

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

**WRITTEN *EX PARTE* SUBMISSION OF HUAWEI TECHNOLOGIES CO., LTD.,
AND HUAWEI TECHNOLOGIES USA, INC.**

Huawei Technologies Co., Ltd., and Huawei Technologies USA, Inc. (collectively, “Huawei”), by their undersigned counsel, submit this *ex parte* presentation to the Federal Communications Commission (“FCC” or “Commission”) to supplement the record in the above-captioned docket. Huawei seeks to clarify misconceptions regarding the relationship between its U.S. subsidiaries and the Chinese government.¹ Huawei previously submitted multiple expert law reports on Chinese laws, addressing misconceptions that these laws impose obligations on Huawei to assist the Chinese government in cyberespionage or other malicious activities.² But the

¹ See *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, Draft Report and Order, Order, and Further Notice of Proposed Rule-making, WC Docket No. 18-89, FCC-CIRC1911-01, para. 47 (circulated Oct. 29, 2019) (“Draft Report and Order”).

² Expert Report of Ariel Ye, Comments of Huawei Technologies Co., Ltd. and Huawei Technologies USA, Inc., WC Docket No. 18-89, Ex. D (filed June 1, 2019); Expert Report of Jihong Chen and Jianwei Fang, Comments of Huawei Technologies Co., Ltd. and Huawei Technologies USA, Inc., WC Docket No. 18-89, Ex. E (filed June 1, 2019); Supplemental Expert Report of Jihong Chen and Jianwei Fang, Reply Comments of Huawei Technologies Co., Ltd. and Huawei Technologies USA, Inc., WC Docket No. 18-89, Ex. B (filed Jul. 2, 2019); Expert Report of Dr. Hanhua Zhou, Ex Parte Written Submission of Huawei Technologies Co., Ltd. and Huawei Technologies USA, Inc., WC Docket No. 18-89, Attachment A (filed May 5, 2019); Expert Opinion on

Chairman’s proposal does not examine these reports. Instead, in designating Huawei as a covered company, the Chairman’s proposal cites to a self-published “expert” report of Donald C. Clarke (the “Clarke Report”) which aimed to rebut one of the Chinese law reports in the record.³ Huawei now submits as **Attachment A** the rebuttal report of Mr. Jihong Chen, a partner and legal expert at the Zhong Lun Law Firm, which demonstrates that the Clarke Report provides an inaccurate analysis of Chinese law that is both misguided, and unsupported by evidence.

Respectfully submitted,

/s/ Andrew D. Lipman

Glen D. Nager
Bruce A. Olcott
Ryan J. Watson

JONES DAY
51 Louisiana Ave., NW
Washington, D.C. 20001
(202) 879-3939
(202) 626-1700 (Fax)
gdnager@jonesday.com
bolcott@jonesday.com
rwatson@jonesday.com

Andrew D. Lipman
Russell M. Blau
David B. Salmons

MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 739-3000
(202) 739-3001 (Fax)
andrew.lipman@morganlewis.com
russell.blau@morganlewis.com
david.salmons@morganlewis.com

*Counsel to Huawei Technologies Co., Ltd.,
and Huawei Technologies USA, Inc.*

November 8, 2019

Article 17 of China’s National Intelligence Law, Ex Parte Written Submission of Huawei Technologies Co., Ltd. and Huawei Technologies USA, Inc., WC Docket No. 18-89, Attachment A (filed Nov. 1, 2019).

³ Draft Report and Order at n.130, 131.

Attachment A

“Rebuttal to Prof. Donald Clarke’s Memorandum”

Rebuttal to Prof. Donald Clarke’s Memorandum “*The Zhong Lun Declaration on the Obligations of Huawei and Other Chinese Companies under Chinese Law*”

Mr. Jihong CHEN
Partner
Zhong Lun Law Firm

November 8, 2019

I. INTRODUCTION

1. This Rebuttal issued by Mr. Jihong CHEN (“Zhong Lun” or “We”) aims to rebut Prof. Donald Clarke’s claims in his memorandum “*The Zhong Lun Declaration*¹ *on the Obligations of Huawei and Other Chinese Companies under Chinese Law*” dated 17 March 2019 (the “Donald Clarke Opinion”).
2. This Rebuttal rebuts the claims in Part II (Summary) and Part IV (Analysis) of the Donald Clarke Opinion in sequence.

II. REBUTTAL

3. Claim in the Donald Clarke Opinion (Para 3. a.):

“It is misleading because it misstates the key question of concern to the United States and other governments. That question is not what Chinese law says about the ability of the Chinese government to tell companies like Huawei what to do. The question is what the Chinese government can actually do, regardless of what the law might say. The Zhong Lun Declaration does not address the key issue of whether the Chinese government is meaningfully constrained by Chinese law.”

4. Rebuttal to Para 3. a. Claim²:

- 4.1 First, Prof. Clarke arbitrarily changed the “key question of concern to the United States and other governments” based on his own thinking. In fact, the key question of concern raised by the United States and other governments was directly derived from the enactment and enforcement of the *PRC Cyber Security Law*, the *PRC National Intelligence Law* and other relevant laws by the Chinese authorities (the “concerned laws”). Therefore, the real question of concern by the United States and other governments is with the obligations imposed on Huawei and the restrictions to the relevant law enforcement authorities’ powers stipulated by the

¹ In this Rebuttal, the “Declaration” refers to the “Zhong Lun Declaration”.

