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RESEARCH ARTICLE

The Return and Transcendence of the Foreign-Related Legal System*

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Abstract

During the tenth group study session of the Political Bureau of the Communist Party of China Central Committee, President XI Jinping stressed to strengthen the development of the foreign-related legal system (FRLS), bringing the FRLS back into focus within China's legal framework. While today's FRLS, like that of the early reform and opening up period, falls within the scope of domestic law and part of the domestic legal system, its content and functions have evolved. As the foundation of the rule of law in foreign-related affairs, today's FRLS has gone beyond the original focus on "attracting foreign investment" and the dual-track legislative model. It is now more focused on adjusting international relations, safeguarding national sovereignty, security, and development interests, facilitating progress in international rule of law, and advancing the building of a human community with a shared future. This return and transcendence reflect shifts in the global landscape and the development of China's rule of law.

Keywords foreign-related legal system (FRLS); rule of law in foreign-related affairs; dual-track system; national interests; a human community with a shared future

During the tenth group study session of the Political Bureau of the Communist Party of China (CPC) Central Committee held on November 27, 2023, President XI Jinping emphasized strengthening the development of the foreign-related legal system (FRLS) and creating favorable Legal conditions and external environment. "Bolstering the rule of law in foreign-related affairs not only serves the long-term need for building a strong nation and advancing national rejuvenation through a Chinese path to modernization, but also carries the immediate importance of FRLS development in fostering high-standard opening up and addressing external risks and challenges ... The FRLS is an important part of the national legal system and the foundation of the rule of law in foreign-related affairs. It plays an important role in consolidating the foundation, ensuring stable expectations, and delivering long-term benefits."[1] These key remarks not only clearly define the connotation of the rule of law in foreign-related affairs but also underscore the role of FRLS. The expression "FRLS," a common term in the early days of reform and opening up, has regained prominence in the new era, assuming renewed significance while achieving both a return to and transcendence of its original purpose.

[1] 习近平在中共中央政治局第十次集体学习时强调　加强涉外法制建设 营造有利法治条件和外部环境 (During the Tenth Group Study Session of the Political Bureau of the Communist Party of China Central Committee, XI Jinping Emphasized Strengthening the Development of the Foreign-Related Legal System and Creating Favorable Legal Conditions and External Environment), 人民日报 (*People's Daily*), Nov. 29, 2023.

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I The Rise and Unification of FRLS

A Overview of the FRLS over the Past 40 Years of Reform and Opening Up

In the past 40 years, from 1979 when the National People's Congress adopted the Law of the People's Republic of China (PRC) on Chinese-Foreign Equity Joint Ventures (hereinafter referred to as the Law on Chinese-Foreign Equity Joint Ventures) to 2019 when XI Jinping first proposed to strengthen the development of the rule of law in foreign-related affairs,[2] China's FRLS has followed a trajectory from foreign-related legislation in the first place, through a dual track of domestic and foreign legislation, to gradual unification and integration.

China's reform and opening up began with foreign-related legislation. Foreign-related legislation also means a dual-track system of internal and external economic management models. The Law on Chinese-Foreign Equity Joint Ventures set a precedent for foreign-related legislation, and it was also the first economic system legislation passed by the National People's Congress after 1978, when China launched its reform and opening up. Against the backdrop of reconstruction and a lack of supporting economic legal systems at the time, the Law on Chinese-Foreign Equity Joint Ventures, consisting of only 15 articles, served multiple purposes, laying the groundwork for China's reform and opening up and for the development of its economic legal system.[3] This law established the limited liability company system and the private property system of enterprises and opened the way for a company system and a market economy. In contrast, the Law of the PRC on Industrial Enterprises Owned by the Whole People adopted by the National People's Congress in 1988, the Provisional Regulations of the PRC on Private Enterprises promulgated in 1988, the Regulation of the PRC on Rural Collectively-Owned Enterprises in 1990, and the Regulation of the PRC on Urban Collectively-Owned Enterprises in 1991 by the State Council, presented a clear distinction between internal and external paths. In 1992, the State Commission for Economic Restructuring issued the Opinions on Standards for Limited Liability Companies and the Opinions on Standards for the Companies Limited by Shares; in 1993, the Standing Committee of the National People's Congress passed the Company Law of the PRC (hereinafter referred to as the Company Law), which applies to limited liability companies and companies limited by shares established in China. Although it clearly states that limited liability companies with foreign investment are subject to this law, the law also stipulates that "where the provisions of national statutes governing Chinese-foreign equity joint venture enterprises, Chinese-foreign cooperative joint venture enterprises, and wholly foreign-owned enterprises stipulate otherwise, the stipulations therein shall prevail."[4] This, in fact, maintains a dual-track system. It was not until 2019 that the Foreign Investment Law of the PRC (hereinafter referred to as the Foreign Investment Law) was enacted to uniformly repeal and

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[2] 习近平主持召开中央全面依法治国委员会第二次会议强调　完善法治建设规划提高立法工作质量效率　为推进改革发展稳定工作营造良好法治环境 (XI Jinping Presided over the Second Meeting of the Commission for Law-Based Governance of the CPC Central Committee, Stressing that Improving the Rule-of-Law Planning and Improving the Quality and Efficiency of Legislative Work Will Create a Sound Legal Environment for Promoting Reform, Development, and Stability), 人民日报 (*People's Daily*), Feb. 26, 2019.

[3] See ZHU Ciyun, 论中国公司法本土化与国际化的融合——改革开放以来的历史沿革、最新发展与未来走向 (The Integration of Localization and Internationalization of Chinese Corporate Law: Historical Evolution, Latest Developments, and Future Trends since the Reform and Opening up), 2 东方法学 (*Oriental Law*), 91–102 (2020).

[4] Articles 2 and 18 of the Company Law (1993).

replace the Law on Chinese-Foreign Equity Joint Ventures, the Law of the PRC on Chinese-Foreign Contractual Joint Ventures (hereinafter referred to as the Law on Chinese-Foreign Contractual Joint Ventures) and the Law of the PRC on Wholly Foreign-Owned Enterprises, expressly stipulating that the organizational form, organizational structure, and operating guidelines of investment enterprises shall be governed by the Company Law and other relevant legal provisions,[5] thereby placing the organizational form and related governance of both domestic and foreign-invested enterprises under the governance of the Company Law.

