A RED FLAG? CHINA'S GENERATIVE AI DILEMMA

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ABSTRACT

We are currently faced with a generative artificial intelligence ("AI") dilemma. All jurisdictions must weigh the potential for tremendous economic and scientific progress on the one hand, while on the other, they must consider the very real possibility of severe social and political upheaval. This includes the mass dissemination of misinformation, the perpetuation of bias, the endangering of jobs, and the stoking of fears surrounding an AI apocalypse.

The way the great powers of the internet — the United States, the European Union, and China — choose to regulate generative AI will undoubtedly seriously impact our lives and politics.

China is the first power to move. This Note investigates the People's Republic of China's forthcoming generative AI regulatory measures, which went into effect on August 15, 2023. We contend that this regulation signifies a cautious decision, motivated mainly by internal political reasons, to decelerate the development of generative AI within China. Chinese regulators view this calculated slowdown as a response to the risks of generative AI.

China's move to affirmatively regulate generative AI will have global implications — notably, its potential ability to mitigate the international "race to the bottom" in generative AI development. This result is not just welcome but a necessary precondition for the responsible advancement of AI. China's choice, inadvertently, serves to grant the rest of the world a much-needed respite for contemplating the regulation of generative AI.

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TABLE OF CONTENTS

I. INTRODUCTION

The world is currently wrestling with the technological dilemma posed by generative artificial intelligence ("AI"). Generative AI's ability to automate and innovate can boost productivity, create new industries, and catalyze economic growth.[1] At the same time, these capabilities raise significant risks, including introducing the ability to mass produce plausible misinformation, amplify hate speech campaigns, propagate bias, and displace jobs.[2] Beyond the direct dangers, a more profound risk may be looming — the potential for an AI-enabled apocalypse. Several leading figures in AI have echoed this concern, including the heads of OpenAI and DeepMind. They have recently stated that "[m]itigating the risk of extinction from AI should be a global priority."[3] Some in the field are calling for a pause in AI

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1. *See* Jan Hatzius, Joseph Briggs, Devesh Kodnani & Giovanni Pierdomenico, *The Potentially Large Effects of Artificial Intelligence on Economic Growth (Briggs/Kodnani)*, GOLDMAN SACHS (Mar. 26, 2023), https://www.gspublishing.com/content/research/en/reports/2023/03/27/d64e052b-0f6e-45d7-967b-d7be35fabd16.html [https://perma.cc/WH5V-YR4G].

2. *See generally* Luke Tredinnick & Claire Laybats, *The Dangers of Generative Artificial Intelligence*, 40 BUS. INFO. REV. 46 (2023).

3. *Statement on AI Risk*, CTR. for AI Safety (last visited Jul. 25, 2023), https://www.safe.ai/statement-on-ai-risk [https://perma.cc/N6A3-9BKR].

development,[4] while others insist on rapid governmental intervention to establish regulations aimed at mitigating these risks while development can continue.[5]

Consistent with its approach to AI technology,[6] China is the first major state actor to design regulations tailored to generative AI. Though China's situation is uniquely its own, given its distinct and illiberal political structure and cultural context, it nevertheless offers profound lessons for other regulators.[7] Some of the struggles China faces in navigating the challenges of generative AI reflect a global dilemma: the pursuit of innovation versus the necessary regulation to prevent misuse and avert disaster.

In several ways, the generative AI dilemma is starker in the People's Republic of China ("PRC"), and makes for a precarious balancing act: on one hand is the political need to assertively pursue growth via technological advancement,[8] and on the other is the Chinese Communist Party's commitment to retaining control over information and maintaining political stability.[9] The ability of generative AI to rapidly generate realistic content may pose extreme challenges for control by the PRC government.[10]

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4. *Pause Giant AI Experiments: An Open Letter*, FUTURE LIFE INST. (Mar. 22, 2023), https://futureoflife.org/open-letter/pause-giant-ai-experiments/ [https://perma.cc/KD8U-WJM5].

5. *See, e.g.*, Ted Lieu, *I'm a Congressman Who Codes. A.I. Freaks Me Out.*, N.Y. TIMES (Jan. 23, 2023), https://www.nytimes.com/2023/01/23/opinion/ted-lieu-ai-chatgpt-congress.html [https://perma.cc/T8LZ-LQ46].

6. *See* Gilad Abiri & Xinyu Huang, *The People's (Republic) Algorithms*, 12 NOTRE DAME J. INT'L COMP. L. 16 (HeinOnline 2022) (discussing the groundbreaking Chinese regulation of recommendation algorithms).

7. The same is true for other Chinese policies, that cannot (should not) necessarily be pursued elsewhere, but still provide important lessons. *See e.g.*, Edward S. Steinfeld & Troels Beltoft, *Innovation Lessons from China*, MIT SLOAN MGMT. REV. (2014); Markus Overdiek & Daniela A. Coka, *Industrial Policy – Lessons from China*, GLOB. & EUROPEAN DYNAMICS (Feb. 7, 2020), https://globaleurope.eu/globalization/china-industrial-policy/ [https://perma.cc/2VD4-JHS3]; John A. Mathews & Hao Tan, *Circular Economy: Lessons from China*, 531 NATURE 440 (2016).

8. *See* Yuchao Zhu, *"Performance Legitimacy" and China's Political Adaptation Strategy*, 16 J. CHINESE POL. SCI. 123 (2011) (analyzing the reasons the CCP chose the path of performance legitimacy).

9. *See* Rogier Creemers, *The Pivot in Chinese Cybergovernance: Integrating Internet Control in Xi Jinping's China*, 2015 CHINA PERSPS. 5, 5 (2015) ("Consequently, significant institutional, regulatory and policy changes were made in order to regain control over the Internet[.]").