² In this Rebuttal, “Para n. Claim” stands for the claim in Para n. of the Donald Clarke Opinion.

concerned laws. Accordingly, a clear discussion of application of the above-mentioned laws, which is a discussion of legal issues, would help to resolve most of these concerns. In contrast, the question Prof. Clarke changed this to - “whether the Chinese government is meaningfully constrained by Chinese law” - is a different question that is principally a matter of fact.

- 4.2 Second, as explained in the Zhong Lun Declaration³, the concerned laws provide regulations on the restrictions to the law enforcement authorities’ power and the means of relief for individuals or organizations affected. Throughout the Donald Clarke Opinion, Prof. Clarke made arguments principally relying on his own conclusion that the Chinese government is not meaningfully constrained by Chinese laws no matter what the Chinese laws stipulate. Above all, Prof. Clarke’s above-mentioned conclusion is just his personal view without any supporting evidence. In addition, the logic underlying Prof. Clarke’s conclusion is obviously wrong. That is, if the Chinese government is not constrained by any law and there is no restriction to the Chinese government’s power, laws *per se* would be meaningless in China and there would be no necessity for the Chinese government to enact laws. Further, in this hypothetical scenario, the United States and other governments would not need to worry about the promulgation and implementation of the concerned laws (at least there is no need to raise new worries of them), which is contrary to the current fact.

5. Claim in the Donald Clarke Opinion (Para 3. b.):

“It is misleading because even its legal analysis focuses entirely on statutory law passed by the National People’s Congress and its Standing Committee. It does not look at lower-level regulations at all.”

6. Rebuttal to Para 3. b. Claim:

First, according to Articles 96 and 97 of the *PRC Legislative Law*, if lower-level laws/regulations contravene higher-level laws/regulations, the relevant authorities shall amend or repeal the lower-level laws/regulations. Therefore, the underlying principle for the application of laws in China is that higher-level laws/regulations should prevail if lower-level laws/regulations contravene higher-level laws/regulations. Second, the Donald Clarke Opinion implies that the conclusion is misleading because the lower-level regulations which may affect the conclusion were not examined. However, the Donald Clarke Opinion does not provide any examples of such lower-level regulations “that were not examined. In fact, not every law must have corresponding lower-level regulations. Moreover, considering that those laws concerned were promulgated in recent years, it is normal that the corresponding lower-level regulations have not been enacted.

7. Claim in the Donald Clarke Opinion (Para 3. c.):

³ See: Paragraphs 22-23, 43-47, 66-67, 81-83 of the Zhong Lun Declaration.

“It is inaccurate because in many places its analysis of the relevant laws attaches tremendous significance to a simple boilerplate statements such as that only ‘relevant’ organizations are subject to the law, or that the ‘legitimate rights and interests’ of citizens shall be respected. It interprets the latter statement as granting a powerful and wide-ranging right to regulated parties to reject Chinese government demands for cooperation. This reading of the law is unrealistic.”

8. **Rebuttal to Para 3. c. Claim:**

8.1 Prof. Clarke’s conclusion relies on his own assumption that the Chinese law enforcement authorities are not meaningfully constrained by Chinese laws no matter what the Chinese laws stipulate, or that the laws are interpreted arbitrarily. The Donald Clarke Opinion does not provide concrete evidence to support the claim that the Zhong Lun Declaration is inaccurate and that the reading of the law is unrealistic. *See* Paragraph 4.2 of this Rebuttal for details.

8.2 The claims in the Zhong Lun Declaration such as that only “relevant” organizations are subject to the law, or that the “legitimate rights and interests” of citizens shall be respected, are not simply boilerplate statements. For example, “the relevant organizations” which are subject to the check for the purpose of counterespionage work” usually means relevant organizations who own, hold or use electronic communication tools, devices, and other equipment or facilities, rather than any organizations or individuals unrelated thereto. Nor are telecommunications equipment manufacturers such as Huawei considered to be “relevant organizations”. Moreover, if the government authorities misuse their powers to compel telecommunications equipment manufacturers to plant back doors, eavesdropping devices or spyware in the equipment they manufactured, such telecommunications equipment manufacturers may seek judicial relief under such laws as the *PRC Administrative Procedure Law*⁴ to safeguard their “legitimate rights and interests”. Accordingly, the claim in the Donald Clarke Opinion is unsupported.

9. **Claim in the Donald Clarke Opinion (Para 11.):**

“[T]he questions addressed by the Zhong Lun Declaration are limited to those of Chinese law. This is inadequate in three respects. First, the questions are only about statutory law passed by the National People’s Congress and its Standing Committee. The Zhong Lun Declaration does not look at lower-level regulations at all. This is like attempting to understand U.S. securities law by looking only at congressional statutes and ignoring SEC rulemaking. Even if everything the Zhong Lun Declaration says about ‘law’ is accurate,

⁴ For instance, Article 2 of the *PRC Administrative Procedure Law* provides that where citizens, legal persons or other organizations which consider that administrative acts of administrative organs or their personnel have infringed their legitimate rights and interests, they shall have the right to institute proceedings in people’s courts according to this Law.

it is important to understand that it is talking about only a limited subset of mandatory rules and ignoring a vast universe of other mandatory rules.”

10. Rebuttal to Para 11. Claim:

See Paragraph 6 of this Rebuttal.

