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ARTICLE

Precedential Value of Judicial Decisions in Increasingly Hybridised Civil Law Systems: Chinese Choreographies at the WTO

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Abstract

Pursuant to Article 63 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS), a state may require other treaty parties to disclose their intellectual property case law 'of general application'. While most domestic judgments in common law are indeed of general application, civil law systems theoretically employ judgments as reference only. Nevertheless, to value consistency and predictability, the hybridisation of civil law jurisdictions is increasingly leading them to devise special lists of judgments that acquire formal or factual binding status on lower-ranked courts. This trend is particularly evident in China, whose Supreme People's Court's 'Guiding Cases' join other specific categories of holdings within 'Judicial Interpretations' and further guideline documents that are factually binding domestically. When the United States and the European Union requested, through the World Trade Organization, that China disclose the full range of its case law of general application, China responded that civil law jurisdictions do not issue judgments that are binding beyond the parties. This article examines the limitations and merits of the Chinese stance.

From Domestic Patent Law to a Global Trade Dispute: Disclosing Core Patent Decisions as an International Obligation

Encouraged by the impending commercial and 'geopolitical' assertiveness and global-market exposure of Chinese technology manufacturers and vendors (especially large state-owned conglomerates in the telecommunications sector),[1] and possibly as a judicially enforced form of

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[1]See eg, Dieter Ernst, 'China's Standard-Essential Patents Challenge: From Latecomer to (Almost) Equal Player?' (Centre for International Governance Innovation Special Report 2017) 24 <https://www.cigionline.org/static/documents/documents/

protectionism,[2] litigation on standard-essential patents (SEPs) in the People's Republic of China (PRC) is on the rise both qualitatively[3] and quantitatively,[4] sparking implications for technology standardisation efforts and transnational dealings which bear *inter alia* an international law (IL) dimension. Indeed, Chinese courts tend to issue 'anti-suit injunctions enforced through daily penalties in case of infringement, which are typically set at the maximum level allowed for under Chinese Civil Procedure Law, and accumulate daily'.[5] This is rapidly becoming common practice, and was already decided with reference to a number of major intellectual property (IP) cases, including *Huawei v Conversant*,[6] *Xiaomi v InterDigital*,[7] *ZTE v Conversant*,[8] *OPPO v Sharp*,[9] and *Samsung v Ericsson*.[10] Such decisions are issued in accordance with a group of recently enacted laws and guidelines,[11] and some of them 'also contain measures relating to initiating court procedures on licence questions and royalty rates'.[12]

China's%20Patents%20ChallengeWEB.pdf> accessed 29 Sep 2023; Guanyang Yao & Xiaoning Yu, 'China emerges as a key litigation venue for standard essential patents' (Managing IP, 14 Apr 2021) <https://www.managingip.com/article/2a5cyvdl53v4r4copbg8w/china-emerges-as-a-key-litigation-venue-for-standard-essential-patents> accessed 29 Sep 2023.

[2]See most recently Gaétan de Rassenfosse, Emilio Raiteri & Rudi Bekkers, 'Discrimination in the Patent System: Evidence from Standard-Essential Patents' (Jan 2023) 3–4 <http://dx.doi.org/10.2139/ssrn.3007699> accessed 29 Sep 2023; Gaétan de Rassenfosse & Emilio Raiteri, 'Technology Protectionism and the Patent System: Evidence from China' (2022) 70 The Journal of Industrial Economics 1.

[3]See extensively Fei Deng, Shan Jiao & Guanbin Xie, 'The Current State of SEP Litigation in China' (2021) 35 Antitrust 95; Wei Huang et al, 'A Review of the Development of SEP-Related Disputes in China and Outlook for the Future Trend' (Competition Policy International, 15 Nov 2022) <https://www.competitionpolicyinternational.com/a-review-of-the-development-of-sep-related-disputes-in-china-and-outlook-for-the-future-trend/> accessed 29 Sep 2023.

[4]See eg, Maximilian von Laer, Knut Blind & Florian Ramel, 'Standard essential patents and global ICT value chains with a focus on the catching-up of China' (2022) 46 Telecommunications Policy 1, 4–5; Zhao Qishan & Lu Zhe, 'Statistics of Chinese SEP Cases in 2011–2019' (2020) LexField Law Offices <https://chinaipr2.files.wordpress.com/2020/07/statistics-of-chinese-sep-cases-in-2011-2019-lexfield9892.pdf> accessed 29 Sep 2023; Tim Pohlmann, 'SEP Litigation Trends: What Does the Data Say?' (IP Watchdog, 28 Apr 2021) <https://ipwatchdog.com/2021/04/28/sep-litigation-trends-data-say/id=132727/> accessed 29 Sep 2023.

[5]World Trade Organization, 'China – Enforcement of Intellectual Property Rights – Request for Consultations by the European Union' (Communication from the delegation of the European Union to the delegation of China, 18 Feb 2022, G/L/1427#IP/D/43#WT/DS611/1) para 1.1.

[6]*Technology Co, Ltd v Conversant Wireless Licensing SÀRL*., Civil Ruling, (Supreme People's Court, 28 Aug 2020). See also Supreme People's Court, 'Judgment Digests of the Intellectual Property Court of the SPC (2020) – Essence of Judgments' (26 Feb 2021) para I.1.

[7]*Xiaomi Communication Technology Co, Ltd v Inter Digital Holdings, Inc* (Wuhan Intermediate People's Court, Civil Ruling, 23 September 2020), Chief Judge Yin Wei. Note that in alignment with the broader moves of the 'geopolitics' of IP rights, similar cases have been simultaneously litigated in other jurisdictions as well, including India; see eg, *Interdigital Technology Corporation & Ors v Xiaomi Corporation & Ors*, IA 8772/2020 in CS(COMM) 295/2020 (Delhi High Court, 9 Oct 2020), I.A. 8772/2020 in CS(COMM) 295/2020. See generally Giuseppe Colangelo & Valerio Torti, 'Anti-Suit Injunctions and Geopolitics in Transnational SEPS Litigation' (2023) 14 European Journal of Legal Studies 45.

[8]Case No Yue 03 Min Chu No 335 [(2018) 粤 03 民初 335 号] (Shēnzhèn Intermediate People's Court). See further Guodong Du (杜国栋) & Liu Qiang (刘强), 'Shenzhen Court Issues "Anti-suit" Injunction in ZTE and Conversant SEP Licensing Dispute' (China Justice Observer, 20 Jun 2021) <https://www.chinajusticeobserver.com/a/shenzhen-court-issues-anti-suit-injunction-in-zte-and-conversant-sep-licensing-dispute> accessed 29 Sep 2023.

[9]*Sharp Corporation and ScienBizip Japan Corporation v Guangdong OPPO Mobile Telecommunications Corp, Ltd and Shenzhen Branch of Guangdong OPPO Mobile Telecommunications Corp, Ltd*, Civil Ruling, (Supreme People's Court, 19 Aug 2021) Zui Gao Fa Zhi Min Xia Zhong No. 517 [(2020) 最高法知民辖终 517 号], 19 Aug 2021, Presiding Judge: Fu Lei.

[10]*Samsung Electronics Co, Ltd et al v Telefonaktiebolaget LM Ericsson* (2020) E 01 Zhi Min Chu No 743. The case was followed up before United States courts as well: *Ericsson Inc and Telefonaktiebolaget LM Ericsson v Samsung Electronics Co, Ltd, Samsung Electronics America, Inc, and Samsung Research America* (District Court for the Eastern District of Texas, Marshall Division, 11 Jan 2021) Civil Action No 2:20-CV-00380-JRG; for an essential timeline, see Dennis Crouch, 'US vs China – Moving toward Global Injunctions' (Patentlyo, 13 Apr 2021) <https://patentlyo.com/patent/2021/04/moving-toward-injunctions.html> accessed 29 Sep 2023.

[11]See further Permanent Mission of the European Union to the WTO in Geneva, 'Request for Consultations to the Permanent Mission of the PRC to the WTO in Chambésy' (18 Feb 2022) 5–6. See also Mark Allen Cohen (柯恒), '*Oppo v. Nokia* in Context' (China IPR, 18 Dec 2023) <https://chinaipr.com/2023/12/18/oppo-v-nokia-in-context/> accessed 12 Jan 2024.

[12]WTO, Council for Trade-Related Aspects of Intellectual Property Rights, 'Communication from the EU to China: Request for Information Pursuant to Article 63.3 of the TRIPS Agreement' (IP/C/W/682, 6 Jul 2021) para 2.

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These cases are cited here for context only, also owing to the fact that other scholars have already discussed their background and implications at length.[13] The present contribution will rather address these disputes from a somewhat unusual angle, investing the extent to which (certain categories of) domestic court cases may prove to be of precedential value for China in fulfilling its World Trade Organization (WTO) obligations under IL. Indeed, some of the cases cited – and many more – have been included by China in special collections, which some scholars see as 'hybridising' the Chinese civil law legal system by embodying *de facto* binding references in domestic IP adjudication. For instance, the *Sharp v Oppo* case was also selected by the Supreme People's Procuratorate within the ten major intellectual property cases,[14] and the *Conversant v Huawei* case was qualified as a 'typical case' (典型案件 *diǎnxíng ànjiàn*) by the Supreme People's Court (SPC).[15]

The IL issue at stake is that WTO law (namely, Articles 63.1 and 63.3 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS)[16]) stipulates that precedents should be published, and yet China maintains that such cases, while of remarkable importance, are not binding precedents in the strict sense, which is why it is not obliged to disclose them systematically – and indeed does not even do so for key cases.[17] What categories of Chinese law should be considered 'precedential' for the sake of WTO compliance? And what broader trends does China's practice outline or anticipate in terms of precedent-identifying cases within hybridised civil law systems? This article aspires to provide a comprehensive and up-to-date account of these matters, which are significant to IP governance (and beyond) both in China and globally.

China, the US, and the EU: A Two-Decade-Long Saga at the WTO

The saga at the WTO began in 2005 with a diplomatic note from the United States (US) to China,[18] demanding that the Chinese government disclose the judicial reasoning in most of the IP cases before Chinese courts, abiding by WTO obligations.[19] The note was followed up on several occasions in the ensuing years, but at the time of writing has yet to receive a response that the US deems satisfactory. If anything, tensions mounted,[20] unilateralism ensued therefrom,[21] supply-chain

[13]See eg, King Fung Tsang & Jyh-An Lee, 'The Ping-Pong Olympics of Antisuit Injunction in FRAND Litigation' (2022) 28 Michigan Technology Law Review 305; Peter K Yu (余家明), Jorge L Contreras & Yu Yang, 'Transplanting Anti-Suit Injunctions' (2022) 71 American University Law Review 1537; Igor Nikolić, 'Global Standard Essential Patent Litigation: Anti-Suit and Anti-Anti-Suit Injunctions' (Robert Schuman Centre for Advanced Studies Research Paper No 2022/10); Jorge L Contreras, 'Anti-Suit Injunctions and Jurisdictional Competition in Global FRAND Litigation: The Case For Judicial Restraint' (2022) 11 NYU Journal of Intellectual Property and Entertainment Law 171.

[14]See also Nick Beckett, 'APAC IP Update – Summer 2021' (CMS Law Now, 29 Jul 2021) <https://www.cms-lawnow.com/ealerts/2021/07/apac-ip-update--summer-2021> accessed 29 Sep 2023. The special IL significance of these cases will be illustrated later in this article.

[15]WTO, IP/C/W/682 (n 12) para 4.

[16]Marrakesh Agreement Establishing the World Trade Organization, Annex 1C ('Agreement on Trade-Related Aspects of Intellectual Property Rights' (TRIPS)), 15 Apr 1994.

[17]See also Stephen J Ezell, 'False Promises II: The Continuing Gap Between China's WTO Commitments and Its Practices' (Information Technology & Innovation Foundation, 26 Jul 2021) <https://itif.org/publications/2021/07/26/false-promises-ii-continuing-gap-between-chinas-wto-commitments-and-its/> accessed 29 Sep 2023.

[18]WTO, Council for Trade-Related Aspects of Intellectual Property Rights, 'Communication from the US to China: Request for Information Pursuant to Article 63.3 of the TRIPS Agreement' (IP/C/W/461, 14 Nov 2005).

[19]See Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), arts 63(1)–(3).

[20]In its first-ever 'Report on WTO Compliance of the United States' (Aug 2023), which mirrors the one yearly published by the US, China singles out the US as a 'Destroyer, Unilateralist and Bullying Hegemonist, Double Standards Manipulator' and 'Disturber of the Global Industrial and Supply Chains'. The Report can be officially retrieved from <http://images.mofcom.gov.cn/sms/202308/20230811165019325.pdf> accessed 29 Sep 2023. Thanks to Professor Henry S Gao for pointing this out on Twitter.

[21]See generally Kristen Hopewell, 'Tumult in the Trading System: The China Paradox, Declining US Institutional Power, and the Crisis at the WTO', in Henry S Gao, Damian Raess & Ka Zeng (eds) *China and the WTO: A Twenty-Year Assessment* (Cambridge University Press 2023).

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disruption loomed,[22] and mistrust between the two WTO members only increased.[23] Indeed, against the broader backdrop of its so-called 'trade war' with China, whose IP component is fundamental[24] and spans from forced technology transfers[25] to trade secrets,[26] the US is constantly and more widely concerned about China's transparency within the WTO system than ever before.[27] In this context, it is perhaps useful to note the distinction between transparency *before* (examined here) and *at* the WTO;[28] the former refers to China's wider attitude *vis-à-vis* its WTO obligations (normative alignment, compliance rate, etc), and not just to the behaviour and decisions of Chinese representatives in this international organisation.

A reply[29] reached the US a few months later the same year, dismissing the Americans' request on four main legal grounds: first, China argued that no such thing as a 'general application' exists for case law in civil law systems; second, it observed that quantity-wise, the US request was massive and administratively overburdensome; third, it stressed that WTO law only grants parties the right to request case disclosure, while there is no corresponding obligation to disclose them, or to do so promptly and thoroughly; and finally, it emphasised that any WTO obligation has to be premised on good faith, to the effect that those who request disclosure should seek to shed light on specific legal matters rather than burden the other party with general and unreasonable demands. The third and fourth points would benefit from a review of the boundaries and limitations of – and exceptions to – *bona fides* in international trade law and cognate IL disciplines, but this is beyond the scope of this article. Rather, I will draw on the first Chinese rebuttal in order to analyse the meaning of 'precedent' under Chinese and international law, employing this 'case-study' as a reference to trace the increasing hybridisation of legal systems, as well as the key sociological and geopolitical transformations underpinning this hybridisation. As such, while this article is primarily addressed, and will hopefully appeal, to international legal scholars and practitioners, it may also prove helpful to international relations or socio-legal academics, including those specialising in trade governance from a political economy perspective.

[22]See eg, Mark Allen Cohen (柯恒) & Philip C Rogers, 'When Sino-American Struggle Disrupts the Supply Chain: Licensing Intellectual Property in a Changing Trade Environment' (2021) 20(2) World Trade Review 238.

[23]See generally Petros C Mavroidis & André Sapir, 'China in the WTO Twenty Years On: How to Mend a Broken Relationship? (2023) 24(1) German Law Journal 227.

[24]See generally Kevin J Hickey et al, 'Intellectual Property Violations and China: Legal Remedies' (US Congressional Research Service Report No R46532, 17 Sep 2020) <https://sgp.fas.org/crs/row/R46532.pdf> accessed 29 Sep 2023.

[25]See generally Alan O Sykes, 'The Law and Economics of "Forced" Technology Transfer and Its Implications for Trade and Investment Policy (and the U.S.–China Trade War)' (2021) 13 Journal of Legal Analysis 127.

[26]See generally Riccardo Vecellio Segate, 'Litigating trade secrets in China: An imminent pivot to cybersecurity?' (2020) 15 (8) Journal of Intellectual Property Law & Practice 649, 658; Paolo Beconcini, 'The State of Trade Secret Protection in China in Light of the U.S.-China Trade Wars: Trade Secret Protection in China Before and After the U.S.-China Trade Agreement of January 15, 2020' (2021) 20 UIC Review of Intellectual Property Law 108; Riccardo Vecellio Segate, 'Securitizing Innovation to Protect Trade Secrets between "the East" and "the West": A Neo-Schumpeterian Public Legal Reading' (2020) 37 UCLA Pacific Basin Law Journal 59, 73.

[27]See eg, recently, Office of the US Trade Representative, 'U.S. Statement on the Trade Policy Review of China' (22 Oct 2021) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/october/us-statement-trade-policy-review-china> accessed 29 Sep 2023; Permanent Mission of the US to the WTO, 'Statement by David Bisbee, Chargé d'Affaires, a.i., on the Trade Policy Review of the People's Republic of China' (20 Oct 2021), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/october/statement-david-bisbee-charge-daffaires-ai-trade-policy-review-peoples-republic-china> accessed 29 Sep 2023; Jennifer Hillman, 'China's Entry into the WTO: A Mistake by the United States?', in Henry S Gao, Damian Raess & Ka Zeng (eds) China and the WTO: A Twenty-Year Assessment (Cambridge University Press 2023) 420–421.

[28]On this distinction, see also Henry S Gao, 'The WTO Transparency Obligations and China' (2018) 12 The Journal of Comparative Law 329, 331.

[29]WTO, Council for Trade-Related Aspects of Intellectual Property Rights, 'Communication from China to the US: Response to a Request for Information Pursuant to Article 63.3 of the TRIPS Agreement' (IP/C/W/465, 23 Jan 2006).