In terms of corporate income tax, the National People's Congress passed the Income Tax Law of the PRC Concerning Joint Ventures with Chinese and Foreign Investment in 1980, the State Council promulgated the Draft Regulations of the PRC on State-Owned Enterprise Income Tax in 1984, and the Provisional Regulations of the PRC on Private Enterprise Income Tax in 1988. The National People's Congress passed the Income Tax Law of the PRC for Enterprises with Foreign Investment and Foreign Enterprises in 1991, and the State Council issued the Interim Regulation of the PRC on Enterprise Income Tax applicable to enterprises other than foreign-invested enterprises and foreign enterprises in December 1993. In 2007, the Standing Committee of the National People's Congress passed the Enterprise Income Tax Law of the PRC, which is uniformly applicable to domestic and foreign-invested enterprises.

In the field of contract law, the National People's Congress passed the Economic Contract Law of the PRC (hereinafter referred to as the Economic Contract Law) in 1983 to ensure the implementation of national plans. In 1985, the Standing Committee of the National People's Congress passed the Law of the PRC on Economic Contracts Involving Foreign Interest (hereinafter referred to as the Law on Economic Contracts Involving Foreign Interest), which applies to economic contracts concluded between Chinese enterprises or other economic organizations and foreign enterprises, other economic organizations or individuals. In 1999, the National People's Congress passed the uniformly applicable Contract Law of the PRC (hereinafter referred to as the Contract Law), marking the end of the dual-track system of purely domestic legislation and foreign-related legislation in the contract field.

It is worth noting that the Law on Economic Contracts Involving Foreign Interest stipulates the choice of applicable law for handling contract disputes, the application of international practices, and especially the relationship between international treaties and China's law: "Where an international treaty which is relevant to a contract, and to which the PRC is a contracting party or a signatory, has provided differently from the law of the PRC, the provisions of the international treaty shall prevail, with the exception of those clauses on which the PRC has declared reservation."[6] In line with this law, Article 142 of the General Principles of the Civil Law of the PRC (hereinafter referred to as the General Principles of Civil Law) adopted by the National People's Congress in 1986 stipulates the law application to foreign-related civil relations: "The application of law in civil relations with foreigners shall be determined by the provisions in this chapter. If any international treaty concluded or acceded to by the PRC contains provisions differing from those in the civil laws of the

[5] Articles 31 and 42 of the Foreign Investment Law.

[6] Article 6 of the Law of the PRC on Economic Contracts Involving Foreign Interests.

PRC, the provisions of the international treaty shall apply, unless the provisions are ones on which the PRC has announced reservations. International practice may be applied to affairs for which neither the law of the PRC nor any international treaty concluded or acceded to by the PRC has any provisions." This provision of the General Principles of Civil Law expands the special provisions on contracts under the framework of the Law on Economic Contracts Involving Foreign Interest to the general provisions for China to deal with foreign-related civil legal relations.

The provisions of the General Principles of Civil Law regarding the relationship between international treaties and Chinese civil law have been further expanded to the realm of public law and almost became a general rule. The section on foreign-related administrative litigation of the Administrative Litigation Law of the PRC (hereinafter referred to as the Administrative Litigation Law) adopted by the National People's Congress in 1989 almost replicated the provisions of Article 142 of the General Principles of Civil Law: "If an international treaty concluded or acceded to by the PRC contains provisions different from those found in this Law, the provisions of the international treaty shall apply, unless the provisions are ones on which the PRC has announced reservations." The above-mentioned provisions concerning the relationship between international treaties and China's laws disappeared entirely in the 2020 Civil Code. And the Administrative Litigation Law revised in 2014 no longer has similar provisions. This seems to indicate that, except for laws specifically related to diplomatic affairs such as the Customs Law of the PRC, the Foreign Trade Law of the PRC (hereinafter referred to as the Foreign Trade Law), the Foreign Investment Law, foreign-related legal issues are no longer topics of particular concern.

Beyond sector-specific legislation, the Standing Committee of the National People's Congress also established four special economic zones, namely Shenzhen, Zhuhai, Xiamen and Shantou, to implement special policies different from those in other regions. The Regulations on Special Economic Zones in Guangdong Province proposed by the State Council was adopted by the Standing Committee of the National People's Congress in August 1980, granting preferential treatment, in terms of land use, import and export, tariffs, income tax, etc., to merchants who invested and set up factories in the special economic zones. Such differential policies issued by China became part of its WTO accession negotiations. The Protocol on the Accession of the PRC to the Marrakesh Agreement establishing the World Trade Organization requires that the provisions of the World Trade Organization Agreement and the Protocol itself shall apply to all customs territories of China, including border trade areas, ethnic autonomous areas, special economic zones, coastal open cities, economic and technological development zones, and other areas where special systems have been established in terms of tariffs, domestic taxes and regulations ("special economic zones"). Unless otherwise provided in the Protocol, when preferential arrangements are offered to enterprises within such special economic zones, the provisions of the WTO regarding non-discrimination and national treatment shall be fully observed.[7] China's accession to the WTO, a historic event in China's reform and opening-up process, has provided new impetus for

[7] See 中国加入世界贸易组织法律文件 (*Compilation of the Legal Instruments on China's Accession to the World Trade Organization*), translated by the Department of WTO Affairs of the Ministry of Foreign Trade and Economic Cooperation, 法律出版社 (Law Press · China), at 3 (2002).

unifying policies governing both domestic and foreign trade and investment.

B Analysis of the Reasons behind the Transition of the FRLS from a Dual-Track to a Unified Track

To some extent, the Law on Chinese-Foreign Equity Joint Ventures of 1979 represents a landmark legislation in the development of China's legal system for two reasons. First, as the first economic legislation after China shifted toward economic development and the implementation of the reform and opening-up policy, it is also the first foreign-related legislation, which laid the foundation for the establishment, development, and improvement of relevant legal systems. Second, it is the first legislation on private property rights under the background of China's planned economy system, aimed at the protection of foreign investment and assets, promoting the subsequent construction of the socialist market economy. Precisely because of its pioneering and heterogeneity, the Law on Chinese-Foreign Equity Joint Ventures can only be implemented as an extraordinary and exceptional institutional arrangement, which in turn determines the approval-based administrative model for the establishment and operation of foreign-invested enterprises. The exceptional and extraordinary nature of foreign-related affairs is the fundamental reason for China's dual-track FRLS, as evidenced by the parallel existence of the Economic Contract Law and the Law on Economic Contracts Involving Foreign Interest, as well as the relevant legislative evolution described above.