10. John Naughton, *Can China Keep Generative AI under Its Control? Well, It Contained the Internet*, OBSERVER (Apr. 22, 2023), https://www.theguardian.com/commentisfree/2023/apr/22/can-china-keep-generative-ai-under-its-control-well-it-contained-the-internet[https://perma.cc/45JY-CTRD].

China is pushing towards a state of self-sufficiency in generative AI, reducing its dependence on American technologies.[11] Initiatives such as Baidu's Wenxin Yiyin have placed generative AI at the frontier of innovation for an array of China's internet and technology giants.[12] These include Alibaba's Tongyi Qianwen, Tencent's Hunyuan, Huawei's Pangu, iFlytek's Spark, and 360's Zhineng.[13] These enterprises aren't simply trying to match their American rivals, but with robust backing from the Chinese government in recognition of the transformative potential of generative AI, they're trying to overtake them.

Simultaneously, however, the Cyberspace Administration of China ("CAC"), China's primary internet information services regulator, recently released the Interim Measures for the Administration of Generative Artificial Intelligence Services (the "Interim Measures").[14] The regulation is active as of August 15, 2023, becoming the first major regulation directly targeting generative AI. Like most other major cyber laws and regulations in China,[15]

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11. Rita Liao, *Baidu's $145M AI Fund Signals China's Push for AI Self-Reliance*, TECHCRUNCH (Jun. 1, 2023), https://techcrunch.com/2023/06/01/baidu-generative-ai-fund-china/ [https://perma.cc/Y8DK-CE6B] ("China, in order to reduce dependence on the U.S. technological foundation, has been pursuing its own large language models that match OpenAI's GPT models. But unlike the U.S., some of its most advanced AI endeavors are happening at established internet juggernauts, such as Baidu.").

12. *Id.*

13. For an overview of Large Language Models developed by Chinese firms, see Jeffery Ding & Jenny Xiao, *Recent Trends in China's Large Language Model Landscape*, CTR. GOVERNANCE A.I. (Apr. 28, 2023), https://www.governance.ai/research-paper/recent-trends-chinas-llm-landscape [https://perma.cc/8CGG-VDQ9].

14. Shengchengshi Rengong Zhineng Fuwu Guanli Zanxing Banfa (生成式人工智能服务管理暂行办法) [Interim Measures for Administration of Generative Artificial Intelligence Services] (promulgated by the Cyberspace Admin. of China, Jul. 10, 2023, effective Aug. 15, 2023) St. Council Gaz., Aug. 30, 2023, at 40, https://www.gov.cn/gongbao/2023/issue_10666/ (China) [hereinafter Interim Measures].

15. *E.g.*, Zhonghua Renmin Gongheguo Wangluo Anquan Fa (中华人民共和国网络安全法) [Cybersecurity Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 7, 2016, effective Jun. 1, 2017) 2016 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 899 (China) [hereinafter Cybersecurity Law]; Zhonghua Renmin Gongheguo Shujü Anquan Fa (中华人民共和国数据安全法) [Data Security Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Jun. 10, 2021, effective Sept. 1, 2021) 2021 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 951 (China); Zhonghua Renmin Gongheguo Geren Xinxi Baohu Fa (中华人民共和国个人信息保护法) [Personal Information Protection Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 20, effective Nov. 1, 2021) 2021 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 1117 (China) [hereinafter

the measures require generative AI companies to produce content respecting socialist values, and prohibit discriminatory and false information.[16] The generative AI companies must also respect intellectual property, safeguard others' rights, ensure legal data sourcing, conduct security assessments in accordance with relevant regulations, establish complaint mechanisms, protect user data, and provide secure, stable services.[17] Non-compliance could lead to severe penalties.[18] The prevailing concern in the debate in China is that these regulations could suppress the creative and practical development of generative AI in China.[19] Critics argue that they might place onerous and risky burdens on China's generative AI firms and users, and could dissuade them from cultivating or employing generative AI products.[20]

We acknowledge that implementation of such regulations will slow the development of generative AI, and this Note argues that for Chinese regulators that may well be their intent. Our discussion first positions China's generative AI regulation within the country's broader strategy of cautious risk mitigation across various technological domains. We then examine how this strategy manifests itself in different parts of the regulation and address various criticisms raised by scholars in China. We conclude by turning our focus to the potential global implications of China's approach. In particular, we highlight the regulations' potential to halt a "race to the bottom" in generative AI and how this would be a positive outcome.

II. POLITICAL CAUTION AND CHINA'S HANDLING OF GENERATIVE AI

China's leadership is deeply concerned about generative AI. A recent meeting of the Communist Party's Central Political Bureau stressed the need

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Personal Information Protection Law]; Zhonghua Renmin Gongheguo Wangluo Xinxi Neirong ShengTai Zhili Guiding (中华人民共和国网络信息内容生态治理规定) [Provisions on Governance of Internet Information Ecosystem of the People's Republic of China] (promulgated by the Cyberspace Admin. of China, Dec. 15, 2019, effective Mar. 1, 2020) St. Council Gaz., Mar. 20, 2020, at 46 https://www.gov.cn/gongbao/content/2020/content_5492511.htm (China) [hereinafter Ecosystem Provisions].

16. Ecosystem Provisions, *supra* note 15, art. 2, 7; Cybersecurity Law, *supra* note 15, art. 12.

17. *See id.* arts. 4, 7–9, 13, 15, 17.

18. *Id.* art. 21.

19. *See infra* Section I.B.

20. *Id.*

to avoid the risks raised by this technology while continuing to utilize it for economic and strategic growth.[21] This statement indicates a stark shift from their previous approach, which was more focused on rapidly advancing AI to maintain a competitive edge globally.[22]

The cautious trajectory of artificial intelligence development in China, while noteworthy, aligns with trends observed in other Chinese data and technology-related sectors. Indeed, the regulations overseeing digital platforms, [23] the sharing economy, [24] live streaming entertainment, [25] and digital finance all demonstrate a similar approach.[26] This cautious trajectory is not an outlier, but rather part of China's current broader regulatory strategy for cyber-related domains.

