

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of )  
 )  
Protecting Against National Security Threats ) WC Docket No. 18-89  
to the Communications Supply Chain Through )  
FCC Programs )

Date: August 3, 2018

**EXPERT REPORT**

*Prepared by*

Jacques deLisle

**INTRODUCTION**

This report addresses issues related to the Notice of Proposed Rulemaking (NPRM) *In the Matter of Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, WC Docket No. 18-89, 83 Fed. Reg. 19,196 (May 2, 2018) and, more specifically, the Reply Comments of the Telecommunications Industry Association (“TIA”), dated July 2, 2018, in that proceeding.

I am the Stephen A. Cozen Professor of Law, Professor of Political Science and Deputy Director, Center for the Study of Contemporary China, Director of the Center for East Asian Studies, and Co-Director of the Center for Asian Law at the University of Pennsylvania. I am also Director of the Asia Program at the Foreign Policy Research Institute. I am a member of the National Committee on U.S.-China Relations and the International Academy of Comparative Law. I have been an honorary professor at Renmin University Law School and am an inaugural member of the global law faculty at Peking University.

For more than thirty years, my research and teaching have focused on Chinese law, Chinese politics, and China’s external relations. My scholarship in these fields has appeared in numerous books, law reviews, and social science and policy journals in the United States and in East Asia. I regularly teach courses and advise graduate students in these fields. I have served as a consultant, advisor, and lecturer in programs on legal reform in China, in several cases in programs supported by the U.S. government and major international foundations. I provide briefings and similar services to U.S. government entities, including the State Department, Defense Department, the intelligence community, and congressional staff. I often give public lectures and appear in print, television and other media commenting on issues within my fields of study.

I have prepared this report at the request of Jones Day. This report represents my independent assessment and opinions.

## **Executive Summary**

The TIA reply comments presents an account of the relationship of the Chinese Communist Party and the Chinese state to Huawei and other somewhat similar enterprises that is overly simplistic, incomplete and one-sided. In some cases, TIA relies on generalizations or specific features of the Chinese system that do not apply in full, or in some cases, at all, to Huawei and similar enterprises.

TIA similarly offers an overly simple, incomplete view of the policy goals of the Chinese leadership, omitting the long-standing high-priority economic goals and supporting policies that would make the Chinese authorities' use of Huawei for the espionage purposes asserted by TIA costly and risky for China.

TIA's arguments "prove too much" in that, if accepted, they call for actions by the U.S. government that would restrict access to U.S. markets and international activities involving the U.S. and U.S. parties that would sweep extremely broadly, and far beyond the program addressed by the FCC's proposed rule.

TIA's assertions that Huawei and other Chinese companies pose security risks not posed by other, non-Chinese companies overstates the relevant contrast between the two categories, both because both Chinese and non-Chinese companies are links in the same or similar global production chains and because many of the mechanisms for influence or coercion that TIA asserts that the party and state could use with Huawei (and others as well) could be used against non-Chinese companies.

TIA's account of the possibly relevant national security risks to the United States is incomplete and unbalanced, taking no note of the controversy surrounding congressional and other claims about the risks posed by Huawei and other Chinese firms, the other already-available and better-suited means in U.S. law and policy to address the asserted risks, and the likelihood that China would respond to the FCC rule in ways that would harm U.S. interests.

## **TIA Examples of Purported Party / State Influence over Huawei**

TIA portrays an extent of party intervention and control in the operation of companies in China that is incomplete and overly generalized. Contrary to TIA's suggestion, there is a great deal of diversity and complexity in the relationships between the party or the state, on one hand, and business enterprises, on the other. Some major enterprises remain wholly owned by the central state and thus have especially robust channels for possible party and state influence and control. As a privately owned enterprise, Huawei is not in this category. Some enterprises operate in highly regulated industries or militarily sensitive sectors and thus are subject to closer monitoring and control. Again, Huawei is not in these categories. To be sure, various mechanisms for the party and state to exercise influence do exist in various types of Chinese enterprises, but they are not evenly distributed, and Huawei is comparatively well-insulated from

some of the most important mechanisms cited in the materials on which TIA relies. (TIA Report at 55-56.)

TIA's account portrays a one-way street of domination and overweening influence. This portrayal ignores the ample evidence that Chinese enterprises—especially economically significant enterprises, and even large state-owned enterprises—have their own, autonomously defined economic interests and work, often effectively, to shape the policy and legal directives that affect their interests.<sup>1</sup> Huawei in particular has been the subject of public reports, including by knowledgeable observers, that do not accept the dark picture of clear lack of autonomy that TIA paints.<sup>2</sup>

Several of the more specific points upon which TIA relies in its account of Huawei are incorrect or irrelevant to TIA's claims. Many of the errors or mischaracterizations may seem small when taken in isolation. But their cumulative effect significantly distorts reality, and cannot support the account TIA asserts of the degree of party and state control over and intervention in Huawei.

First, TIA cites a media report that “Chinese Internet regulators” proposed in late 2017 that the state take one-percent shares in Internet companies and that this report proves that “the Party has broadened its focus from state-owned firms to include private companies” and that “even ‘private’ Chinese companies receive high-level strategic direction from the Party.” (TIA Report 56-57.) The cited media report appears to refer to a proposal to have certain companies issue “special management shares” to the government. This idea has been under consideration, in some form, for media companies since at least since 2013.<sup>3</sup> The discussion of the proposal TIA cites in the media and in official Chinese sources appears to address only Internet companies—a category that does not include Huawei, but instead is composed primarily of companies that provide Internet content or Internet-content platforms. Notably, the principal

---

<sup>1</sup> See, for example, Erica S. Downs, “Business Interest Groups in Chinese Politics,” in Cheng Li, ed. *China's Changing Political Landscape* (Washington, D.C.: Brookings, 2008), pp. 121-141; Erica S. Downs, “New Interest Groups in Chinese Foreign Policy,” Brookings Institution, Apr. 13, 2011, <https://www.brookings.edu/testimonies/new-interest-groups-in-chinese-foreign-policy/>; Scott Kennedy, *The Business of Lobbying in China* (Cambridge, Mass.: Harvard University Press, 2005); Zheng Lei, Benjamin L. Liebman, and Curtis J. Milhaupt, “SOEs and State Governance: How State-Owned Enterprises Influence China's Legal System,” in Benjamin L. Liebman and Curtis J. Milhaupt, eds. *Regulating the Visible Hand* (New York: Oxford University Press, 2015) 203-224.

<sup>2</sup> See, for example, Sheridan Prasso, “What Makes Huawei So Scary?” *Fortune*, July 28, 2011, <http://fortune.com/2011/07/28/what-makes-china-telecom-huawei-so-scary/>; “Huawei and ZTE: Put on Hold,” *Economist*, Oct. 13, 2012, <https://www.economist.com/business/2012/10/13/put-on-hold>; Ian Bremmer, “America's Way or Huawei,” Reuters, Oct. 26, 2012 <http://blogs.reuters.com/ian-bremmer/2012/10/26/americas-way-or-huawei/>; Gregory, Poling, “Who's Afraid of Huawei?” *Diplomat*, Apr. 10, 2012, <https://thediplomat.com/2012/04/whos-afraid-of-huawei/>.

<sup>3</sup> The term likely translated in media accounts as “special management shares” appears in a different but broadly related context—that is, also addressing media content-providing firms—in the principal policy document from the Third Plenum of the 18<sup>th</sup> Central Committee in 2013. See Central Committee of the Communist Party of China, “Decision on Some Major Issues Concerning Comprehensively Deepening Reform,” Nov. 12, 2013, § XI ¶39 (concerning state holding “special management shares” in state-owned media companies that had been transformed into share-issuing companies).

government document discussing the proposed change is from an Internet regulatory body, not one of the more general commercial and economic regulatory bodies that have jurisdiction over Huawei. The most nearly relevant rules—quite possibly the ones referenced in the media accounts—are from that same government body, the Cyberspace Administration of China, and refer prospectively to a “special management share system” that is to be implemented for a subset of “Internet news information service providers” (once more detailed rules are formulated). As indicated consistently in media accounts, the predominant motivation for consideration of these regulatory measures has been concern about Internet content and reflects concern with extending the control that the Chinese state exercises over traditional media into cyberspace.<sup>4</sup> These are not issues that are implicated in Huawei’s business. I have not found any source indicating that this has become a legal requirement or a general policy or a widespread practice with respect to companies outside the narrow, targeted sector (and it remains a rare practice even within that sector).

