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The "China Initiative": The U.S. Department of Justice's Country Specific Focus on the People's Republic of China

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Abstract:

Allegations by the American Administration of intellectual property theft emanating from the People's Republic of China (PRC) are not new. In June 2018, the White House Office of Trade and Manufacturing Policy issued a report entitled "How China's Economic Aggression Threatens the Technologies and Intellectual Property of the United States and the World."^[1] In the 35-page Report, the Administration accuses the Chinese government itself of engaging in "two major strategies and various acts and practices . . . seeking to acquire the intellectual property and technologies of the world and to capture emerging high-technology industries that will drive future economic growth."^[2] Of course, many countries, including the United States, would like to dominate future intellectual property and technology development and growth as a means of securing economic prosperity. China is different from other countries, according to the Report, because of its systematic use of criminal activity authorized at the highest levels of the government and the Communist Party of the PRC.

[1] Available at: <https://www.whitehouse.gov/wp-content/uploads/2018/06/FINAL-China-Technology-Report-6.18.18-PDF.pdf> ^[1].

[2] *Ibid.* p. 20.

Allegations by the American Administration of intellectual property theft emanating from the People's Republic of China (PRC) are not new. In June 2018, the White House Office of Trade and Manufacturing Policy issued a report entitled "How China's Economic Aggression Threatens the Technologies and Intellectual Property of the United States and the World."^[1] In the 35-page Report, the Administration accuses the Chinese government itself of engaging in "two major strategies and various acts and practices . . . seeking to acquire the intellectual property and technologies of the world and to capture emerging high-technology industries that will drive future economic growth."^[2] Of course, many countries, including the United States, would like to dominate future intellectual property and technology development and growth as a means of securing economic prosperity. China is different from other countries, according to the Report, because of its systematic use of criminal activity authorized at the highest levels of the government and the Communist Party of the PRC.

The Report describes a laundry list of criminal activities orchestrated by the Chinese government. These include: the physical theft of technology and intellectual property through Economic Espionage, cyber-enabled economic espionage and theft, the evasion of U.S. export control laws, the counterfeiting and piracy of manufactured goods, and the recruitment of agents within U.S. industry to secure emerging technology and intellectual property, to name a few. The Report led the U.S. Department of Justice (DOJ) to launch its "China Initiative" in November of 2018, in an attempt to thwart these criminal activities. According to DOJ, the Initiative "reflects the strategic priority of countering Chinese national security threats and reinforces the President's overall national security strategy."^[3] To support these goals, DOJ focuses on prosecuting crimes involving the theft of trade secrets, hacking, and economic espionage, as well as protecting critical infrastructure, and combatting "covert" efforts to influence the American public and policymakers.^[4]

There are critics of the Initiative. The Chinese Foreign Ministry has referred to DOJ's allegations as "groundless accusations and malicious slander."^[5] Professor Lewis, a scholar focused on Chinese and Taiwanese legal activities, does not take issue with the threat posed by technology or intellectual property theft, but she is critical of the ethnic emphasis of DOJ's Initiative.^[6] She argues that by using "China" as the framework connecting diverse cases, DOJ creates "an overinclusive conception" that threatens to taint innocent entities that possess "China-ness" even if they

do not have any relationship to the PRC or the Communist Party.[7] A less eloquent observer might see a parallel between the use of the term “China Initiative” by DOJ and the President’s repeated race-baiting use of the phrase “China virus” to describe COVID-19.

Nevertheless, DOJ does make some striking allegations concerning China. It alleges that 80 percent of economic espionage prosecutions “allege conduct that would benefit the Chinese State” and that there is a Chinese “nexus” in 60 percent of all trade secrets cases.[8] These terms, however, are imprecise. For example, saying that certain conduct may be beneficial the Chinese state is not the same as saying that the conduct is directed PRC.

One apparent disconnect between the policy of the Administration and the DOJ’s Initiative is the Administration’s focus upon the Chinese state and the Chinese corporations tied to the state that implement that policy versus DOJ’s record of prosecuting low-level individuals who are not directing or implementing policy. Among the more recent cases is the matter of a New York City Police Officer and member of the U.S. Army Reserve. On September 16, 2020, The U.S. District Court for the Eastern District of New York unsealed a Criminal Complaint alleging that Baimadajje Angwang served as an agent for the People’s Republic of China, and in his capacity as a police officer, gathered information on New York’s Tibetan community and other Chinese citizens living abroad.[9] He is charged with violating the Foreign Agents Registration Act (FARA),[10] as well as wire fraud and making false statements.

In August 2019 and August 2020, a federal grand jury in the District of Columbia indicted five Chinese individuals with computer hacking that facilitated the theft of source codes, customer account data, and other business information. In August, two Malaysian businessmen were indicted for conspiring with Chinese hackers to profit from Chinese intrusions in the U.S. video game industry.[11] The China Initiative identifies 69 individuals in total who have either been charged, convicted or sentenced since 2018 for a variety of offenses related to involving FARA violations, Foreign Corrupt Practices Act (FCPA),[12] International Emergency Economic Powers Act (IEEPA),[13] money laundering, computer hacking, intellectual property theft, false statements, export control violations and even wire fraud and tax offenses.

Only two businesses have found themselves in DOJ’s crosshairs. The first is the Vandel Research Institute, a Michigan-based research facility that paid \$5.5 million to resolve False Claims Act allegations for failing to disclose in a National Institute of Health grant application that it had also received grants from the Chinese government to support two of its researchers.[14] In view of other DOJ settlements, the Vandel Research Institute is relatively small. It is also striking that the settlement involves an American, as opposed to a U.S. company. In fact, the DOJ does not list settlements with any Chinese companies under its China Initiative.