Judging from the trajectory of China's economic system reform, the exceptional heterogeneity of the Law on Chinese-Foreign Equity Joint Ventures, the Law on Economic Contracts Involving Foreign Interest and related legislation precisely represents the development direction of China's socialist market economy. The system of limited liability companies established by the Law on Chinese-Foreign Equity Joint Ventures laid the foundation for China's company system and provided a reference for the reform of China's state-owned enterprises and collective enterprises. The Economic Contract Law applicable to domestic parties is such a management tool of the planned economy, which stipulates contracts signed by parties only become effective after approval by administrative authorities because the signing and performance of contracts are means to complete government plans, whereas the principle and system of party autonomy established by the Law on Economic Contracts Involving Foreign Interest truly represent and conform to the spirit and essence of civil and commercial law. The Contract Law, passed in 1999, which unified domestic and foreign contracts, largely follows the principles and approaches of the Law on Economic Contracts Involving Foreign Interests.

Foreign-related legislation has facilitated China's further opening-up and gradual integration into the world economic system, and China's further opening-up, in turn, has promoted the transformation of Chinese legislation from a dual-track system to a unified one. China's resumption of General Agreement on Tariffs and Trade (GATT) membership and accession to the WTO have directly propelled this unification. It has greatly promoted the unification of foreign-related and non-foreign-related norms that China has adopted measures to establish, amend, and abolish domestic legislation in accordance with its WTO accession commitments

and the requirements of the World Trade Organization Agreement, especially the requirement for national treatment. This is most evident in areas such as intellectual property legislation, foreign investment legislation, and foreign trade legislation.[8] With the view of alignment with international practices, which was the slogan in the early days of China's reform and opening up, joining international agreements and harmonizing domestic rules with the international agreements that China joined were the policy goals pursued at the time. China's legislative autonomy and policy flexibility have become circumscribed to some degree by its international treaty obligations. The Law on Chinese-Foreign Equity Joint Ventures is a product of China's independent policy, predating the privatization policy adopted by the Reagan administration in the United States and the Thatcher administration in the United Kingdom. Around the time of China's accession to the WTO, China's legislature revised relevant foreign investment legislation in accordance with its WTO accession commitments and the rules and requirements of the WTO. The Patent Law of the PRC (hereinafter referred to as the Patent Law), which came into effect in 1984, drew on Germany's experience, and the Copyright Law of the PRC (hereinafter referred to as the Copyright Law) of 1990 reflected the understanding of China's legislature at the time. However, after the China-US intellectual property negotiations in 1991, and especially after China's accession to the WTO, intellectual property legislation, including the Patent Law and the Copyright Law, gradually falls in line with international treaty obligations. Internationally, the domestic legislation of India and Canada, which failed to meet the requirements of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights, was found to be illegal by the WTO Dispute Settlement Body.[9] In terms of foreign trade legislation, foreign trade was a tool of foreign policy in the planned economy era where the state monopolized foreign trade, therefore, there was no trade-related legislation at the time. During China's resumption of GATT membership negotiations were pending, China's legislature passed the Foreign Trade Law in 1994, but the right to operate foreign trade was still subject to government approval. To fulfill its WTO accession commitments to liberalize the right to conduct foreign trade, China's legislature revised the Foreign Trade Law in 2004.

While promoting the alignment between domestic law and international rules, China's accession to the WTO also prompted reflections on the relationship between domestic law and international rules. It is the Chinese understanding and practice that treaties enjoy prioritized and direct applicability. It was established in the Law on Economic Contracts Involving Foreign Interest, confirmed in the General Principles of Civil Law, and expanded in the Administrative Litigation Law, but now it has encountered challenges. This issue is most reflected in how domestic courts implement WTO rules, particularly those related to intellectual property rights. Traditionally, China regards the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works as civil and commercial conventions and uses them directly as the basis for adjudication. Faced with the Agreement on Trade-Related Aspects of Intellectual Property

[8] See HAN Liyu, 入世对中国法治的影响 (The Implications of WTO Accession on China's Rule of Law), 5 中国青年政治学院学报 (*Journal of China Youth University for Political Sciences*), 115–127 (2011).

[9] India—Patents, WT/DS79/R, WT/DS50/R, WT/DS50/AB/R, adopted on 16 January 1998; Canada—Patent Term, WT/DS170/R, WT/DS170/AB/R, adopted on 12 October 2000.

Rights (an integral part of the WTO rules) and those consensus and practice that WTO members, instead of applying directly, adapt before applying them, and the relationship between public law and private law, between domestic law and international law, and between the national and international organizations, have become issues that China's legislative, judicial, and law enforcement authorities have had to rethink. This may explain why the Civil Code does not include provisions on foreign-related legal relations and why the Administrative Litigation Law deleted provisions on the relationship between domestic law and international treaties.

II The Return of FRLS

A Responding to Shifts in the Global Landscape

Overall, China's reform and opening up unfolded in parallel with the trends of economic globalization. Concepts such as free trade and market liberalization dominated global economic discourse. China has deepened its integration into the global economy, gradually emerging as the "world factory." Notions such as zero inventory for enterprises affected the development of the global economy. With the outbreak of the global economic crisis, the landscape of global economic competition has gradually changed. A series of measures undermining free trade taken by some countries have placed the handling of foreign trade and economic relations once again at a crossroads, particularly against the backdrop of the deserted Appellate Body of the WTO and the paralyzed dispute settlement mechanism.

The changes in international relations have triggered reflections on how to defend China's interests and promote a path toward a human community with a shared future. What should we do if we cannot make effective use of multilateral mechanisms? This inevitably requires us to return to the domestic legal system for seeking solutions, but our existing legal system is not sufficient to meet the needs arising from real challenges, which makes it necessary for us to enrich our legal toolbox. The traditional domestic rule of law thinking that leaves foreign-related relations out and the legal thinking that separates or confuses domestic and international relations have exposed their inherent deficiencies.

