

How China's Supreme People's Court Supports the Development of Foreign-Related Rule of Law

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Received 3 January 2023 | Accepted 27 October 2023 |
Published online 19 February 2024

Abstract

This article provides a detailed analysis of the evolution of the role of the Supreme People's Court (SPC) in the Xi Jinping era, examining functions little explored in scholarship. It explains how and why the SPC supports national strategies, focusing on the development of “foreign-related rule of law” through multiple “active” functions. It explores that work in the context of strengthened Communist Party leadership of the courts and other legal institutions. The article examines the SPC's functions of “policy-making,” “law-making,” case hearing, and coordinating and cooperating with central Party and state institutions and how they are used to support the development of “foreign-related rule of law.” The discussion of those functions also illustrates the impact of strengthened Communist Party leadership. The Politburo's 2023 collective study session on foreign-related rule of law signals that the SPC's foreign-related judicial expertise as exercised through its multiple functions is crucially important to the Party leadership. The article illustrates one aspect of the unique role of the SPC as China's highest court in its dynamic political-legal system and the way in which it supports evolving national strategies and the implementation of fundamental policies.

Keywords

foreign-related law – foreign-related rule of law – judicial activism – Party leadership – Supreme People's Court

1 Introduction

Since 2013, Xi Jinping and the senior leadership of the Chinese Communist Party (henceforth, the Party) have launched important changes to the country's legal system, some of which involve reforming the courts, increasing their role in national governance, and requiring that they support national strategies and fundamental policies better. Over that period, the Party leadership has extended the scope and depth of its leadership, one aspect of which is strengthening its controls over political-legal institutions. Concurrently, the Party leadership has significantly reshaped China's relations with the rest of the world, symbolized by Xi's statement that China should move toward the "center of the global stage," which includes launching the Belt and Road Initiative (BRI) in 2013 (Xinhua Net 2017).

The result of these three developments is that, under strengthened Party leadership, Chinese legal institutions, including the courts, must better "serve the greater situation" by taking a more prominent role internationally and actively participating in developing a body of foreign-related Chinese law and related domestic law (summarized in the phrase "simultaneously promoting domestic and foreign-related rule of law" [*tongchou tuijin guonei fazhi he shewai fazhi* 统筹推进国内法治和涉外法治]), abbreviated in this article as "foreign-related rule of law."¹ The SPC actively participates in developing foreign-related rule of law through "fully fulfilling its judicial functions" [*chongfen fahui shenpan zhineng* 充分发挥审判职能].² What this means for the operation of the SPC, the role of the SPC in China's political-legal system and the development of Chinese law has not been addressed adequately in scholarship.

Although the SPC generally uses the phrase "fully fulfilling its judicial functions" in its documents without definition, apparently as a watchword [*tifa* 提法], its policy documents related to foreign-related rule of law demonstrate a pattern of usage. In these policy documents, the SPC uses "fully fulfilling its judicial functions" to refer to multiple functions for supporting national strategies and Party and state policies, only some of which involve directly hearing or considering cases, but all of which are linked directly or indirectly to the case-hearing function of the courts. As further discussed below, shortly after taking office, SPC President Zhang Jun revived the watchword "judicial

1 The development of "foreign-related rule of law" is one part of Xi Jinping's legal thought and is highlighted in 2020 Plan on Building the Rule of Law in China (2020–25) (called the 2020 Rule of Law Plan; CCP and State Council 2021). See the discussion in 11.

2 Sometimes, documents or the speeches of leaders add *zuoyong* [作用].

activism” [*nengdong sifa* 能动司法], thus far to refer to courts seeking to resolve issues underlying a dispute, often through coordinating and cooperating with Party and state institutions (Finder 2023a), but it has not been discussed in detail as applied to foreign-related judicial matters.

The article provides a detailed analysis of one aspect of the evolution of the role of the SPC in the Xi Jinping era, examining functions little explored in scholarship. It explains how and why the SPC supports national strategies, focusing on the development of “foreign-related rule of law” through multiple “active” functions. It explores that work in the context of strengthened Party leadership of the courts and other legal institutions. These important issues are not addressed in the literature but are fundamental for understanding the role of the SPC, as it has changed and continues to evolve in the Xi Jinping era.

This article focuses on SPC functions that are the most important in its development of foreign-related rule of law: policy-making, “law-making,” case hearing, and coordinating and cooperating with central Party and state institutions, all of which involve “judicial activism” to a greater or lesser extent. The characterization of the functions is original to this article, with the term “law-making” meant to convey the contribution of the SPC to the creation of hard and soft law and is not intended to mean law-making in the formal sense under Chinese law. The article provides insights into specific aspects of Party leadership of the judiciary and its implications, usually unseen and poorly understood operations and functions of the SPC, and the link between Party policy, the judiciary, and the development of Chinese law.

As part of its vision to create a body of foreign-related law, the Chinese political leadership has placed significant demands on the judiciary. It seeks to make the Chinese judiciary more internationally influential, to give Chinese law a more important place internationally, and to enable the Chinese government, including Chinese judges, to influence the formation of international legal rules. The political leaders also seek to enable the efficient return to China of corrupt officials and others whom they consider a threat to their governance. Additionally, they aim to make mainland China an internationally recognized center for commercial dispute resolution and arbitration and to make Shanghai an Asian-Pacific center for arbitration and an international center for financial dispute resolution (Jia 2022; Tao and Zhong 2019; Wang 2022).

China’s global ambitions (“the rise of China”) have caused the SPC’s foreign-related expertise, as exercised through its multiple functions, to become significantly more important to China’s political leadership and other central-level institutions and therefore makes the role of the SPC more important. An assessment as of early 2023 of the SPC’s foreign-related work shows that the SPC was more focused on policy-making, what this article describes as

“law-making,” and coordinating and cooperating with other central Party and state institutions, rather than making judicial decisions. This was the impact of reforms at the four levels of the Chinese courts launched in 2021, which was intended to reduce the number of civil and administrative retrial cases that the SPC considers (Finder 2021c; 2022c). In mid-2023, the SPC made further changes in that policy, which are expected to increase the number of foreign-related cases that the SPC hears; it is likely that those cases will be considered significant (SPC 2023c).

The analysis in this article draws on relevant press reports, Party, SPC, and other official documents to the extent that they are publicly available, supplemented with correspondence, interviews with judges and other officials, and the author's observations as a participant in some related official events. The people cited in this article on an anonymous basis have reviewed the statements attributed to them.

The article also draws upon a variety of scholarly literature in English and Chinese concerning the SPC, the Party, China's political-legal institutions, Chinese judicial activism, the SPC and the BRI, the Chinese judiciary and globalization, judicial documents, model cases, the BRI and dispute resolution, and judicial diplomacy. The framework used to consider the work of the SPC was mentioned briefly in an article on transnational judicial dialogue (Cai and Wang 2021), but that article focuses on one particular aspect of the way in which the Chinese judiciary enhances (i.e., supports) the BRI and one that is generally considered part of judicial diplomacy in the official media (NJC 2023). This article offers a perspective on the work of the SPC that is somewhat different from that described in papers focused on the SPC (Ip 2011; Zhang 2012; Zhang and Ginsburg 2019) and an article on the nature of the Chinese courts (Clarke 2022). It develops some of the themes discussed briefly in a book on the SPC (Hou 2021).

In discussing the SPC as a political-legal institution, the article draws on but considers aspects different from those set out in writings by Zhu Suli (2010), Wang Juan and Liu Sida (2019), and Li Ling (2023). With respect to China's judicial activism, a term recently revived by SPC President Zhang Jun, this article finds that activism is manifested in more ways than identified by Lo (2008). The article focuses on different issues from those addressed in papers on the BRI and commercial dispute resolution, including those by Matthew Erie (2023a; 2023b), Wang Jiangyu (2020), Gu Weixia (2019; 2020b), and others, and draws on writings by Vivienne Bath (2020). The literature on judicial documents and model (typical) cases is discussed in the relevant sections.

This article contributes to the discussion on the operation, role, and importance of the Chinese judiciary in the development of the Chinese legal

system under Xi Jinping and how China's global ambitions are influencing legal changes within China, drawing on writings, and on the former, presentations by Jiang Huiling (Finder 2022d; 2023c) and Hou Meng (2021, 220–228) and on the latter by Mark Jia (2022).

Section II of this article describes the scope of the SPC's foreign-related judicial work and summarizes the evolving concept of "foreign-related rule of law." Section III highlights several aspects of strengthened Party leadership as expressed in Party regulations because they have a direct or indirect impact on the SPC's foreign-related judicial work. Section IV focuses on the most important functions of the SPC that support the development of China's foreign-related rule of law, first briefly discussing whether those should be considered "judicial activism (or active justice)" with Chinese characteristics. Those functions include policy making and influencing legal and judicial policies; providing guidance to the lower courts; "making" law (as explained above) or quasi-law, through contributing to the drafting of legislation, and issuing judicial interpretations and soft law documents; hearing and issuing cases in various forms; and using its expertise to support the work of other central institutions.

Section V concludes that the SPC's foreign-related expertise, as shown by the Politburo's November, 2023 collective study session on foreign-related rule of law, has become significantly more important to China's political leadership and other central-level Party and state institutions. Its significance to the political leadership is in its work in creating a body of foreign-related law. It can be said to reflect an evolution in the role of the SPC and court system under Xi Jinping.

2 "Foreign-Related Rule of Law" and Foreign-Related Judicial Work

The 2014 CCP Central Committee Decision Concerning Several Major Issues in Comprehensively Advancing Governance According to Law (Advancing Governance According to Law Decision) signaled the importance that the Party leadership had decided to place on Chinese law related to foreign-related matters (CCP Central Committee 2014). This document was drafted by a group that included several senior members of the SPC, which (among other institutions) also submitted a research report. It contained many new legal policies that continue to have a direct and indirect impact on the work of the SPC, including its foreign-related work (Hu 2015). The principles on foreign-related legal work in this document that are most relevant to the SPC include

Strengthening foreign-related legal work. Perfecting foreign-oriented legal and regulatory systems. ... Vigorously participating in the formulation of international norms, ... strengthening our country's discourse power and influence in international legal affairs, using legal methods to safeguard our country's sovereignty, security and development interests. ... Deepening international cooperation in the judicial area, perfecting our country's judicial assistance systems, and expanding the coverage of international judicial assistance. Strengthening international cooperation on anticorruption, expanding the ability to pursue stolen goods and fugitives overseas, as well as for repatriation and extradition. Vigorously participating in international cooperation concerning law enforcement security

CCP central committee 2014.

Each phrase in this section represents principles that underpin the work of relevant institutions, including the SPC. Although foreign-related rule of law has been discussed elsewhere as merely a slogan, the practices of the SPC in drafting judicial reform proposals indicate that the topics listed above would have been addressed in related reports.³ As shown in this article, these policy principles have been and continue to be implemented by the SPC in its foreign-related judicial work, as they have evolved through subsequent Party documents and the issuance of Xi Jinping's diplomatic and legal thought, including principles relating to foreign-related matters. Among those policy sources are Xi Jinping Thought on Diplomacy, Xi Jinping Rule of Law Thought, and the 2020 Rule of Law Plan (Yang 2022; CCP Central Committee Publicity Department and Office of the Central Commission on Comprehensively Ruling the Country by Law 2021, 117–126; CCP and State Council 2021).