11. Claim in the Donald Clarke Opinion (Para 12.):

“[I]t assumes - even asserts quite explicitly in several places - that if a citizen or organization believes its legal rights under law have been violated, it has an effective remedy available through the court system or via some other kind of administrative review. Particularly in the realm of state security, this belief is unjustified and in no way reflects Chinese reality. Many rights exist only on paper. In particular, rights that are vaguely and tautologically stated - for example, that a citizen’s ‘legitimate rights and interests’ shall be protected - are meaningless for practical purposes, since among other things they leave unsaid what rights and interests shall count as legitimate.”

12. Rebuttal to Para 12. Claim:

- 12.1 First, “legitimate rights and interests” is a concrete concept protected by the Chinese constitution. A citizen’s “legitimate rights and interests” includes the lawful rights and interests of the citizen. The scope of “laws” that the “legitimate rights and interests” are based on includes the explicit provisions of laws and the basic principles of laws.⁵ The implication of “legitimate” should mean that there is no express prohibition provided by laws.⁶
- 12.2 Second, in fact, the statistic report of the PRC Supreme People’s Court shows that there have been over 2.3 million administrative judgements so far.⁷
- 12.3 Third, the Chinese government’s official position supports our understanding. For example, at the PRC Ministry of Foreign Affairs Regular Press Conference on 18 February 2019, the spokesperson emphasized that “China’s National Intelligence Law stipulates not only the obligations of organizations and individuals to lawfully support, assist and coordinate with the country’s intelligence service, but also the obligations of the national intelligence service to carry out its work according to law, respect and protect human rights, and uphold the legal rights and interests of individuals and organizations. Meanwhile, there are many provisions in other laws to protect the legitimate rights and interests of

⁵ With reference to Mr. Tao PENG (2010): *On the Legal Rights of the Plaintiff in Administrative Proceeding*, Journal of Political Science and Law, 27 (1), Page 87-92.

⁶ *Ibid.*

⁷ *See:*

<http://oldwenshu.court.gov.cn/List/List?sorttype=1&conditions=searchWord+3+AjlX++%E6%A1%88%E4%BB%B6%E7%B1%BB%E5%9E%8B:%E8%A1%8C%E6%94%BF%E6%A1%88%E4%B%B6>, last visited: 8 November 2019.

organizations and individuals, including data security and right to privacy. Those stipulations also apply to intelligence-related work.”⁸

12.4 Accordingly, we could conclude that the administrative review/litigation legal system and relief system exist and run in China. Hence, the conclusion in the Zhong Lun Declaration which is based on the above laws and facts is more convincing than the conclusion in the Donald Clarke Opinion, which is primarily based on Prof. Clarke’s own assumption.

13. Claim in the Donald Clarke Opinion (Para 13.):

“[E]ven if the Zhong Lun Declaration did look at the entire universe of mandatory rules in China, it would still fail to address the key question of concern to the United States and other governments. That question is not what Chinese law says about the ability of the Chinese government to tell companies like Huawei what to do. The question is what the Chinese government can actually do, regardless of what the law might say. The Zhong Lun Declaration does not address the key issue of whether the Chinese government is meaningfully constrained by Chinese law.”

14. Rebuttal to Para 13. Claim:

See Paragraph 4 of this Rebuttal.

15. Claim in the Donald Clarke Opinion (Para 14.):

“[T]he Chinese political system is essentially Leninist, and recognizes no limits on government power, even as a matter of form. The Chinese Party/state is not meaningfully constrained by Chinese law. This is particularly so in matters deemed relevant to national security. The current incarceration of approximately one million Uyghurs in ‘education and rehabilitation centers’ is a prime example: it lacks the required statutory basis under China’s own law, and yet proceeds unimpeded. The notion, advanced several times in the Declaration, that Chinese companies, if asked to do things by the Chinese security agencies for which those agencies had no legal mandate, could politely decline, and perhaps even bring lawsuits against the security agencies, is fanciful. The Zhong Lun Declaration cites no examples of anyone in China ever having done this successfully.”

16. Rebuttal to Para 14. Claim:

First, all the opinions in the Zhong Lun Declaration are professional opinions from the legal perspective instead of the political perspective. Second, Prof. Clarke’s conclusion relies on his own assumption that the Chinese law enforcement authorities are not meaningfully constrained by Chinese laws no matter what the Chinese laws stipulate or that the laws are interpreted arbitrarily. *See* Paragraph 4 of this Rebuttal for details.

⁸ *See*: Foreign Ministry Spokesperson Shuang GENG’s Regular Press Conference on 18 February 2019. https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1638791.shtml, last visited: 8 November 2019.

17. Claim in the Donald Clarke Opinion (Para 15.):

“In an important sense, then, the entire Zhong Lun Declaration and the accompanying Clifford Chance Opinion are beside the point, because they fail to address the question that matters: the actual capacity of the Chinese government to do various things. Nevertheless, this memorandum will examine the legal arguments as well.”

18. Rebuttal to Para 15. Claim:

See Paragraph 4 of this Rebuttal.

19. Claim in the Donald Clarke Opinion (Para 17.):

“This is in a sense true, but also misleading. The statutes do not purport to directly regulate companies organized outside of China. But they do regulate Huawei. If Huawei is obliged to do something under Chinese law, it is obliged to do so to the best of its ability. Thus, the fact that a U.S. subsidiary is not subject to Chinese law is irrelevant. The relevant fact is that it is subject to the control of its parent corporation. If Huawei exercises control over an overseas subsidiary (for example, a wholly-owned subsidiary), it is obligated to cause the subsidiary to act. Huawei chooses for business reasons to operate outside of China through subsidiaries with a separate corporate existence, as opposed to divisions or branches that have no separate corporate existence. It is undisputed that such divisions or branches, being part of Huawei itself, would enjoy no exemption from Huawei’s obligations. It is inconceivable that Chinese law would allow organizations to manipulate their obligations simply by choosing to organize their overseas operations in one way as opposed to another.”

