

# FOREIGN POLICY AND THE CHINESE CONSTITUTIONS DURING THE HU JINTAO ADMINISTRATION

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**Abstract:** This Article is a close examination of how China's dual constitution system—that is, the nexus of governing power as outlined between the State Constitution and the Communist Party Constitution—provides both jurisdictional and substantive guidance to Chinese foreign policy makers. It especially focuses on the Hu Jintao administration (2002–2012) as the foremost example of grounding foreign policy in the dual constitutions of China. With the success of the Hu administration, the Chinese constitutional law of foreign policy has become theoretically a unique extraterritorial projection of “the rule of law with Chinese characteristics,” with room for future development by both liberals and realists. Part I of this Article begins by introducing the jurisdictional and substantive bases of the Chinese constitutional law of foreign policy. Part II sets out the specific contributions of the Hu Administration, and explains the linkage between the Scientific Development Outlook, the Socialist Harmonious Society platform, and the Peaceful Development strategy. Part III posits how the Chinese constitutions may have informed foreign policy decision-making regarding some of the biggest challenges of the Hu Jintao era. Finally, this Article predicts that the principal constitutional challenge that China will face in the foreseeable future is securing the vast amount of resources it needs to maintain its domestic development while maintaining harmonious relations with the rest of the developing world.

## INTRODUCTION

In the early to mid-1970s, amidst widespread disillusionment over the Vietnam War, American veterans, politicians, lawyers, political scientists, media, and the public-at-large began a period of penitent reflection intended to reconstruct the constitutional boundaries of the practice of war and U.S. foreign relations.<sup>1</sup> That era buzzed with discourse on the constitutional ba-

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<sup>1</sup> See *Legislative Proposals Relating to the War in Southeast Asia: Hearings Before the Comm. on Foreign Relation*, 92nd Cong. 120 (1971) (statement of John Kerry, former Navy Lieu-

ses for all things related to the design and implementation of American foreign policy, including the power to make war, the limits of national security secrecy, and identifying the proper roles for the different branches of government, and of the public, in this decision-making process.<sup>2</sup> Professor Louis Henkin began his contemporary treatise, *Foreign Affairs and the Constitution*, with the observation:

Volumes about the American Constitution and about American foreign relations abound, but they are two different mountains of books. Those that deal with the Constitution say little about American foreign relations; the others expound, scrutinize, dissect and criticize the international relations, foreign policy, and the “foreign-policy-making process” of the United States, but the controlling relevance of the Constitution is roundly ignored.<sup>3</sup>

A similar claim could be made about the separate bodies of literature on Chinese constitutional law and foreign policy today.<sup>4</sup> Although its circumstances are very different from those of the United States in the early 1970s, the People’s Republic of China (PRC) of the early twenty-first cen-

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tenant, Vietnam Veterans Against the War). At the Congressional Fulbright Hearings in 1971, U.S. Navy Lieutenant John Kerry testified:

We really have a constitutional crisis in this country right now. The Constitution under test, and we are failing [sic]. We are failing clearly because the power of the Executive has become exorbitant because Congress has not wanted to exercise its own power, and so that is going to require some very fundamental changes.

*Id.* John Kerry is the current U.S. Secretary of State. See *Secretary Kerry*, U.S. DEP’T OF STATE, <http://www.state.gov/secretary/> (last visited Mar. 14, 2014).

<sup>2</sup> See THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY, at v (Francis O. Wilcox & Richard A. Frank eds., 1976). The effort culminated in the War Powers Resolution of 1973. See War Powers Resolution of 1973, 50 U.S.C. §§ 1541–1548 (2006).

<sup>3</sup> LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION, at vii (1972).

<sup>4</sup> See *infra* notes 5–9 and accompanying text. There are large bodies of work on Chinese constitutionalism and foreign policy, but neither camp attempts a linkage. For examples of constitutionalism, see: ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA (3rd ed. 2004); LIN FENG, CONSTITUTIONAL LAW IN CHINA (2000); Larry Catá Backer, *Party, People, Government and State: On Constitutional Values and the Legitimacy of the Chinese State-Party Rule of Law System*, 30 B.U. INT’L L.J. 331 (2012). For examples of foreign policy studies, see: Zhu Liqun, *The Domestic Sources of China’s Foreign Policy and Diplomacy*, in CHINA’S “NEW” DIPLOMACY: TACTICAL OR FUNDAMENTAL CHANGE? 109, 109–22 (Pauline Kerr et al. eds., 2008) (discussing China’s peaceful rise/peaceful development formulation without ever citing constitutional roots); Thomas Kane, *China’s Foundations: Guiding Principles of Chinese Foreign Policy*, in CHINESE FOREIGN POLICY IN TRANSITION 101, 101–15 (Guoli Liu ed., 2004) (extensively quoting Mao Zedong, Deng Xiaoping, and Jiang Zemin, but not their constitutional contributions). Indeed, CONTEMPORARY CHINA AND ITS FOREIGN POLICY (Yang Fuchang et al. eds., 2002) is the only title I am aware of to include a discussion of the Chinese constitutions in a primarily foreign policy work, although it is merely included as a primer on the Chinese political system.

ture is at a turning point in the conduct of its foreign affairs.<sup>5</sup> Even though its dual constitutions claim to explicitly shape China's foreign relations to a much higher degree than their American counterpart, the link between the development of Chinese constitutionalism and the conduct of Chinese foreign policy is almost never discussed. Perhaps the reasons for this are the same as those Professor Henkin identified to explain the divide that arose between American constitutional and foreign policy discourse. Henkin wrote:

[This reflects] the impression that the Constitution and its law do not matter, or perhaps that, like other mechanisms that "work" smoothly, it can be taken for granted. The conduct of foreign relations seems long and far removed from any constitutional origins, confronting no constitutional limitations and generating no constitutional issues. When, recurrently, foreign affairs explode into constitutional controversy, it comes as a surprise, and the participants themselves, and other foreign affairs "experts," fumble and mumble in discussing the issues.<sup>6</sup>

Another more contextual reason for the divide between Chinese constitutionalism and foreign policy may be reflected in Ambassador Richard Solomon's advice that, "[t]he Chinese distrust impersonal or legalistic negotiations."<sup>7</sup> Although China's rising power status has caused both external and internal paradigm shifts regarding the perception of its ascension, the possibility of a crisis of "foreign affairs explod[ing] into constitutional controversy" is low precisely because the Chinese constitutional law of foreign affairs is very explicit.<sup>8</sup> China's foreign affairs are not only jurisdictionally

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<sup>5</sup> See Stephanie Kleine-Ahlbrandt, *Opinion: From Japan to the U.S., China Embarks on a Bolder Foreign Policy*, CNN (Nov. 24, 2013), <http://www.cnn.com/2013/11/24/opinion/china-foreign-policy/> (discussing China's design and implementation of a bolder foreign policy) (last visited Mar. 26, 2014).

<sup>6</sup> HENKIN, *supra* note 3, at 4–5. Yet there is room for practical distinction. The language of the 1970s conflated two distinct areas by suggesting that the bridge between them—the internal constitutional ramifications of extra constitutional and jurisdictional activities beyond the national territory—somehow became the entire field of analysis, thereby swallowing both the domestic realm of deep constitutionalism and the jurisdictional limits of foreign policy constitutionalism. The author notes the vast realist body of foreign policy literature.

<sup>7</sup> RICHARD H. SOLOMON, *CHINESE NEGOTIATING BEHAVIOR: PURSUING INTERESTS THROUGH 'OLD FRIENDS'* 4, 205 (2nd ed. 2001).

<sup>8</sup> See XIANFA pmbl., arts. 1, 29, 45, 53–55, 62, 63, 67, 81, 86, 89, 93, 94 (2004) (China); CONST. COMMUNIST PARTY OF CHINA General Program (2012) (China); HENKIN, *supra* note 3, at 4–5. See generally SUSAN L. SHIRK, *CHINA: FRAGILE SUPERPOWER* (2008) (discussing China's rise as a superpower from the perspective of a former U.S. Deputy Assistant Secretary of State); Qin Yaqing, *Struggle for Identity: A Political Psychology of China's Rise*, in *CHINA'S RISE IN HISTORICAL PERSPECTIVE* 249, 249–69 (Brantly Womack ed., 2010) (discussing China's growth as a Chinese professor and vice president of China Foreign Affairs University).

delegated by, but also substantively instructed by express provisions of the State and Chinese Communist Party (CCP) constitutions, which are subject to interpretation by the political branches of government, rather than independent judicial review.<sup>9</sup> Therefore, I submit that China's constitutional discourse is important for understanding the normative approach to Chinese foreign policy.

The Hu Jintao administration particularly advanced the seamlessness between Chinese constitutionalism and foreign policy.<sup>10</sup> Chairman Hu made China's international relations a fundamental plank of his constitutional platform.<sup>11</sup> His government promoted the "Peaceful Development" formulation of Chinese foreign policy, in tandem with the substantive constitutionalism of the "Scientific Development Outlook" and its goal of creating a "Socialist Harmonious Society."<sup>12</sup> As this tripartite linkage became more explicit, China's leaders sought to wed their foreign and domestic policies in an unprecedented way.<sup>13</sup> The official CCP stance on its various policies is that there is a single ideological line that began in the time of Deng Xiaoping and has continued through its most recent manifestation—the Scientific Development Outlook.<sup>14</sup> Because of the effort to unify all Chinese policy in a single ideological line, the Chinese constitutional law of foreign policy has become a unique extraterritorial projection of "socialism with Chinese characteristics."<sup>15</sup> From a practical standpoint, this enterprise should not be surprising, given that the bodies responsible for developing

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<sup>9</sup> See M. Ulric Killion, *Building Up China's Constitution: Culture, Marxism, and the WTO Rules*, 41 LOY. L.A. L. REV. 563, 578–79 (2008).

<sup>10</sup> See Larry Catá Backer, *The Rule of Law, the Chinese Communist Party, and Ideological Campaigns*: Sange Daibiao (the "Three Represents"), *Socialist Rule of Law, and Modern Chinese Constitutionalism*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 29, 90 (2006); Hu Jintao, Chairman of the Chinese Communist Party, Guanyu Goujian Shehui Zhuyi Heshe Shehui Jianghua (关于构建社会主义和谐社会讲话) [Speech at the Central Party School on the Building of a Socialist Harmonious Society] (Feb. 19, 2005), available at [http://www.gov.cn/ldhd/2005-06/27/content\\_9700.htm](http://www.gov.cn/ldhd/2005-06/27/content_9700.htm) [hereinafter Hu's Speech].

<sup>11</sup> See Hu's Speech, *supra* note 10.

<sup>12</sup> See *id.*; DAVID SHAMBAUGH, CHINA'S COMMUNIST PARTY: ATROPHY AND ADAPTATION 103–27 (2008); *China's National Defense in 2006*, STATE COUNCIL INFORMATION OFFICE, <http://www.china.org.cn/english/features/book/194421.htm> (last visited Mar. 26, 2014).

<sup>13</sup> See SHAMBAUGH, *supra* note 12 at 103–27; China's National Defense in 2006, *supra* note 12.

<sup>14</sup> See CONST. COMMUNIST PARTY OF CHINA General Program para. 7 (2012) ("Since the Party's Sixteenth National Congress, the Chinese Communists with Comrade Hu Jintao as their chief representative, following the guidance of Deng Xiaoping Theory and the important thought of Three Represents, have gained a deep understanding of major questions such as what kind of development China should achieve under new conditions and how it should achieve it to meet new requirements for development and answered these questions, and thus developed the Scientific Outlook on Development . . .").

<sup>15</sup> See generally *id.* (stating this goal fifteen times throughout the constitution, starting in paragraph one).

China's domestic constitutionalism are the same bodies charged with the ultimate management of foreign policy.<sup>16</sup>

This Article analyzes Chinese foreign policy from the perspective of Chinese constitutional law. Ambassador Solomon encouraged a generation of Chinese specialists to "understand the PRC political context and the style of your Chinese interlocutor."<sup>17</sup> One way these specialists could understand the PRC political context is by studying the dual constitutions, the highest official statements of China's governing norms and cultural narrative.<sup>18</sup> Indeed, by linking its foreign and domestic policies under the umbrella of constitutional law, the dual constitutions communicate China's intentions both to its people and the outside world. Furthermore, China's foreign policy actions are readily interpretable (at least in hindsight) through the lens of normative constitutionalism. Nonetheless, the Chinese approach remains thoroughly pragmatic, leaving room for both liberal and realist interpretations for future development of the Chinese constitutional law of foreign policy. Whatever the perspective of the observer, the exercise conducted herein has relevance because:

[F]oreign relations . . . cannot be understood in the light of the Constitution alone, but they cannot be understood without it, for it continues to be shaped by the institutions and the actions that determine them. If the conduct of foreign relations seems beset by politics rather than governed by law, it is the law of the Constitution that gives the politics its form and much of its content. Even the extra-constitutional institutions and processes which often seem to dominate the conduct of foreign relations are offspring of the Constitution and of needs created by its blueprint for government.<sup>19</sup>

This Article explores the relationship between Chinese constitutional law and foreign policy practice, and asserts that constitutional norms guide

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<sup>16</sup> See XIANFA art. 67(1) (2004). The locus of power of the Chinese state is the national people's congress standing committee, which has ultimate decision making power over key decisions as well as the ability to interpret the Chinese constitutions. See SHIRK, *supra* note 8, at 43–44.

<sup>17</sup> See SOLOMON, *supra* note 7, at 8–10. This is the eighth of eleven suggestions that the Ambassador shares. *Id.*

<sup>18</sup> See XIANFA pmbl. para. 13 (2004) ("This Constitution, in legal form, affirms the achievements of the struggles of the Chinese people of all ethnic groups and defines the basic system and basic tasks of the state; it is the fundamental law of the state and has supreme legal authority. The people of all ethnic groups, all state organs, the armed forces, all political parties and public organizations and all enterprises and institutions in the country must take the Constitution as the basic standard of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation."); CONST. COMMUNIST PARTY OF CHINA General Program para. 7 (2012).

<sup>19</sup> HENKIN, *supra* note 3, at 7.

foreign policy in ways that are not totally appreciated. Part I introduces both the structural (jurisdictional) and normative (substantive) dimensions of the constitutional bases of Chinese foreign policy. Part II explains the deep constitutionalism of the Hu Jintao administration and culminates in a discussion of the tripartite linkage between the Scientific Development, Socialist Harmonious Society, and Peaceful Development statements of constitutional law and foreign policy. Part III discusses several of the most serious foreign policy decisions of the Hu administration, including the management of Taiwan, the South China Sea, African investments, and rising international environmental awareness, in order to demonstrate how China's dual constitutions may have instructed its foreign policy apparatus. Based on these events and the letter of the constitutions, this Article predicts that the principal normative-constitutional challenge that China will face is securing the vast amount of resources it needs to continue developing while maintaining harmonious relations with the rest of the developing world.