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21. *Id.*

22．Back in 2018, during the Bureau's ninth study on AI development, President Xi Jinping considered AI as a pivotal technology that spearheads the scientific and industrial revolution. He urged for comprehensive research into the legal, ethical, and social implications of AI, advocating for the formulation of laws, systems, and ethical standards that ensure its healthy development. However, at that time, he did not mention risk prevention and control as he did in the recent context of generative AI.

23. *E.g.*, Cybersecurity Law, *supra* note 15, art. 42, para. 1, *translated in* CLI.1.283838(EN) (Pkulaw), https://www.pkulaw.com/en_law/4dce14765f4265f1bdfb.html ("Network operators shall not divulge, tamper with or damage the personal information collected by them, and shall not provide personal information to any other person without the consent of the persons whose information is collected, except that the information has been processed in a manner that it is impossible to distinguish a specific person and it cannot be retraced.").

24. *E.g.*, Wangluo Yuyue Chuzuche Jingying Fuwu Guanli Zanxing Banfa (网络预约出租汽车经营服务管理暂行办法) [Interim Measures for Administration of Online Car-hailing Operations and Services] (promulgated by the Ministry of Transp., Jul. 27, 2016, effective Nov. 1, 2016), art. 27, para. 2, St. Council Gaz., Nov. 10, 2016, at 31, https://www.gov.cn/zhengce/2022-12/06/content_5730384.htm (China), *translated in* CLI.4.5144828(EN) (Pkulaw), https://www.pkulaw.com/en_law/1379d48892483e38bdfb.html ("An online taxi booking platform company may not release information whose dissemination is prohibited by laws and regulations through its service platform, may not provide convenience for enterprises, individuals as well as other communities and organizations in their release of any harmful information, and shall take effective measures to filter and block the dissemination of harmful information. When discovering that any other person disseminates any harmful information by using its network service platform, an online taxi booking platform company shall immediately stop the transmission, store the relevant records, and report to the relevant state organ.").

25. Cybersecurity Law, *supra* note 15, art. 6 ("The state shall advocate honest, faithful, healthy and civilized network conduct, advance the spreading of core socialist values, and take measures to enhance the awareness and level of cybersecurity of the entire society, so as to form a favorable environment for promoting cybersecurity with the participation of the entire society.").

26. For an overview, see Rogier Creemers, *China's Emerging Data Protection Framework*, 8 J. CYBERSECURITY 1 (2022).

Chinese scholars call the early phase of the country's data economy the "illegal rise," a phase characterized more by testing the boundaries of regulations than strictly following them.[27] This act of pushing legal limits often led to new arenas for growth. One key feature of this early phase was governmental tolerance, and in some instances, even support, for this boundary-testing. However, as companies continued to push the boundaries, the government made a shift in its position. What was once tolerance and support gradually evolved into prevention and control. This is especially true when Chinese regulators choose the path of "preventative risk," which indicates that they are dealing with special circumstances with high political stakes.[28] Although many jurisdictions, including the US and the EU, are concerned about the political consequences of generative AI, China's extensive and evolving efforts to surveil and curate online content and debate suggests a heightened sensitivity to potential political threats.

In the global landscape of AI legislation, the PRC stands out as particularly proactive. In 2023, China promulgated a trio of significant AI-related regulations: First, the Provisions on the Administration of Algorithm-generated Recommendations for Internet Information Services were introduced to govern algorithmic recommendations for online content.[29] Next, the Provisions on the Administration of Algorithm-generated Recommendations for Internet Information Services (the "Deep Synthesis Provisions") delineated the boundaries for creating and distributing synthetic content through AI mechanisms.[30] Lastly, the Interim Measures are aimed at

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27. *E.g.*, Hu Ling (胡凌), "Feifa Xingqi": Lijie Zhongguo Hulianwang Yanjin de Yige Shijiao ("非法兴起"：理解中国互联网演进的一个视角) ["Illegal Rise": A Perspective on Understanding the Evolution of the Internet in China], 5 Wenhua Zongheng (文化纵横) [Beijing Cultural Rev.] 120–25 (2016).

28. For example, during the pandemic, China has always adhered to the highly precautionary "zero-tolerance policy" and regarded it as a political principle. But when this principle was changed, the precautionary policy ended quickly.

29. Hulianwang Xinxi Fuwu Suanfa Tuijian Guanli Guiding (互联网信息服务算法推荐管理规) [Provisions on the Administration of Algorithm-generated Recommendations for Internet Information Services] (promulgated by Cyberspace Admin. of China, Dec. 31, 2021, effective Mar. 1, 2022) St. Council Gaz., Mar. 30, 2022, at 71, https://www.gov.cn/gongbao/content/2022/content_5682426.htm (China).

30. Hulianwang Xinxi Fuwu Shendu Hecheng Guanli Guiding (互联网信息服务深度合成管理规定) [Provisions on Administration of Deep Synthesis of Internet-based Information Services] (promulgated by Cyberspace Admin. of China, Nov. 25, 2022, effective Jan. 10, 2023) St. Council Gaz., Feb. 10, 2023, at 22, https://www.gov.cn/gongbao/content/2023/content_5741257.htm (China) [hereinafter Deep Synthesis Provisions].

generative AI technologies that can manufacture a variety of content using language-based cues.[31]

When juxtaposing the Interim Measures with the Deep Synthesis Provisions, it is evident that there exists considerable thematic overlap. The latter legislation characterizes deep synthesis technology as a subset of AI models proficient in generating content across diverse modes, such as text, imagery, spoken and non-spoken audio, and video.[32] This bears a resemblance to the regulatory description of generative AI. However, the Deep Synthesis Provisions seemingly overlooked the swift evolution of "GPT" technology, renowned for its capability to generate vast, authentic, and multifaceted content from linguistic prompts.[33]

Consequently, the framework of the Deep Synthesis Provisions faces dual challenges: First, its purview extends only to the content synthesized by algorithms, neglecting the data-intensive training phase inherent to expansive natural language models.[34] Its approach is also predicated on a conventional user-oriented paradigm, wherein users provide specific data and retrieve algorithmic outputs, and concentrates its preventative measures against the exploitation of deep synthesis technologies to distort information available to the public.[35]

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31. Interim Measures, *supra* note 14.