Article 25 of the 2020 Rule of Law Plan sets out the latest iteration of foreign-related rule of law principles, including the following:

Strengthen rule of law work involving foreign interests. To meet the high-level needs of opening to the outside world, improve the system of laws and rules related to foreign interests, compensate for shortcomings,

3 E.g., “FROL [foreign-related rule of law] is a *tifa*, a watchword used by the CCP, like “community of common destiny” that orients the population toward certain goals without necessarily providing means. It provides what Sinologist Perry Link calls the “language game” in Chinese official speak: a term that may not reflect reality but must be made sense of within political awareness and, in so doing, creates its own reality.” (Erie 2023a, 795).

and raise the level of effort in dealing with foreign interests under the rule of law.

Actively participate in the formulation of international rules and promote the formation of a fair and reasonable international rule system. Accelerate the advancement of the construction of a legal system applicable outside the jurisdiction of our country ... advance the construction and improvement of international commercial courts. Establish a legal system for foreign-related work. ... Establish and improve a mechanism for ascertaining foreign laws. Promote propagation of the rule of law in foreign countries and tell the story of the rule of law in China well. Strengthen the research and application of international law.

Strengthen multilateral and bilateral dialogue on the rule of law and promote exchanges on the rule of law with foreign countries. Deepen international judicial exchanges and cooperation. Improve my country's judicial assistance system and mechanisms and promote international cooperation in the field of judicial assistance in the field of extradition, repatriation of criminal suspects and transfer of sentenced persons. Actively participate in international cooperation in law enforcement and security. ... Strengthen international cooperation in anticorruption, and increase efforts in overseas pursuit of stolen goods, repatriation, and extradition.

CCP and state council 2021

Some of the policies set out in the 2020 Rule of Law Plan repeat provisions in the 2014 Advancing Governance According to Law Decision, such as participating in formation of international rules, increasing foreign-related judicial services and judicial assistance, and combating various types of criminal behavior internationally, but others are new, such as advancing international commercial courts, telling China's story well, and promoting the creation of a body of Chinese law that can be applied extraterritorially.

Therefore, important political goals for the SPC include developing China's foreign-related legal system based on the principles set out above, creating a body of foreign-related law coordinated with domestic law. The scope of "foreign-related judicial work" [*shewai shenpan gongzuo* 涉外审判工作] is not officially defined, but some of the main provisions can be determined from the matters incorporated into the 2022 Report of the Supreme People's Court on Foreign-Related Judicial Work of the People's Courts [*zuigao renmin fayuan guanyu renmin fayuan shewai shenpan gongzuo qingkuang de baogao* 最高人民法院关于人民法院涉外审判工作情况的报告] (Foreign-Related Judicial

Work Report) delivered to the Standing Committee of the National People's Congress (SPC 2022b). Those matters include:

1. foreign-related crimes
2. protecting China's overseas investment interests
3. foreign direct investment—related disputes
4. free trade zone—related disputes
5. market order with fair competition, a concept incorporating bankruptcy law and financial and securities law
6. private international law concepts, such as applying foreign governing law and the enforcement of foreign judgments
7. maritime law
8. commercial dispute resolution, including judicial review of arbitration, development of international commercial courts, and mediation.

3 Strengthening Party Leadership

During the Xi Jinping era, the Party leadership has focused attention on strengthening its leadership over state institutions, especially the political-legal institutions, in numerous ways that have a direct and indirect impact on the SPC's foreign-related judicial work.⁴ This section highlights several of those developments.

The 2014 Advancing Governance According to Law Decision contains principles on Party leadership that were subsequently further developed in a series of documents. On Party leadership, the principal aspects stressed in this section concern the greater focus on the SPC leadership's fulfillment of political obligations and responsibility to the Party leadership. As developed in subsequent Party regulations, not all of which have been made public, the SPC president (who is also the SPC Party secretary) and other members of the SPC Party Group have political responsibility to the Party leadership. The impact of this political responsibility is further discussed below.

The core principles concerning political responsibility are expressed in the Advancing Governance According to Law Decision. Section VII, "Strengthen and Improve the Party's Leadership of Comprehensively Advancing the Rule of Law," signals principles such as "improving procedures to guarantee that the Party determines the principles, policies, and deployments for ruling

4 The principles in the Advancing Governance According to Law Decision apply to the other political-legal institutions as well, but this article focuses in detail on the link to the foreign-related judicial work of the SPC. For a different focus, see Wang and Liu (2019) and Li (2023).

the country according to law” and the “Party organizations of political-legal institutions must establish systems to report major affairs to the Party committee.”

The SPC president and other leaders have political obligations to the political leadership under current Party regulations as the Party Group members of a political-legal institution. These obligations were made explicit in at least three Party documents: the 2019 Regulation on the Communist Party of China’s Political-Legal Work (Party Political-Legal Work Regulation), 2021 Party regulations on Party leaders, and 2018 (revised 2022) Regulations on strengthening the centralized and unified leadership of the Party Center (CCP Central Committee 2019a; Grasp the Times 2023). Consistent with this is the Five-Year Plan Outline for Central Intra-Party Regulations (2023–27), with calls for regulations that strengthen the unified leadership of the Party Center over the Party Groups of major state institutions, including the SPC (CCP Central Committee 2023). Because the members of the Party Group are mostly members of the leadership group of the SPC, this implies strengthening Party Center leadership of the SPC. These political responsibility requirements also imply that the Party leadership considers the SPC part of the political-legal apparatus, rather than an institution with a special status. For example, under the Party Political-Legal Work Regulation, SPC Party Group members, like those of other central political-legal institutions, need to seek instructions from and report to the Central Political-Legal Committee and Party leadership on a variety of matters, depending on their importance.

In a 2022 lecture, Jiang Huiling, dean of Tongji University Law School and the former deputy head of the SPC’s judicial reform office, offered insights into the impact of strengthened Party leadership on the courts. He noted that, in 2019, the Party began to focus on broader systemic innovation, moving from judicial system reform to areas previously little discussed, such as Party leadership and the role of the Political-Legal Committee, and the relationship between the Party and the law. He commented that the goal for the judicial system is to become part of a modern governance system and governance capability. He noted that the bigger goal is to involve the court system more in the development of the country as a whole, which he saw as reflecting a change in China’s overall policy. As he saw it, in the current arrangement of the political-legal reforms and in the reconstruction of the legal system, Chinese characteristics have a great deal of weight, but he did not elaborate on what they are. He highlighted the Party leadership view that although China has learned a great deal from other countries, China has to go its own way, because it has its own history, political conditions, and historical stage. The

international conditions have also changed (Finder 2022d). The meaning of this for the evolution of the function and role of the SPC is explored below.

SPC President Zhang Jun has addressed how judges, including those on the SPC should understand their political, legal, and social responsibilities in a series of speeches and essays since he has taken office. In an article in *Study Times*, republished in *Qiushi* for example, he said:

The law is principled and abstract, but practice is concrete, vivid. Judges must fully use their discretionary power according to law ... within the discretionary space of legal provisions, determine the way of handling [a case] that provides a better political effect and the social effect

ZHANG 2023.

This means that political considerations are incorporated into a judge's legal assessment.

The language used by SPC leaders in 2015, linked to the issuance of the first SPC policy document supporting the BRI, conveys a clear recognition by SPC leaders that the Party leadership determined major judicial policies and deployments. In July 2015, Judge Luo Dongchuan [罗东川], the then-head of the SPC's No. 4 Civil Division, responsible for foreign-related matters, announced the release of *Several Opinions of the Supreme People's Court on Providing Judicial Services and Safeguards for the Construction of the "Belt and Road" by People's Courts (BRI Services & Safeguards Opinion No. 1)* (SPC 2015b):

In accordance with the *requirements of the Party Center* on the establishment of a new system of the open economy and maritime strategy, the People's Courts have assumed the important function of providing judicial services and safeguards for the construction of "One Belt, One Road," and are an important and indispensable force for the rule of law in the construction of "One Belt, One Road."⁵

5 Emphasis added. Beginning as early as the spring of 2015, senior SPC leaders described the BRI as major strategic deployment of the Party Center, for which the SPC needed to provide services and safeguards. It can be assumed that this language was the product of an SPC Party Group meeting. For example, the then—SPC President (and SPC Party Group Secretary) Zhou Qiang repeated what must have been standard language at a June 2015 SPC Party Group meeting on the role of the courts in supporting the Belt and Road: "it is necessary to deeply understand the important responsibilities that the people's courts shoulder in the construction of the Belt and Road, consciously undertake the mission of the times, give full play to the role of judicial functions, and actively serve and integrate into the process of the Belt and Road construction" (Ding 2015).

Similarly, at press conferences held to announce the release of policy documents in support of major national strategies or initiatives, including subsequent policy documents supporting the BRI and other foreign-related developments, the senior SPC leader appearing usually proclaims some variation of “Wherever the Party Center’s policy decisions are deployed, that is where judicial services will be” [*dangzhongyang de juece bushu dao nali, sifa fuwu jiu genjin dao nali* 党中央的决策部署到哪里，司法服务就跟进到哪里].⁶

Providing appropriate judicial support for national strategies is an important way in which SPC as a political-legal institution and the SPC Party Group members, particularly the president (and Party secretary), which bears special responsibility, fulfill their political obligation to the Party leadership. According to the Regulation of the Communist Party of China’s Political-Legal Work, fulfilling their political obligations means fully implementing the political leadership’s policy decisions and arrangements, full involvement of the SPC leadership members in the decision-making, and reporting to Party leadership about their implementation.

Under the Party’s Political-Legal Work Regulation, the SPC’s Party Group is obligated to report regularly to the Party leadership on their work and the work of the SPC. The Political-Legal Regulations use terms such as “seek instructions” [*qingshi* 请示], “report to” [*baogao* 报告], and “report to a superior on their work” [*shuzhi* 述职]. All these phrases imply a hierarchical relationship between the SPC and the Central Political-Legal Committee and the Party Center. The fact that the SPC reports to the Party leadership can be seen in public reports on the leadership of the political-legal institutions meeting with Xi Jinping and other senior leaders before the annual sessions of the National People’s Congress and Chinese People’s Political Consultative Congress, although the materials actually submitted to the Party leadership are not publicly accessible (Article 19(5), Political-Legal Work Regulation; Xinhua 2019b). The mention of the work of the SPC in providing support (using the phrase “services and safeguards”) for national major strategies and initiatives in the SPC’s annual report to the National People’s Congress (NPC) indicates that the Party leadership considers these accomplishments of the SPC.