### I. THE CONSTITUTIONAL LAW OF CHINESE FOREIGN POLICY

"Foreign affairs are national affairs,"<sup>20</sup> and national constitutions provide the blueprints for the functioning of states.<sup>21</sup> China's dual constitutions outline the distribution of governing authority in China.<sup>22</sup> Successive generations of Chinese leadership have committed the PRC government to following "the Rule of Law with Chinese Characteristics" and acting in conformity with the constitutions.<sup>23</sup> Meanwhile, academics and reformers have increasingly pushed for the PRC to follow their own interpretations—based on international human rights norms—of the Rule of Law with Chinese Characteristics.<sup>24</sup>

Any confusion about the Chinese constitutional law of foreign affairs may be the result of confusion about the dual constitutional system. China's State Constitution outlines the mechanics of the State's administrative apparatus, and the CCP constitution outlines the Chinese Communist Party's political machine.<sup>25</sup> As Professor Larry Catá Backer states:

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<sup>20</sup> *Id.* at 15.

<sup>21</sup> *See id.*

<sup>22</sup> *See* Backer, *supra* note 4, at 370–71. *See generally* XIANFA (2004) (laying out the organization of the State and the relationship between the State apparatus and the CCP); CONST. COMMUNIST PARTY OF CHINA (2012) (organizing and institutionalizing political authority).

<sup>23</sup> *See* Backer, *supra* note 4, at 405–06; *Xi Jinping Says All Must Act in Conformity with Constitution, Laws*, XINHUA (Feb. 24, 2013), [http://news.xinhuanet.com/english/china/2013-02/24/c\\_132189143.htm](http://news.xinhuanet.com/english/china/2013-02/24/c_132189143.htm) (last visited Mar. 26, 2014).

<sup>24</sup> *See* Edward Wong & Jonathan Ansfield, *Reformers Aim to Get China to Live Up to Own Constitution*, N.Y. TIMES, Feb. 4, 2013, at A5.

<sup>25</sup> *See* Backer, *supra* note 4, at 370–71.

[I]t is important to understand the constitutional system as being comprised of two documents—the Chinese [State] Constitution of 1982 and the constitution of the CCP, the party in power. The former lays out the organization of the state and the relationship between the state apparatus and the party in power . . . the later organizes and institutionalizes the manifestation of political authority within the nation.<sup>26</sup>

No understanding of the Chinese constitutional order is complete without reading both constitutions. The documents are meant to be read together, as evidenced by the Preamble of the State Constitution, which explicitly defers to the leadership of the CCP,<sup>27</sup> and Article One of the State Constitution, which refers to the “people’s democratic dictatorship,” the CCP.<sup>28</sup> In turn, the CCP Constitution confirms that the Party leads the people in overcoming the nation’s most difficult challenges, through “political, ideological, and organizational leadership.”<sup>29</sup> At least one scholar considers “Leadership of the Communist Party” to be one of the “Four Cardinal Principles” of Chinese Constitutional Law.<sup>30</sup> Once one understands the assumed separation of power between the administrative and the political, one can interpret the jurisdictional and normative provisions of the dual constitutions regarding the design of foreign policy.

#### *A. The Jurisdictional Constitutional Bases of the Chinese Foreign Policy Apparatus*

This section introduces the jurisdictional delegation of constitutional authority for the management of foreign affairs. The Chinese dual constitutions assign foreign affairs duties more clearly than their American counterpart.<sup>31</sup> The PRC government does not have an American-style separation of

<sup>26</sup> *Id.*

<sup>27</sup> See XIANFA pmbl. paras. 6, 7 (2004).

<sup>28</sup> *Id.* art. 1.

<sup>29</sup> CONST. COMMUNIST PARTY OF CHINA General Program para. 28 (2012).

<sup>30</sup> LIN FENG, *supra* note 4, at 23–35. The other three general concepts are the Principle of Guidance of Marxism-Leninism and Mao Zedong Thought, the Principle of People’s Democratic Dictatorship, and the Principle of Adherence to Socialism. See *id.*; see also DENG XIAOPING, *Uphold the Four Cardinal Principles: March 30, 1979*, in SELECTED WORKS OF DENG XIAOPING VOLUME II 1975–1982 (2001), available at <http://english.peopledaily.com.cn/dengxp/vol2/text/b1290.html> (“The socialist road, the dictatorship of the proletariat, the leadership of the Communist Party and Marxism-Leninism and Mao Zedong Thought—all these are tied up with democracy.”).

<sup>31</sup> Compare U.S. CONST. arts. I, §§ 8, 10, II, III, § 2, with XIANFA (2004), and CONST. COMMUNIST PARTY OF CHINA (2012). Although other sections of the U.S. Constitution can have an indirect effect on U.S. foreign relations, the instructive provisions are those herein. See U.S. CONST. arts. I, §§ 8, 10, II, III, § 2. The first mention of foreign policy powers is in Article I, § 8, granting Congress, among other things, the power to regulate Commerce with foreign Nations,

powers among theoretically co-equal branches of government.<sup>32</sup> Rather, Article 57 of the State Constitution makes an explicit grant of administrative power, saying, "The National People's Congress (NPC) of the People's Republic of China is the highest organ of state power. Its permanent body is the Standing Committee of the National People's Congress (NPCSC)."<sup>33</sup>

The State Constitution grants administrative power to the NPC and NPCSC in several areas that touch upon foreign affairs.<sup>34</sup> State Constitution Article 62 grants the NPC the power to "decide on the choice of . . . Ministers in charge of Ministries,"<sup>35</sup> to elect the Chairman of the Central Military Commission (CMC) and make other CMC appointments,<sup>36</sup> to examine and approve the State budget,<sup>37</sup> to establish special administrative regions,<sup>38</sup> and "to decide on questions of war and peace."<sup>39</sup>

Meanwhile, State Constitution Article 67 grants the NPCSC the following foreign affairs powers: to supervise the work of the State Council and the CMC;<sup>40</sup> to decide upon the appointment of Ministers and CMC posts (when the NPC is not in session);<sup>41</sup> to decide upon the appointment and recall of ambassadors;<sup>42</sup> to decide on the ratification and abrogation of "treaties and important agreements" concluded with foreign States;<sup>43</sup> and to declare war (when the NPC is not in session).<sup>44</sup> Furthermore, State Constitution Article 70 establishes a Foreign Affairs Committee under the auspices of the NPC and NPCSC.<sup>45</sup>

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define offenses against the law of nations, declare war, and provide for the armed services. *Id.* art. I, § 8. Article I, § 10, forbids the states from pursuing independent foreign policies. *Id.* art. I, § 10. Article II defines the formal powers of the President, which include commanding the armed forces, making treaties (provided two thirds of the Senators concur), nominating and with the consent of the Senate appointing Ambassadors. *Id.* art. II. Article III, § 2, assigns the Supreme Court power over cases arising from Treaties, original jurisdiction in all cases affecting ambassadors, appellate jurisdiction in all Cases of admiralty and maritime jurisdiction, and between a State, or the Citizens thereof, and foreign States. *Id.* art. III, § 2.

<sup>32</sup> See XIANFA art. 57 (2004); LIN FENG, *supra* note 4, at 62–63.

<sup>33</sup> XIANFA art. 57 (2004).

<sup>34</sup> See *id.* arts. 62, 67.

<sup>35</sup> *Id.* art. 62(5).

<sup>36</sup> *Id.* art. 62(6).

<sup>37</sup> *Id.* art. 62(10).

<sup>38</sup> *Id.* art. 62(13).

<sup>39</sup> *Id.* art. 62(14).

<sup>40</sup> *Id.* arts. 67(6), 94. Article 94 restates that the CMC Chairman is responsible to the NPC and NPCSC. *Id.* art. 94.

<sup>41</sup> *Id.* art. 67(11).

<sup>42</sup> *Id.* art. 67(13).

<sup>43</sup> *Id.* art. 67(14).

<sup>44</sup> *Id.* art. 67(18).

<sup>45</sup> *Id.* art. 70.



Though both the NPC and the NPCSC are charged with exercising the administrative authority of the State,<sup>46</sup> the NPCSC enjoys a higher status.<sup>47</sup> The NPCSC oversees the election of deputies to the NPC.<sup>48</sup> When the NPC is not in session, the NPCSC formally assumes decision-making authority over several areas that the NPC nominally controls.<sup>49</sup> Furthermore, whereas State Constitution Article 62 grants the NPC power to amend the constitution, State Constitution Article 67 grants the NPCSC the sole power to interpret the constitution.<sup>50</sup>

The Chinese executive branch is charged with conducting certain regular foreign policy functions, under the supervision of the NPC and NPCSC.<sup>51</sup> Ceremonial powers are reserved for the Chinese President, who is elected by the NPC.<sup>52</sup> The President appoints the Premier, Ministers, and State Council members, subject to NPC and NPCSC approval.<sup>53</sup> The State Council apparatus, “the highest organ of state administration,” is charged with executing laws and administrative will in internal and external affairs.<sup>54</sup> The State Council includes the heads of Ministries, including the Ministry of Foreign Affairs, which has authority to conduct foreign affairs, to conclude treaties and agreements with foreign States (which must be ratified by the NPC/NPCSC),<sup>55</sup> and to protect the rights and interests of Chinese nationals residing abroad.<sup>56</sup>

As stated, confusion over the Chinese constitutional law of foreign affairs may owe in part to overall confusion about its dual constitutional system.<sup>57</sup> According to the CCP Constitution, the CCP “leads the people” in the nation’s most arduous tasks,<sup>58</sup> “persists in its leadership over the People’s Liberation Army,”<sup>59</sup> and “adheres to an independent foreign policy of peace.”<sup>60</sup> The CCP Constitution also sets out the CCP’s Marxist-Leninist

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<sup>46</sup> See *id.* art. 58.

<sup>47</sup> See *id.* arts. 59, 67(1).

<sup>48</sup> *Id.* art. 59.

<sup>49</sup> See *id.* art. 61.

<sup>50</sup> See *id.* arts. 62, 67(1).

<sup>51</sup> *Id.* arts. 80, 81. Articles 80 and 81 permit the President to conduct several acts performed by heads of state pursuant to decisions the NPC and the NPCSC. See *id.* He may appoint and remove the Ministers, proclaim martial law (later amended to “a state of emergency”), proclaim war, issue mobilization orders, receive foreign representatives, appoint and recall ambassadors, and ratify and abrogate treaties all in accordance with NPC approval. *Id.*

<sup>52</sup> See *id.* art. 79.

<sup>53</sup> See *id.* art. 80.

<sup>54</sup> *Id.* art. 85; see *id.* art. 89.

<sup>55</sup> See *id.* arts. 86, 89(9).

<sup>56</sup> See *id.* art. 89(11).

<sup>57</sup> See *supra* notes 24–29 and accompanying text.

<sup>58</sup> See CONST. COMMUNIST PARTY OF CHINA General Program (2012).

<sup>59</sup> *Id.* General Program para. 18.

<sup>60</sup> *Id.* General Program para. 21.

organizational structure.<sup>61</sup> According to Professor Wang Cungang, the CCP bodies with the most influence on China's foreign policy are the CCP Central Committee, the CCP Central Committee Political Bureau (Politburo), the Politburo Standing Committee, the Central Foreign Affairs Leading Group, and the Central National Security Work Leading Group.<sup>62</sup> Dr. Susan Shirk, Former Deputy Assistant of State, described the jurisdictional boundaries between the State administrative apparatus and CCP political leadership in *China: Fragile Superpower*, writing:

The politicians in the Standing Committee of the Politburo take charge of policies toward the United States, Japan, and Taiwan [as opposed to foreign relations towards the other countries in the world, which is left to the Foreign Ministry] because they consider them "sensitive." In other words, they are domestic hot-button issues to which the public pays a lot of attention. Under Jiang Zemin, two high-level interagency groups of ministers similar to the U.S. National Security Council—the Foreign Affairs Leading Small Group and the Taiwan Affairs Leading Small Group—became the locus for decision making. Hu Jintao continues this practice, leading and regularly meeting with both groups.<sup>63</sup>

Others have asserted that the core foreign policy decision-making group was ultimately even smaller, consisting of just Hu Jintao, first secretary Xi Jinping, and secretary of the Foreign Affairs Leadings Group Dai Bingguo.<sup>64</sup> In any event, it is proper for State apparatus to defer to the PRC's political organs for important foreign policy decision-making, because of the inherently political nature of such issues.<sup>65</sup> Doing so is in line with the United States' political question doctrine, which leaves foreign relations to the political branches.<sup>66</sup> Naturally, the ruling party will have the power to develop the na-

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<sup>61</sup> See *id.* General Program para. 4. See generally LIN FENG, *supra* note 4, at 48–56 (discussing the influence of Marx's, Engels's, and Lenin's theory on the CCP).

<sup>62</sup> Wang Cungang (王存刚), *Dangjin zhongguo de waijiao zhengce: Shei zai zhiding? Shei zai yingxiang?* (当今中国的外交政策：谁在制定？谁在影响？) [China's Foreign Policy Today: Who Designs It? Who Does It Affect?], *WAIJIAO PINGLUN* (外交评论) [FOREIGN AFFAIRS REVIEW], no. 2, 2012, at 4.

<sup>63</sup> SHIRK, *supra* note 8, at 44. Dr. Shirk's analysis echoes an analysis by Hongyi Harry Lai. *External Policymaking Under Hu Jintao—Multiple Players and Emerging Leadership*, 41 *ISSUES & STUD.* 209, 209–44 (2005).

<sup>64</sup> See Alastair Iain Johnston, *How New and Assertive Is China's New Assertiveness?*, 37 *INT'L SECURITY* 7, 35 (2013).

<sup>65</sup> See *infra* notes 66–67 and accompanying text. In effect, Professor David Shambaugh asserts that the NPC remains a "puppet legislature that essentially rubber-stamps party policies" because the state apparatus must defer to CCP leadership in all political matters. SHAMBAUGH, *supra* note 12, at 179.

<sup>66</sup> See generally Louis Henkin, *Vietnam in the Courts of the United States: "Political Questions,"* 63 *AM. J. INT'L L.* 284 (1969) (explaining the political question doctrine).

tion's foreign and internal policies.<sup>67</sup> The seamless development between China's internal and foreign policy affairs, and the linkage of both to constitutional law is what is unique about the Chinese context.

### *B. The Normative Constitutional Bases of Chinese Foreign Policy Practice*

China's dual constitutions both include deep, substantive provisions for the proper conduct of domestic and foreign policy affairs.<sup>68</sup> For instance, the State Constitution insists that:

China consistently carries out an independent foreign policy and adheres to the *five principles* of [1] mutual respect for sovereignty and territorial integrity, [2] mutual non-aggression, [3] non-interference in each other's internal affairs, [4] equality and mutual benefit, and [5] peaceful coexistence in developing diplomatic relations and economic and cultural exchanges with other countries  
 . . . .<sup>69</sup>

The "Five Principles" were adopted by Mao Zedong and incorporated into the 1949 Common Program, the PRC's original governing document.<sup>70</sup> They have been repeated in every State constitution promulgated since, including the current CCP Constitution, as well as in the 1954 Panchsheel Treaty between China and India.<sup>71</sup>

The dual constitutions are the results of years of Chinese constitutional theory. Four of China's first five paramount leaders stamped their imprint on the dual constitutions by incorporating the titles of their primary political platforms into them.<sup>72</sup> Both the Preamble of the State Constitution and the text of the CCP Constitution recognize, in addition to adherence to the ideology of Marxism-Leninism,<sup>73</sup> the ideological guidance of Mao Zedong

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<sup>67</sup> See Wang, *supra* note 62, at 4.

