

Chapter 14

Legal Analysis of the PRC's Defense Industry in Recent Years under the Military-Civil Fusion Strategy

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I. Introduction

China's military industry has emerged as a rising power in recent years. The Military-Civil Fusion¹ national strategy and other measures in conjunction with the technology development and requirements of the country started to take off at the end of 2020. These actions have many implications for some countries, particularly the U.S., as the global leader in the defense industry. For instance, the then U.S. President, Donald Trump, signed an executive order in November 2020 to prohibit U.S. companies and individuals from investing in Chinese military firms.² Trump indicated that China adopted the national strategy of Military-Civil Fusion to enable private enterprises to support military and intelligence activities and expand the scale of its defense industry. While these companies appear to be privately

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¹ "Military-Civil Fusion and the People's Republic of China," *U.S. Department of State*, May 28, 2020, <https://www.state.gov/wp-content/uploads/2020/05/What-is-MCF-One-Page.pdf>; "China's Military-Civil Fusion Strategy: a View from Chinese Strategists," *China Aerospace Studies Institute*, June 10, 2020, <https://static1.squarespace.com/static/5e356cfae72e4563b10cd310/t/5ee37fc2fcb96f58706a52e1/1591967685829/CASI+China%27s+Military+Civil+Fusion+Strategy-+Full+final.pdf>; Military-Civil Fusion is not a unique concept to China. However, "MCF" is currently the term specifically for China's national strategy of Military-Civil Fusion. It was called Civil-Military Integration (CMI) under the Hu Jintao administration and replaced by the term "Military-Civil Fusion" under the leadership of Xi Jinping. The two terms share many similarities.

² "Executive Order 13959 of November 12, 2020," November 17, 2020, <https://home.treasury.gov/system/files/126/13959.pdf>; "Trump Issues an Executive Order to Prohibit U.S. Nationals from Investing in 31 PLA Firms," *Commercial Times*, November 13, 2020, <https://ctee.com.tw/news/global/369281.html>.

owned or operated, they directly support China’s military, intelligence and security institutions. Investing in such firms is essentially funding them with American capital for its development and modernization. On June 3, 2021, the U.S. President Joe Biden signed the Executive Order 14032 to expand the prohibition of U.S. individuals from investing in Chinese defense companies even further. A total of 59 entities, including Huawei, China Aerospace Science and Technology Corporation (CASC) are listed as China military-related companies. Biden said in a statement that the extended ban is a response to the threat posing by Chinese defense firms.³ This paper provides an analysis regarding the development and the strategy of China’s defense industry in the context of legal and policy aspects in recent years.

II. National Strategy of Military-Civil Fusion

The most important national strategy China has recently put in place is the Military-Civil Fusion Strategy, which aims at developing state-of-the-art military technology. In particular, its purpose is to develop a “world-class military” by 2049—the 100th year of the Chinese Communist Party’s ruling,⁴ under the direct supervision of its leader, Xi Jinping.

In March 2015, China included the Military-Civil Fusion Strategy in its “Outline of the 13th Five-Year Plan for National Economic and Social Development” (the 13th Five-Year Plan). Xi Jinping emphasized that the Military-Civil Fusion

³ “Executive Order on Addressing the Threat from Securities Investments that Finance Certain Companies of the People’s Republic of China,” *The White House*, June 3, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/executive-order-on-addressing-the-threat-from-securities-investments-that-finance-certain-companies-of-the-peoples-republic-of-china/>; “FACT SHEET: Executive Order Addressing the Threat from Securities Investments that Finance Certain Companies of the People’s Republic of China,” *The White House*, June 3, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/03/fact-sheet-executive-order-addressing-the-threat-from-securities-investments-that-finance-certain-companies-of-the-peoples-republic-of-china/>; “Biden Signs an Executive Order to Expand the Ban on Investing in Chinese Military Companies,” *Central News Agency*, June 4, 2021, <https://www.cna.com.tw/news/firstnews/202106040008.aspx>.

⁴ M. Taylor Fravel, “China’s ‘World-Class Military’ Ambitions: Origins and Implications,” *The Washington Quarterly*, Vol. 43: 1, 2020, pp. 85-99. <https://taylorfravel.com/documents/research/fravel.2020.TWQ.china.world.class.military.pdf>.