Another aspect of evolving Party policy is involving the courts in national governance, as mentioned more specifically in the 2019 fourth plenum of the nineteenth Party congress and further developed in the SPC’s 2020 “Opinions on Implementing the Spirit of the Fourth Plenary Session of the Nineteenth Party Central Committee to Advance the Modernization of the Judicial System

6 See, e.g., the press conference announcing the Open Economy Guiding Opinion (SPC 2020a) and, similarly, a 2022 statement by President Zhou Qiang (Sun 2022).

and Judicial Capability” (Implementing the Fourth Plenum of Nineteenth Party Congress Opinion) and later policy documents. That 2020 SPC policy document stated that “modernization of the judicial system and judicial capacity is an important part of the modernization of the national governance system and governance capability” and is needed, among other things, to provide judicial services and safeguards for social and economic development” (CCP 2019b; SPC 2020h). The following sections show that the SPC plays a unique role in promoting the national strategy of developing foreign-related rule of law.

Another, less prominent component of the Advancing Governance According to Law Decision, is improving mechanisms for consultation. Part of the process of drafting Party and state legal policy decisions is “listening to opinions broadly” [*guangfan tingqu yijian* 广泛听取意见], particularly of affected institutions. The regulatory basis for “listening to opinions broadly” is the 2012 Handling of Official Documents by Party and Government Organs (Official Documents Regulations) (CCP and SC General Offices 2012). The Official Documents Regulations require drafting institutions to solicit opinions from relevant regions or departments and strive to reach a consensus (Article 19(6)). For example, the Ministry of Justice, the China Council for the Promotion of International Trade, the Ministry of Commerce, and the SPC are known to be among the institutions that offered multiple rounds of input into the drafting of the December 2018 Some Opinions on Perfecting the Arbitration System to Raise the Public Credibility of Arbitration (2018 Perfecting Arbitration Opinion) issued by the General Office of the Party Central Committee and State Council (CCP Central Committee and SC General Offices 2018).

Similarly, judging from the language concerning the work plan to implement the January 2018 BRI Dispute Resolution Mechanisms and Institutions Opinion (whose full text has never been made public), its drafting must have also involved input from the SPC, NPC Supervisory and Judicial Affairs Committee, NPC Standing Committee Legislative Affairs Commission, Ministry of Foreign Affairs, Ministry of Justice, Ministry of Commerce, and the China Council for the Promotion of International Trade (Xinhua News 2018). Based on policy drafting related to judicial reform, it seems likely that Central Political-Legal Committee staff would have reviewed these draft documents and accompanying reports and provided further input before they went to the political leadership.

Based on the drafting procedures, this means that the SPC would have had some input into the specific measures incorporated into these foreign-related legal policy documents, but it does not mean that the SPC set the political goals, such as making China a preferred location for the resolution of international commercial disputes (Tang 2021). Provisions in the BRI Dispute Resolution

Mechanisms and Institutions Opinion, such as “research and make reference to the useful practices of existing international dispute resolution mechanisms” [*yanjiu jiejian xianxing guoji zhengduan jie jue jizhi youyi zuofa* 研究借鉴现行国际争端解决机制有益做法], seem to reflect the SPC’s contribution to the draft (Xinhua News 2018). This interactive drafting of Party documents indicates that those involved in the process at the SPC (and elsewhere) have a sense of the political realities related to the implementation of related policies and measures by their own institution, which is considered a high level of political awareness [*zhengzhi juewu* 政治觉悟]. As further discussed below, the content of measures related to foreign-related judicial work is affected by political considerations.

The SPC has a wide range of functions, as explained below, to actively fulfill its role as the highest court in the country’s political-legal system to support evolving national strategies and the implementation of fundamental policies. This analysis focuses on what seem to be the most important functions and how and why they are used to promote foreign-related rule of law. The term “active” is used here deliberately because some of the SPC’s functions involve proactive engagement, including with other institutions.

4 How the SPC Actively Fulfills Its Judicial Functions in Support of Developing Foreign-Related Rule of Law

4.1 Overview

Among the most important functions that the SPC actively performs in support of developing foreign-related rule of law are making and influencing legal and judicial policies; providing guidance to lower courts; “making” law or quasi-law, through contributing to the drafting of legislation, and issuing judicial interpretations and soft law documents; hearing and issuing cases in various forms; and using its expertise to support the work of other central institutions and vice versa. As mentioned earlier, the SPC uses the phrase “fully fulfilling its judicial functions” without defining it. A review of multiple related SPC policy documents reveals that the phrase is used to refer to multiple functions that support national strategies and Party and state policies, only some of which involve directly hearing or considering cases but all of which are linked directly or indirectly to the case-hearing function of the courts. The functions other than hearing cases, which the SPC has always performed, are linked in some way to hearing cases and are considered more important than the case-hearing functions, something that distinguishes the SPC from supreme courts in many other countries. Hou Meng, a leading Chinese scholar focused on the

SPC, commented that the SPC's impact primarily comes from issuing judicial interpretations and judicial policy documents, and most of its decisions address specific cases, though few create new legal rules (Hou 2021, 220)—that is, implying that its decisions are less important than these documents. The functions discussed below are not new SPC functions, but several of them are rarely discussed in the English-language literature and therefore merit greater attention.

The classification of the functions used here is not fixed, and many SPC functions can be assigned to multiple categories. For example, the SPC issues typical [*dianxing anli* 典型案例, also translated as “exemplary” or “model”] cases, which can be considered part of the SPC's case-hearing function, but they are intended as guidance for lower courts (SPC 2020c).

In 2023, the SPC and other Chinese political-legal institutions promoted use of the term “active justice” [*nengdong sifa* 能动司法], although authoritative Chinese commentators appear to lack a common understanding of it (CIAJ 2023). SPC media often describe courts' addressing of problems by working out solutions with Party and government institutions as a form of active justice (Finder 2023b).

Official documents and the scholarly literature do not clearly explain the SPC's choice of functions to support national strategies or major policies, but the following rationale seems plausible.

National major strategies or initiatives, such as the BRI and the development of foreign-related rule of law, have multiple legal aspects and impacts. These major strategies and initiatives change relatively rapidly, but Chinese law and existing judicial interpretations lag considerably behind, creating some difficulty for Chinese judges, who need to decide cases “correctly,” in a way that combines the legal, social, and political effects (Finder 2021b). Therefore, the SPC first considers the impact on related existing law, judicial interpretations, and judicial policy documents of the major new or updated strategy or initiative. If the impact is broad ranging and significant enough, SPC leaders might take the view that it is appropriate to issue a policy document (about which more is said below), to clarify related new policies and provide various types of guidance and information. Typical cases are a useful supplement to policy documents or judicial interpretations because they specifically illustrate the political and substantive points that the SPC intends to convey. A single document presents a package of matters concisely and comprehensively. SPC case decisions also address specific points but are not sufficiently comprehensive. For these reasons, the SPC often first provides support through policy documents.

Judicial interpretations and guiding cases are intended to provide legal rules for a significant period, so they can be issued only when policy and practice

are settled, and whether a judicial interpretation is appropriate also depends on the text of the relevant legislation. Highly persuasive documents, such as conference summaries [*huiyi jiyao* 会议纪要, also translated as meeting minutes] are intermediate documents, issued after courts confront new issues that arise from a policy document or new situation, when the approaches of lower courts need to be harmonized, but it is not yet appropriate to issue a judicial interpretation (Finder 2022a). Legislation usually lags even farther behind, but that is not a fixed rule.

As explained below, the legal basis is more attenuated for some of these functions than others. Different parts of the SPC use different combinations of these functions, and it is likely that SPC leaders' preference may influence the choice of some of these functions, as the SPC's work planning process (as described below) requires leadership approval. The long experience of Zhou Qiang, President of the SPC from 2013–2023, in Party and state institutions may have influenced the institutional preference during his tenure for issuing comprehensive policy documents.

Because judicial policy documents have often been issued to support the BRI and other aspects of what is considered foreign-related rule of law (for the reasons discussed above), a detailed discussion of judicial policy documents is worthwhile.⁷

4.2 *Judicial Policy*

Scholars and practitioners, inside and outside China, have both long recognized that part of the SPC's role is to create, amend, and implement judicial policy in response to or in anticipation of the impact of changes in Party and state policy or other social, economic, or legal changes (Hou 2021, 220–21; Huang 2013, 27; Zhang 2012). One of the principal ways in which the SPC publicizes new or amended judicial policy is by issuing judicial policy documents. That is particularly true with respect to foreign-related judicial work, in which abrupt changes in policy have revealed the many gaps in Chinese legislation.

For example, as highlighted in the 2022 Foreign-Related Judicial Work Report, the SPC has issued nine policy documents in support of the BRI and related policies. These are often issued after the political leadership distributed a new major document to convey a major new policy (Finder 2023a; SPC 2022a). Beginning with the 2015 BRI Services and Safeguards Opinion No. 1, mentioned earlier, which was linked to the March 2015 Action Plan on the Belt and Road

⁷ The discussion in the following section differs from the most recent English-language scholarship by Shucheng Wang (2022) and Xuanming Pan (2020) but is closer to the discussion in some of the Chinese legal literature and SPC publications.

Initiative (State Council 2015), the SPC issued policy documents, often in the form of judicial opinions [*yijian* 意见] or guiding opinions [*zhidao yijian* 指导意见]. Many of them have a title including the phrase “judicial services and safeguards” [*sifa fuwu yu baozhang* 司法服务与保障] (Judicial Services and Safeguards Opinions).⁸ These policy documents have various titles in SPC media: “judicial documents” [*sifa wenjian* 司法文件] or “judicial normative documents” [*sifa guifanxing wenjian* 司法规范性文件] or, sometimes, “judicial policy documents” or “judicial regulatory documents” [*sifa zhengcexing wenjian* 司法政策性文件]. This article uses the term “judicial policy documents.”

Although neither the official nor the academic literature addresses why the SPC issues Judicial Services and Safeguards Opinions (or other judicial policy documents), observations of the work of the SPC and correspondence with current and former SPC judges suggest the following rationale.

The first is to guide and inform the lower courts about new or readjusted judicial policy and to inform related central Party and state institutions about these developments. These judicial policy documents are generally distributed (or copied [*chaosong* 抄送]) to relevant institutions for information because they also incorporate provisions that signal to those institutions that the SPC is committed to offering its expertise to that institution and may have set policy on a specific issue that may be relevant to one or more institutions. The relevant institutions for the policy documents discussed in this article include the Ministry of Foreign Affairs and the Ministry of Commerce, but the specific institutions depend on the issue.

The second reason is to signal to the Party leadership and Party institutions that supervise the SPC that the SPC is implementing the leadership's policies and preferences. However, these documents convey more than an expression of loyalty to the Party leadership cf (Wang 2020, 13). Judicial policy in recent years focuses on the harmonization of trial standards, and, at the same time, Party and state policies that affect cross-border commercial and other matters are highly dynamic. Judges in leadership roles, such as presidents, vice presidents, and division heads, bear responsibility for guiding and supervising judges under their authority in all areas of related law heard by their courts (Papagiannenas 2023, 7). It is crucial for the SPC to ensure that all related entities within that court and the lower courts implement related policies consistently and for lower-court leaders to lead appropriately. A single judicial

8 A partial list is posted on the Chinese version of the China International Commercial Court's website: <https://cicc.court.gov.cn/html/1/218/62/409/list2.html> archived at <https://perma.cc/ZD5Z-8JEP>.

policy document that encompasses the essential points that both judges with supervisory roles and ordinary judges need to know is a practical and efficient method for achieving this.