B Guidance from XI Jinping Thought on the Rule of Law

"The FRLS is an important part of the national legal system and the foundation of the rule of law in foreign-related affairs. It plays an important role in consolidating the foundation, ensuring stable expectations, and delivering long-term benefits." "Bolstering the rule of law in foreign-related affairs not only serves the long-term need for building a strong nation and advancing national rejuvenation through a Chinese path to modernization, but also carries the immediate importance of FRLS development in fostering high-standard opening up and addressing external risks and challenges." "The rule of law in foreign-related affairs, as an important part of the system of socialist rule of law with Chinese characteristics, bears on law-based governance of the country and on the overall situation of China's opening to the outside world and diplomatic work. The fundamental purpose of promoting the rule of law in foreign-related affairs is to better safeguard the interests of the country and the people,

promote the progress of international rule of law, and advance the building of a human community with a shared future. We must unswervingly follow a path of socialist rule of law with Chinese characteristics."[10] These important statements by XI Jinping and XI Jinping Thoughts on the Rule of Law provide us with a fundamental guide for understanding the return of FRLS.

XI Jinping Thought on the Rule of Law has emerged precisely against the backdrop of the great rejuvenation of the national rejuvenation amid global changes of a magnitude not seen in a century. It is the practical summary and strategic approach of the CPC in the new era, leading the Chinese people in their pursuit of the rule of law, and it is applicable to both China's domestic rule of law construction and its efforts to advance the rule of law in foreign-related affairs. Advancing the rule of law in domestic and foreign-related affairs in a coordinated manner, and pursuing coordinated progress in both domestic and international governance, is one of the "eleven points to uphold" proposed in XI Jinping Thought on the Rule of Law. By putting the rule of law in domestic and foreign-related affairs on a par with each other, XI Jinping Thought on the Rule of Law highlights China's dominant position and role and builds a bridge between the domestic rule of law and the international rule of law, and between domestic governance and international governance.

Xi Jinping Thought on the Rule of Law is rich in content, profound in exposition, rigorous in logic, systematic in structure, and broad in scope. In summary, it embodies at least the following obvious characteristics. The first is law compliance. It emphasizes the compliance with the law and the respect for the law, as well as the use of legal thinking and methods to resolve issues. It upholds the observance of the law and due process, integrating interest relations and structures of power into the framework of rule of law. The second is party consciousness. Party consciousness is reflected in the relationship between politics and law, and in the relationship between the external form of law and its internal dynamics. The third is affinity to the people. The goal of the rule of law is to safeguard the interests of the people, without which goal, the rule of law will degenerate into a performative exercise and lose its fundamental nature. The fourth is directionality. The path taken in developing rule of law directly determines its effectiveness. It is closely linked to party consciousness and affinity to the people, while maintaining its own emphasis. The fifth is coordination. It can also be called as systemic integration. It converges interest intersections, resolves systemic pain points, eliminates governance blind spots, pursues good law, good governance and wisdom, constructs five major systems (a complete system of laws, a highly effective system for realizing the rule of law, a stringent system to oversee the practice of the rule of law, a robust system to guarantee the rule of law, and a well-defined system of rules and regulations within the CPC),[11] integrates rule of law with rule of virtue, and coordinates the rule of law in domestic and foreign-related affairs.

The report to the 20th National Congress of the CPC points out that we must exercise law-based governance on all fronts and advance the rule of law in China. We must pursue coordinated progress in law-based governance, law-based exercise of state power, and law-

[10] See fn. 1.

[11] See XI Jinping, 论坚持全面依法治国 (*On Upholding Comprehensive Law–Based Governance of the State*), 中央文献出版社 (Central Party Literature Press), at 4 (2020).

based government administration and take integrated actions to build a country, government, and society based on the rule of law. We will make all-around efforts to ensure sound legislation, strict law enforcement, impartial administration of justice, and society-wide observance of the law and see that all work of the state is carried out under the rule of law.[12] A sound legal system is the foundation for all work of the state to be carried out under the rule of law; in the realm of the rule of law in foreign-related affairs, the FRLS constitutes this foundation. Without the FRLS, it would be impossible for us to pursue a coordinated progress in law-based governance, law-based exercise of state power, and law-based government administration in foreign-related work.

Since 2020, the National People's Congress and its Standing Committee have successively passed the Law of the PRC on Safeguarding National Security in the Hong Kong Special Administrative Region, the Export Control Law of the PRC (hereinafter referred to as the Export Control Law), the Hainan Free Trade Port Law of the PRC, the Anti-Foreign Sanctions Law of the PRC (hereinafter referred to as the Anti-Foreign Sanctions Law), the Law on Foreign Relations of the PRC (hereinafter referred to as the Law on Foreign Relations), the Law of the PRC on Foreign State Immunity (hereinafter referred to as the Law on Foreign State Immunity), and amended or revised the Civil Procedure Law of the PRC (hereinafter referred to as the Civil Procedure Law), the Counterespionage Law of the PRC, the Securities Law of the PRC, the Tariff Law of the PRC, and other laws. The State Council and relevant government departments have promulgated or revised the Regulation of the PRC on Consular Protection and Assistance, the Measures for the Administration of Conclusion of Treaties, the Regulations of the PRC on the Administration of Import and Export of Technologies, the Provisions on the Implementation of the International Copyright Treaties, the Provisions on the Unreliable Entity List, the Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures, etc. China has made significant progress in foreign-related legislation and continuously improved the FRLS.

III The Transcendence of the FRLS

A The New Era Calls for a New FRLS

It is obvious that, compared with the foreign-related legislation in the early days of reform and opening up, the foreign-related economic legislation in the new era has not returned to the old dual-track system, but rather it has blazed a new path that meets the requirements of the times. The FRLS at the beginning of reform and opening up was a special one, as it was characterized by marginalization, exceptionality, and detachment from the main legal system. The purpose of the FRLS is to "bring in investment and talent from overseas," to "bring in" foreign businessmen and foreign capital, and to give special treatment in the form of concession to foreign investors and operators. Although the establishment and operation of foreign-invested enterprises were subject to approval in terms of management, this was

[12] See XI Jinping, 高举中国特色社会主义伟大旗帜　为全面建设社会主义现代化国家而团结奋斗——在中国共产党第二十次全国代表大会上的报告 (2022年10月16日) (*Hold High the Great Banner of Socialism with Chinese Characteristics and Strive in Unity to Build a Modern Socialist Country in All Respects: Report to the 20th National Congress of the Communist Party of China (Oct. 16, 2022)*), 人民出版社 (People's Publishing House), at 40 (2022).

nothing special in the context of planned economy at the time, just as the aforementioned Economic Contract Law stipulated that economic contracts were subject to administrative approval. The enterprise income tax policy of "two-year exemption followed by three years of 50% reduction" for foreign-invested enterprises actually puts domestic enterprises in a less favorable competitive position compared with foreign-invested counterparts. The foreign trade operation rights enjoyed by foreign-invested enterprises were another advantage far beyond the reach of ordinary domestic enterprises. Therefore, it can be said that, in the 1980s and 1990s, although the FRLS was marginal, it held a core position in terms of policy orientation. To some extent, during this period, foreign investment was both "discriminated against" and "favored," reflecting a dual-track and non-unified legal system.