Strategy is promoted to the national level.⁵ In March 2016, the Politburo of the Chinese Communist Party published “Opinions on the Integrated Development of Economic and National Defense Construction”, this document provides guidance on national defense and economic development, expounding on national security, development strategy, Military-Civil Fusion, and the details in priority tasks and policy measures. In January 2017, the Politburo of the Chinese Communist Party formally established the Central Commission for Integrated Military and Civilian Development, with Xi Jinping as the director. The major issues and the decision-making of the development of the Military-Civil Fusion are managed and coordinated at the central government level.

Military-Civil Fusion primarily consists of economic development and national defense development, aiming of achieving a balance between the two. In reference to the experience of the western countries (notably, the U.S.) with defense companies, China seeks to create its own version of the development paradigm, “military transferred to civil, civil participating in the military,” for its national defense technology and industry.⁶ The Chinese government plays a pivotal role in Military-Civil Fusion. In addition to government-led reforms in defense companies and intervention in M&A activities, relevant legislations and economic policies have been put in place to influence those companies. There is a robust legal and regulatory framework to orchestrate the activities of different actors under the banner of Military-Civil Fusion and to further the institutionalization. The cutting-edge technology for military and civil dual-use is either developed or obtained in a not necessarily legitimate manner, however.⁷ As a consequence, many countries, including the U.S., is feeling unease with such practice.

⁵ Hui-ming Tung, “Current Status and Issues of China’s Military-Civil Fusion strategy,” *Prospect & Exploration*, 14(3), March 2016, pp. 31-38.

⁶ “Military Transferred to Civil” Refers to the Use of Military Technologies by Private Sectors; “civil participating in military” indicates private entities taking part in the military market.

⁷ *Supra* note 3.

III. The 14th Five-Year Plan

Under the Military-Civil Fusion Strategy, the development of the Chinese defense industry will continue to be at the top of the agenda over the next few years. The development of an industry is usually positively correlated with national policies, and with strong support from the government, China's defense industry has been thriving. Furthermore, there are a series of policies and plans, as well as legislative amendments and reform measures that drive the R&D capabilities and the long-term development of China's defense industry.

The most important national strategy for China's military industry is the "Outline of the 14th Five-Year Plan (2021-2025) for National Economic and Social Development and Vision 2035 of the People's Republic of China" (The 14th Five-Year Plan)⁸ passed by the 4th Session of the Thirteenth National People's Congress in March 2021. The 14th Five-Year Plan is perhaps the most significant policy document for China's social and economic development over the next 5 or even 15 years. It is highly relevant to the defense industry, primarily by including the enhancement and integration of mechanization, informatization, and smartness; the strengthening of the preparation for wars; the emphasis on the strategic capabilities in defense of sovereignty, security and development interests; and the acceleration of weaponry and equipment modernization. There is also a focus on self-sufficiency in technology and speedy development as a tech power, encompassing home-grown innovations and the original innovation of the national defense technology, speeding up of the development of strategic, cutting-edge, and revolutionary technologies. It also implies a quicker upgrade and renewal of weaponry and equipment and the development of smart weaponry and equipment.

In addition to the 14th Five-Year Plan, the whitepaper, "China's National Defense in the New Era," published by the State Council of China in July 2019, articulated that China would push at a full drive for modernizing its national defense and military force. By doing so, China will deepen reforms in national defense and

⁸ "Outline of the 14th Five-Year Plan (2021-2025) for National Economic and Social Development and Vision 2035 of the People's Republic of China," *Central People's Government of the People's Republic of China*, March 13, 2021, http://big5.www.gov.cn/gate/big5/www.gov.cn/xinwen/2021-03/13/content_5592681.htm.

the army across the board, resolve systematic and policy problems, and push the comprehensive development of national defense and military establishment. Furthermore, it also seeks to drive the innovation and development of its national defense technology and military theories to construct modernized weaponry, equipment, and systems.⁹ Following the start of the 14th Five-Year Plan, the defense industry will have an important influence on China's army strengths and economic growth, which will likely substantially affect regional security and global development.

IV. China's Legal System for Its Military Industry

To understand the development of China's legal system for its military industry, it is necessary to establish an understanding of its basic laws, in particular, the Constitution of the People's Republic of China, Legislation Law of the People's Republic of China, and Law of the People's Republic of China on National Defense.

1. Constitution of the People's Republic of China

In most countries with the written law system, the constitution is the highest form of domestic law. This is no exception for China's legal system, with its constitution claiming the highest level of legal validity. Under its constitution are laws, which are above regulations, and then rules (e.g., administrative regulations, local regulations, and rules).¹⁰ Noteworthy, according to Article 87 of the

⁹ "The Chinese Government Released the White Paper Titled 'China's National Defense in the New Era'," *Xinhua News Agency*, July 24, 2019, http://www.mod.gov.cn/big5/shouye/2019-07/24/content_4846366.htm.