<sup>68</sup> See XIANFA pmb. (2004); CONST. COMMUNIST PARTY OF CHINA General Program para. 22 (2012).

<sup>69</sup> XIANFA pmb. (2004).

<sup>70</sup> *China's Initiation of the Five Principles of Peaceful Co-Existence*, MINISTRY OF FOREIGN AFF. OF CHINA (Nov. 17, 2000), <http://www.fmprc.gov.cn/eng/ziliao/3602/3604/t18053.htm> (last visited Mar. 26, 2014).

<sup>71</sup> See *id.*; CONST. COMMUNIST PARTY OF CHINA General Program para. 22 (2012) ("[The CCP] develops relations between China and other countries on the basis of the five principles of mutual respect for sovereignty and territorial integrity, mutual nonaggression, noninterference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence.").

<sup>72</sup> See *infra* notes 73–78 and accompanying text. No explicit contribution is recorded from Hua Guofeng, the transitional figure between Mao and Deng. See XIANFA (2004); CONST. COMMUNIST PARTY OF CHINA (2012).

<sup>73</sup> See XIANFA pmb. (2004); CONST. COMMUNIST PARTY OF CHINA General Program (2012) ("Marxism-Leninism brings to light the laws governing the development of the history of human society. Its basic tenets are correct and have tremendous vitality.").

Thought,<sup>74</sup> Deng Xiaoping Theory,<sup>75</sup> and Jiang Zemin's Important Thought of the Three Represents.<sup>76</sup> Hu Jintao's major contribution, the Scientific Development Outlook, was spirited into the CCP Constitution in 2007.<sup>77</sup> In 2012, the Scientific Development Outlook was the subject of a major discursive amendment which, if tradition holds, is a prelude to its incorporation into the State Constitution in the near future.<sup>78</sup>

Each iteration of new substantive constitutionalism claims to refine the ones before it,<sup>79</sup> an example of the ongoing national commitment to renew

<sup>74</sup> See XIANFA pmbl. (2004); CONST. COMMUNIST PARTY OF CHINA General Program para. 4 (2012) ("[I]ntegrating the basic tenets of Marxism-Leninism with the concrete practice of the Chinese revolution. Mao Zedong Thought is Marxism-Leninism as applied and developed in China . . .").

<sup>75</sup> See XIANFA pmbl. (2004); CONST. COMMUNIST PARTY OF CHINA General Program para. 5 (2012). The CCP Constitution defined Deng Xiaoping Theory in part as: "shift[ing] the focus of the work of the whole Party onto economic development and carr[ying] out reform and opening to the outside world, ushering in a new era of development in the cause of . . . building of socialism with Chinese characteristics." CONST. COMMUNIST PARTY OF CHINA General Program para. 5 (2012).

<sup>76</sup> See XIANFA pmbl. (2004); CONST. COMMUNIST PARTY OF CHINA General Program para. 6 (2012). The CCP Constitution defined the Three Represents by stating in part that: "[I]t reflects new requirements for the work of the Party and state arising from the developments and changes in China and other parts of the world today; it serves as a powerful theoretical weapon for strengthening and improving Party building and for promoting self-improvement . . . ." CONST. COMMUNIST PARTY OF CHINA General Program para. 6 (2012).

<sup>77</sup> See Cary Huang & Teddy Ng, *Hu Jintao's 'Scientific Development' to Live on in Revised Constitution*, SOUTH CHINA MORNING POST (Nov. 8, 2012), <http://www.scmp.com/news/china/article/1077395/hu-jintaos-scientific-development-live-revised-constitution> (last visited Mar. 26, 2014).

<sup>78</sup> See *id.* This will likely occur in 2014. Deng Xiaoping Theory was added to the CCP Constitution in 1997, months after his death, and to the State Constitution two years later. See Zou Keyuan, *The Party and the Law*, in *THE CHINESE COMMUNIST PARTY IN REFORM* 77, 79–80 (Kjeld Erick Brodsgaard & Zheng Yongnian eds., 2006). Three Represents ideology was added to the CCP Constitution upon the retirement of Jiang Zemin from the post of General Secretary of the CCP in 2002 and added to the State Constitution two years later in 2004. See *id.* at 80. Although the first iteration of Scientific Development Concept was spirited into the CCP Constitution in 2007, when Hu Jintao still had a full term in office ahead of him, the significant discursive amendment of 2012 may have restarted the constitutional clock. See *Background: Major Previous Amendments to CPC Constitution*, PEOPLE DAILY (Oct. 21, 2007), <http://english.peopledaily.com.cn/90002/92169/92190/6287688.html> (last visited Mar. 26, 2014); *Full Text of Resolution on Amendment to CPC Constitution*, CHINA DAILY (Nov. 14, 2012), [http://usa.chinadaily.com.cn/2012-11/14/content\\_15927800.htm](http://usa.chinadaily.com.cn/2012-11/14/content_15927800.htm) (last visited Mar. 26, 2014); *Hu Jintao Re-elected CPC Chief for Second Term*, TIMES OF INDIA (Oct. 22, 2007), <http://timesofindia.indiatimes.com/world/china/Hu-Jintao-re-elected-CPC-Chief-for-second-term/articleshow/2480428.cms?referral=PM> (last visited Mar. 26, 2014). Hu's term as General Secretary expired in 2012. See *Checkered End-of-Term Report Card for Hu Jintao*, CNN (Nov. 9, 2012), <http://www.cnn.com/2012/11/08/world/asia/china-hu-jintao-report-card-florcruz/> (last visited Mar. 26, 2014).

<sup>79</sup> See CONST. COMMUNIST PARTY OF CHINA General Program (2012). For instance, Deng Xiaoping Theory is described in the CCP Constitution as:

the outcome of the integration of the basic tenets of Marxism-Leninism with the practice of contemporary China and the features of the times, a continuation and de-

the official CCP ideological line.<sup>80</sup> Through this canonization process, which incorporates the political platforms of past leaders into the PRC's dual constitutions, the CCP claims an unbroken chain of title to the utilization of Marxism-Leninism as its guide to action.<sup>81</sup> This claim persists even though Marxism-Leninism itself has been redefined several times since the 1950s, with its latest manifestation being the Scientific Development Outlook.<sup>82</sup> These platforms are the context in which one should view the Chinese constitutional law of foreign policy, which the Hu Administration attempted to merge with domestic constitutionalism.

## II. THE PILLARS OF CHINESE FOREIGN POLICY UNDER THE HU JINTAO ADMINISTRATION

### A. The Constitutional "Scientific Development Outlook"

Like his predecessors, Chairman Hu introduced several policy formulations and frameworks into the CCP's governing lexicon. His signature platform, the "Scientific Development Outlook" (*Kexue Fazhanguan*, also known simply as "Scientific Development"), was first conceptualized as an extension of Jiang Zemin's "Three Represents" (*Sange Diabiao*) in 2003.<sup>83</sup>

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velopment of Mao Zedong Thought under new historical conditions; it represents a new stage of development of Marxism in China, it is Marxism of contemporary China.

*Id.* para. 5. Three Represents is described as "a continuation and development of Marxism-Leninism, Mao Zedong Thought and Deng Xiaoping Theory." *Id.* para. 6.

<sup>80</sup> See *id.* para. 6. From a comparative perspective, it would almost be as if the more renowned American political platforms—Franklin Roosevelt's New Deal, Lyndon Johnson's Great Society, and Ronald Reagan's Reaganomics, for example—were each explicitly defined in such a way to be coherent successions, endowed with interpretive force, and amended into the Preamble of the United States Constitution. Compare *id.*, with U.S. CONST. pmbl.

<sup>81</sup> CONST. COMMUNIST PARTY OF CHINA General Program paras. 2–7 (2012).

<sup>82</sup> See *id.* See generally V.I. LENIN, "LEFT-WING" COMMUNISM, AN INFANTILE DISORDER: A POPULAR ESSAY IN MARXIAN STRATEGY AND TACTICS (1940) (rejecting criticism that he (Lenin) had been too compromising, and arguing that a strategic commitment to Marxism justifies tactical flexibility).

<sup>83</sup> See Hu Jintao, Chairman, Communist Party of China, Report Delivered at the 17th Party Congress § III: Thoroughly Applying the Scientific Outlook on Development para. 2 (Oct. 15, 2007), available at [http://news.xinhuanet.com/english/2007-10/24/content\\_6938749\\_2.htm](http://news.xinhuanet.com/english/2007-10/24/content_6938749_2.htm) [hereinafter 17th Party Report]; Hu Jintao, Zai "Sange Daibiao" Yantaohui Shangde Zhongyao Jianghua (在"三个代表"研讨会上的重要讲话) [Speech at the Theoretical Discussion Meeting on the Important Thought of the "Three Represents"] (July 1, 2003), available at <http://www.people.com.cn/GB/shizheng/1024/1946147.html>. The Three Represents are often stated as:

1. The Party should represent the advanced productive forces in society,
2. The Party should represent the advanced modern culture, and
3. The Party should represent the interests of the vast majority of the people.

SHAMBAUGH, *supra* note 12, at 111. Chairman Hu, realizing that in order to adapt to the new realities of China's reform the CCP must reflect the fundamental interests and common aspirations

Far less narrowly-tailored than the Three Represents, Scientific Development was designed as an umbrella concept, encompassing a wide range of policies.<sup>84</sup> Early iterations of the Scientific Development Outlook included topics as diverse as education, energy, the environment, ethnic minority relations, State-owned enterprise reform, and anti-corruption.<sup>85</sup> Although its final articulation is still being authored, as of the time of this writing, the CCP Constitution includes this definition:

[T]he Scientific Outlook on Development . . . puts people first and calls for comprehensive, balanced and sustainable development . . . It is the crystallization of the collective wisdom of the [CCP] and a guiding ideology that must be upheld and applied in developing socialism with Chinese characteristics.<sup>86</sup>

Some critics believe that the most tangible ways to “put people first” and ensure “comprehensive, balanced and sustainable development”<sup>87</sup> are to narrow the income gap, lessen regional development disparities, and strive for a more evenly developed society.<sup>88</sup> To do so in the context of China would require a platform for monumental social transformation.

### *B. The Political “Socialist Harmonious Society” Platform*

The most developed theorem within Scientific Development is a socio-economic vision which scholars have summarized as “Socialist Harmonious Society” (*Shehuizhuyi de Hexie Shehui*). This focus on bringing about a “Socialist Harmonious Society” is meant to indicate China’s change in focus from pursuit of unbridled economic growth to overall social balance and harmony.<sup>89</sup> As one observer has noted, “[i]f Scientific Development suggests the dynamic element of Chinese substantive constitutionalism, the

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of the broad masses of the people, shifted the emphasis on Jiang Zemin’s Three Represents from the first prong to the third prong, i.e., “the interests of the vast majority of the people.” *Id.* at 114; Backer, *supra* note 4, at 374–75.

<sup>84</sup> See SHAMBAUGH, *supra* note 12, at 119.

<sup>85</sup> See *id.* at 119–20; Sharon R. Wesoky, *Harmony and Critique: Chinese Modernity, Harmonious Society, and Contemporary Chinese Feminist Perspectives*, in CHINA’S RISE TO POWER: CONCEPTIONS OF STATE GOVERNANCE 49, 51–59 (Joseph Tse-Hei Lee et al. eds., 2012).

<sup>86</sup> CONST. COMMUNIST PARTY OF CHINA General Program para. 7 (2012). This lack of specificity may be due to the fact that it was drafted into the Constitution while Hu Jintao still had a full term ahead of him, as opposed to the namesake programs of his predecessors Deng, who had just passed away, and Jiang, who was relinquishing his remaining formal power. See *supra* note 78.

<sup>87</sup> 17th Party Report, *supra* note 83, at § III: Thoroughly Applying the Scientific Outlook on Development.

<sup>88</sup> See HU ANGANG, CHINA IN 2020: A NEW TYPE OF SUPERPOWER 143–44 (2011).

<sup>89</sup> See Backer, *supra* note 4, at 375–78. This too was building upon Jiang Zemin’s stated goal of creating a *Xiaokang* Society which aims for an essentially well-off middle-class oriented populous. See SHAMBAUGH, *supra* note 12, at 115.

*equally potent* notion of ‘Harmonious Society’ provides its object.”<sup>90</sup> Hu Jintao explained the goal of a Socialist Harmonious Society in an important speech to the Central Party School on 19 February 2005, stating:

In short, our Party has proposed building a *Socialist Harmonious Society*, both on a scientific summary of the experience of China’s reform and opening up and modernization, but also in the new situation at home and abroad to improve the party’s ability to implement the *Scientific Development Concept*, to better promote China’s economic social development of strategic initiatives.<sup>91</sup>

This formulation appeals to Chinese traditions while addressing (at least rhetorically) China’s massive social challenges. The semantics of the Socialist Harmonious Society begin to tie together modern CCP ideological development with China’s rich and ancient past.<sup>92</sup> Chairman Hu strengthened this link by emphasizing the universal struggle of social harmony, as well as quoting prominent, classical Chinese scholars, saying, “A lot of thought about social harmony has been produced in the history of our country. For example, Confucius said, ‘and for you,’ Mozi proposed ‘universal love’ and ‘love the poor’ social programs, and Mencius depicted the ‘little children social status’ . . . .”<sup>93</sup>

The impetus for this initiative may have been a 1999 policy speech by Li Ruihuan, then President of the Chinese People’s Political Consultative Congress and a long-time member of the Politburo of the Central Committee, who stated:

More than 2,000 years of history have proven that the teachings of Confucianism can inspire us as means to resolve the problems confronting human societies. We must adopt towards these teachings a *scientific method* and attitude—we must study them, systematise them, synthesise them, keep what is best and reject the rest . . . .<sup>94</sup>

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<sup>90</sup> Backer, *supra* note 4, at 375 (emphasis added).

<sup>91</sup> Hu’s Speech, *supra* note 10.

<sup>92</sup> See SHAMBAUGH, *supra* note 12, at 115–19. The term “Harmonious Society” rings of Confucian overtones, while “Socialist” reminds us that it is a uniquely modern program tied to the Communist experience and the regime’s focus on “socialism with Chinese characteristics.” See *id.* at 116.

<sup>93</sup> Hu’s Speech, *supra* note 10. Modern scholars excited by references to Confucianism in contemporary Chinese political discourse claim that this trend began years sooner. See Sébastien Billioud, *Confucianism, “Cultural Tradition,” and Official Discourse in China at the Start of the New Century*, CHINA PERSPECTIVES, 2007/3, at 50, 52–53, available at chinaperspectives.revues.org/pdf/2033 (last visited Mar. 26, 2014).