As far as I am aware, and as reflected in recent Huawei statements of its ownership, Huawei remains wholly owned by its employees, with no shares held by the state. TIA also does not explain how the acquisition of a mere one percent ownership share in Huawei—were that to occur—would hand to the state a means to impose “high-level strategic direction from the Party” on Huawei.

*Second*, TIA cites a media report from June 2018 that states that China’s principal securities regulator (the China Securities Regulatory Commission, or CSRC) was considering a rule to require more attention to party-building in companies that list on China’s stock exchanges. Huawei is not a listed company and thus would not be subject to these rules (which were merely a proposal on which the CSRC was seeking comments) when they were to go into effect. The proposed amendments—which would revise and update comprehensive rules adopted in the early 2000s—also direct firms to increase attention to environmental issues and corporate social responsibility. Media accounts, including the one cited by TIA, characterize the rules as also part of an effort by the CSRC to improve corporate governance, including protection of minority shareholders’ interests, at listed firms.<sup>5</sup>

*Third*, TIA states that it is an “essential and foundational principle” of the Chinese constitution that the “Party . . . rank[s] above the government.” TIA infers this “principle” from language in the preamble of the constitution that refers to the party’s “leadership” role. (TIA

---

<sup>4</sup> See, e.g., Raymond Zhong and Sui-Wei Lee, “China Seeks Small Stakes in, and More Sway Over, Online Firms,” *New York Times*, Oct. 13, 2017; David Bandurski, “Beijing Eyes Stake in Every Influential Chinese Media Company—Should They Worry?” *Forbes*, Oct. 16, 2017, <https://www.forbes.com/sites/insideasia/2017/10/16/beijing-eyes-stake-in-every-influential-chinese-media-company-should-they-worry/#6bd816b0715d>; Cyberspace Administration of China, 新规为清朗网络再加“紧箍咒” (New Rules Tighten Control for Clean Internet) [http://www.cac.gov.cn/2017-06/21/c\\_1121181949.htm](http://www.cac.gov.cn/2017-06/21/c_1121181949.htm); Cyberspace Administration of China, Internet News Information Service Management Regulations, art. 6 (2017).

<sup>5</sup> See, e.g., “China’s Listed Firms Need to Beef Up Communist Party-Building Activity, Regulator Says,” Reuters, June 15, 2018, <https://www.reuters.com/article/us-china-governance-party/chinas-listed-firms-need-to-beef-up-communist-party-building-activity-regulator-says-idUSKBN1JB16F>; Xie Jun, “China Pushed Listed Companies to Strengthen Party Building,” *Global Times*, June 18, 2018, <http://www.globaltimes.cn/content/1107405.shtml>.

Report 52, 58-59) But the language is more anodyne than TIA assumes, and TIA notably omits other language from that same preamble, which states that the party is required to abide by the state's laws: "The Constitution is the fundamental law of the State and has supreme legal authority.... [A]ll state organs, the armed forces, all political parties and public organizations ... must take the Constitution as their basic standard of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation."<sup>6</sup> In the substantive part of the Constitution, where the role of the party is not otherwise addressed, similar language is adopted: "The People's Republic of China implements governing the country according to law.... All state organs, the armed forces, all political parties and public organizations...must abide by the Constitution and other laws."<sup>7</sup>

This point is echoed in other official sources, including statements by China's top leadership: "All the people of China and all state organs, armed forces, political parties and social groups, and enterprises and public institutions must treat the Constitution as the fundamental code for their activities"<sup>8</sup>; and The Party "must itself act within the scope of the Constitution and the law and properly guide legislation, guarantee the law is fully enforced, and lead the way in observing the law."

Other statements from the highest levels of the party, including Party General Secretary and China's President Xi Jinping express similar points: The party has "adopted law-based governance as its fundamental policy [and] has treated the law-based exercise of state power as the basic means by which it governs ...."<sup>9</sup> Similarly, the Party recently has declared—at a meeting often described as "the 'rule of law' plenum"—that "[t]he comprehensive advancement of law-based governance is an issue of major strategic importance for [its] efforts to govern and reinvigorate the country, for the well-being of the people, and for the lasting stability of the Party and country."<sup>10</sup>

The current leadership in China headed by Xi (and similar to its predecessors) has routinely emphasized in high-profile official statements that the country must be governed according to laws, that party and government activities must follow the law (laws that include prohibitions on intrusion in the operation of companies where not authorized by law), and that enterprises must follow the laws (laws that include rights and obligations of independent management, and fiduciary duty—like responsibility to shareholders). Examples of the former are cited above.

---

<sup>6</sup> Constitution of the People's Republic of China, preamble.

<sup>7</sup> Constitution, art. 5.

<sup>8</sup> Xi Jinping, "Speech at a Meeting for People from All Sectors of Society Based in Beijing to Mark the 30<sup>th</sup> Anniversary of the Promulgation of the Current Constitution," Dec. 4, 2012.

<sup>9</sup> Xi Jinping, Speech at Fourth Plenary Session of the 18<sup>th</sup> Central Committee, Oct. 23, 2014; see also Xi Jinping, "Political Work Report," 19<sup>th</sup> National Congress of the Communist Party of China, Oct. 18, 2017 (advancing law-based governance as one of four comprehensive goals).

<sup>10</sup> "Explanation of Draft Resolution of the Central Committee of the Communist Party of China on Certain Major Issues Concerning Comprehensively Advancing the Law-Based Governance of China." Oct. 20, 2014.

Examples of the latter include: “Directors, supervisors and senior officers shall abide by the laws, administrative regulations and articles of association of the company, and have a fiduciary obligation and obligation of diligence to the company”; “The lawful rights and interests of companies shall be protected and not be infringed upon”; and shareholders and directors have rights to “decide on business policies and investment plans of the company.”<sup>11</sup>

To be sure, the laws “on the books,” political and policy statements, and phrases in the preamble of the constitution cannot be assumed to describe behavior fully. But TIA’s characterization of Chinese law and policy is highly selective and incomplete. To the extent TIA seeks to imply an argument along the lines of “see, they even admit that this is what they do,” it is problematic to cite sources so selectively and incompletely.

*Fourth*, TIA points to reports that it characterizes as showing requirements that companies such as Huawei be “attuned” to party policy statements and that party members (including those at Huawei) engage in political study. (TIA 56) Such measures are clearly and understandably offensive to liberal sensibilities, and they have drawn criticism inside and outside China as elements of a turn toward somewhat greater authoritarianism in Chinese politics. But they are not the dark omens or smoking guns that TIA appears to infer.

It is true that people in responsible positions in major companies in China pay careful attention to the statements of policy and political views by top national leaders. But they do so in large part for reasons that would be familiar and unremarkable to leaders of companies in the United States and elsewhere—including understanding likely developments in policies, laws, and government actions that could affect the company’s business opportunities.

To the extent that some Huawei employees are required, as members of the party, to engage in political study (including, in recent years, the study of Xi Jinping Thought), it is a commonplace and correct understanding that Chinese citizens generally do not take “political study” very seriously. Such obligations are widely seen as a perfunctory obligation, not a powerful means of indoctrination and imposition of fine-grained party-state control. Moreover, the content of the “Xi Jinping Thought” and other such materials that are widely and plausibly reported to be the object of study are general in content and anodyne in tone, addressing broad themes of politics, patriotism, and, in some cases, the need to follow the laws.<sup>12</sup>

*Fifth*, TIA’s characterization of the Company Law as “requir[ing]” establishment of a party organization in all companies with three or more party members is potentially misleading. The relevant provision in the Company Law does cross-reference the party regulations that call for the establishment of such organizations as a means for carrying out party activities, but what the Company Law requires the company to do is only provide the necessary conditions for party

---

<sup>11</sup> Company Law of the PRC, arts. 147, 4, 37, 46.

<sup>12</sup> See, for example, “Changing Ideological Influence in China: An Analysis of Major Surveys,” <https://www.canada.ca/en/security-intelligence-service/corporate/publications/china-and-the-age-of-strategic-rivalry/changing-ideological-influence-in-china-an-analysis-of-major-surveys.html>; Tom Phillips, “Xi Jinping Thought to be Taught in China’s Universities,” *Guardian*, Oct. 27, 2017, <https://www.theguardian.com/world/2017/oct/27/xi-jinping-thought-to-be-taught-in-chinas-universities>.

organizations to conduct those activities.<sup>13</sup> This requirement of facilitation and accommodation falls short of the mechanism of intrusion and dominance that TIA seeks to infer.