20. Rebuttal to Para 17. Claim:

- 20.1 First, at least literally, the Donald Clarke Opinion agrees with the Zhong Lun Declaration on the conclusion that various statutes concerned regulate only Chinese entities and do not apply to Huawei’s overseas subsidiaries.
- 20.2 Second, the claim in the Donald Clarke Opinion relies on Prof. Clarke’s own assumption that the Chinese enforcement authorities would violate the laws and require Huawei to request its overseas subsidiaries to assist such work as the national intelligence work by planting back doors, eavesdropping equipment, or spyware in their equipment. In fact, such assumption lacks any evidence to support it.
- 20.3 Moreover, the Chinese government has repeatedly emphasized that the Chinese government has been asking Chinese companies to strictly abide by local laws and regulations when doing business overseas, and that China has not asked and will not ask companies or individuals to collect or provide data, information and intelligence stored within other countries’ territories for the Chinese government

by installing back doors or by violating local laws.⁹ See Paragraph 60 of this Rebuttal for details.

20.4 Furthermore, Huawei repeatedly declares that Huawei has not planted and will not plant back doors to assist the national intelligence work or engage in the espionage activities.¹⁰

21. Claim in the Donald Clarke Opinion (Para 19. a.):

“Chinese state security authorities generally operate beyond the law. They are rarely punished for exceeding their authority. The Declaration’s assertion that they would be punished for exceeding their authority under the Counterespionage Law, for example, in the same way they would be punished for extorting a confession by torture does not inspire confidence, since it is conceded even by the Chinese authorities that a great deal of official torture still goes unpunished.”

22. Rebuttal to Para 19. a. Claim:

First, this claim relies on Prof. Clarke’s own assumption that the Chinese law enforcement authorities are not meaningfully constrained by Chinese laws no matter what the Chinese laws stipulate or that the laws are interpreted arbitrarily. See Paragraph 4 of this Rebuttal for details. Second, in fact, the statistic report of the PRC Supreme People’s Court shows that there have been over 1.8 million administrative judgements so far.

23. Claim in the Donald Clarke Opinion (Para 19. b.):

“Similarly, the notion that affected parties could successfully sue the state security authorities in administrative proceedings is naive. Chinese courts will not defy state security authorities.”

24. Rebuttal to Para 19. b. Claim:

This claim that “Chinese courts will not defy state security authorities” lacks grounds and is merely an assumption.

⁹ See: (1) Foreign Ministry Spokesperson Shuang GENG’s Regular Press Conference on 18 February 2019.

https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1638791.shtml, last visited: 8 November 2019. (2) Mr. Jiechi YANG, *Hope the United States (US) Side Will Work with the Chinese Side to Well Implement the Consensus of the Two Heads of State and Promote Bilateral Relations Based on Coordination, Cooperation and Stability*.

https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1638953.shtml, last visited: 8 November 2019.

(3) Foreign Ministry Spokesperson Kang LU’s Regular Press Conference on 10 December 2018.

https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1620575.shtml, last visited: 8 November 2019. (4) The spokesperson of Embassy of China in Japan made similar comments in public on 07 December 2018. <http://www.china-embassy.or.jp/chn/sgxxs/t1619923.htm>, last visited: 8 November 2019.

¹⁰ See: <https://wallstreetcn.com/articles/3496863?from=groupmessage&isappinstalled=0>, last visited: 28 March 2019; <https://tech.sina.com.cn/it/2019-01-21/doc-ihqfskcn9148379.shtml>, last visited: 28 March 2019.

25. Claim in the Donald Clarke Opinion (Para 19. c.):

“Nor is it remotely conceivable, as suggested in the Declaration, that individuals and organizations could successfully bring administrative review proceedings to challenge their designation as terroristic.”

26. Rebuttal to Para 19. c. Claim:

This claim lacks grounds and is merely an assumption.

27. Claim in the Donald Clarke Opinion (Para 19. d.):

“The only way the Zhong Lun Declaration could substantiate its claim that its list of remedies is actually effective would be to provide examples of where they have worked in the past. It provides none.”

28. Rebuttal to Para 19. d. Claim:

See Paragraphs 16 of this Rebuttal.

29. Claim in the Donald Clarke Opinion (Para 21.):

“‘Espionage’ is not clearly defined. The definition includes the catch-all term ‘other activities of espionage’. The claim that law enforcement authorities must have explicit purposes and clear and specific goals is not supported in the text of the law. And as always, any claim that a legal standard is meaningful must be accompanied by an explanation of which institutions exist to make it meaningful. As noted above, the Declaration’s repeated statements that affected parties may go to court to vindicate whatever rights the various statutes examined in the Zhong Lun Declaration may give them are fanciful and not reflective of actual Chinese reality.”