<sup>94</sup> LI RUIHUAN, XUE ZHEXUE, YONG ZHEXUE (学哲学 用哲学) [STUDYING PHILOSOPHY, USING PHILOSOPHY], 681 (2006) (emphasis added). Li Ruihuan, Gu Mu, and Ye Xuanping all

This quote explains that China will not resemble a neo-Confucian State in the near future,<sup>95</sup> but rather suggests that the Socialist Harmonious Society is the vehicle for what Li Ruihuan advised: beginning to merge modern China with its rich history by “cherry-picking” the useful elements.<sup>96</sup>

More practically, the Socialist Harmonious Society plank of the Scientific Development concept is meant to address China’s growing sense of social and economic injustice.<sup>97</sup> Whereas the socioeconomic policies pursued by Deng Xiaoping and Jiang Zemin delivered tremendously positive results, modern China features staggering income disparity, and social stratification.<sup>98</sup> This has prompted lamentation from Chinese observers that, “Our society has many contradictions and uncertain factors in it, such as huge gaps in income, increasingly serious problems facing rural areas, farmers and agriculture, the drainage of farmland, heavy pressure in the workplace and an incomplete social security system.”<sup>99</sup>

Chairman Hu’s formative experiences in China’s deep interior likely gave him an important perspective on these growing problems,<sup>100</sup> thereby inspiring his attempted domestic reforms under the banner of the Socialist Harmonious Society.<sup>101</sup> Chairman Hu embraced and expanded his predecessor’s 1999 initiative to “Open Up the West” (*xibu da kaifa*),<sup>102</sup> which shifted

called for a re-evaluation of Confucianism. WILLY WO-LAP LAM, CHINESE POLITICS IN THE HU JINTAO ERA: NEW LEADERS, NEW CHALLENGES 280 (2007).

<sup>95</sup> See LI RUIHUAN, *supra* note 94, at 681; see also Jiang Qing & Daniel A. Bell, Op-Ed, *A Confucian Constitution for China*, N.Y. TIMES, July 11, 2012, at A25 (arguing that the political future of China is far likelier to be determined by the longstanding Confucianism).

<sup>96</sup> See LI RUIHUAN, *supra* note 94, at 97.

<sup>97</sup> See SHAMBAUGH, *supra* note 12, at 115–19.

<sup>98</sup> See *Harmonious Society*, CHINA DAILY (Sept. 29, 2007), <http://english.people.com.cn/90002/92169/92211/6274603.html> (last visited Mar. 26, 2014).

<sup>99</sup> *Id.*

<sup>100</sup> See *Hu Jintao*, GOV.CN (Mar. 15, 2008), [http://english.gov.cn/2008-03/15/content\\_922944.htm](http://english.gov.cn/2008-03/15/content_922944.htm) (last visited Mar. 26, 2014). According to his official government biographical sketch, Hu Jintao was born in Anhui Province and attended Tsinghua University in Beijing, but served his early career in inland and impoverished Gansu and Guizhou Provinces as well as Tibet. *Id.*

<sup>101</sup> See Hu’s Speech, *supra* note 10. Hu noted this in his policy speech, elaborating seven fundamental measures for building a Socialist Harmonious Society: (1) To reverse the trend of excessive financial concentration; (2) To continue to strengthen anti-corruption and anti-bribery efforts; (3) To improve the personal income tax system and strengthen tax enforcement efforts; (4) To narrow the economic gap between urban and rural areas and seek poverty reduction; (5) To promote urbanization and demographically expand employment; (6) To create a more dynamic and well-trained work force; and (7) To establish a universal “saving” society. See *id.*

<sup>102</sup> Heike Holbig, *The Emergence of the Campaign to Open Up the West: Ideological Formation, Central-Decision Making and the Role of the Provinces*, 178 CHINA Q. 335, 354 (2004); see also Guowuyuan guanyu shishi xibu dakaifa ruogan zhengce cuoshi de tongzhi (国务院关于印发实施西部大开发若干政策措施的通知) [Circular of the State Council Concerning Several Policies on Carrying out the Development of China’s Vast Western Regions] (promulgated by St. Council, Oct. 26, 2000, effective Jan. 1, 2001), GUOFA, Oct. 26, 2000, available at <http://www.asianlii.org/cn/legis/cen/laws/cotscspocotdocvwr1122/>.



the focus of national development to China's poorer western regions for the first time since 1978.<sup>103</sup> According to official statistics, the Gross Domestic Product of China's west jumped four-fold at an annual average growth rate of 11.7 percent between 2000 and 2008, allowing more than 9.54 million residents to escape poverty.<sup>104</sup> These successes are likely what led to the inclusion of the Socialist Harmonious Society in the CCP Constitution. The CCP Constitution now states:

[The CCP] leads the people in building a harmonious socialist society . . . the Party focuses its efforts on ensuring and improving the people's well-being by solving the most specific problems of the utmost and immediate concern to the people, works to enable all the people to share in more fruits of development in a more equitable way, and strives to create a situation in which all people do their best, find their proper places in society and live together in harmony.<sup>105</sup>

### C. The "Peaceful Development" Strategy of Foreign Policy

Chairman Hu's administration introduced the concept of China's "Peaceful Rise" (*heping jueqi*)—quickly revised to the less provocative "Peaceful Development" (*heping fazhan*)—to describe China's modern foreign policy approach.<sup>106</sup> Though much has been written on the meaning of this foreign policy framework, it has rarely been considered in the context of China's dual constitutions, where there is ample room for both realist and liberal interpretations, as well as future development.<sup>107</sup>

#### 1. The Normative/Liberal Approach to "Peaceful Development"

The modern statement of the Peaceful Development strategy began with Zheng Bijian's diplomatic study tour of the United States in 2002.<sup>108</sup>

<sup>103</sup> Holbig, *supra* note 102, at 335, 340; Fan Jie, *Western Development Policy: Changes, Effects and Evaluation*, in *DEVELOPING CHINA'S WEST: A CRITICAL PATH TO BALANCED NATIONAL DEVELOPMENT* 79, 85–88 (Y.M. Yeung & Shen Jinfa eds., 2004); see Shiwu xibu kaifa zongti guihua ("十五"西部开发总体规划) [The Tenth Comprehensive Five-Year Plan for Development of the West] (promulgated by the Nat'l Dev. & Reform Comm'n, and the W. Dev. Off. of the St. Council, July 10 2002), No. 259 (China), available at [http://big5.gov.cn/gate/big5/www.gov.cn/gongbao/content/2003/content\\_62545.htm](http://big5.gov.cn/gate/big5/www.gov.cn/gongbao/content/2003/content_62545.htm) (last visited Mar. 26, 2014).

<sup>104</sup> See *Western Development Strategy*, CHINA DAILY (Dec. 22, 2009), [http://www.chinadaily.com.cn/china/westdevelopment/2009-12/22/content\\_9215054.htm](http://www.chinadaily.com.cn/china/westdevelopment/2009-12/22/content_9215054.htm) (last visited Mar. 26, 2014).

<sup>105</sup> CONST. COMMUNIST PARTY OF CHINA General Program para. 17 (2012).

<sup>106</sup> See Bonnie S. Glaser & Evan S. Medeiros, *The Changing Ecology of Foreign-Policy-Making in China: The Ascension and Demise of the Theory of "Peaceful Rise,"* 190 CHINA Q. 291, 229–301 (2007).

<sup>107</sup> See *supra* notes 6–16 and accompanying text.

<sup>108</sup> See Glaser & Medeiros, *supra* note 106, at 293–94.

Henry Kissinger asserts that Zheng and Hu developed this term after the tour in an effort to characterize China as a responsible world leader, committed to internal domestic development and the prudent application of soft power abroad.<sup>109</sup> This linkage of domestic economic development to foreign policy is consistent with the letter of the CCP Constitution, which states:

The [CCP] adheres to an independent foreign policy of peace, follows the path of peaceful development and a win-win strategy of opening up, takes both the domestic and international situations into consideration, and vigorously develops relations with other countries in order to bring about a favorable international environment for China's reform, opening up and modernization.<sup>110</sup>

In this section, the CCP Constitution explicitly links internal development to foreign policy.<sup>111</sup> Hu Jintao then linked Scientific Development, Socialist Harmonious Society, and Peaceful Development together in a speech in February 2005.<sup>112</sup> Hu said, "our Party has proposed building a *Socialist Harmonious Society* . . . in the new situation at home and abroad, to improve the party's ability to implement the *Scientific Development Concept*."<sup>113</sup> Such statements would become a recurring theme for the remainder of the Hu administration.<sup>114</sup> On harmonious international relations, Chairman Hu said:

From an international perspective, building a Socialist Harmonious Society is an inevitable requirement for us to grasp the complex and volatile international situation. . . . Overall, [there now exist] rare opportunities and favorable conditions to the development of China's reform, and so long as we hold high the banners of peace, development, and cooperation, calmly observe and firmly grasp the international situation, and deal with international affairs initiatives, will be able to create a favorable strategic situation in our country in order to fight for a longer term and

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<sup>109</sup> See HENRY KISSINGER, ON CHINA 499–503 (2011).

<sup>110</sup> CONST. COMMUNIST PARTY OF CHINA General Program para. 22 (2012).

<sup>111</sup> *Id.*

<sup>112</sup> See Hu's Speech, *supra* note 10.

<sup>113</sup> *Id.*

<sup>114</sup> See Hu Jintao, Chairman of the Chinese Communist Party, Report at Eighteenth Party Congress (Nov. 17, 2012), available at [http://news.xinhuanet.com/english/special/18cpcnc/2012-11/17/c\\_131981259\\_2.htm](http://news.xinhuanet.com/english/special/18cpcnc/2012-11/17/c_131981259_2.htm) ("New progress has been made in China's diplomacy . . . . We have promoted reform in global governance, enhanced world peace and development, secured more representation and a greater say for China in international affairs, and created favorable international conditions for China's reform and development.").

more favorable international and surrounding environment for China's modernization.<sup>115</sup>

## 2. The Realist Approach to "Peaceful Development"

The realist approach to "Peaceful Development" is that the Peaceful Development Strategy does not imply pacifism. Chinese leaders have used the Peaceful Development Strategy as a justification for enhancing the military, claiming that a favorable strategic situation in foreign policy is critical for domestic development.<sup>116</sup> In 2005, Hu stated:

At the same time, we must be soberly aware that the world today is still far from being tranquil [and] the regional and international security situation is not optimistic. . . . In such a complex and volatile international situation, to mount a stronger response to external challenges and risks, we must do a good job domestically, maintaining national unity, ethnic unity, and social stability.<sup>117</sup>

China unapologetically increased its police and military capabilities, and adopted a more assertive weapons procurement campaign during Hu's tenure, including such high-profile acquisitions as anti-satellite missiles, anti-carrier missiles, and an aircraft carrier.<sup>118</sup> The CCP Constitution honors the military's ongoing role "in the socialist modernization drive"<sup>119</sup> and Hu applauded China's accelerated military build-up during his farewell address to the 18th Communist Party Congress in 2012, saying "Our endeavors to strengthen national defense aim to safeguard China's sovereignty, security and territorial integrity and ensure its peaceful development."<sup>120</sup>

Even though the Peaceful Development Strategy includes a robust strategic outlook, it has its hawkish critics within China.<sup>121</sup> There are early in-

<sup>115</sup> Hu's Speech, *supra* note 10.

<sup>116</sup> *See id.*

<sup>117</sup> *Id.* Critics of the Socialist Harmonious Society claim that it is a euphemism for increased domestic security intended to suppress dissenting opinion, or "no self-initiated disruptive attempts." See Pin Ho & Wen Huang, Opinion, *Hu Jintao: The Mysterious Man Behind China's "Harmonious Society,"* CHRISTIAN SCIENCE MONITOR (Apr. 15 2010), <http://www.csmonitor.com/Commentary/Opinion/2010/0415/Hu-Jintao-the-mysterious-man-behind-China-s-harmonious-society> (last visited Mar. 26, 2014).

<sup>118</sup> See Kathrin Hille, *A Show of Force: Fears Are Growing over the Hold China's Well-Equipped Army Has over Foreign Policy*, FIN. TIMES (Sept. 29, 2011), <http://www.ft.com/cms/s/0/42b2bdba-e9d5-11e0-bb3e-00144feab49a.html> (last visited Mar. 26, 2014).

<sup>119</sup> CONST. COMMUNIST PARTY OF CHINA General Program para. 19 (2012).

<sup>120</sup> Hu Jintao, *supra* note 114, at § IX: Accelerating the Modernization of National Defense and the Armed Forces.

<sup>121</sup> See generally LIU MINGFU, ZHONGGUO MENG: HOU MEIGUO SHIDAI DE DAGUO SIWEI ZHANLUE DINGWEI (中国梦:后美国时代的大国思维与战略定位) [CHINA DREAM: THE GREAT

dications that Xi Jinping will name his own approach to substantive constitutionalism “Chinese Dream” (*Zhongguo Meng*), after a book by Colonel Liu Ming Fu, a professor at the National Defense University in Beijing.<sup>122</sup> In the book, Liu asserts that Beijing should develop its military forces, in part to displace the global leadership of the United States.<sup>123</sup> Henry Kissinger notes that Liu’s views, though not necessarily commanding a majority, reflect “at least some portion of China’s institutional structure.”<sup>124</sup>

Those Chinese hawks may have a louder voice in foreign policy within the Xi Jinping administration. In the first 100 days of the Xi Administration, Chinese troops allegedly entered disputed land between China and India,<sup>125</sup> two influential Chinese Academy of Social Sciences (CASS) scholars asserted a challenge to Japanese administration of the Ryukyu Islands on the basis of its historic tributary status,<sup>126</sup> and Xi himself spoke of a “strong-army dream.”<sup>127</sup> Given the ultimate reach of the tributary system,<sup>128</sup> and claims regarding the destinations of the legendary Ming Dynasty explorer Zheng He,<sup>129</sup> the geographic scope of possible future claims is broad.<sup>130</sup>

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POWER THINKING AND STRATEGIC POSITIONING OF CHINA IN THE POST-AMERICAN AGE] (2010) (supporting a more bellicose approach to Chinese policy).

<sup>122</sup> *Id.* The title of the book translates to: “Chinese Dream: The Great Power Thinking and Strategic Positioning in the Post-American Age.” *Id.* See Robert Lawrence Kuhn, Op-ed, *Xi Jinping’s Chinese Dream*, N.Y. TIMES (June 4, 2013), <http://www.nytimes.com/2013/06/05/opinion/global/xi-jinpings-chinese-dream.html?pagewanted=all> (last visited Mar. 26, 2014).

<sup>123</sup> See generally LIU, *supra* note 121 (advancing a number of reasons why China should develop its military forces).

<sup>124</sup> KISSINGER, *supra* note 109, at 505.