¹⁰ Article 79 of the Legislation Law of the People's Republic of China stipulates that "The effect of administrative regulations is higher than that of local regulations, and rules"; Article 80 states that "The effect of local regulations is higher than that of the rules of the local governments at or below the corresponding level. The effect of the rules formulated by the people's governments of the provinces or autonomous regions is higher than that of the rules formulated by the people's governments of the comparatively larger cities within the administrative areas of the provinces and autonomous regions"; Article 82 states that "The effect of the rules of different departments is equal between the departments, and the effect of the rules of departments and of the rules of local governments is equal between the departments and local governments; their application shall be confined to their respective limits of authority".

Legislation Law of the People’s Republic of China, no laws may be in conflict with the Constitution.¹¹

The Constitution of the People’s Republic of China stresses the importance of armed forces, which emphasizes the importance of the national defense and military at the constitutional level and demonstrates its nation-founding spirit and policy development. Article 29 says, “The armed forces of the People’s Republic of China belong to the people. Their tasks are to strengthen national defense, resist aggression, defend the motherland, safeguard the people’s peaceful labor, participate in national reconstruction, and do their best to serve the people. The state strengthens the revolutionization, modernization, and regularization of the armed forces in order to increase national defense capability.” Chapter 3 of the Constitution of the People’s Republic of China specifies that the Central Military Commission (CMC) is the entity in charge of the country’s military institutions. Article 93 stipulates that “the Central Military Commission of the People’s Republic of China directs the armed forces of the country,” adopting the chairperson responsibility system. According to Article 94, “The Chairman is responsible to the National People’s Congress and its Standing Committee”—a stark contrast with the Constitution of the Republic of China where the military is abstractly mentioned. Furthermore, the establishment of military institutions in China is determined on the basis of law, which speaks of its fundamental emphasis on armed forces.

2. Basic Law: Legislation Law of the People’s Republic of China

The Legislation Law of the People’s Republic of China was promulgated by the National People’s Congress in 2000 and amended in March 2015. The contents include the authority, procedures, and legal ranks of legislation. The regulation on the authority of the Central Military Commission (CMC) in the context of military laws is coded in the final section, “Supplementary Provisions.” This seems

¹¹ Article 87 of the Legislation Law of the People’s Republic of China stipulates that “All laws, administrative regulations, local regulations, autonomous regulations, separate regulations or rules shall contradict the *Constitution of the People’s Republic of China*.”

to be a deliberate act of showing that military laws are different from the laws applicable to civilians, an expression of the separation between military authorities and civil governance. Military laws retain a significant degree of flexibility. According to the first and second paragraphs of Article 103 of the Legislation Law of the People's Republic of China, "The Central Military Commission shall, in accordance with the Constitution and laws, formulate military regulations. The General Departments, the various services and arms, and the military commands of the Central Military Commission may, in accordance with laws and the military regulations, decisions, and orders of the Commission, formulate military rules within the limits of their power. Military regulations and military rules shall be implemented within the armed forces. Measures for formulating, revising and nullifying military regulations and military rules shall be formulated by the Central Military Commission following the principles laid down in this Law."¹²

3. Basic Law: Law of the People's Republic of China on National Defense

China made a significant amendment to the Law of the People's Republic of China on National Defense in December last year. There are extensive management rules on the organization of national defense development and enterprises, as well as tangible measures.

(1) Authority and responsibility in national defense

According to "Chapter II: National Defense Authority of State Institutions" of the Law of the People's Republic of China on National Defense, "The National People's Congress, pursuant to the Constitution, decides on issues of war and peace and exercises other functions and powers in respect of national defense as stipulated by the Constitution" (Article 12); "The State Council is to lead and manage the establishment of national defense and to draw up relevant development programs and plans for the construction of national defense; to

¹² However, it seems that the Central Military Commission (CMC) is not the only entity in charge of formulation of military laws. National defense related legislations are also established by the National People's Congress Standing Committee (NPCSC). For example, *the Law of the People's Republic of China on National Defense Education* was passed on April 28, 2001 and amended on April 27, 2018.

formulate policies and administrative regulations and regulations related to the construction of national defense; to direct and administer defense research and production; to manage defense expenditures and assets; to exercise leadership jointly with the Central Military Commission over the building of the Militia, the work of enlistment and reserve service, and the administration of defense of the frontiers, seas, and air space, and other major security field defense” (Article 14); “The Central Military Commission directs all the armed forces of the country and to decide on military strategies and form concepts of operations for the armed forces; to approve the system, development programs and plans for weapons and equipment of the armed forces, and to work together with the State Council in directing and administering defense research and production; to administer defense expenditures and assets jointly with the State Council” (Article 15); “The State Council and the Central Military Commission may, when necessary, convene a coordination meeting to solve problems relating to national defense” (Article 17).