Therefore, judicial policy documents serve as “packages” of judicial measures in two principal ways. Measures across all relevant areas of law in which the SPC is involved are consolidated, in what the SPC describes as “coordinating the precise efforts in all areas of the judiciary” [*tongchou sifa gelingyu jingzhun falì* 统筹司法各领域精准发力] (SPC 2022a; Finder 2022b). It also means that the Party, administrative matters, and for foreign-related adjudication, diplomatic matters are incorporated, as well as matters more closely linked to the hearing or consideration of cases.

The little-understood process of drafting policy documents helps to ensure proper coordination and incorporation of all relevant provisions. Although transparency concerning the planning of opinion (and judicial interpretation) drafting is limited, it is understood that the plans made public in recent years are typical of SPC procedures.⁹ Among the priorities in the SPC’s annual work plan for 2020 is “serving and safeguarding high-level opening to the outside world” (SPC 2020d, article 13).

The annual work plan has a counterpart in the judicial reform work plan, which includes the drafting of judicial interpretations and opinions, as well as other work. One of the priorities in the 2020 judicial reform work plan is drafting a guiding opinion on greater opening to the outside world. Section 2, SPC 2020e). Linked to the judicial reform work plan is a separate document in which the SPC leadership allocates responsibility for drafting or preparation. The 2020 judicial reform work allocation document designated the SPC’s No. 4 Civil Division, focused on cross-border civil and commercial matters, to be primarily responsible for drafting. The following SPC offices and divisions had secondary responsibility for working on an opinion on greater opening to the outside world: the No. 3 Civil Division, focused on intellectual property law; the Research Office, with research and legal policy functions; the International Cooperation Bureau, which is responsible for international activities of the Chinese courts, participates in judicial cooperation negotiations, and implements judicial assistance obligations; and the Intellectual Property Court (SPC 2020g).

The description of customary practices in drafting policy documents below draws on the guidance that governs their drafting—the 2012 SPC Measures for the Handling of People’s Court Documents (SPC Document Handling Measures) (SPC 2012). It is supplemented by the insights of those who have

9 WeChat correspondence between a former SPC judge and the author.

personal experience with the process through discussions or correspondence with the author.

For example, regarding the 2020 Guiding Opinions of the Supreme People's Court on the Services and Guarantees of the People's Courts for Further Expanding Opening up (Open Economy Guiding Opinion) (SPC 2020b), the leaders of the divisions or offices designated in the work allocation document in turn designate certain judges to take primary responsibility for drafting. In a drafting process similar to that for judicial interpretations, the usual practice is for the members of the drafting team to identify relevant issues, including important policy statements by Party leaders and conduct desk research.¹⁰ The latter could involve the review of relevant legislation, prior cases, judicial interpretations, and other documents, including prior policy documents. Relevant international legal materials would also be reviewed. This is the "starting from reality and deep investigation and research" required by the 2012 SPC Document Handling Measures.

The drafters may also require lower courts to report related cases, practices, or pilot projects, such as practical measures piloted by local courts. Sometimes, members of the drafting team visit the relevant local courts to hold workshops or meetings to obtain a better understanding of the issues and solutions needed. One example of the "practicable policy measures and methods" incorporated into policy documents is visible in the 2015 BRI Services and Safeguards Opinion No. 1. That policy document contains a provision highlighting that it had begun researching and piloting of measures to require lower courts to have specialized judges handle judicial review of arbitration cases (a practice referred to as "centralization"). This resulted in a 2017 SPC notice (SPC 2017). This provision reflects work that the SPC had done with the Guangdong Higher People's Court and the Shenzhen Court of International Arbitration on a pilot project several years earlier to explore whether a mechanism similar to that in the 2017 notice would be effective (Xu et al. 2013).

Because policy documents such as Services and Safeguards Opinions are intended to be consolidated documents, the drafters also involve offices and divisions specializing in matters outside their own expertise.¹¹ This practice has its roots in the 2012 Document Handling Measures, which require consultation with related departments. For the 2020 Open Economy Guiding Opinion, for

10 Designating one or more persons to be responsible for a matter can be seen in the recently issued Provisions on Requests for Instructions (SPC 2023c).

11 That means the various divisions, offices, and related institutions, e.g., the China Institute for Applied Jurisprudence and the National Judges College.

example, the Research Office, which has its own criminal law section, may have consulted with one of the five Criminal Divisions on the criminal law issues.

“Widely listening to opinions”¹² can occur at various stages of drafting, such as early in drafting, to enable drafters to understand the range of issues that may need to be covered in “services and safeguards opinions.” For example, in April 2015, when drafting the BRI Services and Safeguards Opinion No. 1, the SPC organized a closed-door meeting attended by senior representatives (stakeholders) from many related Party and state institutions, and some academics, as well as related SPC departments (Ding 2015). It is likely that the information from those stakeholders was incorporated into the content. For example, the SPC would have acquired an understanding of typical loan structures in BRI projects from the representative of the China Development Bank, the Ministry of Foreign Affairs may have discussed treaty and mutual legal assistance issues, and the Ministry of Commerce has been able to provide input on the types of projects and related legal issues that have arisen so far.

Later, after the SPC assembles a relatively mature draft of a policy document, such as a Services and Safeguards Opinion, the usual practice is to send the draft to several prominent academics for comment.¹³ The Document Handling Measures considers this “sufficient debate.” Those measures do not mention releasing a document for public comment. Soliciting public comment on a draft judicial interpretation requires high-level internal approval within the SPC. However, the drafting process is also understood to involve seeking views from the National People’s Congress Legislative Affairs Commission, so that the provisions in the draft are consistent with the law and related legal policy.

To seek approval, drafters prepare a briefing paper [explanation or report; *shuoming* 说明] that accompanies the draft opinion.¹⁴ The briefing paper explains each provision to enable the members of the SPC leadership who

12 Listening broadly to opinions is required in the drafting all types of SPC documents; see Article 20 (SPC 2012). In addition to relevant SPC departments and scholars, senior personnel from the following institutions participated: Liaison Department of the CPC Central Committee, the State-Owned Assets Supervision and Administration Commission, the Ministry of Foreign Affairs, the Ministry of Communications, the National Development and Reform Commission, the Ministry of Commerce, the National Energy Administration, the China Development Bank, the China Council for the Promotion of International Trade, etc. (Ding 2015).

13 Correspondence with the author.

14 The Measures for the Handling of People’s Court’s Documents also mention an explanation as an attachment to a court document. Similarly, an explanation [*shuoming* 说明] accompanies a draft judicial interpretation. See Article 19 (SPC 2021a). This is also true of other Party and state policy documents; see Article 9(15), Official Documents Regulations.

approve the judicial policy document to understand the implications of each provision from a policy (political) and legal viewpoint. The usual practice is for the draft policy document and the related briefing paper to be discussed by the division responsible before it is submitted further, level by level, to the SPC leadership.¹⁵ The review of the document and briefing paper are understood to include whether the document is sufficiently comprehensive, covering all necessary related points, and whether new initiatives are appropriate, both substantively and politically. SPC press releases since the nineteenth Party congress note more often that a policy document is approved by the SPC Party Group,¹⁶ although membership in the SPC judicial (adjudication) committee [*shenpan weiyuanhui* 审判委员会] and Party Group is nearly identical.¹⁷ The head of the division or divisions involved and at least some of the drafters attend the meetings at which the SPC leaders discuss and possibly approve a draft policy document. After the SPC leadership approves the document, and it is released to the public, the SPC may hold a press conference, at which the responsible vice president and head or heads of the relevant divisions usually appear. Sometimes, representatives from some of the relevant state institutions appear as a cross-institutional show of support for the relevant policy, such as China's policies of opening to the outside world.¹⁸ The issuance of these documents is among the accomplishments expected to be reported to the Party leadership, as they are mentioned annually in the SPC's reports to the NPC. As mentioned above, the final document is distributed to related institutions.

15 The description of the process for issuing responses for requests for instructions on legal issues contains a similar procedure, as explained in Finder (2023d).

16 See, for example, the press release accompanying the release of two foreign-related judicial policy documents and one judicial interpretation in December, 2019, noting that the policy documents had been approved by the SPC's Party Group (SPC 2019).

17 The differences between the two are that the head of the Political Department (in charge of personnel matters) and the head of the Discipline Inspection and Supervision Office of the CCDI (Commission on Discipline Inspection) and the NCS (National Commission on Supervision) at the Supreme People's Court are members of the Party Group but not the judicial committee, while Liu Guixiang, a full-time member of the judicial committee, is not a member of the Party group.

18 For more, see Finder (2020). Some of those involved in the drafting of a Services and Safeguards Opinion sometimes publish a more detailed article on the "understanding and application" [*lijie yu shiyong* 理解与适用] of the Opinion, providing further details on the meaning of the clauses, policy background, and drafting history. This type of article can appear on the SPC official website, but more often in the SPC journal *Renmin sifa* 人民司法 [*People's Justice*] or the National Judges College's academic journal *Falv Shiyong* 法律适用 [*Application of Law*].

4.2.1 Policy-Making and “-Taking”

SPC judicial policy documents, such as the Services and Safeguards Opinions, contain a combination of policy flagging, and guidance as well as other provisions. They require the reader to be familiar with related policy, previous policy documents, court practices, and court jargon to recognize the intended purposes of each article. To understand whether a new policy is being signaled, the careful reader needs to be aware of the more general policy related to each discrete area of law.

For example, the gap between the goal of making China a preferred destination for the resolution of international commercial and investment disputes and the goal of filling gaps in Chinese legislation (as admitted by senior SPC judges) means that one concern of the SPC is in drafting documents that create new judicial policy on cross-border commercial substantive and dispute resolution matters to improve Chinese legislation and dispute resolution institutions. The documents reiterate basic principles, such as national sovereignty and national development rights (Su 2017). This gap-filling process might leap ahead of much-needed legislative reforms. In a 2023 article, for example, SPC Vice President Tao Kaiyuan concluded that much remains to be done in making China a preferred destination for resolution of international commercial disputes and noted that China lags behind the rest of the world in ratifying certain important private international law conventions (Wei 2023). One example of a new policy for which the SPC has taken the policy initiative is the enforcement of foreign judgments in the absence of a treaty, convention, or reciprocal practice. The policy has evolved through several Services and Safeguards Opinions and SPC model cases, with more specific rules eventually “quasi-codified” in a conference summary (meeting minutes) or sometimes law. This is a typical pattern of judicial policy development found in the policy provisions in the foreign-related and other Services and Safeguards Opinions.