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Coming back to the saga, a rejoinder[30] from the US followed suit the next day, but it fell temporarily unheard. The fourth act of this multi-bilateral exchange of diplomatic dispatches was inaugurated a year later during an ordinary review of China at the WTO, when the US lamented that China had never followed up on its rejoinder;[31] in the same document, the US representatives added that China should have translated key judicial contributions to its legal order, including SPC Judicial Interpretations (JIs)[32] in compliance with paragraph 334 of the Working Party Report accompanying China's Protocol of Accession to TRIPS. China remained silent on the matter, but an institutional note followed five years later by voice of the WTO Secretariat. As a premise, it assured all parties that its sole purpose was

> to assist Members in the context of the domestic regulation *negotiations* mandated under Article VI:4 of the [General Agreement on Trade in Services (GATS)]. It does not purport to interpret the use of this term in documents *submitted by Members* nor does it seek to establish an interpretation for any *future* dispute settlement cases.[33]

However, the Secretariat went on to note that

> the findings by WTO panels and Appellate Body do not *necessarily* establish precedents *for future disputes*, nor do they circumscribe any possible specific meanings that Members *may want* to give to a particular term *when formulating new disciplines*. Thus, should Members *find it necessary* to further clarify the concept, or to give a different meaning to the term "of general application", this *could always be done in the text of the instrument itself*.[34]

The guidance above presumably implicates that the ordinary meaning of 'general application' in WTO jurisprudence is authoritative at least as far as disputes *based on the existing text* are concerned. In other words, amended interpretations may always be tabled, but they should be introduced and accepted only *after* states express due commitment to them over time, to the extent that previous interpretations become obsolete and thus evidently representative of emerged disagreement. Provided that such new interpretations are reported in informal working documents over time, they may well crystallise novel readings of the treaty text, making 'it even more important [for states] to raise alternative interpretations',[35] and to consistently endorse and adhere to them over time.

In fact, WTO rulings are even persuasive for extra-WTO courts dealing with trade disputes, the prime example being the Court of Justice of the European Union (CJEU).[36] Similarly, the holdings of the International Court of Justice (ICJ) or the European Court of Human Rights (ECtHR), may constitute *res interpretata* decisions, ie, while only binding on the parties to the original disputes,

[30]WTO, Council for Trade-Related Aspects of Intellectual Property Rights, 'Communication from the US to China: Follow-Up Request for Information Pursuant to Article 63.3 of the TRIPS Agreement – Addendum' (IP/C/W/461/Add.1, 24 Jan 2006).

[31]WTO, Council for Trade-Related Aspects of Intellectual Property Rights, 'Transitional Review Mechanism of China: Communication from the US' (IP/C/W/502, 11 Oct 2007), para 16. See further Paolo Davide Farah, 'Five Years of China's WTO Membership. EU and US Perspectives on China's Compliance with Transparency Commitments and the Transitional Review Mechanism' (2006) 33(3) Legal Issues of Economic Integration 263.

[32]WTO, IP/C/W/502 (n 31) para 17.

[33]WTO, Working Party on Domestic Regulation, 'Note by the Secretariat: Measures of General Application in WTO Agreements' (S/WPDR/W/47, 9 Feb 2012), para 1 (emphasis added).

[34]ibid para 25 (all emphases added).

[35]Christoph Antons, 'Article 27(3)(b) TRIPS and Plant Variety Protection in Developing Countries', in Hanns Ullrich et al (eds), *TRIPS plus 20: From Trade Rules to Market Principles* (Springer 2016) 389, 401.

[36]See Michelle Q Zang, 'Shall We Talk? Judicial Communication between the CJEU and WTO Dispute Settlement' (2017) 28(1) European Journal of International Law 273, 284–285.

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they will have an impact far beyond them.[37] In other words, even though courts applying international law are largely governed by the civil law tenet that decisions are only binding on the parties to the specific dispute being litigated, it is widely accepted (and indeed increasingly theorised) that *in practice* this is no longer the case. This is because courts tend to value consistency – and are fiercely criticised when they fail to do so – unless they explicitly decide to overturn their previous legal findings. However, such dramatic overturns are rare, mostly triggered by disruptive changes in societal expectations in the aftermath of history-making events (such as the 9/11 attacks and the Wikileaks scandal in relation to antiterrorism legislation and surveillance policies, respectively). The ECtHR's repeated references to instruments 'of general application'[38] might shed some light on the status of case-law in a civil law system, but the Court has never explicitly referred to case law, so its jurisprudence will not be helpful. Before these matters are elaborated further, it is essential to trace the aftermath of the aforementioned saga.

In 2021, the European Union (EU) submitted a disclosure request[39] to China modelled on the American one, to which the Chinese representatives responded in an exceedingly dry and concise manner.[40] No agreement was reached, but as the EU is largely dominated by civil law jurisdictions (*a fortiori* after the United Kingdom's (UK) departure), this request can be considered more politically, and legally, compelling than that of the US. The new chapter of the saga witnesses the EU reiterating its points within another – broader – document,[41] which also reports disclosure requests under Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), Article 64.1 of TRIPS, and Article XXII:1 of the *General Agreement on Tariffs and Trade* (GATT).

For the purposes of this article, I will again address the EU's submission that China has failed to fulfil its obligations under Articles 63.1 and 63.3 of TRIPS, as already seen above. The EU's representatives note, *inter alia*, that 'by issuing worldwide anti-suit injunctions for act preservation in patent litigation and imposing maximum penalties on a daily basis, [China] has not applied and administered its laws … in a uniform … manner', a uniformity that could plausibly be improved or better verified by other WTO members, had China decided to share the reference case law on which its courts rely with its trade partners. Once again, China failed to respond, and in the meantime other governments, including those of Japan and Switzerland, had echoed the EU/US concerns or submitted their own petitions.[42] It is rumoured, however, that the EU refrained from insisting as some of its members, including Italy, vetoed further pressure on China on this point, arguing that other China-related dossiers, such as technology transfers and takeovers, were more pressing at the WTO and beyond.

The Negotiating Roots and Teleological Foundations of the TRIPS Transparency Requirement

Time has come to delve deeper into the teleology of the main WTO obligation at stake, contained in Article 63.1 of TRIPS, which reads as follows:

[37]See further Rosanne van Alebeek & P André Nollkaemper, 'The legal status of decisions by human rights treaty bodies in national law', in Helen Keller & Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 356, 407.

[38]See eg, *Baka v Hungary* (General Court, Case No 20261/12, 23 Jun 2016) para 117.

[39]WTO, IP/C/W/682 (n 12). See also Simon Lester, 'EU Requests Information from China on Judicial Decisions and Regulations Relating to Patents' (China Trade Monitor, 6 Jul 2021) <https://www.chinatrademonitor.com/eu-requests-information-from-china-on-judicial-decisions-and-regulations-relating-to-patents/> accessed 29 Sep 2023.

[40]WTO, Council for Trade-Related Aspects of Intellectual Property Rights, 'Communication from China to the EU: Response to the EU's Request for Information Pursuant to Article 63.3 of the TRIPS Agreement' (IP/C/W/683, 7 Sep 2021).

[41]EU Permanent Mission to the WTO, 'Request for Consultations by the European Union' (signed by Christophe Rames as the *Chargé d'affaires ad interim*, 18 Feb 2022).

[42]See eg, WTO, 'Communication from Japan: China – Enforcement of Intellectual Property Rights: Request to Join Consultations' (WT/DS611/2, 8 Mar 2022).

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> Laws and regulations, and *final judicial decisions and administrative rulings of general application*, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable *made publicly available*, in a national language, in such a manner as to enable governments and right holders to become acquainted with them.[43]

Before attempting an exegesis of this requirement, it is necessary to mention the two lines of disagreement which ran through the whole drafting process. First, Article 63.1 of TRIPS should be framed within the more general moves that made negotiations towards TRIPS a battleground between developed and developing countries. Although this dichotomous terminology may seem obsolete today,[44] it had a tangible identity relevance at the time of negotiations[45] – although even then with significant nuances. Another dichotomy is that between civil law and common law jurisdictions, which traversed the whole negotiating exercise far beyond the significance to be credited to case law. For instance, to contrast it with the copyright domain, TRIPS diverged from the *Berne Convention* (mostly responding to the preferences of civil law jurisdictions) in offering no explicit

> protection for two moral rights of authors – the right to be named as author and the right to object to changes in the work that would reflect badly on the author's integrity. This provision was treated as not sufficiently "trade related", which put on one side the reality that experts from civil law countries believed in these moral rights as articles of faith, while common law experts tended to considerable scepticism about their value.[46]

It is further essential to note that the obligation does not extend to *all* judgments; and Article 41(3) of TRIPS specifies that 'decisions on the merits … shall be made available *at least to the parties to the proceeding* without undue delay',[47] but not necessarily to the general public. The fact that there are no general disclosure or publication obligations for TRIPS cases suggests that when it comes to domestic cases, the drafters plausibly did not intend to overburden the parties with all-comprehensive disclosure obligations, either. This is why in this paper I will try to identify the limited *classes* of cases which would warrant disclosure on the part of China (and civil law jurisdictions more broadly).

To evaluate the scope of these transparency requirements, it is advisable to turn to their object and purpose,[48] rather than adhering to an obsolete approach that endeavours to mechanically

[43]Two emphases added.

[44]See eg, Rostam Josef Neuwirth, 'A Constitutional Tribute to Global Governance: Overcoming the Chimera of the Developing-Developed Country Dichotomy' (EUI LAW Working Paper 2010/20) <https://cadmus.eui.eu/handle/1814/15704> accessed 29 Sep 2023; Weinian Hu, 'China as a WTO developing member, is it a problem?' (CEPS Policy Insights No 2019/16) <https://www.ceps.eu/wp-content/uploads/2019/11/PI2019_16_WH_China-as-a-WTO-developing-member.pdf> accessed 29 Sep 2023; Bernard Hoekman & Robert Wolfe, 'Reforming the World Trade Organization: Practitioner Perspectives from China, the EU, and the US' (2021) 29(4) China & World Economy 1, 11.

[45]See eg, Robert Wolfe, 'Decision-Making and Transparency in the "Medieval" WTO: Does the Sutherland Report have the Right Prescription?' (2005) 8(3) Journal of International Economic Law 631, 643.

[46]William Rodolph Cornish & Kathleen Liddell, 'The Origins and Structure of the TRIPS Agreement', in Hanns Ullrich et al (eds), *TRIPS plus 20: From Trade Rules to Market Principles* (Springer 2016) 3, 32, fn 83.

[47]Emphasis added.

[48]By analogy, see Christophe Geiger & Luc Desaunettes-Barbero, 'The Revitalisation of the Object and Purpose of the TRIPS Agreement: The *Plain Packaging* Reports and the Awakening of the TRIPS Flexibility Clauses', in Jonathan Griffiths and Tuomas Mylly (eds), *Global Intellectual Property Protection and New Constitutionalism* (Oxford University Press 2021). For context, see Matthew Kennedy, *WTO Dispute Settlement and the TRIPS Agreement: Applying Intellectual Property Standards in a Trade Law Framework* (Cambridge University Press 2016) 158–225.

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retrieve terms' ordinary meaning by recourse to the Oxford Dictionary or any other apparently objective external reference[49] – especially considering the debates surrounding IL's English-infused neoimperialism.[50] While WTO Panels themselves explicitly committed to the basic rules of interpretation as set out in the *Vienna Convention on the Law of Treaties* (VCLT),[51] in practice, such rules have rarely proven useful or conclusive in resolving a trade-related dispute,[52] and indeed textual interpretation should be abandoned in favour of teleological interpretation.[53] When parties disagree over the scope of an international obligation, it is unlikely that such conflicts stem from disagreements about the general meaning of certain words. Instead, it is more plausible that the parties are unable to find common ground on the intended consequences of such words or their underlying policy rationale, societal value, and/or geopolitical background. Additionally, reaching consensus on terminological meaning per se is not necessarily less burdensome a process, as most terms are fraught with presumptions and assumptions and accommodate potentially endless discussion of possible alternative shades of interpretation – an issue faced by the ICJ itself[54] and echoed in most domestic legal systems.[55] One may attempt to draw rudimentary inferences from cognate – and more frequently employed – expressions such as 'laws of general application', but terminological inspections will mostly just reiterate the original position of all actors involved. One must also be cautious with translations: terminological comparisons can be established with eg, Chinese 'principles' of general application,[56] but this is more for semiotics than for addressing the IL contention at the core of the debate.

In assessing the treaty's purpose, it is useful to recall that TRIPS, for the first time, brought transactions in IP rights (IPRs) under the umbrella of *public* international law (PIL) through the backdoor of trade.[57] This choice speaks to the strategic significance of IPRs for bilateral and multilateral relations among states, and ultimately for geopolitics – IPRs have become public assets worthy of bargaining. The trend has only intensified in recent years, with IP chapters being negotiated in

[49]See also Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 182, 333–334, 342–343.

[50]See eg, Boris N Mamlyuk & Ugo A Mattei, 'Comparative International Law' (2011) 36(2) Brooklyn Journal of International Law 385, 427, 442; Robert Phillipson, 'The Linguistic Imperialism of Neoliberal Empire' (2008) 5(1) Critical Inquiry in Language Studies 1; Jie Zeng, Ariel Robert Ponce & Yuxin Li, 'English linguistic neo-imperialism in the era of globalization: A conceptual viewpoint' (2023) 14 Frontiers in Psychology 1149471; Mohsen al Attar & Shaimaa Abdelkarim, 'Decolonising the Curriculum in International Law: Entrapments in Praxis and Critical Thought' (2023) 34 Law and Critique 41, 48; John King Gamble & Charlotte Ku, 'Choice of Language in Bilateral Treaties: Fifty Years of Changing State Practice' (1993) 3 Indiana International and Comparative Law Review 233.

[51]Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol 1155, 331 (adopted 23 May 1969, entered into force 27 Jan 1980); Christophe Geiger, 'Towards a Balanced International Legal Framework for Criminal Enforcement of Intellectual Property Rights', in Hanns Ullrich et al (eds), *TRIPS plus 20: From Trade Rules to Market Principles* (Springer 2016) 645, 657–658.

[52]See Isabelle Van Damme, 'Treaty Interpretation by the WTO Appellate Body' (2010) 21(3) European Journal of International Law 605, 623.

[53]See Seiya S Takeuchi, 'Teleological interpretation of Article 63 TRIPS based on the Vienna Convention on the Law of Treaties and customary international law—analysis of the EU's request for information on China's SEP cases' (2022) 17(8) Journal of Intellectual Property Law & Practice 674; Ulf Linderfalk, 'Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making' (2015) 26(1) European Journal of International Law 169, 172–175.

[54]See Katayoun Hosseinnejad, 'Rethinking the Meaning of Ordinary Meaning in Light of the ICJ's Jurisprudence' (2021) 20(2) The Law & Practice of International Courts and Tribunals 267; Liliana E Popa, 'The Holistic Interpretation of Treaties at the International Court of Justice' (2018) 87(3) Nordic Journal of International Law 249.

[55]See eg, Kevin Tobia, Brian G Slocum, & Victoria Frances Nourse, 'Ordinary Meaning and Ordinary People' (2023) 171 University of Pennsylvania Law Review.

[56]See Mo Zhang, 'Codified Choice of Law in China: Rules, Processes and Theoretic Underpinnings' (2011) 37(1) North Carolina Journal of International Law 83.

[57]See also Henning Grosse Ruse-Khan, 'Intellectual Property and International Law: A Research Framework', in Irene Calboli & Maria Lillà Montagnani (eds), *Handbook of Intellectual Property Research: Lenses, Methods, and Perspectives* (Oxford University Press 2021) 15, 23; Suma Athreye, Luca Piscitello & Kenneth C Shadlen, 'Twenty-five years since TRIPS: Patent policy and international business' (2020) 3 Journal of International Business Policy 315, 316.

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every free trade agreement (FTA).[58] This shift of bringing IPRs into the public sphere is *only apparently* in contrast with a process – WTO negotiations, including towards TRIPS – that marked a milestone for many jurisdictions in their transition to open market economies, and serves as a reminder that States are indeed essential players in orchestrating the course of open markets.[59] WTO panels do not seem entirely comfortable with the idea of IP-intensive disputes bearing a public dimension,[60] but that does not make the TRIPS revolution any less momentous in this respect.

This brings me to the crux of the contention: what is the exact scope of 'judicial decisions'? If they generally encompass both judicial decisions and administrative rulings under the overarching definition of 'cases', which are to be deemed 'final'?[61] And when it comes to their applicability 'beyond the parties', what parties are being referred to? To what dispute? And what makes a judgment 'final'? One may posit that a ruling is final either when it *has not* been further appealed even though it could, or when it *cannot* be appealed as it has undergone last-instance proceedings in the relevant jurisdiction. In this respect, it is also worth wondering whether judgments in China can now 'be deemed erroneous in the application of law and thus … appealable [insofar as they differ] from an applicable guiding case'.[62] In China's response to the EU, it is objected that '"typical" cases, "typical technology" cases, and "big" cases [are] for reference and have no *legal effect of* general application'.[63] However, the absence of legal effect does not waive the obligation for disclosure: according to TRIPS, cases must be disclosed whenever they bear general application, regardless of the their formality (legal effect). Although an argument can be made about the difference between 'application' and 'applicability' (which will be discussed below), it is unlikely that Chinese negotiators at the time were trained to pay sufficient attention to this terminological sophistication – which is exactly why it is wiser to consider the substance of delegations' choices, whenever possible. In evaluating this substance, the interpretation that upholds, rather than undermines, the very purpose for parties to engage in the treaty-making process should take precedence (*ut res magis valeat quam pereat*).[64]

The role of language in negotiating agreements and understanding definitions – with language understood as a system of values and cultural upbringing, not as pedantic legalistic diatribes about 'ordinary' meanings which are mostly a fantasy – continues to be understudied when it comes to the relationship between China and 'the West'. One impediment IL doctrines face in integrating Chinese legal thinking into a largely Western-shaped international legal order derives from the West's inherent linguistic first-mover advantage. Since treaties are conceived for and negotiated

[58]See eg, Riccardo Vecellio Segate, 'The Unified Patent Court and the frustrated promise of IP protection: Investors' claims in (post-)Brexit Britain' (2020) 27(1) Maastricht Journal of European and Comparative Law 75, 84–85.

[59]See generally Jeffrey Henderson, *East Asian Transformation: On the Political Economy of Dynamism, Governance, and Crisis* (Routledge 2011); Mariana Mazzucato, *The Entrepreneurial State: Debunking Public vs. Private Sector Myths* (Anthem 2013); Jeffrey Henderson, Magnus Feldmann & Nana de Graaf, 'The Wind from the East: China and European Economic Development' (2021) 52(5) Development and Change 1047.

[60]Geiger (n 51) 672.