(2) *Research and production of national defense technologies, talent development, military procurements, and national defense budgets*

The “Chapter V Defense Research and Production and Orders for Military Supplies” of the Law of the People’s Republic of China on National Defense stipulates that “The State establishes and improves the scientific, technological, and industrial system, and develops national defense scientific research and production for national defense (Article 33); the principle to be applied to national defense science and technology industry is to combine military and civilians, combine peacetime-oriented work with wartime-oriented work, give priority to military product manufacturing, be driven by innovation, and be independent and take control” (Article 37); “the State promotes progress in defense science and technology, cultivates talents in defense science and technology, encourages and attracts outstanding talents into the field of defense science and technology to inspire the innovative ability of the talents” (Article 36). The military procurement system is run by the country according to laws to guarantee the purchase and the supply of weaponry, equipment, materials, engineering, and services required

to ensure the armed forces. Chapter 6, “National Defense Budgets and National Assets”, explains the budgetary management of national defense budgets according to laws (Article 39) and the national ownership of national defense assets (Article 40). In sum, China intends to further simplify the flows of private companies entering the military industry and the military market in order to enhance the quality and quantity of national defense technologies, equipment, and development with a market mechanism.

4. Relevant Supporting Regulations

In addition to the stipulations of the basic laws regarding national defense and the military industry, China's defense industry has introduced numerous market competition mechanisms of capitalism and many relevant technical and supporting regulations and measures in recent years. Further, the enactment of the newly amended Regulations on Military Equipment on January 1, 2021 is worth mentioning. These regulations come in 14 chapters and 100 articles. The contents include the overriding principle regarding the CMC's overarching leadership role, the TCs' responsibility for military operations, and the services' focus on developing capabilities. In other words, “the CMC's Equipment Development Department shall centrally manage the deployment of military branches and the collective utilization of warzones”. The functions and positions of different levels within equipment departments are defined under the new system and the new structure.¹³ The Regulations on Military Equipment have improved the flows of equipment procurements and enhanced the requirements of equipment performances. This sheds light on the development direction of the weaponry and equipment system under the 14th Five-Year Plan.

Meanwhile, the decision on constructing the New Military Training System¹⁴ published by the Central Military Commission (CMC) in February 2021 is also

¹³ “Release of the Newly Amended Regulations on Military Equipment,” *people.cn*, January 3, 2021, <http://politics.people.com.cn/n1/2021/0103/c1024-31987074.htm>.

¹⁴ “Central Military Commission (CMC) Released the Decision on Constructing the New Military Training System,” *people.cn*, February 22, 2021, <http://military.people.com.cn/BIG5/n1/2021/0222/c1011-32033752.html>.

noteworthy. The main contents include the “use of realistic combat scenarios in training, use of joint operations scenarios in training, improve the technology in training and guide the training under the law”, “giving play to the fine traditions of the People’s Liberation Army and stepping up reforms and innovations”, “faster establishment of a new-type military training system”, and “improvement of military training in all respects”. The purpose is to establish the people’s army an outstanding army by providing strong support. The actual effects of these regulations are yet to be observed.

V. Conclusion

With the Military-Civil Fusion integrating its military institutions, China has been riding the international trends and adjusting its national defense strategy to further the development of its national defense and military. Meanwhile, it is developing and acquiring technologies from both domestic and overseas with accompanying laws and economic measures. Thus, its international influence should not be overlooked. Moreover, China’s constitutional system makes it easier for national policies and legal measures to effectively push forward military development. This is particularly the case with the newly amended and enacted Law of the People’s Republic of China on National Defense and Regulations on Military Equipment. Further, being the manifestation of China’s tangible and national policy, these two laws can be more effective in creating substantial effects. Moreover, the U.S.’s investment ban as an attempt to stop or slow down the threats of China’s military development is likely to achieve very little.