In BRI Services and Safeguards Opinion No. 1, the SPC signaled a change in its approach to enforcing foreign judgments in the absence of a treaty or convention, which had been highly protective of its sovereignty. For many years, it was possible to enforce a foreign judgment in China in the absence of a treaty or convention only if there was *de facto* reciprocity in enforcement (which had been interpreted to mean that a party seeking to enforce a foreign court judgment in China must show that a foreign court in the relevant jurisdiction had recognized and enforced an equivalent Chinese judgment).¹⁹ BRI Services

19 There is a relatively large literature on this topic, including Erie (2023a, 785–787), Huang (2019), Gu (2020c), Du and Meng (2020).

and Safeguards Opinion No. 1 incorporated language to the effect that, if an agreement on judicial assistance had not yet been reached between China and certain Belt and Road countries, under certain circumstances, Chinese courts could provide judicial assistance to parties from relevant countries to facilitate the creation of reciprocity. Behind this provision must have been a conclusion of the No. 4 Civil Division, approved by the SPC leadership, that the time was right to explore a policy change, after reviewing the briefing paper prepared by the drafters and likely listening to an in-person explanation. Two subsequent Services and Safeguards Opinions reiterated and revised the statement, with Article 15 of the 2020 Open Economy Guiding Opinion announcing that “an inclusive judicial attitude shall be taken to recognize a reciprocal relationship, to make progress in the mutual recognition and enforcement of judgments on civil and commercial affairs among countries”(SPC 2020b). Additionally, in 2018, the SPC concluded a Guiding Memorandum with the Singapore Supreme Court concerning the mutual enforcement of money judgments with related guidance.²⁰ In 2021, the SPC issued more specific legal rules on the enforcement of foreign judgments, in a quasi-binding form (SPC 2021f). The 2021 Conference Summary of the National Symposium on the Foreign-related Commercial and Maritime Trial Work of the Courts include a section setting out specific standards on the enforcement of foreign judgments, requiring the approval of the SPC before a local court can issue its ruling to enforce the judgment. The SPC issued typical cases in 2017 and 2022 to further illustrate current judicial policy concerning the enforcement of foreign judgments in the absence of a convention or treaty relationship and guide the lower courts (SPC 2017b; SPC 2022d). Thus far, a few courts have enforced foreign judgments (Zhang 2022). The slow codification and the requirement of SPC approval are likely tied to SPC concern that local courts should rule in order to enforce foreign judgments correctly.

Among the other areas in which the SPC has led changes in legal and judicial policy in the area of foreign-related law is the judicial review of arbitration and demand (independent) guarantees, areas in which the SPC seeks to make Chinese legal rules consistent with international practice.

20 In a 2018 guiding memorandum on the recognition and enforcement of money judgments in commercial cases, the SPC explained that a Singaporean judgment can be recognized and enforced by the Chinese courts, in which the Singapore Supreme Court sets out how a Chinese judgment can be recognized and enforced by the Singapore courts. It does not set out new provisions but restates current law and practice, judicial decisions, judicial interpretations, and court orders (SPC 2018).

4.2.2 Judicial Policy-Taking and Flagging

SPC judicial policy documents, such as the Services and Safeguards Opinions, contain provisions that illustrate the SPC's "policy-taking" and "policy flagging" roles. Some provisions merely repeat or reemphasize existing judicial policy or provisions in law, judicial interpretations, and legal policy documents. As confirmed by several current and former judges, one of whom served on the SPC, they are incorporated to emphasize the importance of these rules or policies in implementing the related policy to the lower courts. One example of this, but not the sole example in the foreign-related Services and Safeguards Opinions, consists of provisions related to criminal law and policy.

The criminal law policies emphasized in the principal foreign-related Services and Safeguards Opinions changed with each succeeding document. BRI Services and Safeguards Opinion No. 1 mentions improving criminal trials and judicial cooperation with BRI countries in criminal law, before focusing on a list of crimes that were of concern. The crimes listed that needed a "severe crackdown" were committed by violent and terrorist forces, separatist forces, and religious extremist forces, and certain cross-border crimes—such as piracy, drug trafficking, smuggling, money laundering, telecommunication fraud, cybercrime, and human trafficking—were to be "severely punished." A 2019 policy document, titled the Opinions of the Supreme People's Court on Further Providing Judicial Services and Guarantees by the People's Courts for the Belt and Road Initiative (BRI Services & Safeguards Opinion No. 2), repeated the reference to antiterrorism and added anticorruption, with a link to a document concerning a clean (noncorrupt) BRI produced at the second BRI Forum (SPC 2019; Beijing Initiative, 2019). By 2020, the Open Economy Guiding Opinion flagged "national security and economic and social order" as the primary concern, listing crimes, such as espionage and subversion, as high priority and mentioning cybersecurity-related issues several times, repeating the reference to antiterrorism. The 2022 Unified Market Opinion mentions a crackdown on smuggling, money laundering, internet fraud, cross-border corruption, and other cross-border crimes (SPC 2022a; Finder 2022b).

The changes in criminal law policies in these Services and Safeguards Opinions signal and parallel an evolution in policy by the relevant Party institutions. The criminal law priorities in these Services and Safeguards Opinions are guided by policies of the Central Political-Legal Commission, the Party organization for coordinating legal policy, as well as the relevant specialized Party policy groups. For example, the highest-level policy related to terrorism is directed by the Leading Small Group on National Security and, more concretely, the Central Political-Legal Commission Leading Small Group

on Terrorism. Anticorruption policy is directed by the Central Anticorruption Coordination Group. The Central Cyberspace Affairs Commission directs cybercrime policy.²¹ Cross-border anticorruption efforts are coordinated by the Central Anticorruption Coordination Leading Small Group [Zhongyang fan fubai xietiao xiaozu guoji zhuitao zhuizang gongzuo bangongshi 中央反腐败协调小组国际追逃追赃工作办公室], established in 2015, of which the SPC is a member (Xinhua News 2023b). Although the SPC may not take the policy lead in a particular matter, the institution is often an important part of the implementation of the cross-border criminal justice policy, such as extradition (Wang and Zhuang 2022), and the recovery and forfeiture of the proceeds of corruption (Finder 2017a). It makes its professional competence known through its cooperation with other institutions in these procedures. In a 2022 article, two SPC judges involved in cross-border anticorruption matters stated that most cases in which suspects have returned to China have been as a result of persuasion, with few successful examples of extradition, and that official promises made to suspects persuaded to return to China lack a legally binding basis (Wang and Zhuang 2022, 118).

A third category of policy matters can be described as “flagging,” that is, requesting that the lower courts monitor a certain issue, for possible further policy development. These are the ones that courts should “pay attention to” or “pay close attention to,” such as the language in BRI Opinion No. 1 requiring lower courts to “pay close attention to the construction of such maritime strategic channels as major ports and shipping hubs, properly try maritime cases concerning port construction.” Among the many issues that have been repeatedly flagged are parallel proceedings, which are now incorporated into the amendments of the Civil Procedure Law. The language in the foreign-related Services and Safeguards Opinions provides that parallel proceedings, which are proceedings concerning the same issues heard in China and abroad, should be “properly” resolved, while stressing the need to “uphold Chinese judicial sovereignty.” This shows that the national policies favor having Chinese courts take jurisdiction over parallel proceedings, and comity principles play a lesser role.²²

21 “The responsibility of the Central Cyber Security and Informatization Committee is to ‘be responsible for the top-level design, overall layout, overall coordination, overall promotion, and supervision of implementation of major work in related fields.’ (CCP Central Committee 2018b).

22 Article I(5) of BRI Services and Safeguards Opinion No. 1 states: “The people’s courts shall exercise jurisdiction according to the law and provide Chinese and foreign market players with timely and effective judicial remedies. They shall fully respect the right of

4.3 *Guiding the Lower Courts*

The policy documents discussed above contain guidance to the lower courts. The authority to do so is found in Article 10 of the Organic Law of the People's Courts and related documents (NPC Standing Committee 2018; SPC 2010).²³ Rather than passively waiting for issues to come before it in an appeal case, the SPC proactively provides guidance to the lower courts in its policy documents and related model and guiding cases. The guidance is both political and substantive, as Party leadership principles since the nineteenth Party congress stress the political nature of state institutions and judges, among other state cadres. However, the analysis here focuses on substantive guidance.

According to SPC practice, the guidance is cumulative. Guidance set out in an earlier Services and Safeguards Opinion, such as the BRI Services and Safeguards Opinion No. 1, remains valid to the extent that it is not amended, contradicted, supplemented, or superseded by later legislation, judicial interpretations, opinions, or other policy documents.

A significant proportion of the foreign-related Services and Safeguards Opinions is in the form of guidance to the lower courts, related to both law and policy. It relates to all areas of law: criminal, civil, administrative, and procedural. The guidance provisions mostly repeat current law and policy, with the goal of emphasizing the law or policy to the lower courts. Some provisions are repeated in several BRI Services and Safeguards Opinions. For example:

[They shall] adhere to legally prescribed punishments for specified crimes, strictly follow the case-handling procedures, grasp the dimension of criminal policies and the boundary between crimes and non-crimes. ...

They shall accurately comprehend and grasp the relevant provisions and policies on the “pre-access national treatment” and “negative list” related to the construction of free trade zones, properly handle the relationship between party autonomy and administrative approval ... strictly restrict

Chinese and foreign market players engaging in the construction of the ‘Belt and Road’ to select jurisdiction by agreement and by amicable negotiation with countries along the ‘Belt and Road’ and thoroughly carrying out judicial cooperation, reduce international conflicts in foreign-related jurisdiction, and properly resolve issues of international parallel proceedings. They shall observe international treaties and practices, determine connecting factors of cases involving countries along the ‘Belt and Road’ in a scientific and reasonable manner, and exercise jurisdiction according to the law. They shall not only maintain China’s jurisdiction, but respect jurisdiction of countries along the ‘Belt and Road,’ so as to fully safeguard the litigation rights of Chinese and foreign market players engaging in the construction of the ‘Belt and Road.’”

23 Article 1 of SPC 2010 states that the SPC supervises and guides [*jiandu zhidao* 监督指导] the lower courts.

the scope of the invalidity of contracts (Articles 3 and 4, BRI Services & Safeguards Opinion No. 1)

Repeated in Article 7 and 18, BRI Services & Safeguards Opinion no. 2.

BRI Services and Safeguards Opinion No. 1 devoted most of an article to highlighting to lower courts the actions that they should take so that lower courts and judges in supervisory roles could guide the judges within their jurisdiction to decide cases more consistently.

The guidance system is implemented level by level, and the higher people's courts have an obligation under the law and court practice to guide the courts within their jurisdictions, as do the intermediate people's courts. As mentioned earlier, judges in management roles, such as court presidents, vice presidents, and division heads, also have a responsibility to guide their judges.

The SPC has at least two goals in issuing guidance to local courts to assist them in issuing their own guidance to the courts within their jurisdiction. The first goal is political—to demonstrate to the political leadership that it is guiding the lower courts to properly implement the national strategy in question. The second is that it promotes greater consistency in judgments despite the inadequately detailed legislation and judicial interpretations, as well as dynamic Party and state policy. Local policies or typical cases, particularly those issued by local specialized courts, best promote the combination of local policies, policies in a specialized area, and national policies. They also demonstrate to both the local authorities and the SPC that the local courts, including the local specialized courts, are doing their part to support the national policy in question. Local model cases that meet national needs can become SPC model cases (Shanghai 2022; Xiamen 2022).