*Sixth*, TIA leans heavily on descriptions of Zhou Daiqi to infer pervasive party control of and influence over Huawei. Several of TIA's statements are simply incorrect. It is not true, for example, that Zhou is always referred to in the media either by his role as Party committee chair alone or by his party role first and his management/business position at Huawei second. Many media accounts refer to him first by his management/business role and only second by his party role, or only by his management roles.<sup>14</sup> Notably, the media references that TIA regards as suspicious indications of party control recount discussions that focus on describing or celebrating the business accomplishments of Huawei and their past and potential future contribution to the local and national economies.

TIA also points to Huawei's corporate reports referring to Zhou's corporate governance roles at the company, but not to his party role, and seems to suggest that these references are suspicious, presumably as an effort to mask the degree of party control that TIA asserts occurs at Huawei. Yet the omission of Zhou's party role from such company reports is neither unusual nor improper. The party committee positions are, under Chinese law, not part of the corporate governance structure, and therefore would not be reflected in documents that are based on, or report, that structure. TIA suggests that Zhou is listed as an "executive member" of the Supervisory Board because that is a less "suspicious" title. (TIA Report 59) The Supervisory Board is a part of the legally mandated governance structure of a Chinese corporation, along with the shareholders' meeting, the board of directors, and senior management. (The Supervisory Board is loosely modeled on German company law.)<sup>15</sup>

According to publicly available information provided in Huawei's annual report (and other publicly available sources as well),<sup>16</sup> Zhou is also a member of the audit committee, which is another standard corporate governance organ in Chinese companies. He is also listed as holding positions in company management related to compliance and ethics, including chief

---

<sup>13</sup> Company Law of the PRC, art. 19; see also Jake Laband, "Fact Sheet: Communist Party Groups in Foreign Companies in China," *China Business Review*, May 31, 2018, <https://www.chinabusinessreview.com/fact-sheet-communist-party-groups-in-foreign-companies-in-china/> (describing Company Law's limited requirements in article 19 and noting that there is no requirement that party committees have any management role).

<sup>14</sup> See, for example, Ministry of Transportation of the PRC, 通信信息中心与华为开展全面合作 (Communications Information Center and Huawei Fully Cooperate), Aug. 29, 2017, [http://www.mot.gov.cn/jiaotongyaowen/201708/t20170828\\_2909223.html](http://www.mot.gov.cn/jiaotongyaowen/201708/t20170828_2909223.html) (referring to Zhou only as senior (i.e., high-level) vice president); 华为周代琪：华为 70% 销售收入来自国际市场 (Huawei's Zou Daiqi: 70% of Huawei's Sales Revenue Comes from the International Market), *China Daily Fujian*, July 2, 2010 (listing management position before party secretary position); 华为技术有限公司高级副总裁周代琪 (Zhou Daiqi, Senior Vice President, Huawei Technologies Company, Ltd) Tencent Finance, July 1, 2010, <https://finance.qq.com/a/20100701/004260.htm> (same).

<sup>15</sup> Company Law of the PRC, arts. 51-63.

<sup>16</sup> <https://www.huawei.com/cn/about-huawei/executives/supervisory-board/zhou-daiqi;>  
<https://www.chinaventure.com.cn/cvmodule/user/detail/153376.shtml>

ethics and compliance officer, director of the compliance and ethics committee. These roles, too, typically include ordinary corporate management functions at Chinese companies.

More broadly, TIA apparently seeks to imply that Zhou should be seen an agent of the party who is inserted into the enterprise as a mechanism, or reflection, of party dominance and influence over the enterprise, or that he is primarily a member of the party apparatus, making his situation at Huawei akin to that of, say, an officer or employee of a U.S. government agency who was inexplicably wearing a second—and secondary—hat in management at an enterprise.

The inference does not follow from the material that TIA cites, and TIA adopts an incomplete and potentially misleading characterization. Consistent with biographical information from publicly available sources, Zhou's position as party secretary has come through the common and ordinary path of having been trained for, and working in fields in which the company operates—in the case of Huawei, technology and telecommunications—rising to management positions in the company's areas of business operations. According to available information, he is not—as TIA's account might suggest—a party cadre or apparatchik sent into the company. Rather, this biographical information is consistent with the common pattern of someone from within the company becoming the secretary of the party committee within a company. The role of party secretary of a party committee within a company does involve meeting with party officials outside the firm, as is reflected in some of the media accounts cited by TIA, but that role does not entail a position in any party—or government—body outside the company.<sup>17</sup>

TIA seems to invite a similarly problematic inference from the secretary of the party committee within ZTE being a member of the National People's Congress—China's legislature. To the extent that TIA seeks to suggest this implies he is an agent of the state inserted into the enterprise, the conclusion does not follow. In recent years, there has been a policy of recruiting more people who have already become prominent in business into the NPC. The practice has its origins in a policy initiated nearly twenty years ago to increase the representation of business interests in China's lawmaking and policy-making processes.<sup>18</sup>

*Seventh*, TIA depicts several programs as problematic state subsidies to Huawei, presumably to show Huawei's subservience to—born of dependence on—the Chinese state.<sup>19</sup>

---

<sup>17</sup> For another account of party committee secretaries in significant privately owned Chinese firms—in the technology sector—as pursuing and representing the business interests of the firm, rather than being the hands at the end of a centralized party arm that reaches inside the state, see He Huifang, “Why PR Chiefs are Running Communist Party Branches at China Tech Firms,” *South China Morning Post*, Mar. 21, 2017, <https://www.scmp.com/news/china/policies-politics/article/2080545/pr-chiefs-spearhead-communist-party-push-chinas-top>. For an example of a newly established party committee in a privately owned tech firm being headed by someone whose prior role had been on the business side (as a co-founder) of the company, see “Hi-Tech Firms Increasingly Setting Up CPC Committees, July 16, 2017, <http://www.humaniteinenglish.com/spip.php?article3111> (translation of article from China's *Global Times*). See also notes 13-14, above.

<sup>18</sup> The origin of this approach is the “Three Represents” policy articulated by President and Party General Secretary Jiang Zemin in the early 2000s. See Communist Party of China, “Three Represents,” <http://english.cpc.people.com.cn/66739/4521344.html>.

<sup>19</sup> If TIA's point is something else—that is, a claim that Huawei derives unfair competitive advantage over U.S. and other foreign firms—because of financial benefits conferred by the Chinese state, that does not speak in any



(TIA Report 62-65) The examples are a good deal less than TIA seems to infer. As I understand it, the \$30 billion dollar line of credit is available to Huawei as a commitment from the China Development Bank, and is not a line of credit that Huawei has used extensively or is dependent upon. (According even to the sources cited by TIA, Huawei used only an average of \$1 billion per year of the facility—a small number compared to Huawei company revenues that are around \$100 billion.) (TIA Report, 62-62) More fundamentally, the line of credit to which TIA appears to refer is one that is part of a program to support financing of purchases by foreign buyers of exports produced by Huawei and other Chinese companies. Such a program is akin to programs of the U.S. government’s Export-Import Bank and similar export-promotion programs funded by other governments around the world.<sup>20</sup>

TIA also points to research funding that Huawei has received from Chinese government programs. The amounts cited by TIA from Huawei annual reports represent a small fraction (under 10%) of Huawei’s research and development expenditures. As I understand it, these were grants made through competitive programs that were open to Huawei, other Chinese firms, and foreign-owned entities (including wholly owned subsidiaries of foreign companies), and under which projects involving foreign-invested firms were eligible to receive grants and did receive grants.<sup>21</sup> Chinese media reports indicate that Ericsson, Samsung, and Nokia have participated in these projects through operations that they have established in China. These types of programs, too, are hardly unique to China, and government programs similar to them can be found in advanced market economies seeking to promote research and development of technology-

---

relatively direct way to the national security concerns that the TIA submission purports to address. To the extent that such assertedly unfair economic policies and practices have indirect national security implications, the difficulty with TIA’s argument is addressed later in this submission (in the section concerning arguments that “prove too much”).