[61]See eg, WTO, IP/C/W/461 (n 18) 1. Notably, in the PRC 'courts are bound to the judicial interpretations of the Chinese People's Supreme Court, but administrative agencies are not, unless their decision is brought to court', see Liu Wenjing, 'Approaching democracy through transparency: A comparative law study on Chinese open government information' (2011) 26(4) American University International Law Review 983, 1005. See also Fen Lin, 'Authoritarian transparency: A comparative survey on open government information regulations in China', in Xiaowei Zang & Hon S Chan (eds), *Handbook of Public Policy and Public Administration in China* (Elgar 2020) 206; Yawen Zheng, 'China's New Foreign Investment Law and Its Contribution Towards the Country's Development Goals' (2021) 22 Journal of World Investment and Trade 388, 423.

[62]Mo Zhang, 'Pushing the Envelope: Application of Guiding Cases in Chinese Courts and Development of Case Law in China' (2017) 26(2) Washington International Law Journal 269, 273.

[63]WTO, IP/C/W/683 (n 40) para 4 (emphasis added).

[64]See Steven Reinhold, 'Good Faith in International Law' (2013) 2 *UCL Journal of Law and Jurisprudence* 40, 62; Mark E Villiger, 'The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The 'Crucible' Intended by the International Law Commission', in Enzo Cannizzaro (ed) *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011) 105, 110.

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by English-speaking audiences and elites, they naturally tend to accommodate legal dichotomies and expressions which derive from normalised Western conceptions of the law,[65] including 'bindingness versus non-bindingness'. When it comes to the 'precedential' value of cases, China's case law should rather be understood in terms of *degrees of authority*, circles of deference, and harmonious progress; to appreciate this diversity, 'no presumption of similarity should automatically apply'.[66] Problematically, most Westerners would regard rules and principles as interrelated but distinguishable, yet that is not necessarily the case in China. According to Dworkin, the difference between rules and principles lies in the fact that the former decide specific cases in an all-or-nothing fashion, while the latter incorporate the different shades that allow judges to weigh contrasting arguments to arrive at a more equitable outcome.[67] In common law jurisdictions, both seem to be found mostly in case law, but is it true that civil law jurisdictions contain them in laws instead? Perhaps it is more accurate to presume that cases serve a similar – though not as strong – function in civil law systems; dichotomies are dissipating fast and, again, prove unhelpful in explaining how things actually work in contemporary (and arguably future) legal systems.[68]

Before turning to matters of time, one note on the 'applicability vs application' conundrum is due. I noted above that it is unlikely that the negotiators paid attention to this distinction and chose the most appropriate term: they probably went for the most familiar one, at least as far as the Chinese delegation is concerned. Despite this, it is salient that TRIPS mentions 'application' rather than 'applicability', since the latter term was generally known to the drafters; after all, 'applicability' features twice in TRIPS – in the preamble, and in Article 24.1. Could it be inferred from this that 'application' was truly meant to indicate that cases must in fact *have already been applied* in a significant number of other decisions before the obligation to disclose them is triggered? If so, *how many* other decisions would suffice? Also, should cases be applicable to foreigners as well, in order to trigger a disclosure obligation? More generally, *by* whom and/or *to* whom (eg, rightsholders, counsels, and judges) should cases be applied in order to be relevant? They might possibly need to have been applied to court cases in a general sense without specifying to/by whom exactly.

Time, too, is a cardinal perspective from which to consider legal dilemmas. Publication requirements do exist and apply in perpetuity, but after how long are states required to disclose court cases?[69] And is it legitimate to expect states to publish officially through only one channel, perhaps a paper-based one, even if it takes longer than institutional apps or chat services? Time is an essential, albeit often neglected, variable in international as much as domestic law, in that it might shape what States consider lawful as well as their formal and informal expectations. It is significant that a legal and judicial system like China's is 'in transition' – though one could rebut that to an extent, all systems are in constant flux. One's conception of time intertwines with one's idea of authority and stability. Indeed, '[t]he values of legal certainty, stability, and predictability are highly prized in Western legal traditions, but do not carry as much weight in China due to a different attitude toward change',[70] and that would somehow make sense of the claim that there are no cases *of general application* in China. The issue of predictability strikes at the heart of the TRIPS paradox of

[65]For the examples of 'piracy' and 'counterfeiting' between English and Mandarin, see Andrea Wechsler, 'Spotlight on China: Piracy, enforcement, and the balance dilemma in intellectual property law', in Annette Kur & Marianne Levin (eds), *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS* (Springer 2011) 61, 72–73.

[66]Qiao Liu, 'Chinese "Case Law" in Comparative Law Studies: Illusions and Complexities' (2019) 14 Asian Journal of Comparative Law 97, 100; see also Wechsler (n 65) 80.

[67]See Rupprecht Podszun & Benjamin Franz, 'Regulatory Innovation and the Institutional Design of the TRIPS Agreement', in Hanns Ullrich et al (eds), *TRIPS plus 20: From Trade Rules to Market Principles* (Springer 2016) 279, 284.

[68]See generally Rostam Josef Neuwirth, 'The "Letter" and the "Spirit" of Comparative Law in the Time of "Artificial Intelligence" and Other Oxymora' (2021) 26 Canterbury Law Review 1, 30.

[69]See also Peter Van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* (3rd edn, Cambridge University Press 2013) 544–546.

[70]Liu, 'Chinese "Case Law" in Comparative Law Studies' (n 66) 100.

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being 'an institution of stability that aims to promote instability'[71] (ie, innovation). Coming back to modes of publication, perhaps the negotiators did not have in mind a world shaped by the Internet (especially *this* Internet), where one may expect States to promptly publish cases online, or indeed to make them widely available online even after they have been published in print. This is indeed an ontological revolution which certain jurisdictions may not be comfortable with – when they acceded, they must have assumed that timely disclosure could have happened in a few weeks or months, as opposed to a few hours or minutes.

Yet another point of contention relates to reasonableness. What constitutes a *reasonable* number of cases to be disclosed? Is disclosure and the facilitation of participatory awareness among all parties the actual and prerequisite spirit of the WTO, to the extent of overring other legitimate interests on the part of state parties? If the request were to be scaled down, the matter of 'general' application would surface: while the meaning of 'application' may not be straightforward to grasp, its accompanying adjective might be even more contentious. I will elaborate later on what *might* constitute a case of general application in China, but in a more general sense, the scope of the disclosure falls within expectations of reasonableness, which are ultimately grounded in a spirit of cooperation and *bona fides*. Good faith itself, despite its inclusion in Articles 26 and 31(1) of the VCLT, is by its very nature an indecipherable criterion for deciding disputes, subject to the geopolitical discourses of all parties involved. In the matter being scrutinised here, it is evident that a clause cannot *de facto* apply to and bind solely a part of the signatories (ie, common law jurisdictions), especially as civil law jurisdictions formed the overwhelming majority of negotiators! Nevertheless, it might be equally tenable for civil law parties to argue that if cases in common law serve roughly the same function as laws in civil law (that of guiding the judge throughout the resolution of similar cases), then laws are indeed disclosed and virtually all of them are by definition of general application (just like most cases in common law). If one were to take a formalistic approach to the contention, civil law jurisdictions could argue that common law ones also disclose their laws. However, this argument fails to aid in understanding how a case will be decided, mirroring how publishing cases is not key for civil law jurisdiction and disclosing them might foster inaccurate expectations. To escalate the argument, one could argue that civil law jurisdictions are already more predictable than common law ones. In the latter, the secondary position credited to laws results in primary weight being attributed not only to extemporary judicial decisions bearing precedential influence, but also to those which fill specific circumstances through judicial discretion instead of law's textual comprehensiveness. To exemplify (again with copyright law),

> [w]hereas civil law systems traditionally favour enumerative and conclusive catalogues of limitations, US copyright law contains an open "fair use" clause that is applied on a case-by-case basis by the courts.[72]

It is true that negotiating TRIPS was

> a deliberate choice in order to encompass the two different copyright traditions, namely the natural rights-focused continental tradition (where "exception" would be considered as the more appropriate term), and the utilitarian approach of common law (which would prefer "limitation").[73]

[71]Podszun & Franz (n 67) 281.

[72]Annette Kur, 'Limitations and exceptions under the three-step test – how much room to walk the middle ground?', in Annette Kur & Marianne Levin (eds), *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS* (Springer 2011) 208, 214.

[73]ibid 211, fn 13.

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For our purposes, however, the point to notice is that while exceptions are codified, limitations are discretionally applied by judges; hence, the former makes the IP environment slightly more predictable. Nonetheless, because copyright law has – to an extent – been 'socialised' from the empire's barycentre (the US) to the once-periphery (including East Asia), Chinese legislators have consistently found it puzzling to retain the case-tailored discretionary nature of copyright protection, while at the same time entrusting legislation with exclusive control over the outcome of copyright cases – in this field, the law is simply not enough:

> The hybrid characteristics of the copyright regime are represented in the usage of "fair use" by the judiciary and academics when referring to the permissible uses, although Chinese law does not adopt the US open model legislatively. [Common law's] utilitarian understanding of copyright, together with the pragmatic characteristics of the Chinese legal tradition, provide … for the flexible application of laws by the judiciary. … A macro view in judicial enforcement of copyright … illustrates that *the Chinese judicial system is pragmatic, policy-influenced, and one which adopts a guiding-guided relationship between superior and subordinate courts. Apart from judicial interpretations which remain stable to some extent*, judicial documents, including opinions, notices, and conference summaries, all follow or are influenced by national policies or major decisions …, including major cases or typical cases … *New rules are put forward and refined during the process of explanations by the courts*[, whose] activities are influenced by the needs of reality and national policies within a broader social context.[74]

Uniformity, fairness, and stability – in one word, predictability – are, in turn, key values at the WTO.[75]

The rationale behind the disclosure of laws is that whenever they are not published, their intended addressees will not be bound by them.[76] While *ignorantia legis non excusat*, publication is a prerequisite for giving effect to the law. With unpublished case law, the risk of ignorance arguably shifts to the other party, at least where the non-publishing jurisdiction is a civil law one. Conversely, when the non-publishing jurisdiction adopts a common law system, the other party may claim not to be bound by undisclosed laws. This approach is also reflected in Article X.2 of the GATT, pursuant to which 'no measure of general application taken by any contracting party … imposing a new or more burdensome requirement … shall be enforced before such measure has been officially published'.[77] When a civil law party such as China has to decide on new cases, these will not be binding to the same extent as its laws; however, the tenability of this dichotomy between civil and common law systems remains a pertinent question.

China's engagement with transparency requirements stemming from its international trade obligations is far-reaching on its court system and administrative procedures, and exhibits a long history that vastly exceeds the specific TRIPS obligation discussed in this article. Scholars tend to agree that

[74]Zhongyi Tao (陶中怡), 'Fair use regime in China: Findings from an exploration into judicial experiences' (Doctor of Legal Studies Thesis, University of Hong Kong 2015) 286–287 <http://dx.doi.org/10.5353/th_b5558969> accessed 29 Sep 2023 (two emphases added).

[75]See eg, Andreas Klasen, '*Quo Vadis*, Global Trade?', in Andreas Klasen (ed), *The Handbook of Global Trade Policy* (Wiley 2020) 3, 5–6.

[76]However, unawareness of foreign laws might still be problematic in terms of competition; see eg, James Bacchus, Simon Lester & Huan Zhu, 'Disciplining China's Trade Practices at the WTO: How WTO Complaints Can Help Make China More Market-Oriented' (CATO Institute Policy Analysis No 856, 15 Nov 2018) 7 <https://euagenda.eu/upload/publications/untitled-199756-ea.pdf> accessed 29 Sep 2023.

[77]And indeed, precedents on disclosure requests have a long history under the GATT as well; see eg, the cases *Thailand – Cigarettes (Philippines)* in 2011 and *US – Countervailing and Anti-Dumping Measures (China)* in 2014, as well as *US – Underwear (Costa Rica)* in 1997. For further information, see Van den Bossche & Zdouc (n 69) 546–549. All these cases are concerned with the publications of *laws*, which raises the question of how to 'apply' them by analogy to case-law, in keeping with the principles of transparency, due process, and notice.

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if one considers the unfolding of international agreements in the domain of trade, wide-ranging transparency requirements – mostly modelled after Euro-American values, capacity, expertise, and expectations – have been effectively imposed on other jurisdictions[78] through a supposedly 'Global' Administrative Law.[79] Within this context, the case of East Asia is of particular importance, given the geoeconomic power of East Asian countries and their controversial developmental-governmental trajectories[80] (whereby *pro capite* underdevelopment in some rural areas coincides with the strong performance of these economies as a whole).[81] As for China specifically, it has made sweeping efforts to implement systems of review, monitoring, and disclosure of its laws,[82] to the extent that one might hypothesise that its reluctance to undertake similar efforts in relation to case law is partly premised upon its unwillingness to overburden the complex governance of its administrative system if no clear domestic benefit can be generated in return.

Moving on to another segment of the contention at stake, China observed that while a WTO member enjoys the right to demand case disclosure, the requested party has no obligation to follow up (or, to put it slightly differently, to actually disclose those cases). This is indicative of anything but good faith, and yet, the Chinese response might find some residual merit in TRIPS' negotiating history. Indeed, the obligation that 'the Party so requested shall make reasonable efforts to supply the information' – which was already phrased in non-absolute, reasonable-effort lexicon – was explicitly removed from the 25 October 1990 draft TRIPS during the *travaux préparatoires* (whose relevance stand deeply engrained into PIL).[83] The preparatory works reveal other background information of relevance here, including that the requirement that cases be *promptly* disclosed was dropped from the draft dated 1 October 1990, as recommended by Switzerland, as was the consideration that all decisions of international bodies made effective by the party should also be covered by the disclosure requirement – the latter rule was plausibly removed upon objection by the US and Japan.[84] Of relevance here, the formula 'of precedential value' as it had originally been proposed by Switzerland was later replaced with 'of general application', possibly with the intention of broadening the range of cases, although, as this paper outlines, it ultimately achieved the opposite effect.[85]

To draw meaningful analogies, a slightly different legal question was raised by the US in the WTO concerning the precedential status of case law *within the WTO system*. Although no strict *stare decisis* applies to their holdings,[86] WTO panels tend to treat similar cases similarly,[87] unless a 'cogent reason' demands their departure from previous holdings.[88] Unsurprisingly, the US has

[78]See especially Ljiljana Biukoviç, 'Selective Adaptation of WTO Transparency Norms and Local Practices in China and Japan', in Debra P Steger (ed), *Redesigning the World Trade Organization for the Twenty-first Century* (CIGI 2009) 193, 197.

[79]See also Chien-Huei Wu, 'How Does TRIPS Transform Chinese Administrative Law?' (2008) 8(1) Global Jurist.

[80]See also Bo Rothstein, 'The Chinese Paradox of High Growth and Low Quality of Government: The Cadre Organization Meets Max Weber' (2015) 28(4) Governance: An International Journal of Policy, Administration, and Institutions 533.

[81]In fact, 'many of the world's poor live in populous countries which are not the poorest in the world …, such as … China', see Andy P Sumner, *Global Poverty: Deprivation, Distribution, and Development Since the Cold War* (Oxford University Press 2016) 37. To grasp the scope of the practical constraints bearing upon Chinese bureaucracy, one should also distinguish between absolute and relative poverty, with their geographical and generational distribution and broader sociological implications; for instance, 'while the absolute poverty at the bottom has been alleviated, … opportunities for upward mobility of ordinary people have been reduced in recent years', see LI Linyan & Cheng Boqing, 'Hope and Paradox in Contemporary Chinese Society: A Moment for Cultural Transformation?' (2023) 54(1) The American Sociologist 101, 108.

[82]See Biukoviç (n 78) 203–207.

[83]See Daniel J Gervais, *The TRIPS Agreement: Drafting History and Analysis* (Sweet & Maxwell 2008) 672.

[84]ibid 670.

[85]ibid.

[86]See generally Georgios I Zekos, 'Precedent and Stare Decisis by Arbitrations and Courts in Globalization' (2009) 10(3) The Journal of World Investment & Trade 475.

[87]See eg, Kur (n 72) 239–240; Stefan Staiger Schneider, 'Access to Justice in Multilevel Trade Regulation: Brazil, MERCOSUR and the WTO' (2014) LLD Thesis at the European University Institute, p.75.

[88]This is the *jurisprudence constante* doctrine, derived from civil law theory.

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misappraised the doctrine, and maintained that WTO panels are straightly treating previous cases as precedents, while civil law jurisdictions such as Brazil and China rebutted that 'guidance' is not the same as 'precedent'.[89] This aligns with a tendency on the part of the US policymakers to superficially dismiss the nuances and sophistication found in domestic legal frameworks other than their own, which in turn seems to lead them to label any competing system as 'inefficient' whenever it does not conform to US traditions. This was also evident in the ethnocentric bias and oversimplification reiterated in certain strands of American scholarship.[90] In any event, similar arguments were reiterated in relation to arbitrated – as opposed to adjudicated – trade disputes.[91] Interestingly, the term 'jurisprudence' (employed to mean 'case law' rather than 'legal theory') is best derived from the French legal system, which is often considered to be one of the most paradigmatic examples of civil law jurisdictions, while in fact embodying many seeds of 'precedentism' that resemble common law traditions more closely than presumed. To exemplify,

> Plenary Assembly "decisions of principle" ("*arrêts de principe*") are binding on the various chambers of the Court of Cassation, and all lower judicial courts will generally apply the principles set forth in such decisions. Decisions by the Plenary Assembly are almost always considered to be decisions of principle. Decisions of principle do not differ in form from any other court decisions. However, they will generally include a phrase explicitly stating a specific rule that applies to a particular situation. In the future, other courts facing similar cases will state the applicable law as well as the rule from the earlier case that applies to such situations as a matter of legal principle. While courts will not explicitly refer to the earlier decision of principle, they will consistently use the same phrasing in order to refer to the rule … A Court of Appeal can [initially] resist a position taken by the Court of Cassation. This can occur when the Court of Cassation overrules and remands a decision of the Court of Appeal, and the latter does not alter its judgment to conform to the Court of Cassation's decision. The Plenary Assembly is then summoned to issue a decision of principle which will generally be followed by all courts in the *ordre judiciaire* … [Furthermore,] French constitutional law is entirely judge-made law.[92]

Legal historians and comparativists will not be surprised: the bifurcation between civil and common law traditions is a relatively recent phenomenon, with France denying the precedential value of

[89]See Zihan Liu, 'The Precedential Value Case Law of the WTO Dispute Settlement Mechanism' (Edinburgh Student Law Review, 12 Apr 2021) <https://www.eslr.ed.ac.uk/2021/04/12/the-precedential-value-case-law-of-the-wto-dispute-settlement-mechanism/> accessed 29 Sep 2023. See also Office of the United States Trade Representative, 'Report on the Appellate Body of the World Trade Organization' (2020) 7, para 5 <https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf> accessed 29 Sep 2023.