4.4 *The SPC's Role in "Law-Making" [zaofa 造法]*

An important but less-understood part of the role of the SPC in contributing to the development of China's foreign-related legal system is "law-making." This characterization is meant to convey the SPC's contribution to legislation, not as a formal assertion that the SPC makes law, because, as a formal matter, the SPC only interprets the law. In the 2022 Foreign-Related Judicial Work Report, the SPC characterized what it was doing as "actively participating in the construction of a foreign-related legal norm system," incorporating its contribution to legislative drafting (actively cooperating with foreign-related legislation) and the creation of foreign-related legal rules through judicial interpretations and conference summaries ("improving the system of rules

for the application of foreign-related laws”; SPC 2022b).²⁴ This function can be seen as one of the Chinese “judicial activism.” Several earlier Services and Safeguards Opinions had flagged this work.

The term “law-making” [*zaofa* 造法] is used here to refer to several different types of authority exercised by the SPC. The first type is the authority to submit legislative bills to the NPC and the NPC Standing Committee, as authorized by the Legislation Law (Legislation Law, NPC SC 2023, *bnbv* Articles 17 and 29). The second type is by drafting and issuing judicial interpretations, the Organic Law of the People’s Courts and the Legislation Law give its authority to issue interpretations “on the specific application of law in adjudication work” (Organic Law of the People’s Courts 2018, Article 18; Legislation Law, Article 119). The Legislation Law adds language that interpretations shall “shall primarily target specific provisions of laws and be consistent with their legislative purpose, principles, and original meaning” (Legislation Law, Article 119). The third type is by issuing meeting minutes (conference summaries), which have a less certain formal authority but are highly persuasive in practice. Two other types lack specific legislative authority but are important ways in which the SPC contributes to legislation, particularly foreign-related legislation: providing support to the NPC and the NPC Standing Committee when it drafts legislation; and providing support to the Ministry of Justice and other Party and state institutions when those institutions draft legislation that is eventually submitted to the NPC or the NPC Standing Committee. These two ways combine the SPC’s indirect law-making role with its cooperation role. The SPC also issues judicial interpretations of laws that it was involved in drafting. The SPC flagged both indirect law-making roles in the Foreign-Related Judicial Work Report. An overview and analysis follow.

The extent to which the SPC participates in “law-making” in foreign-related matters is not entirely clear because related documents are made public only sparingly. The analysis here draws on available information. SPC involvement in the drafting of laws or their amendments sometimes appears to be arranged by the Party leadership. The author provides a possible rationale for SPC involvement in legislative drafting. How the SPC participates in legislative drafting and its work in drafting judicial interpretations and meeting minutes are discussed separately.

24 The Chinese for the quoted phrases is: 积极参与涉外法律规范体系建设 [*jiji canyu shewai falv guifan tixi jianshe*]; 积极配合涉外立法 [*jiji peihe shewai lifa*]; 健全涉外法律适用规则体系 [*jianquan shewai falv shiyong guize tixi*].

4.4.1 SPC Participation in Drafting Legislation

As mentioned above, the SPC sometimes submits legislative bills to the NPC or its Standing Committee but more often contributes to the drafting of legislation indirectly, through supporting the NPC Standing Committee, Ministry of Justice, sectoral ministries, and other institutions charged with drafting legislation for eventual submission to the NPC or the NPC Standing Committee. The role of the SPC, Party leadership, and cooperation among Party institutions, the judiciary, legislature, and administration to draft or contribute to the drafting of legislation can be seen in the drafting of recent foreign-related legislation. This work does not appear to be well described in Chinese- or English-language academic literature but can be seen in official documents.

The SPC's active assistance in legislation through direct participation in drafting foreign-related legislation and its link to political priorities can be best seen through the ongoing development of the policy concerning the extraterritorial application of Chinese law. The late 2018 fourth plenum of the nineteenth Party congress contained the phrase "speed up the creation of a system for the extraterritorial application of our country's law," indicating that Party leaders had decided that the current law was inadequate in this area. In February 2019, at the second meeting of the Party Commission for Overall Law-Based Governance, Xi Jinping reiterated that "we should accelerate the construction of a legal system of extraterritorial application of our domestic law," further emphasizing the leadership's concern about developing a related body of law (Xinhua News 2019b). This focus on the extraterritorial application of Chinese law may be linked to the 2018 arrest in the Vancouver, Canada sought extradition of Huawei executive Meng Wanzhou further to a US federal arrest warrant for defrauding a global financial institution in Hong Kong, in violation of US sanctions law. The offense with which she was charged involved the extraterritorial application of US law (Chance Bridge 2021). The SPC incorporated the phrase "promote the construction of a legal system of extraterritorial application of our domestic law" into the 2022 Opinions of the Supreme People's Court on Providing Judicial Services and Guarantees for Accelerating the Construction of a Unified National Market (Unified Market Opinion) (SPC 2022a, Finder 2022d). Although at least one prominent Chinese scholar and his co-author proposed, in a 2020 academic article, that the SPC could extend the extraterritorial jurisdiction of the Chinese courts through judicial interpretations, a senior SPC judge specializing in foreign-related commercial matters wrote that creating a legal system of extraterritorial application of Chinese law requires the judiciary, legislature, and administration to work together (Huo and Man 2021, 358; Shen 2022, 150).

Although the judge's academic writings are not considered an official SPC statement, her view should be considered highly authoritative. Therefore, we can expect that in the future, legislation will incorporate provisions related to the overseas application of Chinese law that reflects contributions by the judiciary and the administration.

Recent draft or promulgated legislation demonstrates a similar pattern of cooperation between the SPC, the administration, and legislation in drafting and preparing amendments to specific foreign-related legislation. The institution that takes the lead in drafting depends on the nature of the legislation. For example, the SPC was responsible for drafting the amendments to the foreign-related part of the Civil Procedure Law. The explanation states that one of the NPC committees as well as the Legislative Affairs Commission received multiple reports from the SPC and provided guidance and suggestions to enable the SPC to draft the amendment in a timely fashion, on which the Central Political-Legal Committee, Office of the Governing the Country According to Law, Ministry of Foreign Affairs, and many other institutions commented (NPC SC 2022c). A second example is the draft Foreign Sovereign Immunity Law, which the Ministry of Foreign Affairs drafted with assistance from the SPC and other departments, "according to the deployment of the Party Center and State Council" (NPC SC 2022a).

The SPC is also involved indirectly in drafting other foreign-related legislation when other institutions directly take the lead in drafting. In practice, the institutions that take the lead may either be Party or state institutions and, regardless of which type of institution takes the lead, both Party and state institutions offer input. The Office of the Party Central Committee Foreign Affairs Commission (Foreign Affairs Commission) led the drafting of the Foreign Relations Law, and the SPC was one of many institutions involved in its drafting (NPC SC 2022b).

For more technical legislation, the Ministry of Justice has primary responsibility for drafting or reviewing draft legislation by sectoral ministries that had previously been undertaken by the Legislative Affairs Office of the State Council (Horsley 2019, 5). Several Services and Safeguards Opinions had flagged the SPC's commitment to provide its expertise (an alternative reading is an assertion that its contributions are crucial) to the Ministry of Justice and sectoral ministries. For example, the Open Economy Guiding Opinion included the text "promote the process of revising laws such as the Arbitration Law, Maritime Traffic Safety Law, Maritime Law, and Special Maritime Procedure Law" (Open Economy Guiding Opinion, SPC 2020b, Article 6). That signals that the SPC provides expertise while a draft is being prepared by a sectoral ministry as well as the Ministry of Justice.

The ongoing amendments to the Arbitration Law and Maritime Law provide two examples of the SPC's role in "promoting the process of revising laws." The SPC and lower courts have provided and, as of mid-2023, were continuing to provide input to the Ministry of Justice related to amendment of the Arbitration Law (CPPCC 2022). In mid-2022, Justice Tao Kaiyuan spoke to the Committee on Social and Legal Affairs of the Chinese People's Political Consultative Conference (CPPCC) about the draft amendment of the Arbitration Law and summarized some of the work of the SPC (CPPCC 2022 and Finder 2022f). Various divisions of the SPC and lower courts understood to have participated in providing their views, based on judicial practice, and anticipating the issues that may come before the courts during judicial review of arbitration. Similarly, judges from the SPC and some of the maritime courts have been involved by expressing their views on the amendment of the Maritime Law. The SPC is expected to continue to comment on succeeding drafts of the two laws when they are submitted to the NPC Standing Committee.

A second aspect of the SPC's indirect participation in drafting legislation is that the SPC supports the NPC's Legislative Affairs Commission or special committee that has been designated as the lead institution in doing so. Although the SPC is not taking the lead in revising the Enterprise Bankruptcy Law, for example, it has signaled in several documents the importance of improving the legislative framework for the recognition of and assistance with foreign bankruptcy proceedings (Shi 2022). The SPC engaged in discussions with delegations of NPC Financial and Economic Affairs Committee staff members and arranged for local court visits. That committee forwarded its draft amendments to the law to the SPC for comment, among other central institutions. This type of SPC involvement in legislative drafting of foreign-related legislation is expected to expand with the increase in foreign-related legislation.

The active involvement of the SPC (and lower courts) in the drafting of legislation appears to be little discussed, at least in the English-language literature, perhaps because of the paucity of information. The drafting process appears to be governed by the principles of "listening to opinions broadly," as set out in the 2012 Official Documents Regulations discussed earlier, in which the drafting institutions are required to solicit opinions from relevant regions or departments and strive to reach a consensus. First-hand participants in the process indicate that SPC (and lower-court judges) raise important substantive and procedural issues as well as issues that affect the operation of the courts. Scholars who offer their expertise in the drafting of these laws have remarked that SPC and lower-court judges have been actively involved and have sought to have relevant provisions from judicial interpretations, guiding cases, and

other forms of judicial practice incorporated into the draft, as relevant, as many of the issues will come before the courts. Presumably, the views of the SPC are often, but not always, accepted.

The following rationale can explain why the courts are so involved in the drafting of some legislation. The public is not involved in most of the drafting process, which is driven primarily by the responsible sectoral ministry, related ministries, and other institutions. The career path of ministry officials responsible for legal matters is often siloed—that is, limited to their own regulatory system. It is rare for a ministry official to have private sector experience, for example at a law firm, and, so, it would be difficult for the sectoral ministry or other related ministries to anticipate issues that could arise in the future because of inadequacies in the legislation. So, those are issues that SPC or other judges can bring to the attention of the drafters. They might advocate the codification in legislation of a provision currently in a judicial interpretation or guiding case or raise issues related to fraudulent proceedings, whether litigation, mediation, or arbitration, and whether a provision will lead to further litigation (Finder 2019b). This is another illustration of the distinctive functions of the SPC and an important way in which the SPC supports the development of foreign-related law, the policy of developing foreign-related rule of law, and its specific content, including the policy choices that may underlie a particular issue.