The other company pursued by DOJ under the China Initiative is Chinese telecommunications giant Huawei and its CEO Wuzhou Meng. Huawei is the subject of two indictments, one in the Western District of Washington and the other in the Eastern District of New York. In the Washington case, Huawei is charged with seven counts of wire fraud and one count of obstruction of justice based upon attempts to steal trade secrets from T-Mobile.[15] In the second indictment in the Eastern District of New York, Huawei is charged with bank fraud and conspiracy to commit bank fraud, wire fraud and conspiracy to commit wire fraud, violations of the International Emergency Economic Powers Act (IEEPA) and conspiracy to violate IEEPA, and conspiracy to commit money laundering.[16] Both cases against Huawei are currently awaiting trial. Ms. Meng continues to fight extraction from Canada.[17] The DOJ’s case against Huawei, if successful, would constitute a substantial step towards holding major Chinese companies accountable for economic espionage and theft of trade secrets. But only time will tell if DOJ is able to do so.

For now, Huawei is the only significant Chinese entity to be targeted by DOJ. If the problems of economic espionage and the theft of intellectual property are as great as the Administration asserts, one would expect a more concerted effort directed at governments and corporations involved in these criminal activities. There would not be an apparent need to limit DOJ scrutiny only to Chinese entities; any government or country in the world that engages in economic espionage or the theft of intellectual property should be the subject of criminal prosecution. An “Economic Espionage and Intellectual Property Theft Task Force” would be better than a “China Initiative.”

The apparent focus on the prosecution of individuals also has a questionable impact on the conduct of their corporate masters, particularly when those corporate masters are directed by a foreign state. This is not to suggest that individuals should not be prosecuted for their criminal activities; however, the prosecution of these individuals is not likely to catalyze changes in policy by the PRC or Chinese corporations. Other measures, including the use of civil penalties, exclusion from U.S. markets, and travel restrictions on corporate executives are more likely to deter further thefts than the occasional prosecution of low-level individuals who are easily replaced. Corporate misconduct is rarely deterred by the prosecution of employees or consultants.

[1] Available at: <https://www.whitehouse.gov/wp-content/uploads/2018/06/FINAL-China-Technology-Report-6.18.18-PDF.pdf> [1].

[2] Ibid. p. 20.

[3] Information about the Department of Justice’s China Initiative and a Compilation of China-Related Prosecutions since 2018; available at <https://www.justice.gov/opa/information-about-department-justice-s-china-initiative-and-compilation-china-related> [2].

[4] Ibid.

[5] “Inside DOJ’s Efforts to take on China”, available at: <https://www.politico.com/news/2020/04/07/justice-department-china-espionage-169653> [3].

[6] Lewis, Margaret K., Criminalizing China (August 25, 2020). Journal of Criminal Law and Criminology, Vol. 111, No. 1, 2020, Seton Hall Public Law Research Paper Forthcoming, Available at SSRN: <https://ssrn.com/abstract=3600580> [4].

[7] *Ibid.*

[8] "Information about the Department of Justice's China Initiative and a Compilation of China Related Prosecutions since 2018; available at: <https://www.justice.gov/opa/information-about-department-justice-s-china-initiative-and-compilation-china-related> [2].

[9] "New York City Police Department Officer charged with Acting as an Illegal Agent for the People's Republic of China"; available at <https://www.justice.gov/opa/pr/new-york-city-police-department-officer-charged-acting-illegal-agent-people-s-republic-china> [5].

[10] 22 U.S.C. Section 611 *et. seq.*

[11] "Seven International Cyber Defendants, Including "Apt41" Actors, Charged In Connection With Computer Intrusion Campaigns Against More Than 100 Victims Globally" <https://www.justice.gov/opa/pr/seven-international-cyber-defendants-including-apt41-actors-charged-connection-computer> [6].

[12] 15 U.S.C. Section 78 dd-1 *et. seq.*

[13] 50 U.S.C. Section 1701 *et. seq.*

[14] "Department Of Justice Reaches \$5.5 Million Settlement With Van Andel Research Institute To Resolve Allegations Of Undisclosed Chinese Grants To Two Researchers", https://www.justice.gov/usao-wdmi/pr/2019_1219_VARI [7].

[15] "Chinese Telecommunications Device Manufacturer and its U.S. Affiliate Indicted for Theft of Trade Secrets, Wire Fraud, and Obstruction Of Justice", <https://www.justice.gov/opa/pr/chinese-telecommunications-device-manufacturer-and-its-us-affiliate-indicted-theft-trade> [8].

[16] "Chinese Telecommunications Conglomerate Huawei and Huawei CFO Wanzhou Meng Charged With Financial Fraud" <https://www.justice.gov/opa/pr/chinese-telecommunications-conglomerate-huawei-and-huawei-cfo-wanzhou-meng-charged-financial> [9].

[17] "Meng Wanzhou back in Court to Argue U.S. misled Canada in Extradition Case", (posted Sep. 28, 2020), available at: <https://www.cbc.ca/news/canada/british-columbia/meng-wanzhou-huawei-evidence-1.5739876> [10].

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- [1] <https://www.whitehouse.gov/wp-content/uploads/2018/06/FINAL-China-Technology-Report-6.18.18-PDF.pdf>
- [2] <https://www.justice.gov/opa/information-about-department-justice-s-china-initiative-and-compilation-china-related>
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