32. Deep Synthesis Provisions, *supra* note 30, art. 23, para. 1 ("'Deep synthesis technology' means the technology that uses deep learning, virtual reality, and other synthetic algorithms to produce network information such as text, image, audio, video, and virtual scene, including but not limited to: (1) technologies for generating or editing text content, such as text generation, text style conversion, and Q&A; (2) technologies for generating or editing speech content, such as text-to-speech, speech conversion, and speech property editing; (3) technologies for generating or editing non-speech content, such as music generation and scene sound editing; (4) technologies for generating or editing biometric features in images and video content, such as face generation, face replacement, character attribute editing, face manipulation, and posture manipulation; (5) technologies for generating or editing non-biological features in images and video content, such as image generation, image enhancement, and image restoration; and (6) technologies for generating or editing digital characters and virtual scenes, such as three-dimensional reconstruction and digital simulation."); Interim Measures, *supra* note 14, art. 22.

33. *See* Partha Pratim Ray, *ChatGPT: A Comprehensive Review on Background, Applications, Key Challenges, Bias, Ethics, Limitations and Future Scope*, 3 INTERNET THINGS & CYBER-PHYSICAL SYS. 121 (2023).

34. The article that is most related to the production process of generative AI is Article 14: "Deep synthesis service providers and technical supporters should strengthen the management of training data, take necessary measures to ensure the security of training data; if the training data contains personal information, they should comply with the relevant provisions of personal information protection." Deep Synthesis Provisions, *supra* note 30, art. 14. But it also does not mention the use of any large-scale language models.

35. Deep Synthesis Provisions, *supra* note 30, art. 6, para. 1 ("No organization or individual shall use deep synthesis services to produce, copy, publish, disseminate information prohibited by laws and

Conversely, GPT technologies curtail user control over the resultant outputs, necessitating governmental oversight of training data methodologies and facets of content generation. This legislative gap prompted China's enactment of a distinct generative AI regulation after the Deep Synthesis Provisions. Given their recency and specificity, the Interim Measures are a better indication of China's current approach than the Deep Synthesis Provisions.[36]

By emphasizing preventive risk management in the case of generative AI, China's regulators are choosing caution over growth.

III. The Interim Measures and the Principle of Caution

The Interim Measures have three main features of preventive regulation: outcome-based liability, assigning risk prevention responsibility to technical providers of generative AI,[37] and expanded jurisdiction. These features form a risk management system that relies on outcome assessment and requires technical providers to take preemptive actions or establish implementation standards.

A. Outcome-Based liability

The Interim Measures are mostly focused on prohibiting certain outcomes rather than establishing specific regulatory procedures. For instance, Article 4 mandates that generative AI must not produce content opposing socialist values or disseminating false information, and it should take "effective measure" to guarantee the truthfulness of the outcome.[38] These rules echo past

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administrative regulations, or use deep synthesis services to engage in activities prohibited by laws and administrative regulations that endanger national security and interests, damage national image, infringe on social public interests, disrupt economic and social order, infringe on the legitimate rights and interests of others, etc."). *See* David J. Kappos, Sasha Rosenthal-Larrea, Daniel M. Barabander & Leslie Liu, *ChatGPT and Text Fakes — Sensible Policy to Balance Growth and Risk*, JOLT Dig. (Apr. 6, 2023), https://jolt.law.harvard.edu/digest/chatgpt-and-text-fakes-sensible-policy-to-balance-growth-and-risk.

36. Lifa Fa (立法法) [Law on Legislation] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000), art. 92, 2000 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 112.

37. OpenAI is the technical provider of the GPT engine, which is run by many other platforms through an API.

38. Interim Measures, *supra* note 14, art. 4.

Chinese regulatory approaches, like the "Cybersecurity Law" and the "Provisions on Governance of Internet Information Ecosystem of the People's Republic of China."[39]

The Interim Measures do not detail the technical means service providers should employ to comply, nor do they mention a liability exemption system that could clear service providers of liability provided they exercised a sufficient duty of care. When interpreting Chinese law, "effective" often means a judgment based on the outcome, rather than the preliminary predictability and preparation.[40] This incentivizes generative AI companies to adopt the most thorough preventive measures.

Specifically, the Interim Measures impose two preventive duties on the providers of generative AI products: First, generative AI providers will be legally treated as network information content producers, and they must fulfill their obligations towards network information security. In cases where personal information is involved, these providers will also bear the legal responsibilities of personal information processors and must adhere to the obligations of personal information protection.[41] According to the Provisions on Governance of Internet Information Ecosystem of the People's Republic of China, network information content producers are organizations or individuals who create, copy or disseminate network information content; they are prohibited from creating, copying or disseminating illegal information, and they are required to take measures to prevent and resist the

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39. Seaton Huang, *How Will China's Generative AI Regulations Shape the Future? A DigiChina Forum*, DIGICHINA (Apr. 19, 2023), https://digichina.stanford.edu/work/how-will-chinas-generative-ai-regulations-shape-the-future-a-digichina-forum/ [https://perma.cc/J8B8-24TH] ("Regarding censorship, the CAC's draft Measures should not be seen as a departure from China's existing policies on content regulation. AI-generated content [AIGC] would be required to follow 'Socialist Core Values'—a nebulous term that has for years been defined as the general decorum expected of Chinese citizens—and not to subvert state authority.").