<sup>20</sup> International Development Finance Club, “Members: China Development Bank,” <https://www.idfc.org/Members/cdb.aspx>; “Huawei’s \$30 Billion China Credit Open Doors in Brazil, Mexico,” Bloomberg News, Apr. 24, 2011, <https://www.bloomberg.com/news/articles/2011-04-25/huawei-counts-on-30-billion-china-credit-to-open-doors-in-brazil-mexico>; Edmond Lococo, Crayton Garrison and Michael Forsythe, “CDB Helping Chinese Firms Get Global Edge,” *China Daily*, Apr. 26, 2011, [http://www.chinadaily.com.cn/business/2011-04/26/content\\_12397512.htm](http://www.chinadaily.com.cn/business/2011-04/26/content_12397512.htm)

<sup>21</sup> See, e.g., 诺基亚贝尔章旗:中国势必引领 5G 时代 (Nokia Bell’s Zhang Qi: China Bound to Lead in 5G Era), Xinhuanet, Sept. 29, 2017, [http://www.xinhuanet.com/info/2017-09/29/c\\_136647747.htm](http://www.xinhuanet.com/info/2017-09/29/c_136647747.htm) (describing Nokia Bell joint venture enterprise in China as having participated in 5G projects under the government’s 863 Program of research grants); 科技部曹健林:“863 计划”投入 5G 先期研究经费已达 2.5 亿元 (Ministry of Science and Technology’s Cao Jianlin: 863 Program Has Already Invested 250 Million Yuan in Preliminary 5G Research), Nov. 6, 2015, C114 News, <http://www.c114.com.cn/news/16/a926642.html> (statement by Vice Minister of Science and Technology that the research-and-development organs of foreign companies located in China, including those of Ericsson, Samsung, Nokia, and others, had participated in 863 Program–supported preliminary research on 5G technology).

intensive industries.<sup>22</sup> And non-Chinese telecommunications equipment companies, such as Nokia, have participated in and benefited from such analogous programs in other countries.<sup>23</sup>

To the extent that TIA's characterization of these programs as "subsidies" to Huawei implies that these programs are part of what TIA more generally characterizes as Chinese policies and behaviors that violate relevant international laws and norms, that assertion is not established and is problematic. Although China has been the target of numerous complaints by the U.S. and others in the WTO process, none of those complaints has alleged that these programs constitute subsidies in violation of WTO requirements.<sup>24</sup>

### **China's Policy Goals: Economic Growth and Development through International Engagement and Successful Chinese Companies**

TIA oversimplifies and mischaracterizes the nature of Chinese authorities' policy goals. TIA asserts, assumes, or at least strongly suggests, that party and state authorities in China are one-sidedly focused on an agenda of espionage, and an aggressive posture in security relations, with the United States, and/or that they will pursue that agenda by exercising decisive control over Huawei with little or no concern about other goals, or the costs to those goals that would follow from doing so. That is a significantly incorrect understanding, as TIA appears to

---

<sup>22</sup> Consulate General of the People's Republic of China in New York, "National High Tech R&D Program (863 Program)," Mar. 5, 2016, <http://newyork.china-consulate.org/eng/kjsw/std/t1345403.htm> (special funds earmarked for integrating 863 program with international cooperation projects); Joel R. Campbell, "Becoming a Techno-Industrial Power: Chinese Science and Technology Policy," *Issues in Technology Innovation* 23 (Apr. 2013), p. 6, <https://www.brookings.edu/wp-content/uploads/2016/06/29-science-technology-policy-china-campbell.pdf>, (describing the 863 National High Technology Development Program as "adapt[ing] methods pioneered by the American National Institutes of Health and Department of Defense: most projects are in basic or applied science; planners select researchers for each topic, and firms are encouraged to participate..."); see also 科技部: 863 计划支持 5G 发展投入逾 3 亿元 (Ministry of Science and Technology: 863 Program Supports 5G Development with Investment of Over 300 Million Yuan), Nov. 8, 2014, <http://webcache.googleusercontent.com/search?q=cache:http://news.sciencenet.cn/htmlnews/2014/11/307025.shtm> (describing participation of representatives of Nokia, Ericsson, Qualcomm and others in meeting of National 863 Program 5G Major Projects Expert Group).

<sup>23</sup> Nokia Annual Report on Form 20-F 2017, p. 172 (indicating government grant income and R&D tax credits in excess of €100 million per year); see also Community Research and Development Information Service, "Graphene-Based Revolutions in ICT AND Beyond," April 22, 2017, [https://cordis.europa.eu/project/rcn/109691\\_en.html](https://cordis.europa.eu/project/rcn/109691_en.html); Community Research and Development Information Service, "Self-Optimisation an Self-Configuration in Wireless Networks," April 13, 2017, [https://cordis.europa.eu/project/rcn/85445\\_en.html](https://cordis.europa.eu/project/rcn/85445_en.html); Community Research and Development Information Service, "Energy-conscious 3D Server-on-Chip for Green Cloud Services," April 20, 2017, [https://cordis.europa.eu/project/rcn/93836\\_en.html](https://cordis.europa.eu/project/rcn/93836_en.html).

<sup>24</sup> See Office of the United States Trade Representative, Pending WTO Disputes, <https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/pending-wto-disputes>; Disputes Sorted by Respondent—China, <https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/disputes-sorted-respo>.

recognize through its extensive discussion of what it considers China's very high level of concern with the economic success of Huawei and other Chinese firms.<sup>25</sup> (TIA Report 66ff)

The predominant policy goal of Chinese party and state leaders for four decades has been economic development. More specifically, China has pursued a strategy of economic development through market-oriented reforms and deep engagement and integration with the outside world.<sup>26</sup> Much of TIA's argument, and the sources it relies upon, reflect this basic and obvious truth. So, too, do many of the complaints from the U.S. government and U.S. industry groups about China's behavior. These include accounts or claims of: state-linked theft of commercially valuable intellectual property by hackers possibly linked to the Chinese state (which was the target of an agreement reached between the two sides' governments); inadequate protection of foreign companies' intellectual property rights (which have been the focus of WTO disputes involving China); contractual transfers of licensing of intellectual property rights to Chinese firms on terms that foreign rights-holders regard as unfair or coercive (but that may be consistent with relevant law); advantages conferred upon Chinese firms by state policies and laws giving access to capital on favorable terms; and industrial policy; and so on.<sup>27</sup> Even the behavior by ZTE that has been the focus of U.S. sanctions appears to have been motivated by the pursuit of economic gain: selling products to buyers in North Korea and Iran in violation of U.S. restrictions.

While this behavior may warrant criticism, calls for policy change, and U.S. pursuit of legal remedies against China through the WTO, it does not indicate the national security or espionage agenda that TIA seeks to impute. It reflects an ardent pursuit of *economic* growth, including through means that the U.S. and U.S. firms may find disconcerting, harmful, offensive, and even unlawful. Many of the controversial means are not unlawful or have not yet been judged to be so. As the principal work of Chinese law scholarship on which TIA relies makes clear (and as is, indeed, the focus of that work), many of the economic policies that China pursues and to which the U.S. and U.S. industry groups object are consistent with the

---

<sup>25</sup> This contention fits uncomfortably with another TIA contention—that China seeks economic advantages for itself and for Chinese firms in ways that violate international legal obligations and norms, but that have no clear and direct connection to national security issues.

<sup>26</sup> See, for example, Nicholas Lardy, *Integrating China into the Global Economy* (Washington, D.C.: Brookings, 2002); Nicholas Lardy, *From Markets Over Mao* (New York: Columbia University Press, 2014); Barry Naughton, *The Chinese Economy: Transitions and Growth* (Cambridge: MIT Press, 2006); Harry Harding, *China's Second Revolution: Reform After Mao* (Washington, D.C.: Brookings, 1987); Jacques deLisle, "Law and the Economy in China," in Gregory C. Chow and Dwight H. Perkins, eds. *Routledge Handbook of the Chinese Economy* (New York: Routledge, 2013).

