

U.S. EXTRATERRITORIAL JURISDICTION IN AN AGE OF INTERNATIONAL ECONOMIC STRATEGIC COMPETITION

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ABSTRACT

The United States and China are engaged in a hegemonic rivalry for global dominance. Initially manifested in tariffs and a trade war, the geo-economic competition between China and the United States is broadening and will likely impact all areas of the global economic and legal architectures. With respect to international legal governance, extraterritorial jurisdiction may play an important role as both the United States and China seek to use law as part of their overall geo-economic strategies. In the United States, enforcing U.S. laws against Chinese defendants—particularly Chinese state-linked entities—will likely be an important U.S. stratagem. The question of whether to apply a U.S. federal statute to extraterritorial conduct involves determining the application of U.S. law to conduct that occurs at least partially outside the territory of the United States. This Article contributes to the existing literature by exploring extraterritoriality in the context of the U.S.-China rivalry by examining the potential for an expansion in U.S. extraterritorial jurisdiction through the lens of government enforcement of the anti-bribery provisions of the U.S. Foreign Corrupt Practices Act (“FCPA”). The FCPA was driven to a substantial extent by geo-political strategy in the context of the U.S.-Soviet rivalry—national security concern over U.S. versus Soviet political-economic influence was a factor in congressional intent in enacting the FCPA. Similarly, in the U.S.-China context, U.S. national security concerns over an ambitious China may become an important factor in court rulings on extraterritorial jurisdiction militating strongly in finding adverse domestic effects thereby justifying extraterritorial jurisdiction. Moreover, utilization of the U.S. financial system to further the FCPA violation will likely serve as an additional basis for jurisdiction.

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I. INTRODUCTION

The United States and China are engaged in a hegemonic rivalry for global dominance.¹ Initially manifested in tariffs and a trade war,² the geo-political competition between China and the United States has dramatically broadened to encompass nearly all facets of the global economic and legal architectures.³ The issue of extraterritorial jurisdiction—whether U.S. courts should exercise jurisdiction for overseas conduct

1. See Joel Slawotsky, *National Security Exception in an Era of Hegemonic Rivalry: Emerging Impacts on Trade and Investment*, in HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 1 (Julien Chaisse, et al. eds., 2019) (“Both the United States and China are locked in a long-term contest for overall influence and ultimately control of the global governance architecture.”).

2. See Joel Slawotsky, *The National Security Exception: Lessons from Delaware Corporate Law*, 6 CHINESE J. COMPAR. L. 228 (2018), <https://academic.oup.com/cjcl/article/6/2/228/5265145> (detailing the intensifying geo-strategic schisms and China’s stratagems to become a hegemon).

3. See Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *Toward a Geoeconomic Order in International Trade and Investment*, 22 J. INT’L ECON. L. 655 (2019) (discussing geo-economics as an amalgamation of legal, political and economic competitions between the United States and China).

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violating U.S. law⁴—may become an increasingly important aspect in the strategic rivalry. By enforcing U.S. laws extraterritorially, U.S. enforcement agencies can marshal an effective legal tool in the U.S. quest to triumph over China.⁵

This Article contributes to the existing literature by exploring extraterritoriality in U.S. courts in the context of the U.S.-China rivalry, examining extraterritorial jurisdiction⁶ through the lens of government enforcement of the U.S. FCPA particularly against Chinese state-linked firms.⁷ The context of FCPA enforcement vis-à-vis Chinese state-linked entities⁸ provides an excellent vehicle to examine the issue of extraterritorial jurisdiction. Corruption is an increasingly important issue in global governance and an international consensus has emerged to combat international corruption thus strengthening the general rationale to assert extraterritorial jurisdiction.⁹ Moreover, the context of

4. See Anthony J. Colangelo, *What Is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1310 (2014) (jurisdiction “comprises at least three different aspects, ordinarily referred to as prescriptive jurisdiction, adjudicative jurisdiction, and enforcement jurisdiction.”).

5. China will in all likelihood similarly resort increasingly to extraterritorial jurisdiction to promote its goals and prevail over the United States. See *infra* notes 39-44 and accompanying text.

6. While beyond the scope of this article, the implications are relevant to other states which may increasingly seek to exercise extraterritorial jurisdiction. See, e.g., Eleanor M. Fox, *Extraterritorial Jurisdiction, Antitrust, and the EU Intel Case: Implementation, Qualified Effects, and the Third Kind*, 42 FORDHAM INT’L L.J. 981, 987–88 (2019) (citing the example of a corporate merger in South Africa that was held to be within EU jurisdiction).

7. With respect to state-owned enterprises the argument that state-owned corporations are implements of the economic competition is clear. However, the term “state-linked” is used in this article because of claims (and U.S. enforcement authorities will surely argue) that despite ostensibly being a private actor, some Chinese corporations are in fact “controlled” or “directed” by the Chinese government. See, e.g., CHRISTOPHER BALDINGA & DONALD CLARKE, WHO OWNS HUAWEI? (May 8, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3372669 (noting that Huawei is controlled by the state despite claims it is a privately-owned by its employees); Tony Capaccio & Jenny Leonard, *Huawei on List of 20 Chinese Companies That Pentagon Says Are Controlled by People’s Liberation Army*, TIME (June 25, 2020), <https://time.com/5859119/huawei-chinese-military-company-list/> (“This list includes ‘entities owned by, controlled by, or affiliated with China’s government, military, or defense industry’”).

8. The arguments set forth are applicable to private Chinese entities as well. Murray Scot Tanner, *Beijing’s New National Intelligence Law: From Defense to Offense*, LAWFARE (July 20, 2017, 11:30 AM), <https://www.lawfareblog.com/beijings-new-national-intelligence-law-defense-offense> (noting that even private Chinese entities are legally obligated to provide information to the state).

9. Most major jurisdictions have anti-bribery laws and a major anti-corruption treaty calls for a broad understanding of territoriality as discussed *infra*. See Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 4, Dec. 18, 1997, S. TREATY DOC. NO. 105-43, 37 I.L.M. 1 [hereinafter *Convention on Combating Bribery*] Given the fact that the major world economies have enacted legislation criminalizing bribery of foreign officials (and in the U.K. example private actors as well), the basis of a comprehensive conceptualization of

the strategic competition substantially impacts the question since Chinese businesses—particularly state-linked corporations—might be considered by the United States as tools of strategic competition¹⁰ transforming purely “market-player” corrupt acts into visceral exemplars of adverse “domestic effects.”¹¹

Furthermore, the inextricable link between economic interests and national security in the U.S.-China rivalry is an important factor directly relevant to the FCPA’s enactment.¹² The legislative intent of the FCPA was driven to a substantial extent by geo-political strategy in the context of the U.S.-Soviet rivalry and the perception that economic strength was a vital factor in the hegemonic struggle.¹³ Specifically, “the ‘major

extraterritoriality is strengthened. *See, e.g.*, Bribery Act 2010, c. 23 (UK), <https://www.legislation.gov.uk/ukpga/2010/23/contents>. Indeed, the recent resolution of corruption charges against Airbus pursuant to the UK Bribery Act is indicative; a non-U.K. corporation which committed bribery outside the United Kingdom paid the United Kingdom to resolve the complaint. *Dir. of the Serious Fraud Off. v. Airbus SE* [2020] EWHC (QB) U20200108 [72] (Eng.), <https://www.judiciary.uk/wp-content/uploads/2020/01/Director-of-the-Serious-Fraud-Office-v-Airbus-SE-1-2.pdf> (noting the extraterritorial application of the UK Bribery Act) (“Airbus also accepted that the Bribery Act 2010 provided the SFO with *extended extraterritorial powers* and with a potential interest in the facts post 2011. This was an unprecedented step for a Dutch and French domiciled company to take, in respect of the reporting of conduct which had taken place *almost exclusively overseas*”) (emphasis added); *see also* Emmanuel Gaillard, *The Emergence of Transnational Responses to Corruption in International Arbitration*, 35 *ARB. INT’L L.* 13 (2019), <https://academic.oup.com/arbitration/article/35/1/1/5470845?searchresult=1#133833578> (“Today, there is little doubt that transactions providing for the corruption meet the general disapproval of the international community.”). Therefore, extraterritorial jurisdiction serves to promote the goals of many sovereigns, reducing objections to exercising extraterritorial jurisdiction. *See* Branislav Hock, *Transnational Bribery: When is Extraterritoriality Appropriate?*, 11 *CHARLESTON L. REV.* 305–07 (2017) (opining that extraterritoriality may be appropriate if such jurisdiction advances policy goals of international regulatory regimes).

10. *See* Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 *VA. L. REV.* 1611, 1624 (2017) (discussing the context of Congressional intent in enacting the FCPA, noting “[t]he United States was competing with the Soviet Union for economic and political dominance.”).

11. Larry Catá Backer, *Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets*, 29 *AM. UNIV. INT’L L. REV.* 1 (2013) (arguing that foreign states can exercise influence and engage in international policy making through investments).

12. Robert C. O’Brien, Nat’l Sec. Advisor, *The Chinese Communist Party’s Ideology and Global Ambitions* (June 24, 2020), <https://www.whitehouse.gov/briefings-statements/chinese-communist-partys-ideology-global-ambitions/> (“[C]orporations such as Huawei and ZTE [are] undercut[ing] competitors on price and install[ing] their equipment around the globe at a loss. *This has the side effect of putting out of business American manufacturers of telecom hardware.*”) (emphasis added).

13. *See* Attorney General William P. Barr Delivers Remarks on China Policy at the Gerald R. Ford Presidential Museum, U.S. DEP’T JUST. (July 16, 2020), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-china-policy-gerald-r-ford-presidential> [hereinafter *Barr Delivers Remarks on China Policy*] (“During the Cold War, Lewis Powell—later Justice Powell—sent an important memorandum to the U.S. Chamber of Commerce. He noted ‘[T]he time has come,’ . . . ‘indeed, it is

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motivation for the FCPA was a perception of the national security risks that foreign payments posed. Congressional hearings highlighted the legislators' very strong concern *that foreign corrupt payments were harming the United States' ability to win the Cold War.*"¹⁴

Congressional concerns over U.S. economic interests and the ability to win the U.S.-Soviet rivalry are strikingly similar to the U.S. concerns over rising Chinese economic and technological power. The United States is particularly focused on Chinese business entities and their ability to advance the Chinese vision of governance which, according to the National Security Agency ("NSA"), includes thought control and promotion of the "Common Destiny for Mankind."¹⁵ The United States therefore views China's fusion of economic power and innovative emerging technology as inextricably linked to achieving China's strategic goals, thereby constituting dire security threats.¹⁶ Thus, the context of the hegemonic rivalry may become an important factor in determining the existence of "adverse domestic effects," which can impact court rulings on extraterritorial jurisdiction in FCPA enforcement suits.¹⁷

In addition to "adverse domestic effects," another ground for asserting extraterritorial jurisdiction is the territorial prong of the FCPA¹⁸ which, according to the U.S. Justice Department ("DOJ") and U.S. Securities and Exchange Commission ("SEC"), encompasses using U.S. banking in furtherance of any aspect of the FCPA violation.¹⁹ U.S.

long overdue—for the wisdom, ingenuity and resources of American business to be marshaled against those who would destroy it.”).

14. See Brewster, *supra* note 10, at 1623 (emphasis added). To be sure, Congressional concerns over the U.S. ability to prevail in the U.S.-Soviet rivalry were based on U.S. corporations engaging in conduct, but the concerns in the geo-strategic context are identical. The intent of the FCPA was to assist the United States to prevail in its hegemonic battle with the Soviet Union of which the economic competition played a significant role.

15. See Robert C. O'Brien, *The Chinese Communist Party's Ideology and Global Ambitions*, WHITE HOUSE (June 26, 2020), <https://www.whitehouse.gov/briefings-statements/chinese-communist-partys-ideology-global-ambitions/> ("The CCP's stated goal is to create a 'Community of Common Destiny for Mankind,' and to remake the world according to the CCP. The effort to control thought beyond the borders of China is well under way.") (emphasis added).

16. See *infra* notes 111–22 and accompanying text.

17. See Press Release, U.S. Dep't of Justice, Attorney General Jeff Session's China Initiative Fact Sheet (Nov. 1, 2018), <https://www.justice.gov/opa/speech/file/1107256/download> [hereinafter *U.S. Dep't of Justice Press Release*] (noting that U.S. enforcement will target Chinese violations of the FCPA).

18. See 15 U.S.C. § 78dd-3.

19. See CRIMINAL DIV. OF U.S. DEP'T OF JUSTICE & ENF'T DIV. OF U.S. SEC. EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 10 (2d ed. 2020) [hereinafter *THE FCPA RESOURCE GUIDE*], <https://www.justice.gov/criminal-fraud/file/1292051/download> (FCPA violations can be prosecuted when the conduct involves "using the U.S. mails or any means or

agencies have successfully used this position to resolve cases²⁰ against foreign defendants when the other two prongs of FCPA jurisdiction—domestic persons (U.S. citizens, green-card holders, U.S. businesses)²¹ or issuers (entities traded on a U.S. capital market or obligated to file reports with the SEC)²²—are unavailable. No defendant has challenged and thus no court has yet issued a ruling on whether the DOJ and SEC position is correct. As will be discussed, this Article opines that the DOJ and SEC position is in fact corroborated by federal court rulings in other contexts.²³

The Article proceeds as follows: Part II discusses the extraterritorial jurisdiction in the United States and how it is currently applied in U.S. federal courts. Part III focuses on the geo-economic rivalry and how that might shape U.S. federal courts' views on extraterritoriality. Part IV analyzes the FCPA with special emphasis on how “adverse domestic effects” may potentially be impacted due to the rivalry. The Article opines that given the political-economic perspective, it is likely that U.S. enforcement agencies will increasingly scrutinize Chinese state-linked corporate conduct overseas and endeavor to hold them accountable in U.S. courts. The Article suggests that two strong grounds exist that U.S. courts will likely invoke to justify extraterritorial jurisdiction: the conduct's adverse domestic effects in the United States, as well as accessing the U.S. financial system.