40. In the context of Chinese law, the phrase "effective measures" often appears in legal principles, with effectiveness to be assessed based on the specific results of the implemented measures. *See, e.g.*, Zhonghua Renmin Gongheguo Zaosheng Wuran Fangzhi Fa (中华人民共和国噪声污染防治法) [Law of the People's Republic of China on Prevention and Control of Noise Pollution] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 24, 2021, effective Jun. 5, 2022), art. 9, para. 2, 2022 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 58, 59, *translated in* CLI.1.5112804(EN) (Pkulaw), https://www.pkulaw.com/en_law/44f6acd556635276bdfb.html ("Units and individuals that emit noise shall take effective measures to prevent and reduce noise pollution."). Whether these measures are "effective" is determined based on the results.

41. Interim Measures, *supra* note 14, art. 9, para. 1.

creation, copying or dissemination of harmful information.[42] In this context, the generative AI application programming interface ("API") service is accountable for the content it produces. If the generated content it returns contains illegal or harmful information, such as instances of plagiarism, false data, or defamation, the API service must accept legal liability. [43] Furthermore, if the generated content involves the personal details of students, for example, such as names, academic performance, school names, and so on, it becomes the API service's responsibility to ensure the security and privacy of this information.[44] This means the app must not illegally acquire, disclose, or misuse such information.

Second, the regulation makes generative AI providers responsible for the personal information they handle and for ensuring compliance in all stages of acquisition, use, storage, and transmission.[45] This means that when they act as content providers, generative AI providers must be more self-disciplined and self-examined about the content they release, and when they act as personal information handlers, they must also guarantee that the information they access can be processed in a compliant way. Since generative AI products usually require registration and interaction to produce text, according to

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42. Ecosystem Provisions, *supra* note 15, arts. 6, 7, 41.

43. *Id.* art. 7 (requiring network information content producers not to produce, copy, or disseminate illegal information that endangers national security, discloses state secrets, subverts state power, or destroys national unity, or that damages national honor and interests; to prevent and resist the production, reproduction, and dissemination of unhealthy information that contains "use exaggerated titles that are seriously inconsistent with the content" and "hype gossip, scandals, and misdeeds"; and not to provide false content, fabricate fake news, or spread rumors). *Id.* art. 40, *translated in* CLI.4.338029(EN) (Pkulaw), https://www.pkulaw.com/en_law/dc8a694ae08ed787bdfb.html ("Anyone who violates these Provisions and ca uses damage to others shall assume civil liability according to law. If a crime is constituted, the offender shall be held criminally liable in accordance with law. If the violation doesn't constitute a crime, the competent authorities shall impose penalties in accordance with the relevant laws and administrative regulations.").

44 . Personal Information Protection Law, *supra* note 15, art. 5, 9, 13 (requiring personal information processors not to process personal information "in a way that is misleading, fraudulent or coercive"; not to process personal information in absence of the individual's consent unless any law or administrative regulation provides; to take necessary measures to guarantee the security of the personal information they process).

45. Interim Measures, *supra* note 14, art. 9, para. 1 ("If personal information is involved, the responsibility of the personal information processor shall be assumed in accordance with the law, and the obligation to protect personal information shall be fulfilled."); Personal Information Protection Law, *supra* note 15, art. 4, para. 2 ("Personal information processing includes personal information collection, storage, use, processing, transmission, provision, disclosure and deletion, among others.").

Article 9 of the new measures, providers often need to take on both duties.[46] If they fail to do so, they may face administrative or even criminal sanctions under other Chinese laws, such as the Personal Information Protection Law and the Criminal Law.[47] The cost of such an outcome based liability regime for generative AI providers can thus be very high, creating incentives for them to be extremely careful and risk averse.

B. Expanded Jurisdiction

The Interim Measures seek to govern the use of generative AI products or services in China, regardless of whether they're offered by domestic or international organizations. It applies to "the service of generating text, images, audio, video and other content for the public within the PRC using generative artificial intelligence technology" (Article 2). This implies that overseas generative AI service providers are subject to the regulation, whether at the model level or the application level, and regardless of whether they offer relevant services directly to China or indirectly via APIs. It should also be noted that the term "public" in China is not explicitly defined in law. But in both criminal law and administrative law, "the public" does not refer only to "individuals," but also to companies and business groups, for instance, where

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46. *Id*. art. 9, para. 1, *translated in* CLI.4.5171165(EN) (Pkulaw), https://www.pkulaw.com/en_law/6dc227b9153496c2bdfb.html?articleFbm=CLI.4.5171165(EN) ("A provider shall assume the responsibility of the producer of network information content in accordance with the law and fulfill the obligations of network information security. If personal information is involved, the provide r shall assume the responsibility of the personal information processor according to the law, and fulfill the obligation of personal information protection.").

47. Personal Information Protection Law, *supra* note 15, art. 66, para. 1, *translated in* CLI.1.5055321(EN) (Pkulaw), https://www.pkulaw.com/en_law/d653ed619d0961c0bdfb.html?articleFbm=CLI.1.5055321(EN) ("Where a personal information processor processes personal information in violation of this Law or fails to fulfill the personal information protection obligations as provided in this Law in processing personal information, the authority performing personal information protection functions shall order the personal information processor to take corrective action, give it or him a warning, and confiscate its or his illegal income; and with respect to an application program processing personal information in violation of la w, shall order the suspension or termination of provision of services by such application program. If the personal information processor refuses to take corrective action, it or he shall be fined not more than one million yuan; and any directly liable person in charge or other directly liable person shall be fined not less than 10,000 yuan nor more than 100,000 yuan."); *id*. art. 71 ("Where any violation of this Law constitutes a violation of public security administration, the public security administration punishment shall be imposed in accordance with the law; and if the violation constitutes a crime, the violator shall be held criminally liable in accordance with the law.").

the defining factor is "indeterminate subjects."[48] Therefore, even if foreign companies' services are not targeted at individuals, but at scientific research or enterprises, they will be subject to regulation as long as their service users are not predetermined.