<sup>125</sup> *India and China ‘Pull Back Troops’ in Disputed Border Area*, BBC (May 6, 2013), <http://www.bbc.co.uk/news/world-asia-india-22423999>; *Xi Jinping Fast Facts*, CNN (Mar. 26, 2013), <http://www.cnn.com/2013/01/04/world/asia/xi-jinping—fast-facts/> (last visited Mar. 26, 2014).

<sup>126</sup> Zhang Haipeng, “*Maguan tiaoyue*” *Yu Diaoyudao Wenti* (《马关条约》与钓鱼岛问题) [On the “Treaty of Shimonoseki” and the Diaoyu Islands Issue], XINHUA (May 8, 2013), [http://news.xinhuanet.com/politics/2013-05/08/c\\_115676174.htm](http://news.xinhuanet.com/politics/2013-05/08/c_115676174.htm) (last visited Mar. 26, 2014) [hereinafter *CASS Report*].

<sup>127</sup> *Xi Jinping and the Chinese Dream*, ECONOMIST (May 4, 2013), <http://www.economist.com/news/leaders/21577070-vision-chinas-new-president-should-serve-his-people-not-nationalist-state-xi-jinping> (last visited Mar. 26, 2014).

<sup>128</sup> See J.K. Fairbank, *Tributary Trade and China’s Relations with the West*, 1 FAR E. Q. 129, 136 (1942).

<sup>129</sup> See GAVIN MENZIES, 1421: THE YEAR CHINA DISCOVERED AMERICA 74–75 (2008). The most controversial statement of Zheng’s reach was made by Gavin Menzies, who claims that Zheng He’s expeditions colonized the Americas. See *id.* at 405–06.

<sup>130</sup> See Ilona Raskolnikova, *China Has Territorial Claims to Nearly 20 Countries* PRAVDA (July 17, 2012), [http://english.pravda.ru/world/asia/17-07-2012/121658-china\\_territorial\\_claims-0/](http://english.pravda.ru/world/asia/17-07-2012/121658-china_territorial_claims-0/) (last visited Mar. 26, 2014).

### 3. Balancing the Views Under Hu Jintao

Hu always sought to assuage acute fears about China's increasing capacity for belligerence by repeatedly emphasizing the peaceful development overtone.<sup>131</sup> The PRC government conducted a media blitz in late 2005 to emphasize its focus on peaceful development.<sup>132</sup> As part of this media blitz, Hu proposed the development of a "harmonious world" at 60th anniversary summit for United Nations establishment in September;<sup>133</sup> Zheng published a piece for *Foreign Affairs* in October;<sup>134</sup> and the PRC released a white paper entitled "China's Peaceful Development Road" in December, announcing that China would "persist unswervingly in taking the road of peaceful development."<sup>135</sup> Hu's government would repeat these promises many more times, including his final report to the 18th Party Congress in 2012.<sup>136</sup> In expressing the seamlessness between China's internal and external policies one last time, Hu explained:

China will continue to keep in mind both the interests of the Chinese people and the common interests of the people of all countries, get more actively involved in international affairs, play its due role of a major responsible country, and work jointly with other countries to meet global challenges.<sup>137</sup>

Professor Hu Angang offers the most eloquent scholarly summation of the Peaceful Development nexus yet, writing:

China's rise has been defined by peaceful development. Throughout this process, China and the international community have

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<sup>131</sup> Hu delivered several speeches in 2005 alone asserting peaceful development. See, e.g., Hu Jintao, Chairman of the Chinese Communist Party, Speech to G20: Strengthening Global Cooperation to Promote Common Development (Oct. 15, 2005), available at [http://english.gov.cn/2005-10/16/content\\_78589.htm](http://english.gov.cn/2005-10/16/content_78589.htm) [hereinafter G20 Speech]; *Hu Jintao Delivers an Important Speech at the UN Summit*, MINISTRY OF FOREIGN AFFAIRS OF CHINA (Sept. 16, 2005), <http://www.china-un.org/eng/zt/shnh60/t212614.htm> [hereinafter UN Speech]. Hu gave a speech entitled, "Making Great Efforts to Build a Harmonious World with Long-lasting Peace and Common Prosperity." See UN Speech, *supra*; see also Hu Jintao, *supra* note 114 (repeating the common theme of peaceful development, though not emphasizing it as strongly for a primarily domestic audience).

<sup>132</sup> See, e.g., G20 Speech, *supra* note 131; UN Speech, *supra* note 131; Zheng Bijian, *China's Peaceful Rise to Great Power Status*, 84 FOREIGN AFF. 18, 19–24 (2005) (discussing China's strategic plans to develop peacefully).

<sup>133</sup> See UN Speech, *supra* note 131.

<sup>134</sup> See Zheng, *supra* note, 132 at 18.

<sup>135</sup> State Council Info. Office, China's Peaceful Development Road (2005) [hereinafter Peaceful Development White Paper], available at <http://www.china.org.cn/english/2005/Dec/152669.htm>.

<sup>136</sup> See Hu Jintao, *supra* note 114, at § XI: Continuing to Promote the Noble Cause of Peace and Development of Mankind.

<sup>137</sup> *Id.*

been mutually dependent. For this reason, China must consider both the interests of the world and its own interests. *Thus that which conforms to the interests of China today tends to be conducive to promoting the interests of the world as a whole.* This is why China advocates for a unity of nationalism and globalism rather than putting nationalism above globalism.<sup>138</sup>

This nexus between the Scientific Development Outlook, Socialist Harmonious Society, and Peaceful Development is the most advanced manifestation of Chinese communist thought, and its message resonates in much of the developing world.<sup>139</sup> Whether China will choose to resist the temptation of using coercive power to achieve its developmental goals is an open question, but the decisions of the Hu Jintao administration indicate that China will cautiously, but confidently defend its interests on the world stage, within the limits of its normative constitutionalism.

### III. APPLYING THE CONSTITUTIONAL LAW OF FOREIGN POLICY UNDER HU JINTAO: SUCCESSES AND ONGOING GOALS

This section explains how the Chinese dual constitutions provide specific normative guidance to China's foreign policy decision-makers, thereby informing the practice of Chinese diplomacy. The section notes several examples that demonstrate how the Chinese dual constitutions applied to some of the most pressing international events with which the Hu Administration dealt.<sup>140</sup> These examples show that the foreign policy of "Peaceful Development" can be understood in the context of the Chinese constitutional law of foreign affairs. They also identify and explore two unresolved but related normative questions that emerged during Hu's tenure: [1] what is the scope of Chinese irredentism; and [2] will China be able to maintain its claim as the moral leader of the developing world, even as it achieves its own development goals?

#### *A. Case Studies in Unification and Irredentism*

The first normative question about Chinese foreign policy is how far its irredentist claims extend. By invoking irredentism, China seeks to remove territorial disputes from the arena of foreign policy constitutionalism

<sup>138</sup> HU ANGANG, *supra* note 88, at 15 (emphasis added).

<sup>139</sup> See CONST. COMMUNIST PARTY OF CHINA General Program (2012); Hu Jintao, *supra* note 114. Even before this linkage was made explicit, the extraterritorial appeal of Chinese policy was growing. See JOSHUA COOPER RAMO, THE BEIJING CONSENSUS 3 (2004).

<sup>140</sup> Unfortunately there is not enough length available to discuss all issues. Some, such as the evolving Chinese perception of the "Duty to Protect" in International Law (vis-à-vis situations in Libya and Syria), are reserved for later comment.

(where the Five Principles would apply), and instead consider these disputes under the constitutional clauses on national reunification, or the rhetoric of “core interests.”<sup>141</sup> By considering territorial disputes under irredentism and not foreign policy, China need not follow the “Peaceful Development” policy.

### 1. China’s Use of Irredentism in Taiwan

The PRC and the Guomindang (GMD) political party of Taiwan both agree that there is only “One China”<sup>142</sup> and that Taiwan is an indisputable part of it.<sup>143</sup> Nonetheless, when Hu entered office in 2002, Taiwanese opposition President Chen Shui-bian asserted that Taiwan is a sovereign and independent State, reframing the situation and creating a security crisis for Beijing.<sup>144</sup> Hu responded in part by offering to consider “international living space”<sup>145</sup> for Taiwan, a stance some considered “soft.”<sup>146</sup> Chen responded by offering to negotiate “on the basis of the 1992 meeting in Hong Kong.”<sup>147</sup> His choice of words intentionally demeaned the 1992 Consensus, an agreement between PRC and GMD leaders that re-acknowledged the

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<sup>141</sup> Joint Statement, White House Office of the Press Sec’y, U.S.–China Joint Statement (Nov. 17, 2009), available at <http://www.whitehouse.gov/the-press-office/us-china-joint-statement> (discussing Taiwan and territorial integrity). See generally WU XINBO, U.S. INST. OF PEACE, CHINA AND THE UNITED STATES: CORE INTERESTS, COMMON INTERESTS, AND PARTNERSHIP (2011) (discussing China–U.S. relations and China’s interests in Taiwan, Tibet, and Xinjiang).

<sup>142</sup> U.S.–China Joint Statement, *supra* note 141.

<sup>143</sup> See *id.* (acknowledging China’s One China policy regarding Taiwan); Interview with Chen Shui-bian, President, Taiwan (Mar. 30, 2004), available at <http://news.bbc.co.uk/2/hi/asia-pacific/3582853.stm> (last visited Mar. 26, 2014); Taiwan Affairs Office Issues Statement on Current Cross-Straits Relations, EMBASSY OF CHINA IN THE U.S. (May 17, 2004), <http://www.china-embassy.org/eng/zt/twwt/t111117.htm> (last visited Mar. 26, 2014) [hereinafter *Cross-Straits Relations*] (“[T]here is only one China in the world and both the mainland and Taiwan belong to that one and same China, abandon the ‘Taiwan Independence’ stance and stop the separatist activities, then, cross-Straits relations can hold out a bright prospect of peace, stability and development . . .”).

<sup>144</sup> See Interview with Chen Shui-bian, *supra* note 143 (“Taiwan is an independent sovereign country. Under the current constitution its name is the Republic of China. In the 1999 resolution regarding Taiwan’s future . . . it is stated very clearly that any change to the status quo of Taiwan must be decided by the people of Taiwan through referenda.”). Chen served as President of the Republic of China from 2000 to 2008, leading of the Democratic Progressive Party, the strongest faction in the Taiwanese Pan-Green Coalition. See *Profile: Chen Shui-bian*, BBC (June 11, 2010), <http://news.bbc.co.uk/2/hi/2172980.stm> (last visited Mar. 26, 2014).

<sup>145</sup> *Cross-Straits Relations*, *supra* note 143.

<sup>146</sup> Cheng-yi Lin & Wen-cheng Lin, *A Rising China and Hu Jintao’s Taiwan Policy*, in RISE OF CHINA: BEIJING’S STRATEGIES AND IMPLICATIONS FOR THE ASIA-PACIFIC 284, 296–97 (2009) (discussing Hu Jintao’s series of soft policies toward Taiwan); *Cross-Straits Relations*, *supra* note 143.

<sup>147</sup> Chen Shui-bian’s Call for Talks Discredited, XINHUA (Oct. 11, 2004), [http://news.xinhuanet.com/english/2004-10/11/content\\_2074975.htm](http://news.xinhuanet.com/english/2004-10/11/content_2074975.htm) (last visited Mar. 26, 2014).

One China principle.<sup>148</sup> This statement struck Beijing as a provocative effort to repudiate the One China principle.<sup>149</sup>

China immediately changed course, abandoning its “soft” stance for a decidedly more aggressive one. The NPC passed an Anti-Secession Law in March 2005, threatening to use non-peaceful means in response to a Taiwanese declaration of independence.<sup>150</sup> Most intriguingly, the CCP used its united front strategy to bypass Chen’s government, and speak directly with the GMD opposition.<sup>151</sup> In April 2005, Chairman Hu initiated an unprecedented meeting—the first since the end of World War II—with GMD chairman Lien Chan.<sup>152</sup> These tactics undermined Chen’s government, evidenced by the effect on the Taiwanese electorate in the next election.<sup>153</sup>

In 2008, GMD leader Ma Ying-jeou won the Taiwanese presidency and a majority in the Legislative Yuan.<sup>154</sup> This change in the leadership of Taiwan immediately thawed relations between China and Taiwan, so much so that the two nations agreed to negotiate under the 1992 Consensus. Soon thereafter, China and Taiwan announced the China-Taiwan Economic Cooperation Framework Agreement of 2010.<sup>155</sup>

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<sup>148</sup> See *Backgrounder: The 1992 Consensus on One-China Principle*, PEOPLE’S DAILY (Oct. 13, 2004), [http://english.people.com.cn/200410/13/eng20041013\\_160081.html](http://english.people.com.cn/200410/13/eng20041013_160081.html) (last visited Mar. 26, 2014); *Chen Shui-bian’s Call for Talks Discredited*, *supra* note 147.

<sup>149</sup> See *Chen Shui-bian’s Call for Talks Discredited*, *supra* note 147.

<sup>150</sup> See *Fanfen lieguo jiafa* (反分裂国家法) [Anti-Secession Law] (promulgated by the Nat’l People’s Cong., Mar. 14, 2005, effective Mar. 14, 2005) (Lawinfochina) at art. 8 (China) *available at* <http://www.lawinfochina.com/display.aspx?id=3970&lib=law&SearchKeyword=anti-succession%20law&SearchCKeyword=>.

<sup>151</sup> Cheng-yi Lin & Wen-cheng Lin, *supra* note 146, at 296.

<sup>152</sup> *Text of KMT-Beijing Agreement*, BBC (Apr. 29, 2005), <http://news.bbc.co.uk/2/hi/asia-pacific/4498791.stm> (last visited Mar. 26, 2014).

<sup>153</sup> See Ken Liberthal, President, John L. Thornton China Ctr., Panel Discussion at the U.S. Inst. of Peace & the Richard Nixon Found., Symposium on China’s Domestic Evolution: From Mao Zedong to Deng Xiaoping to the 21st Century (Mar. 7, 2012) [hereinafter *China’s Domestic Evolution*], transcript *available at* [http://www.usip.org/files/TWTCTW/TWTCTW\\_China\\_Domestic\\_Evolution.pdf](http://www.usip.org/files/TWTCTW/TWTCTW_China_Domestic_Evolution.pdf). Ken Lieberthal stated, “[O]n Taiwan I would give Hu even more credit than Susan because in 2005 he really pushed change—a fundamental change—in the policy toward Taiwan that then laid the groundwork, arguably enhanced the prospects for Ma Ying-jeou to be elected in 2008 and certainly has been quite successful.” *Id.* transcript at 18.

<sup>154</sup> See Edward Cody, *Taiwan Voters Elect New President*, WASH. POST (Mar. 23, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/22/AR2008032200442.html> (last visited Mar. 26, 2014).

<sup>155</sup> Cross-Straits Economic Cooperation Framework Agreement, Taiwan–China, June 29, 2010, *available at* [http://www.moea.gov.tw/Mns/populace/news/wHandNews\\_File.ashx?news\\_id=19723&serial\\_no=6](http://www.moea.gov.tw/Mns/populace/news/wHandNews_File.ashx?news_id=19723&serial_no=6).