[90]See eg, Mark Liang, 'A Three-Pronged Approach: How the United States Can Use WTO Disclosure Requirements to Curb Intellectual Property Infringement in China' (2010) 11 Chicago Journal of International Law 285, 294, simplistically noting that '[t]he lack of … precedent … make[s] the Chinese judicial system ineffective as an institution for enforcing IPR'. Law & Economics literature from the US, too, agrees that common-law systems are inherently superior in producing high-performance economic results; see eg, Frank B Cross, 'Identifying the Virtues of the Common Law' (2007) 15 Supreme Court Economic Review 21. See also Gabrielle Kaufmann-Kohler, 'The 2006 Freshfields Lecture: "Arbitral Precedent: Dream, Necessity or Excuse?"' (2007) 23 Arbitration International 357, 361.

[91]The reader is referred to the entries tagged with 'precedent' in the *International Economic Law and Policy Blog*, available at <https://ielp.worldtradelaw.net/precedent/> accessed 29 Sep 2023, for updates on the matter as they arise. These two entries, in particular, may offer valuable insights: <https://ielp.worldtradelaw.net/2022/01/the-us-view-of-precedent-in-article-226-proceedings.html> and <https://ielp.worldtradelaw.net/2023/02/the-mpia-whats-new-part-i.html> both accessed 29 Sep 2023. See further Martin Jarrett, 'ISDS 2.0: Time for a doctrine of precedent?' [2023] Journal of International Economic Law 1.

[92]Laurent Cohen-Tanugi, 'Case Law in a Legal System Without Binding Precedent: The French Example' (Stanford Law School China Guiding Cases Project, Commentary No 17, 29 Feb 2016) <https://web.archive.org/web/20220124201929/https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2016/02/CGCP-English-Commentary-17-Partner-Cohen-Tanugi.pdf> archived from the original 24 Jan 2022, accessed 29 Sep 2023.

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judgments only in the aftermath of the French Revolution.[93] From a historical standpoint, we might thus assess hybridisation as a kind of foreseeable *déjà vu* rather than an unprecedented disruption. In fact, only the 'Google revolution' (and now the emergence of Chat-GPT and other large language models, as well as – to a lesser extent – generative artificial intelligence in general) has made appreciable fractions of US court history available, thereby demonstrating unequivocally that the purportedly solid common law foundations of the US legal system are more mythical than substantially factual.[94] This perspective prompts scholars to advocate for a reconsideration of the viability of this civil/common law divide.[95] In fact, even in common law jurisdictions, the persuasiveness or binding force of cases is a matter of degree[96] and depends on several factors,[97] so that even landmark decisions can be overruled if the opportunity arises.[98] While the divide still broadly corresponds to meaningful distinctions, not least as to what it is meant by 'unity' and 'system',[99] the above serves well as a reminder of the importance of complexifying concepts and eviscerating trends.

All of the above observations have introduced some comparative, analogical, and inferential insights to more comprehensively contextualise the terminological and conceptual scope of the disagreement between Western jurisdictions and China over the subject-matter of their WTO saga. This is not to say that increasingly typical normative resolution tools could not be resorted to in an attempt to untangle the dispute. Admittedly, I would advise holding on to the cultural and geopolitical substance of the stances at stake rather than turning to complex IL rituals. If the latter were preferred, however, the toolbox of 'systemic integration' as per Article 31(1)(c) of the VCLT and related work by the International Law Commission (ILC)[100] should be considered. To this end, lawyers may wish to explore not only the potential resolution of similar conflicts in other trade-intensive treaties (such as FTAs) to which both China and the EU/US are parties, but also in investment agreements[101] and, in particular, human-rights (HR)

[93]See further Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46(2) Journal of Economic Literature 285, 305–306.

[94]See James Maxeiner, 'A Government of Laws Not of Precedents 1776–1876: The Google Challenge to Common Law Myth' (2015) 4 British Journal of American Legal Studies 137. On generative AI and legal databases, see also 'Generative AI could radically alter the practice of law – Even if it doesn't replace lawyers en masse' (The Economist, 6 Jun 2023) <https://www.economist.com/business/2023/06/06/generative-ai-could-radically-alter-the-practice-of-law> accessed 12 Jan 2024.

[95]See most recently Andrea Pin, 'The (In)evitability of Precedent' (2022) 2 The Italian Review of International and Comparative Law 246.

[96]See eg, Randy J Kozel, 'The Scope of Precedent' (2014) 113(1) Michigan Law Review 179.

[97]See eg, Sebastian Lewis, 'Precedent and the Rule of Law (2021) 41(4) Journal of Legal Studies 873; Philip James Sales, 'Default Rules in the Common Law: Substantive Rules and Precedent' (International Workshop on Default Rules in Private Law, 24 Mar 2023) <https://www.supremecourt.uk/docs/Default%20Rules%20in%20Common%20Law%20-%20Lord%20Sales.pdf> accessed 29 Sep 2023; Charles Cole, 'The reality of binding precedent in America' (2005) 24 Nomos 137 <http://periodicos.ufc.br/nomos/article/view/11780/9861> accessed 29 Sep 2023.

[98]To exemplify, in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, the High Court of Australia rejected the doctrine of *terra nullius*, which had been the basis of Australian land law since British colonisation; and in *Brown v Board of Education*, 347 US 483 (1954), the US Supreme Court unanimously overruled the 'separate but equal' doctrine. I thank my anonymous 'Reviewer 1' for these exemplifications.

[99]See René Brouwer, 'On the Meaning of 'System' in the Common and Civil Law Traditions: Two Approaches to Legal Unity' (2018) 34 Utrecht Journal of International and European Law 45.

[100]See Riccardo Vecellio Segate, 'The Distributive Surveillant Contract: Reforming "surveillance capitalism through taxation" into a legal teleology of global economic justice' (PhD Thesis, University of Macau 2022) 580 <https://library2.um.edu.mo/etheses/991010238079006306_ft.pdf> accessed 29 Sep 2023; Ivo Tarik de Vries-Zou, 'Divided but harmonious? The interpretations and applications of article 31(3)(c) of the Vienna Convention on the Law of Treaties' (2020) 16(1) Utrecht Law Review 86; Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration* (Brill 2015); Sotirios-Ioannis Lekkas, 'The Uses of the Outputs of the International Law Commission in International Adjudication: Subsidiary Means or Artefacts of Rules?' (2022) 69 Netherlands International Law Review 327.

[101]Indeed, several international investment and commercial treaties 'include a requirement that States make publicly available any laws and regulations which affect investment activities', including Article 10 of the Agreement Among the Government of Japan, the Government of the Republic of Korea and the Government of the People's Republic of China for the Promotion, Facilitation and Protection of Investment, I-52807 (13 May 2012); see Esmé Shirlow, 'Three

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conventions,[102] which are increasingly being scrutinised by WTO panels themselves.[103] In this respect, I shall note that not many HR treaties applicable to both China and the US contain the expression 'of general application' *et similia*. This is firstly because the US, still biased by its *primus inter pares* status,[104] has largely not ratified HR treaties (but this is *not* true of the EU). Second, the expression itself does not frequently feature in such texts and related commentaries; in the few times that it does, it refers to legislation rather than case law.[105]

By any means, what China (or any other party) can argue is that TRIPS, as it stands, may be interpreted more or less narrowly and/or more or less teleologically, but their arguments shall be grounded in PIL (eg, negotiating stances, subsequent practice, and emerging customs) as opposed to mere domestic considerations. Pursuant to Article 27 of the VCLT, and as also reflected in Article 3 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, a state cannot invoke its domestic legal order (including the configuration of its court system, its enforcing capacity, or the precedential value of its judgments per se) to justify incompliance with the international treaty obligations it entered into.[106] Linguistically, too, under the well-established 'autonomous meaning' doctrine, states may object to certain interpretations being attached to specific IL provisions, but this is to be phrased *in autonomous IL terms* and cannot automatically and explicitly draw on domestic semantics to automatically infer the *IL meaning* of treaty provisions,[107] even if state representatives most plausibly negotiated such provisions with precisely those domestic meanings in mind. For instance, *pacta sunt servanda* is replete with exceptions and qualifications in East Asian legal texts (within China, this holds true for both the 'civil law' Mainland and the 'common law' Hong Kong),[108] but this cannot be immediately 'transposed' onto, eg, Chinese delegations' interpretations of this (and cognate) expression as they should be incorporated or have already been incorporated within international treaties.

Concrete Benefits and Repercussions from Case Law Disclosure Internationally

One intriguing conundrum concerns the reasons why the 'general applicability' of domestic case law for transparency and predictability purposes, despite its self-evident magnitude, has seldom – if ever – been raised by international negotiators and scholars alike in the hundreds of trade and

Manifestations of Transparency in International Investment Law: A Story of Sources, Stakeholders and Structures' (2017) 8 Goettingen Journal of International Law 73, 79.

[102]However, for two notes of caution, see Adamantia Rachovitsa, 'The Principle of Systemic Integration in Human Rights Law' (2017) 66(3) International & Comparative Law Quarterly 557; Mélanie Samson, 'High Hopes, Scant Resources: A Word of Scepticism about the Anti-Fragmentation Function of Article 31(3)(c) of the Vienna Convention on the Law of Treaties' (2011) 24(3) Leiden Journal of International Law 701.

[103]See Klaus Dieter Beiter, 'Establishing Conformity between TRIPS and Human Rights: Hierarchy in International Law, Human Rights Obligations of the WTO and Extraterritorial State Obligations Under the International Covenant on Economic, Social and Cultural Rights', in Hanns Ullrich et al (eds), *TRIPS plus 20: From Trade Rules to Market Principles* (Springer 2016) 445, 479–480.

[104]By way of exemplification, see Olesya Dovgalyuk & Riccardo Vecellio Segate, 'From Russia and beyond: The ICC global standing, while countries' resignation is getting serious' (FiloDiritto, 5 Jan 2017) 15 <https://www.filodiritto.com/sites/default/files/articles/documents/0000002222.pdf> accessed 29 Sep 2023; Riccardo Vecellio Segate, 'Resisting domestic courts' universal jurisdiction over international crimes: Comparative notes on China and Italy', in Patrycja Karolina Grzebyk (ed), *International Crimes in National Regulations of Selected States* (Wydawnictwo Instytutu Wymiaru Sprawiedliwości 2022) 245, 252.

[105]Two examples are para 48 of the 1986 Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, and principles I(B)(i)(15) and II(E)(61) of the ECOSOC Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (28 Sep 1984).

[106]See also Panos Merkouris, 'Interpreting the Customary Rules on Interpretation' (2017) 19(1) International Community Law Review 126, 145–146.

[107]See Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008), 335.

[108]See eg, Siyi Lin, 'Exceptions to *pacta sunt servanda* in the Chinese Civil Code', in Normann Witzleb (ed), *Contract Law in Changing Times: Asian Perspectives on* Pacta Sunt Servanda (Routledge 2023).

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investment fora and arrangements operating worldwide.[109] I cannot offer a satisfactory explanation for this. Instead, I can attempt to illustrate the essential reasons why they *should* consider this matter more often, especially when it comes to reciprocity of treatment in international trade and investment dealings.

The first benefit is obvious: they would be able to negotiate deals on a better-informed basis, lowering or invalidating any information asymmetry, and lawyers would be able to advise their clients more accurately and nuancedly on the applicable legal environment. This would be particularly crucial in China, where the legal market has traditionally been structured around domestic protectionism:[110] under the 'no nationality, no bar' tenet, foreign lawyers are largely barred from practising law, and especially from pleading in court, and are thus forced to nominally rely on local law firms while acting as 'advisors' to them. Providing clients with more insightful advice on what to expect from judicial practices throughout China will also offset certain ethical misalignments between seeking legal protection in China and relying on non-admitted foreign firms to that end. Also, information sharing seems indispensable for in-house counsels to strategise about which courts within a given jurisdiction are more likely to issue higher awards and/or display greater sensitivity to certain legal arguments.[111] This, in turn, likely enhances regulatory coherence and legal certainty, two pillars of what is doctrinally defined as the 'rule of law' and valued by public and private entities alike. Indeed, 'reliable policy frameworks … and predictable and stable revenues are key for private actors … Nearly as important as the national policy framework itself is that private investors perceive it as clear, stable and predictable'.[112] International regimes are shaped by and should represent private interests to varying degrees, but with TRIPS it is definitely the case that the global IP regime has been defined by non-state actors[113] and should tend to meet their expectations (eg, on business-environment predictability) rather than domestic public interests (eg, on secrecy, judicial autarchy, or protectionism). And while 'it is not true that domestic contests over IPRs have disappeared, … the IPRs that eventually find their way into domestic laws are less the outcome of domestic contests and more of those unfolding at the global level'[114] between corporate conglomerates and (post-)Westphalian sovereigns.

Moreover, the greater the degree of information that states possess about judicial practices in the jurisdictions that have acceded to the same treaties to which they are a party, the more proficiently they may be able to direct their industrial policies and steer innovation – including in a joint or coordinated transnational fashion, more diffusely. Doing so according to plan would in turn make the design of such policies more balanced and possibly 'fairer', incentivising the development

[109]There are a few significant exceptions to this. For instance, Article 1 of the APEC Model Chapter on Transparency for RTAs/FTAs (Joint Statement, Annex A, APEC Ministerial Meeting (6 Sep 2012) <https://www.apec.org/docs/default-source/Publications/2012/9/2012-CTI-Annual-Report-to-Ministers/TOC/Appendix-2---Model-FTA-Chapter-on-Transparency.pdf> accessed 29 Sep 2023) provides that

> [t]he term "measure of general application" includes, as it is provided for in the relevant Articles of WTO Agreements (in particular Article X of GATT, Articles III and XXVIII of GATS), judicial decisions of general application. There is no intention to include judicial decisions that are not of general application and that regulate relations between specific parties in a dispute, i.e. those decisions that have no direct impact on non-parties to the proceedings.

[110]See extensively Chenglin Liu, 'Risks Faced by Foreign Lawyers in China' (2018) 35(1) Arizona Journal of International & Comparative Law 131; Sida Liu, David M Trubek & David B Wilkins, 'Mapping the Ecology of China's Corporate Legal Sector: Globalization and Its Impact on Lawyers and Society' (2016) 3(2) Asian Journal of Law and Society 273.

[111]See Susan Finder, 'China's Evolving Case Law System in Practice' (2017) 9 Tsinghua China Law Review 245, 255.

[112]Fiona Bannert, 'Climate Finance, Trade and Innovation Systems', in Andreas Klasen (ed), *The Handbook of Global Trade Policy* (Wiley 2020) 555, 561 and 564.

[113]See eg, Valbona Muzaka, 'Intellectual Property Governance: The Emergence of a New and Contested Global Regime', in Stefano Guzzini & Iver Brynild Neumann (eds), *The Diffusion of Power in Global Governance: International Political Economy Meets Foucault* (Palgrave 2012) 71, 75–76.

[114]ibid 77.

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of technical and entrepreneurial talent. States may also become less wasteful of resources by avoiding frivolous litigation. Put differently, information sharing is also essential for convergence – only by sharing each other's case law can states seek to cooperate to converge on mutually favourable policies.

At the international level, states would be enabled to check whether domestic legislation and judiciaries across foreign jurisdictions have duly taken note of international decisions by, for example, WTO panels. Admittedly, these decisions are not strictly binding on domestic courts, but they could (and arguably should) still inform domestic judges' orientation *vis-à-vis* globally prominent IP matters[115] such as SEPs, whose leading cases have been included by China in major case law compilations, and which I opened my analysis with. It is true that, as seen above, the WTO Secretariat would not define what constitutes a case 'of general application' in a binding fashion, but WTO panels could do so and craft a *de facto* binding definition over time, so that the submission of domestic cases expressing courts' stances on what may or may not not be 'of general application' becomes worthy of consideration by the state parties.

Government attachés could raise timely concerns if judgments looked suspicious, before they crystallise into authoritative case law. As bribery has long proved endemic in the Chinese court circuit[116] and remains a credible threat to its systemic integrity (especially away from the coastal cities), it seems important to prevent corruption-favoured judicial outcomes from falling off the radar. Approaching the problem from the reverse perspective, courts themselves may be motivated to publicise their own cases as a leverage to broaden their normative appeal and possibly set persuasive standards for other courts abroad (and especially regionally) to follow.[117] In fact, a race-to-the-top argument can be made that the more jurisdictions are aware of foreign case law, the more they cross-check each other both horizontally (among colleagues and peers, domestically and transnationally) and vertically (within each hierarchical court system and the court-government dialectic).[118] These transnational, dialogical, interpretational, and somehow 'networked' arrangements of persuasion and citation patterns are well documented among human rights and constitutional adjudicators,[119] but relatively less explored in the realm of IP.[120]

[115]See eg, for the US: Dingding Tina Wang, 'When Antitrust Met WTO: Why U.S. Courts Should Consider U.S.-China WTO Disputes in Deciding Antitrust Cases Involving Chinese Exports' (2012) 112(5) Columbia Law Review 1096, 1125–1126.

[116]See eg, Yuhua Wang, *Tying the Autocrat's Hands: The Rise of the Rule of Law in China* (Cambridge University Press 2015) 118.

[117]See also Daniel Hoadley et al, 'A Global Community of Courts? Modelling the Use of Persuasive Authority as a Complex Network' (2021) 9 Frontiers in Physics 1; Chad Flanders, 'Toward a Theory of Persuasive Authority' (2009) 62 (1) Oklahoma Law Review 55.