<sup>27</sup> See, for example, US-China Business Council, 2017 Member Survey, [https://www.uschina.org/sites/default/files/2017\\_uscbc\\_member\\_survey.pdf](https://www.uschina.org/sites/default/files/2017_uscbc_member_survey.pdf); Office of the United States Trade Representative, Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation under Section 301 of the Trade Act of 1974, Mar. 22, 2018, <https://ustr.gov/sites/default/files/enforcement/301Investigations/301%20Draft%20Exec%20Summary%203.22.ustrfinal.pdf>; Wayne M. Morrison, "China-U.S. Trade Issues," Congressional Research Service, RL 33536, July 6, 2018, <https://fas.org/sgp/crs/row/RL33536.pdf>.

requirements of the WTO and other bodies of international economic law.<sup>28</sup> Some of China’s policies have been upheld, others rejected, and still others remain pending in the WTO dispute resolution process. Moreover, Huawei—like other Chinese firms that make significant R&D investments and create valuable intellectual property—have been among an increasingly powerful contingent in China supporting stronger protection of intellectual property rights and the high-profile commitments by party and state authorities to improve intellectual property protection.<sup>29</sup>

Chinese authorities would put significant elements of their extraordinarily high-priority economic agenda—and the vast investments of resources China has made in that agenda—at risk if they were to manipulate Huawei (and other firms) into the espionage-related behavior TIA alleges would occur and that behavior were to be exposed (which would be a significant risk of undertaking such behavior).<sup>30</sup>

*First*, Chinese policies support the development of Chinese companies—including but not limited to a small number of “national champion” firms—that have international reputations and a significant place in global markets. These companies have valuable brands and significant market share abroad. Huawei is one of the few firms in this category. The pursuit of international certifications and approvals referred to in Huawei’s submission, and Huawei’s

---

<sup>28</sup> Mark Wu, “The ‘China, Inc.’ Challenge to Global Trade Governance,” *Harvard International Law Journal*, 57:2 (2016): 261-324.

<sup>29</sup> See, for example, 宋柳平：华为是如何全球知识产权战略布的 (Song Luping: Layout of Huawei’s Global Intellectual Property Strategy), China Intellectual Property Forum, Nov. 24, 2017, <http://www.qqip.net/plus/view.php?writer=admin&tid=3&aid=822>; 宋柳平：企业创新发展的知识产权保护 (Song Luping: Intellectual Property Protection for Enterprise Innovation and Development), China Law Society, Mar. 30, 2016, [https://www.chinalaw.org.cn/Column/Column\\_View.aspx?ColumnID=1023&InfoID=19019](https://www.chinalaw.org.cn/Column/Column_View.aspx?ColumnID=1023&InfoID=19019); 华为副总裁宋柳平博士来访并作学术讲座 (Huawei Vice President Dr. Song Luping Visits and Gives Academic Lecture), Chinese-German Institute for Intellectual Property, Mar. 13, 2018, <http://patent.hust.edu.cn/info/1018/1752.htm> (public statements by senior Huawei leadership asserting the importance of intellectual property protection, criticizing shortcomings in China’s intellectual property law system, and advocating stronger legal protection for intellectual property rights, including more robust civil and criminal remedies); Peter K. Yu, “Intellectual Property, Economic Development, and the China Puzzle,” in Daniel J. Gervais (ed.), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS Plus Era* (Oxford: Oxford University Press, 2007), pp. 169–216 (discussing emergence of Chinese “stakeholders”—enterprises that create and own valuable intellectual property—as potent advocates for improved intellectual property rights law and intellectual property rights protection); Sharon Thiruchelvam, “How China Became a Leader in Intellectual Property,” *Raconteur*, Apr. 20, 2018, <https://www.raconteur.net/risk-management/how-china-became-leader-intellectual-property> (similar); see also “China to Strengthen IPR Protection: Xi,” *Xinhuanet*, Apr. 10, 2018, [http://www.xinhuanet.com/english/2018-04/10/c\\_137099843.htm](http://www.xinhuanet.com/english/2018-04/10/c_137099843.htm); Notice of the State Council on Issuing the ‘13<sup>th</sup> Five Year Plan’ on National Intellectual Property Protection and Utilization,” Dec. 30, 2016, [http://www.qbpc.org.cn/inc/uploads/ckeditor/State%20Council%20on%20Issuing%20the%2013th%20Five-Year%20Plan%20on%20National%20Intellectual%20Property%20Protection%20and%20Utilization-EN&CH\(1\).pdf](http://www.qbpc.org.cn/inc/uploads/ckeditor/State%20Council%20on%20Issuing%20the%2013th%20Five-Year%20Plan%20on%20National%20Intellectual%20Property%20Protection%20and%20Utilization-EN&CH(1).pdf).

<sup>30</sup> Much of the TIA submission recognizes—and indeed asserts—that the Chinese state has this type of economic agenda. (TIA Report 66-68)

extensive sales and operations globally reflect its achievement of, and quest for, this stature, which very few China-based firms have achieved.<sup>31</sup>

*Second*, Chinese policies support large Chinese firms “going out” (that is, undertaking outbound foreign investment in other countries). For companies in infrastructure fields, including telecommunications, the Belt and Road Initiative pursues a large role for Chinese firms in those sectors, primarily in developing countries, across Asia and into Africa and even to Europe. Although Huawei’s overseas expansion began before the “going out” policy and the Belt and Road Initiative, Huawei’s activities would be considered by the Chinese government to be significant contributions to the advancement of both of these major and capacious goals.<sup>32</sup>

*Third*, Chinese policies encourage Chinese firms to develop research and development capacities in technology fields, including through investment in projects and programs abroad, through attracting foreign investment into China, and through partnerships between Chinese and foreign technology companies. Huawei is, of course, a significant China-based technology company with global operations, and it has invested in research and development abroad and with foreign partners.<sup>33</sup>

*Fourth*, a wide range of China’s laws and policies have fostered Chinese firms’ large-scale and deep integration into global value and production chains. Chinese firms buy and sell components and finished goods in a transnational, repeatedly border-crossing, production and marketing process. In the telecommunications equipment sector, Chinese and foreign firms rely upon extensive cross-licensing of intellectual property, including standard essential patents. Huawei is an especially prominent Chinese firm in this area, and activities in this area are major part of Huawei’s business model and activities.<sup>34</sup>

---

<sup>31</sup> See, for example, Bruce J. Dickson, “Updating the China Model,” *Washington Quarterly* 34:4 (2011): 39-58; Matthew Bey, “Huawei’s Success Puts It in Washington’s Sights,” Stratfor Worldview, June 28, 2018, <https://worldview.stratfor.com/article/huaweis-success-puts-it-washingtons-sights-china-technology>; Nathaniel Ahrens, “China’s Competitiveness: Myth, Reality, and Lessons for the United States and Japan—Case Study: Huawei,” Center for Strategic and International Studies, Feb. 2013, [https://csis-prod.s3.amazonaws.com/s3fs-public/legacy\\_files/files/publication/130215\\_competitiveness\\_Huawei\\_casestudy\\_Web.pdf](https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/130215_competitiveness_Huawei_casestudy_Web.pdf).

<sup>32</sup> See, e.g., “Going Out: An Overview of China’s Outward Foreign Direct Investment,” U.S.-China Economic and Security Review Commission, Mar. 30, 2011, <https://www.uscc.gov/sites/default/files/Research/GoingOut.pdf>; Daniel H. Rosen and Thilo Hanemann, “China’s Outbound Foreign Direct Investment Profile,” Peterson Institute for International Economics, June 2009, pp. 1-2, <http://www.andrewleunginternationalconsultants.com/files/petersen-institute-policy-brief---chinas-ofdi---daniel-rosen-thilo-hanemann---june-2009.pdf>; “Chinese Investment in Developed Markets: An Opportunity for Both Sides?” Economist Intelligence Unit, 2015, [chinese-investment-in-developed-markets.pdf](http://www.eiu.com/report/chinese-investment-in-developed-markets.pdf); “China Selects Huawei to Build Digital Silk Road between Asia and Europe,” Huawei, Mar. 16, 2016, <https://www.huawei.com/en/press-events/news/2016/3/Build-Direct-Digital-Silk-Road>; Wenyuan Wu, “China’s ‘Digital Silk Road,’” *Diplomat*, Nov. 3, 2017, <https://thediplomat.com/2017/11/chinas-digital-silk-road-pitfalls-among-high-hopes/>. Almost all of these sources specifically mention Huawei.

