(^{151}\) 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.
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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. 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. The USSR, therefore, did not attain strategic objectives by using sanctions against individuals or firms in the free world. By contrast, many around the world are eager to participate in China’s market. 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. 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. 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. 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. 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. To change the operating code of the legal

159 Id.
161 Riordan et al., supra note 141.
162 See id.
163 Id.
164 See id.
profession the way that China seeks would be to change society in fundamental ways. It is China’s concept of “legal warfare,” which other writers have recently addressed, 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. 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. 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.

The democratic-liberal countries, when facing geopolitical revisionist states in the past, faced them essentially at the intergovernmental level. 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.

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. 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


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.

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.\textsuperscript{174} Capitulations were indeed an instrument of European domination in China and around the world.\textsuperscript{175} They were a significant, and justified, object of grievance.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{180} A counter-sanctions strategy, therefore, will work best if it addresses

\begin{itemize}
\item \textsuperscript{174} Lowenfeld, supra note 160
\item \textsuperscript{175} Id.
\item \textsuperscript{176} Perhaps the most conspicuous procedural incident of that grievance was the Sino-Belgian case of 1927. See Denunciation of the Treaty of Nov. 2\textsuperscript{nd}, 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”).
\item \textsuperscript{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.globalegalpost.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).
\item \textsuperscript{178} See, e.g., Stop China’s IP Theft Act, H.R. 8764, 116th Cong. § 2 (2020).,
\item \textsuperscript{179} Telekom (Judgment), supra note 12, at ¶¶ 35, 37; Telekom (Advocate General’s Opinion), supra note 14.
\item \textsuperscript{180} See Riordan et al., supra note 141.
\end{itemize}
private actors and not just China. 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.” 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.” The Advocate General noted, however, that “blunt” though the blocking statute may be, the EU anti-sanctions law targets one country’s sanctions only. Perhaps the Advocate General was inviting the EU legislator to think more broadly about whom it addresses its blocking legislation to. 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.

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. 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. 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.

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. It remains to be seen how businesses address

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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.\textsuperscript{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).\textsuperscript{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.\textsuperscript{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.\textsuperscript{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’.”\textsuperscript{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.\textsuperscript{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.

\textsuperscript{192} See id.
\textsuperscript{193} See id.
\textsuperscript{194} Telekom (Advocate General’s Opinion), supra note 14.
\textsuperscript{195} Id.
\textsuperscript{196} See generally William Shakespeare, King Lear act 2, sc. 4.