[118]See also Liang, 'A Three-Pronged Approach' (n 90) 308.

[119]See eg, Wayne Sandholtz, 'Human rights courts and global constitutionalism: Coordination through judicial dialogue' (2021) 10 Global Constitutionalism 439; Christopher McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' (2000) 20(4) Oxford Journal of Legal Studies 499; Monica Claes & Maartje de Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks' (2012) 8 Utrecht Law Review 100; Antonios Tzanakopoulos, 'Judicial Dialogue as a Means of Interpretation', in Helmut Philipp Aust & Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford University Press 2016) 72.

[120]Nevertheless, see Xavier Seuba, 'International Intellectual Property Enforcement: From Multilateralism to Plurilateralism and Bilateralism', in Pedro Roffe & Xavier Seuba (eds), *Current Alliances in International Intellectual Property Lawmaking: The Emergence and Impact of Mega-Regionals* (Global Perspectives for the Intellectual Property System, CEIPI-ICTSD publication series, issue 4, 2017) 137; Thomas Cottier, 'The legal nature of intellectual property rights in public international law', in Gustavo Ghidini, Hanns Ullrich & Peter Drahos (eds), *Kritika: Essays on Intellectual Property* (Edward Elgar 2021) 23; Laurence R Helfer, Karen J Alter & M Florencia Guerzovich, 'Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community' (2009) 103(1) American Journal of International Law 1; Emmanuel Lazega, 'Mapping Judicial Dialogue across National Borders: An Exploratory Network Study of Learning from Lobbying among European Intellectual Property Judges' (2012) 8 Utrecht Law Review 115.

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Relatedly, still in the PIL domain, there is a HR component (eg, on environmental, property, or health-related dignity rights) to IP transactions and enforcement whose balancing exercises are not too infrequently factored into judgments before constitutional and supranational courts.[121] These exercises are best performed when jurisdictions are made aware of each other's jurisprudence, and whenever WTO panels are faced with 'trade & …' questions featuring a HR component (ie, substantially always), cognizance of the case law of state parties could help them to extrapolate general principles and bestow due weight upon the stances and traditions of diverse legal systems. In this sense, refusing to make panels aware of such discussions reads like self-defeating a strategy. Even if one were to accept the reasoning that developing countries would benefit most from submitting their case law to the attention of foreign counterparts and international bodies (such as WTO panels), these countries might well be afforded certain degrees of leeway to disclosure requirements[122] in order to lower the burden on their courts. Tellingly, Article 41.5 of TRIPS specifies that the Part of the Agreement dealing with the enforcement of IPRs

> does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in [this] Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

Phrased differently, it would be extremely favourable and worthwhile for developing countries to share their judgments with institutions and other governments globally, but where administrative strain is anticipated, they could be afforded 'customised shades' of disclosure obligations. The Council for TRIPS acknowledges that disclosure requirements are burdensome for developing countries, but notes that institutional accommodation (eg, in the form of translation services) has been provided.[123] It would appear that the Council does not believe that developing countries should be given further accommodations, but this is far from settled and warrants analysis in its own right. As for China, it has never come across as a proper fit for the 'developing country' category, so that when joining the WTO, it was met with enhanced obligations (so-called 'WTO-plus rules') rather than deeper policy accommodation. None of those enhanced obligations, however, relate to case law disclosure. Negotiators appeared more concerned with securing China's willingness to operate exclusively under *the laws* it had published domestically and disclosed to its trade partners.[124] Nonetheless, one could argue that while most of inner China is still somewhat rural ('development' is mostly concentrated along the coast) and thus disclosing most or all cases in any organic and systematic manner would be administratively and bureaucratically burdensome, the disclosure of core categories of apical IP cases from selected technology-intensive districts such as Běijīng, Shànghǎi, Shēnzhèn, Guǎngzhōu, Tiānjīn, Dàlián, or Hángzhōu would stand as a more

[121]On the need for these balancing exercises, see Wechsler (n 65) 67; Frantzeska Papadopoulou, 'TRIPS and human rights', in Annette Kur and Marianne Levin (eds), *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS* (Springer 2011) 262, 275.

[122]This suggestion might sound like a reedition of the infamous 'common but differentiated responsibilities' argument often submitted by China (together with other 'developing' jurisdictions) in the context of environmental treaty negotiations; see eg, Riccardo Vecellio Segate, 'Protecting Cultural Heritage by Recourse to International Environmental Law: Chinese Stances on Faultless State Liability' (2020) 27 Hastings Environmental Law Journal 153, 191.

[123]Kristie Thomas, *Assessing Intellectual Property Compliance in Contemporary China: The World Trade Organisation TRIPS Agreement* (Palgrave 2017) 54.

[124]See extensively Julia Ya Qin, '"WTO-Plus" Obligations and Their Implications for the WTO Legal System: An Appraisal of the China Accession Protocol' (2003) 37(3) Journal of World Trade 483, 492.

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reasonable expectation and commitment. This is already the case in practice – but not always,[125] and not *de iure*.

Precedential Value in China: Special Case Law Compilations and their Wider Socio-Judicial and (Geo)Political Context

'China has undergone an overhaul of its judicial system – including its IP law system – that is unprecedented in legal history',[126] and making certain cases to an extent precedential is a major contribution to this revolution. Even as recently as six years ago, scholars could confidently maintain the long-held assumption that '[i]n China, cases are not binding precedents[, even though] Chinese courts, with the SPC in the lead, have taken various opportunities to fill in the blanks … through their authority to interpret the laws'.[127] After all, from domestic fora to those operating under PIL,

> it is not unusual for courts of last resort to be entrusted with a level of discretion. Courts are necessary precisely because law-makers, both domestic and international, cannot envisage every [eventuality] to which law may be applied, and it is the highest courts to whom we accord the greatest degree of discretion in interpreting the law.[128]

However, case guidance in China is rapidly shifting from being merely interpretative to truly precedential a legal device. To be sure, the assumption that Chinese cases bear no precedential significance did not hold true decades ago either. More than thirty years ago, scholars both in China and abroad were already noticing that binding force in Chinese case law was moving towards a mixed system.[129] A couple of decades ago, doctoral theses were already classifying it as a 'mixed system'.[130] Granted, China has probably *not* progressed towards mixed status as steadily and uninterruptedly as one might have expected at the time of its entry into the WTO system, but the transition has occurred and has been remarkably catalysed in the last five years or so. If one has to draw a correlation, this roughly corresponds to the second (and third) Xi Jinping era, ie, to the season after President Xi amended the Constitution to grant himself power *ad vitam*.[131]

While Chinese judges are still prohibited from citing cases *as the legal basis for their judgments*, including from the SPC itself,[132] they are, nevertheless, allowed to cite them more casually *as a*

[125]Most importantly, not in the case of anti-suit injunctions granted by Chinese courts in leading patent cases; see the Testimony of Mark Allen Cohen (柯恒) before the US Economic and Security Review Commission on cross-border intellectual property litigation (Panel III, Hearing on 'Rule of law: China's increasingly global reach', 4 May 2023) 4 <https://www.uscc.gov/sites/default/files/2023-05/Mark_Cohen_Testimony.pdf> accessed 29 Sep 2023. Other notable exceptions are court decisions involving Veeco and Schneider Electric; see the Statement by Mark Allen Cohen (柯恒) on 'Engaging and Anticipating China on IP and Innovation' before the US Senate Committee on the Judiciary, Subcommittee on Intellectual Property (Hearing on 'Foreign Competitive Threats to American Innovation and Economic Leadership', 18 Apr 2023) 6–7. See further the Statement by Mark Allen Cohen (柯恒) on 'Optimizing US Government Engagement on Chinese IP and Tech Issues' before the Subcommittee on Courts, Intellectual Property and the Internet of the Committee of the Judiciary (Hearing on 'Intellectual Property and Strategic Competition with China: Part 1', 8 Mar 2023) 9.

[126]Wechsler (n 65) 84.

[127]Wenliang Zhang, 'Sino–Foreign Recognition and Enforcement of Judgments: A Promising "Follow-Suit" Model?' (2017) 16(3) Chinese Journal of International Law 515, 520. See also Thomas E Volper, 'TRIPS Enforcement in China: A Case for Judicial Transparency' (2007) 33 Brooklyn Journal of International Law 309, 329–330.

[128]James Gerard Devaney, 'The role of precedent in the jurisprudence of the International Court of Justice: A constructive interpretation' (2022) 35(3) Leiden Journal of International Law 641, 658.

[129]See Walter Hutchens, 'Private Securities Litigation in China: Material Disclosure about China's Legal System?' (2003) 24 University of Pennsylvania Journal of International Economic Law 599, 620 fn 84.

[130]See eg, Emilia Justyna Powell, 'Conflict, Cooperation, and the World's Legal Systems' (PhD Thesis, Florida State University 2006) 41.

[131]See further Kjeld Erik Brødsgaard, 'China's political order under Xi Jinping: Concepts and perspectives' (2018) 16(3) China: An International Journal 1.

[132]See John Zhuang Liu, Lars Klöhn & Holger Spamann, 'Precedents and Chinese Judges: An Experiment' (2021) 69(1) The American Journal of Comparative Law 93, 93.

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reference. However, Guiding Cases (GCs) represent an official exemption from this rule. Moreover, judges may refrain from directly citing SPC cases while citing SPC JIs, which are anyway based, covertly or overtly, on the most authoritative, persuasive, and successful case law developed in China on the relevant subject (mostly owing to the SPC itself). This warrants an examination of the purpose of China's choreography of banning GCs as a legal basis for judgments. Chinese scholars themselves have acknowledged that searching Chinese laws for solutions to practical legal problems is a recurring source of frustration: substantive laws in China (not merely the Constitution) are often programmatic and principled in nature and therefore lack precision, accuracy, and determination in exchange for flexibility, acceptability, and interpretative room.[133] One implication is that legislative lacunae help to explain the gap-filling function played by court cases – unofficially at first, more formally today. Interestingly, one explanation that has been offered for this phenomenon is that most Chinese laws have been transplanted from Western jurisdictions (and only superficially adapted to China), including common law jurisdictions where statutes are indeed declaratory and principle-enouncing in nature, as they are meant to play a fairly limited role in shaping concrete judicial outcomes.[134]

Another interesting point is that China's judgment-related substantive obligations under TRIPS are largely complied with, and progress is evident,[135] leaving transparency as the only (procedural) obligation related to judgments that China openly refuses to meet under TRIPS. Initially, this also related to laws,[136] but now it mostly refers to cases. And yet, even this apparently straightforward record needs to be complexified, as China's compliance landscape is actually murkier. For example, there may be substantive compliance with enforcement obligations, but still patchy coverage through large-scale crackdowns that have proven to be unfair and arbitrary.[137] If cases were published, this would increase our awareness of where enforcement action is being taken, pursuant to what timeline, and against whom. This is because court case reports are harder to manipulate than government agency aggregate statistics on enforcement. More importantly, this added value would stem from the publication of *all* cases, rather than just those 'of general application', whose issuance is arguably restricted to a handful of courts in a few major coastal cities. Exclusion from enforcement, or overexposure thereto, is a common IP-related complaint in China,[138] so the government would be doing a great service by promoting transparency in the distribution of enforcement – which is unlikely to happen, as the government must have good reasons for keeping IP enforcement in its current chaotic (or selectively targeted?) state.

Where can Chinese cases even be found? Where are they published and what databases collect them? I will not delve too deep into this, but some preliminary notes are due.[139] China Judgments Online (裁判文书网 *cáipàn wénshū wǎng*)[140] was established in 2014, and pursuant to the 'Provisions on the Publication of Judgments on the Internet by the People's Courts' in July

[133]See eg, Thomas (n 123) 37.

[134]See Liu, 'Chinese "Case Law" in Comparative Law Studies' (n 66) 98.

[135]See further Thomas (n 123) 93.

[136]See eg, Romi Jain, 'China's Compliance with the WTO: A Critical Examination' (2016) 29 Indian Journal of Asian Affairs 57, 63.

[137]See also Thomas (n 123) 180 and 184; Wechsler (n 65) 85; Donald P Harris, 'The Honeymoon is Over: Evaluating the U.S.-China WTO Intellectual Property Complaint' (2008) 32(1) Fordham International Law Journal 96, 102.

[138]See eg, Thomas (n 123) 181.

[139]See further Joan Lijun Liu, 'UPDATE: Finding Chinese Law on the Internet' (GlobaLex, Hauser Global Law School Program, 2017) <https://www.nyulawglobal.org/globalex/China1.html> accessed 29 Sep 2023; Björn Ahl & Daniel Sprick, 'Towards judicial transparency in China: The new public access database for court decisions' (2018) 32 China Information 3; *Law Info China*, <http://www.lawinfochina.com/Article/Article2.html#_D._Researching_Chinese_Law_on_the_I> accessed 29 Sept 2023. Most preciously, in May 2019, the China Review has dedicated an entire special issue on 'Data-Driven Approaches to Studying Chinese Judicial Practice', edited by Björn Ahl, Lidong Cai & Chao Xi.

[140]Supreme People's Court of the People's Republic of China, 'China Judgments Online' <https://wenshu.court.gov.cn/> accessed 29 Sep 2023.

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2016[141] it publishes a remarkable share (but by no means *all*) of Chinese judgments. Other key sources[142] include Peking University's ChinaLawInfo (北大法宝 *běidà fǎbǎo*),[143] as well as Faxin (法信),[144] Itslaw (无讼),[145] Stanford Law School's China Guiding Cases Project (no longer maintained),[146] the National People's Congress's (NPC) National Database of Laws and Regulations (relevant here as it also covers JIs),[147] and the Supreme People's Procuratorate (SPP) internal database. Additionally, there are specialised databases such as the subscription-based IPhouse[148] and CIELA[149] in the domain of IP. Whatever the database, however, one rule remains: not all cases are uploaded (not even when it is so declared or intended), so just a tiny proportion of cases can be found, varying from field to field. While it is true that IP cases are generally uploaded at a higher rate than others (such as security, pollution, or corruption cases), databases will never return a complete picture.[150] Cases may even be published and later removed, temporarily classified and embargoed for a number of years, or redacted or censored.[151] While this is common in most jurisdictions globally, it is arguably more impactful in China, both because of the magnitude of governmental meddling and the vastity of the case-docket; authoritarian institutionalism also plays a role.[152] Judicial secrecy may even be lobbied for by Chinese state-owned corporations that are

[141]See further Yiming Wang & He Tian, *Judicial Transparency in China: Theory and Realization Path* (Springer 2023) 23.

[142]More are mentioned within several empirical studies performed across diverse fields of Chinese law; see eg, Jian Qu, 'Trust law in Chinese courts: Judicial decisions as data (2001–2017)' (2019) 25(7) Trusts & Trustees 761, 764.

[143]Peking University, 'ChinaLawInfo' (2008–2023) <https://web.archive.org/web/20230307031007/http://www.lawinfochina.com/search/SearchCase.aspx> archived from the original 7 Mar 2023, accessed 29 Sep 2023.

[144]Supreme People's Court Publishing Group, 'Faxin' (2013–2023) <https://www.faxin.cn/> accessed 29 Sep 2023. See further George G Zheng, 'China's Grand Design of People's Smart Courts' (2020) 7 Asian Journal of Law and Society 561, 566–570; Rachel E Stern et al, 'Automating Fairness? Artificial Intelligence in the Chinese Court' (2021) 59 Columbia Journal of Transnational Law 515, 531 fn 51; Yuan Ye (袁野), 'How "case law" works in the Chinese courts' (Supreme People's Court Monitor, 29 May 2022) <https://supremepeoplescourtmonitor.com/2022/05/29/how-case-law-works-in-the-chinese-courts/> accessed 29 Sep 2023; Weimin Zuo & Chanyuan Wang, 'Judicial Big Data and Big-Data-Based Legal Research in China' (2020) 7 Asian Journal of Law and Society 495, 501 fn 19; Benjamin Minhao Chen & Zhiyu Li, 'How Will Technology Change the Face of Chinese Justice?' (2020) 34 Columbia Journal of Asian Law 58, 17.

[145]Non-litigation Network Technology (Beijing) Co, Ltd, 'Itslaw' (2017–2021) <https://www.itslaw.com/home> accessed 29 Sep 2023.

[146]But still available at Stanford Law School, China Guiding Cases Project (2014–2021) <https://law.stanford.edu/china-guiding-cases-project/> accessed 29 Sep 2023; see also Jeremy L Daum, 'The Curious Case of China's Guiding Cases System' (China Law Translate, 21 Feb 2017) <https://www.chinalawtranslate.com/en/the-curious-case-of-chinas-guiding-cases-system/> accessed 29 Sep 2023.

[147]National People's Congress, '国家法律法规数据库 [National Database of Laws and Regulations]' (2019–2023). For a description, see NPC Observer, 'NPC Launches Official Chinese Law Database: A Guide & Review' (2019) <https://npcobserver.com/2021/02/npc-launches-official-chinese-law-database-a-guide-review/> accessed 29 Sep 2023.

[148]'IPHouse' <https://en.iphouse.cn/> accessed 29 Sep 2023.

[149]Rouse, 'CIELA' <https://www.ciela.cn/en/> accessed 29 Sep 2023.

[150]See further Whitney Stenger, 'Mark Cohen: Global Intellectual Property Ambassador' (2011) 15 SMU Science and Technology Law Review 41, 47; Mark Allen Cohen (柯恒), 'China's Practice of Anti-Suit Injunctions in SEP Litigation: Transplant or False Friend?', in Jonathan M Barnett & Sean M O'Connor (eds), *5G and Beyond: Intellectual Property and Competition Policy in the Internet of Things* (Cambridge University Press 2023) 20 <https://dx.doi.org/10.2139/ssrn.4124618> accessed 29 Sep 2023.