This approach is likely meant to achieve two goals. First, it is a protectionist policy that could lessen China's reliance on foreign AI platforms.[49] By enforcing its laws against foreign platforms, China may discourage some from operating within its market or compel them to reevaluate their business strategies. This could pave the way for domestic alternatives, much like the situation when Google and YouTube were blocked in China for failing to adhere to content regulations.[50] Second, the proposed regulation seeks to safeguard a consistent provision of AI services from international providers, mitigating potential interruptions in the production and distribution processes. This aspect becomes increasingly significant in the context of recent developments, such as the unexpected deactivation of numerous Chinese accounts by ChatGPT.[51] The new measures provide clear

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48. *See, e.g.*, Guangzhoushi Guizhang Zhiding Gongzhong Canyu Banfa (广州市规章制定公众参与办法) [Measures for Public Participation in the Formulation of Guangzhou Municipal Regulations] (promulgated by the People's Gov. of Guangzhou Mun., Feb. 1, 2020, effective Apr. 1, 2020), art. 2, para. 1, People's Gov. Guangzhou Mun. Gaz., Feb. 29, 2020, at 9, https://www.gz.gov.cn/zwgk/fggw/zfgz/content/post_5667124.html (China) ("The public referred to in the Measures refers to natural persons, legal persons and other organizations."); *see also* Xingfa (刑法) [Criminal Law] (promulgated by the Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997; rev'd by the Standing Committee of National People's Congress, Dec. 26, 2020), art. 176, 2021 Standing Comm. Nat'l People's Cong. Gaz. 275 (special issue for Criminal Law), *translated in* CLI.1.349391(EN) (Pkulaw), https://www.pkulaw.com/en_law/39c1b78830b970eabdfb.html ("Whoever absorbs public savings illegally or in disguise, disrupting the financial order, shall be sentenced to imprisonment of not more than three years or limited incarceration and a fine or be sentenced to a fine only; if the amount involved is huge or there is any other serious circumstance, shall be sentenced to imprisonment of not less than three years nor more than ten years and a fine; or if the amount involved is especially huge or there is any other especially serious circumstance, shall be sentenced to imprisonment of not less than ten years and a fine.").

49. *See* Xin Yidai Rengong Zhineng Fazhan Guihua (新一代人工智能发展规划) [Plan for Development of the New Generation of Artificial Intelligence] (promulgated by St. Council, Jul. 8, 2017) St. Council Gaz., Aug. 10, 2017, at 7, https://www.gov.cn/gongbao/content/2017/content_5216427.htm (China).

50. Arjun Kharpal, A Chinese App That Let Users Access Google, Facebook Has Disappeared, CNBC (Oct. 12, 2020), https://www.cnbc.com/2020/10/12/chinese-app-that-let-users-access-google-facebook-has-disappeared.html [https://perma.cc/L69E-TQMN].

51. Ouz, *ChatGPT Reportedly Blocks Large Number of Asian Accounts, Causes Panic Among Users*, Gizmochina (Apr. 6, 2023), https://www.gizmochina.com/2023/04/06/chatgpt-account-suspensions/ [https://perma.cc/W3MJ-UH5H].

guidelines for all service providers, helping avoid actions that could disrupt operations. For example, Article 13 stipulates that providers must offer reliable, robust, and continuous services, thus ensuring a seamless experience for users. [52] Such regulations aim to prevent arbitrary restrictions or suspensions by international providers such as ChatGPT, mitigating potential risks to production and supply processes.

C. Other Preventive Measures

Besides these three aspects of regulation, the Interim Measures also add other elements of preventive responsibility and obligation, such as:

- Requiring providers, when illegal content is discovered, to promptly take measures such as stopping generation, transmission, and even deleting such content, model optimization training to correct the issue, suspending or terminating the service for the user in accordance with the law and the service contract, preserve relevant records, and report to the relevant authorities.[53]
- Requiring providers to clearly and publicly state their service's target population and purpose.[54]
- Requiring providers to take actions to prevent users from over-dependence or addiction to generated content.[55]

We believe that these regulations suggest a clear intent by the Chinese authorities to slow down the development and deployment of generative AI. Despite the potential advancements and economic benefits AI technology can offer, the cautious approach taken by China indicates it is prioritizing risk management and national security over rapid technological growth.

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52. Interim Measures, *supra* note 14, art. 13.
53. *Id.* art. 14.
54. *Id.* art. 10.
55. *Id.*

IV. TOO MUCH CAUTION?

The strict regulation of generative AI has ignited intense debates among Chinese legal experts and industry participants. Some scholars, often linked with the industry, argue against overly cautious policies, asserting they can hinder innovation and place undue burdens on the companies behind the affected platforms. These views were expressed at a seminar for feedback on the draft regulation of generative AI, where these scholars objected to the stringent regulation.[56] They argued that such measures would force companies to shoulder uncontrollable risks, leading to low investment returns and high risk costs.[57] They suggested that generative AI regulations should accommodate the nature of human-AI interaction, simplify real identity information requirements, target illegal usage, and avoid overly specific regulations on training data and technical methods.[58] They promoted the idea

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56. Jin Can (金灿), Tansuo Shengchengshi Rengong Zhineng Suanfa Guizhi de Silu (探索生成式人工智能算法规制的思路) [Exploring Ideas for Generative Artificial Intelligence Algorithm Regulation], Jingji Cankao Bao (经济参考报) [Econ. Info. Daily], May 23, 2023, at 8, http://dz.jjckb.cn/www/pages/webpage2009/html/2023-05/23/node_9.htm (recounting keynote addresses on the Draft Measures for the Administration of Generative Artificial Intelligence Services).