## 2. Chinese Claims in the South China Sea

China has also used irredentism to claim territory in the South China Sea.<sup>156</sup> The South China Sea contains many disparate island chains and coral reefs and a seabed that is believed to be rich in oil and natural gas.<sup>157</sup> Although there have been several longstanding disputes about sovereignty in the South China Sea, the competition to claim parts of the Sea greatly intensified during the 1990s.<sup>158</sup> Chinese military forces established themselves on an increasing number of islands<sup>159</sup> and Chinese naval vessels increased the number of patrols on the waters.<sup>160</sup> The U.S. Navy reported that one of its ships—the *USNS Impeccable*—was harassed by Chinese ships in the South China Sea in 2009, and India claimed that one of its ships was harassed in July 2011.<sup>161</sup> Partially in response to increased activity in the South China Sea, the United States has reinvested in regional diplomacy in the area, under its “pivot to Asia.”<sup>162</sup>

Some observers are concerned that China is pursuing dominance in the region, claiming the vast majority of the South China Sea for itself under its formulation of the “Nine–Dash Line.” The “Nine–Dash Line” is a line of demarcation that sets out China’s claims in the South China Sea. The line nearly

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<sup>156</sup> Zhonghua Remmin Gongheguo Linghai Jipi Lianoufa (中华人民共和国领海及毗连区法) [Law of the PRC on the Territorial Sea and the Contiguous Zones] (promulgated by the Standing Comm. of the Nat’l People’s Cong., Feb. 25, 1992, effective Feb. 25, 1992) Order No. 55 of the President of China [hereinafter Territorial Sea Law], available at [http://english.chinamil.com.cn/site2/special-reports/2006-04/20/content\\_460094.htm](http://english.chinamil.com.cn/site2/special-reports/2006-04/20/content_460094.htm); see also Mohan Malik, *Historical Fiction: China’s South China Sea Claims*, WORLD AFF., May–June 2013, at 83, 88–90.

<sup>157</sup> See Zou Le, *Oil Bonanza in the South China Sea*, GLOBAL TIMES (China) (Apr. 19, 2011), <http://www.globaltimes.cn/NEWS/tabid/99/ID/645909/Oil-bonanza-in-South-China-Sea.aspx> (last visited Mar. 26, 2014). The state-owned China Offshore Exploration Corp. has extensive plans to exploit the resources of the region in the decades ahead. See *id.*

<sup>158</sup> See CLIVE SCHOFIELD & IAN STOREY, *THE JAMESTOWN FOUND., THE SOUTH CHINA SEA DISPUTE: INCREASING STAKES AND RISING TENSIONS* 1, 19–24 (2009). China’s enactment of the Territorial Sea Law apparently transferred the region into its constitutional irredentism discourse. See *id.*; Territorial Sea Law, *supra* note 156. Thereafter, in 1995, China occupied the Meiji Reef, for which the Philippines had a rival claim. See *China Cannot Tolerate Philippines’ Occupation of Reef*, CHINA DAILY (Mar. 17, 2014), [http://www.chinadaily.com.cn/china/2014-03/17/content\\_17354226.htm](http://www.chinadaily.com.cn/china/2014-03/17/content_17354226.htm) (last visited Mar. 26, 2014).

<sup>159</sup> See Kane, *supra* note 4, at 309–10. Including a 1988 skirmish with Vietnamese forces over the Spratley Islands. See *id.*

<sup>160</sup> See *Navy Enters South China Sea for Patrol, Training*, XINHUA, (Feb 1, 2013), [http://news.xinhuanet.com/english/china/2013-02/01/c\\_132144770.htm](http://news.xinhuanet.com/english/china/2013-02/01/c_132144770.htm) (last visited Mar. 26, 2014).

<sup>161</sup> *India-China Face-off in South China Sea*, DNA India (Sept. 2, 2011), [http://www.dnaindia.com/india/report\\_india-china-face-off-in-south-china-sea-report\\_1582481](http://www.dnaindia.com/india/report_india-china-face-off-in-south-china-sea-report_1582481) (last visited Mar. 26, 2014); *Pentagon Says Chinese Vessels Harassed U.S. Ship*, CNN (Mar. 9, 2009), [http://articles.cnn.com/2009-03-09/politics/us.navy.china\\_1\\_chinese-ships-chinese-vessels-chinese-media?\\_s=PM:POLITICS](http://articles.cnn.com/2009-03-09/politics/us.navy.china_1_chinese-ships-chinese-vessels-chinese-media?_s=PM:POLITICS) (last visited Mar. 26, 2014).

<sup>162</sup> Keith B. Rickburg, *U.S. Pivot to Asia Makes China Nervous*, WASH. POST (Nov. 16, 2011), [http://www.washingtonpost.com/world/asia\\_pacific/us-pivot-to-asia-makes-china-nervous/2011/11/15/gIQAAsQpVRN\\_story.html](http://www.washingtonpost.com/world/asia_pacific/us-pivot-to-asia-makes-china-nervous/2011/11/15/gIQAAsQpVRN_story.html) (last visited Mar. 26, 2014).

encircles the entire South China Sea, and thus encroaches upon the competing claims of the Philippines, Malaysia, Vietnam, Brunei, and Taiwan.<sup>163</sup> After encountering fierce resistance to its claims under the Nine-Dash Line, China agreed to submit to multilateral negotiations with the States that had competing claims.<sup>164</sup> Critics were suspicious of China's willingness to partake in multilateral negotiations, claiming that China's embrace of multilateralism is intended only to provide a stage for airing its goals.<sup>165</sup>

In January 2013, several months after a standoff with China over the Scarborough Shoal, the Philippines brought an action against China in a binding arbitration tribunal organized under the United Nations Convention on the Law of the Sea, which both nations have ratified.<sup>166</sup> Although the tribunal does not have jurisdiction to settle boundary disputes outright, the Philippine complaint was carefully worded to grant the tribunal jurisdiction in this case, by stressing China's alleged interference with the lawful exercise of rights within the legitimate maritime zones of the Philippines (i.e., the recognized 200-mile-from-shore exclusive economic zone).<sup>167</sup> The Chinese did not make a timely response to the complaint and though they may respond at a later date, a ruling may be made *in absentia*.<sup>168</sup> At the time of this writing, China was also involved in territorial skirmishes over the Diaoyu (Sensaku) Islands with Japan, and a stretch of the Himalayan Mountains with India, both of which China considers its own national territory.<sup>169</sup>

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<sup>163</sup> David Lague, *Analysis: China's Nine-Dashed Line in South China Sea*, REUTERS (May 25, 2012), <http://www.reuters.com/article/2012/05/25/us-china-sea-boundary-idUSBRE84O07520120525> (last visited Mar. 26, 2014).

<sup>164</sup> See Ma Shaohua, *China's Multilateralism and the South China Sea Conflict: Quest for Hegemonic Stability?* 48–51 (2006) (unpublished Master thesis, National University of Singapore), available at [http://scholarbank.nus.edu.sg/bitstream/handle/10635/15352/MASHA\\_OHUATHESIS.pdf?sequence=1](http://scholarbank.nus.edu.sg/bitstream/handle/10635/15352/MASHA_OHUATHESIS.pdf?sequence=1).

<sup>165</sup> See *id.* at 50.

<sup>166</sup> See Peter A. Dutton, *The Sino-Philippine Maritime Row: International Arbitration and the South China Sea*, 10 E. & S. CHINA SEAS BULL. 1, 1 (2013).

<sup>167</sup> See *id.* at 3–6. Chinese editorials claim that because China's Nine-Dash line map dates back to 1948 and pre-dates the United Nations Convention on the Law of the Sea by 34 years, it is exempt from that convention's 200-mile exclusive economic zone rule under Article 15. See Li Guoqiang, Op-ed, *Claim over Islands Legitimate*, CHINA DAILY (July 22, 2011), [http://usa.china-daily.com.cn/opinion/2011-07/22/content\\_12957473.htm](http://usa.china-daily.com.cn/opinion/2011-07/22/content_12957473.htm).

<sup>168</sup> See Catriona Paterson, *Philippines-China Arbitration to Proceed with China in Absentia*, LATHAM & WATKINS INT'L ARB. NEWSL., Oct. 2013, at 10, <http://www.lw.com/thoughtLeadership/international-arbitration-newsletter-October-2013>; Guoqiang, *supra* note 167.

<sup>169</sup> See *China Alert to Japanese Diaoyu Islands Escalation*, XINHUA (Jan. 16, 2013), [http://news.xinhuanet.com/english/china/2013-01/16/c\\_132107163.htm](http://news.xinhuanet.com/english/china/2013-01/16/c_132107163.htm) (last visited Mar. 26, 2014); *India and China 'Pull Back Troops' in Disputed Border Area*, *supra* note 125.

### 3. Constitutional Instruction on Irredentism

As shown in these examples, China has used irredentism to effectively remove territorial disputes from the arena of foreign policy constitutionalism—where the Five Principles would theoretically apply—and transfer these disputes to the purview of the constitutional clauses on national reunification and defense of the motherland.<sup>170</sup> Once these territorial disputes have been taken out of the realm of foreign policy constitutionalism, it seems that China will treat them as core interests.<sup>171</sup>

Regarding Taiwan, the CCP and GMD agree that the One China policy will one day result in reconciliation.<sup>172</sup> Though the Hu administration applied pressure to generate the Taiwanese election result that the CCP and GMD desired, the Chinese dual constitutions are clear on the status of Taiwan.<sup>173</sup> The Preamble of the State Constitution avers:

Taiwan is part of the sacred territory of the People's Republic of China. It is the inviolable duty of all Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland. . . . [T]here has been formed under the leadership of the Communist Party of China a broad patriotic united front, which is composed of . . . all patriots who stand for the reunification of the motherland. This united front will continue to be consolidated and developed.<sup>174</sup>

The CCP Constitution also contains the application of this United Front to Taiwan.<sup>175</sup> It states:

The [CCP] rallies all [into] the broadest possible patriotic united front embracing all . . . who support the reunification of the motherland. The Party will constantly strengthen the unity of all the Chinese people, including the compatriots in Hong Kong and Macao special administrative regions and in Taiwan as well as overseas Chinese.<sup>176</sup>

<sup>170</sup> See XIANFA pmbl., arts. 24, 29, 54, 55 (2004); *supra* Part III(a)(1)–(2).

<sup>171</sup> See WU, *supra* note 141, at 2–3. See Territorial Sea Law, *supra* note 156, arts. 1–3.

<sup>172</sup> See Rajaram Panda, *Thaw in China-Taiwan Relations*, Chennai Centre for China Stud. (Feb. 24, 2014), <http://www.c3sindia.org/taiwan/3909> (last visited Mar. 26, 2014).

<sup>173</sup> See XIANFA pmbl. paras. 9–10 (2004); CONST. COMMUNIST PARTY OF CHINA General Program para. 21 (2012); China's Domestic Evolution, *supra*, note 153, transcript at 18; Cody, *supra* note 154.

<sup>174</sup> XIANFA pmbl. paras. 9–10 (2004).

<sup>175</sup> See CONST. COMMUNIST PARTY OF CHINA General Program para. 21 (2012).

<sup>176</sup> *Id.*

Although it influenced Taiwan's election, Beijing did not violate any of its constitutional rules on mutual respect or non-interference because both constitutions regard relations with Taiwan as a domestic situation.<sup>177</sup> As to the more opaque mechanics of jurisdictional constitutionalism, Dr. Susan Shirk told a conference panel that Hu was particularly active in Taiwan policy, stating:

[Hu] really tried to reach out and take a different approach to Taiwan, especially after Ma Ying-jeou's election . . . It's very interesting that he's protected Taiwan policy from the trends towards a, kind of, more provocative Chinese foreign policy in other areas. But Taiwan policy has been protected by Hu, and, you know, that's been quite a good thing. . . . I'd say maybe that's his most positive legacy.<sup>178</sup>

The situation in Taiwan is relevant to the situation in the South China Sea and beyond, because China will seek to absorb any Taiwanese claims over the territory in these areas, just as it sought to absorb the GMD's claims to sovereignty over Tibet and Xinjiang.<sup>179</sup> Thus, China and Taiwan are likely to agree in principle on any claims to both the South China Sea, and the Diaoyu islands.

#### 4. Constitutional Instruction on Reunification

Once China has used irredentism to take a dispute from the foreign policy arena and place it under the domestic constitutional clauses, it uses the principle of reunification to justify its claims. The State Constitution refers to reunification three times in the Preamble (just as many times as it refers to the leadership of the CCP).<sup>180</sup> Article 29 refers to the duty of every citizen to defend the motherland<sup>181</sup> and "participate in national reconstruction."<sup>182</sup> But the territorial scope of such historicist claims is not unlimited.

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<sup>177</sup> See XIANFA pmbl. paras. 9–10 (2004); CONST. COMMUNIST PARTY OF CHINA General Program para. 21 (2012); Cody, *supra* note 154.

<sup>178</sup> China's Domestic Evolution, *supra* note 153, transcript at 18.

<sup>179</sup> See SUSAN V. LAWRENCE & THOMAS LUM, CONG. RESEARCH SERV., R41108, U.S.-CHINA RELATIONS: POLICY ISSUES 20–22, 26–30 (2011); *Mainland, Taiwan Should Jointly Safeguard Diaoyu Sovereignty*, GLOBAL TIMES (China) (Jan 15, 2014), <http://www.globaltimes.cn/content/837606.shtml> (last visited Mar. 26, 2014). This may explain why Chinese officials allegedly communicated to U.S. officials in 2010 that the South China Sea is a core interest, giving it the same non-negotiable status as Taiwan on the national agenda. See Robert A. Manning, Editorial, *China's New City: Is this Beijing's Pivot?*, BANGKOK POST (Mar. 21, 2014), <http://m.bangkokpost.com/opinion/306560> (last visited Mar. 26, 2014).

<sup>180</sup> See XIANFA pmbl. (2004).

<sup>181</sup> See *id.* art. 29.

<sup>182</sup> *Id.*

Recalling the Socialist Harmonious Society's historical undertones, one should reconsider China's ancient foreign policy tradition.<sup>183</sup> Chinese domestic and foreign affairs long operated under a worldview known as *Tianxia*, literally translating to "Under Heaven."<sup>184</sup> According to this view, China's Imperial Court was the center of a world that extended outward to Chinese citizens and, finally, foreign "barbarians."<sup>185</sup> This view of the order of social relations was reinforced by the tributary system of international relations, which required nations that wanted to trade with China to demonstrate China's superior status by sending "tribute" missions before trading could begin.<sup>186</sup> In exchange for their careful performance of subjugating rituals, the barbarian nationalities were allowed to trade at China's ports.<sup>187</sup>

With increasing economic and military power at its command, it is not difficult to imagine that China's foreign policy establishment could be tempted to reinstate modes of regional hegemony that resembles a de facto *Tianxia* order.<sup>188</sup> Indeed, there has been renewed academic interest in the *Tianxia* system.<sup>189</sup> Members of the Chinese Academy of Social Sciences (CASS) have argued for world government based on the *Tianxia* system.<sup>190</sup> Additionally, other scholars have asserted that the United States currently manages "the most successful tributary system the world has ever seen."<sup>191</sup> In October 2011, an editorial in the *Global Times* threatened, "If these [Southeast Asian] countries don't want to change their ways with China, they will need to prepare for the sounds of cannons,"<sup>192</sup> demonstrating a modern *Tianxia* worldview.<sup>193</sup> After the editorial, China appeared to back off, with a Chinese Foreign Ministry spokeswoman reconfirming China's dedication "to resolv-

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<sup>183</sup> See Hu's Speech, *supra* note 10.