[151]See Yang Jinjing (杨金晶), Qin Hui (覃慧) & He Haibo (何海波), '杨金晶、覃慧、何海波：裁判文书上网公开的中国实践 | 中法评 [China's practice of publishing judgment documents online]' (2019) China Law Review <https://mp.weixin.qq.com/s/4T_4DwvIm6-jWXC8NKFalQ> accessed 29 Sep 2023; Ma Chao (马超), Yu Xiaohong (于晓虹) & He Haibo (何海波), '大数据分析 · 中国司法裁判文书上网公开报告（简要版） | 中法评 [Big data analysis: Online public report on China's judicial documents (brief version)]' (2016) China Law Review <https://mp.weixin.qq.com/s/bNHvLWRpharPmUCPbmzVQw> accessed 29 Sep 2023; Tang Yingmao (唐应茂), '司法公开及其决定因素——基于中国裁判文书网的数据分析 [Judicial disclosure and its determinants: Data analysis based on the China Judgment Documents Network] (2021) Huazheng Chinese and Foreign Legal Documentation Center <https://mp.weixin.qq.com/s/OwIEA2yCU3L3iokdoODi4w> accessed 29 Sep 2023.

[152]See eg, Mark Allen Cohen (柯恒), 'China's judiciary: The case of the missing cases' (Hinrich Foundation 2023), <https://www.hinrichfoundation.com/research/wp/tech/the-case-of-the-missing-cases/> accessed 29 Sep 2023.

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concerned that Western investors who become over-acquainted with the Chinese regulatory environment may operate too boldly in an economy that is brutally neoliberal but still also centrally planned in some significant way. After all,

> [f]oreign enterprises have other ways besides advocating judicial empowerment to defend themselves against expropriation hazards[, including] to partner with indigenous firms that have a comparative advantage in interactions with the host country government … [This is mutually convenient: in turn, f]acing competition from foreign companies that have a comparative advantage in capital, management, and technology, Chinese companies particularly need policy leverage … to remain resilient.[153]

The SPC has designated the Běijīng IP court (the Chinese closest-to-power specialised IP court) as an IP law research base to pilot what it calls a 'system of using prior judgments to guide trial work' (先例判决指导审判工作的制度 *xiān lì pànjué zhīdào shěnpàn gōngzuò de zhìdù*).[154] Professor Susan Finder, a leading scholar in PRC Law from Peking University's School of Transnational Law in Shēnzhèn, has suggested that this new system was piloted from the IP field because of 'the relatively non-political and technical nature of IP issues, as they are not seen as affecting social stability'.[155] However, I respectfully disagree: there are numerous high-level instances where even President Xi himself has remarked on the strategic importance of IP for societal development and economic progress,[156] including in multilateral arenas.[157] Therefore, it seems more plausible to conclude that the prior-judgment scheme was piloted from IP judgments exactly due to their acquired vitality within China's strategic priorities. In any case, it is precisely the SPC (and, in this field, its specialised IP chamber) that decides most of the key cases, and it is from the SPC that special compilations of Chinese cases (and guiding opinions on them) emanate.[158] For the sake of the present analysis, I will more succinctly list some of the main collections of Chinese court cases, which one could argue are rapidly crystallising into a body of case law 'of general application'.

[153]Wang, *Tying the Autocrat's Hands* (n 116) 41.

[154]See Finder, 'China's Evolving Case Law System' (n 111) 251.

[155]ibid.

[156]See for instance this government brief: Shen Changyu, 'Commissioner's Message', in State Intellectual Property Office of the People's Republic of China (SIPO), *2017 SIPO Annual Report* (2018) 6 <https://english.cnipa.gov.cn/2018-06/20180629153821302183.pdf> accessed 29 Sep 2023. See also Aaron Wininger, 'President Xi at the 20th National Congress of the CPC: Strengthen Legal Protection of Intellectual Property Rights' (The National Law Review, 19 Oct 2022) <https://www.natlawreview.com/article/president-xi-20th-national-congress-cpc-strengthen-legal-protection-intellectual> accessed 29 Sep 2023; Matt Ho, 'Chinese President Xi Jinping says intellectual property protection is key part of country's development plans' (South China Morning Post, 2 Feb 2021) <https://www.scmp.com/news/china/politics/article/3120118/chinese-president-xi-jinping-says-intellectual-property> accessed 29 Sep 2023; Shaomin Li & Ilan Alon, 'China's intellectual property rights provocation: A political economy view' (2020) 3(1) Journal of International Business Policy 60, 66. Cf Avery Goldstein, 'China's Grand Strategy under Xi Jinping: Reassurance, Reform, and Resistance' (2020) 45(1) International Security 164, 184.

[157]See eg, Riccardo Vecellio Segate, 'Fragmenting Cybersecurity Norms Through the Language(s) of Subalternity: India in "the East" and the Global Community' (2019) 32 Columbia Journal of Asian Law 78, 119–120.

[158]For a thorough perusal of how these special compilations are designed, the reader may wish to refer to the writings of Professor Finder, who is indeed the highest scholarly authority in the field. Besides her other works which are cited in this article, refer to Susan Finder, 'Decoding the Supreme People's Court's Services and Safeguards Opinions' (2022) 3(7) USALI Perspectives <https://usali.org/usali-perspectives-blog/decoding-the-supreme-peoples-courts-services-and-safeguards-opinions> accessed 24 Dec 2023. See further Tian Lu, 'Comment on the Announcement of the Top Ten Intellectual Property Cases of 2020 in China' (2022) 71(4) GRUR International 346; Riccardo Vecellio Segate, 'Neuroenhancement Patentability and the Boundaries Conundrum in Psychiatric Disorders: Comparative Regulatory Inquiries from China and the West' (2024) 11(1) European Journal of Comparative Law and Governance 1, 27; William Weightman, 'Is the emperor still far away? Centralization, professionalization, and uniformity in China's intellectual property reforms' (2020) 19(1) UIC Review of Intellectual Property Law 143, 162–163.

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The most important ones, already mentioned above, are GCs: judges *may* or even *shall* refer to them in their reasoning, but – as anticipated earlier – must not cite them *as the basis of their judgments*.[159] It is worth mentioning that SPC Annual Reports are available on the ten 'big' IP cases (大知识产权案件 *dǎ zhīshì chǎnquán ànjiàn*),[160] the SPC 'exemplary cases' (典型案例 *diǎnxíng ànlì*), the SPC 'model cases',[161] the Cases published in the monthly SPC Gazette (最高人民法院公报 *zuìgāo rénmín fǎyuàn gōngbào*), the Selection of People's Court Cases (人民法院案例选 *rénmín fǎyuàn ànlì xuǎn*), the China Case Trial Highlights (中国审判案例要览 *zhōngguó shěnpàn ànlì yào lǎn*), the China Court Annual Cases (中国法院年度案例 *zhōngguó fǎyuàn niándù ànlì*), and the People's Justice Cases (人民司法案例 *rénmín sīfǎ ànlì*). Of particular importance (though arguably of lower status compared to the GCs) are the fifty yearly 'Typical Cases' (TCs; 典型案件/典型案例 *diǎnxíng ànjiàn/diǎnxíng ànlì*), which have been systematically listed since 2014 but whose practice dates back to the 1980s.[162] The compilation of the TCs follows two routes: one is top-down, stemming from research conducted by the SPC while drafting the aforementioned JIs; the other is bottom-up, allowing the provincial-level Higher (or High) People's Courts to select their most influential cases and submit them to the SPC for editorial review and possible publication. Through several levels of screening, some of these publications are policy-oriented while others rest on technical merits.[163] Of interest here is that despite the selection process, the approval of the cases remains uncodified and informal,[164] to the extent that claiming them to be 'of general application' might prove problematic for foreign jurisdictions. SPC Major Cases (MCs; 十大案件 *shí dà ànjiàn*) are also significant, although some terminological confusion may arise here, as there appears to be no official distinction between these and the above-mentioned TCs for the purposes of case search under the 2020 Guiding Opinion.[165] Such MCs seem to include both major IP and major commercial holdings on an annual basis, though when it comes to complex IP transactions, it is advisable to refer directly to the Typical Technology Cases (TTCs), whose selection criteria continue to fluctuate between technical salience and political momentum. In 2020, for instance, the SPC issued its list of ten IP TTCs, selected on the basis of 'their effective protection of national interests, judicial sovereignty, and the legal interests of enterprises'.[166]

Again, this list was not intended to offer an exhaustive and articulated analysis of the lists of special cases under PRC law, firstly because Professor Finder has already accomplished this and continues to refine and share her research, and secondly because the lists themselves are unstable, constantly shifting in both denomination and configuration, so that overlaps and inaccuracies should surprise no one. Rather, my report serves to highlight three essential points. First, China

[159]Supreme People's Court of the People's Republic of China, '《最高人民法院关于案例指导工作的规定》实施细则 (*zuìgāo rénmín fǎyuàn guānyú ànlì zhǐdǎo gōngzuò de guīdìng*) [Detailed Rules for the Implementation of the Provisions of the Supreme People's Court on Case Guidance]', SPC Document No 130 [2015] (法[2015]130号), released on and effective as of 13 May 2015, arts 9–10.

[160]See also Tian Lu, 'Selected criminal trade mark cases in the annual Top Ten Intellectual Property Cases of the Supreme People's Court of China' (2023) 13(2) Queen Mary Journal of Intellectual Property 239.

[161]See also Susan Finder, 'Using Cases to Explain the Law in the New Era' (Supreme People's Court Monitor, 9 Jul 2020) <https://supremepeoplescourtmonitor.com/2020/07/09/using-cases-to-explain-the-law-in-the-new-era/> accessed 29 Sep 2023.

[162]See also Susan Finder, 'More on the Supreme People's Court and Typical Cases' (Supreme People's Court Monitor, 2 May 2014) <https://supremepeoplescourtmonitor.com/2014/05/02/more-on-the-supreme-peoples-court-and-typical-cases/> accessed 29 Sep 2023.

[163]See the section 'How does a case in the local courts become an SPC typical case?' in Susan Finder, 'More on Supreme People's Court Typical and Major Cases, or How Typical Cases Are "Tempered"' (Supreme People's Court Monitor, 1 Apr 2022) <https://supremepeoplescourtmonitor.com/2022/04/01/more-on-supreme-peoples-court-typical-and-major-cases-or-how-typical-cases-are-tempered/> accessed 29 Sep 2023.

[164]ibid.

[165]See ibid.

[166]Mark Allen Cohen (柯恒), 'China's Evolving Case Law on ASI's' (China IPR, 4 Mar 2021) <https://chinaipr.com/2021/03/04/chinas-evolving-case-law-on-asis/> accessed 29 Sep 2023.

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is visibly endeavouring to sort its leading cases into an extremely complex network of categories, situating itself within the broader hybridisation trends of civil law systems and aiming to ensure greater consistency over time and across courts. Second, there are indeed lists of cases that foreign jurisdictions should be aware of and that hold special influence on Chinese courts, both generally and in IP-intensive disputes. In my view, these collections are at least the GCs and TCs for general-purpose judgments, and the TTCs for IP-intensive disputes more specifically, *a fortiori* if one is interested in the regulatory landscape for complex technological cross-border transactions involving IPRs. Third, there is merit on both sides: from a formal standpoint, these SPC-selected cases are not (yet) 'of general application', but they are definitely of general *applicability*, and China should disclose them on *bona fides* grounds, as they are central enough to the system to situate themselves within the scope of what seems to be the teleology underpinning the TRIPS draft: to address those cases that, while not necessarily and strictly *binding* on subsequent cases, will most plausibly *inform* their proceedings and outcomes significantly.

A deeper understanding of PRC law is essential to provide context, focusing not so much on cases *per se* but on the intricate 'legal politics' and procedural choreographies entrusting them with legal authority within the articulated Chinese polity. One noteworthy process is the incorporation of relevant cases into broader document collections and guidelines, mostly issued by the SPC and its affiliated research centres, whose main purpose is indeed to provide guidance and direction to lower courts. Among these resources are publications like the China Trial Guide (审判指导丛书 *shěnpàn shí dào cóngshǔ*),[167] issued by the SPC's criminal divisions. Also of importance are the Case Summaries (案例要旨 *ànlì yào zhī*), the SPP Case Guidance Provisions,[168] the Collection of the Supreme People's Court's Judicial Rules (最高人民法院司法观点集成 *zuìgāo rénmín fǎyuàn sīfǎ guāndiǎn jíchéng*), and several collections of digests. Other documents referencing case law are the Responses (答复 *dàfú*) and Answers (解答 *jiědá*) supplied by different SPC divisions upon requests from the lower courts, as well as the Research Opinions (研究意见 *yánjiū yìjiàn*) delivered by the SPC's own Research Office. Depending on the field, Responses, Answers, and Opinions may incorporate include a commentary section on the socio-judicial significance (典型意义 *diǎnxíng yìyì*) of the cases referred. Most of these also contain Important Points (要点 *yàodiǎn*) extrapolated from judgments, but not necessarily the full texts of the latter; nevertheless, they may still be cited by lower-court judges who avail themselves of such Points as a departure. This is because, unlike the general public, they have (or can be granted) access to the full judgments through internal databases on request. At this stage, it can be seen that if Chinese judges refer to these Important Points, but the cases containing them can only be searched through internal databases because they are not published, then such cases will not be openly citable either, so they cannot be considered 'of general application'. This is all the more so as the internal databases date back to at least 2005, predating public databases, and represent an exclusive auxilium for SPC judges, despite the fact that Mainland China is a fairly extensive (if somewhat centralised) jurisdiction where local courts display uneven degrees of familiarity with each other and the superiors' expectations. Adjudication Guidelines are also frequently released, but special salience for IP lawyers is to be found in the Provisions on Act Preservation Measures in Intellectual Property Disputes.

A quantitative assessment of the scope and frequency of these numerous collections, both between collections and on a comparative annual basis, would provide extremely valuable insights into China's judicial politics, but this is an undertaking for another paper. It is China's belief that all '[t]hese cases and [the] adjudication guidelines extracted from these cases serve to timely summarize the trial experiences, strengthen publicity of the rule of law and provide references for judicial

[167]This includes the Criminal Trial Reference (刑事审判参考 *xíngshì shěnpàn cānkǎo*).

[168]On the SPP's role within the case-guidance system under PRC law, see also Xiaomeng Zhang, 'Public Access to Primary Legal Information in China: Challenges and Opportunities' (2014) 14(1) Legal Information Management 132, 133.

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practices and legal education',[169] and quantitative perusal – via *inter alia* computational linguistics tools and the 'experimental jurisprudence'[170] movement – would plausibly contribute to confirming or disproving such claims. What seems safe to posit is that China's efforts at 'systematisation' are aimed at a wider audience than just domestic courts, and may even be premised on educational purposes as well, so much so that some compilations are published exclusively (or first) on the all-comprehensive WeChat app (plus LexisNexis and other platforms), reinforcing the conclusion that the authoritativeness and officiality of contents in China emanates from the issuing bodies rather than from the means of publication and dissemination. It is fair to assume that at least when it comes to these major collections and the guidelines incorporating them, case publication is timely and exhaustive.

More focus is warranted on how these cases are reviewed, edited, and selected; on the officials who personally authorise their inclusion on special lists; as well as on the potentially misaligned attitudes between younger and more senior members of the judiciary. However, this legal-ethnographic work falls outside the ambition of my present article. Rather, I will expand on how judges might avail themselves of the guidance – which is both a constraint on them and an opportunity to pursue and achieve coherence (notoriously valued in China as 'harmony'). Again, empirical work could draw inferences from citation patterns, differences in use compared to JIs, perceptions of their binding nature, and so forth, but one observation already worth making is that citing a case (eg, in passing, that is, in non-dispositive parts of the judgment) cannot be taken as a testimony of judicial support for the findings of such case (nor as conformity, for that matter), although it may outline nominal alignment (or institutionalised deference, otherwise called 'fear of repercussions'). At the opposite end are hidden citation patterns, where cases are referenced but the reference cannot be overly exhibited.[171] For instance, the citation practices of lower courts may exhibit considerable ambiguity:[172] their judges cannot feel as bold as those of the SPC in dismissing the civil law nature of China, and may therefore refrain from going so far as to cite cases, but at the same time they may feel obliged to take into account how higher courts have handled similar cases, so as not to diverge from their established trends. Hence, if higher courts begin to cite precedents, lower-court judges might be motivated to do the same – though possibly not by selecting precedent-setting cases themselves, but rather by relying on those that have already been highlighted by higher courts (and thus 'politically' sanctioned by Party officials). Unmistakably, there are numerous other factors to consider, including territorial alignment, conformism, and conservatism, or the like-mindedness of judges *by field*, but also broader concerns such as for the geopolitical context and market indexes. In truth, it also depends on how counsels act, although it is admittedly difficult to demonstrate a correlation between the extent to which counsels rely on precedents in their pleadings or written memorials and judges' inclination to construe their decisions on the acceptance or rejection of such cases. In any event, counsels may find it effective to cite authoritative precedents, on the assumption that 'a lower court is likely to be persuaded that the superior court will rule similarly if the case is appealed'.[173] This is because:

> [i]nconsistency between a judicial decision and a Guiding Case will be challenged by litigants and their lawyers at second instance, thereby hurting the evaluation and advancement of the responsible judge. Chinese judges are therefore professionally – and financially – rewarded for following Guiding Cases.[174]

[169]WTO, IP/C/W/683 (n 40) para 4.
[170]See further Kevin Tobia, 'Experimental Jurisprudence' (2022) 89(3) The University of Chicago Law Review 735.
[171]See eg, Liu, Klöhn & Spamann (n 132) 94.
[172]See Finder, 'China's Evolving Case Law System' (n 111) 252.
[173]ibid 254.
[174]Benjamin M Chen et al, 'Detecting the influence of the Chinese guiding cases: A text reuse approach' [2023] Artificial Intelligence and Law 1, 20 <https://doi.org/10.1007/s10506-023-09358-7> accessed 29 Sep 2023.