<sup>33</sup> See, for example, Xue Lan and Nancy Forbes, “Will China Become a Science and Technology Superpower by 2020?” *Innovations*, Fall 2006, <https://www.mitpressjournals.org/doi/pdf/10.1162/itgg.2006.1.4.111> (including discussion of policies of encouraging inbound and outbound investment in R&D, including in telecommunications sector); Fu Jing, “Europe Map Dotted with Huawei R&D,” *China Daily (Europe)*, July 25, 2014.

<sup>34</sup> See generally, Yutao Sun and Seamus Grimes, *China and Global Value Chains: Globalization and the Information and Communications Technology Sector* (New York: Routledge, 2018); David Dollar, “Global Value Chains Shed New Light on Trade,” Brookings Institution, July 10, 2017, <https://www.brookings.edu/blog/order->

For the Chinese Communist Party or the Chinese state to “use” Huawei in the way that TIA imagines would be to put this multifaceted, high-priority, long-developing, much-invested-in agenda at risk. Such behavior, if undertaken, well might be exposed. If it were exposed, the impact on Huawei’s ability to perform the roles described above could be considerable. From the Chinese authorities’ perspective, the damage done could not be undone by turning to another Chinese firm. Few firms, if any, could play the roles that Huawei has because they lack Huawei’s international stature, presence, and connections. And the reputational fall-out from any exposure of the activities that TIA asserts Huawei would be required to undertake would very likely extend to other major Chinese firms in the telecommunications sector and beyond.

The recent controversies over ZTE’s reported violation of U.S. restrictions on sales of certain products to buyers in North Korea and Iran is instructive here in two respects. For one, the incident confirms China’s emphasis on avoiding threats to the economic success of major Chinese telecommunications companies. When it became clear that the U.S. was threatening to impose sanctions on ZTE, in the form of banning its purchase of key components, that would be hugely damaging and perhaps fatal to the company, the issue became a focus of the highest level diplomacy involving nothing less than Chinese President Xi Jinping’s successful intervention with high-level officials of the Trump Administration to seek mitigation of the consequences for ZTE.<sup>35</sup>

In addition, if one were to assume, implausibly, that China did not appreciate the risks to its high-priority economic agenda that would follow from one of its prominent firms running afoul of U.S. legal restrictions related to national security, the ZTE incident surely would have made the point abundantly clear to Chinese leaders, including Xi.

TIA argues, in effect, that Chinese party or state authorities would be willing to risk all of these consequences because: they would “prefer,” if seeking to use companies as a vehicle for espionage, to work with Chinese-speaking Chinese nationals who are employees of a Chinese company” (TIA Report 58); or (in a more implicit argument) because Chinese authorities have the ability to use a company such as Huawei to those ends whereas they would not be able to do so with other companies. The first of these arguments is addressed above. The second is addressed later in this submission.

### **TIA’s Arguments Prove Too Much**

Several of TIA’s arguments “prove too much”: they are not specific to Huawei’s relevant actions and characteristics—or, in some cases, Huawei at all—and, if accepted as a basis for action by the U.S. government, they would call for restrictions on access to U.S. markets and international activities involving the U.S. and U.S. parties that sweep extremely broadly, and far beyond the program addressed by the FCC’s proposed rule.

---

[from-chaos/2017/07/10/global-value-chains-shed-new-light-on-trade/](http://en.people.cn/n3/2017/1122/c90000-9295737.html); Sun Wenyu, “China Improves Status on Global Value Chain of Manufacturing Industry: WIPO Report,” *People’s Daily*, Nov. 22, 2017, <http://en.people.cn/n3/2017/1122/c90000-9295737.html>.

<sup>35</sup> Niv Elis, “Trump Says ZTE Support Followed Request from Chinese President,” *The Hill*, May 17, 2018, <http://thehill.com/policy/finance/388199-trump-says-zte-support-followed-request-from-xi>.

*First*, much of the most pointed language in the TIA submission concerns negative trends in U.S.-China relations, including references to rising rivalry in international security affairs and a generally more adversarial bilateral relationship. (TIA Report 45-51) Other foci of TIA’s submission include China’s purported violation of WTO obligations, coercing foreign firms to enter contracts transferring or licensing intellectual property to Chinese parties, shortcomings in protecting intellectual property rights, and so on. These broad-brush features have no clear and specific connection to espionage activities, much less those that Chinese authorities might, in TIA’s view, use Huawei to conduct or facilitate. If these general features of U.S.-China relations are a basis for keeping Huawei out of the specific telecommunications markets at issue in this rulemaking (which evidently are not among the more highly national security-sensitive telecommunications networks), the same logic would dictate severing many aspects of the U.S.-China economic relationship, which amounts to more than \$500 billion in trade annually and includes nearly \$100 billion in cumulative direct investments in China by U.S. sources and a smaller (under \$30 billion) but faster rising level of Chinese direct investment in the United States.<sup>36</sup>

If, as TIA appears to argue, the problem is a generally rivalrous U.S.-China relationship, then any economic dealings between China, or Chinese companies, and the United States, or U.S. companies, that strengthen China militarily, technologically, or even merely economically are harmful to U.S. interests. Even in a time of rising security tensions and threats of significant reciprocal trade sanctions, there has been no serious suggestion on the U.S. side of suspending all aspects of U.S.-China ties that might benefit China absolutely, or even relatively. This is, thus, a case of an argument from TIA that “proves too much.”

To the extent that there are significant concerns about China’s not playing by the rules of the WTO or other aspects of international economic law, U.S. law and international law provide often-employed mechanisms for addressing those issues—including the many actions that U.S. and other WTO members have initiated against China in the WTO dispute resolution process, and the many measures that the U.S. has adopted pursuant U.S. trade laws, to address issues such as intellectual property protection, dumping of exports, limits on access to Chinese markets, and state subsidies to Chinese firms.

To use an FCC rule to prohibit use of federal government funds to purchase equipment from a handful of Chinese companies for USF funding projects—and not reaching otherwise highly similar purchases by U.S. parties for telecommunications networks that are not supported by USF—is a seemingly random and arbitrary, and surely ineffective, means to address the national security issues in U.S.-China relations. The U.S.’s large, and legitimate, concerns about bilateral security relations are a correspondingly weak basis for the proposed prohibition.

*Second*, the TIA submission points to several factors that can be fairly summarized as characteristic of China’s authoritarian or illiberal political order. As noted earlier, these features are understandably unappealing to U.S. audiences, but they are hardly unique to China, unusual

---

<sup>36</sup> Office of the U.S. Trade Representative, U.S.-China Trade Facts, <https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china>.

in the world, or absent among states with which the U.S. maintains extensive and open economic relationships.

*Third*, the TIA report emphasizes several Chinese laws on issues such as national security, national intelligence, and cybersecurity, including provisions that require private companies to cooperate with the government. Laws of this type, too, are far from unusual. The U.S., of course, has adopted laws of this general type. Also, contrary to what the TIA submission apparently seeks to imply with its rather nihilistic reading of Chinese statutory language (TIA Report 52-53), China's national security- and cyberspace-related laws (and emergency powers-type laws more generally) were adopted in significant part to regularize and make subject to law state authorities' directives to, or commandeering of, private enterprises and assets where national security or public order problems need to be addressed.<sup>37</sup> Those motives are commonly asserted in official commentaries and in the laws themselves.<sup>38</sup>

*Fourth*, as also was partly addressed earlier, TIA invokes several aspects of what can be fairly called Chinese "industrial policy"—the use of state resources for the economic benefit of Chinese firms, particularly in sectors (including telecommunications) that the Chinese government has identified as important sectors for the future—and export promotion.<sup>39</sup> These types of policies and expenditures of government resources—and related regulatory measures—are, of course, hardly specific to China, nor do they have any necessary or evident connection to espionage or related issues. Even the United States has these types of laws and policies. Examples include: U.S. Export-Import Bank—a government supported entity—that seeks to facilitate U.S. exports, including through making possible loans to buyers at favorable rates; U.S. government programs that provide grants for basic research to support the development of new

---

<sup>37</sup> Compare Jacques deLisle, "States of Exception in an Exceptional State: Emergency Powers Law in China," in Victor V. Ramraj and Arun K. Thiruvengadam, eds., *Emergency Powers in Asia* (New York: Cambridge University Press, 2010) 342-392; see National Security Law, ch. VI (detailing legal rights and obligations of citizens and organizations in national security area); Cybersecurity Law chs. III-VI (setting forth detailed rights and obligations of network operators and other enterprises, and the powers / authority of state actors in cybersecurity area); National Intelligence Law, chs. II-IV (setting forth obligations of citizens and organizations, and the powers / authority of state actors in national intelligence area). These laws contain provisions authorizing sanctions against state authorities who exceed or abuse their powers under the laws.