<sup>184</sup> See Tingyang Zhao, *Rethinking Empire from a Chinese Concept "All-Under-Heaven,"* 12 SOC. IDENTITIES 29, 30 (2006).

<sup>185</sup> See SOW KEAT TOK, *MANAGING CHINA'S SOVEREIGNTY IN HONG KONG AND TAIWAN* 32–33 (2013).

<sup>186</sup> See Xu Bijun, *Is Zhao's Tianxia System Misunderstood?*, 6 TSINGHUA CHINA L.R. 95, 102–05 (2014) (China), available at [http://www.tsinghuachinalawreview.org/articles/PDF/TCLR\\_0601\\_XU.pdf](http://www.tsinghuachinalawreview.org/articles/PDF/TCLR_0601_XU.pdf).

<sup>187</sup> James Graham, *China's Growing Sea Trade with Europe 1517–1800*, HISTORYORB.COM, [http://www.historyorb.com/asia/china\\_trade.php](http://www.historyorb.com/asia/china_trade.php) (last visited Mar. 26, 2014).

<sup>188</sup> See generally Tingyang Zhao, *supra* note 184 (proposing that the Chinese theory of *Tianxia*, or All-Under-Heaven, is the best philosophy for world governance).

<sup>189</sup> See, e.g., *id.* at 29–41; Qin Yaqing, *supra* note 8, at 253–59 (discussing the dismantling of China's identity as the Central Kingdom in the tribute system).

<sup>190</sup> See Tingyang Zhao, *supra* note 184, at 29–41.

<sup>191</sup> Yuen Foong Khong, *The American Tributary System*, 6 CHINESE J. INT'L POL. 1, 1 (2013).

<sup>192</sup> *Don't Take Peaceful Approach for Granted*, GLOBAL TIMES (China) (Oct. 25, 2011), <http://www.globaltimes.cn/NEWS/tabid/99/ID/680694/Dont-take-peaceful-approach-for-granted.aspx> (last visited Mar. 26, 2014).

<sup>193</sup> See *id.*

ing the dispute through peaceful means.”<sup>194</sup> Despite this reassuring message afterwards, the assertive approach of the editorial aroused alarm in those nations with competing claims to the South China Sea, and allowed the United States to organize China’s aggrieved neighbors—including the former pariah state of Myanmar—into a concerted negotiating group.<sup>195</sup> China’s decision not to participate in the binding arbitration procedure proposed by the Philippines, though reasonable from a realist perspective, may also further swing international opinion against Beijing.

Whether China’s impulse to use force to get what it wants is philosophically derivative of *Tianxia*, *Realpolitik*, or “big-nation chauvinism”<sup>196</sup> may reveal the extent of future Chinese claims, especially in light of the recent challenge to Japanese administration of the Ryukyu Islands on the basis of their historic tributary status.<sup>197</sup> China has demonstrated that it will not acquiesce to the adverse possession of Chinese territory, through its persistent claims throughout the present era.<sup>198</sup> In the future, when the international conditions are ripe, China may attempt a similar strategy of invoking constitutional irredentism to reclaim lands once belonging to China, but now under Indian, Japanese, or Russian administration.<sup>199</sup> At present, China’s developing neighbors to the south see this assertion in the South China Sea as a challenge to their sovereignty, and may change their perception of China as protector of the developing world.

### B. Case Studies in Sovereignty and Non-Interference

Even where China does not assert any irredentist claims, Chinese foreign policy is still done for the purpose of “bring[ing] about a favorable international environment for China’s reform, opening up and modernization.”<sup>200</sup>

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<sup>194</sup> Nicholas Wadhams & Michael Forsythe, *China May Resort to Force in Sea Disputes, Global Times Says*, BLOOMBERG BUSINESSWEEK (Oct. 25, 2011), <http://www.businessweek.com/news/2011-10-25/china-may-resort-to-force-in-sea-disputes-global-times-says.html> (quoting Foreign Ministry spokeswoman Jiang Yu as “[China] adheres to the strategy of peaceful development. . . . Sowing discord and hostility will only complicate the issue.”).

<sup>195</sup> See Thomas Fuller, *Wary Neighbors Turn into Partners in a Quickly Developing Southeast Asia*, N.Y. TIMES, July 5, 2012, at A4.

<sup>196</sup> See XIANFA pmbl. para. 11 (2004). Though Mao stressed the slogan “never seek hegemony,” Premier Zhou Enlai candidly acknowledged the temptation in a conversation with Henry Kissinger on Feb. 18, 1973, stating, “[t]he objective fact of the largeness of the Chinese nation and Chinese area easily create a tendency to nationalistic sentiments and big nation chauvinism.” SOLOMON, *supra* note 7, at 30.

<sup>197</sup> CASS Report, *supra* note 126.

<sup>198</sup> See *Background: The 1992 Consensus on One-China Principle*, *supra* note 148; CASS Report, *supra* note 126.

<sup>199</sup> Raskolnikova, *supra* note 130.

<sup>200</sup> CONST. COMMUNIST PARTY OF CHINA General Program para. 22 (2012). The State Constitution features similar prioritization of development goals. XIANFA pmbl. para. 7 (2004).

This purpose of Chinese foreign policy is clear, even if one considers other constitutional provisions that claim that China “consistently opposes imperialism, hegemonism and colonialism,”<sup>201</sup> and seeks “good neighborly relations between China and the surrounding countries.”<sup>202</sup> Decades of substantive constitutionalism stressing national development support the idea that the focus of Chinese foreign policy has always been the development of China’s domestic economy.<sup>203</sup> Although it seems Hu Jintao sensed that China should attempt to reconcile these goals, his work remains unfinished.

### 1. International Environmentalism and the 2009 UN Copenhagen Climate Conference

China’s tenuous claim to its traditional role as a champion of the developing world was evident at the Copenhagen Climate Conference in December 2009.<sup>204</sup> The conference highlighted the growing divide between China’s constitutional insistence upon sovereignty and non-interference, and the aspirations of the developing world.<sup>205</sup> The attendees failed to create a legally binding plan to abate global warming despite years of advance diplomacy,<sup>206</sup> and only managed to agree to a three-page accord.<sup>207</sup> The conference’s most important precedential contribution was to codify the responsibility of individual nations to act on their own to address global warming, including China in this responsibility for the first time.<sup>208</sup> This new responsibility, however, will likely mean nothing, because the parties did not establish any international surveillance practices—as China had in-

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<sup>201</sup> CONST. COMMUNIST PARTY OF CHINA General Program para. 12 (2012).

<sup>202</sup> *Id.* para. 22 (2012).

<sup>203</sup> See *The Driving Forces Behind China’s Foreign Policy—Has China Become More Assertive?*, RABOBANK (Oct. 23, 2013), <https://economics.rabobank.com/publications/2013/october/the-driving-forces-behind-chinas-foreign-policy-has-china-become-more-assertive/> (last visited Mar. 26, 2014). See generally XIANFA (2004) (including provisions indicating the relationship between Chinese foreign policy and domestic economic growth). The current Chinese State constitution was promulgated in 1982. *Id.*

<sup>204</sup> See generally Lin Feng & Jason Bui, *The Copenhagen Accord and the Silent Incorporation of the Polluter Pays Principle in International Climate Law: An Analysis of Sino-American Diplomacy at Copenhagen and Beyond*, 18 BUFF. ENVTL. L.J. 1 (2010) (discussing China’s involvement at the conference day by day).

<sup>205</sup> See *id.* at 33–34, 37–56.

<sup>206</sup> See *id.* at 56.

<sup>207</sup> U.N. Framework Convention on Climate Change, Conference of Parties, Fifteenth Session, Copenhagen, Den., Dec. 7–18, 2009, add., p. 8, U.N. Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010) [hereinafter Copenhagen Accord].

<sup>208</sup> See Lin & Bui, *supra* note 204, at 56–59. China was exempt under the previous Kyoto Protocol. See *id.* at 58.

sisted.<sup>209</sup> Indeed, just as the international community saw the United States as the major obstacle to crafting a meaningful outcome at Kyoto, it saw China as a major obstacle to any agreement at Copenhagen.<sup>210</sup> But in Kyoto, the developing nations allowed the United States to demand different standards, resulting in an agreement with no teeth, whereas in Copenhagen, the developing nations refused to give China—another world leader—any special consideration, resulting in the lack of any agreement at all.<sup>211</sup> In 2009, Lin Feng and I observed:

Whereas the environmental law principle of ‘common but differentiated responsibilities’ was absolutely paramount in the Kyoto regime, the inclusion of responsibilities for the largest developing countries [at the Copenhagen Conference] incorporates the ‘polluter pays’ principle, which is favored by the developed world. Indeed, nations that arrived divided between North and South, developed and developing, and rich and poor, left frustrated by the relatively inflexible attitudes of the United States and China.<sup>212</sup>

It is likely that the world’s small-scale developing nations are realigning, to pressure the world’s largest overall greenhouse gas emitters into greater concessions.<sup>213</sup> For example, Maldives President Mohamed Nasheed seemed to question China’s future leadership of the G77 group of developing nations, saying, “It is very difficult to maintain a political grouping that was formed with a whole lot of ideology that has become obsolete . . . There are many big developing countries that do not need an agreement. They would rather go with business as usual.”<sup>214</sup> Although both the United States and China managed to preserve their bottom lines at Copenhagen, future negotiations may challenge their power regarding global governance.<sup>215</sup> If the developing world does realign to counterbalance China’s self-interest, it will have serious implications for China’s soft power diplomacy.

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<sup>209</sup> See John Lee, *How China Stiffed the World in Copenhagen: Why Beijing Insists, “Don’t Look at Our Books!”*, FOREIGN POL’Y (Dec 21, 2009), [http://www.foreignpolicy.com/articles/2009/12/21/how\\_china\\_stiffed\\_the\\_world\\_in\\_copenhagen](http://www.foreignpolicy.com/articles/2009/12/21/how_china_stiffed_the_world_in_copenhagen) (last visited Mar. 26, 2014).

<sup>210</sup> See Lin & Buhi, *supra* note 204, at 17; Jonathan Watts & John Vidal, *China Blamed as Anger Mounts over Climate Deal*, GUARDIAN (Dec 19, 2009), <http://www.theguardian.com/environment/2009/dec/20/china-blamed-copenhagen-climate-failure> (last visited Mar. 26, 2014).

<sup>211</sup> See Lin & Buhi, *supra* note 204, at 17–18, 52–56.

<sup>212</sup> *Id.* Professor Alastair Iain Johnston also notes that China “was unprepared for the changing diplomatic alignments on global warming” at Copenhagen. Johnston, *supra* note 64, at 15, 34.

<sup>213</sup> See Geoff Dyer, *China Hails Deal Despite Being Cast Villain*, FIN. TIMES (Dec. 21, 2009), <http://www.ft.com/cms/s/0/c42ead8c-ee54-11de-944c-00144feab49a.html> (last visited Mar. 26, 2014); Watts & Vidal, *supra* note 210.

<sup>214</sup> Dyer, *supra* note 213.

<sup>215</sup> See *id.*



## 2. Financial Globalization, the Developing World Multilateral Offensive, and African Investments

China has the luxury of expanding its international economic portfolio in an era of Western austerity.<sup>216</sup> The most significant symbol of this was the establishment of China's largest sovereign wealth fund—the Chinese Investment Corporation (CIC)—in 2007, just as western economies were spiraling into financial crisis.<sup>217</sup> Though China is deficient in critical natural resources, its State-owned enterprises are spending billions of dollars to secure access to foreign deposits of natural resources, an approach that has concerned many other nations.<sup>218</sup> Although China's investment outlook in Western markets has improved considerably over the past five years, China has had greater success investing in the developing world, particularly Africa.<sup>219</sup>

More quietly, the Hu administration sought to create different forums for economic engagement.<sup>220</sup> In Latin America, China created new multilateral consultation mechanisms with the Andean Community, the Rio Group, and the South American trading bloc MERCOSUR.<sup>221</sup> In 2004, China sent a police contingent to Haiti, and also created the China-Caribbean Economy and Trade Cooperation Forum.<sup>222</sup> That same year, it established the China-Arab Nations Cooperation Forum.<sup>223</sup>

Although China has made great strides to promote development in the Americas, the “flagship for China's multilateral diplomacy toward the developing world”<sup>224</sup> is the China-Africa Cooperation Forum.<sup>225</sup> This project, which began under Jiang Zemin, has grown into a “summit meeting of Chinese and African leaders” which met in November 2006, with delegates of forty-eight African countries travelling to Beijing to discuss a new brand of strategic partnership.<sup>226</sup>

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<sup>216</sup> See Jason Buhi, *Negocio de China: Building Upon the Santiago Principles to Form an Effective International Approach to Sovereign Wealth Fund Regulation*, 39 HONG KONG L. J. 197, 198, 202 (2009).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 205. For example, Chinese interest had a role in scuttling the proposed merger of ore mining giants Rio Tinto and BHP in 2009, and a Chinese attempt to buy U.S. oil firm Unocal was blocked over national security concerns in 2005. *Id.*

<sup>219</sup> See President Hu Proposes New Measures to Boost China-Africa Ties, XINHUA (July 19, 2012), [http://news.xinhuanet.com/english/china/2012-07/19/c\\_131726133.htm](http://news.xinhuanet.com/english/china/2012-07/19/c_131726133.htm).

<sup>220</sup> See Injoo Sohn, *After Renaissance: China's Multilateral Offensive in the Developing World*, 18 EUR. J. INT'L REL. 77, 80–82 (2012).

<sup>221</sup> *Id.* at 80.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> See *id.*

<sup>226</sup> See *id.* at 80–82.