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The practice of hidden citations finds its exemplification *par excellence* in foreign cases, sometimes including those issued in the two Special Administrative Regions (SARs) of Macao and Hong Kong – some of which wield significant influence in reaching normative harmonisation in the Greater Bay Area. It is unviable to rely on case collections to establish a spotless hierarchy of different types of cases; the GCs would safely top the list, but beyond them, no defined priority is recognised in official documents. And yet, judges have already informally suggested a hierarchy based not so much on the typology of the cases *per se*, but on the courts issuing them (or endorsing their importance). In this informal list, foreign judgments matter the least,[175] although this abstraction is not always reflected in practice – which only underlines the relevance of distinguishing between overt and covert citation patterns. When lower courts publish their own case collections, they do not necessarily resemble the orientation of the SPC, and citations taken in isolation may not return the most compelling picture. To exemplify, the 2.1% citation rate of the Běijīng IP Court may indeed seem low, but what matters most is that Chinese specialist IP judges consider its decisions to be standard practice, ie, that they have come to regard them as 'normative', despite the 'civil law' characterisation of the PRC jurisdiction. In addition, many other minor cases (ie, those not reported in collections), where 'subordinate' judges do not display the need or the will to directly cite Běijīng judges, are still shaped by hidden citations.[176] What is more, the Běijīng IP Court Guiding Case Work Implementation Methods were drafted for 'encouraging advocates to submit relevant precedents, considering precedents as *de facto* binding, and permitting judges to cite precedents in their judgments'.[177]

Whatever one's position on whether the 'specially listed' Chinese case law should be deemed 'of general application', it must be admitted that China's systematisation of its case law is not an accidental deviation from civil law practices, but rather the in-progress outcome of a coherent strategy pursued as part of a grand design: to harmonise judicial practice and thereby promote the predictability of PRC law, especially in the field of IP.[178] Harmonisation and predictability are *a fortiori* essential when foreign entities are involved, which is why the Chinese resistance to disclosure at the WTO is of onerous interpretation. To validate that China's case law systematisation devises a long-term strategy rather than temporary political opportunism on the part of Chinese leaders,[179] I am going to mention some of the political directives to that effect, starting with the Central Committee of the Communist Party Decision concerning Several Major Issues in Comprehensively Advancing Governance According to Law (4th Plenum Decision). Also worth mentioning (in chronological order) are the Opinion of the SPC on Deepening Reform of the People's Courts Comprehensively (4th Five-year Court Reform Plan), the 2010 Provisions of the SPC on Guiding Cases Works,[180] the 2019 Implementing Measures of the SPC for Establishing the Mechanism for Resolving Law Application Differences,[181] the 2020 Guiding Opinion Concerning Strengthening the Search for Similar Cases to Unify the Application of Law (for Trial Implementation),[182] the 2020 Opinions of the SPC on Perfecting the Working Mechanism

[175]See Finder, 'China's Evolving Case Law System' (n 111) 250.

[176]See ibid 252 and 257.

[177]ibid 251.

[178]Some Chinese authors posit that this is also an effort to control Chinese judges more 'panoptically' than just vertically, as was previously the case; see eg, Xin He, 'From hierarchical to panoptic control: The Chinese solution in monitoring judges International' (2023) 21(2) Journal of Constitutional Law 488.

[179]It might have turned out useful for, eg, stabilising the economy or tighten the political grip on the – already highly politicised – courts.

[180]Effective as of 26 Nov 2010.

[181]Effective as of 28 Oct 2019.

[182]Supreme People's Court of the Peoples's Republic of China, 最高人民法院关于统一法律适用加强类案检索的指导意见(试行) (*zuìgāo rénmín fāyuàn guānyú zhǒngyī fǎ lǜ shìyòng jiāqiáng lèi ànjiàn sù de zhǐdǎo yìjiàn (shìxíng)*) [Guiding Opinion Concerning Strengthening the Search for Similar Cases to Unify the Application of Law (for Trial Implementation)], effective as of 31 Jul 2020 <https://web.archive.org/web/20230601165003/https://www.court.gov.cn/

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of Unifying Standards for Application of Laws,[183] the 2021 Guiding Opinions on Perfecting the Working Mechanism of the Professional Judges' Meeting of People's Courts,[184] as well as the 2021 SPC Implementing Measures for the Unified Application of Laws.[185] They all seek to promote the principle of 'same judgment for all similar cases' (类案同判 *léi àn tōngpán*).[186] In addition, private initiatives by judges and scholars,[187] the support from Party leadership,[188] and the case-guidance mechanism (案例指导机制 *ànlì zhǐdǎo jīzhì*) – which, while to be distinguished from a systematic collection of precedential value, resembles it quite closely – can also be listed for the purpose of standardising judicial outcomes across the entire Mainland.

Apart from GCs selected by the SPC and other specially listed cases as outlined, '[t]he non-guiding cases are not directly binding, may not be cited in court judgments, and do not have precedential value. They can be used as a source of reference (参考 *cān kǎo*)'.[189] Professor Finder writes of 'soft precedents', and indeed the Presiding Judge of the Dōngguǎn Municipality No 2 People's Court in Guǎngdōng Province emphasised that

> because a guiding case is prepared with an emphasis on abstracting guiding principles, and because of significant regional differences in China, the [G]uiding [C]ases released by the Supreme People's Court might not be timely and practical enough to meet the needs of local courts. There is still a need for the timely release of some cases that are of referential value as "soft guidance" by individual High People's Courts.[190]

Interestingly, the above implies that even if one were to regard GCs as 'hard precedents' (which would be somewhat inaccurate for the time being), other 'softer' judgments would be needed in practice to supplement the SPC's guidance with more province-adjusted, context-sensitive flavours. This may be an expression of genuine concern, but it could also reflect a certain degree of intolerance or even hostility towards the rigidly hierarchical impositions of higher courts rather than laws. This is because, paradoxically, local courts might have enjoyed more room for manoeuvre before the case-referencing system was 'institutionalised'.

Notably, these formalising trends are even more remarkable and impressive in China – where judges used to issue fairly dry decisions – than virtually anywhere else in the civil law constellation.

zixun-xiangqing-243981.html> archived from the original 1 Jun 2023, accessed 29 Sep 2023. See also Susan Finder, 'Supreme People's Court's New Guidance on Similar Case Search' (Supreme People's Court Monitor, 27 Jul 2020) <https://supremepeoplescourtmonitor.com/2020/07/27/supreme-peoples-courts-new-guidance-on-similar-case-search/> accessed 29 Sep 2023; Lianjun Li et al, 'Judicial precedents to play an important role in future legal practices in China' (Reed Smith Client Alerts, 5 Aug 2020) <https://www.reedsmith.com/en/perspectives/2020/08/judicial-precedents-to-play-an-important-role-in-legal-practices-china> accessed 29 Sep 2023. Reasonable disagreement may arise as to whether, pursuant to this Opinion, judges *should* or *shall* (应当) search for and refer to Guiding Cases that can shed light on the dispute they are hearing. While this point would warrant an analysis on its own, most Chinese scholars believe that judges *must* do so in a number of circumstances. See eg, Desai Shan & Pengfei Zhang, 'The Legal Challenges for Seafarers in Claiming Workplace Injury Compensation in China', in Shengnan Jia & Lijun Liz Zhao (eds), *Commercial and Maritime Law in China and Europe* (Routledge 2023) 228.

[183]Effective as of 14 Sep 2020.

[184]Effective as of 12 Jan 2021.

[185]Released on and effective as of 1 Dec 2021.

[186]See further Ulrike Glueck, Stephen Wu & Lei Shi, 'PRC Supreme People's Court Enacts New Document to Unify Standards for Application of Laws' (CMS Law-Now, 29 Dec 2021) <https://www.cms-lawnow.com/ealerts/2021/12/prc-supreme-peoples-court-enacts-new-document-to-unify-standards-for-application-of-laws> accessed 29 Sep 2023.

[187]Finder, 'China's Evolving Case Law System' (n 111) 246.

[188]ibid 256.

[189]ibid 246.

[190]Kui Chen, 'How to Apply the Guiding Cases of the Supreme People's Court in Judicial Practice', (司法实务中如何适用最高法院指导性案例 [Stanford Law School China Guiding Cases Project], 22 Apr 2012) <https://web.archive.org/web/20220308022801/https://cgc.law.stanford.edu/commentaries/3-judge-chen/> archived from the original 8 Mar 2022, accessed 29 Sep 2023.

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This reflects *inter alia* the outcome of 'legal education geopolitics' in the field of law, where many Chinese judges (especially the younger ones) have been partly or wholly trained overseas in common law schools and bars, and have unconsciously imbibed a precedence-upholding mindset. All across US, Canadian, Australian, Hong Kong, and UK law schools, aspiring Chinese lawyers (namely Bachelor of Laws, Master of Laws, and Juris Doctor students) are trained to search, compare, and retrieve cases using commercial platforms such as Westlaw, Bloomberg Law, or LexisNexis. When these students return to Mainland China, they reiterate this behaviour, or at least retain the same mindset, which imports the gradual normalisation of these routine lawyering operations into the legal practice of the Chinese civil law system.[191] Plausibly, educational and judicial training objectives are also being pursued in a broader sense, ie, lists of GCs and TCs are being compiled to ensure not only that lower court judgments are in line with to the judicial holdings of the SPC and its 'high politics', but also that the drafting and reasoning of such judgments approximate a common minimal standard of *quality* (and not just *policy*) across the Mainland. And even more broadly, the underlying pedagogical intention seems to be that of educating the whole nation and society to conform to expected standards of behaviour: the more consistent the case law, the clearer the guidance. The fact that ample room for discretion is supposedly left to politicised judges may seem contradictory in an autocratic system, where judges are disciplined not to exercise too much freedom in *ius dicere*.[192] Such an apparent contradiction can be explained by considering that the Party only intervenes directly in very apical judgments (and judiciaries), whereas, from an overarching viewpoint, the independence of courts has been remarkably strengthened in recent years, along with its overall qualitative overhaul.[193]

On the contrary, an alternative critical narrative is that the Party is strengthening the judiciary in an attempt to more systematically exercise its control over 'lower' cases by reference to 'higher' cases that are more directly influenced by political directives.[194] One should therefore be wary of the overly triumphalist and nationalistic tone that attribute the 'merit' of China's case law systematisation to the influence of US law. While the American contribution cannot be dismissed, it should not be credited with unrealistic weight towards this China's pivot, either, not even when it comes to the most technical IP-centred proceedings. US think tanks such as the Brookings Institution posit that

> U.S.-China IP law exchanges helped promote the establishment of specialized IP courts, introduced the practice of *amicus* briefs in IP proceedings, and supported China's development of a form of case precedent to enhance uniformity of court judgments. All of these developments were informed by U.S. law and practice and are contributing to a procedurally and substantively fairer system of IP law in China.[195]

This is a bold overstatement. While US law has set the bar on certain matters (and legal transplants from other Western jurisdictions have also played a role in these advances), the drive is primarily endogenous and motivated by domestic policies framed in terms of security, development,

[191]See Finder, 'China's Evolving Case Law System' (n 111) 255.

[192]See eg, Liu, Klöhn & Spamann (n 132) 94. Furthermore, greater freedom in citing precedents can be promoted in the interests of demonstrating formalist detachment, despite (arguably inevitable) emotional involvement on the part of the judges; refer, eg, to Riccardo Vecellio Segate, 'Navigating Lawyering in the Age of Neuroscience: Why Lawyers Can No Longer Do Without Emotions (Nor Could They Ever)' (2022) 40(1) Nordic Journal of Human Rights 268, 272.

[193]See the section 'Guiding the General Public' in Finder, 'How Typical Cases Are "Tempered"' (n 163).

[194]For this viewpoint, see eg, Ji Weidong (季卫东), 'The Judicial Reform in China: The Status Quo and Future Directions' (2013) 20 Indiana Journal of Global Legal Studies 185, 188 et seq; Straton Papagianneas & Nino Junius, 'Fairness and justice through automation in China's smart courts' (2023) 51 Computer Law & Security Review 105897, 6–10. See more generally Samuli Seppänen, 'Formalism and anti-formalism in the Chinese Communist Party's governance project' (2021) 10(2) Global Constitutionalism 290.

[195]Jamie P Horsley, 'Revitalizing Law and Governance Collaboration with China' (Brookings Institution, 17 Nov 2020) 2 <https://www.brookings.edu/wp-content/uploads/2020/11/Jamie-P-Horsley.pdf> accessed 29 Sep 2023.

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stabilisation, investment-friendliness, win-win cooperation, and social cohesion. This is not to dismiss that the US has *aspired* to play a more assertive role, and has confidently kept trying to do so through 'legal education diplomacy'.[196] The soft power of US law schools, where generations of Chinese lawyers have studied before returning to Mainland China to become counsels and judges in Chinese courts, is now at risk, yet it has never fully faded.

At this point, assuming that Western requests for disclosure before the WTO should be met, at least as far as key case law lists of Chinese judgments are concerned, one might legitimately doubt whether it is genuinely beneficial for other jurisdictions to be made aware of only a restricted number of cases. In fact, these are selected by Chinese judges (and shadow political advisors) to feature in such collections,[197] a politicised selection process that may paint a misleadingly distorted picture of the actual judicial framework operating in China. In trying to read through the lines of the SPC's judicial pragmatism,[198] it must be acknowledged that the line between authoritativeness and authoritarianism in establishing judicial precedents is somewhat thin,[199] with the SPC being endowed with double-faced authority – derived as much from its legal prestige as from the support of the Party leadership.[200] It may be that judges are attempting to cement their expertise-grounded independence from party politics through legal authority, but it may equally be that political grip has again (and in a more systematic manner) found its way into the apical Chinese courts *precisely through guiding cases*. This has a cascading effect on the entire legal system, which can somehow impose the Party's political direction on judgments at all levels, fostering uniformity and, ultimately, a perilous conformism. Moreover, there is inherent bias in the quasi-scholarly packaging built around cases when they are 'edited' for publication. Case collections are supposed not only to organise and (re)publish judgments, but also to systematise them conceptually and purposefully, to level up their divergences, and to make sure that they read as coherently as possible through laudatory commentaries that restate the underlying principles they convey. Judges' seniority, Party affiliation, and personal connections, as well as the length of their appointments and the conditions (written and unspoken) attached to the renewal of their contracts and their 'political visibility', also play a role. Having one of their cases selected and endorsed as a GC confers prestigious recognition on both the judges and counsels involved, therefore the politics of selection is rarely confined to the mere cases; the question of who decided and issued them is just as much a criterion for inclusion.

To conclude this section, it is safe to emphasise that in China, cases (particularly as incorporated in JIs) that may serve as guidance for judiciaries throughout the country are seriously needed – and increasingly integral to the system – out of a primarily endogenous traction, precisely as a 'counterbalance' to the PRC's legislative and enforcement deficiencies in relation to China's stature as both a jurisdiction and economic powerhouse, and the socio-legal demands arising therefrom:

> [N]o legislature during the drafting process can formulate a rule of general application that can match legislative intent to all specific situations. But the degree of vagueness is greater in China because of a number of factors … As the NPC is only in session for about two weeks each year,

[196]See eg, Matthew S Erie, 'Legal Education Reform in China Through U.S.-Inspired Transplants' (2009) 59 Journal of Legal Education 60, 87 fn 81.

[197]In fact, any 'project on how the Court uses prior decisions as legal precedents must necessarily include an inquiry into whether the Court is subject to any external constraints in developing and employing precedents', see Taisu Zhang, 'Disaggregating the Court: A Methodological Survey of Research on the Supreme People's Court of China' (2017) 2 China Law and Society Review 154, 157.

[198]On the SPC's pragmatism as an institutional actor, see further Taisu Zhang, 'The pragmatic court: Reinterpreting the Supreme People's Court of China' (2012) 25 Columbia Journal of Asian Law 1, 60.

[199]See also Mark Z Jia, 'Chinese Common Law? Guiding Cases and Judicial Reform' (2016) 129(8) Harvard Law Review 2213, 2218.

[200]See also Xuanming Pan, 'Judicial lawmaking and discontent: Debating the legislative function of Chinese courts' (2020) 28(2) Asia Pacific Law Review 297, 301.

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> it has little time to adopt more sophisticated statutes or to review problems associated with the application of existing statutes. Although the [NPC Standing Committee (NPCSC)] enjoys the authority to interpret laws, it lacks capacity to perform this duty adequately because of a lack of professional legal staff. It is also impractical for the NPCSC, which convenes bimonthly, to carry out the task of interpretation when it is already overloaded with legislative tasks.[201]

The SPC itself has endorsed the need to 'fill this gap' in paragraph 6 of its Opinions on Putting a Judicial Responsibility System in Place and Improving Mechanisms for Trial Oversight and Management (Provisional),[202] and it is actually the case guidance system that drives judicial interpretations, not the other way round.[203]

Quasi-Precedential Case Law and Other Hybridising Features of Legal Systems Worldwide

The *casus* before the WTO between the US/EU and China strikes at the heart of the conundrum of the precedential value of case law, but this particular collision between such diverse jurisdictions may ultimately be reconnected with divergent understandings of the rule of law between common and civil law systems.[204] Nonetheless, the commonly held view today is that Chinese cases are only binding on the disputing parties, which has been mentioned, *inter alia*, to explain why Chinese courts are not as reluctant to cite international HR treaties (such as the Convention on the Rights of the Child) as might be expected:[205] if the outcome is politically unsatisfactory or overly demanding, other courts can subsequently backtrack and rule otherwise. In fact, 'case law continues to be controversial in China, as it has for over ten years, with some suggesting that judges are making law (法官造法 *fǎguān zàofǎ*) or are seeking to import a Western practice to China',[206] something that has occurred for the longest time not just in China but throughout East Asia – as will be discussed below.

Nevertheless, the time has come to challenge the oversimplified distinction between common law's 'precedentialism' and civil law's 'mere application of the law', to the point of questioning whether the comparison with common law (or, worse still, 'Western' jurisdictions) is even a meaningful exercise. I have already discussed the trend towards hybridisation of civil law systems worldwide, but common law systems, too, are transforming into more hybrid regimes. Two immediate examples of infra-jurisdictional hybridised regimes are Scotland as well as the Canadian province of Québec,[207] where different areas of law (and related court proceedings) are governed by either common law or civil law traditions. In addition, there are other systems that are hybridising *entirely*,

[201]Jieying Liang, *Party Autonomy in Contractual Choice of Law in China* (Cambridge University Press 2018) 260.

[202]See Finder, 'China's Evolving Case Law System' (n 111) 256–257.

[203]See ibid 257.