II. EXTRATERRITORIAL JURISDICTION

This Part provides a brief background on the issue of extraterritoriality generally as well as an overview of the current U.S. perspective. Initially, an international view is discussed including the Chinese perspective which in recent manifestations is broadly conceptualized. The Part concludes with a review of the issue in U.S. courts, the landmark Supreme Court rulings, and the recent Scoville appellate decision corroborating the “effects test” in determining extraterritoriality.

instrumentality of interstate commerce . . . [including] placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States involves interstate commerce—as does sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system . . .”) (emphasis added).

20. See *infra* Section.IV.B.

21. See 15 U.S.C. § 78dd-2.

22. See 15 U.S.C. § 78dd-1.

23. See, e.g., *United States v. Napout*, 963 F.3d 163 (2d Cir. 2020).

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A. General Perspectives

The conceptualization and application of extraterritorial jurisdiction is particularly vexing,²⁴ generating substantial disagreement among courts and legal scholars.²⁵ International law recognizes that sovereigns should limit jurisdiction to conduct occurring within their sovereign territory.²⁶ However, international law also recognizes that overseas conduct causing negative “domestic effects” overrides that limitation permitting the sovereign to exercise extraterritorial jurisdiction.²⁷ Major jurisdictions such as the United States, the EU, and China²⁸ utilize the “effects” standard allowing extraterritorial jurisdiction when overseas conduct has deleterious effects in the nation. Some jurisdictions may state that the effects must be “immediate”²⁹ to justify extraterritorial jurisdiction. However, this requirement is subjective and increasingly difficult to justify in a technologically driven global economy with potentially longer-term effects not constituting an “immediate effect,” particularly if the conduct is undertaken by an actor owned or controlled by a government. Chinese courts recognize that “immediate adverse effects” is not required to justify extraterritorial jurisdiction;

24. See Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT'L L. 563, 565 (2000) (“Comity was the burning issue of the day for nearly the past fifty years . . .”).

25. Moreover, rulings have been inconsistent. See William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1583, 1615 (2020) (“Historically, we have seen that the Supreme Court applied the traditional presumption against extraterritoriality inconsistently, ignoring the presumption when limiting a provision to conduct within the United States would have defeated the apparent purpose of the statute.”) (emphasis added). EU extraterritorial rulings have similarly been cited as inconsistent. See Sarah Miller, *Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention*, 20 EUR. J. INT'L L. 1223, 1229 (2009) (“Legal scholars have criticized these decisions on the ground that they rob the [European Justice] Court’s extraterritorial jurisprudence of any consistency.”).

26. See William S. Dodge, *Understanding the Presumption against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 113 (1998) (“The original justification for the presumption against extraterritoriality was based in international law”); see also *Napout*, 963 F.3d at 178 (“As a general matter, statutes are presumed to ‘have only domestic application.’”).

27. See Fox, *supra* note 6, at 988 (“A version of the effects doctrine is widely accepted in the world”).

28. China’s Antimonopoly Law explicitly provides that China’s domestic statute is “applicable to monopolistic conducts outside the territory of the People’s Republic of China, which serve to eliminate or restrict competition on the domestic market of China.” Fanlongduan Fa (反垄断法) [Anti-monopoly Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 2, <http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml>.

29. See Fox, *supra* note 6, at 989 (“Moreover, the court said, the test is ‘justified under public international law when it is foreseeable that the conduct in question will have an immediate and substantial effect in the European Union.’”) (emphasis added).

rather, the effects can also be an impairment of a future opportunity for domestic Chinese corporations.³⁰ Illustrative of the problematic nature of “immediacy” is the U.S. claims over Huawei and allegations that backdoors allow data flows to the Chinese government. Data might cause adverse effects to a hegemonic rival immediately or in the longer-term.

While extraterritorial jurisdiction has been exercised—particularly in antitrust and securities law enforcement—doing so is contentious as questions of sovereignty and international comity are implicated.³¹ Extraterritorial jurisdiction also raises significant geo-economic and strategic implications³² and extraterritoriality has been critiqued as interference in the sovereignty of other states.³³ In the wider context of hegemonic power rivalry, nations may object to extraterritorial jurisdiction based upon a violation of the principle of “non-intervention” in another sovereign’s affairs.³⁴ For example, Russia and China take the position that extraterritorial jurisdiction impinges upon their national

30. A Chinese court ruled that extraterritorial conduct outside of China that “directly ha[s] a major, substantial and reasonably foreseeable effect of impairing and restricting the domestic production activities, export opportunity and export trade of domestic enterprises” is justiciable in China. See *Huawei Jishu Youxian Gongsi Su Jiaohu Shuzi Tongxin Youxian Gongsi Deng Lanyong Shichang Zhipeng Diwei Jiufen Shangsu An* (华为技术有限公司诉交互数字通信有限公司等滥用市场支配地位纠纷上诉案) [*Huawei Tech. Co. v. Interdigital Commc'ns, Inc., A Dispute over Abusing Dominant Market Positions (Huawei v. IDC)*], 2013 Yue Gao Fa Min San Zhong Zi No. 306 [Higher People’s Ct. of Guangdong Province Civil No. 306 2013] (Higher People’s Ct. of Guangdong Province Oct. 21, 2013) (China) (emphasis added).

31. See Fox, *supra* note 6, at 983 (Public international law “disallows assertion of jurisdiction where it would unreasonably interfere with the laws or policy of another sovereign state.”).

32. See Miller, *supra* note 25, at 1224 (“European participation in the ‘war on terror’ has transformed the question of the [European Convention on Human Rights] Convention’s extraterritorial scope from a doctrinal abstraction into an issue with profound and very real political and legal ramifications.”).

33. See John “Jay” A. Jurata, Jr. & Inessa Mirkin Owens, *A New Trade War: Applying Domestic Antitrust Laws to Foreign Patents*, 22 GEO. MASON L. REV. 1127 (2015) (noting foreign objection to U.S. courts exercising extraterritorial jurisdiction); see also Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, 2012 WL 2312825 (June 13, 2012) (“The Governments are, therefore, opposed to broad assertions of extraterritorial jurisdiction over alien persons arising out of foreign disputes with little, or no, connection to the United States (“U.S.”). Such assertions of jurisdiction are contrary to international law and create a substantial risk of jurisdictional and diplomatic conflict . . . As such, the Governments have maintained their concern with the extraterritorial application of U.S. law over a long period of time.”)

34. Reid Standish, *Russia: U.S. FIFA Investigation Is Illegal, Extraterritorial Use of Law*, FOREIGN POLICY (May 27, 2015), <https://foreignpolicy.com/2015/05/27/russia-us-fifa-investigation-is-illegal-extraterritorial-use-of-law-world-cup-2018-sepp-blatter-putin/> (Russian Foreign Ministry referring to an investigation into corruption of FIFA officials as “clearly another case of illegal exterritorial (sic) use of U.S. law.”).

sovereignty: “[t]he Russian Federation and the People’s Republic of China condemn extraterritorial application of national law by States not in conformity with international law as another example of violation of the principle of non-intervention in the internal affairs of States.”³⁵

However, the criticisms overlook the fact that an interconnected international economic and technological architecture cuts against the claim that extraterritorial jurisdiction violates the principle of non-interference.³⁶ Global corporations conduct business across borders and are critical in the competitive realms of emergent industries, while innovative finance such as Central Bank Digital Currencies (“CBDCs”) and dual-use technology can negatively affect a strategic competitor. This triggers the need to regulate those global actors beyond the restrictions of national borders.³⁷ Moreover, with respect to the businesses domiciled in jurisdictions practicing state-capitalism such as China, a market-capitalism sovereign such as the United States could argue that—depending upon the facts—Chinese government-linked firms’ overseas conduct may constitute the sovereign controller’s interference in the internal affairs of the state seeking to employ extraterritorial jurisdiction. In a world of innovative emerging technology and businesses that operate internationally, a more broad-minded view of extraterritoriality is likely to develop, particularly given a general rise in economic nationalism.

35. *The Declaration of the Russian Federation and the People’s Republic of China on the Promotion of International Law*, THE MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FEDERATION (June 25, 2016, 5:07 PM), https://www.mid.ru/en/foreign_policy/position_word_order/-/asset_publisher/6S4RuXfeYlKr/content/id/2331698. Notwithstanding this position, both Russia and China do claim extraterritorial jurisdiction. See *Russia Aims to Prosecute Destruction of War Monuments Abroad*, ASSOCIATED PRESS (Apr. 8, 2020, 1:59 PM), <https://abcnews.go.com/International/wireStory/russia-aims-prosecute-destruction-war-monuments-abroad-7004722> (Russia seeks to prosecute foreigners who remove Russian war commemorations).

36. Jack Brewster, *No ‘Hoax’: Bipartisan Senate Report Confirms Russian 2016 Role, Putin Ordered DNC Hack, More*, FORBES (Aug. 18, 2020, 4:18 PM), <https://www.forbes.com/sites/jackbrewster/2020/08/18/putin-ordered-dnc-hack-bipartisan-senate-report-confirms/#7bf64817daec> (U.S. intelligence agencies confirm Russian election hacking).

37. The digitization of money—CBDCs, virtual currencies such as Bitcoin, tokenized assets—and the ability to move digitized “value” from a wallet/exchange in one jurisdiction to an exchange/wallet in another jurisdiction renders an overly restrictive conceptualization of “territoriality” a nebulous paradigm. Julien Chaisse & Cristen Bauer, *Cybersecurity and the Protection of Digital Assets: Assessing the Role of International Investment Law and Arbitration*, 21 VAND. J. ENT. & TECH. L. 549, 564 (2019) (“The extraterritorial nature of digital assets is already being debated among internet actors and will likely be a highly contentious jurisdictional issue in any digital asset investment case. Establishing a territorial link to the host state might depend on the nature of the disputed digital asset itself.”).

In fact, a more tolerant view of extraterritoriality has recently emerged in China.³⁸ For example, notwithstanding China's Joint Declaration with Russia, China seems to be more receptive to the exercise of extraterritorial jurisdiction when overseas conduct adversely affects China. For example, China's Anti-Monopoly Law provides that: "this law shall apply to the monopolistic conducts *outside the territory of the People's Republic of China that has the effect of eliminating or restricting competition on the domestic market of China.*"³⁹ As noted above, Chinese courts also recognize the problematic nature of "immediacy" and interpret adverse effects to include future potentially negative economic consequences on the Chinese economy.

Moreover, China's new Hong Kong National Security Law ("HKNSL") embraces extraterritoriality. The HKNSL contains no geographic limitation, encompassing conduct committed anyone and anywhere, that harms the national security of Hong Kong. Article 38 states: "[t]his Law shall apply to offences under this Law committed against the Hong Kong Special Administrative Region *from outside the Region by a person who is not a permanent resident of the Region.*"⁴⁰ The HKNSL has extraterritorial reach comporting with the increasing recognition that extraterritorial jurisdiction is justified when domestic adverse effects are manifested.⁴¹

Another exemplar of China's endorsement of extraterritoriality is China's Draft Data Security Law which broadly conceptualizes "security

38. Doing so comports with the general trend. See Miller, *supra* note 25, at 1227 ("[M]ore recent cases appear to undermine Banković's central proposition, that jurisdiction is primarily territorial, in favour of more expansive interpretations of jurisdiction."); see also Fox, *supra* note 6, at 988 ("It is considered fair game for any nation within whose borders anticompetitive effects of a merger may be felt to examine the merger and impose remedies to alleviate the anticompetitive harm in the nation.").

39. See Michael Faure & Xinzhu Zhang, *Towards an Extraterritorial Application of the Chinese Anti-Monopoly Law That Avoids Trade Conflicts*, 45 GEO. WASH. INT'L L. REV. 501, 528 (2013) (quotation omitted) (emphasis added). As noted *supra*, the effects do not need to be immediate.

40. *Hong Kong national security law full text*, S. CHINA MORNING POST (July 2, 2020, 8:17 PM), <https://www.scmp.com/news/hong-kong/politics/article/3091595/hong-kong-national-security-law-read-full-text> (emphasis added).

41. See Naomi Xu Elegant, *If You're Reading This, Beijing Says its New Hong Kong Security Law Applies to You*, FORTUNE (July 7, 2020, 6:55 AM), <https://fortune.com/2020/07/07/hong-kong-law-scope-extraterritorial-jurisdiction/> (quoting Donald Clarke's understanding of Article 38 of HKNSL, Donald Clarke, *Hong Kong's National Security Law: A First Look*, THE CHINA COLLECTION (June 30, 2020), <https://thechinacollection.org/hong-kongs-national-security-law-first-look/> ("I know of no reason not to think it means what it appears to say: It is asserting extraterritorial jurisdiction over every person on the planet.")).

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interests⁴² and encompasses extraterritorial jurisdiction. The Draft Data Security Law is applicable to “data activities’ within China, but it also states that organizations and individuals *outside of China that conduct data activities which may harm China’s national security, public interests, or the rights of Chinese citizens may be subject to this law.*”⁴³ Accordingly, China, along with the United States and EU, also incorporates the “adverse domestic effects” doctrine in determining whether its domestic courts should apply extraterritorial jurisdiction. While this Article examines the issue from the U.S. perspective, China may also seek to broadly interpret and exercise its extraterritorial power against U.S. entities for causing adverse effects in China.⁴⁴

B. U.S. Perspective of Extraterritoriality

With respect to the United States’ exercise of extraterritorial jurisdiction,⁴⁵ a balanced approach has developed. U.S. courts presume that the U.S. Congress takes “the legitimate sovereign interests of other nations into account”⁴⁶ with respect to the extraterritorial reach of U.S. statutes, including cognizance of risks that overreach might lead to a “serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs.”⁴⁷ Indeed, the intellectual foundation of the presumption against extraterritorial application of federal statutes is “the assumption that Congress is primarily concerned with domestic conditions.”⁴⁸ Accordingly, federal statutes that have a specific geographic focus within the United States will likely be found within the presumption against extraterritoriality’s contours. In contrast, and strongly

42. Yan Luo & Zhijing Yu, *China Issued the Draft Data Security Law Inside Privacy*, INSIDE PRIVACY (July 3, 2020), <https://www.insideprivacy.com/data-security/china-issued-the-draft-data-security-law/> (discussing Draft Data Security law defining “data security” as a compilation of data that may affect China’s national security, economic security, social stability and public order).