30. Rebuttal to Para 21. Claim:

30.1 It should be noted that Article 38 of the *PRC Counterespionage Law* provides a detailed list to define acts of espionage which shall be prevented, stopped and punished. Besides, when interpreting Article 38 (5) of the *PRC Counterespionage Law*, “other activities” should be interpreted to the activities with the same nature as the activities listed before Article 38 (5) (i.e., Article 38 (1) - (4) of the *PRC Counterespionage Law*).¹¹

30.2 Besides, as explained in the Zhong Lun Declaration, Article 13 of the *PRC Counterespionage Law* explicitly provides that its application shall be restricted to the needs for counterespionage work. It implies that law enforcement authorities should have explicit purposes and clear and specific goals.

30.3 Moreover, the claim in Donald Clarke Opinion that “the Declaration’s repeated statements that affected parties may go to court to vindicate whatever rights the

¹¹ With Reference to Ms. Lanhua SHI (2012): *Application of the Miscellaneous Term under Legal Interpretation*, Journal of Hubei University of Police, 128 (5), Page 49-51.

various statutes examined in the Zhong Lun Declaration may give them are fanciful and not reflective of actual Chinese reality” lacks the evidence to support it.

31. Claim in the Donald Clarke Opinion (Para 23.):

“This is putting far more weight on an unimportant term - ‘relevant’ - than it can bear. Whether an organization is relevant or not is decided by the authorities. A company approached by the government with a request to cooperate is for that very reason ‘relevant’. The Zhong Lun Declaration provides no examples of cases in which parties escaped the jurisdiction of a Chinese government agency on the grounds that the applicable statute covered only ‘relevant’ parties and that they were not relevant.”

32. Rebuttal to Para 23. Claim:

See Paragraphs 16 of this Rebuttal.

33. Claim in the Donald Clarke Opinion (Para 25.):

“Even if the Zhong Lun Declaration were correct in its restrictive reading of ‘checking’ and its confidence that that reading would be upheld by Chinese courts against the wishes of the security services, it is mistaken in asserting that ‘checking’ is all that the security authorities are entitled to do. Article 22 of the law states that when security agencies are investigating espionage activities and collecting evidence, organizations and individuals may not refuse to provide it. It is not difficult to read into this language an obligation to implant spyware or engage in similar activities.”

34. Rebuttal to Para 25. Claim:

The provision that “organizations and individuals may not refuse to provide it” in Article 22 of the *PRC Counterespionage Law* means that organizations and individuals may not refuse to provide relevant evidence of espionage that the organization already possesses. There is no word in Article 22 indicating that an individual or an organization has an obligation, as an intelligence agent, to collect the evidence or intelligence by planting spyware or engage in similar activities.

35. Claim in the Donald Clarke Opinion (Para 27.):

Misleading or wrong.

36. Rebuttal to Para 27. Claim:

See Paragraphs 22-28 of this Rebuttal.

37. Claim in the Donald Clarke Opinion (Para 29.):

Misleading or wrong.

38. Rebuttal to Para 29. Claim:

See Paragraphs 22-28 of this Rebuttal.

39. Claim in the Donald Clarke Opinion (Para 31.):

Misleading or wrong.

40. Rebuttal to Para 31. Claim:

See Paragraphs 19-20 of this Rebuttal.

41. Claim in the Donald Clarke Opinion (Para 34.):

“It does not. Like the *PRC Counterespionage Law*, the definition of terrorism includes a vague catch-all clause: ‘other terrorist activities’.”

42. Rebuttal to Para 34. Claim:

Paragraph 1 of Article 3 of the *PRC Anti-terrorism Law* provides a clear definition of the “terrorist activities”. Therefore, “other terrorist activities” in Article 3 (5) of must be interpreted with reference to the definition of the “terrorist activities” in a specific case. Also See Paragraph 30.1 of this Rebuttal.

43. Claim in the Donald Clarke Opinion (Para 36.):

“First, the claim above does not address the question of the expansive term ‘other terrorist activities’. It addresses only the question of whether the Chinese government would abuse its power through overly broad and unjustified classifications of terrorist groups and individuals. Second, it addresses that question by making the profoundly unrealistic claim that individuals and groups designated as terroristic can simply apply for administrative review and have their claims heard fairly by an institution with the will and capacity to restrain the state security authorities.”

44. Rebuttal to Para 36. Claim:

See Paragraphs 42 and 12 of this Rebuttal.

45. Claim in the Donald Clarke Opinion (Para 38.):

“This claim appears to be accurate. I note, however, that the Zhong Lun Declaration states that Huawei is not obligated under the law ‘where it acts as a manufacturer and seller of telecommunications equipment’, implying that there may be times where it acts other than as a manufacturer and seller of telecommunications equipment and is therefore subject to the law.¹²”

46. Rebuttal to Para 38. Claim:

46.1 First, Prof. Clarke admitted that Huawei is not obligated under the law “where it acts as a manufacturer and seller of telecommunications equipment”.

46.2 Although we could not exclude the possibility that Huawei may extend its business, where Huawei constitutes a telecommunications business operator and/or an Internet service provider, Huawei’s obligations would be limited. Specifically, Huawei’s obligations should be limited to those networks related to its service

¹² “The law” refers to the *PRC Cyber Security Law*.

operation as a telecommunications business operator and/or an Internet service provider, and should not extend to the telecommunications equipment manufactured and sold by it (as an equipment manufacturer and seller).

47. Claim in the Donald Clarke Opinion (Para 40.):

“The Zhong Lun Declaration does not cite a clear basis for its view that ‘terrorist activities’ must refer to a specific case and cannot refer to general measures designed to deal with what the state chooses to define as terrorism. Thus, its assertion that the scope of legal obligation is limited is valid only if one believes that there are limits on the Chinese government’s ability to define what counts as ‘terrorist activities’ and what counts as ‘assistance and support’. But there are no such limits.”