In line with the goal of reform and opening up, the Chinese government applied in 1986 to resume its status as an original contracting party to the General Agreement on Tariffs and Trade. After the WTO was established to replace the General Agreement on Tariffs and Trade, the Chinese government applied to join the WTO. In the process of accession negotiations, China gradually formulated, amended, and improved relevant laws and policies. For example, it enacted the Foreign Trade Law in 1994 and revised the same in 2004. In terms of content and orientation, the Foreign Trade Law enacted in 1994 was mainly enacted to establish a legal framework for foreign trade and regulate foreign trade enterprises. The right to operate foreign trade remained a privileged concession. The Foreign Trade Law revised in 2004 turned to address international economic and trade relations, liberalize the right to operate foreign trade, and regulate the exercise of government power. The changes in the Foreign Trade Law reflect the changing trend of FRLS. The changes in China's foreign investment legislation, from the coexistence of the Law on Chinese-Foreign Equity Joint Ventures, the Law on Chinese-Foreign Contractual Joint Ventures, and the Law of the PRC on Foreign-Funded Enterprises and their actual isolation from the Company Law, to the unified application of the Foreign Investment Law and its compatibility with the Company Law, indicate that the FRLS has begun to shift from a dual-track system to a unified system. This unification is not only the result of the further development of China's reform and opening up, but also the result of China's economic integration into the world economy. It is also the requirement and result of the consistency between China's legal system and international rules.

The FRLS of today is an integral part of the strategy of advancing law-based governance across all fields of endeavor, and an inherent requirement and result of the strategy. We must uphold the rule of law in modernizing China's system and capacity for governance. And only by advancing law-based governance across all fields of endeavor can we effectively ensure the systematic, standardized, and coordinated nature of the national governance system. The internal and external disharmony and inconsistency that existed in the past must be corrected. "The system of socialist rule of law with Chinese characteristics is the focus of the drive to advance law-based governance. We must accelerate the formation of a complete system of laws, a highly effective system for realizing the rule of law, a stringent system to oversee the practice of the rule of law, a robust system to guarantee the rule of law, and a well-defined system of rules and regulations within the CPC. We should integrate the rule of law with the rule of virtue so that they complement and reinforce each other. We should push ahead with

legislative work on national security, scientific and technological innovation, public health, biosafety and biosecurity, ecological conservation, risk management, and laws concerning external affairs and other key areas."[13] Therefore FRLS, as the foundation of the rule of law in foreign-related affairs, serves as a component of the rule of law system in foreign-related affairs and as a component of the main body of the socialist rule of law system, hence its inherent unity.

The FRLS in the new era reflects China's evolving developmental stages as well as the changes and requirements of its international environment. Since the founding of the PRC, it has undergone a historic transformation from standing up to becoming prosperous and then growing strong, entering a new phase characterized as a Chinese path to modernization. It has become China's current historical task to pursue a strategy of national rejuvenation amid global changes of a magnitude not seen in a century. This inevitably requires that the content of FRLS be different from that in the early days of reform and opening up. From closed to open, from planned to market-based, and from domestic to international, China's posture, role, strength, function, and expectations have undergone major changes. From blindly integrating itself with external standards to coordinating internal and external standards, from passively following the lead to leading in rule-making, from keeping a low profile to seeking proactive engagement, from developing its economy to upholding a Chinese path to modernization. China, with its own developmental path and achievements, has provided new choices and references for the development of other countries and regions.

We are also deeply aware that China's rights and interests are facing new threats. Unlike in the early days of China's reform and opening up, when the focus was mainly on attracting foreign investment, China has now become the world's manufacturing center. Its overseas investments span the globe, making itself a major investing country with huge overseas interests. China's legitimate rights and interests and overseas interests are relatively well protected in an environment of relatively subdued geopolitical tensions, prevalence of free trade policies, and respect for the multilateral trade regimes. After China's accession to the WTO, its disputes, including those brought by other members against China and those brought by China against other members, are handled through the WTO's dispute settlement mechanism and relatively well resolved. This is an example of how multilateral mechanisms safeguard rights and interests. However, as some countries undermine the WTO dispute settlement mechanism and abuse unilateral measures, the channels for China to obtain effective and legal relief through the WTO have been blocked. This compels China to seek alternative avenues to safeguard its legitimate interests. It is in this context that XI Jinping put forward the important proposition of "advancing the coordinated development of the rule of law in domestic and foreign-related affairs" and added that "we should accelerate our efforts to create a strategic framework for the rule of law in foreign-related affairs, enhance domestic and international governance in a coordinated way, and better safeguard our country's sovereignty, security, and development interests. We should strengthen the rule-of-law thinking and use rule-of-law approaches to effectively respond to challenges and prevent risks. This requires comprehensive utilization of legislative, law enforcement, and judicial

[13] See XI, fn. 11.

measures to resolutely safeguard national sovereignty, dignity, and core interests. We should promote global governance reform and advance the building of a human community with a shared future."[14]

We have also observed that in response to the development of developing countries represented by China, some Western countries have adopted a series of so-called "decoupling" and "de-risking" economic and trade restrictive measures. Therefore, the FRLS of today is not a simple return to the FRLS in the early days of reform and opening up, but a spiraling upward return, a transcendence. In terms of content, most parts of it directly address international economic and trade relations, including both "bringing in" and "going global." In terms of form, it no longer adopts the traditional dual-track system, no longer focuses on treatment differentiation against domestic enterprises, but rather, it is a general FRLS. Its purpose is to safeguard national sovereignty, security, and development interests rather than to protect the interests of specific companies or investors.