43. *Id.* (referencing Article 2 of the draft law) (emphasis added).

44. China’s understanding of adverse effects is broad and “immediacy” is not required; rather the effects can also be an impairment of a future opportunity for domestic corporations. A Chinese court in fact ruled that extraterritorial conduct outside of China that “directly ha[s] a major, substantial and reasonably foreseeable effect of impairing and restricting the domestic production activities, *export opportunity and export trade of domestic enterprises*” is justiciable in China. *See Huawei v. IDC*, 2013 Yue Gao Fa Min San Zhong Zi No. 306 [Guangdong Higher People’s Ct. of Guangdong Province Civil No. 306 2013] (emphasis added).

45. For an excellent and comprehensive review of the issue in the context of Supreme Court precedent, *see* Dodge, *supra* note 25, at 1592–96.

46. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004).

47. *Id.* at 165.

48. *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

militating in favor of extraterritorial application, is a statute's lack of a required geographic focus.⁴⁹ Thus, laws "not logically dependent on their locality for the Government's jurisdiction, but . . . enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated"⁵⁰ are not presumptively blocked from extraterritorial application.

1. Expansion of Extraterritoriality

Comporting with the general rules of extraterritoriality as outlined by the Supreme Court in earlier decades, in the 1960s and 1970s the U.S. federal circuit courts began to expansively affirm jurisdiction over violations of securities laws pursuant to the "conduct and effects" test.⁵¹ The Second Circuit's rulings in *Schoenbaum*,⁵² *Leasco*,⁵³ *Bersch*,⁵⁴ and *Vencap*⁵⁵ all held that extraterritorial application of securities law was proper if the "conduct and effects" test was satisfied. Pursuant to the "conduct and effects" test, U.S. courts could exercise extraterritorial jurisdiction: "if 'wrongful conduct [abroad] had a substantial effect in the United States or upon United States citizens,' or if 'wrongful conduct . . . in the United States' affected investors abroad."⁵⁶

Following these Second Circuit rulings, courts in other circuits (and in foreign jurisdictions)⁵⁷ increasingly applied securities laws extraterritorially⁵⁸ as well as in the context of antitrust litigation incorporating "jurisdictional

49. See Dodge, *supra* note 25, at 1607 ("The possibility of nongeographic provisions was noted as early as *Bowman*, where the Court recognized a class of statutes that are 'not logically dependent on their locality for the Government's jurisdiction.'") (citation omitted).

50. *United States v. Bowman*, 260 U.S. 94, 98 (1922).

51. See *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972) (conduct test); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 208 (2d Cir. 1968) (effects test).

52. See *Schoenbaum*, 405 F.2d at 206.

53. See *Leasco Data Processing Equip. Corp.*, 468 F.2d at 1336.

54. See *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 992 (2d Cir. 1975).

55. See *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017–18 (2d Cir. 1975).

56. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 257 (2010) (quoting *SEC v. Berger*, 322 F.3d 187, 192–93 (2d Cir. 2003)).

57. Other jurisdictions have also applied extraterritorial jurisdiction. See *Fox*, *supra* note 6, at 983–84 ("The occurrence of foreseeably substantial and immediate effects in the territory is a recognized basis for jurisdiction.").

58. *In re CP Ships Ltd. Sec. Litig.*, 578 F.3d 1306, 1313–14 (11th Cir. 2009); *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 664–67 (7th Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999).

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rule of reason” to ascertain whether overseas conduct could be subject to suit.⁵⁹ Cumulatively, these cases broadly expanded notions of extraterritoriality and perhaps precipitated the Supreme Court endeavoring to prevent unlimited further expansion of extraterritorial jurisdiction as discussed in the next section.

2. *Morrison* and *RJR Nabisco*

Commencing with *Morrison v. Natl. Austr. Bank Ltd.*, the Supreme Court endeavored to cutback against a potentially limitless expansion of extraterritoriality.⁶⁰ *Morrison* held that a statute is presumptively not to be applied to overseas conduct *unless* the statute expressly stated congressional intent for extraterritoriality or the statute demonstrated *a clear indication of extraterritorial intent*. The Court stated that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”⁶¹ However, *Morrison* held the presumption was not a “clear rule” and was rebuttable by a “clear indication of extraterritoriality.”⁶² Congressional intent was inferable and provable by reference to the statute’s language and the statute’s context could be utilized⁶³ to establish a “clear indication of extraterritoriality.”⁶⁴

In *RJR Nabisco, Inc. v. European Community*,⁶⁵ the Court discussed the presumption in the context of a Racketeer Influenced and Corrupt Organizations Act (“RICO”) suit examining whether RICO’s predicate acts alleged (such as violating the federal money-laundering statute) applied to acts committed “outside the United States” if “the defendant is a United States person.”⁶⁶ Bolstering *Morrison*’s instruction that the statute’s context was important, *RJR Nabisco* provided an additional pathway of finding a “clear indication” of congressional intent to confer

59. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1301 (3d Cir. 1979) (Adams, J., concurring); *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 613–14 (9th Cir. 1976).

60. *Morrison*, 561 U.S. at 255 (“[D]isregard of the presumption against extraterritoriality. . . has been repeated over many decades by various courts of appeals in determining the application of the Exchange Act . . .”).

61. *Id.*

62. *Id.* at 265.

63. *Id.* (“Assuredly context can be consulted as well.”); *see also* *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 119 (2013) (looking to the “historical background” of a statute to determine whether the presumption had been overcome).

64. *Morrison*, 561 U.S. at 265.

65. 136 S. Ct. 2090 (2016).

66. *Id.* at 2101 (“RICO defines racketeering activity to include a number of predicates that plainly apply to at least some foreign conduct.”).

extraterritorial jurisdiction.⁶⁷ The Court stated that such intent can also be found in examining the “structure” of the statute.⁶⁸ *RJR Nabisco* further corroborated that while a “clear indication” of congressional intent is required, the pathway to finding the indication is not particularly strict and is in fact quite broad.⁶⁹ In sum, the presumption against extraterritoriality exists but is not a “hard” rule and courts can look at language, context, and structure to find a congressional intent in favor of extraterritoriality. Therefore, establishing extraterritoriality is not unduly burdensome if the conditions are satisfied.⁷⁰

3. Scoville’s Return to the “Conduct and Effects” Test

Following the Supreme Court’s opinion in *Morrison*, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd Frank”) containing a provision (Section 929P(b)) which expresses congressional intent to apply extraterritorial jurisdiction to securities laws with respect to government enforcement action,⁷¹ thus overriding the presumption against extraterritoriality.⁷² Pursuant to Section 929P(b), enforcement actions by government agencies could be based upon extraterritorial conduct if the “conduct and effects” standard was satisfied.⁷³ Section 929P(b) was drafted with “extraterritoriality language that clarifies

67. *Id.* at 2102 (explaining that to overcome the presumption, “an express statement of extraterritoriality is not essential.”)

68. *Id.* at 2102–03.

69. *Morrison*, 561 U.S. at 265, and *RJR Nabisco*, 136 S. Ct. at 2103, instruct that even when there is no specific extraterritorial authorization in the statute, the language, context and structure of the statute can provide that clear indication of Congressional intent to so authorize.

70. *See* *United States v. Napout*, 963 F.3d 163, 178 (2d Cir. 2020) (“[A] presumption is no more than that.”).

71. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929Y, 124 Stat. 1376, 1871 (2010) (directing the Commission to conduct a study on the private right of action and solicit public comment as to whether it should be extended to private claimants). The results are available at U.S. SEC. & EXCH. COMM’N, STUDY ON THE CROSS-BORDER SCOPE OF THE PRIVATE RIGHT OF ACTION UNDER SECTION 10(B) OF THE SECURITIES EXCHANGE ACT OF 1934 AS REQUIRED BY SECTION 929Y OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT (2010), <http://www.sec.gov/news/studies/2012/929y-study-cross-border-private-rights.pdf>. The question of private suits is beyond the scope of this paper.

72. *See* 15 U.S.C. § 78aa(b) (2018) (Extraterritorial jurisdiction is appropriate if there is “(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.”) (emphasis added).

73. *See* H.R. Rep. No. 111-687, Pt. 1, at 80 (2010) (“This section addresses the authority of the SEC and the United States to bring civil and criminal law enforcement proceedings involving transnational securities frauds” by “codify [ing] . . . both the conduct and the effects tests.”).

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that in actions brought by the SEC or the Department of Justice” the securities laws “apply if the conduct within the United States is significant, or the external U.S. conduct has a foreseeable substantial effect within our country.”⁷⁴

However, Congress did not amend the Securities Exchange Act of 1934 itself; therefore, until 2019, there was uncertainty whether Dodd Frank had in fact “overruled” *Morrison* with respect to governmental securities law enforcement.⁷⁵ The uncertainty was eliminated in *SEC v. Scoville* in which the issue was “whether Section 929P(b) of Dodd-Frank reinstated the ‘conduct and effects’ test that had just been repudiated in *Morrison*.”⁷⁶ Based upon both the language and legislative history of Section 929P(b),⁷⁷ the district court found congressional intent to over-ride *Morrison* in government enforcement suits.⁷⁸

The Tenth Circuit Court of Appeals concurred⁷⁹ holding that with respect to government enforcement, “Congress undoubtedly intended that the substantive antifraud provisions should apply extraterritorially when the statutory conduct-and-effects test is satisfied.”⁸⁰ The U.S. Supreme Court rejected a petition for certiorari apparently not wishing to overturn the ruling.⁸¹ In sum, *Scoville* held that Dodd-Frank had in fact overturned *Morrison* in government enforcement actions finding that courts could apply the statute extraterritorially subject to the “conduct and effects” test being satisfied.⁸²

Scoville’s reasoning has potential impact in other areas besides securities laws. As noted above, a more receptive view of extraterritoriality has recently emerged in the EU and China.⁸³ In the context of

74. 156 CONG. REC. at 13, 182 (2010).

75. Compare U.S. Sec. & Exch. Comm’n v. A Chi. Convention Ctr., LLC, 961 F. Supp. 2d 905, 909–17 (N.D. Ill. 2013) (finding that Congress did not amend the Exchange Act), with Sec. & Exch. Comm’n v. Scoville, 913 F.3d 1204, 1215–18 (10th Cir. 2019) (finding that Congress specifically amended the Exchange Act).

76. See Sec. & Exch. Comm’n v. Traffic Monsoon, LLC, 245 F. Supp. 3d 1275, 1289 (D. Utah 2017), *aff’d sub nom.* Sec. & Exch. Comm’n v. Scoville, 913 F.3d 1204 (10th Cir. 2019).

77. *Id.* at 1289–90.

78. *Id.* at 1292.

79. See *Scoville*, 913 F.3d at 1213.

80. *Id.* at 1218.

81. See *Scoville v. Sec. & Exch. Comm’n*, 140 S. Ct. 483 (2019).

82. Sec. & Exch. Comm’n v. Scoville, 913 F.3d 1204, 1225 (10th Cir. 2019).

83. See Miller, *supra* note 25, at 1227 (“[M]ore recent cases appear to undermine Banković’s central proposition, that jurisdiction is primarily territorial, in favour of more expansive interpretations of jurisdiction.”); see also Fox, *supra* note 6, at 988 (“It is considered fair game for any nation within whose borders anticompetitive effects of a merger may be felt to examine the merger and impose remedies to alleviate the anticompetitive harm in the nation.”).

the U.S.-China hegemonic rivalry, the trend towards a more receptive view of extraterritorial jurisdiction would not be surprising. The next Part examines the geo-economic rivalry between China and the United States, setting the stage for Part IV, which focuses on the “conduct and effects” test with respect to the FCPA and Chinese state-linked firms.

III. THE AGE OF THE U.S.-CHINA HEGEMONIC RIVALRY

This Part discusses the geo-economic contest between the United States and China and how this competition may drive U.S. enforcement agencies to focus on Chinese corporate violations of the FCPA. As detailed below, the United States perceives an ascendant China as a national security threat. The Part outlines several of the Chinese stratagems established as alternative parts of the current United States-led global governance architecture, followed by a review of recent remarks provided by U.S. policy leaders identifying China’s model of governance with Chinese state-linked firms’ promotion of China’s strategic objectives. The Part concludes with a discussion of the China Initiative and concerns over China’s state-capitalism model.

A. *The Rivalry and National Security*

The United States is the current Chief Architect⁸⁴ of the global governance architecture, wielding dominant positions in the triad of hegemonic power levers—military, economic, and technological.⁸⁵ However, an aspiring China seeks to replace the United States as the global hegemon.⁸⁶ President Xi Jinping acknowledges China has global ambitions to lead the “new world order” and to guarantee international

84. See generally Joel Slawotsky, *The Clash of Architects: Impending Developments and Transformations in International Law*, 3 CHINESE J. GLOB. GOVERNANCE 83 (2017) (discussing the effects of China’s ascendancy and how this will affect international law and global governance as well as potentially impacting domestic governance of sovereigns militating towards a Chinese governance model).