48. Rebuttal to Para 40. Claim:

See Paragraph 42 of this Rebuttal.

49. Claim in the Donald Clarke Opinion (Para 42.):

Misleading or wrong.

50. Rebuttal to Para 42. Claim:

See Paragraphs 22-28 of this Rebuttal.

51. Claim in the Donald Clarke Opinion (Para 44.):

Misleading or wrong.

52. Rebuttal to Para 44. Claim:

See Paragraphs 19-20 of this Rebuttal.

53. Claim in the Donald Clarke Opinion (Para 47.):

“The premise is correct, but the conclusion does not follow. The Chinese government is not limited by law. There is no institution in China that could determine that the state security agencies had overstepped the bounds of the Cybersecurity Law and provide an effective remedy.”

54. Rebuttal to Para 47. Claim:

It seems that the Donald Clarke Opinion agrees with the Zhong Lun Declaration at least from the legal perspective on the conclusion that the purpose of the law is to protect China’s cyber security, not to threaten the cyber security of any other country. Thus, the authorities could not use the law for any purpose beyond this scope. The Donald Clarke Opinion believes that “the conclusion does not follow” only because Prof. Clarke made his conclusion based on his own assumption that the Chinese government is not meaningfully constrained by Chinese laws no matter what the Chinese laws stipulate. *See* Paragraph 4 of this Rebuttal for details.

55. Claim in the Donald Clarke Opinion (Para 49. a.):

“‘Network’ is not clearly defined in the Cybersecurity Law, and therefore ‘network operator’ is not clearly defined. There is little question that the term extends beyond ordinary internet service providers. Chinese banks have argued in overseas legal proceedings that it covers them as well, since they store data in internal networks. To the extent Huawei’s internal networks are less accessible to the public than those of banks, it is plausible to argue that it is not a ‘network operator’. Nevertheless, the question is not clear. There is sufficient ambiguity that if the state security authorities wished to deem Huawei a network operator on the basis of its internal networks, it is hard to see how they could be prevented from doing so.”

56. Rebuttal to Para 49. a. Claim:

Firstly, according to Article 9¹³ of the *PRC Cyber Security Law*, “network operators” are limited to those operators who carrying out business operation and service activities rather than operating their internal network. Secondly, the Cyber Security Legal Research Centre of No. 3 Research Institute of the PRC Ministry of Public Security¹⁴ has summarized almost all publicly known law enforcement actions under the *PRC Cyber Security Law* between June and August 2017. According to this article, all these enforcement actions are against network operators that carry out business operations and service activities to the public.

57. Claim in the Donald Clarke Opinion (Para 49. b.):

“Note, however, the statement’s qualification: ‘[w]hen Huawei, as a manufacturer of telecommunications equipment, engages in R&D and production and sale of telecommunications equipment.....’ This of course implies that Huawei could be considered a network operator for other reasons. If so, it would be subject to the law. Consequently, the fact that it is not a network operator for one set of reasons is not particularly relevant.”

58. Rebuttal to Para 49. b. Claim:

See Paragraph 46.2 of this Rebuttal.

59. Claim in the Donald Clarke Opinion (Para 51.):

“The Zhong Lun Declaration provides no support for its assertion that the broad term ‘technical support and assistance’ does not include the specific actions it mentions. It is simply declaring this to be true. Without more, the bare assertion is not credible. In the

¹³ Article 9 under the *PRC Cyber Security Law* provides that “[w]hen carrying out business operation and service activities, network operators shall abide by laws and administrative regulations, show respect for social moralities, follow business ethics, and act in good faith. They shall also fulfill the obligation of cybersecurity protection, accept governmental and public supervision, and undertake social responsibilities.”

¹⁴ Cyber Security Legal Research Centre of No. 3 Research Institute of the PRC Ministry of Public Security, *Analysis on Certain Issues under Administrative Enforcement of the PRC Cyber Security Law*, published on 29 September 2017, available at Wolters Kluwer.

Chinese legal system, vagueness and ambiguity are interpreted in favor of the authorities, not against them.

60. Rebuttal to Para 51. Claim:

In addition to the literal interpretation of the law, the Chinese government has taken a consistent position on the issue whether the Chinese companies are required by Chinese laws to provide assistance to the national intelligence work through installing mandatory back doors or violating local laws of other countries. For example:

- 60.1 On March 15, 2019, Chinese Premier Li Keqiang¹⁵ met the press after the conclusion of the second session of the 13th National People's Congress (NPC) at the Great Hall of the People in Beijing and said publicly that “[t]he Chinese government did not and will not ask Chinese companies to spy on other countries, such kind of action is not consistent with the Chinese law and is not how China behaves.”
- 60.2 At 18 February 2019 PRC Ministry of Foreign Affairs Regular Press Conference, the spokesperson emphasized that “the Chinese government has been asking Chinese companies to strictly abide by local laws and regulations when doing business overseas; this position will not change...China has not asked and will not ask companies or individuals to collect or provide data, information and intelligence stored within other countries’ territories for the Chinese government by installing ‘back doors’ or by violating local laws.”¹⁶
- 60.3 At a press meeting of the 55th Munich Security Conference on 16 February 2019, Mr. Yang Jiechi, Member of the Political Bureau of the CPC Central Committee and Director of the Office of the Central Commission for Foreign Affairs of China, pointed out that “the Chinese government always requires Chinese companies to abide by international rules and laws and regulations of the country where they operate. Over a long period, Huawei Technologies Co., Ltd. has made positive contributions to the development of communication technologies in countries including in Europe, and strictly abided by international rules and local laws and regulations in this process.”¹⁷

¹⁵ See: *Chinese government did not and will not ask companies to engage in spying: premier*, http://www.xinhuanet.com/english/2019-03/15/c_137897399.htm, last visited: 8 November 2019.