<sup>38</sup> Xi Jinping, "Speech at the Inaugural Meeting of the Central Leading Group for Cybersecurity and IT Applications," *People's Daily*, Feb. 28, 2014 (characterizing new laws as recognizing that "[c]yberspace must be governed in accordance with law so as to safeguard citizens' legitimate rights and interests"); National Security Law, art. 5 (purpose of national security leading body is "promoting the rule of law in national security"); Cybersecurity Law, arts. 3, 8 (State pursues cybersecurity management in accordance with law; government agencies to perform responsibilities and functions pursuant to relevant laws); National Intelligence Law, art. 8 (national intelligence work to be conducted in accordance with law and to respect and protect rights and interests of individuals and organizations).

<sup>39</sup> See, e.g., Eswar Prasad, "China's Approach to Economic Development and Industrial Policy," Brookings Institution, June 15, 2011, <https://www.brookings.edu/testimonies/chinas-approach-to-economic-development-and-industrial-policy/>; Reggie Lai and Lingling Ding, "China's Industrial Policy and Its Implications for Foreign Manufacturers," American Chamber of Commerce—Shanghai, Nov. 8, 2017, <https://www.amcham-shanghai.org/en/article/chinas-industrial-policy-and-its-implications-foreign-manufacturers>; Scott Kennedy, "Made in China 2025." Center for Strategic and International Studies, June 1, 2015, <https://www.csis.org/analysis/made-china-2025>; "Made in China 2025' Plan Unveiled," Xinhua, May 19, 2015, [http://www.xinhuanet.com/english/2015-05/19/c\\_134251770.htm](http://www.xinhuanet.com/english/2015-05/19/c_134251770.htm).



technologies that are expected to benefit U.S. companies in global competition; and various laws, policies, and government-backed credits that seek to support the development of expected economically important sectors of the future, such as green energy. Many other market-based economies pursue these types of policies more assertively than the U.S. does.

On these several issues, too, TIA's arguments thus prove too much and sweep too broadly.

### **TIA's Distinctions between Huawei and Non-Chinese Firms**

The TIA submission asserts that Huawei and other Chinese companies pose security risks that other companies in the field do not. This overstates the contrast between Huawei (and other Chinese companies), on one hand, and "non-Chinese" companies, on the other hand, in two principal respects.

*First*, the security threats to which TIA points appear to be ones that could enter at various points in the supply chain and thus come from a number of sources, including both hardware and software. To the extent that the equipment that would be governed by the proposed FCC rule is produced transnationally as part of the global supply or value chains, the relevant vulnerabilities could be embedded in components or equipment produced partly by Chinese companies or in China. To the extent that equipment that is "made" by a non-Chinese company contains the same relevant components as equipment made by Huawei or another Chinese company, the risk would not be addressed by a rule banning Huawei and other Chinese suppliers. As a logical matter, the point is obvious. As a descriptive matter, much telecommunications equipment nominally produced by non-Chinese—as well as Chinese—companies in China and elsewhere is indeed produced transnationally, using Chinese-made components. Moreover, equipment and components that are made by non-Chinese companies are sometimes made in China or by companies with significant operations in China. The Chinese / non-Chinese distinction that TIA appears to rely upon is a much blurrier one than the binary categorization implies.<sup>40</sup>

*Second*, and relatedly, TIA assumes or asserts an implausibly sharp dichotomy between the vulnerability to pressure or demands from the party and state faced by Huawei (and other Chinese firms), on one hand, and all "non-Chinese" firms, on the other hand. Non-Chinese firms in the telecommunications equipment sector operate in China, as the TIA submission acknowledges. In some cases, they operate through wholly owned subsidiaries that are Chinese legal persons, subject to a full range of Chinese laws and policies. In other cases, they may operate through joint-ventures with Chinese partner firms. Such joint ventures are typically organized as Chinese legal persons as well.

Even where neither of these types of legal arrangements exists, a foreign telecommunications enterprise that operates or does business in China is subject to Chinese laws

---

<sup>40</sup> See the discussion of China and global value chains earlier in this report. See also Hauni Zhu and Gloria O. Pasadilla, "Manufacturing of Telecommunications Equipment," in Patrick Low, ed. *Services in Global Value Chains* (Singapore: World Scientific Press, 2016); Deborah K. Elms and Patrick Low, eds. *Global Value Chains in a Changing World* (Geneva: WTO, 2013).

and regulatory authority when acting within Chinese territory—much as Huawei’s sales and other operations in the United States are subject to U.S. laws on national security and other matters. The TIA submission recognizes this symmetry between the reach of Chinese law over foreign firms and Huawei, for example, in its reference to major American ICT companies’ understanding that they are subject to China’s cybersecurity laws no less than Huawei would be. (TIA Report 54)

Even where a foreign company’s relevant operations are outside of China, they are not necessarily beyond the reach of Chinese laws and regulations. As is true of the law of many countries, including the United States, Chinese law provides for extraterritorial reach where the relevant law purports to do so.<sup>41</sup> And foreign firms’ exports of goods or services to China are, of course, subject to Chinese laws even where the foreign firm does not have business operations or a subsidiary in China. To the extent that TIA asserts that Chinese authorities might use legal powers inappropriately to coerce firms, such pressures, of course, could be brought to bear on those aspects of a targeted firm’s activities that are within the reach of Chinese law and regulation even where such activities are separate from and collateral to the activity relevant to the Chinese authorities’ goals—goals such as having a foreign firm market equipment outside China that would facilitate espionage in the United States.

As accounts of the recently escalating U.S.-China economic disputes have illustrated anew, Chinese authorities possess multiple methods to induce desired behavior by foreign and foreign-owned, as well as Chinese, firms that are potentially effective, hard to detect definitively, and not easily and convincingly characterized as unlawful. Examples include more zealous enforcement of regulations against targeted firms, more frequent or probing inspections or monitoring of foreign firms, slower approval of various permits for business activities or approvals of imports, threatening airlines and hotels with loss of access to business opportunities with Chinese customers if they do not refer to Taiwan as part of China on their websites, and so on.<sup>42</sup> If one accepts the TIA submission’s view of party influence on Chinese companies, then what foreign firms identify as coerced transfer of intellectual property rights or sensitive business information to Chinese parties, or ostensibly autonomous decisions by Chinese firms not to

---

<sup>41</sup> This is not to suggest that the specific Chinese laws that TIA addresses, including the National Intelligence Law, the Cybersecurity Law, and others, purport to reach extraterritorially to cover, for example, the overseas operations of a subsidiary of a Chinese firm (such as Huawei). Chinese laws generally reach extraterritorially only where they clearly purport to do so. I have not conducted a detailed analysis of whether the national security laws referenced in this footnote or in the TIA reports reach extraterritorially. Because some Chinese regulatory and criminal laws do so reach, those laws (which are not national security-focused laws) do provide legal powers to Chinese authorities that would be available to Chinese authorities to be used, on TIA’s account, to improperly coerce non-Chinese firms even outside China.

<sup>42</sup> See, e.g., Danielle Paquette, “U.S. Companies in China Think the Government is Already Messing with Them,” *Washington Post*, July 4, 2018; Bob Bryan, “China May be Disrupting US Companies because of Trump’s Tariff Threats,” *Business Insider*, July 5, 2018, <https://www.businessinsider.com/trump-china-tariff-trade-fight-disruptions-us-companies-2018-7>; Catherine Rampell, “China Will Learn its Lesson—Just Not the One Trump Wants,” *Washington Post*, July 12, 2018; Danielle Paquette, “China to U.S. Airlines: Change Taiwan on Your Websites or Pay the Price,” *Washington Post* July 24, 2018; Benjamin Haas, “Marriott Apologises to China over Tibet and Taiwan Error,” *Guardian*, Jan. 12, 2018.

acquire goods and services from (or to sell to) targeted foreign firms, are additional methods that China / the party could deploy to pressure foreign firms to engage in desired behaviors.