57. *See id.* Xu Ke (许可), Associate Professor of University of International Business and Economy, pointed out the contradiction between network information content security management and general technology regulation. Restricting general artificial intelligence to network information content may result in a mismatch between regulatory tools and regulatory objectives. In fact, the risks of generative artificial intelligence vary in different scenarios, and how to judge its risks requires modular judgment. Lastly, the contradiction between the full-process security requirements and the inherent characteristics of the technology. The full-process management does not match the characteristics of generative artificial intelligence. For example, the legality of pre-training data is difficult to achieve, and there is no direct mapping relationship between the data and the final information generation. Wang Liming (王利明), one of China's most famous civil law experts and drafters of the civil code, believes that ChatGPT is different from general products such as autonomous driving, and that imposing strict liability on service providers would hinder technological development and contradict the value orientation of encouraging technological innovation. He advocates borrowing from the rules of medical liability reduction, and when there are unavoidable flaws due to technical limitations, the liability of service providers can be appropriately reduced or exempted. He also believes that the issue of tort liability allocation caused by ChatGPT's hallucinatory answers should distinguish between the situations of large-scale generation by platforms and malicious inducement by users.

58. *Id.* Su Yu (苏宇), Professor of People's Public Security University of China, pointed out: "The main consideration of the Draft Measures for the Administration of Generative Artificial Intelligence Services is the information content security issue, and it designs a 'six-layer overlap' mechanism for security protection, including output-end generation result control, input-end data source and data information content restriction, extended content producer responsibility, user reporting and active supervision combination, broad information provision obligation, and limited connection with existing

of cooperative regulation, governance regulation, and the self-regulation of AI technology by AI technology.[59] It is important to mention that the interim regulations have been substantially revised since their initial draft, which was released for public comments. This earlier draft, which received the majority of criticism, contained more precautionary measures like mandating real-name verification for users and placing more direct responsibility on providers for the content their technology produces.[60]

Conversely, other scholars endorse risk prevention policies, arguing that they are vital to safeguard public interests and maintain social stability. These scholars often wield considerable influence in legal academia and their views align with the current government stance. Liu Yanhong, a highly influential criminal law professor in China, highlighted three major potential risks from ChatGPT: (1) creating biased or false information that could evade network monitoring systems; (2) reinforcing individuals' biased views by providing biased or false information, eroding social trust and potentially leading to social unrest; (3) generating high quantities of false information due to the prevalence of inaccurate data in ChatGPT's training data, which would be challenging or expensive to verify using current technology.[61] Liu and her colleagues generally support preventive supervision, which might be the most viable strategy for the Chinese government in managing unpredictable technology trajectories.

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legislation on algorithm recommendation and deep synthesis, etc. Some of these mechanisms have varying degrees of security redundancy. In addition, there are some governance points that need to be fully considered, such as the separate classification of generation code, the necessary distinction of training data, the type hint of output results, and the specific definition of data source legality, etc. Generally speaking, reducing the risk of invalid or inefficient security redundancy should be an important goal of mechanism design for legal governance of generative artificial intelligence."

59. *See* Zhang Xin (张欣), Shengchengshi Rengong Zhineng de Suanfa Zhili Tiaozhan yu Zhilixing Jianguan (生成式人工智能的算法治理挑战与治理型监管) [Algorithmic Governance Challenges and Governance-Based Supervision of Generative Artificial Intelligence], 5 Xiandai Faxue (现代法学) [Mod. L. Sci.] 108 (2023).

60. For a translation of the draft, *see Translation: Measures for the Management of Generative Artificial Intelligence Services (Draft for Comment) – April 2023*, DIGICHINA (Apr. 12, 2023), https://digichina.stanford.edu/work/translation-measures-for-the-management-of-generative-artificial-intelligence-services-draft-for-comment-april-2023/ [https://perma.cc/Q6M8-TBHL].

61. Liu Yanhong (刘艳红), Shengchengshi Rengong Zhineng de Sanda Anquan Fengxian ji Falü Guizhi—Yi ChatGPT Weili (生成式人工智能的三大安全风险及法律规制——以 ChatGPT 为例) [Three Major Security Risks and Legal Regulation of Generative Artificial Intelligence: A Case Study of ChatGPT], 5 Fazhi Ribao (法治日报) [Legal Daily] 29 (2023).

The current dialogues shed light on an ongoing struggle in China: Balancing state regulation with social and economic autonomy. This struggle revolves around the question of whether the constraints on AI technology should be delineated by the state or whether they should evolve organically through societal and market forces. The industry tends to favor the latter; a more appealing and plausible option that allows for effective regulatory models to take shape iteratively. On the other hand, the state, in the face of unknown technologies and their implications, deems it necessary to adopt a cautious regulatory stance, employing certain risk prevention measures.

V. A RISK-BASED APPROACH

China's Interim Measures illustrate a principled, rather than a recklessly anxious, approach towards regulating generative AI. In response to a number of critiques on the initial draft, the regulators made significant changes. The benchmarks for authenticity, accuracy, objectivity, and diversity of generated content and data have been reframed from being absolute to relative — instead of dictating strict rules, they now merely require improvements or enhancements. Significantly, the previously included requirement for users to disclose their real identity has been entirely discarded, a clear win for both tech corporations and privacy proponents. The protocol for filtering generated content and optimizing models has also been relaxed, offering a more manageable time frame. This suggests that regulators have not turned a deaf ear to the feedback received during the public comment period.