4.4.2 Judicial Interpretations and Conference Summaries

The 2022 Foreign-Related Judicial Work Report used the phrase “improving the system of rules for the application of foreign-related laws” to refer broadly to foreign-related judicial interpretations, policy documents, guiding cases, and typical cases. The policy documents were addressed earlier, and this section addresses guiding and typical cases. One of the most important functions of the SPC is issuing formal interpretations of law, not connected with specific cases, especially in the area of foreign-related law. The SPC continues to focus on this function for reasons connected to the slow pace and abstract language of Chinese legislation, although Chinese scholars and lawyers, as well as scholars elsewhere, sometimes criticize the SPC’s expansive reading of laws.²⁵ This function is particularly important, as it is related to the body of foreign-related law that the NPC Standing Committee has promulgated in recent years, as it tends to comprise statements of broad principles. The background and

25 In addition to the literature previously cited by the author at Finder (2021e 87), see also Wang (2022).

implications are discussed below. Conference summaries (meeting minutes) are highly persuasive when courts hear cases but have a less formal status.

In the 2022 Foreign-Related Judicial Work Report, the SPC announced that it had issued thirty-one foreign-related judicial interpretations since 2013. SPC judicial interpretations [*sifa jieshi* 司法解释] have a major impact on the implementation of Chinese law. Judges cite them as the basis for their judgments as well as in their reasoning. The extent to which SPC judicial interpretations bind institutions outside the court system is one of several fundamental uncertainties related to this function, as the NPC Standing Committee is authorized to review them and may require amendments to them or major changes, and the Party appears to approve having the NPC Standing Committee use its power to review them more vigorously.²⁶ The Party Political-Legal Work Regulation requires that the SPC seek instructions from the Central Political-Legal Committee on major judicial interpretations probably because, as a practical matter, judicial interpretations are so important (Political-Legal Work Regulations, Article 20). Internally, they are intended to remain in place for an extended period, and therefore the process of drafting them is often slow. The work planning and drafting procedure described earlier concerning policy documents generally applies to judicial interpretations. Other factors that the SPC leadership needs to consider include political-legal priorities and the workload among various divisions. As a result, some specific issues have been on the agenda of the relevant division of the SPC for some time before the drafting of a judicial interpretation is officially approved by the SPC's judicial committee. Some issues have gone on and off the judicial interpretation drafting agenda. No specific reasoning has been given, but it appears to be linked to "appropriate timing." Two examples of issues that fall into that category are the recognition and enforcement of foreign judgments and the implementation of treaties, conventions, and international practices.²⁷

The SPC's Research Office is the gatekeeper for reviewing proposals for judicial interpretations, as well as examining and coordinating the drafting of judicial interpretations, which is similar to the drafting procedure for policy documents. The SPC liaises with the NPC Legislative Affairs Commission during the judicial interpretation drafting process to harmonize the views

26 For an overview of the how the NPC Standing Committee reviews judicial interpretations and administrative subsidiary legislation, see Wei (2021) and Sun (2021).

27 Former CICC judge Song Jianli discussed, in part, a draft interpretation on the recognition and enforcement of foreign judgments, which was dropped from the judicial interpretation drafting agenda for 2018–2020. According to the Unified Market Opinion and a 2023 SPC press release both are back on the agenda (Song 2018; Finder 2022b; SPC 2023d; Finder 2023e).

of the institutions. Additionally, the Research Office staff are charged with reviewing the package of documents that come before them after all review has been completed and before the documents are forwarded to the SPC Judicial Committee (Adjudication Committee) for consideration. It is understood that the Judicial Committee reviews draft interpretations with these factors in mind (among others): whether the SPC entities involved have performed sufficient research and investigation about the issues that arise in practice; whether it is sufficiently comprehensive, with the right amount of discretion given to the lower courts and can accommodate varying levels of judicial competence, incorporates the views of internal and external stakeholders, and implements relevant overall policies. It is not unusual for draft interpretations to be approved “in principle,” which means that they are returned to the drafters for certain substantive amendments, likely involving another review by the NPC Standing Committee (Finder 2017b). Soliciting public comments on draft judicial interpretations is optional and requires the approval of the SPC leadership, unlike consulting internal and other official stakeholders (Finder 2021b).

As mentioned above, the SPC issues meeting minutes (conference summaries), which are considered a judicial document, but are issued to approach that lower-court judges take more consistent about certain issues in which the law is unclear. The legal basis for the conference summary derives from the SPC’s authority under Article 10 of the Organic Law of the People’s Courts to supervise the lower courts (NPC SC 2018). The SPC regards “codifying” the principles from cases and issues considered by the SPC in the form of a conference summary the most useful and efficient form of guidance for lower-court judges when time, fluidity in the law, and the attenuated basis for some of a conference summary’s provisions do not permit anything more authoritative. Although conference summaries are not judicial interpretations and cannot be cited in court judgment documents as the basis of a judgment, they provide important guidance for the work of the courts concerning issues about which existing law and judicial interpretations are unclear. Judges rely on its provisions in deciding cases. Although English-language commentary on conference summaries tends to denigrate their importance, a 2023 book analyzing the provisions of the 2021 Conference Summary of the National Symposium on Foreign-Related Commercial and Maritime Trial Work mentions that the SPC No. 4 Civil Division had sought comments from related State Council departments, related departments of the SPC, higher people’s courts and maritime courts, and selected experts, indicating the seriousness with which the document should be taken (SPC 2023b).

4.5 *Deciding and Issuing Foreign-Related Cases*

The SPC decides some cases involving foreign-related commercial law and issues some cases as guidance, either as guiding or typical cases. The difference between the two types of cases is explained below. Under the 2021 pilot reform of the four levels of Chinese courts, the SPC has heard a smaller number of civil, commercial, and administrative cases, but under a document issued at the end of the pilot in 2023 clarified that the SPC intended to terminate the pilot and resume prior practices (SPC 2021b; 2023c). This discussion focuses on foreign-related civil and commercial cases.

The SPC reduced the number of appeals and retrial petitions that it considered through several regulations, raising the amount that had to be in dispute as well as changing the standards by which the SPC could reopen civil (and commercial) cases (SPC 2021d; SPC 2021e; 2022d). A search of the SPC's Judgments Online database in June 2023 shows that, in the first half of 2023, the SPC decided on relatively few appeals or retrial civil cases, with the exception of appeals decided by the SPC's intellectual property court. In the area of foreign-related commercial law, the SPC reviews approximately 200 arbitration cases annually under its reporting system for the judicial review of arbitration (SPC 2021c, 90).

If a lower court intends to set aside or refuse to enforce an arbitral award, it is required to follow reporting procedures, sometimes involving the SPC, for final approval before it can issue a ruling. If the case involves foreign, Hong Kong, Macau or Taiwan elements, the intermediate people's court will report to the higher people's court and if the higher people's court agrees with the view of the lower court, it will further report to the SPC. If the case is purely domestic, the higher people's court makes the final decision, which is filed with the SPC, unless the award involves a possible violation of social and public interests (Chen 2023). The SPC responses and the reports from the lower courts are made public through a publication edited by the No. 4 Civil Division of the SPC entitled *Shewai shangshi haishi shenpan zhidao* 涉外商事海事审判指导, with the English title of *China Trial Guide: Guide on Foreign-Related Commercial and Maritime Trial* (Finder 2019c).

Another way in which the SPC decides foreign-related commercial cases is through the China International Commercial Court (CICC). In short, the CICC was established in 2018 as a constituent part of the SPC, approved by the Party leadership in the January 2018 BRI Dispute Resolution Mechanisms and Institutions Opinion, discussed earlier. The CICC, as China's international commercial court, accepts one-time high-value and important international commercial cases. The CICC operates on a part-time basis. It promotes connections between litigation, arbitration, and mediation as a one-stop

shop. All the judges on the CICC are Chinese, in contrast to the Singapore International Commercial Court, for example, which has a number of non-Singaporean judges. Moreover, the CICC established an international commercial expert committee, and has members from both China and other countries who undertake certain responsibilities and provide an international perspective. The CICC has taken a small number of cases, most of which were referred from the lower courts. Based on a review of the cases accepted thus far, the goal of the CICC is apparently to take cases that involve significant issues for which existing law and judicial interpretations are unclear. The CICC has accepted and decided at least five cases related to arbitration—filling gaps in Chinese arbitration law and judicial interpretations—and accepted two more related to disputes over demand guarantees and standby letter of credit fraud. It also issued a judgment on an issue related to product liability.

Earlier, the SPC decided some appeals or retried cases to clarify certain substantive legal issues on Chinese law related to international commercial, maritime, and arbitration matters. They include the relationship between the United Nations Convention on Contracts for the International Sale of Goods and governing law, the fraud exception to payment under a letter of guarantee, and the application of the 1989 International Convention on Salvage. The 2023 provisions on retrial mentioned earlier seem to indicate that an increase in retried cases involving foreign-related issues can now be anticipated. The SPC can be expected to decide more appeal or retried cases involving new issues in foreign-related law, regarding judicial review of arbitration, maritime matters, and international commercial law.

In addition to deciding foreign-related cases, the SPC issues cases as guiding, or more often typical cases as a form of guidance. The No. 4 Civil Division reviews and selects (or recommends the selection) of both types of cases. Guiding cases, about which much has been written, are subject to a rigorous review process and approval by the SPC's judicial committee, and therefore relatively few have been issued, with an even smaller number of those related to foreign matters. Although the SPC issued BRI guiding cases in 2019, it is not likely to use guiding cases as the primary vehicle for lower-court guidance because the length of the review process prevents the issuance of enough cases to meet the needs of the No. 4 Civil Division.

The SPC more often issues typical cases to provide political and substantive guidance for the lower courts, sometimes linked to a policy document. Although the SPC General Office is the SPC entity that issues monthly SPC typical cases, in fact they are selected by the division or office in charge of the topic involved, so that the Belt and Road typical cases would be selected by the No. 4 Civil Division. A few judges or other staff at the SPC review the typical

cases submitted by the provincial high courts. Those who perform the initial review select more cases than the target number. In general, the professional judges meeting of the division involved review the selection, with the deputy and head of the division reviewing the selected cases and determining the final selection of cases to be submitted to SPC leadership. It is likely that a report accompanies the selection of the typical cases so that SPC leaders understand the significance of each case. Having a case selected by the SPC as a typical case is considered prestigious for the individual and the court involved (Finder 2022e). As of mid-2023, SPC President Zhang Jun appeared to favor using typical cases to guide the lower courts, and this is also likely to be true of guiding lower court judges on foreign-related matters (Finder 2023d). As of the fall of 2023, the SPC issued four groups of BRI typical cases. The points made by these typical cases apply to all types of foreign-related cases, regardless of whether they involve the BRI in some way (Liu 2022). Including BRI in the title highlights that these cases help support the BRI and develop foreign-related rule of law.

4.6 *Coordination and Cooperation with Other Party and State Institutions*

One of the unrecognized “active” functions of the SPC is coordination with other central Party and state organs regarding specific legal issues, based on bureaucratic custom (Finder 2021a). As the discussion above concerning SPC participation in legislative drafting shows, this work is only partially visible.