¹⁶ See: Foreign Ministry Spokesperson Shuang GENG’s Regular Press Conference on 18 February 2019. https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1638791.shtml, last visited: 8 November 2019.

¹⁷ See: Mr. Jiechi YANG, *Hope the United States (US) Side Will Work with the Chinese Side to Well Implement the Consensus of the Two Heads of State and Promote Bilateral Relations Based on Coordination, Cooperation and Stability*. https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1638953.shtml, last visited: 8 November 2019.

60.4 At 10 December 2018 PRC Ministry of Foreign Affairs Regular Press Conference on, the spokesperson emphasized that Chinese laws and regulations never give any institution the mandate to force companies to build “mandatory back doors”.¹⁸

61. Claim in the Donald Clarke Opinion (Para 53.):

Misleading or wrong.

62. Rebuttal to Para 53. Claim:

See Paragraphs 22-28 of this Rebuttal.

63. Claim in the Donald Clarke Opinion (Para 55.):

Misleading or wrong.

64. Rebuttal to Para 55. Claim:

See Paragraphs 22-28 of this Rebuttal.

65. Claim in the Donald Clarke Opinion (Para 57.):

Misleading or wrong.

66. Rebuttal to Para 57. Claim:

See Paragraphs 19-20 of this Rebuttal.

67. Claim in the Donald Clarke Opinion (Para 60.):

“This is one of the most preposterous claims of the Declaration. Language in Chinese statutes about protecting ‘legitimate rights and interests’ is essentially meaningless boilerplate. Among other things, it leaves unanswered the question of which rights and interests count as legitimate. It is inconceivable that a Great Wall of resistance to Chinese state authority could be built upon such a flimsy linguistic foundation. No Chinese authority to my knowledge has ever acknowledged that the interest of Chinese companies and individuals in doing business and making money trumps the state’s interest in national security. Furthermore, it is impossible to believe that the Chinese state would consider the prospect of punishment under foreign law as a valid reason for refusing an otherwise valid demand to cooperate. The United States recognizes no such general exemption; still less does China. That would be to allow foreign governments the power to constrain the regulatory authority of the Chinese government over Chinese parties in China, and that would clearly be unacceptable.”

68. Rebuttal to Para 60. Claim:

68.1 First, the implication of the “legitimate rights and interests” has been explained in Paragraph 12 of this Rebuttal. *See* Paragraph 12 of this Rebuttal for details.

¹⁸ *See*: Foreign Ministry Spokesperson Kang LU’s Regular Press Conference on 10 December 2018. https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1620575.shtml, last visited: 8 November 2019.

68.2 Second, state security should be protected in accordance with the law. As explained above, the Chinese law does not authorize the state authorities to require the telecommunications equipment manufacturers to plant back doors, eavesdropping equipment, or spyware in their equipment. Therefore, if the telecommunications equipment manufacturers were requested to plant back doors, eavesdropping equipment, or spyware in their equipment in the guise of assisting the state security protection, such requests would be unlawful given it exceeds the scope of legal authorization and would infringe upon the “legitimate rights and interests” of the telecommunications equipment manufacturers. Under this circumstance, the telecommunications equipment manufacturers could refuse the unlawful requests.

68.3 Third, as explained in Paragraph 60 of this Rebuttal, the Chinese government is taking a consistent stand on the issue whether the Chinese companies are required by Chinese laws to provide assistance to the national intelligence work through installing mandatory back doors or violating local laws of other countries. The official stand demonstrates that individuals and organizations shall have the right to refuse to obey requests for cooperation made by national intelligence agencies, particularly if the cooperation relationship would result in violation of local applicable laws of another country. *See* Paragraph 60 of this Rebuttal for details.

69. Claim in the Donald Clarke Opinion (Para 64.):

“This is another preposterous claim. ‘In accordance with law’ is another example of essentially meaningless boilerplate. It is incorrect to suggest that every type of request for cooperation must have a specific basis in law. There is no law explicitly authorizing the state security authorities to do anything specific when they request cooperation, and yet nobody supposes that they are therefore crippled. Chinese laws are highly general and simply do not get into specifics like this. It might equally be observed that there is no law specifically authorizing the state intelligence agencies to make cooperation requests on a Tuesday, but nobody doubts they have the power to do so.”

70. Rebuttal to Para 64. Claim:

70.1 “In accordance with law” is not meaningless boilerplate. The requirement that requests or provisions of support, assistance and cooperation should be “in accordance with law” has the following two implications:

First, under the Chinese legal system, a requirement must be codified into law before becoming a legal obligation for individuals and organizations. However, there is no such law in China whatsoever authorizing national intelligence agencies to require telecommunications equipment manufacturers to plant back doors, eavesdropping equipment, or spyware, nor is there any Chinese law that imposes a legal obligation on individuals and organizations to do so.