85. See Joel Slawotsky, *The National Security Exception in US-China FDI and Trade: Lessons from Delaware Corporate Law*, 6 CHINESE J. COMP. L. 228, 241–45 (2018) (noting economic, technological, and military power as the triad of hegemonic status).

86. The prospect of hegemonic defeat was considered by U.S. elites unthinkable just a few years ago. See Barack Obama, Remarks by the President at the U.S. Military Academy Commencement Ceremony (May 28, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/05/28/remarks-president-united-states-military-academy-commencement-ceremony> (“[T]he United States is and remains the one indispensable nation. That has been true for the century passed and it will be and true for the century to come.”) (emphasis added).

security:⁸⁷ “[b]eing a big country means shouldering greater responsibilities for regional and world peace and development.”⁸⁸

China views the United States with an understanding that each side is locked in a strategic battle particularly with respect to both domestic financial strength as well as international economic power. This is illustrated by the statement of Mei Xinyu, a research fellow with the Chinese Academy of International Trade and Economic Cooperation under the Ministry of Commerce:

In this sense, we should attach importance to the mutual influence of trade disputes and financial markets so as to achieve the following targets: to minimize the impact of trade disputes on China’s financial market, to contain any harm to the rival’s side in the trade war, and to prevent the opponent from using the trade war to manipulate and attack the domestic financial market.⁸⁹

Therefore, the power contest between the United States and China will inevitably influence and shape financial markets and economic governance⁹⁰—a foundation of a sovereign’s strength and a crucial component of overall domestic stability.⁹¹

87. See Zheping Huang, *Chinese president Xi Jinping has vowed to lead the “new world order”*, YAHOO! FIN. (Feb. 22, 2017), <http://finance.yahoo.com/news/chinese-president-xi-jinping-vowed-084654413.html> (“China should take the lead in shaping the ‘new world order’ and safeguarding international security.”); see also O’BRIEN, *supra* note 15, at 4 (“Xi Jinping’s ambitions for ideological control are not limited to his own people. The CCP’s stated goal is to create a ‘Community of Common Destiny for Mankind,’ and to remake the world according to the CCP. The effort to control thought beyond the borders of China is well under way.”).

88. Michael Schuman, *Whose Money Will the World Follow?*, BLOOMBERG BUSINESSWEEK (May 14, 2015), <https://www.bloomberg.com/news/articles/2015-05-14/u-s-china-rivalry-whose-money-will-the-world-follow->. Unsurprisingly, China envisages an increasing military role to protect Chinese national interests overseas and is rapidly developing a powerful military. See Anthony H. Cordesman, *China’s New 2019 Defense White Paper: An Open Strategic Challenge to the United States, But One Which Does Not Have to Lead to Conflict*, CTR. FOR STRATEGIC & INT’L STUDIES, (July 24, 2019), <https://www.csis.org/analysis/chinas-new-2019-defense-white-paper> (noting that the PLA mission includes protecting China’s overseas interests).

89. Mei Xinyu, *Financial Defense Important in US-China Trade War*, GLOB. TIMES (Aug. 12, 2019), <http://www.globaltimes.cn/content/1161201.shtml>.

90. The world’s largest hedge fund manager believes that capital markets will inevitably find themselves in the crosshairs of geopolitically driven economic combat. See Thomas Franck, *Ray Dalio Says ‘Capital Wars’ Will Be the Next Front in the US-China Economic Conflict*, CNBC (Nov. 15, 2019), <https://www.cnbc.com/2019/11/15/ray-dalio-says-us-china-capital-wars-could-be-next-stage-of-feud.html>.

91. Illustrative of the potential impact on financial markets: the United States is considering the unprecedented delisting of Chinese ADRs traded on U.S. capital markets and the possible delisting of

To achieve its goal, China has embarked on several stratagems astutely developing and leading international financial institutions such as the Asian Infrastructure Investment Bank (“AIIB”) and New Development Bank (“NDB”) which are alternatives to the United States-led International Monetary Fund (“IMF”) and World Bank.⁹² Despite U.S. efforts to discourage U.S. allies from joining the AIIB, U.S. allies joined.⁹³ While only at an incipient stage, both the AIIB (and the NDB) have the potential to develop into major financial actors in the longer-term, eroding the U.S. IMF and World Bank influence.

China has also successfully implemented preliminary steps to promote Yuan internationalization and Yuan usage is steadily increasing. Various commercial deals are being made in Yuan, demonstrating an increasing global role for the currency.⁹⁴ China’s efforts at internationalizing use of the Yuan is ongoing and the development of China’s CBDC is in the advanced stage.⁹⁵ China understands that the

Chinese companies. See Alexandra Alper & David Lawder, *Trump Considers Delisting Chinese Firms from U.S. Markets*, REUTERS (Sept. 27, 2019), <https://www.reuters.com/article/us-usa-trade-china-limits/trump-considers-delisting-chinese-firms-from-u-s-markets-sources-idUSKBN1WC1VP> (United States considering measures including delisting Chinese shares); see also Soyoung Ho, *Trump Administration Seeks to Delist U.S.-Listed Chinese Companies for Blocking Audit Inspections*, THOMSON REUTERS TAX & ACCT. (Aug. 10, 2020), <https://tax.thomsonreuters.com/news/trump-administration-seeks-to-delist-u-s-listed-chinese-companies-for-blocking-audit-inspections/> (U.S. stock exchanges may delist Chinese companies that do not allow U.S. audit inspections); Thomas Franck, *White House Directs Federal Pension Fund to Halt Investments in Chinese Stocks*, CNBC (May 12, 2020), <https://www.cnbc.com/2020/05/12/white-house-directs-federal-pension-fund-to-halt-investments-in-chinese-stocks.html> (prohibition on U.S. government pension fund to invest in Chinese equities).

92. China had lobbied hard to reform the IMF and World Bank claiming China was substantially under-weighted in the voting shares of each institution, but these efforts were rejected. See Paola Subacchi, *American Leadership in a Multipolar World*, PROJECT SYNDICATE (Apr. 10, 2015), <https://www.project-syndicate.org/commentary/china-united-states-global-governance-by-paola-subacchi-2015-04?barrier=accesspaylog> (United States rejected Chinese requests to provide China with greater influence at the IMF).

93. See Lawrence Summers, *Time US Leadership Woke Up to New Economic Era*, FIN. TIMES (Apr. 5, 2015), <https://www.ft.com/content/a0a01306-d887-11e4-ba53-00144feab7de> (referring to the fact that dozens of U.S. allies joined the AIIB despite immense U.S. pressure not to do so as “the moment the United States lost its role as the underwriter of the global economic system”).

94. See Min Zhang & Tom Daly, *BHP Completes First Yuan-based Iron Ore Sale to China’s Baosteel*, REUTERS (May 12, 2020), <https://www.reuters.com/article/us-china-baowu-bhp-idUSKBN2200LZ> (“The world’s top listed miner BHP Group said on Tuesday it had made its first yuan-denominated sale of iron ore to China Baoshan Iron & Steel Co Ltd (Baosteel) and would explore using blockchain for such transactions in future.”).

95. *China Aims to Launch the World’s First Official Digital Currency*, THE ECONOMIST (Apr. 23, 2020), <https://www.economist.com/finance-and-economics/2020/04/23/china-aims-to-launch-the-worlds-first-official-digital-currency> (China in the lead to introduce the first Central Bank Digital Currency).

innovation of CBDCs is an integral aspect of the hegemonic rivalry. As a People's Bank of China (PBOC) official commented on Facebook's Libra: "[i]f the digital currency is closely associated with the US dollar . . . *there would be in essence one boss, that is the US dollar and the United States. If so, it would bring a series of economic, financial and even international political consequences.*"⁹⁶

China also has engineered the Belt and Road Initiative ("BRI") infrastructure project which in addition to the hope for economic gains, will—if successful—induce nations to align with China.⁹⁷ Recognizing the importance of alliances, China has endeavored to engage U.S. allies, bringing them within China's orbit of influence.⁹⁸

U.S. policymakers and enforcement agencies will not view the AIIB or BRI or Yuan internationalization in isolation but as components of China's overall strategy. For example, despite the expectation that the AIIB and NDB would lend money only in U.S. dollars, these Chinese-dominated institutions are already starting to "de-dollarize" and are lending in Yuan and other currencies.⁹⁹ Doing so has a deleterious effect on the prominence of the U.S. Dollar which is a pillar of U.S. power projection, especially as U.S. dollar sanctions have become increasingly invoked. From the U.S. perspective, notwithstanding the distinctness of each project, the stratagems will likely be viewed jointly

96. Frank Tang, *Facebook's Libra Forcing China to Step Up Its Own Cryptocurrency*, S. CHINA MORNING POST (July 8, 2019) (emphasis added), <http://www.globaltimes.cn/content/1161201.shtml>.

97. For a comparable U.S. plan to incentivize nations to ally with the United States, see *Marshall Plan*, HISTORY.COM (Dec. 16, 2009) (last updated June 5, 2020), https://www.history.com/topics/world-war-ii/marshall-plan-1#section_3.

98. See, e.g., China, Israel to Continue Win-Win Cooperation, XINHUA NET (Mar. 27, 2019), http://www.xinhuanet.com/english/2019-12/10/c_138620210.htm (China-Israel cooperation); Holly Ellyat, *Is Italy Playing with Fire When It Comes to China?*, CNBC (Mar. 27, 2019), <https://www.cnbc.com/2019/03/27/italy-joins-chinas-belt-and-road-initiative.html> (Italy joins BRI).

99. See Chen Jia, *AIIB to Adopt Local Currency Loans in Asia*, CHINA DAILY (Jan. 30, 2019), <http://www.chinadaily.com.cn/a/201901/30/WS5c50fdb2a3106c65c34e73c5.html> ("The China-based Asian Infrastructure Investment Bank plans to launch local currency financing in some Asian countries later this year in a move to reduce cross-border investment risks caused by exchange-rate fluctuations. The first group of countries to have this new service could include India, Indonesia and Pakistan."); Tom Hancock, *'Brics Bank' Seeks Move Away from Dollar Funding*, FIN. TIMES (August 6, 2019), <https://www.ft.com/content/76707e22-b433-11e9-8cb2-799a3a8cf37b> ("The New Development Bank, a lender owned by Brazil, India, Russia, China and South Africa, is aiming to almost double its lending this year and shift its loan book away from the US dollar to emphasise lending in local currencies.").

as the initiatives are interrelated to promote the ultimate goal of achieving Chinese ascendancy.¹⁰⁰

The developments described above point to an ambitious China¹⁰¹ and corroborate China as a capable and effective hegemonic rival.¹⁰² While the United States had ostensibly welcomed China's economic rise,¹⁰³ U.S. perceptions have markedly changed; the United States now perceives China as a strategic rival.¹⁰⁴ Unsurprisingly, U.S.-China relations have undergone an adversarial transformation. 2018 will be recalled as the year the rivalry was acknowledged, and the gauntlet was thrown down.¹⁰⁵ The new contentious relationship has manifested in various contexts,¹⁰⁶ generating threats¹⁰⁷ and tit-for-tat diplomatic expulsions.¹⁰⁸

100. Democratic Staff of S. Comm. on Foreign Relations, 116TH CONG., *The New Big Brother: China and Digital Authoritarianism* 29 (July 21, 2020) [hereinafter *China and Digital Authoritarianism*], <https://www.foreign.senate.gov/imo/media/doc/2020%20SFRC%20Minority%20Staff%20Report%20-%20The%20New%20Big%20Brother%20-%20China%20and%20Digital%20Authoritarianism.pdf> (“Huawei’s 5G push continues to see success in other countries, especially ones in China’s Belt and Road Initiative, highlighting the company’s ability to dominate the 5G space by providing networks for prices estimated to be 30 percent less than its competitors.”).

101. None of this is a criticism of China—it wishes to restore itself and if China was the global hegemon, the United States would seek to replace China.

102. See Donald J. Trump, National Security Strategy 25 (Dec. 2017), <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf> (“China seeks to displace the United States in the Indo-Pacific region, expand the reaches of its state-driven economic model, and reorder the region in its favor.”) (emphasis added).

103. See Larry Catá Backer, *Encircling China or Embedding It?*, LAW AT THE END OF THE DAY (Nov. 8, 2010), <https://lbackerblog.blogspot.com/2010/11/encircling-china.html> (“[T]he Chinese suggest that American policy has been to engage China economically while creating an effective military encirclement that would enhance the American position in the event of conflict.”).

104. See U.S. Dep’t of Justice Press Release, *supra* note 17.

105. See Michael Pence, U.S. Vice President, Remarks by Vice President Pence on the Administration’s Policy Toward China (Oct. 4, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-administrations-policy-toward-china/> (“[T]he United States Navy will continue to fly, sail, and operate wherever international law allows and our national interests demand. We will not be intimidated and we will not stand down. . . . [O]ur message to China’s rulers is this: This President will not back down.”).

106. See *id.*

107. See Paul D. Shinkman, *China Threatens Trump Over F-16 Sale to Taiwan*, U.S. NEWS AND WORLD REPORT (Aug. 16, 2019), <https://www.usnews.com/news/world-report/articles/2019-08-16/china-threatens-trump-over-f-16-sale-to-taiwan> (China threatens serious retaliation if the United States sells F-16s to Taiwan); Civil Justice for Victims of COVID Act, S. 4212, 116th Cong. (2020) (proposed bill to allow suits against China and Chinese entities for damages arising out of gross negligence in handling the 2019-2020 virus pandemic).

108. See Matthew Lee, U.S., *China Consulate Closures Deal Losses to Both Nations*, PBS NEWS HOUR (July 31, 2020), <https://www.pbs.org/newshour/world/u-s-china-consulate-closures-deal-losses->

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Unquestionably, the United States is endeavoring to push back China's rise based upon threats to U.S. hegemony—a quintessential U.S. national security interest.¹⁰⁹ The U.S.-China rivalry has dramatically increased invocation of national security whose conceptualization is broadening and blurring the distinctions between technological and economic strength.¹¹⁰ The next section details the fusion of “governance competition, technology and economic power” as a national security threat.