As with the other functions discussed above, the SPC has coordinated and cooperated with other central Party and state institutions on a broad variety of legal matters for many years, but it appears to be little discussed in English-language literature. The BRI and other related major policy shifts related to developing a body of foreign-related law, as well as Xi Jinping's policies promoting the role of the courts in social governance, mean that SPC divisions and offices involved in foreign-related matters are much more active in coordinating and cooperating with other institutions than they were before. Some provisions in SPC policy documents, particularly the Services and Safeguards Opinions discussed above, signal to other central institutions that the SPC extends its expertise to that institution, considers that its views are crucial to that other institution, or has set policy on a specific issue that may be relevant to one or more institutions. The coordination and cooperation take a variety of forms, and which institutions and departments are relevant depends on the matter under consideration.

One example of SPC support for other institutions concerns treaty and convention negotiations. The SPC provides direct and indirect support to the

Ministry of Foreign Affairs or other ministries that lead treaty or convention negotiations, such as the Ministry of Commerce. It is among the institutions that contribute to decisions to sign or accede to conventions (relevant to dispute resolution and other judicial matters). At the SPC, judicial assistance matters are the responsibility of the International Cooperation Bureau. That bureau (likely with assistance from staff at the Research Office or another relevant division, depending on the matter) works with Section No. 3 of the Department of Treaties and Law of the Ministry of Foreign Affairs to negotiate civil and criminal bilateral and multilateral mutual legal assistance conventions and treaties, along with other related institutions, if the Ministry of Foreign Affairs leads the negotiations. It is unclear whether the institutions have drafted a model template that is presented to the foreign counterpart (Chinese Embassy in Kenya 2016; Liu 2021; Xinhua News 2019a; Zeng 2016). The “related institutions” involved depend on the subject of the specific treaty or convention. For example, the SPC was one of the institutions with which the Ministry of Commerce consulted regularly when that ministry led the negotiation of the Singapore Mediation Convention on behalf of the Chinese government, with most of those consultations occurring at the staff level (Liu 2021; interview in Beijing by the author, with involved official 2023).

Mutual legal assistance is necessarily cross-institutional, and the related institutions and policies related to judicial cooperation depend on the area of law. The emphasis in the Xi Jinping era on developing international mutual legal assistance on criminal matters is motivated by the political leaders’ interest in building a more robust legal framework for compelling the return of those whom they regard as having violated Chinese criminal law, particularly the crimes of corruption and terrorism (Zhang 2014). The repeated mention of deepening criminal judicial cooperation in several foreign-related Services and Safeguards Opinions are understood by the SPC’s counterparts at the Ministry of Foreign Affairs, Ministry of Justice, the Supreme People’s Procuratorate, the Ministries of Public and State Security, and the Central Commission on Disciplinary Inspection/National Supervision Commission (CCDI/NSC) to mean that the SPC provides necessary expertise as needed and works with those institutions to enable the extradition of Chinese nationals from overseas (or other forms of return), either based on a treaty or one-time arrangements. For example, during the extradition process, foreign jurisdictions often require the Chinese authorities to offer assurances that capital punishment or a life sentence will not be imposed. In a 2022 article, two SPC judges explained the procedure in Article 50 of the 2000 Extradition Law, which states that assurances regarding criminal punishment are subject to a decision by the SPC (Wang and Zhuang 2022).

The importance of mutual civil judicial assistance is emphasized in many foreign-related policy documents as well as in the 2022 Foreign-Related Judicial Work Report, as part of the goal for Chinese courts to become more influential internationally. The 2022 Report highlights that Chinese court judgments are being enforced in more countries, and more foreign parties are voluntarily choosing to litigate in China. As shown by the recent amendments to the Chinese Civil Procedure Law, the objective is expansion in the jurisdiction of Chinese courts. Therefore, the amended Civil Procedure Law incorporates provisions that permit cross-border electronic service of process and collection of evidence, if not prohibited by law in the location of the party or the evidence. At the same time, the policies are highly protective of Chinese national sovereignty as it relates to the judiciary (“judicial sovereignty”). Although China has acceded to the Hague Service Convention, it does not permit foreign courts or foreign litigators to take witness statements or depositions in person or by videolink. Nor does it permit service of process from abroad by electronic means, such as email, despite promoting its use by Chinese courts and seeking to increase the use of Chinese online litigation platforms by foreign parties.

The negotiation of civil and commercial judicial assistance treaties and conventions involves the Ministry of Foreign Affairs, Ministry of Justice, and the SPC, and sometimes the Ministry of Commerce. The Ministry of Justice is usually designated as the central authority in international conventions and treaties. Implementation of civil and commercial treaties and conventions usually involves coordination between the Ministry of Justice and the SPC, and coordination within the Chinese judiciary. The SPC established a judicial assistance electronic platform to expedite the implementation of judicial assistance requests within the Chinese judiciary and noted that, in 2022, “after two years of efforts,” it had become linked to the Ministry of Justice (Gao 2022), revealing some of the challenges in cross-institutional cooperation. A single phrase in the report on the Politburo’s 2023 collective study session on foreign-related law signals further coordination between the SPC and other relevant institutions in developing foreign-related rule of law. The phrase is “it is necessary to . . . promote foreign-related legislation, law enforcement, justice, legal compliance by the public and legal services in a coordinated manner, thus establishing a collaborative working pattern in this regard” (Xinhua News 2023c).

5 Conclusion

This article offers a detailed analysis of the SPC’s work in supporting national strategies in the Xi Jinping era. It identifies the 2014 Advancing Governance

According to Law Decision as a pivotal document because it signaled that the Party leadership had decided that a body of law concerning foreign-related matters had become crucially important. That document stressed strengthening Party leadership, particularly over legal institutions. The principles concerning foreign-related rule of law and strengthened Party leadership were developed in subsequent documents. Providing appropriate judicial support for national strategies is an important way in which the SPC as a political-legal institution and the leaders of the SPC (virtually all of whom are Party Group members) fulfill their political obligations to the Party leadership. The SPC Party Group's fulfillment of its political obligations means that it fully implements the political leadership's policy decisions and arrangements and reports to Party leadership about that implementation, as well as being fully involved in important institutional decision-making.

The SPC performs a wide range of functions as it actively fulfills its role as China's highest court in the political-legal system to support evolving national strategies and the implementation of fundamental policies. Among the most important functions of the SPC in support of developing foreign-related rule of law are making and influencing legal and judicial policies; providing guidance to the lower courts; "making" law or quasi-law, through contributing to the drafting of legislation, and issuing judicial interpretations and soft law documents; hearing and issuing cases in various forms; using its expertise to support the work of other central institutions and vice versa. This characterization of its functions is derived from a review of multiple related SPC policy documents. The functions other than hearing cases, which the SPC has always performed, are linked in some way to hearing cases and are considered more important than the case-hearing functions, something that distinguishes the SPC from many supreme courts in other countries.

The article discusses why the SPC leaders select certain types of measures, explaining that it is likely based on whether the impact of a new policy is significant enough to require a document that conveys policies concisely and comprehensively. Judicial policy documents, such as Services and Safeguards Opinions, guide and inform the lower courts about new or adjusted judicial policy and apprise related central Party and state institutions of these developments. Judicial policy documents also incorporate provisions that signal to those institutions that the SPC is committed to providing its expertise to that institution and may have set policy on a specific issue that is relevant to one or more institutions. Another reason is to signal to the Party leaders and Party institutions that supervise the SPC that it is implementing the leadership's policies and arrangements. The drafting procedure for judicial policy documents, described in detail, is intended to incorporate all related

measures and incorporate input from related internal and external official stakeholders, with limited input from other sources. SPC leaders who review draft judicial policy documents consider whether the document is sufficiently comprehensive and the new initiatives proposed are appropriate, both substantively and politically. The SPC has led changes in foreign-related legal and judicial policy in the recognition and enforcement of foreign court judgments, the judicial review of arbitration and demand (independent) guarantees—areas in which the SPC seeks to harmonize better Chinese legal rules with international practice. In other areas of law, such as foreign-related criminal law and procedure, the SPC follows the policy lead of other institutions, but deals with important questions in the course of procedures such as extradition.

The article provides an extended discussion of several little-understood areas of SPC work, one of which is the SPC actively contributes to the drafting of legislation, directly or indirectly, also involving its role in cooperating with other Party and state institutions. It provides some reasons for the practice. The SPC also issues judicial interpretations of laws for which it was involved in drafting as well as other legislation or issues, and the article explains why the practice is needed, as well as why the process for issuing judicial interpretations may take several years. To provide needed guidance to ensure that lower court decision-making is more consistent on a timely basis, the SPC issues conference summaries (meeting minutes), a form of document that is not technically binding but is highly persuasive. The SPC decides a number of foreign-related cases, some in the judicial review of arbitration, others through the CICC, and others through the SPC's appeal or retrial procedure. The SPC also selects other cases as guiding or typical cases to provide additional guidance to the lower courts. The foreign-related cases decided and selected by the SPC are likely to become more significant in creating a body of Chinese foreign-related commercial law. The final section provided an overview of the work of the SPC in supporting other institutions. The way that the SPC coordinates and cooperates with other Party and state institutions takes a variety of forms, and which are relevant depends on the matter under consideration. One example of SPC support for other institutions concerns treaty and convention negotiations, in which the SPC provides direct and indirect support to the Ministry of Foreign Affairs or other ministries that lead treaty or convention negotiations. It also enables the SPC to say that it actively participates in the formulation of international rules.

In doing its important part to support the dynamic development of foreign-related rule of law, the SPC is actively involved with many matters besides considering cases. The November, 2023 collective study session of

the Politburo on foreign-related rule of law highlights that the SPC's foreign-related expertise is currently and in the foreseeable future, crucially important to the Party leadership. The professional and scholarly Chinese public, not to mention their counterparts abroad, appear to be less aware of the range of the SPC's contribution to the development of foreign-related rule of law, because a significant part is provided behind the scenes, within and outside the judiciary. Given that the Party leadership increasingly stresses political leadership of the courts and political competence of members of the judiciary, carrying out the functions described above requires SPC judges dealing with foreign-related matters to have both a high degree of political consciousness and technical expertise. Dealing with the range of issues discussed above requires not only expertise in such fields as domestic substantive and procedure law, related public and private international law, international arbitration law, but also sensitivity to the constellation of political implications of judicial policy and the ability to advocate persuasively to leaders of the SPC, related institutions, and when needed, the Party leadership. Why? As the SPC media often say, "the people's courts are a highly political professional institution, and a highly professional political institution" [*renmin fayuan shi zhengzhixing hen qiang de yewu jiguan, ye shi yewuxing hen qiang de zhengzhi jiguan* 人民法院是政治性很强的业务机关, 也是业务性很强的政治机关].

Acknowledgments

The author thanks the many people who commented on earlier drafts of this article, including Mary Young, Vivienne Bath, Mark Jia, Katherine Wilhelm, and Sida Liu. She also appreciates the assistance of Sun Dongyu, Yuan Ye, He Kejin, and Li Sitao. Special thanks are due to Jerome Cohen. All views in this article are the author's own.

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