Many Western commentators have lauded the Chinese initiatives, especially toward Africa.<sup>227</sup> In 2007, members of the Council on Foreign Relations praised Chinese investments both for their focus on infrastructure improvements and their relative transparency.<sup>228</sup> The Associate Direction of the Sustainable Development Solutions Network similarly commended China for its strong track record regarding the cancellation of African debt and because Chinese aid is both largely non-conditional and more quickly deliverable than Western aid.<sup>229</sup>

Controversially, China has “targeted resource-rich African nations such as Sudan and Angola for energy-related development.”<sup>230</sup> This led some African leaders to add their voices to a small, but growing, chorus of dissatisfaction with Chinese investment.<sup>231</sup> For example, one critic has asserted in 2007 that, “one has to be naïve to believe that the sudden interest of China is out of philanthropy.”<sup>232</sup> More recently, the governor of Nigeria’s central bank, Lamido Sanusi, wrote a 2013 *Financial Times* editorial, in which he claimed that China’s approach to Africa is as exploitative as any form of Western imperialism, because the Chinese extract natural resources without transferring valuable skills to the local workforce.<sup>233</sup> He wrote, “The days of the Non-Aligned Movement that united us after colonialism are gone. China is no longer a fellow under-developed economy—it is the world’s second-biggest, capable of the same forms of exploitation as the west. It is a significant contributor to Africa’s deindustrialisation and underdevelopment.”<sup>234</sup>

These examples underscore the potential for disharmony between China’s pursuit of national development goals and the expectations of the developing world.

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<sup>227</sup> See Deborah Brautigam & Adama Gaye, *Is Chinese Investment Good for Africa?*, COUNCIL ON FOREIGN REL. (Feb. 20, 2007), <http://www.cfr.org/china/chinese-investment-good-africa/p12622> (last visited Mar. 26, 2014).

<sup>228</sup> *Id.*

<sup>229</sup> See Emmanuel Guerin, *Chinese Assistance to Africa: Characterization and Position Regarding the Global Governance of Development Aid*, 6, 9–10 (Idées Pour le Débat, Working Paper No. 3, 2008), available at [http://www.iddri.org/Publications/Collections/Idees-pour-le-debat/Id\\_0803\\_Baillursemurgents\\_Guerin\\_EN.pdf](http://www.iddri.org/Publications/Collections/Idees-pour-le-debat/Id_0803_Baillursemurgents_Guerin_EN.pdf).

<sup>230</sup> KERRY DUMBAUGH, CONG. RESEARCH SERV., RL34588, CHINA’S FOREIGN POLICY: WHAT DOES IT MEAN FOR U.S. GLOBAL INTERESTS? 21 (2008).

<sup>231</sup> See Brautigam & Gaye, *supra* note 227; Lamido Sanusi, *Africa Must Get Real About Chinese Ties*, FIN. TIMES (Mar. 11, 2013), <http://www.ft.com/cms/s/0/562692b0-898c-11e2-ad3f-00144feabd c0.html> (last visited Mar. 26, 2014).

<sup>232</sup> Brautigam & Gaye, *supra* note 227.

<sup>233</sup> Sanusi, *supra* note 231.

<sup>234</sup> *Id.*

### 3. Constitutional Instruction on China's Relations with the Developing World

China's traditional alignment with the developing world has long been a source of pride for the nation, and is also enshrined in its State Constitution, which states:

China consistently opposes imperialism, hegemonism and colonialism, works to strengthen unity with the people of other countries, supports the oppressed nations and the developing countries in their just struggle to win and preserve national independence and develop their national economies.<sup>235</sup>

Indeed, China's status as the only developing country member of the U.N. Security Council has provided it with many opportunities to speak out on behalf of developing countries.<sup>236</sup> But, the union between Chinese interests and the interests of the developing world may be weakening, as evidenced by China's refusal to accept international monitoring standards.<sup>237</sup> Though China's refusal is in keeping with its constitutional "Five Principles" insistence upon sovereignty and mutual non-interference,<sup>238</sup> it is contrary to the expectations of much of the developing world.<sup>239</sup>

Furthermore, the dual constitutions highlight the paramount role of economic and industrial development in modernizing the nation.<sup>240</sup> The State Constitution proclaims that "Major successes have been achieved in economic development. An independent and fairly comprehensive socialist

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<sup>235</sup> XIANFA pmb. para. 12 (2004). The pledge to resist Pacific hegemony is a fundamental tenet of the U.S.–China Shanghai Communiqué. *Joint Statement Following Discussions with Leaders of the People's Republic of China: Shanghai, February 27, 1972*, U.S. DEP'T STATE, available at <http://history.state.gov/historicaldocuments/frus1969-76v17/d203>.

<sup>236</sup> See World Economic Situation Prospects 2014, U.N. Dep't Econ. & Soc. Affairs, 145–47 (2004), available at [http://www.un.org/en/development/desa/policy/wesp/wesp\\_current/wesp2014.pdf](http://www.un.org/en/development/desa/policy/wesp/wesp_current/wesp2014.pdf); SUZANNE XIAO YANG, CHINA IN UN SECURITY COUNCIL DECISION-MAKING ON IRAQ: CONFLICTING UNDERSTANDINGS, COMPETING PREFERENCES 116 (2013) (quoting Chinese Foreign Minister Qian Qichen). Russia is considered an economy in transition, the others developed. World Economic Situation Prospects, *supra*, at 145–47.

<sup>237</sup> See Lin & Buhi, *supra* note 204, at 42.

<sup>238</sup> See XIANFA pmb. para. 12 (2004); Lin & Buhi, *supra* note 204, at 42. This is not to say that all Chinese are united in this view. Hu Angang recognizes that China's insistence on developing country exemptions is ultimately self-undermining, as the adverse consequences of climate change do not discriminate between developed and developing nations. See HU ANGANG, *supra* note 88, at 135–36. He argues that China serve as a leader among developing countries in emission-reduction efforts and to subject itself to strict emission standards—even if China's per capita emissions are lower than those developed economies. See *id.*

<sup>239</sup> See Richard Black, *Climate Deal Pushed by Poorest Nations*, BBC (Dec. 1, 2011), <http://www.bbc.co.uk/news/science-environment-15992519> (last visited Mar. 26, 2014).

<sup>240</sup> XIANFA pmb. para. 6 (2004); CONST. COMMUNIST PARTY OF CHINA General Program para. 14 (2012).

system of industry has in the main been established.”<sup>241</sup> Meanwhile, the CCP Constitution says:

The [CCP] leads the people in developing the socialist market economy. It unwaveringly consolidates and develops the public sector of the economy and unswervingly encourages, supports and guides the development of the non-public sector. It gives play to the basic role of market forces in allocating resources and works to set up a sound system of macroeconomic regulation.<sup>242</sup>

Deng Xiaoping Theory and the Three Represents helped to facilitate China’s meteoric shift from an agrarian to an industrial power.<sup>243</sup> The theories of Scientific Development and the Socialist Harmonious Society continue to push for China’s economic development, but seek to distribute economic prosperity more evenly across the populace.<sup>244</sup> Even the foreign policy of Peaceful Development focuses on foreign policy as a means to aid China’s economic development.<sup>245</sup> From these examples, one can see that there is no constitutional motivation to put the brakes on industry or investment.

Although the constitutions maintain a focus on economic development, in 2010, the CCP Constitution also added a section promoting ecological progress.<sup>246</sup> The relevant provision reads, “The Party must promote all-around economic, political, cultural, social, and ecological progress in accordance with the overall plan for the cause of socialism with Chinese characteristics.”<sup>247</sup> The General Program of the CCP Constitution goes on to say that the CCP “leads the people in promoting socialist ecological progress . . . aimed at creating a good working and living environment for the people and ensuring lasting and sustainable development of the Chinese nation.”<sup>248</sup> The qualifying language of “progress in accordance with the overall plan for the cause of socialism with Chinese characteristics,”<sup>249</sup> and placing eco-

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<sup>241</sup> XIANFA pmbl. para. 6 (2004).

<sup>242</sup> CONST. COMMUNIST PARTY OF CHINA General Program para. 14 (2012).

<sup>243</sup> SHIRK, *supra* note 8, at 13–19; *Full Text of Resolution on Amendment to CPC Constitution*, XINHUA (Nov. 11, 2012), [http://news.xinhuanet.com/english/special/18cpcnc/2012-11/14/c\\_131973750.htm](http://news.xinhuanet.com/english/special/18cpcnc/2012-11/14/c_131973750.htm) (“[F]ollowing the guidance of Deng Xiaoping Theory and the important thought of Three Represents, [Chinese communists] have gained a deep understanding [on] what kind of development China should achieve under new conditions and how the country should achieve it to meet new requirements for development.”). China’s economic liberalization began in 1978 under Deng Xiaoping’s reforms. SHIRK, *supra* note 8, at 15.

<sup>244</sup> See Hu’s Speech, *supra* note 10.

<sup>245</sup> See Peaceful Development White Paper, *supra* note 135.

<sup>246</sup> See CONST. COMMUNIST PARTY OF CHINA General Program para. 18 (2012).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* para. 27.

<sup>249</sup> *Id.* para. 18.

logical progress at the end of list, however, subjugates environmental concerns to economic ones.<sup>250</sup> Thus, for the time being, China's leaders have a distinct constitutional mandate to place the national economic interest clearly ahead of environmental diplomacy. With that in mind, China should be lauded for its considerable investment in developing a greener economy under Hu Jintao.<sup>251</sup>

Meanwhile, although at first glance China's venture socialism would seem to be opposed to the State Constitution's admonition against the "decadent" ideas of capitalism,<sup>252</sup> this admonition must be read in the light of the Three Represents constitutionalism.<sup>253</sup> That reading dictates that the CCP must: [1] represent the advanced productive forces in society; [2] represent the advanced modern culture; and [3] represent the interests of the vast majority of the people.<sup>254</sup> Indeed, once the 1982 Constitution declared that the historical "exploiting classes as a class have been eliminated in our country,"<sup>255</sup> China was free to begin interfacing with global economic institutions as part of its reform and opening up, in order to build an advanced socialist society.<sup>256</sup> This unleashed a torrent of Chinese industriousness, resulting in the anointing of an elite professional class.<sup>257</sup> Whereas Deng Xiaoping Theory unleashed these "Red Capitalists,"<sup>258</sup> the Three Represents allowed them to become CCP members.<sup>259</sup> The challenge for Scientific Development is to redirect capitalism in a way that it can benefit the vast majority of the people, as opposed to just the small class of elites.

China's primary foreign policy challenge will be securing the immense amount of resources it needs to complete its development while maintaining harmonious relations with the developing world.<sup>260</sup> One can speculate on the amount of leverage the CCP will have with the governments and corporations that it seeks to invest in, but Beijing believes that its model of so-

<sup>250</sup> See *id.* paras. 18, 27.

<sup>251</sup> See *China Pledges to Deepen Economic Restructuring, Grow Green Economy*, XINHUA (Nov. 13, 2011), [http://news.xinhuanet.com/english2010/china/2011-11/13/c\\_122271179.htm](http://news.xinhuanet.com/english2010/china/2011-11/13/c_122271179.htm) (last visited Mar. 26, 2014).

<sup>252</sup> XIANFA art. 24 (2004).

<sup>253</sup> Zhenmin Wang, *The Developing Rule of Law in China*, HARV. ASIA Q. (2000), available at <http://archive.is/rqeqp> ("[U]nder the rule of law, the primary purpose of the legal system is to regulate and restrain the behavior of government officials. There must be laws regulating the authority of the government and its officials—political behavior must comply with legal rules.").

<sup>254</sup> See SHAMBAUGH, *supra* note 12, at 111.

<sup>255</sup> XIANFA pmbl. para. 8 (2004).

<sup>256</sup> See CONST. COMMUNIST PARTY OF CHINA General Program para. 5 (2012).

<sup>257</sup> See BRUCE J. DICKSON, RED CAPITALISTS IN CHINA: THE PARTY, PRIVATE ENTREPRENEURS, AND PROSPECTS FOR POLITICAL CHANGE 1–2 (2003).

<sup>258</sup> See *id.* at 32–38; SHIRK, *supra* note 8, at 13–19.

<sup>259</sup> See DICKSON, *supra* note 257, at 1–2.

<sup>260</sup> See discussion *supra* Part III.

cialism provides an example for other nations to follow.<sup>261</sup> The flow of capital from this more altruistic China could someday echo the “conditional aid” packages of Western countries, where aid to developing countries is tied to policy conditions.<sup>262</sup> China will emphasize the advantages of adopting those policies as reflected in its own domestic constitutionalism.

## CONCLUSION

A new generation of Chinese leaders took over in early 2013, when Chairman Hu passed the reins of power to his successor, Xi Jinping. Although each CCP administration’s constitutional platform is refined into its successors to form an uninterrupted iteration of socialism with Chinese characteristics, it is unclear exactly what will become of the nexus between the theories of Scientific Development, the Socialist Harmonious Society, and Peaceful Development under the Xi Jinping administration. The rhetorical focus has already shifted to the “Chinese Dream” (*Zhongguo Meng*). If and when China achieves superpower status, it will be in large part due to the success of its internal policies, which it is now attempting to project into the practice of foreign affairs. This seamless expression of national and international policy is a product of the proper application of the CCP’s governing ideology as refined from the time of Mao Zedong up to and including its expression as Scientific Development.

Under the theory of *realpolitik*, one can predict that as China’s domestic wealth and military strength continue to increase, Chinese leaders will face greater internal pressure to use those resources to press for national interests. The first year of the Xi administration suggests an early willingness to do so with more confidence. Although it does appear that China is risking some of its soft power in the developing world, from the perspective of Copenhagen and the South China Sea, it is gaining an attractive portfolio of territorial and economic interests. Hu’s China counterbalanced the effects of its resource acquisitions by increasing foreign aid. Although there is room for both policy goals under China’s constitutional law of foreign policy, China’s primary challenge will be securing the vast amount of resources it needs to complete its development while maintaining harmonious relations with the developing world. The normative argument could be made that in order to remain constitutional, China’s attempts at policy seamlessness should eschew the competitive temptations at the heart of big nation

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<sup>261</sup> See Joshua Kurlantzick, *China’s Model of Development and the “Beijing Consensus,”* CHINA US FOCUS (Apr. 29, 2013), <http://www.chinausfocus.com/finance-economy/chinas-model-of-development-and-the-beijing-consensus/> (last visited Mar. 26, 2014).

<sup>262</sup> Guerin, *supra* note 229, at 6, 9–10.

chauvinism, but China's constitutional development leaves ample room for both realist and liberal interpretations.

The possibility of a foreign affairs crisis resulting in a major constitutional controversy is low because the Chinese constitutional law of foreign affairs is fairly explicit. As the specific examples of foreign policy conduct during the Hu administration analyzed herein demonstrate, the practice of Chinese foreign policy is informed by the nation's dual constitution system. China's foreign affairs are not only procedurally ordered by, but also substantively instructed by, express provisions of the State and Communist Party Constitutions, and this feature is worthy of more study. After all, as the Chinese state constitution says, "China's achievements in revolution and construction are inseparable from support by the people of the world. The future of China is closely linked with that of the whole world,"<sup>263</sup> while one of its leading minds asserts, "that which conforms to the interests of China today tends to be conducive to promoting the interests of the world as a whole."<sup>264</sup> As the constitutions communicate the highest official narrative of Chinese intentions to its own people and the world, one must consider China's constitutions to understand both China's view of its own role in the world as well as the normative bases of Chinese foreign policy.

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<sup>263</sup> XIANFA pmb. para. 12 (2004).

<sup>264</sup> HU ANGANG, *supra* note 88, at 15.