B. *The Fusion of Ideology (Political Governance Competition), Emerging Technology, and Economic Power as a National Security Threat*

U.S. efforts to contain China have fused together several competitions: ideological supremacy, dominance in emerging technology, and economic power. One illustration of the fusion of different competitions is provided in a July 2020 report from the U.S. Senate: “[i]n an era in which rising authoritarianism is working to undermine the fabric of democratic institutions globally, the Internet and connected technologies represent a continually evolving domain that will fundamentally shape the future of politics, economics, warfare, and culture.”¹¹¹

The linkage of Chinese dominance in emergent technology and rising economic strength, along with a competition over political governance as a vital national security interest, was enforced in a series of summer 2020 speeches, remarkable in the sweeping nature of the U.S. assessment of the threat posed by China. A critical mass of government agencies is now targeting China in an apparent all-governmental agency defense of U.S. democracy, dominance in technology, and economic supremacy. As national security threats are intertwined with economic and emerging technology, the United States is now linking a host of seemingly unrelated concerns into a general “all-perils” security threat.

to-both-nations (United States ordering China's Houston consulate closed and China retaliating ordering the U.S. Chengdu mission closed).

109. See *America's New Attitude towards China is Changing the Countries' Relationship*, THE ECONOMIST (Oct 18, 2018), <https://www.economist.com/briefing/2018/10/18/americas-new-attitude-towards-china-is-changing-the-countries-relationship>.

110. The erosion of distinctions is logical. Dual-use technology and new emerging technology such as AI, 5G and robotics are all potential triggers for tremendous economic gain as well as have immense military applications. See Slawotsky, *supra* note 1, at 4. (discussing the immense transformative benefits from dominating emerging dual-use technology including military and economic gain) (“Dominating powerful emergent technologies will likely crown the hegemonic winner[.]”).

111. *China and Digital Authoritarianism*, *supra* note 100, at 5.

For example, U.S. National Security Advisor Robert C. O'Brien identified China's state-capitalism's subsidization of emerging technology as a serious threat to U.S. economic interests.¹¹² Highlighting the blurring of economic and technological power, Huawei and ZTE were singled out as willing *to sell at a loss and to undercut the competition in order to advance the strategic goals of China* which includes access to data.¹¹³ And data is crucial not only for economic reasons, such as artificial intelligence ("AI"), but data is also vital as a conduit for strategic usage, such as intelligence gathering and political interference, as well as promotion of visions for global governance. As O'Brien commented, "[t]he CCP's stated goal is to create a 'Community of Common Destiny for Mankind,' and to remake the world according to the CCP. The effort to control thought beyond the borders of China is well under way."¹¹⁴

O'Brien's claims dovetail a U.S. Senate Report profiling Huawei as benefiting from China's state-capitalism and government support for national champions:

[Huawei] is a prime example. In 1996, the Chinese government gave Huawei the status of "national champion" and ensured it would have easy access to financing and high levels of government subsidies. . . . Government support has enabled Huawei to offer prices for its network equipment that are below

112. See, e.g., Li-Wen Lin & Curtis J. Milhaupt, *We are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697, 754 (2013) ("In the future, more boards of directors may be established for the parent companies of the national champion groups, SOE boards may take on somewhat more power, and independent directors may become more prevalent. (These are reforms that have preoccupied many corporate law commentators.) But they will hardly alter the fundamental governance norms of Chinese SOEs, which are determined by the party-state in its role as controlling shareholder.") (emphasis added).

113. See Robert O'Brien, NSA Advisor, *The Chinese Communist Party's Ideology and Global Ambitions* (June 24, 2020), <https://www.whitehouse.gov/briefings-statements/chinese-communist-partys-ideology-global-ambitions/> ("The CCP accomplishes this goal, in part, by subsidizing hardware, software, telecommunications, and even genetics companies. As a result, corporations such as Huawei and ZTE undercut competitors on price and install their equipment around the globe at a loss. This has the side effect of putting out of business American manufacturers of telecom hardware and has made it very difficult for Nokia and Ericsson. Why do they do it? Because it is not telecom hardware or software profits the CCP are after, it is your data. They use 'backdoors' built into the products to obtain that data.").

114. See *id.* (emphasis added). In the digital age, opinion and thoughts are influenced by data and potential data manipulation and is so recognized by both China and the United States. See Chris Buckley, *China PLA Officers Call Internet Key Battleground*, REUTERS (June 3, 2011), <https://www.reuters.com/article/us-china-internet-google/china-pla-officers-call-internet-key-battleground-idUSTRE7520OV20110603> (noting that the Chinese military understands that the internet is a significant battleground over public opinion).

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other companies' prices, allowing Huawei to quickly gain market advantage. In the Netherlands, for example, Huawei undercut its competitor, the Swedish firm Ericsson, by underbidding for a contract to provide network equipment for the Dutch national 5G network by 60 percent. Two industry officials who spoke to The Washington Post on the condition of anonymity held that Huawei's price was so low that, absent the subsidies the company had been provided, Huawei would have been unable to even produce the necessary network parts. Some countries also receive low-interest loans from Chinese state-owned banks to use Huawei equipment.¹¹⁵

Similarly, U.S. Federal Bureau of Investigation ("FBI") Director Christopher A. Wray commented that U.S. economic superiority was under threat: "[t]he stakes could not be higher, and the potential economic harm to American businesses and the economy as a whole almost defies calculation. We need to be clear-eyed about the scope of the Chinese government's ambition."¹¹⁶

For purposes of extraterritoriality and the FCPA, Wray connected bribery and corruption to China's ambitions: "China is engaged in a highly sophisticated malign foreign influence campaign, and its methods include *bribery, blackmail, and covert deals*."¹¹⁷ By doing so, Wray strengthened the argument that U.S. enforcement of laws such as the FCPA are inextricably linked to defending U.S. national security interests as outlined in the U.S. Justice Department's China Initiative's emphasis on FCPA enforcement of Chinese economic actors.¹¹⁸ As discussed elsewhere in this Article, defending U.S. economic interests within the context of the U.S.-Soviet rivalry was an integral aspect of the FCPA's enactment. The U.S.-China contest is a similar contest, and defending U.S. economic interests in light of China's achievements to date will likely be viewed as substantially more of a U.S. national security interest than the concerns over the Soviet Union.

Echoing this line of thought, U.S. Attorney General William P. Barr identified economic rivalry and *China's economic model* as a threat to U.S. economic preeminence:

115. *China and Digital Authoritarianism*, *supra* note 100, at 27.

116. Christopher Wray, FBI Director, The Threat Posed by the Chinese Government and the Chinese Communist Party to the Economic and National Security of the United States (July 7, 2020), <https://www.fbi.gov/news/speeches/the-threat-posed-by-the-chinese-government-and-the-chinese-communist-party-to-the-economic-and-national-security-of-the-united-states>.

117. *Id.* (emphasis added).

118. *See infra* Section III.B.2.

The People’s Republic of China is now engaged in an economic blitzkrieg—an aggressive, orchestrated, whole-of-government (indeed, whole-of-society) campaign to seize the commanding heights of the global economy *and to surpass the United States as the world’s preeminent superpower*. . . . Made in China 2025” is the latest iteration of the PRC’s *state-led, mercantilist economic model*.¹¹⁹

But Barr also repeated the accusation that China intends to spread its political governance globally—linking governance, technology, and finance. “[T]he CCP’s campaign to compel ideological conformity does not stop at China’s borders. Rather, the CCP seeks to extend its influence around the world, including on American soil.”¹²⁰

In the final speech, U.S. Secretary of State Michael P. Pompeo specifically profiled Huawei, accusing the Chinese giant of constituting a critical national security threat.¹²¹ Referring to Chinese state-linked businesses, Pompeo stated that they are promoting China’s ideological objectives. “[I]t’s this ideology that informs his decades-long desire for global hegemony of Chinese communism. America can no longer ignore the fundamental political and ideological differences between our countries, just as the CCP has never ignored them.”¹²²

As detailed in the next subsection, China’s state-capitalism and the fact that important and strategic corporations¹²³ are controlled or

119. *Barr Delivers Remarks on China Policy*, *supra* note 13. Interestingly, while Barr is critical of China’s state-capitalism in his July 2020 remarks, a few months earlier he had suggested the United States engage in state-capitalism with respect to 5G. *See Really? Is the White House Proposing to Buy Ericsson or Nokia?*, N.Y. TIMES (Feb. 7, 2020), <https://www.nytimes.com/2020/02/07/business/dealbook/bill-barr-huawei-nokia-ericsson.html> (“President Trump has made it very clear that he is worried about Huawei’s leading role in 5G wireless technology. Now his attorney general, Bill Barr, has offered a radical solution: having the United States invest in the Chinese company’s European counterparts.”).

120. *Really? Is the White House Proposing to Buy Ericsson or Nokia?*, *supra* note 119.

121. *See* Michael P. Pompeo, Secretary of State, Communist China and the Free World’s Future (July 23, 2020),

<https://www.state.gov/communist-china-and-the-free-worlds-future/> (“We stopped pretending Huawei is an innocent telecommunications company that’s just showing up to make sure you can talk to your friends. We’ve called it what it is—a true national security threat—and we’ve taken action accordingly.”).

122. *Id.*

123. *See* Evan B. Shaver, *Two Paths to Development: Policy Channeling and Listed State-Owned Enterprise Management in Peru and Colombia*, 21 J. BUS. L. 1006, 1008 (2019) (“[SOEs] have, however, in recent years become increasingly influential in international markets and outside of their home countries.”).

owned by the Chinese government heightens national security concerns.¹²⁴

1. Chinese State-Linked Firms and U.S. National Security Interests

In light of the above-referenced speech excerpts, it is useful to understand what is behind the claims that Chinese businesses such as Huawei pose a threat to U.S. security interests. Large global corporations wield immense power over nations.¹²⁵ State-owned or controlled corporations may also potentially promote a sovereign's interests.¹²⁶ "States and corporations are now capable of deploying forces in the field—sometimes states hire corporations that serve as mercenary armies that protect its own operations as well as those of the institutions of the state from sub-national and supra-state threats."¹²⁷

Even among allies, national security concerns are raised by foreign government-controlled entities buying shares in other nations' corporations.¹²⁸ Whether to protect national champions or to partner with and direct businesses to achieve strategic goals, sovereign participation in economic affairs raises national security issues.¹²⁹

124. See Slawotsky, *supra* note 85, at 233 ("Specifically, but not exclusively, Chinese State-owned enterprises (SOEs) are also perceived as inherently more threatening to national security due to their governmental links."); see also Qingjiang Kong, *Emerging Rules in International Investment Instruments and China's Reform of State-owned Enterprises*, 3 CHINESE J. GLOB. GOVERNANCE 57, 73 (2017) ("SOEs are exactly established to execute national strategic goals").

125. See Joel Slawotsky, *The Global Corporation as International Law Actor*, 52 VA. J. INT'L L. DIG. 79, 84 (2012) ("[C]rucial actors in international business have taken the mantle of economic leadership and development once relegated primarily to nation states."); Rachel Brewster & Philip J. Stern, *Introduction to the Proceedings of the Seminar on Corporations and International Law*, 28 DUKE J. COMP. AND INT'L L. 413, 420 (2018), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1526&context=djcil> ("[L]arge multinational corporations may have greater expertise in understanding international law, particularly as compared to developing states, and use this expertise as a means of resisting and reshaping global regulatory development.").

126. See Shaver, *supra* note 123, at 1008 ("Generally, states weigh social, economic, and strategic interests. These can include industrial policy, regional development, public goods supply, as well as corrupt motives.").

127. Larry Cata Backer, *The Emerging Normative Structures of Transnational Law: Non-State Enterprises in Polycentric Asymmetric Global Orders*, 31 BYU J. PUB. L. 1, 50 (2016).

128. See Toby Sterling, Tim Hopher & Sudip Kar-Gupta, *Air France-KLM Shares Slump on Surprise Dutch Stake Buy*, REUTERS (Feb. 27, 2019), <https://www.reuters.com/article/us-netherlands-air-france-klm/air-france-klm-shares-slump-on-surprise-dutch-stake-buy-idUSKCN1QG0XM> ("Shares in Air France-KLM fell sharply as the Dutch government amassed a 14 percent stake in the airline to counter French influence, in a surprise move highlighting tensions over the company's strategic direction.").

129. See Backer, *supra* note 11, at 92–94 (noting that foreign states can exercise influence and engage in international policy making through investments); Joel Slawotsky, *Sovereign Wealth Funds as Emerging Superpowers: How U.S. Regulators Should Respond*, 40 GEO. J. INT'L L. 1239, 1255 (2009).

While state-linked entities such as state-owned enterprises (“SOE”) generally are significant global economic participants,¹³⁰ Chinese state-linked firms are especially important economic actors¹³¹ and are likely to increase in importance in the years ahead. “The role of SOEs has become all the more important . . . China is home to 109 corporations listed on the Fortune Global 500—but only 15% of those are privately owned.”¹³²

Chinese SOEs exist to promote state goals,¹³³ which is common to SOEs globally. However, an additional dimension of complexity arises in the context of China’s state-linked corporations for two reasons. First, in contrast to a private market-led corporate architecture, China’s economic model embraces state-capitalism—a “unique Chinese model of state-business relationships” wherein the state owns or controls important businesses and national champions and directs important national goals via the economic model.¹³⁴ Second, China’s domestic governance is unique: the nation is governed by a single party, and “the [] manifestation of the party-state in its role as controlling shareholder” is of critical importance.¹³⁵

China’s model of partnering government with the private sector has produced impressive breakthroughs.¹³⁶ The partnering of private actor

130. See Shaver, *supra* note 123, at 1008 (“[SOEs] in recent years become increasingly influential in international markets and outside of their home countries.”).