The TIA submission also relies heavily on the asserted influence of intra-firm party committees and the impact of political study requirements on Chinese firms such as Huawei, particularly during the period since Xi Jinping became China's top leader. Yet, foreign-owned firms in China are not immune from these requirements. Tellingly, two of the media reports on which TIA principally relies on this issue refer to policies and requirements that target *foreign* enterprises in China.<sup>43</sup>

Again, these levers—whether legal or more informal and political—could be employed against foreign parties even when the activities that would be reached are collateral to the manufacturing or marketing of products the sale of which would be governed by the proposed FCC rule.

*Finally*, much of the immediately foregoing analysis applies to another feature on which the TIA submission relies heavily: the threat purportedly posed by Huawei due to its having Chinese-speaking, Chinese-national employees. (TIA Report 58) Chinese-speaking Chinese nationals, of course, work in non-Chinese telecommunications companies—including some that would supply the markets covered by the proposed FCC rule—both inside and outside China. Given the nature of global supply and value chains noted above, Chinese-speaking Chinese nationals work in enterprises—some of them Chinese—that supply components for equipment that is superficially and formally the product of non-Chinese firms. And, on TIA's logic, Chinese authorities would be wise to target those Chinese-speaking Chinese nationals working at non-Chinese firms (where such firms could introduce the desired vulnerabilities) because it would achieve the espionage-supporting results that TIA asserts while doing less to put at risk China's high-priority economic goals that are advanced by the international commercial success of companies such as Huawei.

### **TIA's Assessments of Risks to U.S. National Security Interests / Effectiveness of a Ban on Huawei**

The TIA submission's assessment of the risks to U.S. national security, and how the proposed FCC rule excluding Huawei from selling to the recipients of federal funds in the covered program would protect U.S. national security interests, are problematic in several ways.

*First*, TIA relies upon certain statements in Congress, and certain measures Congress has taken to prohibit purchase of Huawei equipment for some government uses. Whether potentially legitimate and well-founded national security concerns that may lie behind those statements and measures extend to the activity that would be governed by the proposed FCC rule is uncertain because the relevant information has not been fully publicly disclosed. But the claims in congressional reports and other government sources have met with considerable skepticism that

---

<sup>43</sup> TIA Report 56-57, citing Simon Denyer, "Command and Control: China's Communist Party Extends Reach into Foreign Companies," *Washington Post* Jan. 28, 2018; Chun Han Wong and Eva Dou, "Foreign Companies in China Get a New Partner: The Communist Party," *Wall Street Journal*, Oct. 29, 2017.

TIA ignores.<sup>44</sup> And the long history of the congressional politics of U.S.-China economic relations is littered with exaggeration and error (in both “pro-China” and “anti-China” directions). Members’ calls for measures to impose, or lift, restrictions on Chinese enterprises’ opportunities to do business in the United States or with U.S. companies and consumers have at times been based on questionable factual foundations (ranging from claims during the Clinton administration that China’s entry into the WTO would lead to significant political change in China, to claims by congressional critics of China that China’s currency was radically undervalued that continued long after the consensus view among expert economists rejected such assertions). More broadly, the bilateral political relationship—reflected on the U.S. side in speeches and, sometimes, actions with legal effect by Congress and the Administration—has long blown hot and cold, sometimes without corresponding changes in relevant underlying realities. Moreover, compared to other governments, the U.S. government has taken a significantly harder line toward Huawei, invoking ostensibly security-based concerns to close a wide range of markets to Huawei.<sup>45</sup>

*Second*, an assessment of the effect of the proposed FCC rule on U.S. national interests must take into account possible responses by China, which the TIA submission does not do. Any action by the U.S. government that China regards as discriminating against China and Chinese firms in trade and related economic affairs carries a risk that China will take reciprocal measures against the U.S. and harm U.S. enterprises. This risk has become greater in light of the recent rounds of threatened and imposed trade measures that Beijing and Washington have launched against each other.

Moreover, and especially relevant here, the U.S. has faced criticism for invoking—implausibly in the view of many critics whose views are well-known to Chinese officials—national security grounds (specifically, a long-unused provision in U.S. trade law) as the basis for tariffs on steel and aluminum imports. These tariffs are widely criticized—including in China—as motivated primarily or exclusively by the U.S. administration’s economic policy goal of protecting U.S. producers from competition by foreign firms from, for example, Canada (as well as China).<sup>46</sup>


---

<sup>44</sup> See the sources cited in note 2, above.

<sup>45</sup> See, e.g., Raymond Zhong and Paul Mozur, “Huawei, Failing to Crack U.S. Market, Signals Change in Tactics,” *New York Times*, Apr. 17, 2018; Max Chafkin and Joshua Brustein, “Why America is So Scared of China’s Biggest Tech Company,” *Bloomberg Businessweek*, Mar. 22, 2018, <https://www.bloomberg.com/news/features/2018-03-22/why-america-is-so-scared-of-china-s-biggest-tech-company>

<sup>46</sup> See, for example, Peter Coy, “National Security is a Good Reason for Protection, But Not of Steel and Aluminum,” *Bloomberg Businessweek*, Mar. 2, 2018, <https://www.bloomberg.com/news/articles/2018-03-02/national-security-is-a-good-reason-for-protection-but-not-of-steel-and-aluminum>; Jennifer A. Hillman, “Trump Tariffs Threaten National Security,” *New York Times*, June 1, 2018; “China Seeks WTO Dispute Resolution with U.S. Over Steel, Aluminum Tariffs,” Reuters, Apr. 5, 2018, <https://www.reuters.com/article/us-usa-trade-china-wto/china-seeks-wto-dispute-resolution-with-u-s-over-steel-aluminum-tariffs-idUSKCN1HC117>; The Spokesperson of the Ministry of Commerce Makes Remarks on China’s Release of a List of Discontinuation of Concessions Against the U.S. Steel and Aluminum Imports under Section 232,” Mar. 24, 2018, <http://english.mofcom.gov.cn/article/newsrelease/policyreleasing/201803/20180302723376.shtml>.

In this context, a measure such as the FCC rule is particularly prone to prompt Chinese charges that it is a case of disguised U.S. protectionism—and specifically for the protection of the companies that would benefit from the proposed FCC rule—or a reflection of “China-bashing” politics, rather than genuine national security concerns.<sup>47</sup> In this context, there is more likely to be some form of countermeasures by China.

  
Jacques deLisle

---

<sup>47</sup> This is already occurring. See, for example, PRC Ministry of Foreign Affairs Spokesperson Hua Chunying, Press Briefing, Apr. 20, 2018, (“I must point out that the restrictions the US rolled out time after time on trade and investment in the high technology field under the pretext of ensuring national security are purely protectionist measures. You can see US products like the iPhone everywhere in China, and we do not see them a threat. In the US, however, using mobiles made by Huawei could be regarded as a critical incident that threatens US national security. As the number-one developed country and frontrunner in the scientific field in the world, has the US really reduced itself to such a fragile state. On the one hand, the US urges China to open wider the market. On the other hand, it keeps rolling out restrictions on China’s business activities. This does not conform to the market disciplines or international rules, nor is it consistent with the principle of equality, fairness and reciprocity that the US has been calling for. That the US clamps down on China’s technology development under the excuse of national security is an unreasonable economic or scientific bullying.”), <http://www.aparchive.com/metadata/youtube/2375b12a457e2adbc2c3e4714fa55b66>); Marie Mawad, “Huawei CEO Fights Back over Trust in China’s Tech Companies,” Bloomberg, Feb. 26, 2018, <https://www.bloomberg.com/news/articles/2018-02-26/huawei-ceo-fights-back-over-trust-in-china-s-tech-companies> (blaming U.S. actions excluding or impeding Huawei on competitors’ turn to political means); Corrine Reichert, “Huawei: National Security Concerns not a Blank Cheque for Public Policy Decisions,” ZDNet, Feb, 9, 2018, <https://www.zdnet.com/article/huawei-national-security-concerns-cannot-justify-all-public-policy-decisions/>; Nik Martin, “ZTE, Huawei Bans: Genuine Security Concerns or Part of China Trade Spat?” Deutsche Welle, Apr. 19, 2019, <https://www.dw.com/en/zte-huawei-bans-genuine-security-concerns-or-part-of-china-trade-spat/a-43456452>; Huang Ge, “Huawei, ZTE Product Ban by US Violates WTO Rules, Shows Discrimination: Commerce Ministry,” *Global Times*, Feb. 23, 2018.