[204]In this respect, the interfaces between China's Mainland (civil law) and its Hong Kong SAR (common law) are noteworthy; see extensively Riccardo Vecellio Segate, 'Horizontalizing Insecurity or Securitizing Privacy? Two Narratives of a Rule-of-Law Misalignment between a Special Administrative Region and Its State' (2022) 10 The Chinese Journal of Comparative Law 56. See also Lu Xu, 'The Changing Perspectives of Chinese Law: Socialist Rule of Law, Emerging Case Law and the Belt and Road Initiative' (2020) 5(2) The Chinese Journal of Global Governance 153; Jaakko Husa, 'Constitutional Biography of Hong Kong and Ambiguities of One Country, Two Systems Policy' (2021) 9(2) The Chinese Journal of Comparative Law 268.

[205]See eg, Harriet Moynihan, Ruma Mandal & Zhu Lijiang (eds), 'Exploring Public International Law Issues with Chinese Scholars – Part 4' (Chatham House and China University of Political Science and Law, 2 Jun 2018) 7 <https://www.chathamhouse.org/sites/default/files/publications/research/2018-06-02-Roundtable4-summary.pdf> accessed 29 Sep 2023.

[206]Finder, 'China's Evolving Case Law System' (n 111) 259.

[207]See Jaakko Husa, 'Classification of Legal Families Today: Is it time for a memorial hymn?' (2004) 56(1) Revue internationale de droit comparé 11, 31; William A Tetley, 'Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)' (2000) 60(3) Louisiana Law Review 677, 684; Jaakko Husa, 'Language of Law and Invasive Legal Species – Endemic Systems, Colonisation, and Viability of Mixed Law' (2020) 9(2) Global Journal of Comparative Law 149, 171–175.

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meaning that even full common law regimes are gradually incorporating doctrines and procedures from their civil law counterparts.

Post-colonial East and Southeast Asian jurisdictions have long represented thriving laboratories of legal transformation at the judicial level. Japan is usually labelled a civil law system, but precedents are influential.[208] In South Korea, which originally resembled a common law system,[209] Japanese civil law was forcibly imported, but customary traditions began to tilt the system towards hybridisation, amplifying the precedential weight of decisions from the constitutional level downstream.[210] Indeed, Japanese legal theories have undergone a spiralling Americanisation, with constitutionalism first, followed by the influence of case law.[211] Within the same Pacific macroregion, Indonesia adopts a mixed system,[212] as do Thailand and the Philippines.[213] Laos and Vietnam are following an analogous path, empowering their courts to develop a system of precedents, under certain conditions as formally envisaged in the law.[214] Similar predicaments can be attested in other regions as well, not least in Latin America,[215] where advances in information technology, telecommunications, and artificial intelligence make it much easier for judges to practice judicial analytics to find and cite precedents.[216] The blending of inquisitorial and adversarial procedures is part of the same grand metamorphosis; even in China, judges may welcome parties'

[208]See eg, Hiroshi Itoh, 'The Role of Precedent at Japan's Supreme Court' (2011) 88(6) Washington University Law Review 1631; Shigenori Matsui, 'Constitutional Precedents in Japan: A Comment on the Role of Precedent' (2011) 88(6) Washington University Law Review 1669.

[209]See further Marie Seong-Hak Kim, 'Law and Custom under the Chosŏn Dynasty and Colonial Korea: A Comparative Perspective' (2007) 66(4) The Journal of Asian Studies 1067.

[210]See extensively Marie Seong-Hak Kim, 'Customary Law and Colonial Jurisprudence in Korea' (2009) 57(1) The American Journal of Comparative Law 205. See also Jae Hyung Kim (김재형), 'Formulating the Korean Supreme Court's stature and roles: With a focus on the relationship between legislation and precedents' (2019) 14 University of Pennsylvania Asia Law Review 136.

[211]See Jibong Lim, 'Korean Constitutional Court Standing at the Crossroads: Focusing on Real Cases and Variational Types of Decisions' (2002) 24 Loyola Los Angeles International and Comparative Law Review 327, 329–330.

[212]See further Lita Tyesta Addy Listya Wardhani, Muhammad Dzikirullah H Noho & Aga Natalis, 'The adoption of various legal systems in Indonesia: An effort to initiate the prismatic Mixed Legal Systems' (2022) 8 Cogent Social Sciences 1; Ignazio Castellucci, 'How mixed must a mixed system be?' (2009) 3 <https://elearning.unite.it/pluginfile.php/211567/mod_resource/content/1/2013-2008_ECJL_How%20mixed%20must%20a%20mixed%20system%20be%20-apr10%20-%20FINAL.pdf> accessed 29 Sep 2023.

[213]See Wayne R Barnes, 'Contemplating a Civil Law Paradigm for a Future International Commercial Code' (2005) 65(2) Louisiana Law Review 677, 685.

[214]See extensively Ngoc Son Bui, 'The Socialist Precedent' (2019) 52 Cornell International Law Journal 421.

[215]See eg, for Brazil: Maria Angela Jardim de Santa Cruz Oliveira & Nuno Garoupa, 'Stare Decisis and Certiorari Arrive to Brazil: A Comparative Law and Economics Approach' (2012) 26(2) Emory International Law Review 555; Anelize Slomp Aguiar, 'The Law Applicable to International Trade Transactions With Brazilian Parties: A Comparative Study of the Brazilian Law, the CISG, and the American Law About Contract Formation' (LLM Thesis, University of Toronto 2011) 20. And for Argentina: Keith S Rosenn, 'Expropriation in Argentina and Brazil: Theory and Practice' (1975) 15 Virginia Journal of International Law 27, 294.

[216]Such an algorithmic and Internet-driven revolution does not come without risks, see eg, Ryan McCarl, 'The Limits of Law and AI' (2022) 90(3) University of Cincinnati Law Review 923, 941; Riccardo Vecellio Segate, 'Shifting Privacy Rights from the Individual to the Group: A Re-adaptation of Algorithms Regulation to Address the Gestaltian Configuration of Groups' (2022) 8(1) Loyola University Chicago Journal of Regulatory Compliance 55, 98; Daniel Brantes Ferreira & Elizaveta A Gromova, 'Hyperrealistic Jurisprudence: The Digital Age and the (Un)Certainty of Judge Analytics' (2023) 36 International Journal for the Semiotics of Law 2261; John O McGinnis and Steven Wasick, 'Law 's Algorithm' (2015) 66 (3) Florida Law Review 991, 1019; Riccardo Vecellio Segate, 'Cognitive Bias, Privacy Rights, and Digital Evidence in International Criminal Proceedings: Demystifying the Double-Edged AI Revolution' (2021) 21(2) International Criminal Law Review 242, 245; Bart Jansen & Agnes Schreiner, 'Captured by Digitization: Algorithms, Law, and Media' (2023) 36 International Journal for the Semiotics of Law 2179, 2183–2185; Matthew Gillett & Wallace Fan, 'Expert Evidence and Digital Open Source Information: Bringing Online Evidence to the Courtroom' [2023] Journal of International Criminal Justice 1, 24; Peter Biesenbach, 'Aspects of the Digital Transformation of the Judiciary', in Walter Frenz (ed), *Handbook Industry 4.0: Law, Technology, Society* (Springer 2022) 3. This is also linked to phenomena of judicial ghost-writing, which are contributing their share towards precedence-driven hybridisation.

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submissions referring to precedents, while conducting their own research into precedents to cite.[217] Evidently, transnational legal moves and exchanges are major drivers of hybridisation. For example, with respect to the recognition and enforcement of foreign awards, it would be unbalanced for common law systems to incorporate foreign cases that might acquire precedential value through 'nationalisation', while civil law systems import foreign cases that end up being exclusively binding on the parties. As a result, higher expectations of greater reciprocity could lead to a gradual shift towards hybridised traditions.

One could be tempted to conjecture that PRC law constitutes a special case within civil law systems, on the *prima facie* hypothesis that Chinese 'socialist' law, due to its often remarked 'Chinese characteristics', should not be misused to generalise about trends in civil law systems. And yet, in this specific matter, there is nothing particularly original in what is happening in China – except, perhaps, for the complexity of the jurisdiction at stake, as well as for the magnitude of the geoeconomic repercussions of its judicial holdings. The trends developed in France and elsewhere have already been mentioned above, and there are indeed innumerable examples of similar developments outside China – starting from Continental Europe. The factual law-making activity of the German Federal Court of Justice and the Polish Supreme Court has recently been acknowledged.[218] In Spain, the Supreme Court is binding on lower courts after expressing itself twice, but in many other civil law jurisdictions even a single pronouncement may suffice. In Italy, the *Corte Suprema di Cassazione* is *de facto* binding on the lower courts and often even on the executive and regulatory authorities,[219] as confirmed in a contribution uploaded to its institutional website.[220] Curiously enough, even if a regional trade and/or investment agreement were negotiated exclusively between civil law jurisdictions, no consensus could straightforwardly be reached on the issue of what last-instance court cases are binding on lower-in-rank judiciaries – or become 'of general application' in the TRIPS lexicon. While identifying specific cases and procedures that count as precedential is a daunting exercise, one could conclude that all jurisdictions are slowly converging on one main tenet: precedents are to be followed and adhered to unless a strong argument can be made for overruling them. This is how cases are overruled in common law and civil law systems alike. In China, for instance, 'judges will consider what the line of prior cases are, whether the reasoning in the prior cases is applicable to the case before them, or whether there are factual, legal or policy reasons to take another approach'.[221]

There is no doubt that civil law jurisdictions are hybridising this fast because having courts indirectly contribute to lawmaking is a relatively viable solution to the inadequacy of legislative processes to keep pace with the needs of fast-moving, globalised societies. Just like most other civil law jurisdictions, China is attempting to respond to the solicitations brought about by an increasingly

[217]See Finder, 'China's Evolving Case Law System' (n 111) 253.

[218]See Maciej Małolepszy & Michał Głuchowski, 'Judicial Law-Making in the Criminal Decisions of the Polish Supreme Court and the German Federal Court of Justice: A Comparative View' (2023) 36 International Journal for the Semiotics of Law 1147.

[219]See further Alessandro Martinuzzi, 'Il valore del precedente giurisprudenziale nell'ordinamento costituzionale [The Value of Case Law Precedent in the Constitutional Order]' (PhD Thesis, University of Bologna 2016); Marco Croce, 'Precedente giudiziale e giurisprudenza costituzionale' (2006) 18(5) Contratto e Impresa 1114; Eliana Reccia, *Il valore del precedente e il carattere vincolante delle Pronunce delle Sezioni Unite* [*The Precential Value and Binding Character of Full Chambers' Decisions*] (Giappichelli 2020); Ermanno Calzolaio, 'Il ruolo della giurisprudenza come fonte normativa tra *Civil Law* e *Common Law* [The Role of Judicial Writings as a Source of Law between Vivil and Common Law Systems]' (2020) 36(4) Contratto e Impresa 1447; Michele Taruffo, *Precedente e giurisprudenza* [*Law and Precedent*] (Editoriale Scientifica 2007).

[220]Gaetano De Amicis, 'La formulazione del principio di diritto e i rapporti tra Sezioni semplici e Sezioni Unite penali della Corte di Cassazione [The Interpretation of Laws by, and the Relationship between Single and Grand Chambers of, the Italian Court of Cassation]' (Corte di Cassazione, 30 Nov 2018) <https://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/Rel.__Cons._DE_AMICIS-Il_principio_di_diritto_ed_i_rapporti_tra_Sez._simplici_e_Sez._Unite.pdf> accessed 29 Sep 2023.

[221]Finder, 'China's Evolving Case Law System' (n 111) 247.

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oppressive time-shrinking[222] that seems to render any rule obsolete as soon as it is issued (or, in some extreme events, even before it is enacted). These limitations are being addressed under mounting competition and regulatory anxiety, especially in corporate-intensive fields such as financial law and tort law, where leading common law jurisdictions seem to be more effective at updating their frameworks whenever they so decide. IP, too, is a time-sensitive field of law, where a few days can mean the difference between winning or losing a new market, and courts are increasingly being incentivised by the legislature to share the responsibility for responding to these challenges in a timely, 'competitive' manner.

A Preliminary Proposed Solution and Further Hints for a Way Forward

No one disputes the widespread evidence that the WTO system, and TRIPS with it, is facing what may be the most profound challenge to its political sustainability since its foundation. Whatever the way the WTO will be reformed (if there is any way at all), enhancing and levelling-up transparency will be a contentious dossier for all members, especially for the US and China.[223]

The inconvenient truth is that China will never disclose as many cases as the US and the EU have demanded. Nonetheless, if the regulatory needs subsumed under their request are further delineated, if trust is regained on both sides, and if the burden itself is narrowed, there is a possibility that China will comply with the spirit of TRIPS and disclose at least the text of most of the key judgments strictly related to IP dossiers. This would warrant closer inspection of the criteria for inclusion in such a pool of judgments to be disclosed. These could number in the dozens, but the key factors to consider are whether such cases are: 1) cited by higher or lower courts; 2) included and enumerated in special collections; 3) borrowed from, transplanted from, or referred to by relevant courts in other jurisdictions; 4) not subject to appeal; 5) issued by specialised (IP) courts, which in China correspond to the three nationwide IP courts in addition to the dedicated SPC Chamber; and/or 6) incorporated (explicitly or implicitly, along a sliding scale of political endorsement weight) into legislative and executive acts – in the case of China, of course, the allusion is to the SPC's JIs, provided that the (legal) relationship between inclusion in case collections and incorporation into meta-legislative acts such as the JIs is further enucleated. Corollary variables to be assessed might be, for instance: 7) whether they are widely featured in official publications like the Gazette as well as in media and policy reports, *a fortiori* if efforts towards strengthened outreach are put in place; 8) whether the amount of the award is noteworthy; 9) whether the case discusses new technologies or new types of digital and scientific evidence; and/or 10) the extent to which they can be considered a 'first' or a major procedural turning point. Criteria 9 and 10 could be merged into 'novelty', which is indeed an orientation that the WTO Secretariat appears to endorse.[224] A couple more of very sophisticated criteria would be: 11) the level of scholarly support and references by lawyers – particularly relevant here because the research divisions of the SPC and other Chinese courts employ large numbers of post-doctoral researchers and junior faculty to filter and refine case collections and subsequent publications, on the assumption that judges have neither the time nor, as for the most senior judges who were recruited decades ago, the expertise or motivation to do so – and/or 12) whether publicists could claim that they contain findings that crystallise into general principles of law in the sense of Article 38(1)(c) of the *Statute of the International Court of Justice*.[225] This is important because WTO panels turn to *laws* of general application across party

[222]See eg, Rostam Josef Neuwirth, 'GAIA 2048—A "Glocal Agency in Anthropocene": Cognitive and Institutional Change as "Legal Science Fiction"', in Meredith Kolsky Lewis et al (eds), *A Post-WTO International Legal Order: Utopian, Dystopian and Other Scenarios* (Springer 2020) 71, 72–73.

[223]See also Bernard Hoekman, Xinquan Tu & Robert Wolfe, 'China and WTO Reform', in Henry S Gao, Damian Raess & Ka Zeng (eds) *China and the WTO: A Twenty-Year Assessment* (Cambridge University Press 2023) 281–282.

[224]See eg, WTO, S/WPDR/W/47 (n 33) 7 para 24(d).

[225]Statute of the International Court of Justice (signed 26 Jun 1945, effective as of 24 Oct 1945).

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members to understand municipal law, but the actual meaning and application of these laws may be clarified by domestic judgments, so that PIL-phrased 'general principles' could just as well be extrapolated from consistent and authoritative 'lineages' of domestic judgments.[226]

As China is moving closer to common law precedent discourses (as do most civil law systems around the world), there is merit to the US/EU request. China is expected to pivot fairly steadily towards a hybridised system in which judges cite precedents both directly and indirectly,[227] and make extensive use of them not only in reasoning about the law, but increasingly in drafting it. Consequently, the WTO transparency requirements will become even more salient, and it would certainly be *mala fide* to ignore them or to respond to them in a formalistic manner. Nevertheless, overly broad and quantitatively phrased petitions do not seem to be helpful, partly because only certain collections of cases truly matter. In my view, in the interests of quality and time, if none or only a minority of the above twelve points are satisfactorily matched, China should be exempted from further compliance demands. Importantly, politically sensitive cases will not be made public anyway, and on the presumption of good faith and 'international comity' they should be exempted therefrom under the aegis of national security (*ordre public*).

In summary, as far as China is concerned, and after evaluating Chinese case law *in its own terms and context*, I would advise that at least GCs and TCs should be considered 'of general application' (especially if reported in or substantiated by SPC JIs), along with a scant number of other cases in light of the criteria listed above, depending on the field and all relevant geopolitical and geoeconomic circumstances. This exhausts the inspection into the scope of case law to be disclosed.

Returning to the WTO procedures that have prompted this discussion, a few concluding remarks are in order. The first concerns the risk that the more transparent a jurisdiction is in releasing case law, the more material the other parties can gather to lodge cases against it in the WTO. To defy this paradox, a strict obligation of disclosure should be maintained at least for disputes whose dismissal would trigger a reversal of the burden of proof after a very light *prima facie* case. In other words, if a state lodges a complaint and the other state does not disclose relevant case law, the burden of proof should shift to the responding state. This is to avoid that non-disclosure becomes a shield against complaints, and, in particular, that disclosure becomes a litigation risk factor. Second, further reflection is needed on the most appropriate channels for submitting and negotiating disclosure requests. The current bureaucratic protocol does not seem to best serve the interests of diplomatic engagement. My third and final observation concerns the feasibility and convenience of renegotiating and reformulating the TRIPS clause to take account of the above discussions and to accommodate global change, against the backdrop of a decidedly outdated WTO framework that warrants reform well beyond this specific issue. Sometimes, though, ambiguity may be deliberate in order to make all parties 'limitedly unhappy' and allow for a *de minimis* consensus to emerge. Indeed, this may well justify the current landscape.

[226]See further Arie Reich, 'The effectiveness of the WTO dispute settlement system: A statistical analysis' (EUI Working Paper LAW 2017/11) 28–29.

[227]See also Liu, Klöhn & Spamann (n 132) 95.

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