131. See Ines Willems, *Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?*, 19 J. INT’L ECON. L. 657 (2016) (SOEs are important international economic actors); Shaver, *supra* note 123, at 1009 (state-capitalism models have substantial global ramifications).

132. See Amir Guluzade, *The Role of China’s State-owned Companies Explained*, WORLD ECONOMIC FORUM (May 7, 2019), <https://www.weforum.org/agenda/2019/05/why-chinas-state-owned-companies-still-have-a-key-role-to-play/>.

133. See Kong, *supra* note 124, at 73 (“SOEs are exactly established to execute national strategic goals”).

134. See Ji Li, *I Came, I Saw, I . . . Adapted: An Empirical Study of Chinese Business Expansion in the United States and its Legal and Policy Implications*, 36 NW. J. INT’L L. & BUS. 143, 157 (2016) (at its core, China’s state capitalism is a model of political-economic partnership; the sovereign sets forth national objectives and assists businesses in order to promote those goals.).

135. See Li-Wen Lin & Curtis J. Milhaupt, *Bonded to the State: A Network Perspective on China’s Corporate Debt Market*, 3 J. FIN. REGUL. 1, 15 (2017).

136. See Leonard David, *China’s Farside Moon Rover Breaks Lunar Longevity Record*, SPACE.COM (Dec. 18, 2019), <https://www.space.com/china-change-4-rover-moon-record.html> (landing on Farside of the moon). China will likely be the first nation to introduce a virtual national currency. See Ana Nicolaci da Costa, *China’s Virtual Currency Could be Launched ‘Quite Soon,’ Says Fund Manager*, CNBC (Nov. 20, 2020 4:22 AM), <https://www.cnbc.com/2019/11/20/chinas-virtual-currency-could-be-launched-quite-soon-says-fund-manager.html>. See Natalie Sherman, *Is China Gaining an Edge in Artificial Intelligence?*, BBC (Nov. 12, 2019), <https://www.bbc.com/news/>

businesses with governmental ownership under the Chinese state capitalism model is increasingly viewed by U.S. authorities as possessing unfair competitive advantages and, in light of the fusion of business, technology, and ideology, a national security threat.¹³⁷ Interestingly, partnering with the private sector was also an impetus for several significant U.S. technological breakthroughs.¹³⁸ State subsidies and incentives to emerging technology businesses have been suggested by U.S. corporate leaders as well.¹³⁹

Thus, from a national security viewpoint, Chinese corporate FCPA violations, particularly (but not exclusively) of government-linked businesses, may potentially be regarded by U.S. authorities as puzzle pieces within the wider context of the geo-economic contest. As will be explained in the next section, the United States has established the China Initiative manifesting the view that China is a national security threat, which has significant importance with respect to the “effects” test in determining extraterritorial jurisdiction as explained in Part IV.

2. The United States Government’s China Initiative and the FCPA

Exemplifying the rivalry, the United States has established the China Initiative which “reflects the [Justice] Department’s strategic priority of countering Chinese national security threats and reinforces the President’s overall national security strategy.”¹⁴⁰ The China Initiative’s directive to defend against threats to U.S. technological dominance,

business-50255191 (“[T]he US has been inhibited by privacy concerns, as well as a fractured, for-profit industry. ‘In China, it’s a different situation. If the government decides that it’s going to have country-wide electronic medical records . . . then it’s going to happen.’”). China’s space program has made great advances.

137. See *China and Digital Authoritarianism*, *supra* note 100, at 5 (“In an era in which rising authoritarianism is working to undermine the fabric of democratic institutions globally, the Internet and connected technologies represent a continually evolving domain that will fundamentally shape the future of politics, economics, warfare, and culture.”).

138. See Peter L. Singer, Info. Tech. & Innovation Found., Federally Supported Innovations: 22 Examples of Major Technology Advances That Stem From Federal Research Support (2014), <http://www2.itif.org/2014-federally-supported-innovations.pdf> (outlining significant achievements arising from governmental-private sector partnering).

139. See Gabriel Wildau, *China’s Industrial Policies Work. So Copy Them*, BLOOMBERG (Nov. 17, 2019, 7:00 PM), <https://www.bloomberg.com/opinion/articles/2019-11-17/u-s-should-copy-rather-than-oppose-china-s-industrial-policy> (“A congressional advisory panel on artificial intelligence, chaired by ex-Google Chief Executive Officer Eric Schmidt, recently recommended that the U.S. government ‘partner with the commercial sector’ to help overcome substantial technical and financial barriers to AI research. Whatever its flaws, the Green New Deal is also based on an acknowledgement that relying exclusively on free markets is insufficient to achieve important national objectives.”).

140. U.S. Dep’t of Justice Press Release, *supra* note 17 at 1.

intellectual property, and economic strength reflects the geo-economic battle:

The Department of Justice's China Initiative reflects the strategic priority of countering Chinese national security threats The Initiative was launched against the background of previous findings by the Administration concerning China's practices In June 2018, the White House Office of Trade and Manufacturing Policy issued a report . . . documenting . . . major strategies and various acts, policies, and practices Chinese industrial policy uses in seeking to acquire the intellectual property and technologies of the world and to capture the emerging high-technology industries that will drive future economic growth.¹⁴¹

Global bribery to advance the China's national goals such as undercutting U.S. business opportunities or obtaining dominance in technology is considered to cause damage to U.S. economic interests. As noted above, Barr explicitly stated that overseas bribery by Chinese state-linked businesses constitutes a national security threat to the United States. Not surprisingly, one of the goals is to "[i]dentify Foreign Corrupt Practices Act (FCPA) cases involving Chinese companies that compete with American businesses."¹⁴²

Accordingly, from the U.S. perspective, the China Initiative's emphasis on enforcement of the FCPA¹⁴³ is understandable; Chinese entities that compete with U.S. entities for business globally that ostensibly engage in corrupt practices are viewed as having deleterious effects on United States economic interests and pose national security threats. As the introduction to the China Initiative Fact Sheet notes, the Justice Department is prioritizing enforcement efforts to counter Chinese threats to U.S. national security:

China wants the fruits of America's brainpower to *harvest the seeds of its planned economic dominance*. Preventing this from happening will take all of us, here at the Justice Department, across

141. See *Information About the Department of Justice's China Initiative and a Compilation of China-Related Prosecutions Since 2018*, U.S. DEP'T OF JUSTICE (Nov. 12, 2020), <https://www.justice.gov/opa/information-about-department-justice-s-china-initiative-and-compilation-china-related>.

142. *Id.*

143. See *id.* ("Identify Foreign Corrupt Practices Act (FCPA) cases involving Chinese companies that compete with American businesses").

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the U.S. government, and within the private sector. With the Attorney General's initiative, *we will confront China's malign behaviors and encourage them to conduct themselves as they aspire to be one of the world's leading nations.*¹⁴⁴

As discussed above, the National Security Agency, FBI, Justice Department, and State Department all correlate economic rivalry with national security.¹⁴⁵ The claims that Chinese businesses are engaging in corruption to engineer a competitive advantage connects overseas bribery of foreign officials to the contest between the United States and China. Overseas bribery of foreign officials may be particularly viewed as an economic threat if the Chinese entity is government-linked.

As the U.S.-China rivalry increases, U.S. enforcement agencies are likely to expand scrutiny of Chinese corporate conduct overseas and evaluate whether a U.S. court will exercise extraterritorial jurisdiction. The next Part discusses the FCPA and extraterritoriality.

IV. EXTRATERRITORIALITY AND THE U.S. FCPA

This Part discusses the FCPA and opines that the legislative intent of the U.S. Congress to confer extraterritorial jurisdiction to enforce FCPA violations is manifestly clear. Presuming a court accepts this position, the question then focuses on whether the conduct causes adverse domestic effects in the United States. In the context of the U.S.-China geo-strategic rivalry, depending upon the particular facts, Chinese entities may indeed be subject to U.S. FCPA enforcement actions. Alternatively, the position of the DOJ and the SEC that utilization of U.S. banking (even from overseas) serves to satisfy the explicit FCPA territorial prong is likely to be accepted by a reviewing court.

A. Evidence of Clear Congressional Intent

The FCPA provides three jurisdictional hooks: (a) U.S. "issuers"¹⁴⁶ (U.S. and foreign entities which trade on U.S. capital markets or entities obligated to file periodic reports with the U.S. SEC); (b) "domestic concerns"¹⁴⁷ (U.S. persons including U.S. Green Card holders and U.S. businesses); and (c) "territorial jurisdiction"¹⁴⁸ applicable to entities

144. U.S. Dep't of Justice Press Release, *supra* note 17, at 2.

145. *See supra* Section.II.B.

146. 15 U.S.C. § 78dd-1.

147. 15 U.S.C. § 78dd-2.

148. 15 U.S.C. § 78dd-3.

not within the first two categories that commit acts within the territory of the U.S. to promote or advance the violation.

Enacted in 1977, the FCPA was intended to deter U.S. businesses paying bribes to *foreign officials* and stop the falsification of corporate books and records¹⁴⁹ by entities engaged in bribery to hide the corrupt payments.¹⁵⁰ Initially, it is noted that the FCPA aimed to prevent bribery that has no geographic limitation and it would be inherently illogical to presume such conduct—the bribery of foreign officials—would not encompass on occasion, let alone most of the time, overseas bribery. Since the FCPA is a manifestation of congressional intent to deter bribery of foreign officials, based upon the language and context of the statute itself, the extraterritorial application of the FCPA cannot be seriously questioned. Nowhere does the FCPA state or suggest that the violation is geographically confined to bribery that occurs within the territory of the United States.

Furthermore, and comporting with the prevailing conceptualization of extraterritoriality, “the conduct and effects test” shows that Congress specifically understood that “[although] the payments which [the Act] would prohibit are made to foreign officials, in many cases the *resulting adverse competitive affects* [sic] *are entirely domestic*.”¹⁵¹ This appears to be an exact codification of the “conduct and effects” test. Congressional intent for extraterritorial application of the FCPA is thus essentially explicitly understood. Such understanding is also the only logical conclusion: concerns over adverse domestic effects are sensible only if the bribery takes place overseas. Thus, the FCPA’s purpose, structure, and context demonstrate an “affirmative intention [that] the Congress clearly expressed’ to give [the] statute extraterritorial effect.”¹⁵²

However, only the initial FCPA enactment has been examined so far. Subsequent history strengthens the clear congressional intent for the extraterritorial reach of the FCPA. In 1988 the FCPA was amended by adding affirmative defenses,¹⁵³ but, significantly for purposes of

149. The FCPA also addresses the concealment of bribes via the “books and records” provision to “strengthen the accuracy of the corporate books and records and the reliability of the audit process which constitute the foundations of our system of corporate disclosure.” S. REP. NO. 95-114, at 7 (1977).

150. U.S. SEC. AND EXCH. COMM’N., 94TH CONG., REP. ON QUESTIONABLE AND ILLEGAL CORP. PAYMENTS AND PRACTICES 2–3 (Comm. Print 1976).

151. H.R. REP. NO. 95-640, at 4 (1977) (emphasis added).

152. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)).

153. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1107, 1415–25 (1988); see also H.R. REP. NO. 100-576, at 916–24 (1988) (discussing FCPA amendments, including changes to standard of liability for acts of third parties).

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examining legislative intent, Congress also sought an international agreement with Organization for Economic Co-operation and Development (“OECD”) members to prohibit bribery in international business transactions:¹⁵⁴ “[s]uch international agreement should include a process by which problems and conflicts associated with such acts could be resolved.”¹⁵⁵

The congressional push was successful and the Convention on Combating Bribery of Foreign Officials in International Business Transactions (“Anti-Bribery Convention”) was signed, obligating member states to outlaw the bribery of foreign officials.¹⁵⁶ The Anti-Bribery Convention contains an important reference to jurisdiction. Significantly, the Anti-Bribery Convention calls on parties to apply territorial jurisdiction broadly conceptualized. In fact, the Anti-Bribery Convention embraced an exceedingly expansive approach to jurisdiction:¹⁵⁷ “[t]o address claims that the FCPA would be jurisdictionally overreaching by pursuing foreign persons or corporations with limited territorial ties to the United States, American negotiators included very broad bases for jurisdiction into the OECD Convention.”¹⁵⁸

Article 4 empowers sovereigns to enact legislation that would take a broad view of jurisdiction and find “jurisdiction over the bribery of a foreign public official when the offence is committed in whole *or in part in its territory*.”¹⁵⁹ The official commentary states that: “[t]he territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.”¹⁶⁰ Accessing U. S. banking would come within the ambit of this broad understanding of jurisdiction when global corruption is involved.¹⁶¹

154. See Omnibus Trade and Competitiveness Act of 1988 § 5003(d).

155. *Id.*; see also S. REP. NO. 105-277, at 2 (1998) (describing efforts by Executive Branch to encourage U.S. trading partners to enact legislation similar to FCPA following 1988 amendments).

156. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 1(1), Dec. 17, 1997, S. TREATY DOC. NO. 105-43, 37 I.L.M. 1 [hereinafter *Anti-Bribery Convention*].

157. See Brewster, *supra* note 10, at 1664-65 (quoting Mark Pieth, *Article 4: Jurisdiction*, in THE OECD CONVENTION ON BRIBERY: A COMMENTARY 213, 267, 276-77 (Pieth et al. eds., 2007)) (“The Convention interpretation is clear: even the slightest of connections is sufficient.”).

158. See *id.* at 1664.

159. *Anti-Bribery Convention*, *supra* note 156, art. 4(1) (emphasis added).

160. *Id.* cmt. 25.