B Changes and Constants in the FRLS

In simple terms, FRLS is a legal system that involves international or non-domestic elements, which specifically manifest as the foreign-related people, objects, behaviors, etc.[15] The Law on Chinese-Foreign Equity Joint Ventures at the very beginning of reform and opening up dealt with foreign partners, the Law on Economic Contracts Involving Foreign Interest, foreign enterprises and other economic organizations or individuals, and the Regulations on Special Economic Zones in Guangdong Province, foreign citizens, overseas Chinese, Hong Kong and Macao compatriots and their companies that invested and established factories in the special economic zones.[16] The Hainan Free Trade Port Law of the PRC, passed by the Standing Committee of the National People's Congress in 2021, aims to promote the formation of a new pattern of reform and opening up at a higher level and establish a new open economic system. It is fashioned after the Regulations on Special Economic Zones in Guangdong Province to give Hainan the power to implement special economic policies. However, the fundamental difference between the Hainan Free Trade Port Law of the PRC and the Regulations on Special Economic Zones in Guangdong Province lies in the former's adoption of a management and operation model of "inside national territory but outside customs territory." The Law on Foreign Relations and the Anti-Foreign Sanctions Law, etc., are different from the aforementioned laws in content. No matter what specific characteristics

[14] See XI, fn. 11 at 5.

[15] The determination of specific foreign-related relations should be based on specific laws. The judgment criteria for different types of laws, such as criminal law, anti-monopoly law, civil and commercial law, procedural law, are not the same. Article 1 of the Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the PRC on Choice of Law for Foreign-Related Civil Relationships (I) stipulates: Where a civil relation falls under any of the following circumstances, the people's court may determine it as foreign-related civil relations: (1) where either party or both parties are foreign citizens, foreign legal persons, other organizations, or stateless; (2) where the habitual residence of either party or both parties is located outside the territory of the PRC; (3) where the subject matter is outside the territory of the PRC; (4) where the legal fact that leads to establishment, change, or termination of civil relations takes place outside the territory of the PRC; or (5) other circumstances under which the civil relations may be determined as a foreign-related civil relations.

[16] For a long period after the reform and opening up, investment from Hong Kong, Macao, and Taiwan was regarded as overseas investment. In 1994, the Standing Committee of the National People's Congress specially formulated the Law of the PRC on the Protection of Investments by Taiwan Compatriots.

these laws have, however, they are all foreign-related legislation and are part of the FRLS. The fact that the FRLS is an important part of the national legal system has remained unchanged from the early period of reform and opening up to the present.

Since XI Jinping proposed "advancing the rule of law in deomestic and foreign-related affairs in a coordinated manner," Chinese scholars have enriched and deepened their understanding of "the rule of law in foreign-related affairs," albeit there are some disagreements.[17] XI Jinping pointed out that "the FRLS is an important part of the national legal system and the foundation of the rule of law in foreign-related affairs" and "the fundamental purpose of promoting the rule of law in foreign-related affairs is to better safeguard the interests of the country and its people, promote the progress of international rule of law, and the development of a human community with a shared future."[18] XI Jinping's important remarks are of great significance to our understanding of the FRLS. The FRLS, whose content is foreign-related, falls under the category of domestic legislation and serves as a bridge between traditional domestic law and international law. The rule of law in foreign-related affairs, which is based on the FRLS, is developed for the two-fold fundamental purpose: it not only safeguards the interests of the country and the people, but also promotes the progress of international rule of law and advances the building of a human community with a shared future. This positioning distinguishes the FRLS of today from that of the early period of reform and opening up. It transcends domestic interests and rises to the level of a human community with a shared future.

What the FRLS of today does is to subject international relations to the regulation of domestic law. This regulation includes promoting the building of a human community with a shared future and safeguarding national sovereignty, security and development interests. While foreign-related legislation such as the Law on Chinese-Foreign Equity Joint Ventures, in a way of speaking, focuses more on internal issues, legislation in the new era is more directly concerned with the external relations of China. Article 1 of the Law on Foreign Relations states its legislative purpose: "This Law is enacted pursuant to the Constitution of the PRC to conduct foreign relations to: safeguard China's sovereignty, national security, and development interests; protect and promote the interests of the Chinese people; build China into a great modernized socialist country; realize the great rejuvenation of the Chinese nation; promote world peace and development; and build a human community with a shared future." The objects regulated by the Export Control Law passed in 2020 overlap to a certain extent with those regulated by the Foreign Trade Law passed in 1994, but the legislative purposes of the two laws are very different. The former

[17] Many studies have been made in this regard, for example, HE Zhipeng, 涉外法治的辩证思维 (Dialectical Thinking on Foreign-Related Rule of Law), 4 法制与社会发展 (*Law and Social Development*), 5–27 (2023); HUO Zhengxin, 我国法域外适用体系之构建——以统筹推进国内法治和涉外法治为视域 (Constructing a System of Extraterritorial Application of Chinese Law: From the Perspective of Advancing the Rule of Law in Domastic and Foreign-Related Affairs in a Coordinated Manner), 1 中国法律评论 (*China Law Review*), 41–51(2022); HUANG Jin, 论统筹推进国内法治和涉外法治 (On Advancing the Rule of Law in Domestic and Foreign-Related Affairs in a Coordinated Manner), 12 中国社会科学 (*Social Sciences in China*), 84–95 (2022); HAN Liyu, 涉外关系治理的法律化与中国涉外法律实施 (The Legalization of Foreign Relations Governance and the Implementation of Chinese Foreign-Related Laws), 2 吉林大学社会科学学报 (*Jilin University Journal Social Sciences Edition*), 34–48, 235, 236 (2022); ZHANG Yan, 涉外法治的概念与体系 (The Concept and System of the Rule of Law in Foreign-Related Affairs), 2 中国法学 (*China Legal Science*), 264–282 (2022).

[18] See fn. 1.

is "enacted for the purposes of maintaining the national security and interest, performing nonproliferation and other international obligations, and strengthening and regulating export control," and the latter is "formulated with a view to developing foreign trade, maintaining order in foreign trade activities and promoting a healthy development of the socialist market economy."[19] From these examples, we can clearly see the differences between the FRLS in the early period of reform and opening up and the FRLS of today, especially the difference between internal orientation and external orientation.