Second, the reference to “in accordance with law” means that the state authorities are not empowered to request individuals and organizations to carry out any

unlawful activity, and the individuals and organizations are not obliged to comply with any request to carry out any unlawful activity. Requests for planting back doors, eavesdropping equipment, or spyware in the telecommunications equipment would be considered as unlawful requests as it may result in potential breaches of some applicable laws and regulations of China. This is another reason why Huawei is not obliged to comply with any request to plant back doors, eavesdropping equipment, or spyware in their telecommunications equipment. For example, requests for planting back doors, eavesdropping equipment, or spyware in the telecommunications equipment would contravene Article 27 of the *PRC Cyber Security Law*. Article 27 of the *PRC Cyber Security Law* provides that, any individual or organization shall neither engage in activities endangering cyber security, including illegally invading others' networks, interfering with the normal functions of others' networks and stealing cyber data, nor provide programs or tools specifically used for activities endangering cyber security, such as network intrusions, interference with the normal functions and protective measures of the network, and theft of cyber data; if such individual or organization knows that a person engages in activities jeopardizing cyber security, it shall not provide technical support, advertising promotion, payment and settlement services or other types of assistance to such person or organization.

70.2 Besides, as explained in Paragraph 60 of this Rebuttal, the Chinese government is taking a consistent stand on the issue of whether the Chinese companies are required by Chinese laws to provide assistance to the national intelligence work by installing mandatory back doors or violating local laws of other countries. That is, the Chinese government has been asking Chinese companies to strictly abide by local laws and regulations when doing business overseas. China has not asked and will not ask companies or individuals to collect or provide data, information and intelligence stored within other countries' territories for the Chinese government by installing 'back doors' or by violating local laws. See Paragraph 60 of this Rebuttal for details.

71. Claim in the Donald Clarke Opinion (Para 66.):

“Even if this claim were true - which it is not - the Constitution is not part of the enforceable legal system of China. Chinese courts do not have the power to invalidate government actions on constitutional grounds, even in the unlikely event that a particular judge should be inclined to do so. Thus, constitutional arguments are simply irrelevant here. In any case, the claim is not true. The section of the Constitution cited in the Zhong Lun Declaration (Article 40) is about protecting the privacy of Chinese citizens. The concern of the U.S. and other governments is about Huawei being required to infringe on the privacy of non-Chinese persons and organizations. Huawei could do that without infringing on the privacy of Chinese citizens.”

72. Rebuttal to Para 66. Claim:

- 72.1 The *Constitution of the PRC* is the fundamental law of the Chinese legal system. The rights and interests of citizens and legal persons stipulated in the *Constitution of the PRC* are intended to be embodied in specific law branches, like the *General Rules of the Civil Law of the PRC* and the *PRC Tort Law*. Therefore, if the constitutional rights and interests of the citizens and legal persons are infringed, such citizens and legal persons have rights to file lawsuits with the court according to the specific provisions of the specific laws. For example, Article 110 of the *General Rules of the Civil Law of the PRC* stipulates that natural persons have the right to privacy, and Article 111 of the *General Rules of the Civil Law of the PRC* stipulates that any organization or individual shall legally obtain the personal information of others when necessary and ensure the safety of such personal information, and shall not illegally collect, use, process or transmit the personal information of others, or illegally buy or sell, provide or make public the personal information of others. Also, Article 2 of the *PRC Tort Law* stipulates that the right to privacy shall not be infringed. Therefore, if an individual's right under Article 40 of the *Constitution of the PRC* is infringed, he or she may bring a lawsuit to the relevant courts in accordance with the relevant provisions of the *General Rules of the Civil Law of the PRC* and the *PRC Tort Law*. Under this circumstance, if the infringer is the state authorities, such state authorities may be sued under the *PRC Administrative Review Law* and the *PRC Administrative Procedure Law*.
- 72.2 In addition, according to Article 32 of the *Constitution of the PRC*, China protects the lawful rights and interests of foreign citizens in Chinese territory. Therefore, the privacy of the foreign citizens in China could also be protected. Regarding the foreign citizens outside China, their "legitimate rights and interests" would also be respected - as the Chinese government has reiterated. For instance, at the PRC Ministry of Foreign Affairs Regular Press Conference on 18 February 2019, the spokesperson emphasized that "China's National Intelligence Law stipulates not only the obligations of organizations and individuals to lawfully support, assist and coordinate with the country's intelligence service, but also the obligations of the national intelligence service to carry out its work according to law, respect and protect human rights, and uphold the legal rights and interests of individuals and organizations. Meanwhile, there are many provisions in other laws to protect the legitimate rights and interests of organizations and individuals, including data security and right to privacy. Those stipulations also apply to intelligence-related work".¹⁹

73. Claim in the Donald Clarke Opinion (Para 68.):

Misleading or wrong.

¹⁹ See: Foreign Ministry Spokesperson Shuang GENG's Regular Press Conference on 18 February 2019.
https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1638791.shtml,
last visited: 8 November 2019.

74. Rebuttal to Para 68. Claim:

See Paragraphs 22-28 of this Rebuttal.

75. Claim in the Donald Clarke Opinion (Para 70.):

Misleading or wrong.


76. Rebuttal to Para 70. Claim:

See Paragraphs 19-20 of this Rebuttal.

I declare that the foregoing is true and correct under penalty of perjury of the laws of the United States of America.

Executed on November 8, 2019

Beijing, P. R. China



Chen Jihong