161. See Brewster, *supra* note 10, at 1664 (“This explicit multilateral endorsement of broad jurisdictional rules provided for American FCPA enforcement when any act in furtherance of a foreign bribe touched on American territory, *including uses of the American banking system*.”) (emphasis added).

Further establishing congressional intent to “apply territorial jurisdiction broadly,” the FCPA was further amended in 1998 to adhere to the Anti-Bribery Convention¹⁶² to encompass within the territorial jurisdictional hook:

any person other than an issuer . . . or a domestic concern . . . while in the territory of the United States, *corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of* [of a corrupt payment.]¹⁶³

This provision is particularly relevant to foreign entities as the jurisdictional hook of § 78dd-3 extends potentially to corrupt usage of a means or “any means” of instrumentality of interstate commerce in order to further any act of bribing a foreign official. For example, a corrupt payment made entirely overseas between non-United States-connected entities will still be within the ambit of U.S. enforcement if the transaction involved “sending a wire transfer from or to a U.S. bank *or otherwise using the U.S. banking system*, or traveling across state borders or internationally to or from the United States.”¹⁶⁴

Some have pointed to a 2018 Second Circuit ruling to argue the DOJ and SEC position is wrong inasmuch as the ruling allegedly cuts back against an expansive view of the territorial prong. In the Second Circuit’s opinion in *United States v. Hoskins*,¹⁶⁵ the court reviewed the legislative history of the FCPA and stated: “[i]n adopting the FCPA . . . Congress intended to limit the overseas applications of the statute to those that it explicitly defined.”¹⁶⁶ The court held that there was no evidence of congressional intent to apply the FCPA extraterritorially—if the defendant acted “outside American territory”—there could be no primary FCPA violation.¹⁶⁷ Thus, the import of *Hoskins* is that the FCPA’s territorial jurisdiction hook is applicable only when the defendant is physically within the territory of the United States.

However, the opinion in *Hoskins* is not determinative for evaluating whether enforcement actions against Chinese entities for overseas conduct can be pursued for two important reasons: first, there was no

162. See International Anti-Bribery and Fair Competition Act of 1998, Pub. L. 105-366, 112 Stat. 3302 (1998); see also S. REP. NO. 105-277, *supra* note 155, at 2–3 (describing amendments to “the FCPA to conform it to the requirements of and to implement the OECD Convention”).

163. 15 U.S.C. § 78dd-3(a) (2012) (emphasis added).

164. See *THE FCPA RESOURCE GUIDE*, *supra* note 19, at 10 (emphasis added).

165. *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018).

166. *Id.* at 102 (emphasis added).

167. *Id.* at 84, 97.

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indication that *Hoskins* used U.S. banks which the Second Circuit has held is sufficient proof in other contexts of a U.S. territorial nexus to rebut the presumption against extraterritoriality.¹⁶⁸ Second, the ruling did not consider whether adverse national security effects caused by a foreign government controlled entity constitutes sufficient conduct, i. e., adverse domestic effects, to satisfy the territorial prong.

Moreover, the position of the U.S. enforcement authorities that accessing U.S. banking brings overseas FCPA violations within the “territorial hook” of the FCPA was implicitly endorsed in *United States v. Napout*, a 2020 decision arising from a conviction based on overseas conduct violating the honest services wire fraud statute. Defendants appealed alleging the prosecution was an improper exercise of extraterritorial jurisdiction. The Second Circuit upheld the convictions finding the enforcement action proper.

The government similarly established that Napout was often bribed with American banknotes from U.S. bank accounts that had been wired to a cambista (money changer) in Argentina, delivered to Full Play’s safety deposit box, and then given to Napout by hand. Napout was also bribed with luxury items including, for example, concert tickets and the use of a vacation house, which, wherever located, were paid for with money wired from a U.S. bank account.¹⁶⁹

This supports the U.S. enforcement agencies position that if U.S. banks are used to transfer funds which are part of the scheme, and perhaps even if cash U.S. dollars are used, jurisdiction to enforce federal laws is proper.

To be sure, defendants in FCPA actions have not litigated the issue; prior enforcement actions based on accessing the U.S. financial system

168. See *Licci v. Lebanese Canadian Bank, SAL*, 834 F.3d 201, 214–15, 217 (2d Cir. 2016) (holding that defendant’s usage of U.S. banks “touch[ed] and concern[ed]’ the United States with sufficient force to displace the presumption, so long as the second prong of the extraterritoriality analysis [in Alien Tort Statute cases] was satisfied.”); see also *United States v. Napout*, 963 F.3d 163, 180–81 (2d Cir. 2020) (“The government similarly established that Napout was often bribed with American banknotes from U.S. bank accounts that had been wired to a cambista (money changer) in Argentina, delivered to Full Play’s safety deposit box, and then given to Napout by hand. Napout was also bribed with luxury items including, for example, concert tickets and the use of a vacation house, which, wherever located, were paid for with money wired from a U.S. bank account.”).

169. *Napout*, 963 F.3d at 180–81.

were resolved prior to trial or decision on jurisdiction.¹⁷⁰ Since no defendant has challenged FCPA enforcement based upon utilizing U.S. banking, until the issue is litigated it is unknown whether the DOJ position in FCPA enforcement is indeed correct.

As the following sub-section discusses, U.S. enforcement agencies have incorporated the Convention's (and thus the U.S. Congress's) mandate for broad jurisdiction and have relied upon conduct touching or concerning U.S. banks to find enforcement jurisdiction.

B. FCPA Enforcement: Recent Perspectives

U.S. government enforcement agencies have consistently interpreted the congressional intent of the FCPA's "territorial hook" as being applicable to foreign entities' overseas misconduct when U.S. banks are involved in furthering the FCPA violation.¹⁷¹ Thus, the DOJ and SEC position is that jurisdiction is established should the foreign actor utilize the U.S. Dollar financial system vesting the United States government jurisdiction over a wide variety of conduct.¹⁷²

FCPA enforcement actions have alleged jurisdiction because the transactions were denominated in U.S. dollars and used correspondent banks located in the United States to further the bribery.¹⁷³ Utilization of the U.S. financial system, including foreign defendants' usage of U.S. banks remotely from outside the United States, is a sufficient jurisdictional basis for U.S. enforcement agencies.¹⁷⁴

170. See, e.g., Deferred Prosecution Agreement, *United States v. JGC Corp.*, No. 11-cr-260 (S.D. Tex. Apr. 6, 2011), <https://www.justice.gov/criminal/fraud/fcpa/cases/jgc-corp/04-6-11jgc-corp-dpa.pdf>.

171. See *THE FCPA RESOURCE GUIDE*, *supra* note 19, at 10 ("sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system, or traveling across state borders or internationally to or from the United States.") (emphasis added).

172. See *id.*

173. See, e.g., *United States v. Snamprogetti*, H-10-460, at 11 (S.D. Tex. July 7, 2010), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/07-07-10snamprogetti-info.pdf> [hereinafter *Snamprogetti*] ("caused wire transfers totaling approximately \$132 million to be sent from Madeira Company 3's bank account in Amsterdam, The Netherlands, to bank accounts in New York, New York, to be further credited to bank accounts in Switzerland and Monaco controlled by Tesler for Tesler to use to bribe Nigerian government officials."); see also *Information, United States v. Unitel, LLC*, No. 16-cr-00137 (S.D.N.Y. Feb. 18, 2016) (Form USA-33s-274) [hereinafter *Unitel Information*] ("In addition, VimpelCom and UNITEL each made numerous corrupt payments that were executed through transactions into and out of correspondent bank accounts at financial institutions in New York, New York.").

174. Note that the issue of whether utilizing U.S. banking or correspondent banks located in the United States is sufficient to establish jurisdiction has not yet been addressed by the courts. There is a lack of appellate decisions on this issue, as defendants have paid fines and entered into agreements based upon their acceptance of the enforcement agencies' position. No foreign

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Illustrative is *United States v JGC Corp.*¹⁷⁵ wherein the defendant was neither a “domestic concern” nor an “issuer.”¹⁷⁶ The defendant, a foreign entity, was accused of violating the FCPA by bribing Nigerian officials and faced DOJ allegations of FCPA violations to obtain government contracts. The sole connection to the United States was that the defendant had a U.S. JV partner and—significantly—the corrupt payments were U.S. Dollar wire transfers transferred through U.S. bank accounts. The corrupt conduct occurred exclusively outside the territory of the United States in European nations and Nigeria. The DOJ claimed jurisdiction in part based on the defendant’s wiring of funds that were routed through correspondent banks in the United States¹⁷⁷ Essentially, the government enforcement was predicated on the fact that funds were routed through the U.S. banking system which thus *established a territorial act in furtherance of the FCPA violation.*¹⁷⁸ The defendant did not litigate the issue and resolved the enforcement via a deferred prosecution agreement (DPA).¹⁷⁹

The Article will now analyze whether Chinese state-linked corporations are subject to extraterritorial FCPA enforcement based upon the “conduct and effects” test or a territorial connection by accessing U.S.-based financial institutions, or both. As the next sub-section discusses, there are two potential paths to find that overseas bribery has effects in the United States. First, U.S. government agencies can argue that—depending on the Chinese entity or the specific facts—the conduct has adverse effects on U.S. national interests either economically or from a national security basis. Given the hegemonic U.S.-China rivalry and the re-conceptualization of effects in the United States, courts are likely to accept enforcement agency arguments. Second, the usage of U.S.

defendant has yet disputed jurisdiction, but the issue may be raised in the future. However, as discussed, the view of the U.S. enforcement agencies is sensible in a technologically-driven world in which global transactions are initiated without need for physical presence.

175. Information, *United States v. JGC Corp.*, No. 4:11-cr-00260 (S.D. Tex. Apr. 6, 2011) [hereinafter *JGC Information*].

176. *Id.* at 3, 4.

177. *Id.* at 17, 19.

178. See, Lauren Ann Ross, *Using Foreign Relations Law to Limit Extraterritorial Application of the Foreign Corrupt Practices Act*, 62 DUKE L.J. 445, 462 (2012) (discussing 15 U.S.C. §§ 78l, 78m(b)(2), 78o(d), 78dd-1 (2006) at 447–48).

179. See *Deferred Prosecution Agreement*, *supra* note 170; see also Information, *United States v. Magyar Telekom, Plc.*, No. 1:11CR00597 (E.D. Va. Dec. 29, 2011) (asserting jurisdiction over a Hungarian subsidiary of a Deutsche Telekom based on the sending and storage of emails on U.S. servers.); *but see United States v. Hoskins*, 902 F.3d 69, 72 (2d Cir. 2018) (emailing others who were in the United States was of no import since the defendant himself was not physically within the United States).

banking or correspondent banks may serve as a basis for exercising jurisdiction as it has been used in enforcement and resolutions in recent years. The DOJ and SEC position that there is enforcement jurisdiction when any act in furtherance of a foreign bribe touched on U.S. territory—including use of the U.S. banking system—comports with a broad understanding of extraterritoriality pursuant to congressional intent.¹⁸⁰

C. *Extraterritorial FCPA Enforcement Applied to Chinese State-Linked Entities*

As the following two subsections discuss, there are two potential avenues for a U.S. court to determine whether the FCPA should be applied to overseas conduct. One potential option is finding that the specific conduct’s effects in the United States were sufficient to constitute “adverse effects”. An alternative ground is that the U.S. financial system was used to effectuate the improper payments.

1. Adverse Domestic Effects—Ideological, Technological, and Economic Rivalry

Emerging dual-use technology is a crucial national security to both the United States and China.¹⁸¹ China’s stunning inroads in emergent technology is now starkly perceived by the United States as a national security threat: “[n]o country presents a broader, more severe threat to our ideas, our innovation, and our economic security than China.”¹⁸² As discussed above, adverse effects in the context of the U.S-China hegemonic struggle are broad based and include U.S. claims that China seeks ideological, technological, and economic superiority over the United States. U.S. officials point to a one-party, state-capitalist model which jointly works towards these objectives.

Concern over emergent technology is well-placed. Dominating emergent technologies will likely crown the hegemonic winner for two reasons: first, the offensive capabilities of emerging technology in the military is enormous. China’s 5G efforts “present ‘grave concerns’ to the United States, our allies, and our partners [A] Chinese-developed 5G network ‘provide[s] near-persistent data transfer back to China,’ [] mean[ing] U.S. reliance on Chinese technologies for critical military communication.”¹⁸³ However, *even in the non-military context*

180. See Brewster, *supra* note 10, at 1664.

181. See *China and Digital Authoritarianism*, *supra* note 100, at 5 (“[T]echnologies represent a continually evolving domain that will fundamentally shape the future of politics, economics, warfare, and culture.”).

182. See U.S. Dep’t of Justice Press Release, *supra* note 17, at 2.

183. See *China and Digital Authoritarianism*, *supra* note 100, at 55 (emphasis added).

technological supremacy is potentially devastating: the power to shut or cause havoc in critical infrastructure, interference with a nation's capital markets and financial stability, election interference to run a desired candidate or influence public opinion and other permutations all offer effective and efficient paths to virtually conquer or seriously degrade a strategic adversary.¹⁸⁴ Second, nations able to exploit emergent technologies will bring vast sums of wealth to the sovereign. AI, for example, is expected to bring in many trillions in added global wealth and the leader in AI will reap the most benefit.¹⁸⁵ Emerging technological innovation such as 5G and AI are led by corporations exemplifying the significance of corporations in the hegemonic rivalry.