It is not new to subject foreign relations to the regulation of domestic law. The constitution of almost every country contains similar provisions. The preamble of China's Constitution clearly puts forward that China pursues an independent foreign policy, observes the five principles including peaceful coexistence, opposes imperialism, hegemonism and colonialism, and promotes the building of a human community with a shared future. The provisions in the Constitution regarding the establishment of national institutions and the division of powers are fundamental provisions for handling foreign relations. The United States Constitution's provisions regarding the federal government, the congress, and the president likewise address foreign relations. U.S. courts, by adjudicating cases and publishing precedents, also indirectly participate in shaping foreign relations. In *United States v. Curtiss-Wright Export Corp.*, the U.S. Supreme Court established, based on international law, that the federal government possesses powers in foreign relations not enumerated in the U.S. Constitution, and denied that those states have comparable powers.[20] Constitutional norms, as the supreme and fundamental norms, entail the implementation of other relevant laws. The return of China's FRLS is precisely to meet this requirement. The Export Control Law, the Anti-Foreign Sanctions Law, and the Law on Foreign Relations are all directly enacted "in accordance with the Constitution." It can be said that the contemporary FRLS is the inevitable requirement and result of law-based governance and Constitution-based governance.

Subjecting foreign relations to the regulation of domestic law is also permitted by international law and contributes to the formation and development of international law. International law is a product of conventionalization among states. With the intensive development of human activities, the relations between different states are becoming closer and closer, and the content of international law regulating such relations has also continued to expand and evolve. Wolfgang Friedmann argues that the structural changes in international law have gone through three levels characterized by coexistence, cooperation and community.[21] The proposal put forward by XI Jinping to promote the building of a human community with a shared future represents the direction of the development of international law. In addition, the fact that international law is constantly developing and improving also shows that the actual scope of regulation of international law is limited and incomplete. The fact that international law is a product of conventionalization among states determines the lag and difficulty that international law undergoes in its formation

[19] Article 1 of the Export Control Law; Article 1 of the Foreign Trade Law.

[20] *United States v. Curtiss-Wright Corp.*, 299 US, 304 (1936). See also Barry E. Carter & Allen S. Weiner, 国际法 (*International Law*), Volume 1, translated by FENG Jiehan, 商务印书馆 (The Commercial Press), at 262–265 (2015).

[21] Wolfgang Friedmann, *The Changing Structure of International Law*, Columbia University Press, at 60–71 (1964).

and development. Without the consent of states, there is no international law. The failure of the WTO Doha Round of negotiations and the embarrassment encountered in multilateral negotiations through the Joint Statement Initiative (JSI) both illustrate the difficulty in forming and developing international legal rules.[22] Free trade agreements such as the United States-Mexico-Canada Agreement abandon the investment arbitration mechanism between investors and host countries, pushing the resolution of investment disputes back to the domestic legal system. All these indicate that there is still a lack of mature and complete international rules to regulate many affairs in international relations. In this case, it is imperative to subject international relations to the regulation of domestic laws. In return, the maturity and coordination of domestic legal systems can, to a certain extent and within a certain scope, promote the development of international rules. This is also the inherent meaning of "international law is a product of the coordination of national wills."[23]

From the perspective of the enforcement of international law, the enforcement of international law largely depends on the wills and self-help of relevant members due to the lack of a unified enforcement or adjudication body in the international community. From a necessity perspective, the domestic law of a nation must contain content for overseeing and responding to the implementation of international law. The United States Section 301 regime and the European Union's rights exercise system for the application and enforcement of international trade rules[24] are both domestic legal mechanisms designed to monitor foreign compliance with international economic and trade agreements. There is a long-standing lack of a similar system in Chinese law. When the international legal mechanisms function well, China's rights and interests may be protected by these mechanisms. However, when the international legal mechanisms are undermined, especially when other countries adopt hegemonic and bullying measures, the lack of domestic response mechanisms has led to obvious disadvantages. Therefore, "we must place the rule-of-law response in a more prominent position, speak by rules, act by rules, safeguard China's political and economic security, and safeguard the legitimate rights and interests of Chinese enterprises and citizens," "the response mechanism must keep up," and "the reserve of rule-of-law measures must keep up." In response to the hegemonic behavior of Western countries under the guise of 'rule of law,' we must strengthen theoretical and practical research on countermeasures, establish a blocking mechanism, and make it clear in the form of law that China does not accept the 'long-arm jurisdiction' of any country. We must accelerate the development of a legal system applicable outside our jurisdiction so as to provide a legal basis for our foreign-related law enforcing and judicial activities."[25]

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[22] Texts reached by some WTO members through the Joint Statement Initiative, such as the Investment Facilitation Agreement, have failed to deliver the expected outcomes as they cannot be incorporated into the WTO rule framework due to opposition from other members.

[23] "The so-called fact that international law represents the will of the ruling classes of various states can only be called the representation of their coordinated will." See ZHOU Gengsheng, 国际法 (*International Law*), 商务印书馆 (The Commercial Press), at 11 (2018).

[24] Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules (OJ L 49/1, 12.2.2021).

[25] See XI, fn. 11 at 256–257.

IV The Implications of the Return of the FRLS

The FRLS in the new era shoulders a new historical mission. Its focus has evolved from the enterprise-centered regulation in the early days of reform and opening up to the state-centered regulation today. Its scope has expanded from commercial transactions to foreign relations, and from private law to public law. This progression does not negate the previous stage but rather reflects an enrichment and deepening of the FRLS content, demonstrating shifts in sovereign consciousness, work priorities and strategic approaches. Advancing the rule of law in domestic and foreign-related affairs in a coordinated manner does not mean that we reject international rule of law, but rather that we have a deeper understanding of international rule of law. By developing the domestic rule of law, we aim to contribute to international rule of law and change the passive and unilateral acceptance of external normative constraints.

The return of the FRLS and the advancement of the rule of law in domestic and foreign-related affairs in a coordinated manner have had important implications on the entire legal work and research and put forward new requirement. The core of this requirement is to safeguard national sovereignty, security, and development interests and advance the building of a human community with a shared future.