At the same time, the Interim Measures underscore the increased focus by regulators on what they perceive as potential political risks from generative AI. Notably, entities not engaged in providing generative AI services to the public within China are now expressly exempt from the obligations imposed by the Interim Measures, thus easing the regulatory pressure on numerous stakeholders. [62] The regulatory scope for required security assessments, algorithm evaluation, and filings has also been narrowed, shifting from broader applicability defined by "using generative artificial intelligence products," to covering only those "providing generative artificial intelligence

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62. Interim Measures, *supra* note 14, art. 2, para. 3.

services with public opinion attributes or social mobilization capabilities."[63] It is therefore possible that while the regulation will apply to ChatGPT-like services, it will not apply to AI tools that can only be used for travel planning, for instance. This shift indicates a heightened attention to perceived political implications and a mindful response to the criticisms directed towards the initial draft.

Some of the highlights of this dynamic precautionary features of the Interim Measures are:

- They focus on specific risk scenarios. The Interim Measures exclude some private, internal, and undisclosed generative AI models from regulation, and introduce the principle of "inclusive prudence and classified and graded supervision," which tailors the law's coverage to different artificial intelligence risks and situations.[64]
- They adopt a realistic precautionary stance. The Interim Measures build on the Chinese regulators' existing approach of risk-based assessment and classified and graded supervision, which may draw inspiration from the EU's draft Artificial Intelligence Act.[65]

However, this does not mean that the Interim Measures neglect precautionary regulation of generative AI entirely. In some respects, the Interim Measures broaden the scope of responsibility imposed by the regulation

- They extend the regulated subjects. Article 4 of the Interim Measures expands the regulation to "providing and using generative artificial intelligence services," requiring both users and providers

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63. *Id.* art. 17.
64. *See id.* arts. 2–3.
65. *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts*, EUR-LEX (Apr. 21, 2021), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0206 [https://perma.cc/TTK2-YZKZ].

to fulfill the same general obligations, as well as enlarging the law enforcement scope. [66]

- They specify the responsibility of content producers. Article 9 of the Interim Measures changes the provider's "content producer responsibility" to "network information content producer responsibility," which is consistent with existing regulations.[67] This change narrows the future interpretation space for the provider's responsibility as a content producer and clarifies the boundaries of its responsibility.

VI. CONCLUSION: HOW CAN THE WORLD BENEFIT FROM CHINA'S CAUTION?

We are in the midst of an escalating rivalry for technological supremacy between major state actors like the United States and China. Within this struggle, generative AI has emerged as a key battlefield. Scott Galloway, a leading voice in U.S. technology discourse, contends that hitting the brakes on generative AI development would be ill-advised, asserting that "China, Russia, and North Korea won't pause."[68] We hear similar sentiments from the Pentagon, whose Chief Information Officer recently stated that he does not advocate for slowing or pausing development, "because if we stop, guess who's not going to stop: potential adversaries overseas. We've got to keep moving."[69]

While this fearful perspective may seem rooted in national security pragmatism, it will very likely lead to a "race to the bottom" dynamic.[70] In this scenario, the prevailing conduct becomes not who can develop the most robust and ethical AI, but rather, who can create the most powerful technology

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66. *See* Interim Measures, *supra* note 14, art. 4.

67. *Id.* art. 9, para. 1; Ecosystem Provisions, *supra* note 15, art. 41.

68. Scott Galloway, Guardrails, MEDIUM (Apr. 24, 2023), https://medium.com/@profgalloway/guardrails-5d7188b2a38 [https://perma.cc/E3E8-39WG].

69. Jon Harper, *Pentagon CIO and CDAO: Don't Pause Generative AI Development — Accelerate Tools to Detect Threats*, DEFENSESCOOP (May 3, 2023), https://defensescoop.com/2023/05/03/pentagon-cio-and-cdao-dont-pause-generative-ai-development-accelerate-tools-to-detect-threats/ [https://perma.cc/VBE8-SSJX].

70. David E. Harris, *The Race to the Bottom on AI Safety Must Stop*, CTR. FOR INT'L GOVERNANCE INNOVATION (June 16, 2023), https://www.cigionline.org/articles/the-race-to-the-bottom-on-ai-safety-must-stop/ [https://perma.cc/PC64-38GX].

the fastest, regardless of potential societal implications. The magnitude of the harms that may follow from such a race should give us pause. Just as unregulated markets can lead to harmful market externalities, an unfettered race in AI development can precipitate unintended, detrimental consequences.[71]

Yet, as our preceding analysis demonstrates, China is deliberately *decelerating* the development and application of generative AI due to internal political dynamics. Even if Western nations may be reluctant to embrace the Chinese style of technology governance, China's new regulation signals that China does not intend to participate in a reckless race to the bottom. While China's motives may be primarily self-interested, the resulting slowdown provides a window of opportunity for the rest of the world to reflect and recalibrate the direction of AI technology.

The global implications of generative AI necessitate an international regulatory framework. Such a framework would serve to standardize diverse national approaches, mitigating the risk of individual countries developing AI technologies with potentially harmful global externalities. Understanding China's precautionary approach could provide valuable insights into managing the risks associated with rapid AI advancement; China's deliberate deceleration offers a real-time case study in the potential challenges and outcomes of a more cautious AI development approach. Therefore, as China steps back from breakneck AI advancement, this pause offers an opportunity for worldwide stakeholders to reflect and adjust their strategies in managing the transformative power of generative AI. The world could benefit from this pause, not necessarily by adopting China's methods, but by learning from its caution.

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71. *See, e.g.*, Henrik Skaug Sætra, *Generative AI: Here to Stay, But For Good?*, 75 TECH. SOC'Y, art. no. 102372, Nov. 2023.