Illustrative of the potential "adverse effects" test is the U.S. claim that Huawei poses a national security threat.¹⁸⁶ Huawei's efforts aimed at introducing Huawei's 5G infrastructure in U.S. allies' economies¹⁸⁷ is a key motivator of U.S. measures, such as the China Initiative, on the basis that Huawei poses a national security interest to the United States.¹⁸⁸ Huawei has also violated U.S. sanctions and has been identified as a strategic adversary of the United States.¹⁸⁹ Indeed, the United States

184. See Nicole Perloth and Scott Shane, *In Baltimore and Beyond, a Stolen N.S.A. Tool Wreaks Havoc*, N.Y. TIMES (May 25, 2019), <https://www.nytimes.com/2019/05/25/us/nsa-hacking-tool-baltimore.html> ("For nearly three weeks, Baltimore has struggled with a cyberattack by digital extortionists that has frozen thousands of computers, shut down email and disrupted real estate sales, water bills, health alerts and many other services").

185. See Ross Chainey, *The Global Economy Will Be \$16 Trillion Bigger by 2030 Thanks to AI*, WORLD ECONOMIC FORUM (June 27, 2017), <https://www.weforum.org/agenda/2017/06/the-global-economy-will-be-14-bigger-in-2030-because-of-ai/> ("China has become a world leader in AI development, filing patents at a rate that significantly outpaces other countries").

186. See Zak Doffman, *Huawei Just Launched 5G In Russia With Putin's Support: 'Hello Splinternet'*, FORBES (Sept. 1, 2019), <https://www.forbes.com/sites/zakdoffman/2019/09/01/hello-splinternet-huawei-deploys-5g-in-russia-with-putins-support/?sh=1768c043199d> (fueling U.S. concerns is the fact that Russia is working with Huawei to build Russia's 5G network).

187. See *China and Digital Authoritarianism*, *supra* note 100, at 57 ("In Europe in particular, Huawei and ZTE have partnered with many countries to build their 5G networks despite US protests over security concerns, and Chinese-built network infrastructure continues to spread across the continent. Within Congress and the Administration there is a bipartisan understanding of the threats posed by Chinese firms building the base layers of radio equipment and other telecommunications infrastructure upon which 5G operates.")

188. Christopher Bing & Jack Stubbs, *U.S. to Press Allies to Keep Huawei Out of 5G in Prague Meeting: Sources*, REUTERS (April 16, 2019), <https://www.reuters.com/article/us-usa-cyber-huawei-tech/u-s-to-press-allies-to-keep-huawei-out-of-5g-in-prague-meeting-sources-idUSKCN1RR24Y> (discussing U.S. pressure on allies to ban Huawei 5G).

189. See Ana Swanson, *U.S. Delivers Another Blow to Huawei With New Tech Restrictions*, N.Y. TIMES (May 15, 2020), <https://www.nytimes.com/2020/05/15/business/economy/commerce-department-huawei.html>; see also Frank Bajak, *US Adds New Sanction on Chinese Tech Giant Huawei*, US NEWS AND

has threatened to withhold security cooperation should an ally allow Huawei into their nation. China understands the threat to its ascendancy and its national security and is threatening retaliation for heeding U.S. warnings.¹⁹⁰ U.S. enforcement agencies could argue that Huawei is an enterprise whose core self-interest as a state-linked entity is inapposite to U.S. interests and therefore bribery of foreign officials outside the United States (depending upon the particular facts) committed by Huawei undermines U.S. security.

For purposes of the analysis of extraterritoriality and the FCPA, FBI Director Christopher A. Wray connected bribery and corruption to China's ambitions: "China is engaged in a highly sophisticated malign foreign influence campaign, and its methods include *bribery, blackmail, and covert deals*."¹⁹¹ Indeed, and of particular import in the context of the U.S.-China hegemonic rivalry, the impetus for enacting the FCPA was to focus on the adverse domestic economic effects of overseas bribery on the U.S. economy in the context of the U.S.-Soviet rivalry. This is corroborated by Rachel Brewster: "the 'major motivation for the FCPA was a perception of the national security risks *that foreign payments posed*. Congressional hearings highlighted the legislators' very strong concern *that foreign corrupt payments were harming the United States' ability to win the Cold War*."¹⁹²

This motivation is significant: the FCPA was motivated by national security concerns arising from the U.S.-Soviet rivalry. As stated by Brewster, "[t]ogether, the national security concerns [] posed by illicit corporate payments abroad were sufficient to achieve legislative passage of the FCPA."¹⁹³

The parallels between the U.S.-Soviet and U.S.-China rivalries are striking. The motivation driving the FCPA was related to national security in the context of the U.S.-Soviet competition and was a manifestation of concern that overseas bribery would subvert the United States' ability to prevail in its strategic rivalry against the Soviet Union. It is critical in examining congressional intent to appreciate the linking of

WORLD REPORT, ASSOCIATED PRESS (May 16, 2020), <https://apnews.com/article/22e139b05c8ff6b8a9c910eebea8c295e>.

190. See Shi Jiangtao, *Chinese Ambassador Accused of Threatening German Car Industry if Huawei is Frozen Out*, S. CHINA MORNING POST (Dec. 15, 2019), <https://www.scmp.com/news/china/diplomacy/article/3042190/chinese-ambassador-accused-threatening-german-car-industry-if> (discussing how China will retaliate should Germany ban Huawei 5G).

191. Christopher Wray, Director, Federal Bureau of Investigation, Speech at the Hudson Institute: The Threat Posed by the Chinese Government and the Chinese Communist Party to the Economic and National Security of the United States (July 7, 2020) (emphasis added).

192. See Brewster, *supra* note 10, at 1623 (emphasis added).

193. *Id.* at 1626.

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corruption with defending U.S. national interests. U.S. enforcement agencies could argue that Chinese corporate bribery of foreign officials impedes the United States' ability to prevail against China.

U.S. government enforcement agencies can point to the clear congressional intent in enacting the FCPA *and its amendments*¹⁹⁴—the defense of the national interests of the United States to prevail in the U.S.-Soviet struggle.¹⁹⁵ If foreign corporations violate the FCPA and corruptly take business from U.S. corporations, enforcement agencies can argue that the conduct adversely impacts U.S. interests within the U.S.-China contest. Alternatively, enforcement agencies may claim that Chinese violations of the FCPA, which erode U.S. technological dominance or otherwise promote Chinese state goals, directly cause adverse domestic effects. Therefore, Chinese corporate conduct violating the FCPA might be viewed by U.S. government agencies as engaging in subverting U.S. national interests. This argument is likely to be advanced in the context of the China Initiative and heightened FCPA enforcement.

2. Utilizing U.S. Financial Institutions or U.S. Dollars, or Both

As discussed above, U.S. enforcement agencies have successfully resolved FCPA enforcement actions on the basis that jurisdiction is established by defendants' utilization of the U.S. Dollar financial system. The DOJ and SEC have relied on sending a wire transfer to or from a U.S. bank, or U.S. correspondent bank, to satisfy jurisdictional requirements based on a broad understanding of the statute. The language of the FCPA supports the DOJ and SEC position:

[A]ny person other than an issuer . . . or a domestic concern . . . while in the territory of the United States, *corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of* [a corrupt payment.]¹⁹⁶

In the decades following the FCPA Amendments, financial and technological innovation has transformed business conduct. Since the late 1990s, using the “mails” has been essentially replaced with e-mail and

194. See Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340, 370 (2019) (“Courts may also weigh congressional intent, especially in regard to the policy rationales that have encouraged Congress to amend and enact certain statutes.”).

195. See Brewster, *supra* note 10, at 1623 (noting that U.S. countering Soviet hegemonic ambitions played an important role in enacting the FCPA).

196. 15 U.S.C. § 78dd-3(a) (2012) (emphasis added).

other communications services such as WhatsApp, Signal or other systems. “Any means” can include sending virtual currency from a United States-based Bitcoin exchange or wallet to one in another nation (or vice-versa). No longer does one have to take a flight and physically present oneself in U.S. territory and request a financial services institution to wire money from one account to another with a U.S. bank intermediary. Someone engaging in a corrupt payment under the FCPA can simply enter the U.S.-based institution or exchange’s website or send an e-mail or a WhatsApp message to a variety of virtual financial service providers from the comfort of a yacht, hotel room, or personal residence in almost any location. Physical presence within a territory is not required. Based upon a transformative and innovative financial services landscape, the utilization of the U.S. financial system, whether that is a United States-based financial institution or United States-based virtual currency exchange or wallet, should be the controlling factor as opposed to demanding physical presence within U.S. territory.

Recently, in the context of a different federal statute, the Second Circuit’s *United States v. Napout*¹⁹⁷ ruling confirms that overseas violations of U.S. statutes are justiciable on the basis that jurisdiction is established by utilizing the U.S. Dollar financial system from overseas. The Second Circuit observed that a presumption against extraterritorial applications of statutes exists unless the unambiguous statutory text states otherwise. And in *Napout*, the Second Circuit allowed for extraterritorial application of a federal statute and rejected defendants’ appeal, concluding that the case involved a domestic application of the statute. The court noted that the defendants used United States-based bank accounts and wires to receive the majority of the \$3.3 million in bribes, and the “use of wires in the United States therefore was integral to the transmission of the bribes in issue.”¹⁹⁸ Therefore, the court held that the application of Section 1346 to defendants’ conduct was permissible.

Pursuant to this perspective, jurisdiction over FCPA violations exists even without physical presence in the United States.¹⁹⁹ The ability to bring Chinese entities within the enforcement rubric of the FCPA via the defendant’s utilization of U.S. financial institutions allows

197. See *United States v. Napout*, 963 F.3d 163, 180–81 (2d Cir. 2020).

198. *Id.* at 181.

199. See generally *JGC Information*, *supra* note 175 (claiming jurisdiction based on the defendant’s wiring of funds that were routed through correspondent banks in the United States, thus establishing a territorial act in furtherance of the FCPA violation). See also *Snamprogetti*, *supra* note 173, at 11; see also *United States v. Technip S.A.*, No. 10-cr-00439 (S.D. Tex. June 28 2010); *Unitel Information*, *supra* note 173.

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government agencies to reach a large majority of international transactions which are generally U.S. Dollar denominated.

Although a discussion of the historical relationship of extraterritoriality as an outgrowth of state sovereignty is beyond the scope of this Article, it is sensible to conclude that in a virtual world the concept of “territory” should reflect the huge leaps technology has made that render “physical presence in a territory” a more nebulous concept. The fact that financial services innovation enables the opening of accounts and the seamless transfer of funds instantaneously would favor an updated conception of territorial jurisdiction to encompass the use of financial accounts in the country seeking to exercise extraterritorial jurisdiction. In other contexts, this reality is already self-evident. For example, the U.S. efforts at combatting terrorism and money laundering expanded the basis for jurisdiction to include using financial accounts located in the United States.²⁰⁰ Even with respect to civil lawsuits, banking through the United States may constitute a sufficient nexus to rebut the presumption against extraterritoriality.²⁰¹ As we enter a virtual currency paradigm, Bitcoin and other types of currencies, let alone CBDCs may become alternatives or supplements to traditional banking and will likely be considered as “financial institutions” for purposes of evaluating whether a corrupt payment was conducted by accessing a U.S. financial institution.

Therefore, based upon modern technologies, the conceptualization of a “territorial nexus” via the use of wiring funds through U.S. banks or financial institutions is sensible. Banking relationships with U.S. correspondent accounts in the United States, because of the significance of such accounts to further the bribery, should allow enforcement agencies to pursue bad actors.²⁰² Utilizing United States-based Bitcoin exchanges to further an FCPA violation could also fall within a modern conceptualization of “sending money to or from” a bank account. Accordingly, while not yet challenged and therefore not yet ruled

200. See Lani Cossette, *New Long-Arm Authority over Foreign Banks Raises Due Process Concerns but Remains a Viable Tool to Prevent Money Launderers from Abusing the U.S. Financial System*, 71 GEO. WASH. L. REV. 272 (2003).

201. *Licci v. Lebanese Canadian Bank, SAL*, 834 F.3d 201, 217 (2d Cir. 2016) (ruling that a foreign bank’s wire transfers between through a U.S. bank was in fact sufficient “domestic conduct” to overcome the presumption against extraterritoriality. Such activity included “numerous New York-based payments” and “financing arrangements conducted exclusively through a New York bank account.”)

202. See, e.g., 18 U.S.C. § 981(k) (2012) (stating that assets derived from violating U.S. law and deposited overseas in a non-U.S. bank are subject to confiscation from U.S. authorities if that non-U.S. bank has a correspondent account in a U.S. bank).

upon, it is likely that the DOJ and SEC's position on use of U.S. financial accounts to find jurisdiction would be accepted by U.S. courts.

V. CONCLUSION

In the age of the U.S.-China hegemonic rivalry, the increasing perception that Chinese international economic activities serve to undermine U.S. economic and security interests will likely lead to enhanced FCPA enforcement against Chinese corporations. China's unique one-party political system and the state's significant role in managing and directing business affairs magnifies the United States' concern over business activities by Chinese entities. Enforcement agencies will in all likelihood increase their scrutiny of Chinese business activity worldwide and endeavor to enforce the FCPA against Chinese entities—particularly but not exclusively—against state-linked entities. U.S. courts will need to grapple with the question whether the Chinese business activity and alleged violation of the FCPA outside the United States created either adverse negative effects within the United States, or alternatively, utilized U.S. financial institutions to further the violation. Enforcement agencies will point to the United States' view of national security as a fusion of ideological, technological, and economic threats which will serve to impede the United States' ability to prevail in the strategic contest. In addition, the use of U.S. financial institutions which has been successfully used by the DOJ and SEC in prior FCPA enforcement actions will likely be relied upon as well. In the present environment, U.S. courts are likely to side with U.S. government agencies since China and the United States are locked in an ever-widening hegemonic struggle. U.S. courts would likely consider Chinese government-linked corporate conduct as potentially impinging on U.S. national interests. Particularly in emergent technology, this view is sensible as dominance in emerging industries will crown the hegemonic winner. Therefore, depending upon the specific Chinese entity and the conduct involved, U.S. enforcement agencies may have grounds to argue that the Chinese state-linked corporate violation falls within extraterritorial jurisdiction of U.S. courts.