The FRLS belongs to domestic law in form and to foreign-related law in content. In terms of discipline, the rule of law in foreign-related affairs refers to the rule of law in foreign-related affairs of an all-encompassing nature. It forms an interdisciplinary nexus beyond traditional international/domestic law binaries. Legal research should be guided by the idea of coordinating the rule of law in domestic and foreign-related affairs where domestic law is applied to resolve foreign-related issues, and international law, to safeguard rights and interests. If not based on the FRLS and not connected with domestic rule of law, international rule of law will be like a highway without on-ramps—theoretically advanced but practically inaccessible. Conversely, if domestic laws only focus on affairs within the national territory but not on cross-border affairs, do not respond to threats or infringements from abroad, and do not deal with international relations, it will be impossible for such domestic laws to adapt to the long-term need for building a great country and advancing national rejuvenation through a Chinese path to modernization, and to the immediate importance in fostering high-standard opening up and addressing external risks and challenges. In fact, if you leaf through or read international law or constitutional law textbooks compiled by Western scholars, you will find both precedents from international tribunals and domestic courts. It is not advisable to attempt to sever the connection between domestic law and international law, or to ignore the fact and need for domestic law to regulate foreign relations. If international law cannot provide effective remedies for infringement upon China, and if it only focuses on issues within the territory of China while ignoring challenges faced outside its territory, such rule of law will be incomplete in content and limited in effect. Advancing the rule of law in domestic and foreign-related affairs in a coordinated manner requires us to go beyond traditional disciplinary divisions and enhance interdisciplinary perspectives based on traditional disciplines.

From the perspective of practical sectors, strengthening and improving the FRLS is first and foremost the responsibility of state authorities with legislative functions. The National People's Congress and its Standing Committee, the State Council and its ministries and

commissions, local people's congresses and governments, including the courts, all assume such responsibilities within their respective powers. "On the new journey of building a great country and advancing national rejuvenation, we must follow the correct political direction and demonstrate greater historical responsibility and innovative spirit to accelerate the development of China's rule of law in foreign-related affairs system and capabilities." "The rule of law in foreign-related affairs is a comprehensive and highly interconnected system that needs to take into consideration both domestic and international situations, as well as development and security. It requires forward-looking thinking, overall planning, strategic layout, and holistic advancement, strengthening top-level design, and promoting foreign-related legislation, law enforcement, judicial proceedings, observance of the law, and legal services in an integrated manner, thus establishing synergies between lines of effort."[26]

As far as the judicial sector is concerned, it is essential to cultivate a strong sense of national identity and sovereignty. Fundamentally speaking, the FRLS is mainly a public law system, including procedural laws and laws on the application of law. A public law system is the fundamental embodiment of the will of a nation. We should profoundly understand that civil law, administrative law, and criminal law are three systems and means for a state to regulate social relations. They are distinct yet mutually complementary and cannot be isolated or severed. In foreign-related cases, national sovereignty, security, and development interests take precedence over private interests. The system designed to seek compensation through litigation stipulated in Article 12 of the Anti-Foreign Sanctions Law and Article 9 of the Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures are aimed at enabling the domestic litigation system to resist and counter the infringements inflicted by foreign laws and measures upon China's legitimate rights and interests. It is a countermeasure in addition to and in parallel with administrative measures. The provisions on jurisdiction in the Civil Procedure Law revised in 2023, on the surface, expand case jurisdiction, but in essence, assert and defend state jurisdiction and manifest the efforts made to safeguard national sovereignty, security, and development interests. The Law on Foreign State Immunity clarifies the jurisdiction of Chinese courts over civil cases involving foreign states and their properties, and grants courts the important responsibilities of protecting the legitimate rights and interests of litigants, safeguarding the sovereign equality of states, and promoting friendly exchanges with foreign countries. The above-mentioned laws and regulations, as well as the provisions or amendments regarding foreign-related affairs in other relevant laws, make judiciary an important force and link in the progress in the rule of law in foreign-related affairs and the core of the application of FRLS. The contest over anti-suit injunctions among courts in major economies around the world shows that courts are the first line of defense in safeguarding national interests. The new development of the FRLS not only provides a basis for the courts, but also imposes higher demands on them, requiring Chinese courts to make greater contributions. The ability to interpret laws should be particularly strengthened. Understanding legal principles, clarifying reasoning, and accepting reasoned judgments are important aspects of judicial work. The ability to interpret the law accurately is a fundamental professional skill. This is exactly our previous shortcoming,

[26] See fn. 1.

which needs to be addressed.

As far as law enforcement departments are concerned, in addition to enforcing foreign-related law within domestic territory as before, they need to further strengthen and improve law enforcement outside China's territory in light of new developments in the FRLS. The FRLS provides law enforcement departments with new basis and new requirements for foreign-related law enforcement, but overseas enforcement of law requires cooperation between countries, in which regard, international agreements and international law play an important role. Law enforcement departments should not only master domestic law but also fully understand and ably apply international law, and, through their own practices, promote the development of international law. In this process, they should not only safeguard China's interests but also take into account the interests of other countries, as detailed in the statement that "China adheres to the Five Principles of Peaceful Coexistence in pursuing friendship and cooperation with other countries, and it is committed to promoting a new type of international relations, and broadening the convergence of interests with other countries."[27] Compared with the judiciary, the law enforcement departments operate in a wider scope and under relatively greater influence, thus, they should act more proactively.

For enterprises, it is inevitable to face challenges under the current international landscape, where some Western countries or economies frequently impose sanctions and restrictive measures on Chinese companies, particularly amid China's efforts to strengthen its rule of law in foreign-related affairs. In response to the escalating "decoupling" and "de-risking" measures of some Western countries, without strong countermeasures at the national level, the compliance of enterprises with the laws and measures of other countries would only reinforce the extraterritorial application of the laws of some other countries to Chinese companies. Such compliance cannot fundamentally reverse the bullying and unilateral actions of some countries nor fully safeguard the legitimate rights and interests of enterprises. While enhancing risk aversion awareness is necessary, it is more critical for enterprises to rely on Chinese law and state power to defend their legitimate rights and interests.

Lawyers form the backbone of legal services. When providing legal services, lawyers should demonstrate technical skills, political acumen, as well as professionalism and patriotic commitment. The challenges posed by the changes of a magnitude not seen in a century, the return of the FRLS, and the important task of advancing the rule of law in domestic and foreign-related affairs in a coordinated manner present new opportunities for lawyers to demonstrate their expertise and uphold justice.

[27] See XI, fn. 12.